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"Economic development, however, is not enough to bring about complete equality between men and women. Policy action is still necessary to achieve equality between genders. Such policy action should be unambiguously justified if empowerment of women also stimulates further development, starting a virtuous cycle. Empowerment of women, thus, is perceived as equipping them to be economically independent, self-reliant, with positive esteem to enable them to face any situation and they should be able to participate in the development activities."

- Dr A. K. Sikri, J.

Richa Mishra v. State of Chhattisgarh
(2016) 4 SCC 179, para 28

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Lex Revolution

Journal of Social & Legal Studies

Quarterly Published International Peer Reviewed Research Journal

Lex Revolution welcomes and encourages scholarly unpublished papers on various fields of Law, Human Rights and Social Science from students, teachers, scholars and professionals. The Journal invites the submission of papers that meet the general criteria of significance and academic brilliance. Authors are requested to emphasize on novel theoretical standard and downtrodden concerns of the mentioned areas against the backdrop of proper objectification of suitable primary materials and documents. The papers must not be published in parts or whole or accepted for publication anywhere else.

OBJECTIVES:

- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

The most valuable and suggestive comments of all the readers are always awaited and welcomed in order to achieve the ultimate goal. We are looking forward for your contributions. All communications shall be made only in electronic form e-mailed to: **EDITOR(DOT)LEXREVOLUTION(AT)GMAIL(DOT)COM**. The submission guidelines are available at website.

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MESSAGE

It is with great pleasure we announce the release of Volume II Issue 2 (April-June 2016) of our Journal ***Lex Revolution*** ISSN 2394-997X as an intellectual platform for contemporary issues pertaining to various fields of Law, Human Rights and Social Science. Research and dialogue is the sine qua non for the development of any legal system. Our goal is to provide scholars worldwide with comparative papers on recent legal developments on the international level. The journal focuses on education, research and existing legal concerns with an editorial board comprising of academicians, professionals, researchers, advocates and students.

We express our discontent towards the recent incident in distinguished institutions of higher education and in the court premises in India which put forth a major concern before the judicial system on deciding the ambit of permissible free speech in the country. Every citizen has the right to protest and pursue his political ideology or affiliation but it must be within the framework of the constitution.

We owe our sincere gratitude to Prof. Gopal Krishna Chandani, Mr. K. N. Chaubey and Prof. S. K. Gaur for their valuable guidance and motivation for making this journal a reality. We would like to acknowledge the generosity of www.advocatekhoj.com that has been the continuous platform for us encouraging various forms of legal dialogue with our readers and contributors.

Finally, we would like to thank all prominent members of our Editorial Board for joining us in this new fascinating and promising academic voyage.

We are indebted to the various Professors, Asst. Professors, Research Scholars, Advocates and Students whose views and opinions have been incorporated in the text.

- **Editorial Board**

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HUMAN RIGHTS OF PRISONERS AND UNDER TRIALS – A STUDY WITH REFERENCE TO CENTRE PRISON OF VISAKHAPATNAM

Tandra Seetharam* & Prof. A. Rajendra Prasad**

Abstract

Human right is a modern term but the principle that it invokes is as old as humanity. This article addresses human rights in their complexity by dealing with the legal dimension of human rights and the moral dimension of human rights. The article related to, current theories of human rights are examined on prisoners of three basic questions concerning human rights with reference to centre prison of Visakhapatnam:

- (1) why prisoners have them;
- (2) who is included as a subject of human rights; and
- (3) how they are related to other forms of rights.

Keywords: Human rights, Constitution of India, Indian prison system, under-trials, self-incrimination

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INTRODUCTION

Human right is a modern term but the principle that it invokes is as old as humanity. It is that certain rights and freedoms are fundamental to human existence. They are inherent entitlements that come to every person as a consequence of being human, and are founded on respect for the dignity and worth of each person. The article deals with the various aspects of Human Rights, in the light of Human Rights of Prisoners under Trials. The great gift of classical and contemporary human thought to culture and civilization is the notion of Human Rights. The struggle to preserve, protect and promote basic Human Rights continues in every generation in each society. Today we widen the sphere of Human Rights thought and action to new arenas and Constituencies.¹ As UN Secretary General Mr. Kofi Annan observed *Human Rights are the foundation of human existence and co-existence. Human Rights are universal, indivisible and inter-dependent.* Human Rights are what make us human. They are the principles by which we create the sacred home for human dignity. When we speak of the right to life, or development, or to dissent and diversity, we are speaking of tolerance. Tolerance - promoted, protected and enshrined - will ensure all freedoms, without it, we can be certain of none. Human Rights are the expression of those traditions of tolerance in all religions and cultures that are the basis of peace and progress. Human Rights are foreign to no culture and native to all nations. Tolerance and mercy have always and in all cultures been ideals of government rule and human behaviour. Today, we call these ideals Human Rights. It is the universality of Human Rights that gives them their strength. It endows them with the power to cross any border, climb any wall, defy any force.

The struggle for universal Human Rights has always and everywhere been the struggle against all forms of tyranny and injustice - against slavery, against colonialism, against apartheid. It is nothing less and different today.²

The expression ‘Human Rights’ had its origin in International law, appertaining to the development of the status of an individual in the International legal system which was originally confined to the relation between sovereign states, who were regarded as the only persons in International Law. For all practical purposes, the genesis of this International aspect of Human Rights is not older- than the Second World War, though the concept of an

¹ Human Rights in Constitutional Law by Acharya Dr. Durga Das Basu Ch-I, p.1, Prentice Hall of Indian Private Ltd., New Delhi-110001

² India ratified on 10-04-1979

individual having certain inalienable Rights. As against a Sovereign state had its origin in the dim past, in the somewhat nebulous doctrines of natural law and natural rights.³

Every human being is divine being and has little to dignity,, liberty and other basic rights.⁴ The concept of human rights has two basic meanings. The first is that inherent and inalienable rights are due to man simply because of being man. They are moral rights which are derived from the humanness of every human being, and they aim at ensuring the dignity of every human being. The second meaning of human rights is that of legal rights, established according to the law-creating process of societies both National and International. The basis of these rights is the consent of the governed, which is the consent of the subjects of the rights, rather than a natural order which is the basis of the first meaning.⁵

Human life and human dignity have been disregarded and violated throughout the history and continue to be violated today. Nevertheless the idea of rules common to all human beings without discrimination dates back many centuries. It is often called natural law, which implies the concept of a body of rules that ought to prevail in society. The principle of equality recognized in natural law, was long accepted as the source and standard of political rights.

During the eighteenth century the early ideas of natural law developed into an acceptance of natural rights as legal rights and these rights for the first time became a basic part of National Constitutions, thus reflecting an almost contractual relationship between the State and the individual which emphasized that the power of the State derived from the assent of the free individual. The American Declaration of Independence and the French Declaration of the Rights of Man and Citizen were based on this premise. The status of human rights takes us to the life style of a society, the Magna Carta, the Bill of rights of the Rights of Men are the products of their society. Jefferson himself was a slave owner and the French Declaration or the Rights of Men and Citizen did not apply to women or and slavery. Although these several monuments of human rights were achievements in their own way and time.⁶ Lenin's Declaration of the rights of working and exploited people had relevance to the Russian Revolution even as the Objectives resolution moved by Nehru in the Constituent Assembly

³ Covenant on Civil and Political rights 1966 covenant on Social, Economic & Culture Rights-1966: General Assembly Resolution 45/11 of 14th Dec, 1970 on Prisoners right.

⁴ Krishna Iyer, V.R. Human Rights and the law,(1984) 9 Vedpal Law House, Indore

⁵ Leven, Leah, Human rights, (1981) (UNESCO, Paris) at p. 11

⁶ Supra note No.1 at 4

was history in the mankind, not hortative rhetoric. This dialectical angle reveals that the compulsions of the global holocaust and Nazi savagery accounted for the integrated agenda of Peace. Human and Survival and the Dignity and Worth of Human Person and the glorious developments at the International level, of the rainbow of human rights.⁷

India adopted the concept of ‘rule of law’ and ‘democratic’ system and created institutions to protect the people. The Constitution of India guaranteed some of human rights to its people. But the Constitution of India neither gave a new crime control model sensitive to freedom and democracy, nor subjected the pre-trial process, managed mostly by the police to comprehensive Constitutional controls, nor guaranteed to the persons in police custody the needed effective safeguards to direct, regulate and bridle the discretion of the police. Although police raj was well known to Nehru, Patel and others, the torture was still a rumbling volcano; the Constitution contained no specific right against torture, cruel, in-human or degrading punishment or treatment or unreasonable search and seizure. It made the right against self-incrimination available only to the accused and left the suspect to the mercy of the police trained to use brute force. It contained no right to speedy trial and allowed arbitrary and archaic bail system.

Before 1977, the view prisoners are non-persons, that assured fundamental rights are not available to them by their incarceration received considerable support in the celebrated Gopalan’s case. In a situation of callous and near-total disregard for human rights in the administration of Indian prison system, one would have expected that judiciary would provide a major forum for vindication rights and amelioration of prison conditions.⁸ Although Indian Courts have not really developed a judicial handset doctrine concerning the internal administration prisons, they have in effect shown a lack of appreciation concern for conditions of detention.⁹

The post-emergency Court has taken rapid strait in claiming prison justice as its own province, transformation owes tremendously to the crusading spirit Mr. Justice Krishna Iyer. The Court encourages prisoners- under trials as well as convicts – to app confidently to the Court for violations of legality by authorities.

⁷ Ghose, Mohammad, “ State Lawlessness and the Constitution A study of Lock-up dath”, in comparative Constitutional Law (1989) (EBC, Lucknow) p. 248 at 252

⁸ Baxi, Upendra. The Crisis of the Indian Legal System (1982) (Vikas Publications, New Delhi.) at 209

⁹ *Ibid*

In Sunil Batra Case Justice Krishna Iyer observed on fundamental rights of the prisoners the whenever fundamental rights are flouted or legislate protection ignored to any prisoner's prejudice, his Court writ will run, breaking through stone walls and iron Bars to right the wrong and to restore the rule of law.¹⁰

SCOPE AND LIMITATION OF STUDY

The scope of the study is aimed at the Constitutional and & Statutory protection to the prisoners and under trials.

It must make it clear that the expression Prisoners are and 'under trials classified as under-trials, convicts and condemned. The under-trials are those who have been sent to judicial custody, while their cases are tried in courts convicts are those serving a sentence and the' condemned are those who have been sentenced to death. The expression 'under-trial' prisoner used in wide sense even to include persons who are in judicial custody on remand during the investigations.

OBJECTIVES OF THE STUDY

- (1) To trace the evolution of the human rights for the protection of Prisoners and under-trails.
- (2) To discuss the role of the judiciary in protecting the human freedoms of the prisoners and under-trails.
- (3) To examine the conditions of Prisoners and under-trails in the Central Jail of Visakhapatnam.

HYPOTHESES

Keeping in view of the above objective the following hypotheses are formulated:

1. The human rights provisions under the national and international instruments have not ensured required protection to the Prisoners and Under-Trials.
2. The Judicial mandates to mitigate the rigour of under-trials have little impact on the conditions of Prisoners and under-trials.
3. The human rights and the judicial pronouncements have no impact on the conditions of the Prisoners and under-trials in the jails.

¹⁰ Charles Sobraj v. The Sup. Central Jail, Tihar, New Delhi (1979) 1 SCR 512 at pp. 514-515

METHODOLOGY

The reliability and dependability of any research study mainly depends upon the method that is applied. In the present study both doctrinal and non-doctrinal methods are applied, it includes case study, historical methods and the problem is studied from its social and economic angles.

The non-doctrinal study is based on empirical investigations of prisoners and under-trials with reference to the human right provisions confined to the Central Jail of Visakhapatnam of Andhra Pradesh. The data is collected through an ‘interview schedule’ method from prisoners and under-trials that were willing for the same. The collected data is presented in the last chapters. The data is analyzed and interpreted. The derived conclusions are correlated to the hypotheses and the hypotheses are tested.

CONCLUSION

The attitude of society towards prisoners may vary according to the object of punishment and social reaction to crime in a given community. If the prisons are meant for retribution or deterrence, the condition inside them shall be punitive in nature inflicting greater pain and suffering and imposing severe restrictions on inmates. On the other hand, if the prison is used as an institution to treat the criminal as a deviant, there would be lesser restrictions and control over him inside the institution.

SUPREME COURT GUIDELINES ON FIR AND ROLE OF POLICE IN CRIMINAL JUSTICE SYSTEM

Dr. Suresh Mani Tripathi*

INTRODUCTION

FIR is a very important document as it sets the process of criminal justice in motion. It is only after the FIR is registered, the police take up investigation of the case, and all other necessary actions. In the case of, **Munna Lal v. State of Himachal Pradesh & others**¹, the provisions of law about the registration of FIR are very clear. When the petitioner approached the police on Feb.9, 1991 and brought the fact, which are given in this petition to their notice and prayed for the registration of FIR, the police has no opinion but to register it and thereafter start investigation. It is not necessary that only the victim of the crime should file an FIR, it may lodge by any person having information about a cognizable crime. Article 246 of the Constitution of India places the police, public order, courts, prisons, reformatories, borstal and other allied institutions in the State List. To understand things related to Police a person should also have a clear understanding of the Criminal Justice System.

MEANING AND DEFINITION

The provisions of the Code and more particularly the provisions in Chapter XII of Code of Criminal Procedure, 1973 deal with the procedure to be followed in case of every information in cognizable cases to the police and their powers to investigate. It starts with Section 154 which deals with information in cognizable cases providing several stages for the police to follow and their powers to investigate.

154. Information in cognizable cases.

- 1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book

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¹ 1992 CrLJ 1558

to be kept by such officer in such form as the State Government may prescribe in this behalf.

- 2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.
- 3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

Under this section, information about the cognizable offence needs to be reduced in writing by an officer in-charge of a police station. Such information is known as First Information Report (hereinafter referred as FIR) under Section 154 of the Code. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, he shall reduce it to writing and then to enter the substance thereof in the prescribed format and register the case on the basis of such information.

CASE LAWS ON FIR

In **Tapinder Singh v. State of Punjab**², wherein the Supreme Court has held that an anonymous telephone message at police station that firing had taken place at taxi stand does not amount to FIR.

In this Ruling the telephone message was anonymous and therefore their Lordships of the Supreme Court had held that such an anonymous telephone message will not amount to an FIR under Section 154, Cr.P.C.

In **Suresh Sakharam Nangre v. State of Maharashtra**³, wherein the Supreme Court has held that a telephonic message that a person was lying injured without indicating that any offence was committed will not amount to FIR.

² 1970 AIR 1566

³ (2012) 9 SCC 249

Again, in this Ruling the message was only to the effect that a person was lying injured. The message did not disclose that any offence was committed, much less, cognizable offence. Their Lordships of the Supreme Court have held that it will not amount to an FIR in the case.

In **Soma Bhai v. State of Gujarat**⁴, therein the Supreme Court has held that the first information report (FIR) is the earliest report made to the police officer with a view to taking his action in the matter. In that case the Supreme Court held that a cryptic telephonic message will not constitute an FIR.

In **Ramsinh Bavaji Jadeja v. State of Gujarat**⁵, Every telephonic information about commission of a cognizable offence irrespective of nature and details of such information cannot be treated as FIR.

After perusing the Supreme Court Rulings stated above it is clear that a telephonic message also can be a FIR provided it discloses the particulars required by Section 154, CrPC about the commission of cognizable offence.

Jayantibhai Lalubhai Patel v. State of Gujarat⁶ whenever FIR is registered against the accused, a copy of it is forwarded to the Court under provisions of the Code thus it becomes a public document. Considering,

- 1) the provisions of Art 21 of the Constitution of India,
- 2) first Information Report is a public document in view of 5.74 of the Evidence Act;
- 3) Accused gets right as allegations are made against him under provisions of 5.76 of the Indian Evidence Act and
- 4) FIR is a document to which S.162 of the Code does not apply and is of considerable value as on that basis investigation commenced and that is the first version of the prosecution, as and when application is made by accused for a certified copy of the complaint, the Court to which it is forwarded should give certified copy of the complaint, the Court to which it is forwarded should give certified copy of the FIR, if the application and legal fees thereof have been tendered for the same in the Court of law. The application is therefore allowed.

⁴ AIR 1975 SC 1453

⁵ 1994 SCC (2) 685

⁶ 1992 Cr.L.J. 2377 (Gujrat)

SUPREME COURT DIRECTION ON FIR⁷

1. An FIR must be registered as soon as information about a cognizable offence is received,
2. Before starting an investigation, police officers should make a rational inference that a cognizable offence has been committed. The inference should be made solely on the basis of facts mentioned in the FIR,
3. Courts will not as a rule interfere in the investigation process except in the following circumstances when the High Court⁶ can cancel the FIR and other proceedings carried out by the police.
 - i. Where the allegations in the FIR do not constitute any cognizable offence or justify an investigation by the police.
 - ii. Where the allegations made in the FIR and the evidence collected by the police in support of the allegations do not point towards the guilt of the accused.
 - iii. Where investigation has been carried out by the police in a non-cognizable offence⁷ without the order of a magistrate.
 - iv. Where the CrPC or any other law expressly prohibits carrying out criminal proceedings against the accused.
 - v. Where criminal proceedings have been started with dishonest intent to take revenge from the accused.

EVIDENTIARY VALUE OF FIR

The FIR has certain evidentiary value, and this value is perhaps much greater than the evidentiary value which would exist with any statement which is made to any police officer during any point of time of the investigation. FIR is definitely not substantive, but, it cannot be doubted that it is an important piece of evidence and is an essential tool to corroborate the informant under Section 157 of the Indian Evidence Act. Alternatively, it may also be used to contradict him under Section 145 of the same Act.⁸ This is however, only possible if the informant is the witness when the trial is taking place

DUTIES AND RESPONSIBILITIES OF THE POLICE

⁷ State of Haryana v. Bhajanlal & Others AIR 1992 SC 604

⁸ Hasib v. State of Bihar, (1972) 4 SCC 773

Police are one of the most universal organisations of the society. The policemen, is the most evident legislative body of the government.

According to Article 246 of the Indian Constitution and section 3 of the IPA, the police force is a state subject and not dealt with at central level. Each state government has the responsibility to draw guidelines, rules and regulations for their respectively police forces. These regulations are found in the state police manuals.

To maintain the law scrupulously and decisively to prevent crime to pursue and bring to justice those who break the law to uphold and enforce the law impartially, and to protect life, liberty, property, human rights, and dignity of the members of the public to promote and preserve public order is the main purpose of the police service is and to keep the Queen's peace to protect, help and reassure the community and to be seen to do this with integrity, common sense and sound judgement.

In an hour of need, danger, crisis and difficulty, when a citizen does not know, what to do and whom to approach, the police station and a policeman happen to be the most appropriate and approachable unit and person for him. The police are expected to be the most nearby, collaborating and active organization of any society. Their roles, functions and duties in the society are natural to be varied, and multifarious on the one hand and complicated, knotty and complex on the other. Broadly speaking the twin roles, which the police are expected to play in a society are maintenance of law and maintenance of order. However, the ramifications of these two duties are numerous, which result in making a large inventory of duties, functions, powers, roles and responsibilities of the police organization.

The Police Act of 1861 laid down the following duties for the police officers:

- i. Obey and execute all orders and warrants lawfully issued by any competent authority;
- ii. Collect and communicate intelligence affecting the public peace;
- iii. Prevent commission of offences and public nuisances;
- iv. Detect and bring offenders to justice; and
- v. Apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists.

An area assigned to every police station in a state where the police are upholding local law-and order. patrolling neighborhood for security; solving petty crimes; investigating grave criminal offences and assisting the public prosecution; presenting the accused and bringing witnesses to the court during trial; serving court summons; crowd management and riot control are the examples of typical duty of police

“The primary duty of the police is to stop crime and disorder and the police must recognise that the test of their efficiency is the absence of both and not the visible evidence of police action in dealing with them.”

In the case of, **Ramesh Kumar v. The State (Delhi Admn)**⁹ The duty officer is required to mention the brief facts including the name of the assailant, names of the witnesses and the weapon used in the daily diary entry about the registration of the case. In the instant case all these details are conspicuous by their absence from D.D. entry. There are no valid explanations as to why these details have not been mentioned. Also, the special report was sent without mentioning the name of the constable through whom it was dispatched, and no efforts have at all been made to bring on record the testimony of this constable which could have led corroboration to the testimony of the duty officer and other police officials about the factum of the recording of the FIR at the time at which it is claimed to have been recorded.

In the aforesaid circumstances, the prosecution had, not been able to prove that the FIR was recorded at the time at which it was claimed to have been recorded.

The charter prescribed by the National Police Commission goes far beyond the 1861 charter, taking into account not only the changes which have occurred within the organization during this period, but also in the socio-political environment in which the organization is required to function. The NPC's Model Police Bill prescribes the following duties to the police officers.¹⁰

- i. Promote and preserve public order;
- ii. Investigate crimes, apprehend the offenders where appropriate and participate in subsequent legal proceedings connected therewith.
- iii. Identify problems and situations that are likely to result in commission of crimes;

⁹ 1990 Cr.L.J. 255 (Delhi)

¹⁰ National Police Commission: Eight Report, Police Bill, Section 43

- iv. Reduce the opportunities for the commission of crimes through preventive patrol and other prescribed police measures;
- v. Aid and co-operate with other relevant agencies in implementing the prescribed measures for prevention of crimes;
- vi. Aid individuals who are in danger of physical harm;
- vii. Create and maintain a feeling of security in the community;
- viii. Facilitate orderly movement of people and vehicles;
- ix. Counsel and resolve conflicts and promote amity;
- x. Provide necessary services and afford relief to people in distress situations;
- xi. Collect intelligence relating to matters affecting public peace and crimes in general including social and economic offences, national integrity and security; and
- xii. Perform such other duties as may be enjoined on them by law for the time being in force.

PROCESS OF CRIMINAL JUSTICE

1. Registration of the FIR

The process of criminal justice is initiated with the registration of the FIR. The FIR is a written document prepared by the police when they receive information about the commission of a cognizable offence.

2. The police officer proceeds to the scene of crime and investigates the facts of the case.

Police investigation mainly includes:

- In cognizable offences, the police have a direct responsibility to undertake investigation and the power to arrest a person without warrant. Non-cognizable offences cannot be investigated by the police on their own, unless directed by the courts having jurisdiction to do so.
- FIR is the report of information that reaches the police first in point of time and that is why it is called the First Information Report.
- The First Schedule of Cr.P.C lists all offences in the IPC and mentions whether they are cognizable (255 of the offences) or non-cognizable (122 of the offences).

- Examination of the scene of crime Examination of witnesses and suspects
Recording of statements Conducting searches Seizing property Collecting fingerprint, footprint and other scientific evidence Consulting records and making entries in the prescribed records, like case diary, daily diary, station diary etc. Making arrests and detentions Interrogation of the accused
3. After completion of investigation, the officer in charge of the police station sends a report to the area magistrate. The report sent by the investigating officer is in the form of a charge sheet, if there is sufficient evidence to prosecute the accused. If sufficient evidence is not available, such a report is called the final report.
 4. On receiving the charge sheet, the court takes cognizance and initiates the trial of the case.
 5. The charges are framed. The procedure requires the prosecution to prove the charges against the accused beyond a shadow of doubt. The accused is given a full opportunity to defend himself.
 6. If the trial ends in conviction, the court may award any of the following punishments:
 - Fine
 - Forfeiture of property
 - Simple imprisonment
 - Rigorous imprisonment
 - Imprisonment for life
 - Death Sentence

SOCIAL PRESSURE AND MEDIA PRESSURE ON POLICE

Working with a free mind is very important regardless of the organization. We live in a society where everyone is inter-related to one another creating a relation. It depends on the persons involved and the situation what will be the effect of the relation Positive or Negative. If we Focus on the relation between Police, Society, and Media, we come to a result that it depends on to which extent we exercise our power in Mathura Case.¹¹

The judgment by the court found the defendants not guilty. It was stated that because Mathura was 'habituated to sexual intercourse, her consent was voluntary; under the circumstances only sexual intercourse could be proved and not rape.

¹¹ Tukaram & Others v. The State Of Maharashtra 1979 AIR 185

The case was appealed in the Nagpur bench of the Bombay High Court who sentenced the accused to one and five years' imprisonment respectively. The Court held that passive submission due to fear induced by serious threats could not be construed as consent or willing sexual intercourse.

The Justice failed when India justices Jaswant Singh, Kailasam and Koshal of Supreme Court in 1979 gave a judgment on case of Tukaram. Their judgment reversed the High Court ruling and again acquitted the accused policemen.

Law was saved from failing when prof. Upendra Baxi, Raghunath Kelkar et al wrote an open letter to the Supreme Court, protesting the concept of consent in the judgment.

"Consent involves submission, but the converse is not necessarily true...From the facts of case, all that is established is submission, and not consent...Is the taboo against pre-marital sex so strong as to provide a license to Indian police to rape young girls."

Spontaneous widespread protests, demonstrations followed by women's organisations who demanded a review of judgment, receiving extensive media coverage, Creating both Social and media pressure. The case was a turning point in women right's movement in India. The Mathura rape case protests, which eventually led to amendments in Indian rape law via The Criminal Law (Second Amendment) Act 1983 (No. 46).

JUDICIAL VIEW ON AGE AND QUANTUM OF PUNISHMENT IN CASE OF JUVENILE OFFENDERS

Animesh Kumar* & Juhi Singh**

INTRODUCTION

The Juvenile Justice Act¹ was passed in 2000 with the purpose of incorporating into domestic law India's obligations under international law as a signatory of the UN Convention on the Rights of the Child of 1989, the UN Standard Minimum Rules for Administration of Juvenile Justice 1985 also known as the Beijing Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990. Underlying these international texts is the legal philosophy that juveniles lack the physical and mental maturity to take responsibility for their crimes, and because their character is not fully developed, they still have the possibility of being rehabilitated. This basic principle underlies the juvenile justice systems in many countries, including the United States and the UK.

The JJA creates a juvenile justice system in which persons up to the age of 18 who commit an offence punishable under any law are not subject to imprisonment in the adult justice system but instead will be subject to advice or admonition, counselling, community service, payment of a fine or, at the most, be sent to a remand home for three years.

As the data suggests, between 2011 and 2012 alone, there was a massive increase in instances of rape by juveniles by nearly 300, which is almost as much as the increase in such cases over the entire previous decade. This increase alone makes amendment of the JJA imperative.

The incident of gang rape cases, *inter alia*, has brought to limelight the issue of involvement of a juvenile in a crime as heinous as rape. The accused taking up the plea of being a minor has allegedly committed the maximum damage to the deceased victim.

This brings to the forefront the questions relating to the legal provisions followed in cases like this and the methods implied by forensic experts to determine the age of the accused to

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¹ Hereinafter referred as JJA

enable court in taking a decision, whether the accused is fit as per law to be treated as a juvenile.

This paper aims to peruse the Juvenile Justice Act, 2000 and the Indian Evidence Act, 1872 and the forensic methods involved, to reach a conclusion pertaining to the legal position of the age of juvenile offender.

The Following Issues are discussed herein:

1. Position of juveniles under Indian legislations- JJA
2. Determination of age by the court or competent authority
 - i. Forensic methods- Forensic odontology, radiology etc. (brief)
 - ii. Reliability and evidentiary value of forensic procedures - In reference to the Indian Evidence Act and related case laws.
3. Legal principles on determining the quantum of sentence and related procedures.

JUVENILE JUSTICE ACT, 2000 - RISING CONTROVERSY AFTER AMENDMENT OF 2006

- India has had interventions on justice for children first through the National Children's Act, 1960. This was followed by the Juvenile Justice Act, 1986 and presently the Juvenile Justice (Care and Protection of Children) Act 2000, as amended in 2006. The Juvenile Justice Law in India deals with children in need of care and protection as well as children in conflict with law.
- Section 2 (1) (k) & (l) defines the following as:
 - ‘juvenile’ or ‘child’ means a person who has not completed eighteenth year of age;
 - ‘juvenile in conflict with law’ means a juvenile who is alleged to have committed an offence;
- Determination of age of a delinquent, particularly in borderline cases, is rather a complex exercise. The Act as such does not lay down any fixed norms, which could be applied for determining the age of a person.
- However, Section 49 of the Act provides for Presumption and determination of age that when it appears to the competent authority viz., the Board, that the person

brought before it is a juvenile, The Board is obliged to make an enquiry as to the age of that person; for that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not.

- Also in terms of the provisions of Section 68 of the Juvenile Justice (Care & Protection of Children) Act, 2000, the Central Government has framed Juvenile Justice (Care & Protection of Children) Rules, 2001. Rule 22 of the said Rules provides for the procedure to be followed in respect of determination of the age of a person. It indicates that the opinion of the Medical Board is to be preferred only when a date of birth certificate from the school first attended is not available.
- One issue in the Delhi gang rape case that has provoked a lot of outrage is the claim that the most brutal rapist of the lot is allegedly a minor (he says he is 17 years plus) and hence may not get punished for the crime.
- There is debate over whether the legal age of a ‘minor’ needs to be lowered to 16 from the current 18, and also over whether or not the 17-year-old should be allowed to go scot-free just because he falls under the legal definition of a ‘minor’. While those debates rage on, the first task is to establish if he is indeed 17 years old as he claims to be.
- The most commonly used age determination test - is a bone or an ossification test. As ossification test is a medical procedure that detects a person’s age based on a biological process known as ossification.
- The law itself says very little about age determination tests. The Indian Penal Code, for example, doesn’t mention age determination tests at all. Section 49 of the law states that a competent authority can be asked to provide evidence of a person’s age to determine whether he or she is a juvenile. It does not, however, state who or what the competent authority could be, nor does it lay down any procedures to determine a person’s age.

HIGHLIGHTS OF JUVENILE JUSTICE ACT, 2015

The bill was introduced in Parliament after public outrage because one of the offenders in the 2012 Delhi gang rape case was a few months short of 18 years of age. After getting assent from President on December 31, 2015, the Ministry of Woman and Child Development has passed orders enforceable from January 15, 2016.

The Act allows for juveniles 16 years or older to be tried as adults for heinous offences like rape and murder. Heinous offences are those which are punishable with imprisonment of seven years or more. Act consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach. It mandates:

- Setting up Juvenile Justice Boards and Child Welfare Committees in every district. Both must have at least one woman member each.
- The decision to try a juvenile 16 years or older as an adult will be taken by the Juvenile Justice Board, which will have a judicial magistrate and two social workers as members. If the board decides against it, the juvenile will be sent for rehabilitation.
- The Child Welfare Committees will look at institutional care for children in their respective districts. Each committee will have a chairperson and four other members, all specialists in matters relating to children.
- Act also deals with adoption of children and lays down the eligibility criteria for adoptive parents. A central adoptive resource agency will frame the rules for adoption, which will be implemented by state and district level agencies.

Since India is a signatory to the UN Convention on the Rights of the Child which mandates that all children under the age of 18 years be treated equal. There is argument that the law was in contradiction with international standards and that most children who break the law come from poor and illiterate families. Instead of punishment they should be educated. It is one of the post December 2012 Delhi Gang Rape responses as creation of media sensationalization of the issue, and cautioned against any regressive move to disturb the momentum of Juvenile Justice Legislation in the Country.

However, some sections in the society felt that in view of terrorism and other serious offences, Juvenile Justice Act of 2000 needed to be amended to include punitive approaches in the existing Juvenile Justice Law, which so far is purely rehabilitative and reformative. Some argued that there is no need of tampering with Juvenile Justice Act for putting up effective deterrent against terrorism.

"We are a civilized nation and if we become barbaric by twisting our own laws, then the enemy will succeed in destroying our social structure. We should not allow that but we must condemn this move of sending children to fight their war".²

There is division into two groups one below 16 and another above 16, goes against the core principle that all children should be treated as such till the age of 18. This age has been fixed based on studies in child behaviour and the UN Convention of the Rights of the Child. A parliamentary Standing Committee opposed the change, noting that subjecting juveniles to the adult judicial system would go against the objective of protecting all children from the rigours of adult justice. It noted that the Supreme Court had not agreed with the view that children involved in certain offences should be tried as adults.

VERDICTS OF SUPREME COURT ON THE ISSUES

Babloo Parsi & Other v. State of Jharkhand³ - Relevancy/Evidentiary Value of Bone Ossification Test:

- The Supreme Court ruled in this case held that no fixed norm had been laid down by the Act for the age determination of a person and the plea of the juvenile must be judged strictly on its own merit. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.
- At Para 16: It is no more than an opinion. More so, when even the Medico-Legal opinion is that owing to the variation in climatic, die tic, hereditary and other factors, affecting the people of different States in the country, it would be imprudent to formulate a uniform standard for the determination of the age. True, that a Medical Board's opinion based on the radiological examination is a useful guiding factor for determining the age of a person but is not incontrovertible. Commenting on the evidentiary value of the opinion of a doctor, based on x-ray tests, as to the age of a person, in **Ramdeo Chauhan v. State of Assam⁴**, R.P. Sethi, J., speaking for the majority in a three-Judge Bench, had observed that an X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate

² Justice R.S. Sodhi, Retired Judge of Delhi High Court, Hindustan Times, 08 August 2015

³ 2009 (1) JCR 73 (SC)

⁴ (2001) 5 SCC 714

the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform.

- At Para 17: It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

Ram Suresh Singh v. Prabhat Singh & Others⁵ - Section 35 of Evidence Act cited in light of evidentiary value of school records for the purpose of determining age of a person:

- It was held that in cases “where determination of age is in question with regard to Act of 2000 the date of birth as entered in school admission register, such evidence has to be taken in account and when such entry in register is been proved as per Sec. 35 of Evidence Act there lies no reason as to why the same should not be given effect to.”
- At Para 15: The condition laid down in Section 35 of the Evidence Act for proving an entry pertaining to the age of a student in a school admission register is to be considered for the purpose of determining the relevance thereof. But in this case, the said condition must be held to have been satisfied.
- At Para 16: An entry in a school register may not be a public document and, thus, must be proved in accordance with law, as has been held by this Court in the case of **Birad Mal Singhvi v. Anand Purohit⁶**, but, in this case the said entry has been proved.
- At Para 17: Even if we had to consider the medical report, it is now well known that an error of two years in determining the age is possible. In the case of **Jaya Mala v. Home Secretary, Government of J&K & Others⁷**: This Court held: However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

⁵ (2009) 6 SCC 684

⁶ 1988 SCR Supplementary (2) 1

⁷ [1982] 3 SCR 583

- A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard.

Mahadeo v. State of Maharashtra & Others⁸ - Rule 12(3) is to be followed while determination of age:

- It was held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining – (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a playschool) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

- At Para 12: Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be

⁸ (2013) 14 SCC 637

rightly followed by the courts for the purpose of ascertaining the age of a victim as well. (Emphasis supplied)

Vimal Chadha v. Vikas Chowdhary⁹: Determination of age by the court on the date on which the offence is said to have been committed by the accused it was held:

- That the determination of age of a ‘juvenile in delinquency’ must be determined as and when an application is filed. In view of the decision of the Constitution Bench in **Pratap Singh v. State of Jharkhand¹⁰**, it is no longer res integra that the relevant date for determination of the age of the accused would be the date on which the occurrence took place. What would be the date on which offence has been committed in a given case has to be decided having regard to the fact situation obtaining therein. If an offence has been a continuing offence, then the age of the juvenile in delinquency should be determined with reference to the date on which the offence is said to have been committed by the accused.
- Further it also held that if an offence has been a continuing offence, then the age of the juvenile in delinquency should be determined with reference to the date on which the offence is said to have been committed by the accused.

Gurpreet Singh v. State of Punjab¹¹: Method of Computing Sentence when the accused was juvenile on the date of occurrence:

- It was held at Para 18 in this case that first SC should consider the legality or otherwise of conviction and in case conviction is upheld a report should be called from trial court on the said issue and there upon receiving report, if it is found that the accused was juvenile on the date of occurrence and continues to be so, he shall be sent to juvenile home but if in case where he was juvenile on the date of occurrence but not so on the date when Supreme Court is passing the final order, the sentence imposed against him would be liable to be set aside.

State of Madhya Pradesh v. Anoop Singh¹² : Answering with the central question as to the criteria to be adopted and applied to resolve the controversy over the age of a rape victim in the event of a discrepancy in the birth certificate and the school certificate SC held:

⁹ (2008) 15 SCC 216

¹⁰ (2005) 3 SCC 551

¹¹ (2005) 12 SCC 615

- Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape, and that medial opinion can be relied on only in the absence of the documents prescribed in Rule 12(3) of the Juvenile Justice Rules.
- Further it was found on facts that there was a difference of only two days in the dates mentioned in the abovementioned Exhibits, and further endorsed the finding of the Trial Court that the birth certificate Ext. P/5 clearly shows that the registration regarding the birth was made on 30.10.1987 and keeping in view the fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as under-aged in view of the possibility of the incident in question.
- That the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in presuming that the documents could not be relied upon in determining the age of the prosecutrix said the Court.

CONCLUSION

Child rights activists have condemned the 2015 Act as regressive and not in sync with international standards. They argue that children cannot be made to fight their own wars. Further, they vociferously argue that laws especially those meant for children should be reformatory and not retributory in nature. Children are the wealth of a nation. Provisions like the 'transfer system' in the new Act must be given a reassessment. A carefully thought of juvenile justice system is the need of the hour.

¹² (2015) 3 MLJ (Crl) 358 (SC)

FEMALE FOETICIDE AND INDIAN LAW

Dr. S. P. Mishra*

INTRODUCTION

The social, cultural and religious fiber of India is pre-dominantly patriarchal contributing extensively to the secondary status of women. The patrilineal social structure based on the foundation that the family runs through a male which makes male a precious commodity that needs to be protected and given special status. Another important pillar of the patriarchal structure is marriage wherein women are given subordinate status having no say in the running of their life or any control over their body or bodily integrity. Marriage is also considered as a process whereby the burden of the father is passed on to the class structure that generations may have to toil to repay the debts incurred during marriage. All of this has contributed to a low status for women in the society to such an extent that even the birth of a girl child in a family is sought to be avoided. A deleterious fall out of the subjugated position of women is their vulnerability to violence, rape, sexual abuse dowry harassment, domestic violence, trafficking etc. with little or no mechanisms of combating the same either by way of effective laws and there implementation or civil society action. Various methods were found to eliminate the girl child after her birth like starving her, crushing her under bed or giving poison etc. Pertinently the responsibility for killing the child was fixed on the mother/women as she was considered responsible for bringing the girl child into existence. The causes for elimination of girl child indicate that the reasons are similar and different depending upon the geographical location in which female infanticide is practiced. An exorbitant dowry demand is one of the main reasons for female infanticide. Some of the other reasons are the belief that it is only the son who can perform the last rites, lineage and inheritance runs through the male line, sons will look after parents in old age, men are breadwinners etc. Strong male preference and the consequent elimination of the female have continued to increase rather than decline with the spread of education.¹

The recent technological developments in medical practice combined with a vigorous pursuit of growth of the private health sector have led to the mushrooming of a variety of sex-

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¹ Manjeet Rathe, *Eradicate Scourge of Female Foeticide*, People's Democracy, Vol XXV, No. 39, Sep 30

selective services. This has happened not only in urban areas but deep within rural countryside also. Female infanticide in most places has been replaced by female foeticide. Female foeticide or sex selective abortion is the elimination of the female foetus in the womb itself. The sex of the foetus is determined by methods like amniocentesis, chorion villus Biopsy and now by the most popular technique ultrasonography. Once the sex of the foetus is determined, if it is a female foetus, it is aborted. The increase in female foeticide has seen the proportionate decrease in female sex ratio, which has hit an all-time low especially in the 0-6 age group, and if this decline is not checked, the very delicate equilibrium of nature can be permanently destroyed.²

In ancient India, the birth of a girl child used to be praised as the arrival of Laxmi (Goddess of Wealth) into the family. In Hinduism, Abortion or killing of foetus has always been considered to be a sin and prohibited as such. The person who causes abortion is described as Bhrunaha and the killing of foetus is described as Bhrunahatih. References in Atharva Veda show that abortion was known in the Vedic age. Abortion was always considered to be a sin for which, however, expiation ceremonies were prescribed in Taittiriyanapashad and also in Arunam. *Mannu* in his Dharmashastra said that a killer of a priest or destroyer of an embryo casts his guilt on the willing eater of his provisions (Chapter VIII, Verse 317).

Kautilya's Arthashastra provides for the highest punishment for causing abortion by physical assault. It refers to Yajnavalkya and Manu as well as Vishnupurana. Lesser punishments are also provided for inducing miscarriage by drugs.³

Muslim jurists also agree unanimously that after the foetus is completely formed and has been given a soul, aborting it is *harama*. While Islam permits preventing pregnancy for valid reasons, it does not allow doing violence to the pregnancy once it occurs.⁴

Foeticide was prohibited and classified as murder, equal to neglect of Vedas, incest and drinking of spirituous liquors. Man even considered a woman as murderer of her husband or of Brahmin or as an outcaste who had undergone abortion. The Buddhists who condemned the destruction of life, laid down that the bhiku “*who intentionally destroys a human being by way of abortion, is no Samana and no follower of Sakeyaputta.*” As per Gandhiji, “*abortion*

² Manmeet Kaur, *Female Foeticide: A Sociological Perspective*, The Journal of Pomily Welfare, Vol. 39 (i), March, 1993

³ Shaw S. P., *Encyclopedia of Laws of the Child In India*, First Edition, 2000, p. 99

⁴ *Id at* p. 201.

was more in violation of the principle of the ahimsa than the artificial birth control which was morally blameworthy. Holy Quran prohibits the killing of child”, “Astray have gone those who stupidly kill their children without knowledge and deny to themselves of what Allah has blessed them with”. The Didache, an authoritative source of Christian law, considered abortion, as a grievous sin and was included in the Ten Commandments which contain the forbidden acts. Every human being including the unborn child in the womb of its mother receives the right to life directly from the Almighty God but not from parents, society or any other authority.⁵

FEMALE FOETICIDE AND LAW IN INDIA

India has always possessed the hateful legacy of killing the female child. Earlier, because scientific techniques were not advanced and it was impossible to determine the sex of the child, the killing of the female child took the form of adding opium to the infant's milk or by suffocating the infant under the mother after birth or else by plainly ill-treating daughters. Now it is given a sophisticated aura of education by the perverse use of scientific technology. The truth is disheartening but nonetheless the truth, that the technique used to diagnose the condition and sex of the foetus, medically termed as amniocentesis, is now primarily conducted for sex determination and the consequent extermination of a female foetus. And paradoxically, the practice is adopted by supposedly educated and reasonably well off families rather than by the poor who can neither afford doctors' costs nor have ever heard of such perversions. The blind killing of female foetuses has led to a precarious situation where the male-female ratio of the population is being affected.⁶

Indian society is patriarchal in nature with inborn desire for the birth of a male child in the family. This desire, along with the many prevailing superstitions, leads to indiscriminate abortion of female foetuses. Women carrying illegitimate children also have a high abortion rate. These factors have contributed to the prevalence, in Indian society, of the menace of quacks. These unregistered medical practitioners had become a health hazard for women who were carrying unwanted or illegitimate children because they performed abortions illegally and not knowing much about termination of pregnancies. In order to prevent such illegal acts

⁵ Sehgal B. P. Singh, *Human Right In India*, 2004, pp. 158-59

⁶ Rao Mamata , *Law Relating to Women and Children*, 2008, p. 143

Sections 312-318 of the Indian Penal Code deal with the causing of miscarriage with or without consent.⁷

In our country female foeticide has always been regarded as socially, morally and legally wrong. Under Penal Code, 1860 stringent penalties have been laid down for causing miscarriage whether it has been caused with or without the consent of the woman.⁸ A woman who causes her to miscarry may also be punished. The IPC even provides punishment for whosoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive⁹ but under certain situation the right to abortion has been recognized under the Medical Termination of Pregnancy Act, 1971. Section 3 of this Act provides for the termination of pregnancy by a registered medical practitioner only where its continuance would invoke a risk to the life of the pregnant woman or grave injury to her physical or mental health or where there is a substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Where the pregnancy is alleged to have been caused by rape or as result of failure of contraceptive used by a married woman or her husband, it would be presumed to constitute a grave injury to the mental health of the pregnant woman. But in practice this Act has provided a license to every registered medical practitioner to terminate pregnancy whether it is a fit case within the exception or not. There is no method to check whether the reasons specified for termination of pregnancy are true or not. D-regularization has resulted into a new type of criminal behaviour practiced by the medical practitioner. The government being concerned only with its family planning programme became a willing party to this so called legalized female foeticide. Amniocentesis technology added fuel to the fire when after detecting the sex of the foetus, selective abortions were caused. The problem of female foeticide became so acute that activists group, media persons and intellectuals demanded State intervention. In mid-eighties matter became a major campaign issue. A concerted campaign in Mumbai under the banner of ‘Forum against sex-determination and sex pre-selection’, supported by groups in other States, led to the formation of an investigation committee and later the formulation of Bill in 1988 which ultimately was passed in 1994 as the Pre-Natal Diagnostic Techniques Act. It came into force on January 1, 1996.

⁷ *Id at p. 178*

⁸ I.P.C. 1860, Section 312 & 313

⁹ *Id*, Section 315

**[PRE-CONCEPTION AND] PRE-NATAL DIAGNOSTIC TECHNIQUES
[PROHIBITION OF SEX SELECTION] ACT 1994**

The Act provides for the prohibition of sex selection, before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

It is proposed to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. Legislation is required to regulate the use of such techniques and provide deterrent punishment to stop such inhuman act.

Section 3 provides for the regulation of genetic counseling centers, genetic laboratories and genetic clinic.

Section 6 prohibits Genetic Centres, Laboratories and Genetic Clinics from conducting any prenatal diagnostic technique tests including ultrasonography for the purpose of determining the sex of a foetus. The same prohibitions apply to an individual also.

When otherwise for determining any abnormality, the prenatal diagnostic techniques are used and the sex of the foetus is known Section 5, specifically prohibits communication by words, signs, etc. is prohibited.¹⁰

Thus Section 5 and 6 prohibit the determination or communication of the sex of the foetus.

Section 5 lays down certain conditions which have to be fulfilled before carrying out a prenatal diagnostic technique on a pregnant woman. These are:

1. obtain her consent after giving her an explanation in the language she understands,
2. Give her a copy of her written consent.
3. Explain the side effects and consequences of using such technique. Unless these conditions are fulfilled no prenatal diagnostic test can be carried out.

¹⁰ PC-PNDT Act, 1994

No any person conducting pre- natal diagnostic procedure shall communicate to the pregnant women concerned or her relative or any other person the sex of the foetus by word, sign or any other manner.

Sections 7-16 deal with the Central Supervisory Board under Chapter IV. The sections give the details of constitution, term of members, meetings of the Board, Vacancies. Temporary Association of persons. Appointment of officers, authentication of orders and other instruments of the Board, Disqualifications, eligibility and functions of the Central Supervisory Board.

The act empowers and directs the Central Government to constitute an authority called the Central Supervisory Board consisting of a Minister and Secretary of Ministry of Family Welfare, two members representing the ministries of Women and Child and Law and Justice. Director General of Health Services, and ten members, two each from amongst eminent medical geneticists, gynecologists and obstetricians, pediatricians, social scientists and representatives from Women's Welfare Organizations. Apart from these, three women members of Parliament and four members are to be appointed by the Central Government (Sections 7).

Section 16 of the Act assigns the following functions to the Board:

- a) To advise the Government of policy matters relating to the use of prenatal diagnostic techniques, sex selection techniques, and against misuse.
- b) To review the implementation of the Act and the rules made there under and recommend changes in the said act and rules to the Central Government;
- c) To create public awareness against the practice of pre-conception sex selection and pre- natal determination of sex of foetus leading to female foeticide;
- d) To lay down Code of Conduct to be observed by persons working at Genetic Counseling Centres, Genetic Laboratories and Genetic Clinics.

The Central or State Government shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions.

The Advisory Committee, according to Section 17 (6), shall consist of:

- 1) Three medical experts who may be gynecologists, obstetricians, pediatricians and medical geneticists;
- 2) One legal expert;
- 3) One officer from the department of information and publicity of the State Government/Union Territory;
- 4) Three eminent social workers, of whom not less than one shall be from amongst representative of women's organizations.

Applications for registration or any complaint for suspension/cancellation of registration shall be considered by the Advisory Committee either on the request of the Appropriate Authority or on its own.

Under Section 18 of the Act, every Genetic Counseling Centre, Laboratory or Clinic must be registered under the Act before its commencement. No person shall open any centre unless such registration is made separately or jointly. The application for registration is made to the appropriate Authority, who, after holding an inquiry and satisfying itself regarding compliance with the requirements and also having regard to the advice given by the Advisory Committee, may grant a certificate of registration under Section 19. If after inquiry and affording opportunity of being heard and for reasons to be recorded, it is found that the requirements have not been complied with, the Appropriate Authority may reject the application for registration.

The certificate of registration has to be renewed as per the manner prescribed and has to be displayed by the Genetic Counseling Centre, Laboratory or Clinic.

The Appropriate Authority is vested with powers under Section 20 to cancel or suspend a registration if it is found that such a centre has misused diagnostic techniques.

The Appropriate Authority may issue a show cause notice to a centre as to why its registration should not be suspended or cancelled for reasons mentioned in the notice. The action against the centre may be on:

1. A complaint, or
2. *Suo motu*

If after the advice of the Advisory Committee and after giving the offender a reasonable opportunity of being heard, the Appropriate Authority is satisfied that there has been violation of the provisions of the Act, it may suspend or cancel the registration as it may deem fit. If it is required in public interest the Appropriate Authority may also suspend the registration without notice.

However, an appeal can be made against the order of suspension or cancellation under section 21, within thirty days to:

1. Central Government, or
2. State Government

Whichever is appropriate, Section 22 of the Act provides that, no person, organization or Genetic Centre should advertise in any form facilities available for prenatal determination of sex at such centres or laboratories. Therefore, no publicity can be given as to the existence or availability of the facility. Publicity includes publishing or distribution of notices, circulars, labels, wrappers or other documents and includes visible representations made by light, sound smoke or gas.

If an advertisement is given in contravention of the above provision, the same is punishable with imprisonment up to 3 years and with fine up to Rs. 10,000.

The seriousness of the offences committed under this Act is reflected by Section 27 which makes every offence under this Act cognizable, non-bailable and non-compoundable. Section 28 of the Act specifies that no court other than that of a metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act. These courts shall take cognizance of offences under the Act only on complaint made by:

1. The Appropriate Authority or any officer authorized by the Central or State Government, or
2. A person who has given not less than 15 days' notice of offence to the Appropriate Authority and of his intention to make a complaint.

Penalties have been provided for the violation of the Act by Genetic Centers or Laboratories and the persons seeking aid of such centers and companies. Notwithstanding anything in the Indian Evidence Act it has been laid down in Section 24 that unless the contrary is proved,

the court shall presume that a pregnant woman was compelled by her husband or relative to undergo prenatal diagnostic test and such person shall be liable for abetment of the offence. Thus, special protection has been given to a pregnant woman taking into consideration the fact that for a mother her child is important and not its sex.

If the Appropriate Authority has reasons to believe that an offence is being committed under the Act, power to search and seize records at all reasonable times has been conferred. It has also got the power to examine any record, register, document, book, pamphlet, advertisement or any other material object found therein. Such acts have been protected by the Act under Section 31 if taken in good faith.

The Act confers power on the Central Government to make rules for carrying out the provisions of the Act. The rules may provide for, inter alia, the minimum qualifications of persons employed at Genetic Counseling Centres or Laboratories, facilities, equipments and other standards to be made available by these centres, the form in which consent of a pregnant woman has to be obtained under Section 5, the form and manner in which application has to be made for registration, manner in which seizure of documents shall be made and the manner in which the seizure list shall be prepared.

The Board has also been granted powers to make regulations with the previous sanction of the Central Government. The Rules and Regulations so made shall be laid before each House of Parliament while it is in session.

With this pious legislative backdrop we have the Union Family Welfare Secretary saying:

"In Vitro Fertilization (IVF) clinics have mushroomed all over. In the name of fertility techniques all such practices are being carried out."

These centres encourage couples seeking a male child to go in for procedures such as separation of X-Y chromosomes of the sperm or embryo selection following IVF. These practices have led to increasing distortions in the sex ratio. Challenged again by IVF, the scope of the law for checking tests which determine the sex of a foetus is being expanded to cover pre-conception sex selection techniques.

FEMALE FOETICIDE AND JUDICIARY

Activists through intervention of the Supreme Court are compelling State governments to initiate action against ultrasound centers encouraging female foeticide under the (Pre-Conception and) Pre-Natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994. Therefore, it is for the first time since the enactment of this law about eight years ago that States have started registering ultrasound machines for a better supervision of their use.

The Indian Medical Association, too, has called for action against doctors helping in such sex-selection procedures. Activist Sabu George says.¹¹

“The problem with foeticide is that doctors are promoting and encouraging it. It is one organized crime against women encouraged by professionals.”

Not only is sex determination a crime against women but achieving is a balance in sex ratio also a crucial part of population stability. Expressing its concern, an NGO, CEHAT, filed a Public Interest Litigation highlighting this issue.

The challenge to the constitutionality of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 on ground of violation of Article 21 of the Constitution was rejected by the Supreme Court in *Vinod Soni v. Union of India*.¹²

Expressing concern over this issue the Supreme Court in *CEHAT v. Union of India*¹³ moved in to stop illegal sex determination and directed all States to confiscate ultrasound equipment from clinics that are being run without licenses. The Health Secretaries of Punjab, Haryana, Delhi, Bihar, Uttar Pradesh, Maharashtra, Gujarat, Andhra Pradesh, Kerla, Rajasthan and West Bengal were present to explain the steps taken to implement the Pre-Natal Diagnostic Techniques Act, 1994.

A bench comprising Arijit Pasayat, M.B. Shah and B.N. Agrawal, JJ. said:

“State Governments are directed to take immediate action if such machines were being used in clinics without licence. The machines are to be seized and sealed for the time being.”

¹¹ Rao Mamata – *Law Relating to Women and Children*, 2008, p. 148

¹² *Vinod Soni v. Union of India*, 2005 CrLJ 3408.

¹³ *CEHAT v. Union of India*, (2001) 5 SCC 577

When the petitioner's counsel Indira Jai Singh said that the State Governments were casually granting licences to ultrasound clinics the court said:

"The authorities should not grant certificate of registration if the application form is not complete."

The court also asked the manufacturers of ultrasound machines-Philips, Symonds, Toshiba, Larsen and Toubro and Wipro Ge-to give the name and addresses of the clinics and persons in India to whom they sold these machines in the last five years "This," the court said, "would help the government find out whether these clinics or persons were registered."

Again in a resumed hearing the Supreme Court warned that health secretaries of States failing to implement its orders banning sex determination of foetus would be required to be present before the court in the next hearing.

Shocked at the slackness of the Union and the State governments, the Supreme court in *CEHAT v. Union of India*¹⁴ again asked the authorities to file within six weeks status reports regarding implementation of (Pre-Conception and) Pre-natal Diagnostic Techniques (prohibition of sex selection) Act, 1994. A Bench comprising M.B. Shah and R.P. Sethi, JJ., said:

"We make it clear that there is total slackness on the part of administration in implementing the Act."

It asked the authorities to implement the Act and prosecute clinics, centres and laboratories which aid and abet identification of the sex of the foetus illegally.

When consul for certain States said that the authorities have issued warnings to several such unregistered centres having ultrasound facilities, an anguished Bench expressed surprise and wondered "whether the implementing authorities are aware of law?" "The Act provides for prosecution and not warning. Authorities under the provision of the Act are not empowered to issue warnings and allow these centers to continue their illegal activities."

It also castigated the Union Government for not setting up an Appropriate Authority to implement the Act. It should have set up the authority five years ago, the court added.

¹⁴ *Ibid.*

Such, then, is the attitude of the government towards a crime which hits at dignity even before conception. There has to be a concerted effort by all to stop this inhuman treatment of the female foetus. By the intervention of the Apex Court, prosecutions have been launched against the offenders but, in all cases, it is the will to protect the dignity of women which will ultimately succeed.

In *CEHAT v. Union of India*,¹⁵ further directions were issued by the Supreme court. The Centre and State Governments were directed to issue advertisements to create awareness in the public that there should not be any discrimination between male and female child, and to publish annually the reports of appropriate authorities for the information of the public. National Monitoring and Inspection Committee is to continue to function for the effective implementation of the Act. Certain States were directed to appoint State Supervisory Board and multi-membered appropriate authorities.

In *Malpani Infertility Clinic (P.) Ltd. v. Appropriate Authority PNDT Act*,¹⁶ the petitioner sought to challenge the order, under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT) suspending the registration of the petitioners Diagnostic Centre. A writ petition was also filed by an NGO in 2001, Center for Enquiry into Health and Allied Themes CEHAT, against the activities being carried out which are banned by the PNDT Act. The petitioners have then in their affidavit defended sex determination on the ground of family balancing'. Later they tendered apology through another affidavit.

The petitioners Diagnostic Centre was allegedly carrying out prohibited activities involving pre-natal sex determination leading to female foeticide. Prima facie there was some material before authority, a prosecution lodged on the basis of which the authority had adequate power under the Act to suspend the licence pending prosecution. It cannot be said that there was no sufficient mention of reasons for authority to take action.

In *Chitra Agarawal (Dr.) v. State of Uttaranchal*,¹⁷ the petitioner, a practicing doctor having an Ultrasound Centre was registered under the PNDT Act, 1994. The registration of the petitioner was first suspended and then cancelled. There was also criminal proceeding

¹⁵ *CEHAT v. Union of India*, (2003) 8 SCC 398

¹⁶ *Malpani Infertility Clinic (P.) Ltd. v. Appropriate Authority PNDT Act*, AIR 2005 Bom. 26.

¹⁷ *Chitra Agarawal (Dr.) v. State of Uttaranchal*, AIR 2006 Utt. 78.

pending against the Ultrasound Centre. Appeal was filed against decision of District Level Appropriate Authority of canceling the registration. The petitioner was informed that his appeal cannot be entertained in view of pending criminal proceeding. This refusal was challenged in the present writ petition.

The Court while giving its decision lay that the initiation of criminal proceedings against the Ultrasound Centre of pendency of such criminal proceedings before Court is no bar for deciding the appeal against cancellation of its registration. It cannot be a ground for refusing to entertain and decide the appeal filed by violation of the provisions of the PNDT Act and the rules. The action is directed against registration of Ultrasound Centre and not against owner of the Center. Both actions are independent and can be preceded simultaneously. The pendency of criminal proceeding should not deter the appellate authority from deciding the appeal filed against the cancellation of registration.

In *Vijay Sharma v. Union of India*,¹⁸ the High Court held that the provisions of the Pre-conception and pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 as amended by the Amendment Act, 2002 are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition. Therefore it is not necessary for the Central Government to issue any order regarding removal of difficulties in the official gazette.

The above discussion is pertinent in today's scenario because even after various states attaining high literacy rates, the cases of illegal foeticide have not reduced significantly. It is a worthy move by the present day Uttar Pradesh and other state governments to make identity proof mandatory for getting ultrasound or any other Pre Conception and Pre Natal diagnostic tests and procedures. This is going a long way in curbing this dreadful practice.

¹⁸ *Vijay Sharma v. Union of India*, AIR 2008 Bom. 31

THE INDIAN JUGAAD: PROSPECTS OF PATENTING UTILITY MODELS IN INDIA

Shital Priyadarshi*

Abstract

The research paper aims to inquire into the realm of Jugaad, which is also called utility models or petty patents and what are the prospects of patenting utility models in India. In order to examine the prospects, the present International laws and Treaties on the point that together constitutes the global IPR regime related to utility patents has been examined. To get a holistic picture, the global trends in patenting utility models have been seen. Thereafter, the domestic scenario has been discussed ranging from Indian Patent Law to the institutions catering to the needs of such innovations. At last the whole situation has been analysed and concluded accordingly. The paper is an effort to see whether India should go ahead with the patenting of Jugaad.

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INTRODUCTION

The research paper is an attempt to study the concept which is popularly called “*Jugaad*” in Indian languages. Here in this paper, it is used in the context of Utility Models or Petty Patents. They are very much part of our IPR policy though not explicitly recognized in the present system. In order to give more recognition and attach more importance to them, our government has ignited discussions on this in the year 2011¹ and 2014² respectively. In the year 2014, it gained momentum when it was covered in the Draft IPR Policy. The draft IPR policy was looking forward to legalize the utility models so that it builds the culture of commercialization of innovations.

Talking about the utility models, it is difficult to define it with exact precision. Though it has been defined by WIPO as-

*“A utility model is an exclusive right granted for an invention, which allows the right holder to prevent others from commercially using the protected invention, without his authorization, for a limited period of time. In its basic definition, which may vary from one country (where such protection is available) to another, a utility model is similar to a patent. In fact, utility models are sometimes referred to as petty patents or innovation patent”.*³

If we see this term in domestic realm, a more familiar word named “*Jugaad*” comes to our mind. It is considered by many as a million dollar word. It basically denotes the idea of discovering a way out of a problem situation, amidst all odds. It is used in many other streams and not just IPR. It also qualifies as a mainstream management technique. Not only this, many scholars believe that *Jugaad* is the driving force behind the Indian start-up culture and their optimism for a better future.

Coming up with a low cost solution to a problem is born out of Indian way of life. We are accustomed to situations of scarcity and time shortage, which in turn has made us more flexible in getting problem situations resolved. Everything need not be cured in the conventional proper way but they can be resolved as quick as possible in the minimum

¹ DIPP Discussion Paper 2011, available at:
http://dipp.nic.in/english/Discuss_paper/DiscussionPaper_relevance_23June2011.pdf last accessed on 8.5.2016

² Draft NATIONAL IPR POLICY 2014, available at:
http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf last accessed on 8.5.2016

³ What is a Utility Model? available at:
http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm last accessed on 8.5.2016

resources available. The biggest example of *Jugaad*, which gathered global attention was the India's successful Mission on Mars. It was very low in cost and time as compared to their International counterparts. It was known worldwide that it was almost half the cost of the movie made on a similar concept. The budget was only \$74 million compared to NASA's \$671 million for the MAVEN project.⁴

INTERNATIONAL CONVENTIONS ON UTILITY PATENTS

There are a number of international treaties and conventions that cover the intellectual property rights across the globe. In order to understand the global legal regime on utility patents, there is a need to see what legal provisions are there in them to cover and protect utility patents. The following are the International Conventions:

1. The Paris Convention, 1883
2. TRIPS
3. The Patent Cooperation Treaty and the Patent Law Treaty.
4. Free trade Agreements

The Paris Convention for the Protection of Industrial Property (1883) – This is one of the Oldest Convention protecting the Intellectual Property Rights, then known as Industrial rights. This text which is as old as 120 years defines the industrial property that covers all the forms of IPR along with utility patents too. At present, there are about more than 170 members to this convention. India joined the Paris Convention on December 8, 1998 and became bound to the provisions of this convention.⁵

What is important implication of this definition is that as in the case of other IPRs, the utility patents also enjoy the benefits arising out of the convention like National treatment⁶, Priority rights⁷ and Compulsory Licensing⁸. And the contracting states, which are almost 170 in

⁴ Getting to Mars through 'jugaad' by Karine Schomer (2014), available at: <http://www.thehindu.com/opinion/op-ed/getting-to-mars-through-jugaad/article6479048.ece> last accessed on 8.5.2016

⁵ Utility model –A tool for economic and technological development: A case study of Japan, Submitted By Dr.K.S.Kardam as Final Report In Fulfillment of the Long-term Fellowship Sponsored by World Intellectual Property Office (WIPO), available at: http://www.ipindia.nic.in/research_studies/finalreport_april2007.pdf last accessed on 8.5.2016

⁶ Article 2 of the Paris Convention, 1883 available at: <http://www.wipo.int/treaties/en/ip/paris/> last accessed on 8.5.2016

⁷ Article 4A of the Paris Convention, 1883 available at: <http://www.wipo.int/treaties/en/ip/paris/> last accessed on 8.5.2016

number, are bound to accord the protection to the utility models as laid down in the convention.

It needs to be realized that all these articles talk in general about the Industrial rights, which covers Utility patents too. For e.g. the words of article 2 goes like this-

Art. 2(1) states:

*"Nationals of any country of the Union shall, as regards the protection of **industrial property**, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with."*

TRIPS – Probably the most popular agreement on IPRs, TRIPS is one of the many agreements that come in the WTO package of agreements. The scope of TRIPS to which its substantive law extends, is defined in its Art. 1(2) whereby “*the term ‘intellectual property’ refers to all categories of intellectual property*” of the Agreement. So, as we can see there is no explicit mention of the utility models, but a sweeping effect has been given within the scope of TRIPS. At the same time, there is a reference to the Paris Convention, 1883 in the TRIPS. There is an obligation put on all the WTO members to comply with the Paris convention. Art 2(1) of the TRIPS lays down that WTO Members are obliged to “*comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)*”.

This article not only makes it mandatory for the contracting parties to follow the Paris Regime, but now those obligations are very much part of WTO as they find mention in the TRIPS (which is an inherent part of WTO agreements). Being part of WTO implies that the doors of WTO dispute Settlement body is compulsorily open to the parties.

The Patent Cooperation treaty and Patent Law Treaty. They are a couple of treaties that aim to uniformise the patent application system across the world. The Patent Cooperation Treaty (PCT) was concluded in 1970 and entered into force on January 21, 1978. It has been

⁸ Article 5A of the Paris Convention, 1883 available at: <http://www.wipo.int/treaties/en/ip/paris/> last accessed on 8.5.2016

modified several times.⁹ There are about more than 135 members to this treaty. India has become member to this treaty with effect from December, 8, 1998. Similarly, the Patent Law Treaty was concluded in 2000, and entered into force in 2005. The PLT is open to States members of WIPO and/or States party to the Paris Convention for the Protection of Industrial Property (1883). These treaties do not confer any extra or overt protection to the utility models. But according to some scholars they do encourage and protect the utility models procedurally.

The Free Trade Agreements – The Free trade agreements refer to the regional trade agreement which are made between nations for highly subsidized or tariff reduced or zero tariff trade. It is also called the Regional Trade Agreements (RTAs), one example being the Trans Pacific Partnership Agreement (TPP). Many FTAs are being signed across the globe, so much so that they have almost taken over WTO in terms of world trade. When functional, the TPP would cover 40% of the world trade. The bilateral or multilateral agreements related to IPRs which are not within the ambit of TRIPS or which are in excess to it are often referred to as “TRIPS Plus”. A popular example is the Economic Partnership Agreement signed between European Union and the Caribbean Countries in the year 2008. This agreement is a very good example of protection towards Utility Models as there is an explicit mention and mandatory provisions for them. Article 148¹⁰ of this agreement provides so.

⁹ Summary of the Patent Law Treaty (PLT)(2000), available at: http://www.wipo.int/treaties/en/ip/plt/summary_plt.html last accessed on 8.5.2016

¹⁰ **ARTICLE 148 - Utility models**

A. **Requirements for protection** - 1. *The EC Party and the Signatory CARIFORUM States may provide protection for any products or processes in any fields of technology, provided they are new, involve some degree of non-obviousness and are capable of industrial application.* 2. *The EC Party and the Signatory CARIFORUM States may exclude from protection all those products and processes the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.* 3. *The EC Party and the Signatory CARIFORUM States may also exclude from protection: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) subject to Article 150, plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.* 4. *The provisions of this Article shall be without prejudice to existing legislation in the EC Party or the Signatory CARIFORUM States.*

B. **Term of protection** - *The term of protection available shall not end before five years, nor exceed ten years, counted from the filing date, or where priority is claimed, from the priority date.*

C. **Relationship to patents** - 1. *All other conditions and flexibilities provided for patents in Section 5 of the TRIPS Agreement shall apply mutatis mutandis to Utility Models, in particular any that might be required to ensure public health.* 2. *An application for the grant of a patent may be converted into an application for utility model protection provided the request for conversion is made before the patent has been granted.*

GLOBAL TRENDS IN GRANTING UTILITY PATENTS

A study of the aforementioned International Conventions shows that apart from the FTAs, which are totally dependent on the Nations between whom they are signed, no other Treaty or conventions mentions Utility patents. They haven't been expressly recognized separately. They do not have any dedicated article or point of law on them. They are accorded the same level of protection as others. Also, the member nations of the International treaties and conventions are in no way bound to make a domestic law for the protection of Utility Patents.¹¹

In order to map what is the global trend in granting utility patents we need to see what countries offer utility patents. A number of resources taken together give an idea in this regard. There are a fairly good number of nations that grant such patents some of them being Germany, South Korea, Japan, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Slovakia, Spain, Brazil and China.¹² It is important to note here that our allies in BRICS also recognize utility patents in some form or the other. It can very well happen that the form of protection granted to these petty patents are not of the same scale as the other regular IPRs, to say a bit weaker protection or for a smaller term. A study shows that these weaker protections do provide and encourage technological learning. They help on the local absorption of foreign innovations. It triggers invention by the domestic and local manufacturers.¹³

INDIAN LAW ON POINT

Much has been discussed about the international scenario of Utility patents, now the Indian scenario needs a look. Our law on the point, being The Patent Act, 1970 does define

¹¹ THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF UTILITY MODELS by Henning Grosse Ruse – Khan, Senior Research Fellow, Max Planck Institute for Intellectual Property and Competition Law, presented at WIPO Regional Seminar on the Legislative, Economic and Policy Aspects of the Utility Model System, Kuala Lumpur (Malaysia), September 2012 available at: http://www.wipo.int/edocs/mdocs/aspac/en/wipo_ip_kul_12/wipo_ip_kul_12_ref_t2b.pdf last accessed on 8.5.2016

¹² UTILITY MODELS AND THEIR COMPARISON WITH PATENTS AND IMPLICATIONS FOR THE US INTELLECTUAL PROPERTY LAW SYSTEM by Dr. Hans-Peter Brack, 2009 Boston College Intellectual Property & Technology Forum available at: <http://www.bciptf.org>

¹³ U. Suthersanen, Utility Models and Innovation in Developing Countries, International Center for Trade and Sustainable Development (ICTSD), Issue Paper No. 13 (2006), available at: http://www.unctad.org/en/docs/iteipc2006_en.pdf

“Invention”¹⁴ but does not define utility models. Also it has a reference to “Patent of Addition”¹⁵, which basically gives recognition to the improvement made to the patent. As a matter of fact, the utility models are most seen in small and medium size industries.¹⁶ These refer to small manufacturing units catering to the local needs. They are engaged in the business of mechanical innovations on regular basis. This area is more exposed to minor innovations which are often called “Incremental Inventions”. Also, there is one fact that despite a dedicated IPR legal regime, India is way behind in filing of patents. It is often hoped that once we start granting patents for these utility models, it will encourage the spirit of invention in public.

INNOVATION IN INDIA

Just because India does not legally recognize Utility Patents, it cannot be at all concluded that there is less innovation done in the country. May be we are not aware of everyday innovations that take place. One such institution that takes note of these innovations and recognizes them is the National Innovation Foundation-India (NIF). It works on the principle of Honey Bee Network. Honey Bee network is a network of innovators and it is spread in 75 nations worldwide. The inherent idea behind NIF was to recognize the Traditional knowledge. It started in the year 2000 but today it is very much resourceful. The statistics show that it has a rich database of more than 210000 technological ideas, innovations and traditional knowledge practices from over 575 districts of the country.¹⁷ As a body it has been very active and functional as till date recognized more than 775 grassroots innovators and school students at the national level in its various award functions¹⁸.

ANALYSIS

After studying the global trends of utility patents, it is necessary to analyse the situation. One thing that is very clear that there is a huge amount of diversity in regard to grant of Utility patents across the worlds. Let us not conclude that the presence of utility patent protection in a number of countries make it successful. Mere recognition does not tell the tale. There are studies that show the doubts as to why petty patents are not reaping benefits in Australia and

¹⁴ Section 2(j) of the Patents Act

¹⁵ Section 54 of the Patents Act

¹⁶ Intellectual Property Rights - Utility Models, available at: http://ipindia.nic.in/whats_new/Intellectual_Property_Rights_UtilityModel.pdf last accessed on 8.5.2016

¹⁷ WHO ARE WE?, available at http://www.sristi.org/cms/en/our_network

¹⁸ About NIF, available at: <http://nif.org.in/aboutnif>

Brazil when compared to those in China, Taiwan and Korea. Also, as it is mentioned in 2011 policy the legal enforceability attached to patents is weakened by lack of prior substantive examination.¹⁹ On similar lines it can be assumed that when a weaker protection is available for a minor patent, it will gradually lower down the overall quality of patents. It will in turn affect both invention and innovations.

Not only this, the other side of the story needs perusal too, the utility patents are subjects to a number of criticisms. Ranging from the poor quality of patents to it being a tool in the hands of foreign bodies to extract more royalty from our country.²⁰

CONCLUSION

After studying the above discussed details, it can be said that granting utility patents does not guarantee the high invention rate or high filing of patents. But at the same time, it does provide recognition to the small patents, which in turn instill a feeling of innovation in the holder to pursue bigger challenges. Let us not forget we are still in our developing phase. We need a lot of Indian built technology to achieve self-sufficiency, which is the key to development, lest we want to be dependent on importing technology and pay high royalties in return. Many scholars see the same thing in a different spectrum. Some say that every great journey starts with a small step.²¹ Hence, these petty patents need to be protected as one day they will lead to bigger patents. So, the toil and intellect required for these small patents also need to be protected.

Talking about the small and medium size industries, where the utility models are most prevalent. It is also said that granting of utility patents will boost up this sector. This will establish a rich databank of innovations and minor improvements. If this sector ushers into the utility patents, it will graduate or develop into proper patenting system too.²² In short if

¹⁹ DIPP Discussion Paper 2011 available at: http://dipp.nic.in/english/Discuss_paper/DiscussionPaper_relevance_23June2011.pdf last accessed on 8.5.2016

²⁰ National IPR Policy Series : CIS Comments to the First Draft of the National IP Policy, available at: <http://cis-india.org/a2k/blogs/national-ipr-policy-series-cis-comments-to-the-first-draft-of-the-national-ip-policy>

²¹ India: Need For Utility Model Protection In India by SuchiRai and Akshay Mehta (2014), available at: <http://www.mondaq.com/india/x/325864/Patent/NEED+FOR+UTILITY+MODEL+PROTECTION+IN+INDIA> last accessed on 8.5.2016

²² Govt mulls IPR courts to fast-track cases by Arun S (2014) , available at: <http://archive.financialexpress.com/news/govt-mulls-ipr-courts-to-fasttrack-cases/1295746> last accessed on 8.5.2016

there will be a pool of utility patents, in all probability it will definitely lead to a few proper Patents.

India as a nation is still evolving with utility patents and we are still in the nascent stage. There is so much diversity in this area globally that there can be absolutely no hard and fast rule for inclusion of utility models patenting. Though *prima facie* Jugaads have an all-round support from every strata of society. But coming up with a law on the point requires much more than just popular sentiment or public voting for it. If we are looking into the prospects of patenting utility models in India, the call of time is to see and learn from the failures and successes across the world than just to rush towards bringing a law on Jugaad. By failures and successes of the world, it is meant the legal system of those nations where the utility patents are failure and successfull. There is dire need to zero in to those causes. And then bring a law keeping in consideration all the factors and parameters. It is only after addressing those issues, the inclusion of utility models in our IPR regime shall be fruitful. As if right now there are still many grey areas which need to be clarified.

THE MYSTERIOUS PROSECUTION OF AARUSHI TALWAR...

Joyjoti Hore*

Abstract

India holds the credit to be the second largest populated country across the world. But again when it comes to economic standing, India though considered to be the most evolving economy, has a lot to cover to meet the standards of the First world countries. Thus as, the ratio

High Population: Fair Economy => Increases the Incidence of Crimes in the Society,

The crime rates in India are always on higher note. Having said that, there has been a noticeable increase in crimes which are female eccentric. The early onset of the 21st Century witnessed such horrible instances which as if challenged the foundation of our balanced society.

One of such instance was the murder of a 14 year old girl in her own flat in the summers of 2008. However, on progress of the prosecution it appeared that, a small child's death got overshadowed by the high-profiled depiction of the untoward incident.

The below stated analysis of the Judgment given in the Aarushi Talwar murder case, is an attempt to prove onto ourselves, whether we could bring JUSTICE to the loss of life of a little girl, Aarushi.

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BRIEF FACT OF THE CASE¹

In the morning of 16/05/2008 in a flat at Jalvayu Vihar, Sector 25, N.O.I.D.A., a suburb of New Delhi, a girl was found dead in her bedroom. Aarushi Talvar died at the age of only 14 years. The dead body of her was first seen by her parents, Dr Rajesh Talwar and Dr Nupur Talwar who were sleeping in the adjacent room.

Initially, the murder of their only daughter were alleged by Dr. Rajesh Talwar, to have been made by their domestic help, Hemraj, the dead body of whom was later recovered in the terrace lying in a pool of blood.

The case was taken up for investigation by the local police of Noida, who after the course of Investigation declared in a press conference that the double murder of Aarushi and Hemraj were committed by the Dr Rajesh Talwar and Dr. Nupur Talwar.

Thereon this case was transferred over by The Government of Uttar Pradesh through a Notification No. 1937-VI-P-3-2008-15(48) P/2008 dated 29.05.2008 to C.B.I. The investigation was taken up by Mr. Vijay Kumar, the then S.P., C.B.I./SCR-III New Delhi. Three new names surfaced up Krishna, Raj Kumar and Vijay Mandal, who were arrested and later subjected to Brain-mapping, Narco-analysis and Polygraph. On the basis of these findings on 11.07.2008 C.B.I. filed report under section 169 Cr.P.C. in the Hon'ble Court of Learned Special Judicial Magistrate (C.B.I.), Ghaziabad and accordingly Dr. Rajesh Talwar was released from custody.

Thereafter the stated Investigating officer, Vijay Kumar was bit off the case, the investigation changed many hands and ultimately went on to Mr. A.G.L. Kaul, Dy. S.P., C.B.I., SC-III.

After completing the investigation Mr. Kaul reached to the conclusion that these twin murders were committed by the accused persons and not by Krishna, Rajkumar and Vijay Mandal or any other outsider. However, on account lack of substantial proof, a closure report was laid by Mr. Kaul in the Hon'ble Court of Learned Special Judicial Magistrate (C.B.I.), Ghaziabad on 29.12.2010/01.01.2011.

¹ Sessions Trial No. 477 of 2012, **The State of U.P. Through the C.B.I. v. Rajesh Talwar & Other**, In the Court of Additional Sessions Judge/Special Judge, Anti-Corruption, C.B.I., Ghaziabad (U.P.)

Dr. Rajesh Talwar, who being aggrieved by and dissatisfied with the closure report filed protest petition seeking impreatory relief to direct C.B.I. for carrying out further investigation but the same was rejected.

The closure report was also rejected by the Learned Magistrate on 09.02.2011, who took cognizance of the offence under section 190 (1)(b) of the code of criminal procedure and summoned both the accused persons to stand trial for offences punishable under sections 302/34 and 201/34 IPC.

HON'BLE COURT'S VERDICT

The Observations of The Hon'ble Court and Analyzing the Parameter

Findings

- 1) That in the night of 15/16.05.2008 both the accused were last seen with both the deceased in Flat No. L-32, Jalvayu Vihar at about 9.30 P.M. by Umesh Sharma, the driver of Dr. Rajesh Talwar;
- 2) That there is nothing to show that an outsider(s) came inside the house in the said night after 9.30 P.M.
- 3) That no person was seen loitering near the flats in suspicious circumstances in that night;
- 4) That there is no evidence of forcible entry of any outsider(s) in the flat in the night of occurrence;
- 5) That there is no evidence of any larcenous act in the flat;
- 6) That there is a close proximity between the point of time when both the accused and the deceased persons were last seen together alive and the deceased were murdered in the intervening night of 15/16.05.2008 and as such the time is so small that possibility of any other person(s) other than the accused being the authors of the crime becomes impossible;
- 7) That in the morning of 16th may 2008 when the maid came to flat for the purpose of cleaning and mopping a false pretext was made by Dr. Nupur Talwar that door might have been locked from outside by the servant Hemraj although it was not locked or latched from outside;

- i. **Inference by Hon'ble Court:** The first seven observations have been interpreted to conclude that on the night of 16/05/2008, there was none other than four people in the flat.

Analysis of the Inference: It is a well-known that the parameter to prove a criminal case is to deduce the most probable inference which appears to be almost the only possible surmise.

Now the sole basis of this assumption ought to have been dependable on the witness of the Night guards of the complex that no intruder from outside has entered the complex, but what about the internal movements made within the complex of Jalvayu Vihar for example from Flat L-32 to Servant quarter, that is, L-14 or other way round.

Query: Is it also most probable for the night guard Virender Singh to have taken note of ?

- ii. **Inference by Hon'ble Court:** The second ground wherein the finding of the maid servant who was the first outsider to visit the crime scene, that the grill door was open and the flat entrance gate was latched from outside.

Analyzing the Inference: The insight to this incident has been given by CBI as: That during the time taken (about 3- 4 mins) by the Maid servant to go downstairs and collect the keys of the outside door from Nupur Talwar, Dr Nupur Talwar opened the adjoining door of Hemraj's room which opened between the grill door and flat entrance door, which usually remained closed, as a fridge was placed against it, unlatched it and again closed the door and placed back the fridge against it.

Query: Can a person, here Dr. Nupur Talwar, if engaged in all such activities as stated by CBI, does it appears probable, that she at the same time also made herself available at the balcony to deliver keys to the maid-servant?

Surmise: Does this probabilities appear to any extent as even remotely probable leave apart the most probable inference which can be drawn.

Finding:

- 8) That in the morning of 16.05.2008 at about 6.00 A.M. Ms. Aarushi was found murdered in her bed-room which was adjacent to the bedroom of the accused and there was only partition wall between two bed-rooms;

Inference by Hon'ble Court: The 8th Observation has been deduced to conclude that, as the victim was found murdered in her bed-room which was adjacent to the bedroom of the accused, divided only by a partition wall, thus the accused ought to have known of any forced entry or act of larceny.

Analyzing the Inference: It is herein refreshed that the Air conditioner of the accused's room is reported to make a noise of 85 to 90 db (decibels) compared to 50 to 60db of a normal A/C. As it is on record that the sound created by the A/C was 80 – 90db, which if continuously is played in a closed confined area (room of the accused) can easily hinder any other noise from reaching to them.

Query: Now if one goes by the report of the technician of the A/C, does not it corroborates the statement of the accused made u/s 313 crpc, that the A/C if being on, it is impossible for any sound to be heard from within the room?

Surmise: Thus again it can be observed that the inference drawn by the Hon'ble trial court falls far from the parameter of "most probable inference."

On the other hand from the above statements the impossibility of hearing of any noise from within the room seems the most inferable viewpoint.

Findings:

- 9) That the door of the terrace was never locked prior to the occurrence as it was found in the morning of 16.05.2008 and the accused did not hand over the key to the police despite of being asked to;
- 10) That the dead body of the servant Hemraj was found lying in the pool of blood on the terrace of the flat and the door of terrace was found locked from inside;

Inference by Hon'ble Court: The 9th and 10th observation of the Judgment has been inferred to conclude from the locked door of the terrace and the recovery of body therein, that such act can only be done by the accused. From the above stated findings it has been presumed that the accused has injured Hemraj and has taken his injured body to the terrace whereof he was being killed. The door of the terrace on being found locked, it was also presumed to have done so to conceal the alleged murder.

Analyzing the Inference: Now if we consider the statement made by the accused under Section 313 CrPC, that for about 8-10 days before the occurrence, painting of cluster had started and the navvies used to take water from water tank placed on the terrace of the flat and then Hemraj had started locking the door of the terrace and the key of that lock remained with him.

Query: Since the police investigation did not reveal any other version by seeking witness of the inmates of other flats why the accused's statement u/s 313 Crpc was not considered?

The ground on which such inference has been drawn that the terrace as was not locked previous to the occasion and the accused inspite of having the key did not hand over the same to conceal the dead body of Hemraj has been left unexplained?

Surmise: Although the body of Hemraj was recovered from the terrace, but again there was no blood mark of Hemraj found either in flat or in the stairs to the terrace, it is highly unlikely to assume that Hemraj was probably injured in the flat.

Moreover, the inference that Hemraj was taken to the terrace in an injured state, significantly depends on the existence of a time-gap between Hemraj's injury and death but again the post-mortem report adduced before the Hon'ble Court clearly don't throws any light on the stated aspect.

Finding:

- 11) That the door of Ms. Aarushi's bed-room was fitted with automatic click-shut lock which was locked from outside. Both the accused have admitted that door of Ms. Aarushi's bed-room was having automatic-click shut lock like that of a hotel, which can be opened without key only from inside and Dr Talwar has admitted that he had gone to sleep with the key after locking the door of Ms. Aarushi's bed-room from outside.

Inference by Hon'ble Court: The 11th observation has been inferred to hold that, the door of Aarushi, being locked from outside and the same being a click-shut lock, there remains no scope for any outsider to enter the room.

Analyzing the Inference: It is again emphasized that accused in their statement has stated that the key of the door was left hanging with the lock. The same was reiterated in the lie detector test.

Query: On what findings of the police investigation the statement made by the accused were not admitted?

Surmise: The Statements made during a lie detector test may not be used to incriminate a person, but can very well be used to corroborate a fact.

Finding:

- 12) That the internet remained active in the night of the gory incident suggesting that at least one of the accused remained awake;

Inference by Hon'ble Court: The 12th observation, one of the important observation, to uphold the accusation by the Hon'ble Court, is the fact that the Internet router was in a working state in the night of 16/05/2016, which has been held to be suggestive that at least one of the accused remained awake throughout the night.

Analyzing the Inference: This is one of the sole evidence which can be found in pen and paper but again when the same is proved to be lawful or rather not flawless, is it legally viable to depend on such finding? The router is stated to be in the like phase even on 16.05.2016 from 6.00 A.M. to 1.00 P.M. a time when computers were shut down. Thus there is an existing disparity in the above two findings which is again enough to create a doubt as to the accuracy of the stated finding.

Query: How forth the prosecution without seeking record of the previous seven days to deduce the working of the Internet router, hold that the accused were awake all the night on 16/05/2008?

Surmise: From the above chronology of incidents, there seem to float another probability that starting off or switching off of Router has nothing to do with the use of Laptops or Computers.

Finding:

13) That it is not possible that an outsider(s) after committing the murders will muster courage to take the Ballentine Scotch Bottle knowing that the parents of the deceased, Ms. Aarushi are in the nearby room and his top priority will be to run away from the crime scene immediately;

Inference by Hon'ble Court: The 13th observation was made from the fact that as Ballentine Scotch bottle been recovered from the dining table, the stated liquor therein ought to be consumed by the accused.

Analyzing the Inference: Again the ground for drawing of such inference has been left unexplained as nothing on record suggest that either the finger prints on the Ballentine Scotch bottle has been derived or the DNA samples of saliva content on the stated bottle were examined. Besides, no expert opinion of Forensic department was sought to analyze the veracity of the findings.

Query: The ground on which the prosecution has made such apprehension?

Surmise: Had it been so that the liquor has been consumed by the accused, then considering the time of murder to be maximum at 2 a.m., there was an extended gap of four hours before the arrival of the house maid, to keep the bottle back in the shelf.

Finding:

14) That it is not possible that after commission of the crime an outsider(s) will dress-up the crime scene;

Inference by Hon'ble Court: The 14th observation has been inferred to as the crime scene being dressed up which could presumably be done by the accused and not by an outsider

Analyzing the Inference: But again it is refreshed herein that the alleged murder has taken place after midnight, a time when one is presumed to go to sleep and dressing-up the bed-sheet is a usual practice that is done before going to sleep.

Query: By adducing no evidence of combat to distort the attributes of the room what made the prosecution to infer that Aarushi's room was ransacked prior to her murder to be subsequently dressed up?

Surmise: On the contrary, the story of the prosecution states Aarushi to be involved in a voluntary act with Hemraj which made Dr. Rajesh Talwar to lose control over himself. Thus going by this angle of the prosecution, there appears no scope for any distortion of Aarushi's room.

Finding:

- 15) i) That golf-club no. 5 was thrown in the loft after commission of the crime and the same was produced after many months by the accused Dr. Rajesh Talwar;
- ii) That pattern of head and neck injuries of both the accused persons is almost similar in nature and can be caused by golf-club and scalpel respectively;
- iii) That the accused Dr. Rajesh Talwar was a member of the Golf-Club, N.O.I.D.A. and golf-clubs were produced by him before the C.B.I. and scalpel is used by the dentists and both the accused are dentists by profession;

Inference by Hon'ble Court: The 15th observation, flows from the inference whereby a Golf-stick is presumed to be one of the probable murdering weapon.

Analyzing the Inference: This finding of the prosecution stands in sharp contradiction to the opinion of Experts as Dr. R.K. Sharma, who stated, that if an injury is caused by the golf stick, then a depressed fracture will be caused and the bone will have a depression; concept based on Locard's Principle of Exchange. But on perusal of Hemraj's postmortem report, nowhere one will find mentioning of any injuries to the extent of depressed fractures. Neither the injury on the head of Ms. Aarushi which again has been classified by experts as simple fracture, could not have been the probable outcome, if was done by a golf club.

Query: What made the prosecution belief the murder to have been committed by the Golf-club, more so when the same has been produced by the accused himself?

Surmise: It is further stated as per the report of Dr. Mahapatra, that no blood stains were found on the golf-club.

Finding:

- 16) That the motive of commission of the crime has been established;

Inference by Hon'ble Court: The 16th observation as to the motive of the murder is stated to be “Grave and sudden provocation.” Dr. Rajesh Talwar, who when found Aarushi and Hemraj in a compromising position lost control on himself and murdered both the victims.

Analyzing the Inference: This finding stands to be the most vital, at the same time the most uncorroborated thread of the prosecution. If we go by the above narrated findings then:

i) Hemraj ought to have been killed/injured in the room of Aarushi.

Query: If that be so how can there be not be a single blood content of Hemraj found in the room, when blood contents of Aarushi were found therein?

ii) Hemraj would have been subjected to more than one blow.

Query: When an action results out of such uncontrollable rage, then is it possible to control or regulate such outcome?

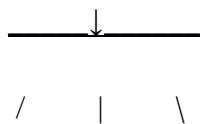
If not then how can the accused in such a state of provocation start and stop by hitting only once and that too without much force only to cause a simple fracture?

Surmise: The closure report filed by Mr. A.G.L. Kaul of CBI wherein he himself mentioned that no blood of Hemraj was found on the bed-sheet and pillow of Aarushi and that there is no evidence to suggest that Hemraj was killed in room of Aarushi, or no biological fluid, sputum, body hair, pubic hair of Hemraj were found in Ayushi's room, goes on to negate the prosecution's story of both the victims be involved in any such stated activities.

DECIPHERING THE OBSERVATIONS OF THE JUDGMENT

The crime which occurred in the night of 16/05/2008 was a barbarous act, as it created suspicion to the involvement of father in the murder of his only daughter of 14 years. Such presumption should only have been incurred after a detailed investigation and proper appreciation of evidence adhered to.

As the prosecution of the case was framed on circumstantial evidence, it required the fulfillment of three basic parameters, namely:



Motive Modus Method

None of the above findings of the prosecution has been corroborated with substantial evidence. On bare perusal of the above findings it becomes apparent that the whole story of the prosecution has been drawn relying on “4 – 2” theory, meaning, four people were last seen, of which two were found dead, thus all the acts committed were done by the other two, who are alive.

The primary three findings of the prosecution are:

1. That the accused persons were sleeping, when such inhuman act was carried out in the adjacent room. This finding if made in isolation fulfills the criteria of the “only probable conclusion” of the accused being involved in such heinous act. But when we speculate the same after taking in the working condition of the A/C in the accused room, do this inference still holds enough ground?
2. The router of internet showing start and stop activity throughout the whole night suggested that the accused persons were awake. But when the same phase is observed even on 16.05.2016 from 6.00 A.M. to 1.00 P.M, do the previous finding still holds enough ground?
3. The next important finding is the murdering weapon which again was presumed by the prosecution to be a Golf-club as the same was missing from the Golf Bag. But again when the reports of expert if considered, how probable this inference appears? And lastly,
4. The Motive which has been classified to be “grave and sudden provocation.” But again none of the evidence goes on to corroborate or fortify the presumptions made in this like manner, whether be it non-finding of Hemraj's blood samples in Aarushi's room or absence of any biological fluid. Even the much talked about finding of “swollen penis” of Hemraj which also added to the above imagination was also negated by the experts stating the same to an obnoxious result of putrefaction.

The aspects on which the prosecution failed to take note of the gap in the investigation:

1. According to the report of Dr. Naresh Raj who conducted Post-mortem examination of the dead body of Hemraj, stated Hemraj to have been in a state of shock before death. This frame of mind is only possible when one can perceive the coming danger, a situation very different from that as stated by prosecution, whereby before he being alert, was hit by Dr. Rajesh Talwar from back.
2. The post-mortem report of Hemraj revealed no presence of liquor in his digestive system, when a Sula wine bottle, an empty Kingfisher beer bottle were seized from his room. Who had consumed it?
3. Why prosecution failed to appreciate the finding of the hand print found in the roof top...Exhibit-24 (piece of wall having impression of palm print) at the amplified loci and send the same to countries with advanced forensic findings?
4. Why the Narco-test of Krishna and other accused were not appreciated, as was done in Nithari Killings², when the same revealed information as:
 - Another probable murdering weapon which the expert committee report by Dr. Dohre on 06.09.2008 stated to be “Khukri.”
 - The song which was a common find in the narco-test of both Krishna and Rajkumar, at what time it was telecasted, so as to analyse if it provides a connection to the time of murder of Ms.Aarushi?

CONCLUSION

Thus to sum up, the accusation for such an unfathomable instance was done on the below stated findings:

- a) Non-ascertainment of time of murder: Autopsy Report stated death to have occurred 12 to 18 hrs before the time of autopsy, a time span of six hours enough to draw a probable inference?
- b) No Cogent Evidence(whether documentary/oral witness): The most important witness to the whole prosecution, Bharti Mandal, the maid servant, also turned out to be hostile, as she alleged to have been forced to change her testimony and add to statements made by her initially u/s 161 CrPC;
- c) Flawful investigation: Hon'ble Judge's own observation as to “the cooler panel has not been taken into possession by S.I. Data Ram Naunaria and he has not directed

² Surendra Koli v. State of UP (2011) 4 SCC 80

constable Chunni Lal Gautam to take photographs and finger-prints of panel then it is merely a negligence on the part of Mr. Naunaria but it is well settled law that on account of *negligence or defective investigation of I.O.* the prosecution case cannot be thrown away,” whereby the Hon’ble court also admits the investigation to be defective.

- d) Non-finding of Proper murdering weapon: The Golf-stick which the accused has himself produced and the scalpel which is only presumed, but again not discovered.
- e) No explanation as how the act was committed: Hemraj’s dead body found found with slippers on it, but again Hemraj stated to be injured/murdered in the flat itself. And lastly,
- f) No proper motive established: The motive stated is nothing but a pigmented imagination without a single on record evidence to provide authenticity to it.

Henceforth the prosecution of Aarushi murder case puts forth such gamut of unanswered queries which clearly fails to meet the standard of “*even preponderance of probability*” the parameter to determine liability in a civil case.

But again deducing on the above highlighted inferences the accused persons were sentenced to life imprisonment u/s 302 of IPC.

Thus after going through the epilogue of events can it be said with certainty JUSTICE has been done to Aarushi?

ISSUES RELATING TO HUMAN RIGHTS OF DIFFERENT CLASSES AND GROUPS

Dhruv B. Goswami*

Abstract

From the moment of birth until death, every person and citizen possess a full composite of interrelated and interdependent rights and freedoms. That is why there is an inevitable wish to present all these rights and freedoms in a unique system, to classify them, dividing them into groups according to common traits.

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Human rights are the basic freedoms and protections that people are entitled to simply because they are human beings. Human Rights are Universal. They belong to everyone, regardless of their race, sexuality, citizenship, gender, nationality, ethnicity, or abilities. Human Rights are Inherent. Fundamental rights are a generally regarded set of legal protections in the context of a legal system, wherein such system is itself based upon this same set of basic, fundamental, or inalienable rights. Such rights thus belong without presumption or cost of privilege to all human beings under such jurisdiction.

Keywords: Human Rights and Women, Human Rights of Dalits, Domestic Violence, Contemporary Human Rights Issues, Child care with Human Rights Perspective, Children in the Globalized Era, Human Rights and Transgender.

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CONTEMPORARY HUMAN RIGHTS ISSUES

You are most welcome in the era of human rights. This research paper is with a brief discussion of what human rights are. Human rights are rights inherent to all human beings whatever our nationality , place of residence, sex, national or ethical origin, religion, color, language, or any other status. We are equally entitled to our human rights without human rights are often expressed and guaranteed by law in the form of treaties, customers, International law , human rights lay down obligations of Government to act in creation ways post-world war period. Human rights help to create a system in which every human being has society is to devolve a human being. All human rights such as the rights to work, social security and education or collective rights, such as rights to development and self – determination, are indivisible, interrelated and interdependent. It improvement and give right facilities advertisement of others. Likewise deprivation of one right adversely affects the others.¹

Human Rights and Women

In any civilization the role of women is very crucial in terms of social and economic development. Women have been the back bone of social, Culture and religious harmony and development. Unfortunately in many undeveloped and developing countries still women are socially and economically deprived. Effective implementation of human rights can make huge changes in prevailing condition of women. The question is that is what areas do women need to assert their human rights. – Birth, Liberty of moment, Education, clothing, employment, choice of life partner etc. In many societies women are treated as commodities and they are subjected to many atrocities. ²Provisions in human rights acts can place them in better conditions but the irony is that women themselves are still largely ignoring their rights in view of social religious and emotional pressure. This is related to uplifts the prevailing conditions and social status.³

Human Rights of Dalits

¹ Shirwadkar, S. (2009), *Family violence in India: Human rights, issues, actions, and International comparisons*, Human Rights in India: Volume 11(1), 2013, pp. 265-270

² Lalita Dhar Parihar. *Women & Law from Impoverishment to Empowerment - A Critique (Paperback)* (2011 ed.)

³ *Status of Women in India* by Shobana Nelasco, p.11

We know that the Right of equity is a human right and this human has been accepted as UNO's Universal Declaration of Human Rights and in Article 14 of the Constitution of India Dalits are a part of the human race and accordingly , they are entitled to the right of equality. Dalits include the communities of SC and ST's . As in the case of other Communities, Human rights are applicable to the dalits also. However, their economic, Social and Political circumstances are very poor. In the Indian constitution there are various provision for reservation, for the promotion of their economic, social and education interest.⁴ Reservation is a constitutional support to those who are deprived of adequate opportunity and deprived of equal treatment from the rest of the society for centuries.⁵

Domestic Violence

Domestic Violence is often treated as a private matter, but it is a human rights violation. Human rights agenda throughout the world are built on an important distinction between civil and political Liberties and economic and social rights. The united nations decade for women help in bringing attention to the importance for women's activity to economic and social development. However, after many years of 49 affords to integrate women into development and spite of considerable work by the united nations for the elimination of violation against women globally. The principal has been accepted in the constitution of the India, but patriarchy reigns supreme in the society. Male domination is manifested everywhere. The head of the family is almost invariably the man. Many husband treat their wives in several ways⁶. Some commit physical violence against women and some other resort to mental torture. While some deny food to the wife, some others deprived her rest and leisure⁷

Child care with Human Rights Perspective

The United Nations "Convention on the right of the Child" , Which has been adopted by the General Assembly of the United Nations. On 20th November 1989, and also acceded by the Government of India in the convention dated the 11 December,1922 ,also provides for provisions for the welfare and procedure for punishment of the child. The provisions envisage that child should not be subjected to torture or other cruel, inhuman, provide for special

⁴ <http://idsn.org/un-and-caste-discrimination-in-india/>

⁵ Identity and Politicization of the Community, D.D. Publications, New Delhi 1995

⁶ Domestic violence Act

⁷ Meerambika; Gupta, R N; Gupta, Vinay K., *Control and Support Models of Help-Seeking Behavior in Women Experiencing Domestic Violence in India*

procedure for dealing with the trials of offences committed by the child. The law is enacted to serve the social purpose, namely to control the problem of population explosion any person.⁸ There is also no invention on the part of the Legislation in material right of a person concerned or a right or procreation of children⁹.

Children in the Globalized Era

Quantum leap in Science and technology has ushered in the era of globalization, breaking down barriers of communication and has set up a trail of information highway. Such advancement though desirable has brought with it undesirable evils living a sinister impact on children and their childhood. The children of today are adult souls trapped in the body of child. Adulthood has been thrust upon them too soon and too young. The world has robbed the child of his innocence, his childhood leading to gross violation of human rights. The children in the underdeveloped countries taught to wield weapons before learning to read or write. The children of the development and developed countries in their tryst to become astronauts, engineers or doctors are trying to cope with stress induced by the lofty , of misleading standers set by the education system . The object of this to make attention to the fact that we as adults are not merely responsible for a few set of rights of child , We are responsible for childhood.¹⁰

Human Rights Issues

Human rights are moral principles that set out certain stands of human behavior, and are regularly protected as legal rights in national and international law. They are “*commonly understood as inalienable fundamental right to which a person is inherently entitled simply because she or he is human being.*” Human rights are thus conceived as universal and egalitarian. The doctrine of human rights has been highly influential within international law, global society can be said to have common moral language, it is that of human rights. The strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debates about the content, nature and justification of the human rights to this day. Indeed the question of what is meant by right is itself controversial and the subject of continued philosophy debate. Many of the basic ideas that animated the human rights moment developed in the aftermath of the second World War and the atrocities of the

⁸ http://www.unicef.org/earlychildhood/files/Guid_GC

⁹ <http://en.unesco.org/themes/early-childhood-care-and-education>

¹⁰ Managing global resource in global era

Holocaust, culminating in the adoption of the Universal Declaration of Human Rights. The ancient world did not possess the concept of universal Human Rights; the true forerunner of human rights discourse was the concept of rights which appeared as part of the medieval.

Human Rights claim of Refugees in India

The problems of refugees were first addressed by the League of Nations in 1921 and then also by the General Assembly of the United Nations leading towards some of the conventions related to the matter. Through India is not a signatory to any of these International Instruments, but faces many political, social and economic issues arising out of the presence of refugees in India. The claims of human rights are also raised by them in India which sometimes poses paradoxical situations due to absence of any accurate legislative or other provisions under any of the Indian laws. This paper investigates how the claims of human rights dealt with by legislative and judicial bodies along with the international bodies such as UNHCR in India. The constitutional provisions are also studied under which the human rights to a refugee can be guaranteed in India.¹¹

CONVENTION OF THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Convention of the elimination of all forms of Discrimination Against Women adopted in by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The Convention defines discrimination against women as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms.

The Convention provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life

¹¹ India ratified the International Covenant on Civil and Political Rights (ICCPR)

including¹² the right to vote and to stand for election as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms. The Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women. Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.

CONVENTION OF THE RIGHT OF CHILD

The United Nations Convention on the Rights of the Child (UNCRC) is a legally-binding international agreement setting out the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities. The UNCRC consists of 54 articles that set out children's rights and how governments should work together to make them available to all children. Since it was adopted by the United Nations in November 1989, 194 countries have signed up to the UNCRC, with only two countries in the world still to ratify. All countries that sign up to the UNCRC are bound by international law to ensure it is implemented. This is monitored by the Committee on the Rights of the Child. Under the terms of the convention, governments are required to meet children's basic needs and help them reach their full potential. Central to this is the acknowledgment that every child has basic fundamental rights. In 2000, two optional protocols were added to the UNCRC. One asks governments to ensure children under the age of 18 are not forcibly recruited into their armed forces.¹³ The second calls on states to prohibit child prostitution, child pornography and the sale of children into slavery. These have now been ratified by more

¹² <http://www.un.org/womenwatch/daw/cedaw/>

Torture or Cruel, Inhuman or Degrading Treatment or Punishment: General Comment 7, U.N. GAOR, Hum. Rts. Comm., 16th Sess., para. 7, U.N. Doc. HRI/GEN/1/Rev. 1 (1994) [hereinafter General Comment 7]

¹³ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

than 120 states third optional protocol was added in 2011.¹⁴ This enables children whose rights have been violated to complain directly to the UN Committee on the Rights of the Child. The UNCRC is also the only international human rights treaty to give non-governmental organisations (NGOs), like Save the Children, a direct role in overseeing its implementation, under Article 45(a).¹⁵

CONVENTION RELATING RIGHTS OF DISABLE PERSON

The Convention on the Rights of Persons with Disabilities is an international human rights treaty adopted by the United Nations General Assembly on 13th December 2006; it opened to signatures on 30th March 2007 and came into force on 3rd May 2008 following ratification by the 20th State Party. As of February 2011, the Convention had 98 State Parties and was the first Human Rights Treaty to be ratified by a regional integration organization, the European Union. It has 147 signatories. The Convention adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptation have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced. The Committee is a body of 18 experts which monitors implementation of the Convention on the Rights of Persons with Disabilities. The members of the Committee serve in their individual capacity, not as government representatives. They are elected from a list of persons nominated by the States at the Conference of the State Parties for a four year term with a possibility of being re-elected once.

All States parties have to submit regular reports to the Committee on how the rights enshrined in the Convention are being implemented. States must report initially within two years of ratifying the Convention and, thereafter, every four years. The Committee examines each report and makes suggestions and general recommendations on the report. It forwards

¹⁴ The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with article 49

¹⁵ India ratified the UN Convention on the Rights of the Child in 1989.

these recommendations, in the form of concluding observations, to the State Party concerned. The Committee normally meets in Geneva and holds two sessions per year.¹⁶

CONVENTION RELATING RIGHTS OF OLDER PERSON

The human rights of older persons have depended upon an international legal regime that is fragmented, uneven and incomplete, she added, in contrast with the success of dedicated international protection regimes for specific groups, including women, children, and persons with disabilities. There must be a particular focus on ageism and age discrimination, the High Commissioner said, expressing concern that the older persons risk being stereotyped as non-productive and irrelevant. Participation, too, is a fundamental right for this group, she said, along with access to an adequate standard of living, employment and health care. General Assembly described an inconsistent global response to protecting the human rights of older persons. Efforts on their behalf are scattered and insufficient, it concluded, and several areas were identified which require special attention, including: a dedicated international protection regime for older persons; explicitly prohibiting age-based discrimination age; ensuring participation in policy making and political life; legislating to prevent discrimination in the work-place and extending social protection; ensuring appropriate health care and services for older persons; improving access to and the standard of long-term care; addressing violence against older people, especially women ; and preventing the financial exploitation of older persons. Human Rights Council consultation in 2013 who found that a number of human rights issues particularly relevant to older persons have “*not been given sufficient attention either in the wording of existing human rights instruments or in the practice of human rights bodies and mechanisms*”.¹⁷

¹⁶ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106 Adopted without vote, 76th plenary meeting; Issued in GAOR, 61st

¹⁷ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (explaining that all free human beings have a right to civil and political freedoms). International Labour Organization, Convention (C102) Concerning Minimum Standards of Social Security, opened for signature June 28, 1952, 210 U.N.T.S. 131, [hereinafter ILO Minimum Standards] (discussing minimum social security standards that governments should provide for their citizens)

CONCLUSION

Human Rights of Different Classes and Groups suffer social banishment from the society. There is much that parliamentarians can do to make human rights a practical reality, particularly for people living within their country, but also for those who live beyond its geographical borders. However, it is imperative to note that the active protection, promotion and realization of human rights are a multipronged and ongoing process. Simply passing a law or ratifying a treaty, for instance, will not lead to greater permeation of human rights. These actions have to be accompanied by efforts to ensure that those who are given the responsibility of upholding and protecting the law are trained and fully aware of the import of the law; that they have access to means that will help in practical realization of the human rights standards that the law seeks to uphold; that government policies and actions support the upholding of these principles; and that there is recourse for violation. It is also significant to note that the concept of human rights is ever evolving. Contemporary standards that are accepted and respected today by the international community may not have been in vogue or considered accepted practice until very recently. The period since 1948 – when the Universal Declaration of Human Rights was adopted by the United Nations General Assembly – has seen extraordinary developments in human rights standards and the processes for upholding them. New international standards are constantly being developed such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in 1990 or the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2002. Equally, it is also relevant, given the ever-increasing linkages in trade, aid and development that previously laid down international standards in respect of economic, social and cultural rights be revisited and reinforced. As far as India is concerned, precious rights are recognized achieve these rights are provided under Article 32 and 226 of the Constitution. The judiciary has been contributing human rights jurisprudence to protect human rights of the people. In addition to this, India signed and ratified several agreements and conventions to promote human rights jurisprudence. The present implementation mechanism has to be modified to promote and protect the human rights of the citizens in India. This can be done by removing the difficulties which exist in the present system like denial of justice due to delay in conducting trial and uncertainty of law, so that the remedy would be within the reach of the Aggrieved. Special Human Rights Appellate Authority would be helpful to implement the directions of

the court effectively. Otherwise this Appellate Authority has to be entrusted with power to take contempt proceeding against the officials.

GENDERED SUBALTERNISM AND MYTH OF MASCULINITY IN A HOUSE FOR MR. BISWAS AND HALF A LIFE

Ghan Shyam Pal*

Abstract

V. S. Naipaul is one of the finest writers of English prose over the world and famous for his dissecting tone and piquant style of narration. He is an expert writer of exploiting each moment into literature. In this paper Naipaul talks about gendered subaltern and myth of masculinity in a patriarchal society. Basically Naipaul is associated with the literature of 'Diaspora'. He has come before us as a champion of subaltern, diasporic and marginalized people in terms of caste, class and gender. His oeuvre commonly speaks of expatriation and the people who have been sidelined from the mainstream of development of the society due to caste, class, and ethnicity and therefore he has been traditionally looked at from that point of view. The issues like gender, subaltern, diaspora and ethnicity have been discussed much at length in Naipaul's chosen texts.

Keywords: Gender, Subaltern, Ethnicity and Diaspora

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The literature produced by male authors, indoctrinated by the ideology of patriarchy, provides a prejudiced, mutilated graph of women. Women are misrepresented either as angels, the true emblem of purity and innocence, of service and sacrifice or as the evil temptress, the demon ready to tempt and lead man to havoc. Male constructed literary texts stereotype woman either as paragon of all virtues or the demon of all vices.

The realistic portrayal of woman, who stands between these extreme cases, is conspicuous by absence in literature produced by male writers. These stereotypical images are intended as prescriptions for women dictating to them what they should be and what they should not be. The discourse of patriarchy reads women's desire for choices and liberation of women as forms of aberrations.

The women in the postcolonial society are doubly colonized. However, in the hierarchy of structural oppression, there are women who are placed further down the scale. Tribal, 'lower-caste', differently-abled, lesbian, lower class women all come in at the lower end of the hierarchy of women. Writings by such women often present a challenge even to feminists because they resist homogenizing into the larger category of 'Third World women'.

Perhaps the most important example of the genre is Rigoberta Menchu's *I, Rigoberta Menchu* (1984), a text which has attained cult status as *testimonio*. Menchu, a Quiche Mayan woman from Guatemala, documented the traumatic events of her community. Her opening paragraph states:

My name is Rigonerta Menchu. I am twenty-three years. This is testimony ... I'd like to stress that it's not only my life, it's also the testimony of my people ... the important thing is that what has happened to me has happened to many other people too My personal experience is the reality of a whole people. (1)

It becomes the document of a struggle of the entire community and race. Likewise, Bama described her *Karukku* this way:

The story told in Karukku was not my story alone. It was the depiction of a collective trauma-of my community-whose length cannot be measured in time. I just tried to freeze it forever in one book so that there will be something physical to remind people of the atrocities committed on a section of the society for ages. (*Karukku* 67)

Stuart Hall points out the power of discourse to create and reinforce Western dominance. The colonialist discourses describe how Europe represents differences between ‘itself’ and ‘others’ using European cultural categories, languages and ideas, and performs cultural othering. The knowledge produced by a discourse gets put into practice and then becomes reality. “By producing a discourse of difference Europe was able to maintain its dominance over ‘the other’ thereby creating a subaltern by excluding the other from the production of the discourse” (Hall 157). The scenario is the same when the subaltern, particularly the subaltern woman is being represented in mainstream discourse by elite community. It only furthers and reinforces her subalternity. Adopting mainstream discourses to subaltern female experiences only leads to further marginalization of the subalterns both as individuals and as a community.

The ideology of patriarchy tends to reinforce an already entrenched system of exploitation. Gender equations attain threatening dimensions within the framework of patriarchal dominance. Juliet Michell sees patriarchy as a dominant feature with cultural rooting and maintained through the operation of ideology. It is perpetuated through a process by which subjectivity is culturally constructed. Gendered subjectivity can be seen as “constituted ideologically, ensuring the continuous reproduction of dominant masculinity and dominated femininity” (Michell 197). Patriarchy is not merely an ideology; it is a set of organized power structures with the key positions occupied by man or his supporting mechanism.

The process of indoctrination starts right from childhood. There is even now a categorization of toys as boys’ toys which include gun, car and so on and girls’ toys predominantly represented by dolls of different types and hues. It is still possible to find playthings labeled in much the same way as in the nineteenth century verse, part of a collection for school boys, during their leisure hours at boarding school. I would like to begin this paper with the statement of V. Geetha:

...A little boy who dashes up a tree, while his sister hovers uncertainly on the ground; an older man plunges in to a life of adventure and travel while his wife or mother anxiously awaits at home hoping and praying for his safety. (Geetha 127)

The above lines are ample to show position of women in a patriarchal society. The society, in which V. S. Naipaul was born and brought, has been more or less the same. The overall literary output of Naipaul owes much to the experience of his personal life. People migrating

from India in early ages were conservative to their social, religious and cultural conduct. This paper would not only explore but analyze gendered subalternism and the myth of masculinity in Naipaul's *A House for Mr. Biswas*, and *Half a Life*.

Naipaul has set these novels in the Indian communities of Trinidad and India. The people living in these communities had firm belief in old tradition as far as women treatment is concerned. The characters Naipaul has produced are archetypes of Indian masses and are highly prejudiced. These women characters are categorized in two major slots- dominating and dominated types although the culture of both is same, with slight difference in their overall condition. They had enough power to maintain the families and control household responsibilities. Despite having so much power they had to bear reprimanding and sometimes were severely beaten by their husbands. Discrimination with women is apparent with the fact that these women are from the rich families, yet they are not provided good higher education rather later on confined to their houses.

The women characters of Naipaul are ignorant and innocent. The personal world of women comes to an end with her family. She remains only a component in the household machinery. Her happiness lies in the happiness of the families. Her life is dedicated to the families. Her happiness shatters if the families suffer. She stays at home minding all their families' responsibilities. Men on the contrary, remain outside as he has been expected by the society. The statement made by Simon de Beauvoir in her path breaking work *The Second Sex* is quite appropriate to illustrate the role of women in the society:

She is the one who waits, submits, complains, weeps, makes scenes: an ungrateful role that in daily life leads to no apotheosis; as a victim she is looked down on; as a shrew detested; her fate seems the prototype of rapid "recurrence" life only repeats in her, without going anywhere; family set in her role as a housekeeper, she puts a stop to the expansion of existence, she becomes obstacle and negation.... (*The Second Sex* 322)

Women are unable to expose their hidden talent in the male dominant society thus they put an end all the possibilities of their shining future by confining themselves within domestic activities. They are away from the limelight and their life passed without valuable achievement. They became handicapped as they are dependent on their husbands who are the backbone of the economy. For their basic personal necessity of life they had to look at their husband's pocket. Sarojani and Shama are the example of that who had to look at the world

through the eyes of their husband and they responded accordingly. They scarified their own perception of judging any verdict.

Being a diasporic writer, Naipaul writes about the Indian communities especially in Caribbean and Africa where people live with outdated customs and rituals. Female oppression and exploitation, conservative thinking regarding the status of the women in the society and family, dearth of education and obstacle in their progress are the inseparable part of their customs. There are the people like Pt. Ganesh, Mohan Biswas and Willie Chandran who have stepped out of their finite worlds of orthodoxies. They desperately feel the need to change the thinking of the women of their families and want their partner to be equal. Irony lies in the fact that they never made an effort to bring about the change rather they expected the things to happen themselves. These men want educated partner who would understand them and would also accompany them in the course of life.

V.S. Naipaul's magnum opus, *A House for Mr. Biswas*, can rightly be called a work of art that deals with the problems of isolation, frustration and negation of an individual. The novel tells the story of its protagonist, Mr. Biswas from birth to death, each section dealing with different phases of Mr. Biswas's life. Here, Naipaul has a more subjective approach towards the problems of identity crisis than the objective one a reader finds in his travelogues, especially on India.

Women like Shama and her sisters have seemingly come to a pause regarding their development. They are treated as pieces of property, therefore have become an object of possession. Shama before her marriage is governed by her mother and afterwards by her husband Mr. Biswas. Naipaul attempts to highlight his qualities for survival in a patriarchal world where indifference to women's sentiments is marked as a sign of manhood.

When I start narrating female character in *A House for Mr.Biswas* one finds Bipti, Mr. Biswas's mother, a perfect example of stereotypical Indian women. She depends on her husband when she lives with him and on her mother's family when deserted by her husband. A comparison could be drawn between Bipti, as a feeble character, her sister Tara, as an assertive one. But the society does not appreciate Tara for her authoritative nature. Naipaul brings to light the negative attitude of the society towards a powerful woman. Tara is gossiped about when she takes charge of Bipti's family after her husband's death. Bipti, too, willingly gives her children's responsibility to Tara, and sets herself free from the burden of

caring. It is evident because Bipti, “who had not been consulted” for anything after her husband’s death, feels “very grateful to Tara”; and Mr. Biswas gets “thrilled at the thought of earning money” by being nurtured by his affluent aunt. (*A House for Mr. Biswas* 59)

Bipti is a week widow and the mother of four –three sons and a daughter. She has to hide her emotion for her children in front of other due to her dependence on her sister. She could not express her loss when her daughter Dehuti eloped with Tara’s low caste yard boy Ramchand. Instead she shares Tara’s outburst for the shame and dishonor her daughter brought to the family. Naipaul shows Bipti lamenting for the loss of her sister’s honour not for the loss of her daughter, who was not more than a maid in Tara’s house. Dehuti’s ‘shameless’ act is well contrasted with Mr. Biswas’ quest for identity as a sign of self-pride. This highlights the difference between the expectation of a society from a boy and a girl child.

If we compare Sarojini to Willie, we find Sarojani better than Willie in adjusting and equally intelligent. Her father sends Willie abroad for further studies and thinks of an ‘international marriage’ for her. Willie on the other hand as a male, ‘*exceeds power and confers privilege*’ by choosing to go abroad to study. Men have derived a great deal of advantage from ‘*the simple and irrefutable logic of categorization*’ (Geetha 46). A similar distinction is visible between Mr. Biswas and his sister Dehuti. Mr. Biawas gets an opportunity to go to the school and later on for a training to become a proper “pundit”. Whereas, his sister is given to his aunt Tara to learn some “grace” which would help her in getting a match. Bipti is caught thinking:

Bipti had been hoping that Tara would make the suggestion. In four or five years Dehuti would have to be married and it was better that she should be given to Tara. She should learn manners, acquire grace and, with a dowry from Tara, might even make a good match. (*A House for Mr. Biswas* 35)

‘Shyness’ and wearing heavy jewellery is a sign of their feminine nature. Dehuti was liked by Tara because she ‘*smiled shyly, not looking up*’ (35). In Indian society, identity of a girl is always associated with the identity of her husband. His role in her life is that of a “provider.” Caste is a matter which is applied to men only; women ethically belong to their provider’s caste regardless of their birth in any particular caste. They, as V. Geetha writes, are “feminized in a derogatory sense.” The state of women is as demeaning as a ‘shudra’, she argues:

A shudra is like a woman—a case of caste identity being feminized in a derogatory sense. Shudra much like Brahmin and upper caste women, is only fit to serve Brahmin and others, and as with women, in such service lies his salvation. In Hinduism both untouchables and women are polluting ---a menstruating woman is literally an untouchable for the days that her period lasts. Gender and class differences are likewise mutually linked....(50)

The above statement fits Dehuti's stature suitably. Dehuti by her simple act of eloping with a low caste 'chamar' boy demeans herself completely and she is ousted by her high-caste family. Naipaul presents the attitude of her family post-elopement through Mr. Biswas who visits her place by chance. He feels 'that to Dehuti marriage had brought no joy.' She was uneasy at being caught among her household possession 'which was embarrassing for both of them. (71) Dehuti's mental struggle is overpowered by Mr. Biswas's reputation. Her poor and low caste becomes a reason of shame for Mr. Biswas because he is linked with the Tulsis who are well known for their high caste status in Port of Spain. She is not a Brahmin now instead is considered a low caste person. Dehuti in her brother's view is reduced to an only without beauty or brains. He could not penetrate her mindset instead he observes her superficially:

Dehuti, never pretty, was now frankly ugly. Her Chinese eyes looked sleepy, the pupils without a light, the whites smudged. Her cheeks, red with pimples, bulged low and drooped around her mouth. Her lower lip projected, as though squashed out by the weight of her cheeks. (71)

Naipaul shows Dehuti as an unattractive girl who brings dishonor to her family. He never shows her mental struggle; instead, the repulsion of her brother overpowers the meeting. Dehuti's words and mind do not hold any value for him. It is not so with this demeaned girl only but the rest of the female characters in the text suffer from this servitude and attitude of inferiority. They are conditioned. Shama is taught servitude although she belonged to a "rich" family and lived in the big house famous as 'Hanuman House.'

Hanuman House is governed by Mrs. Tulsi, commonly known as the big boss. Naipaul shows a dichotomy by contrasting Mr. Biswas's thinking and other sons-in law of the family, who unobjectionably accept the supremacy of Mrs. Tulsi. Naipaul shows Shama's house as an overcrowded monkey house where a mother with all the daughters and son-in law, and her sister and brother-in law lives. In such a house where matriarchy seems to prevail overtly,

Mr. Biswas fears his identity and faces a hard time to save his manhood despite being a declared failure. His philosophy of paddle your own canoe gets wounded when his career as a sign painter could not provide him with bread and butter. If the text is diasporic in nature on the one hand then on the other it also brings forth psychological complexities produced by the clash between matriarchy and patriarchy.

Naipaul presents Shama as a properly trained woman by the patriarchy. She displays her discomfiture for Mr. Biswas's status as a dependent of Tulsis. She considers herself inferior to her brothers and sisters due to her husband's incompetence to provide them bread and butter. Her other brothers-in law are not independent, so they cooperate with Mr. Tulsi and contribute in family income. On the contrary, Mr. Biswas considered it below his dignity to give help to "her" family. He considered it as the trick of Tulsis for they strangled and exploited everyone. He observed and commented that sisters "*had, in the Tulsi marriage lottery, drawn husbands with money and position; these daughters followed the Hindu custom of living with their husbands's family, and formed no part of the Tulsi organization.*" (97)

In this way we find that Naipaul is capturing the attention of the characters searching for a permanent foothold. The novel depicts houses as the predominant metaphor signifying the universal diasporic disorder. The hero of the novel Mohun Biswas represents the psychology of every East- Indian colonial at Trinidad. He endeavors to create something significant and substantial out of the "unimportant, uncreative, cynical Trinidad." (124)

Biswas is a more complex version of Ganesh as he also follows the same process of growing up from nothing. His sense of alienation and homelessness is perhaps derived from the character of *Miguel Street*. His life is a complex tale of an expatriate Indian's ambivalence presenting the typical expatriate sensibility. Mr. Biswas, whose life-long ambition is the ownership of a house, finds him caught in an inescapable trap. Thus, the symbol of house embodies Naipaul's personal diasporic predicament.

Biswas's individual quest for selfhood, identity and coherence in his life terminates with the ownership of a house of his own. Though the multiple defects and drawbacks of the house lessen his charm, he is excited because he has now found some meaning in his existence in the world. He exclaims: "How terrible it would have been... to have lived and died as one had been born, unnecessary and unaccommodated." (54)

Naipaul's men like Mohun, Ganesh and Willie Chandran think that women are no match to their intelligence. They are inferior by birth. This imposed inferiority gives way to men to ridicule their sentiments. Mohun does so by intention to Shama and she either has to keep silent or will receive physical torture. Here Naipaul portrays Mohun teasing Shama by ridiculing her relatives:

‘How the little gods getting on today, eh?

He would ask.

He meant her brothers

‘how the hods, eh?

Shama wouldn't reply.

‘And how the Big Boss getting on today?’ that was Seth.....

And how the old queen?’ that was Mrs. Tulsi.

‘The old hen? The old cow?’

‘Family? Family? This blasted fowl run you calling family?¹

Shama accepts her lot as a passive listener but when Mr. Biswas becomes intolerable, she has to retaliate. His ego is hurt by Shama's words, “*you can't give me anything consequently he temporarily abandons Hanuman House*” (107). As Naipaul portrays women, they always create turbulent dramatic scenes like Shama, Chinta and Padma to draw attention. This is a characteristic which is typically associated with the powerless species that use it as their weapon against oppression. They make issues out of non-issue. Mr. Biswas soothes and nourishes his pride by abusing Shama's family as ‘a fowl run’ or ‘monkey house’ or a ‘blasted zoo’ or a ‘low caste bunch’ (120). More than Shama, Mr. Biswas created nuisance in Hanuman House for which they had to leave for ‘chase’, a nearby town in Port of Spain. In Chase a closed house and shop awaited their arrival with ‘the smell of grease’. Shama indignantly held her husband responsible for their banishment. She disliked every action of Mr. Biswas and he never confined in her. She felt martyred at her husband's indecent behavior and the distance between them always haunted their relationship. Mr. Biswas always underestimated her emotions and Shama thought him ‘stupid, boring and shamng.’²

As a contrast to Mr. Biswas, Shama is a dull girl; even then she seems to adjust better than him in adverse condition. It was Shama who “produced a meal” (146) in that garbage house

¹ *A House for Mr. Biswas*, pp. 104-05

² Ibid at p. 143

in Chase and told him how to run a shop while Mr. Biswas was still fumbling. Naipaul writes:

He knew nothing about keeping books and it was Shama who had suggested that he should make notes of good given on credit on squares of brown shop papers. It was Shama who suggested that these squares should be spiked ... it was Shama who made the accounts. (147)

Naipaul's description of Shama carries the features of a typical Indian girl who handles the things with great subtlety along with the nagging habits. Mr. Biswas was amazed to see Shama nag for the first time in his life, "it has puzzled him. Living in wife-beating society, he couldn't understand why women were even allowed to nag or how nagging could have any effect." (148)

Shusila and Leela in *The Mystic Masseur* are a case in point. The society has assigned for them befitting their gender. In India, women as a wife are expected to be "patient, understanding, emotionally expressive and compassionate" (Geetha 35). The women in Hanuman house and in all these texts efficiently adopt their pre-assigned roles. They conceive their passive roles as the sign of dignity. Being a man "means that one is rational, always in control, unemotional and consistently strong" (Geetha 35). Mr. Biswas falling short of manly qualities in a predefined society "cultivates a huge sense of inferiority for not being man enough." (36)

Mr. Biswas' quest for identity and for a house of his own is a manifestation of his desire to be known as a "complete man." He knows that the definition of "man" compulsorily involves the ability to be the "owner" with authority. Biswas craved throughout his life for a permanent shelter in order to satisfy his ego; "occupy positions of power, prestige and authority" (36) his desire to control was unfulfilled at Hanuman House. He behaved remarkably in an uncivilized quarrelsome way to Tulsis because they overpowered him and tried to crush him.

Children are given toys according to their gender. It prepares them for their roles in the society in future. Mr. Biswas gifts a "doll house" to Savi, but a toy car to his son Anand. In Savi, thus, her girlhood is involved by her parents and the people around her, which is a common thing in any conventional society. V. Geetha writes that "parents dress their boy and girl children in different ways. They buy them different toys and books" (31). It was expected

from Savi to cry when “doll house” was broken by Shama whereas Anand’s timidity is hated by her father as “boys must not cry.”

In utter frustration, Mr. Biswas behaves savagely towards Shama to the extent of kicking her “on her belly” during her fourth pregnancy. Despite her will to rebel Shama can never refute rather continues to live in suffocation. Contrary to this he enjoyed her discomfiture and used it very often by offending her. When Mr. Biswas had made his wooden house ready, Shama went to live in it. He feels depressed when Shama comes to stay with him because he suffers from an inferiority complex. He thinks that Shama would ridicule his incapability in the absence of the other members of her family. In its furious reaction he tries to kill himself along with his two elder children but “he didn’t want to kill” Myna and Shama as he “didn’t care” for them. He tries to show his indifference for Shama, because Shama’s sheer presence irritates him. “He was violently angry; never before disgusted by her” (275). He was drawn to such a disgusting idea like suicide as a consequence of his incompetent manhood. She continuously reminds him of his failure as a husband and father both.

Most of these girls have never been to the boundary of the college. They were confined to the four walls of their house. Their knowledge is limited to writing and reading letters in a funny way, be that Shama or Leela or Sarojini in *Half a Life*. There is a wide difference in the level of education of Willie and Sarojini, Leela and Ganesh, and Mr. Biswas and Shama.

In *A House for Mr. Biswas* women are often left alone in their limited worlds and are never considered as companions by their men. Shama too is left alone with her tenants in Hanuman House while Mohun and his children go to visit Ajodha and Tare every weekend. Shama feels the “need of company” due to her loneliness. It is not so that his absence gives her a sense of loneliness rather she feels more alone in his presence because of Mr. Biswas’s regular habit of quarreling with her and her family members. His tendency to fight with everyone leads to his boycott from her sisters and other relatives. Here too Shama is the sufferer due to her gender as she cannot initiate any communication, whereas Mr. Biswas can do it only by virtue of being a male.

Naipaul shows a wide difference between the status of women in Indian society and other communities. Comparing the women of *A House of Mr. Biswas* and of *Half a Life*, there is a huge difference between the two. Shama, a conservative uneducated stereotype girl, is a hurdle in Mr. Biswas’s progress. Willie’s mother and his wife Ana are graduates and

understand their men to a certain limit, yet they are considered as obstacles. Willie's mother always falls short of his father's expectations. She is a "backward caste" girl whom Chandran never married. Therefore she could not achieve a respectable place in India where marriage is looked at as an important institution. Chandran could never share his emotions with his wife as he never felt associated with her. Chandran was under great influence of Mahatma Gandhi when he saw her in his college. Gandhi called the youth of India to defy the caste system by inter-caste marriages. He thought to live a "life of sacrifice" and this girl became the victim of his infirm decision (*Half a Life* 12). Naipaul writes in the novel about this girl without name from Chandran's point of view:

There was a girl at the university. I didn't know her. I hadn't spoken to her. I had merely noticed her. She was small and coarse-featured, almost tribal in appearance, noticeable black, with two big top teeth that showed very white. She wore colors that were sometime very bright and sometime very muddy, seeming to run into the blackness of her skin. She would belong to a backward cast... (*Half a Life* 11)

Chandran without taking her emotions into consideration proposed to her in a very timid manner. She becomes a victim of hatred unintentionally. Naipaul writes that Chandran felt 'repelled, ashamed, moved' and instead of love 'there came a little sympathy' (12) in his heart for her. Her too she is victimized due to her low caste status and gender. She is either speechless or stunned by his sinister decision about family matters and her own children.

Men, as it is visible in each and every society are privileged by patriarchal law and expect an unconditional servitude. As J. S. Mill observed in 19th century in his *On the Subjection of Women*, "*all men, expect the most brutish, desire to have, in the women most nearly connected with them, not a forced slave but a willing one, not a slave merely, but a favorite....*" (14)

She serves Chandran throughout her life willingly, yet she is not given a proper place in his life. She loves her son Willie beyond the fact that he was entirely different from her and never associated with her. In these texts it is distinctly visible that a "women" feels satisfied and considers her life meaningful if she can assist him in "his individualistic pursuit. She has other independent existence. She has no individual identity. She ultimately will have to return to her man at the end. So does Shama. She gives herself physically, emotionally and mentally

to her husband by making ‘him’ her; but in return she has no right to expect security. “Love” as a feeling is a far-fetched idea for these women.

Willie is the only hope to his mother, yet he deserts her like his father. He always had negative thoughts for his mother even during his college time in England. He associates her with everything ugly; his friend Percy’s bad taste of colours reminds him of his mother’s colour choice. Willie thinks that, “A fussiness about cloth and colour was something he associated with women (and in a now secret part of his mind he thought of the backwards on his mother’s side, and their love of strong colour). (*Half a Life* 64)

All these men desert their wives at a certain point of time ... some literally and some stop talking to them. As Willie used Ana and then deserts her just because he was ‘fed up living her life.’ He gave words to his desire of living alone while taking the best of her life as he narrates to his sister that, “when she came back later I said to her, ‘I am forty one. I am tired of living your life’ (*Half a Life* 227). Willie shows his selfishness by ignoring Ana’s point of view. He acknowledged her services and, felt the gratitude for her as he confessed to her at the time of departure.

I know, you did everything for me. You made it easy for me here. I couldn’t have lived here without you. When I asked you in London I was frightened. I had nowhere to go. They were going to throw me out of the college at the end of the term and I didn’t know what I could do keep afloat. (*Half a Life* 227)

In a few cases women’s agony becomes acute by the virtue of their individual weakness. Shama is the case in point. She suffers doubly; firstly through her husband, and secondly by her families consequential response. Leela, too, has to bear the torture of her husband due to her childlessness. She suffers both as an abandoned mother and wife. Ana suffered Willie’s selfishness post-marriage. Ana, in spite of belonging to non-Indian community, has to accept Willie’s treachery and deception. She witnessed Willie’s and Graca’s increasing incestuous relations, without a sign of agitation on her face she bore all the insult including Willie’s confessions to Ana: “*We made live in the house, Graca and I, as it was being built.*” (219)

Despite the despotic nature of their husbands, they do not revolt against them as they continue to live with them. They adopt a submissive role on the domestic front. Mostly they surrender to the will of their men and follow the norms laid by the society.

Willie's sister Sarojini is seen in the image of his mother as he calls her the 'little ugly Sarojini.' Her father never wished to send her abroad or to college for higher education. Due to her marriage she manages to visit England once and her brother too in his hostel. He feels 'repelled by the 'smell of the food she prepared in the little hostel room.' Sarojini stands as a symbol of Chandran's failure and thus poses a threat to his reputation. Consequently Willie feels ashamed of her presence in his hostel room in England. He disliked her Indian way of dressing. He avoids introducing her to his college friends.

After leaving Ana, Willie seeks support from his sister. She is comfortable even in adverse situation. She had no complications, no fabricated lies, and no unreal conceptions to lead in her problems like her brother Willie. She adjusts naturally and never feels awkward due to her Indian identity. She provides support to her brother in his dire need. On the contrary he still feels the same repulsion for the 'food' that "*Sarojini cooked in the small stale-smelling kitchen at the back*" (*Half a Life* 137). Willie observes a change in her dressing sense as "*She had given up the style of sari and cardigan and socks. She was in jeans and a heavy sweater and her manner was brisker and even more authoritative than Willie remembered.*" (*Half a Life* 137-138)

Willie abhors his poor adjustability in awkward situations when he sees Sarojini living a comfortable life. He is compelled to think that all her oddity "was buried in the girl" now, whom he had left behind him at home. She had come a long way as she seems "attractive." Willie also guesses about her being in love with would have probably been lost in nothingness if the women in his life, like Ana, June, and Sarojini would not have supported him. He narrates the role of Ana in his life to Sarojini:

I drew comfort from Ana, her strength and authority. And just as now, as you may have noticed, Sarojini, I lean on you, so in those days, ever since she had agreed to my being with her in Africa, I leaned on Ana. I believed in a special way in her luck, some of this had to do with the very fact that she was a women who had given herself to me. (141)

Willie had always been 'protected' and 'guided' by one or the other women "*in some essential way.*" In his childhood it was his mother, in youth June and Ana, and in his later life it is his sister who cares for him. He completely depends on Ana during his stay in Portuguese Africa in her grandfather's house. Naipaul thus comments through him that in Indian culture "men are really looking for women to lean on" (141). Naipaul here draws a

difference between two women from different communities. Both of them have difference ideas. Sarojini follows her ‘firebrand’ maternal uncle’s radical genes and is furious in nature; whereas Ana is different in her thinking due to her racial and social difference. Willie cherished this difference in Ana and despised Sarojini. Ana was ‘important’ for him because he depended on her ‘for his idea of being a man’ in his beginning years but Sarojini becomes the need for his survival in his later life.

In medieval India ‘sati system’ was followed with a pure religious dedication. The society had no guilt in burning the widowed wife on her husband’s pyre. Bipti, Mr. Biswas’s mother who is born in modern times is not burned but she has to suffer the painful phase of widowhood. She leads the life of alienation and seclusion devoid of all the pleasures after the death of her considerably incompetent husband. Now she was to be avoided in all pious ceremonies of her family and could not perform any ritual as she is seen as the inauspicious sight in her very house. Naipaul narrates that touchy moment of proclamation of her widowhood in a series of prolonged rituals which is enough to give an idea of patriarchy prevalent in these societies:

Bipti was bathed. Her hair, still wet, was neatly parted and the parting filled with red henna. Then henna was scooped out and the paring filled with charcoal dust. She was now a widow forever. Tara gave a short scream and at the signal the other women began to wail.³

This episode is marked with irony and sarcasm as these customs are no more followed in modern times yet it remains effective among conventional people. They follow that age old system which takes pride in making a widow’s life hell without feeling ashamed of its oddity. Bipti, Sarojini and Shama remain submissive throughout the novels and they could not get recognition by their husbands. In the society like that the future of girls are decided by their parents. They are very rarely given the opportunity to develop. On the other hand boys are granted more liberty and enjoy the freedom of making their own choices. Sarojini in *Half a Life* is brought up with same ideology. A letter to Willie from his father reveals his biased attitude:

I write now with news of your sister Sarojini... Well, a German came one day. He was an oldish man with a bad leg. Well, to cut a long short, he asked to marry Sarojini, and that is what precisely he had done. You will know that I always felt that Sarojini’s only hope lay on

³ Ibid at p.32

an international marriage, but I must say this took me surprise. I am sure he has a wife somewhere, but, perhaps isn't good to ask too much. (*Half a Life* 112)

Thus in the novels of Naipaul gender bias is a commonplace. In the institution of marriage, it becomes evident that both live together but dwell in separate worlds. Women are left; they ramble in another sphere, which definitely co-exists with men's world but is entirely different. It goes without saying that these women play the role of auxiliary in Naipaul's novels. They do not possess multiple layers of characters; in comparison to men they are inferior and one-dimensional. They always revolve around the centre and never complain of it, and whenever they complain they do it by nagging as Shama does in *A House for Mr. Biswas*.

Male individuality crushes conjugal relationship and thus brings disaffection to the institution of marriage. The acceptance of identity of both the gender cannot always be expected from these people; subsequently clashes between them increase. As women do not develop, the only way to survive for them is to adopt the male-oriented atmosphere and remain stereotype forever.

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NETWORKING OF RIVERS IN INDIA

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Abstract

The rivers play a vital role in the lives of the Indian people. The rivers in India are truly speaking not only life-line of masses but also for wild-life. The river systems help us in cheap transportation, potable water, electricity, irrigation and as a source of livelihood for increasing population. Proper management of river water is the need of the hour. Some of the major cities of India are situated at the banks of holy rivers. Indian agriculture largely depends upon Monsoon which is always uncertain in nature. There is a severe problem of lack of irrigation in one region and water logging in others. Damage to crops due to drought and pitiable drainage facility could be managed. Decreasing and depleting status of water resources may be one of the most critical resource issues of the 21st century. The core objectives of the paper are to study the case of Re networking of rivers to know how it affected this problem and interlinking of rivers in India (IRL Project) and to study other constitutional provisions affecting inter-state water disputes. At the backdrop of this, the present paper is an attempt to study issues and challenges in interlinking of rivers in India from the point of view of society at large.

Keywords: Water, environment, society, masses, management

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INTRODUCTION

Water is undoubtedly the most important natural resource on the planet, as it sustains all aspects of life in a way that no other resource can. United Nations agencies and the World Bank have claimed that these scarcities will escalate in the future, creating serious problems for humankind and the environment. India needs to adopt a crystal-clear water mission that can help us to use available water resources to fields, villages, towns and industries round the year, without harming our environment. Keeping in mind the increasing demand for water, the government of India has developed a new National Water Policy which claims that water is a prime natural resource, a basic need and a precious national asset.

The NWDA has suggested the interlinking of rivers of the country. This proposal is better known as the Inter-River Linking Project (IRL)¹. It is a mega project that engages money, resources, engineering, management and human understanding. It is designed to ease water shortages in western and southern India and aims to link 30 major rivers. It will also involve diverting the rivers Ganga and the Brahmaputra - two of India's biggest rivers. It is estimated to cost US \$ 123 billion (as per 2002) and, if completed, would be the single largest water development project anywhere in the world. It is expected that properly planned water resource development and management could alleviate poverty, improve the quality of life, and reduce regional disparities, better law and order situation and manage the integrity of the natural environment.

The idea of linking rivers is not new. It was Sir Arthur Cotton who had originally proposed the networking of rivers more than a century ago, and Dr. K. L. Rao, the Minister of Power and Irrigation in the Cabinet of Smt. Indira Gandhi, revived this proposal in 1972. Both were no doubt eminent engineers. Cotton's prime concern was for inland navigational network and Dr. Rao's concern was for irrigation and power. The then-Ministry of Irrigation (now the Ministry of Water Resources) conceived a plan for *National Perspectives for Water Development* in August 1980 (Ministry of Water Resources, 1980) This paved the way for the establishment of the National Water Development Agency (NWDA) in 1982 to work out basin wise surpluses and deficits and explore possibilities of storage, links and transfers, has identified 30 river links, which would connect every major river in the Indian mainland, and has prepared a feasibility report on six of these. The Supreme Court has asked the

¹ <https://youtu.be/ESJMLWA3L4>- A Documentary for NWDA of river inter-linking by deep project

Government of India to complete all planning required to launch the project by 2006 and these projects of inter-basin transfers be completed in the next 10 years or so.

“We also have many challenges in front of us. We have to find a solution to the repeated droughts and floods...The need of the hour is to have a water mission, which will enable availability of water to the fields, villages, towns and industries throughout the year, even while maintaining environmental purity. One major part of the water mission would be networking of our rivers.”²

RE NETWORKING OF RIVERS

The ‘networking of rivers’ petition 512 of 2002³ was filed following the speech of the then President of India, Dr. A. P. J. Abdul Kalam suggesting inter-linking of rivers. Unmindful of his initial speech, where the President underlined that such programmes should have a large-scale people participation even at the conceptual and project planning stages, honorable former President who comes from Tamil Nadu never misses an opportunity to express his support for the networking of rivers project precluding any scope of participation in the decision making which entails rewriting the geography of the country.⁴

Petitions had been filed to issue an appropriate writ order or direction, more particularly a writ in nature of Mandamus directing Respondents i.e., Central Government as well State Governments to take appropriate action to nationalize all rivers in country, and also to take appropriate steps/action to inter link rivers in southern peninsula and to formulate a scheme whereby water from west flowing rivers could be channelized and equitably distributed.

It was held that, primarily there was unanimity between all concerned authorities including Centre and a majority of State Governments, with exception of one or two, that implementation of river linking would be very beneficial. There was no reason as to why Governments should not take appropriate and timely interest in execution of this project, particularly when, in various affidavits filed by Central and State Governments, it had been affirmed that governments were very keen to implement this project with great sincerity and effectiveness - Stand taken by respective States, showed that, by and large, there was unanimity in accepting interlinking of rivers but reservations of these States could also not

² Dr. A.P.J Abdul Kalam’s, Speech on eve of Independence Day dated 14-8-2002

³ MANU/SC/0155/2012

⁴ Inter Linking of Rivers in India: An Overview, Indus Research Centre, April 17, 2015

be ignored, being relatable to their particular economic, geographical and socio-economic needs - These were matters which squarely fell within domain of general consensus and thus, required a framework to be formulated by competent Government or Legislature, as case may be, prior to its execution - Relative economic and social needs of interested states, volume of stream and its uses, land not watered were other relevant considerations.

Thus, it would be for expert bodies alone to examine on such issues and their impact on project. National interest must take precedence over interest of individual States - State Governments were expected to view national problems with a greater objectivity, rationality and spirit of service to nation and ill-founded objections might result in greater harm, not only to neighbouring States but also to nation at large.

Under constitutional scheme, there was a clear demarcation of fields of operation and jurisdiction between Legislature, Judiciary and Executive. Legislature might save unto itself power to make certain specific legislations not only governing a field of its legislative competence as provided in 7th Schedule of Constitution, but also regarding a particular dispute referable to one of Articles itself. Article 262 of Constitution was one of "such powers, under this Article, Parliament, by law, could provide for adjudication of any dispute or complaint with respect to use, distribution and control of water of any inter-state river or river valley. Parliament could reserve to itself, power to oust jurisdiction of Courts, including highest Court of land, in relation to a water dispute as stated under 262 of Constitution", Jurisdiction of Court would be ousted only with regard to adjudication of dispute and not all matters incidental thereto.

Huge amounts of public money had been spent, at planning stage itself and it would be travesty of good governance and epitome of harm to public interest, if these projects were not carried forward with a sense of sincerity and a desire for its completion. In Section 11 of Inter-State Water Disputes Act, expression 'use, distribution and control of water in any river' were key words in determination of scope of power conferred on a Tribunal constituted under Section 3 of Act - If a matter fell outside scope of these three crucial words, then power of Section 11 of Act in ousting jurisdiction of Courts in respect of any water dispute, which was otherwise to be referred to Tribunal, would not have any manner of application. Test of maintainability of a legal action initiated by a State in a Court would thus be, whether issues raised therein were referable to a Tribunal for adjudication of manner of use, distribution and control of water. A greater element of mutuality and

consensus needed to be built between States and Centre on one hand, and States inter se on other. A Public Interest Litigation before the Court had to fall within contours of constitutional law, because no jurisdiction was wider than the Court's constitutional jurisdiction under Article 32 of Constitution. Court was not equipped to take expert decisions and they essentially should be left for Central Government and concerned State. Requirements in present case had different dimensions - Planning, acquisition, financing, pricing, civil construction, environmental issues involved were policy decisions affecting legislative competence and would squarely fall in domain of Government of States and Centre. Court itself would not be a very appropriate forum for planning and implementation of such a programme having wide national dimensions and ramifications. It would not only be desirable, but also inevitable that an appropriate body should be created to plan, construct and implement this inter linking of rivers program for benefit of nation as a whole. And hence Petition was disposed of.

INTER-LINKING OF RIVERS PROJECT

The Project that the Supreme Court and the President have enjoined the government of India to implement may well be the largest infrastructure project ever undertaken in the world, to transfer water from the surplus river basins to ease the water shortages in western and southern India while mitigating the impacts of recurrent floods in the Eastern India (NWDA 2006). It will build 30 links and some 3000 storages to connect 37 Himalayan and Peninsular rivers to form a gigantic South Asian water grid. The canals, planned to be 50 to 100 meters wide and more than 6 meters deep, would facilitate navigation. The estimates of key project variables still in the nature of back-of-the-envelope calculations suggest it will cost a staggering Rs 560,000 crore, handle 178 km³ of inter-basin water transfer/per year, build 12,500 km of canals, create 35 giga watts of hydropower capacity, add 35 million hectare to India's irrigated areas, and generate an unknown volume of navigation and fishery benefits⁵. Some 3700 MW would be required to lift water across major watershed ridges by up to 116 meters. Far from 2016, most observers agree that the Project may not be fully complete even by 2050. Yet if estimated, it should be viewed as a 50-100 year project.

- The former will transfer 33 Km³ water, and the latter will transfers 141 Km³ water through a combined network of 14,900 km long canals (NWDA 2006). The

⁵ Mohile 2003; Institution of Engineers 2003; GOI 2003)

Himalayan Component (HC), with 16 river links, has two sub-components: the first will transfers the surplus waters of the Ganga and Brahmaputra to the Mahanadi basin, for relayed thereon from Mahanadi to Godavari, Godavari to Krishna and Krishna to Pennar and Pennar to Cauvery basins.

- The second will transfer water from the eastern Ganga tributaries to benefit the western parts of the Ganga, and the Sabarmati river basins.
- Altogether, these transfers will mitigate the floods in the eastern parts of Ganga basin, and provide irrigation and water supplies to the western parts of the basin. The Himalayan Component needs several large dams in Bhutan and Nepal to store and transfer flood waters of the tributaries of the Ganga and Brahmaputra rivers, and within India to transfer the +-surplus waters of Mahanadi and Godavari rivers.⁶

The Peninsular component has 16 major canals with have four sub components:

- i. linking Mahanadi-Godavari-Krishna-Cauvery-Vaigai rivers;
- ii. linking west flowing rivers south of Tapi and North of Bombay;
- iii. linking Ken-Betwa and Parbati Kalisindh-Chambal rivers and
- iv. diverting of flows of some west flowing rivers to the eastern side.

The en-route irrigation under the peninsular component is expected to irrigate substantial area proposed under the NRLP, which fall in arid and semi-arid western and peninsular India. The total cost of the project too has three components: the Peninsular component will cost US\$ 23 billion (Rs 1,06,000 crore); the Himalayan component will cost US\$ 41 billion (Rs 1,85,000 crore); and the Hydroelectric component will cost US\$ 59 billion (Rs 2,69,000 crore). The quantity of water diverted in the peninsular component will be 141 cubic kilometers and in the Himalayan component 33 cubic kilometers. The total power generated will be 34 GW - 4 GW in the peninsular component and 30 GW in the Himalayan component.⁷ The majority observers agree that the project would not be over by year 2050.

⁶ <https://youtu.be/U6HSSa5Q9zA>- Interlinking of rivers (ILR)- Part 1

⁷ (Rath 2003)

PROVISIONS REGARDING INTERSTATE WATER DISPUTES

The Prime Minister has said, “*Rivers are a shared heritage of our country....they should be the strings that unite us, not the strings that divide us.*”⁸ However, water conflicts now divide every segment of our society: political parties, states, regions, sub-regions within states, districts, castes, groups and individual farmers. Water conflicts, not water, seem to be percolating faster to the grassroots level in India.⁹

Constitutional Provisions

The Constitution lays down the legislative and functional jurisdiction of the Union, State and Local Governments in respect of water. Water is essentially a State subject and the Union comes in only in the case of inter-State waters.

- List II of the Seventh Schedule, dealing with subjects in respect of which States have jurisdiction has entry 17 which reads: Water, that is to say water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I;
- Entry 56 of List I (Union List), reads: Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union, is declared by Parliament by law to the expedient in the public interest.

The Constitution contains a specific Article –

Article 262: This deals with adjudication of disputes relating to matters of inter-state rivers or river valleys that reads:

- 1) Parliament may by law provide for the adjudication on any dispute or complaint with respect to the use, distribution or control of water of, or in, any inter-state river or river valley.

⁸ Prime Minister’s speech at the Inauguration of the National Conference of Irrigation and Water Resources Ministers, November 30, 2005.

⁹ Biksham Gujja, K J Jay, Suhas Paranjpe, Vinod Goud and Shruti Vispute, “Million Revolts in the Making”, Economic and Political Weekly, February 18, 2006

- 2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other Court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause(1).

The two laws enacted under Article 262 and entry 56 of List I are the River Boards Act, 1956 and the Inter-State Water Disputes Act, 1956. The River Boards Act was enacted with the objective of enabling the Union Government to create, in consultation with the State Governments, boards to advise on the integrated development of inter-State basins.

Inter-State Water Disputes Act, 1956

The genesis of the Inter-State River Water Disputes Act, 1956 lies in the Government of India Act, 1935. This act had been passed in pursuance of Article 262 of the Constitution. However, in a purely legal sense, water Tribunals owe their existence to the decision of the framers of the Indian constitution to make water the responsibility of state governments. When distributing subjects according to whether they should be dealt with by the states, the union or concurrently by both, water was placed on the state list.¹⁰

The act gives the meaning of water disputes and provides for complaints regarding water disputes from various states to Central government. It also provides for the adjudication of disputes relating to waters of Inter-State Rivers and River Valleys. The act enables setting up of tribunals to settle disputes on Inter-State water or river when the Central government is of the view that the matter cannot be solved by negotiations. It had been recommended by The Sarkaria Commission to set up a Tribunal within one year of complaint by the State Government and to declare its decision within five years.

The Inter-State Water Disputes Act was amended in 2002 and the following important changes were made:

- Government of India to establish a Tribunal within one year on a request by a State Government.
- The Tribunal to investigate the matters referred to it and gives its Report within a period of three years (Government of India may extend the period by another two years).

¹⁰ Pani N, The Place Of The Tribunal In Inter-State Water Dispute, Vol. 2 Issue 1.

- The decision of the Tribunal, after its publication in the Official Gazette by the Central Government, shall have the same force as an order or decree of the Supreme Court.

River Boards Act, 1956

In pursuance of the power provided under Entry 56 of List I, the Parliament passed the River Boards Act in the year 1956. This Act is the only instance when the Parliament has used its power allowed to it under Entry 56. The board was mainly having two functions,

1. to ensure proper and optimum utilization of the water resources of the inter-state rivers and
2. To monitor different schemes of irrigation, water supply, hydroelectricity power generation.

However the nature of work of the board is advisory in nature and is meant only for the purpose to give advice and suggestions. Therefore the act has been rendered as a dead letter by not appointing River Boards¹¹. Thus the act had not been effective and one of the major causes for this is that Entry 56 confers a vast and unfettered power on the Union, which, in conjunction with its large resources, enables it to encroach upon an area which is within the jurisdiction of the States¹². There are River Boards set up under separate legislation, but these were set up to implement a mutually agreed sharing agreement between States, e.g. Upper Yamuna River Board, Betwa River Board. River Boards cannot be set up to monitor the working and functioning of Tribunal awards.

The new enactment should clearly define the constitution of the River Boards and their jurisdiction so as to regulate, develop and control all inter-State rivers keeping intact the adjudicated and the recognized rights of the States through which the inter-State river passes and their inhabitants. While enacting the legislation, national interest should be the paramount consideration as inter-State rivers are ‘material resources’ of the community and are national assets. Such enactment should be passed by Parliament after having effective and meaningful consultation with all the State Governments.

¹¹ D.D.Basu, Commentary on the Constitution of India, 8th Ed, pg 9113

¹² Sarkaria Commission Report (1988), Chapter XVII, para 17.4.01

According to, Prime Minister's speech at the Inauguration of the National Conference of Irrigation and Water Resources Ministers, November 30, 2005;¹³ The River Boards were supposed to prevent conflicts by preparing developmental schemes and working out the costs to each State. No water board, however, has so far been created under the River Boards Act, 1956.

Jurisdiction of Court

Over the years, several inter-State river water disputes have come up before the Supreme Court with reference to a variety of issues such as the competence of the Tribunal to deal with a request for an interim allocation (Cauvery); the non-implementation of an Order of the Tribunal (Cauvery); failures on the environmental and rehabilitation fronts (Narmada); the constitutionality of an Act of a State Legislature terminating all past water accords (Punjab);¹⁴ etc. In each of these cases, what went before the Supreme Court was not the water-sharing issue, which had been adjudicated or was under adjudication by a Tribunal, but some other related legal or constitutional issue.¹⁵

Analyzing the decision of the Supreme Court in inter-state water disputes, it can be seen that Supreme Court point to a constitutive tension between “we the people” and “sovereign socialist secular democratic republic” of India.¹⁶ It is important to understand and reflect on the tension before quick and ready prescriptions are given out to inter-state water conflicts. Inter-state disputes over water are of two types. One type of dispute relates to the rights of states and scope of their rights within the Union. With the exception of reopening the terms of unification, the states may apply to the Supreme Court to resolve questions of rights flowing from the constitution¹⁷ Inter-state rivers; on the other hand do not involve questions of rights flowing from the constitution itself.

The Cauvery Case

The main issue of the Cauvery dispute case is related to the re-sharing of waters that are already being fully utilized. The Cauvery cases are important because first, they paved the

¹³ Biksham Gujja, K J Jay, Suhas Paranjpe, Vinod Goud and Shruti Vispute, *Million Revolts in the Making*, Economic and Political Weekly, February 18, 2006

¹⁴ Sainath P., Little Pani, Less Panchayat (2002), The Hindu, 15 and 22 September

¹⁵ The Supreme court and river water disputes, Ramaswamy R. Iyer, The hindu , 17/09/12

¹⁶ Petrella, R. The Water Manifesto, London: Zed Books, and Bangalore: Books for change

¹⁷ The Constitution Of India, Article 131

way for the involvement of the Supreme Court in inter-state water disputes, and without a constitutional mandate to do so the Supreme Court could not play an effective role. It is claimed by the Karnataka Government, the state does not get its due share of water and because of this reason the state is of the opinion to re-enact the agreement which should be based on “equitable sharing”. Contrary to this, Tamil Nadu government contends that since it had already developed plans in furtherance of the agreement and any change in the agreement pattern will greatly affect the many. The agreement rejects the Original jurisdiction of the Supreme Court under Article 131 of the Constitution of India. However, the question before the court is the implementation of the Tribunal’s Interim Order, and the related issue of compliance with the decisions of the Cauvery River Authority and with the directions of the Supreme Court¹⁸ itself which is entirely within the Supreme Court’s jurisdiction.

In the year 1990, a tribunal was finally constituted by an order of the Supreme Court. Soon Tribunal passed an interim order in June 1991. State of Karnataka was directed not to increase its area of irrigation from the Cauvery waters and also let the water flow of certain meters allowed.

In 2007, final award was given by the tribunal after holding many discussion and debates for almost 17 years to all the States accordingly as required. In pursuance of the 2007 award, Cauvery Water (Implementation of the Order of 2007) Scheme, 2013 a temporary body was introduced by the government. The body is given the responsibility of implementation of the decision of the Cauvery Water Dispute Tribunal. However, the order is yet to be implemented as a Special Leave Petition on the matter remains pending in the Supreme Court.

Does Article 262 of the Constitution get affected?

The Provision under Article 262 seems to be insufficient. It would have been better if machinery had been written into the Constitution itself. Then it would not be left to the Parliament to provide machinery. 5 years passed before the Inter-State Water Disputes Act was passed in 1956. Article 262 grants power to make a law; it does not impose a duty, for no court can issue a mandamus to the legislature to make a law¹⁹. Also no provision of the Constitution can be held ultra-vires, but any law, or part of law made under Article 262 can be held ultra-vires.

¹⁸ Cauvery Dispute: An Instance of Judicial Fallacy, Mr. Naresh Pareek, Manupatra.

¹⁹ Seervai H.M., Constitutional Law of India, Vol.3 (4th Edition) pp. 3243

Also there are always inordinate delays in the setting up of tribunals and deciding the award. The right to have a dispute referred to a tribunal under IWSDA is dependent on the opinion of the Central Government that the matter cannot be settled by negotiations.²⁰

CONCLUSION

Networking Rivers does not mean drawing some mega litres from one river and pouring it into another like one does with static containers, or even with canals. The ramifications are much wider because a river is not only the water that flows or the channel, which holds the flow rather it's much more. The river is the dynamic face of the landscape. "*In the drama of history, the ecosystem is not the stage setting; it is the cast.*" In the past the court has rightly and consistently held that large infrastructure projects invariably raise technical and policy issues which the courts are not equipped to handle. In view of the reasons cited above and especially an evolving international law on Transboundary River there is a clear case for the apex court to review its order on 'networking rivers'.

In the days, months and years ahead it is likely to reveal Indian Government's exact policy vis-à-vis networking of rivers and court's considered response while dealing with contempt applications in the face of sub continental protest. This case is likely to give birth to a new international legal order to safeguard the legitimate regime of river basins from the obsolete notions of 'conquest over nature', 'surplus' rivers and taming rivers. If the environmental movement in the Indian sub-continent fails to stop this mega project, it would mean nothing short of a premature death of the movement itself and acceptance of the proposed rewriting of sub-continent's geography with painful consequences as fait accompli.

As per National Water Policy, 2002, "Water resources development and management will have to be planned for a hydrological unit such as drainage basin as a whole or for a sub-basin, multi-sectorally, taking into account surface and ground water for sustainable use incorporating quantity and quality aspects as well as environmental considerations."²¹ Outlining India's National Water Policy in 2002, the then Prime Minister Atal Bihari Vajpayee said that the policy should be people-centered and those communities ought to be

²⁰ The Inter-State Water Disputes Act, Section 4(1)

²¹ National Water Policy (2002), Ministry of Water Resources, Government of India, <http://wrmin.nic.in/policy/default4.htm>

recognized as the ‘rightful custodians of water’.²² This clearly shows that networking of river is contrary to the Government’s stated policy which means vested interests are so powerful that they can subvert both executive’s and judiciary’s role.

²² Francois M. Farah (October 23, 2003), UNFPA Representative, UNFPA Water and Sanitation Report

ORIGIN AND EVOLUTION OF THE HUMAN RIGHTS IN PRISON SYSTEM

Tandra Seetharam* & Prof. A. Rajendra Prasad**

Abstract

The basic tenets of human rights are Life, Liberty, Equality and Dignity. In the concept of the judiciary in our country has a major role to play in enforcing the human rights of the prisoners. The main objectives of this article is to sensitize the prison administration to human rights issues; suggest mechanisms to effectively monitor prison conditions and ensure accountability in respect to violations of human rights; and discussion of prison system in India and the ways to motivate and develop prison human rights. This article mainly makes remarks of careful scrutiny and examination to study the evolutionary stages of prison system in India will be dealt with to ascertain how far the societal environment and societal development have helped to shape the correctional institutions by the Indian judiciary to ensure the protection of Human Rights of the prisoners.

Keywords: Prison system, Ancient India, Mughal Period, Modern prison system, The Indian Jails Committee

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SCOPE AND LIMITATION OF STUDY

The scope of the study is aimed at the origin and evolution of the human rights in prison system. It must make it clear that the ignition of Prison system in India in different periods in ancient times. The meaning and perspective of prison system is identified throughout the past years in India.

OBJECTIVES OF THE STUDY

The following are the specific objectives of the present study,

- i. Historical perspective of prison system related to India,
- ii. The view of Prison System concerning to Ancient India,
- iii. The details of Prison System during the Mughal Period and
- iv. Modern prison system in India and development with a view to just icing the human rights

EVOLUTION OF PRISON SYSTEM IN INDIA

Historical perspective

The word ‘Prison’ conveys the meaning, a place for detention. It is a place where the persons awaiting their trial are detained, and also a place wherein offenders are confined to bring about reformation.¹

Before giving an introduction to the Indian Prison System, It will be relevant to state that the prisons were inexistence as long as in 1597, but the conditions of those prisons were miserabla and horrible, where “ recidivism was rampant, men and women and children were hurled together like rats in hamper and pigs in - asty”. These prisons are as an author observes ‘afford opportunities for graduation to a life of crime.’² They were not as we find it today. The miserable condition of prisons in ancient times was described by one of the authors as follows:

¹ J.M.L. Sethan Society and Criminal-4th Edn. Ch.IX “The prison system in India and elsewhere end the need for and made of prison reform”, p.251

² Ibid

“Totally unlighted and unwermed damp and vermin infasted, devoid of sanitation and quits baron of furniture, they were veritable ante-chambers of the grava”.³

Cellular system came into existence in the 18th century, and substantial prison reforms took places during the middle of 19th century. Owing to the strenuous efforts of the prisoners like John Howards of England and Elizebethan Fry, who took the lead in the sphere of prison reforms Cellular prisons were built at many places in England.⁴ During the latter part of the 18th century America also undertook the task of prison reforms. The mode of confinement was that in each cell single prisoner was confined, the justification therefore was that “*prevention of unhealthy influences end contamination by fellow prisoners.*”⁵ But having regard to the severe consequences experienced by the said solitary confinement experienced by the said solitary confinement which resulted in mental disorders, the congregate confinement was substituted for the solitary confinement. A compromise between the cellular and congregate confinement was effected by allowing the prisoner during day time, in the company of fellow prisoners. But during night the prisoner was sent back to the solitude of his own cell.⁶ Reformatories for juveniles also were set up during this era of prison reforms, first reformatory of such type was established in America at Rendalls Island in Newyork. In Ireland, ‘the marks System’ was introduced by the Director of Irish convict persons Sir Walter Crafton, according to which marks will be awarded to the convict according to behaviour, work and thereafter, grades will be assigned. This system was subsequently followed by danish prisons.⁷

PRISON SYSTEM: ANCIENT INDIA

Many writers consistently hold the view that the prisons of the Pre-Buddhist period were appalling and horrible indeed. The Prisoners were mercilessly and inhumanly subjected to all sorts of savers and barbarous afflictions like whipping, keeping under chain and heavy loads. The whipping as a principal punishment continued in jails until the medieval times.

While 19th century witnessed remarkable prison reforms in other countries, the Indian Prisons remained untouched. These prisons were notorious places for torture and ill health.

³ Dr. FCJ Hearnshaw cited in Society and Criminal by J.M.L.Saths at p.251

⁴ Goult R.N.Criminology, p.310 referred to by Sethna in society and the Criminal at p. 251

⁵ J.M.L.sethna-Society and the Criminal p. 252

⁶ Sethna-society and the Criminal at p.252

⁷ Pillai K.S.Principles of Criminology referred to by J.M.L.Sethna in *Society and the Criminal* p.252.

The death rate was very high in these prisons. The implementations of the disciplinary measures were too harsh and barbarous to bear.⁸ The Prisoners were being paid subsistence allowance and this was mostly abused by the jailors. We learn that an Inspector General was appointed in the year 1855 and in each presidency town a civil surgeon was appointed 10 years later. The work of Central Jails was commenced in the year 1857 and fixed diet scales and the system of remission of sentence were introduced in the year 1867.⁹

The change in the Indian prison system also is attributable mostly to one or more incidents namely, the incarceration undergone by the most of the Indian leader during the pre-independence era, and their personal bitter experiences of such intramural life land a support to the prison reforms in India.¹⁰

Administration of Justices in India during the Vedic period (a period of 1000 years earlier than the ages of Manu) was not a part of the State function as it is so today, although references to murders, theft and adultery offences were made, it was nowhere mentioned that king was authorized to act as a judge either to settle a civil dispute or punish a criminal. Sabhapati was said to have acted as Judge, during the later Vedic period, though the veracity of this is uncertain it is evident that he acted as a Governor, Instead of approaching the king it was said that the aggrieved party had mostly to resort to self-help. “*Distraint of the defendant or the accused by the plaintiff, his sitting before the latter's house, and not allowing him to move on, until his claim was satisfied or wrong righted as a well-established practice in Vedic period*”.

During the Rigveda Period, the idea of a divine cosmic order was prevalent. Riti, the regularity of the Universal process was the main basis of law. ‘Sabha’ a village Assembly used to settle the disputes by arbitration when it was found feasible to do so, From all this, aforesaid account, it is quite evident that during Vedic period there was no prison in India; however, it should be borne in mind that “the house of the accused served the purpose for

⁸ Maclean's Manual of the Administration of India Vol. 1 Ch.II cited in Cambridge history of India Vol. VI. p.56 referred to in Society and the Criminal at P.253 by J.M.L.Sethna

⁹ Ibid P.57 cited by J.M.L.Sethna in *Society and the Criminal*

¹⁰ A.L.Basham, *The wonder that was India* 1959, 113 Macmillan, Newyork cited by Indra J.singh in Indian Prison p.17

jails and he was practically imprisoned in his own house till he managed to compensate the plaintiff".¹¹

Reference to 'Prison', Jail or Jailer also can be found having made in sutras and Shastras. In Arthashastra, the word Bandhanagaradhyaksha' is used for jailor¹² Although the writings of the foreign visitors like Magasthenesa reveal that the Indians were mostly law abiding people, it cannot be completely ruled out the existence of crime in India as can be understood from the writings of Hieuntsang, it is quite evident that though crime was a problem in ancient India, Kings were able to quell it. Fine, imprisonment, banishment, mutilation and Capital punishment were in bogus. During the emperor Harsha period, prisoners were not put to death, but were left to suffer in dungeons.¹³ Frequent reference to the description of prisoners and imprisonment can be found in Arthashastra of Kautilya. One of the modes of imprisonment was forced labour in the State mines, or at some other place and this was considered to be the most serious type of imprisonment. Thus the existence of rigorous imprisonment can be found during Msuyyan's Rule However, no systematic description of the construction of Prison is available.

Abandoned and small fortresses were supposed to have served the purpose of prisons.¹⁴ In a pamphlet entitled 'Rajgir' published by the Department, Archaeology, India, the Jail of Bimbisara was described as " Proceeding southwards along the main road and travelling about three quarters of a mile from Manigar Math, the visitor will find in area, about 200 Sq. feet enclosed by a stone wall about 6 feet thick with circular bastions at the corners. The structure has been identified with prison in which Bimbisara was confined by his son Ajatasathru. It is said, from this prison. Bimbsara was able to see Budha on the Gridrakuta partial clearance of the site brought to life, stone cells in one of which were found from rings with loop at one extremity which might possibly have served the manacling prisoners".¹⁵

The officials of the jail were called bandhanagaradhyaksha and karka. The former was the Superintendant and the latter was one of his assistants¹⁶, and the Jail Department was placed

¹¹ Indra J. Singh- Indian prison, p.17

¹² ibid at 18

¹³ A. L. Basham f.N.11 (Supra) cited by Indra. J.Singh in Indian Prison at p.19

¹⁴ Indian prison p.20

¹⁵ V. Ramachandra Dikeshitar 'The Mauryan Policy', Madras University Historical Series No 21 1953 at pp.172-173 cited by Indra J.Singh in Indian Prison at p.20

¹⁶ Mohd. Hamid KaraishiRajgir –revised by A.G.Ghose Director Gen. of archeology, New Delhi, 1958 - Referred to in Indian Prison Indra J.Singh at p.20

under the charge of Sannidata and he was responsible to select the sites for construction of the Jails (B.K.11 4) During king Asoka's rule, it was said, there was an unreformed prison wherein prisoners were subjected to all sorts of fiendish and traditional tortures, and it was said that no prisoner from that jail returned alive¹⁷ From the writing of Prof. V. R. Ramachandran¹⁸ it is manifest that Asoka has introduced certain prison reforms like officials' visit to the prison, once a day, or once in five days to make inquiries about the prisoners' conditions such as health, specific work and sometimes granting money for their upkeep as evident from the below cited verse “Divasa Panearatrava Bandhanistan Visodaya” Karmanakayadandenethranyagrahana Ch. II (D.K.III Ch.36)”. The Officials of the Jail ware expected to follow any violation of those rules. Some of the offence likes ill-treatment of the prisoners in the matter of ration and bedding, transfer of prisoners to another jail without proper reasons and illicit intercourse with female prisoners were meted with the infliction of punishment more new then what was due.¹⁹ References can be found of amnesty given to prisoners-young, old, disabled and destitute prisoners used to be set free on birth-day of the king and on the full moon days. From Asokan inscription, it is manifest that prisoners used to be released on certain occasions like the birth of a prince, acquisition of new territory which can be found especially from fifth Rock Edict.²⁰

THE PRISON SYSTEM DURING THE MUGHAL PERIOD

Hardly means it made any emphasis that during Maghul Rule in India, the administration of Justice was according to the tenets of the Holy Quran. It is the sole and Principal source of the law of the day, Jurisprudence of Mohamadanies classified offences into the three types nearly offence against God, offence against the State, and offence against the personal property for which there prescribed four kinds of punishments, namely Head, Taxir, Quisas and Hegat (Lockup)²¹ A diligent study of the Qukeer and hagat Muslim penology discloses that imprisonment was not encouraged under the mughal laws though it remained a form of a punishment²² The Mughal state never cared to ameliorate the living conditions of the prisons,

¹⁷ Theragathna 522-4 quoted by A.L.Basham p.118 referred by Indra J. Singh in Indian Prison p.20

¹⁸ V.R.Ramachandradikshitar- Madra University History Service No. 21

¹⁹ Indra. J. Singh Indian Prison, p.21

²⁰ Corpus p.75 alen p.32 kalsivarsi cited by Indure J.Singh in Indian Prison p.21

²¹ Indra 3, Singh-Indian Prison p.32

²² Ibid

and they were neglected institutions and the prisoners had to suffer in the cell ‘ so that their crime may be washed off for peace in heaven.²³

The Prison system during the British Rule:

Ever since East Indian Company was empowered by the British Parliament in 1784 to rule, some attempts were made to bring about some reforms in the spheres of administration of Justice. At the time when the East India Company assumed the power in India, there were 143 Civil Jails, 75 Criminal Jails and 68 Mixed Jails.²⁴ An author comments that these jails were an extension of Moghal rule which were being managed by the personnel of the East India Company in their efforts to maintain peace and establish their trade”²⁵ But the plight of prisoners inside those jails was very miserable. and debasing, indeed prisoners “ were just slave labourers”. These inmates were used to be engaged in extra-mural works such as construction of the roads, and exemption was being given to such prisoners from other work inside the prison, there are some references from which it can be learnt that in two jails carpets were being manufactured, The company in the year 1856 has appointed a jail Enquiry Committees with Lord Macaulay as one of the members. After its two years problem into prison conditions of the day, it has recommended for many radical changes in the prison administration. The appointment of this Enquiry Committee can be considered as a land mark in the history of Indian penology.²⁶ The significant outcome of this Enquiry Committee is that the Prison was given differential treatment, the nature and character of the institution assumed a changed meaning, though it remained punitive basically.²⁷

The Enquiry Committee has decried the unsanitary conditions in the prisons, and ill-health of the inmates. These jails were described as ‘halls’, by many visitors which were abode of contagious diseases, and wherein the death rate was extremely high. Recommendation for good food, and clothing was made by the above enquiry committee. In order to look after sanitary conditions, health of the prisoners, and to secure efficient prison administration. I.C.S. and I.R.S. Officer were posted as Jail Superintendants. The corruption which was rampant among the Jail authorities was also severally decried by the Enquiry Committee. Having understood that the employment of prisoners in extramural labour was cause of high

²³ ibid

²⁴ Indra J.Sing- Indian prison p.23

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

death rate and had health of the prisoners, it prohibited the employment of prisoners in construction of roads, and other extramural labour.²⁸ Another significant recommendation made by the Enquiry Committee, though not with a scientific aim related to the classification of the prisoners. The Enquiry Committees suggested that a distinction has to be made between the prisoners who were imprisoned to do hard labour, from those sentenced to simply imprisonment, and it further recommended that the latter should not be compelled to work in the prisons.²⁹ A glaring lacuna in this classification was that no suggestion was made to separate Juveniles from adults and habitual offenders. The Enquiry Committee did not advert to the classification system existing in Bombay and Bengal being upon the ground of costs, further; it did not give any thought to bring in reformative measures, like religious and moral instructions, education, or any system of awards for good conduct. It also recommended that the lifers, and those convicted for longer periods should be confined in Central Prison.³⁰ Those convicts confined in the Central Prison were to be engaged in dull, monotonous and uninteresting tasks. The rationales behind this commendation seems to have been “ based upon the conception of engaging a convict of heinous crime into a trade means providing him excuses for passing time and learned skill.”³¹ As regards the administration of the prisons in India, the entire prison administration was under the sole control of the District Collector, and there was no Superintendent, but only ‘Darogah’ (Police Inspector) used to be incharge of the prison. Subsequently as there was a proliferation in Collector’s functions, Collectors could not bestow their whole attention to the matters of the Prison administration, in order to cope-up with this. Superintendents were appointed.³² During those days, some jails started factories also. It was stated that the living conditions of the prisoners in those jails were “really led to despair, ruination of mind, enervation of body, spiritual negation and even death.”³³ They were in fact, abode of misery, sorrow and terror. The death rate of the prisoners also was extremely and unusually high.

The Government of India intending to bring in ameliorative conditions in the prisons has appointed another enquiry committee consisting of some experts, in the year 1864.³⁴ A third commission, after three years was appointed, consisting of only the jail officers to inquire

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² Ibid

³³ B.S. Haikarwal-A Comperative Study of Penology Chap. VI Imprisonment, p. 29

³⁴ Ibid

into the existing prison administration³⁵, and this commission assembled to ponder over the problems pertaining to the administration of the Prisons. The fourth enquiry Commission with Dr. Walker and Lith Bridge, as members, was set up to evaluate the contemporary prison administration and the significant contribution of this commission is that it has brought out the prison Act of 1894³⁶ which is surviving seven today.

Under the Chairmanship of Sir Alexeder Cardiff, in the year 1919-20 Indian Jails Committee,³⁷ was set up. The Principal reason in appointment of this committees was that the then Indian Government felt the need to overhaul the present Jail administration as it was found lagging behind in the reformative aspect and that it remained unchanged for the past thirty year³⁸ it has been said by one of the authors in this context that “ it had failed till than to regard the prisoner as an individual, on the other hand, he was condemned as a unit in the Jail administrative machinery”³⁹ Besides this, the Indian Jails Committee was appointed to obtain recommendations to implement reformative measures replacing, the existing unfair, indecent and harsh treatment in the prisons.⁴⁰

The Indian Jails Committee, after touring all over India, Burma, Andaman, England and America, has made the infra said significant recommendations,

1. The Jails should be run by specially trained men,
2. The Superintendent of the Jails should alter be appointed from amongst the ranks or from the educational or the Police Department, who had special aptitude or training in this kind of work, or they should be drawn from the assistant surgeon’s grade, preferably. Military Assistant Surgeons Grade,
3. The Medical Officers of the Jail should be under the control of the Jail Department,
4. The Warden class should be an educated one,
5. Classification of Prisoners should be done like habitual and casuals,
6. The number of convict officers should be reduced,
7. Prisoners should not be kept separately altogether in barracks,
8. Machinery should be installed in jails,

³⁵ Indra. J. Sing. Indian Prison p.25

³⁶ Ibid

³⁷ B.S.Haikarwal-A Comparative Study of Penology-Chap.VI Imprisonment P.30

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

9. Flogging should only be restored to in cases of rioting or an attack,
10. Whatever work is taken out of the prisoners in jail, the underlying idea always should be to reform them,
11. No fetters for the sake of protection should be put on the prisoners inside the jail,
12. Prisoners with more than six months sentence should get remission,
13. Prisoners should be allowed to write and receive letters, and should also be entitled to interviews their relations,
14. Solitary confinement should be abolished,
15. Prisoners below the age of 25 should be made to read and write,
16. Libraries should be opened inside the jails,
17. Food should be more varied and less monotonous,
18. Food should be served hot,
19. Prisoners should be provided with two sets of clothing,
20. Prisoners should get some sort of help at the time of their release,
21. The system of probation should be introduced for adults and child offenders and probation officers should be appointed,
22. Juveniles should be kept separate or Borstal jails should be opened for them,
23. Prison Officers should be released on parole and parole Officers should be appointed,
24. Under trials should be kept separate and should not be made to work,
25. Non Officials visitors should be appointed to visit jails,
26. The buildings of the jails should be made and lastly it recommended that no prisoners should be sent to Andamans only the most dangerous should be allowed to stay over there.

After the Montague Chastmsford Scheme of 1821, the prison was placed under the charge of an Executive Officers, notes Minister, although, it became a provincial subject. Improvements in light of the recommendations made by the Indian Jail Committee of 1920, were made according to the needs in the respective provinces and the practice of sending prisoners to Andemans was given a go-by for some time, however, it was revised in 1932 in respect of political prisoners, ultimately owing to the widespread countrywide agitation it was abolished.⁴¹ Confinement of Prisoners in solitary cells was prohibited in the Bombay State.⁴² however, it was permitted in case of violent and turbulent prisoners with the sanction of the

⁴¹ J.M.Sethna Society and the Criminal Chap.IX The Prison System

⁴² Ibid at 269

highest authority of the prison⁴³ such a measure for the batter as one of the author remarked would indeed produce very good result on the character of the offender, and could prevent the impious crushing of the offender's spirit.⁴⁴

The Indian Jails Committee 1919-20 referred to herein before, but recommended that all the prisoners should be assigned good and ameliorating work, so as to make them self-sufficient after their release. It has also recommended the teaching of up to-date methods and techniques to prisoners. This committee has recommended to put an end to the employing of prisoners in extramural labour such as road constructions and canal constructions.⁴⁵ It was said that the Bombay State had prohibited the use of fetters except in extremely dangerous cases by the end of 1948 (47) J. M. Sethna, comments that such a wholesome consequence of such a change is welcome to all right thinking and benevolent persons.⁴⁶

M.L.Sethna, suggests, that there should be a provision enabling the Superintendent to send a reasonable portion of the prisoners' wages in the prison to his dependants. It will be pertinent to State in this context that the then Bombay State government laid down that the prisoners should be paid at the current rate of the market for his work, and the government is permitted to retain 4/5 thereof towards the food, and clothing in prison, and the remainder should be paid to the prisoners: and they were allowed to send a part of their earnings in prison to their families.⁴⁷

According to Powell J⁴⁸, significant steps were taken to ameliorate the prison conditions during 1907-27, and Borstal institutions were established, so as to separate the youthful offenders. Star classification⁴⁹ was introduced in all Indian prisons, whereby the first offenders are separated from the habitual offenders and professional offenders of serious crimes. Special Jails were also set up to confine the habitual offenders who were hitherto being confined in ordinary prisons. Advisory Boards also were constituted for the purpose of considering the prisoners sentences, and to grant release prior to the expiry of the term of imprisonment imposed. Many prisoners were released on the recommendations of the Advisory Board.

⁴³ Ibid

⁴⁴ Ibid at 269-270

⁴⁵ Ibid

⁴⁶ Ibid at 149, 270

⁴⁷ Ibid

⁴⁸ Indian Prisons p.15 cited by J.M.L.Sethna in Society and the Criminal p.372

⁴⁹ Ibid

MODERN PRISON SYSTEM IN INDIA

Prisonisation symbolizes a system of punishment and also a sort of institutional placement of under trials and suspects during the period of trial. Since there cannot be a society without crime and criminals, the institution of prison is indispensable for every country.⁵⁰

The history of prisons in India and elsewhere clearly reflects the changes in society's reaction to crime from time to time. The system of imprisonment represents a curious combination of different objectives of punishment. Thus, prison may serve to deter the offender or it may be used as a method of retribution or vengeance by making the life of the offender miserable and difficult.

The isolated life in prison and incapacity of inmates to repeat crime while in the prison fulfills the preventive purpose of punishment. It also helps in keeping crime under control by elimination of criminals from the society. That apart, prison may also serve as an institution for the reformation and rehabilitation of offenders, it is therefore, follows that whatever be the object of punishment, the prison serves to keep offenders under custody and control. The attitude of society towards prisoners may vary according to the object of punishment and social reaction to crime in a given community. If the prisons are meant for retribution or deterrence, the condition inside them shall be punitive in nature inflicting greater pain and suffering and imposing severe restrictions on inmates. On the other hand, if the prison is used as an institution to treat the criminal as a deviant, there would be lesser restrictions and control over him inside the institution.

CONCLUSION

Human rights developed systematically in India by the date knowingly day to date. In all circumstances of the different periods recognized the values and authentic importance of Human rights. The implementation of human rights of prisoners are given importance considering the administration and government policies, even though we should expect some more changes in current system of human rights to prisoners in India.

⁵⁰ wikipedia

APPROACH OF INDIAN JUDICIARY TOWARDS DEVELOPMENT INDUCED DISPLACEMENT

Shailesh Mishra*

INTRODUCTION

In the absence of any law on rehabilitation, it was expected that the judiciary will take a dynamic stance while interpreting Article 21 of the Constitution, and grant relief to the oustees. In any case, the judiciary has recognized that Article 21 incorporates certain unenumerated rights in the enumerated Right to Life, and has given it a broad interpretation to include right to life with dignity¹ and to mean more than mere survival and mere animal existence.² Right to be rehabilitated is the logical corollary of the right to life with dignity. In the absence of any enumerated right to be rehabilitated, the judiciary could correct the legislative error by recognizing the same as an unenumerated right under Article 21 and it did the same in Narmada. However, it is important to contextualize the decision to ascertain whether the expansion of Article 21 has solved the problem at hand that is, providing rehabilitation to the displaced.³

In **Waman Rao v. Union of India**⁴ a constitutional bench had observed that, “*India being a predominantly agricultural society, there is a “strong linkage between the land and the personal status in the social system.” The tip of land on which they till and live, assumes them equal justice and dignity of their person by providing to them a near decent means of livelihood.*”

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¹ *Francis Coralie v. NCT Delhi*, AIR 1981 SC 746: Justice Bhagwati observed that the right to life includes the right to live with human dignity and all that gives along with it, namely 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 and mixing with fellow human beings.

² *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180: The court observed that Article 21 means something more and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. The ambit of ‘right to life’ is wide and far reaching. It does not mean only that life cannot be extinguished as taken away but much more than that.

³ Bulbul Khaitan & Nitya Priya, Rehabilitation Of The Displaced Persons In India, 2 NUJS L. Rev. 111,115-121, (2009)

⁴ AIR 1981 SC 271

The judicial approach towards rehabilitation policy in India has been quite complex. The Supreme Court of India in several of its decisions⁵ has viewed that, It is desirable for the authority concerned to ensure that as far as practicable persons who had been living and carrying on business or other activity on the land acquired, if they so desire, and are willing to purchase and comply with any requirement of the authority or the local body, be given a piece of land on terms settled with due regard to the price at which land has been acquired from them. However, the State Government cannot be compelled to provide alternate accommodation to the oustees and it is for the authority concerned to consider the desirability and feasibility of providing alternative land considering the facts and circumstances of each case. In certain cases, the oustees are entitled to rehabilitation. Rehabilitation is meant only for those persons who have been rendered destitute because of a loss of residence or livelihood as a consequence of land acquisition. The authorities must explore the avenues of rehabilitation by way of employment, housing, investment opportunities, and identification of alternative lands. “*A blinkered vision of development, complete apathy towards those who are highly adversely affected by the development process and a cynical unconcern for the enforcement of the laws lead to a situation where the rights and benefits promised and guaranteed under the Constitution hardly ever reach the most marginalized citizens.*” For people whose lives and livelihoods are intrinsically connected to the land, the economic and cultural shift to a market economy can be traumatic.

While the apex court recognizes the fundamental right of the farmer to cultivation is a part of right to livelihood. However, in case of land acquisition, the Supreme Court ruled that the plea of deprivation of right to livelihood under Article 21 is unsustainable.⁶

With respect to property rights of the displaced the court has consistently held that article 300-A is not only a constitutional right but also a human right.⁷ However, in **Jilubhai Nanbhai Khachar v. State of Gujarat**⁸ the Supreme Court held that, *Right to property under Article 300-A is not a basic feature or structure of the Constitution. It is only a constitutional right. The principle of unfairness of the procedure attracting Article 21 does not apply to the acquisition or deprivation of property under Article 300-A giving effect to the directive principles.”*

⁵ *Chameli Singh v. State of U.P.*, AIR 1996 SC 1051, para-3,4,9 and *Samatha v. State of A.P.*, AIR 1997 SC 3297

⁶ *Lachhman Dass v. Jagat Ram* (2007) 10 SCC 448; and *Amarjit Singh v. State of Punjab* (2010) 10 SC 43).

⁷ *State of M.P. v. Narmada Bachao Andolan* (2011) 7 SCC 639 at para 62

⁸ AIR 1995 SC 142

In the case of **Ram Chand v. Union of India**,⁹ the Supreme Court stated that, “*The power to acquire private property for public use is an attribute of sovereignty and is essential to the existence of a government. The power of eminent domain was recognized on the principle that the sovereign state can always acquire the property of a citizen for public good, without the owners' consent. The right to acquire an interest in land compulsorily has assumed increasing importance as a result of requirement of such land more and more every day, for different public purpose and to implement the promises made by the framers of the Constitution to the people of India. The claims that the local population should be granted inalienable rights to their lands, where state access is subject to a mutually defined process of negotiation, are denounced.*”

In rejecting the petition of the people displaced by the Rourkela Steel Plant, their claims for employment of adult population and for a preferential right of employment in the case of **Buta Prasad Kumbhar v. SAIL**¹⁰, the Supreme Court laid down that, “*Whose land was taken under the Land Acquisition Act, They were paid compensation for it. Therefore the challenge raised on violation of Art 21 is devoid of any merit*”. The Constitutional mandate that a deprivation of life, i.e. livelihood and dignity, will have to be only by the procedure established by law was believed to be fulfilled by applying the Land Acquisition Act.

In case of **Banwasi Seva Ashram v. State of Uttar Pradesh & Others**¹¹ the initial purpose of evicting the residents of several villages by the state Government was the creation of a Reserve Forest. The Supreme Court ordered for appointment of a Committee to look into the claims of the locals. On finding that the Committee, so established, was biased, another order was issued to substitute that Committee with another one. In the meantime, the government thought of changing the entire purpose of the project to set-up a Thermal Power Plant (Rihand Super Thermal Power Plant), instead of creating a Reserve Forest, as proposed by the National Thermal Power Corporation (NTPC), on the lands which were subject matter of the writ petition. NTPC got itself impeded

⁹ 1994 SCC (I) 44, at 49-50

¹⁰ (1995) 2 SCC 225

¹¹ On the basis of a letter received from Banwasi Seva Ashram operating in the Mirzapur District of Uttar Pradesh protesting against the non-observance of procedures established by law and for non-accommodation of interests of the local communities including tribals in the process, a Writ Petition (Criminal) No. 1061/82 under article 32 of the Indian Constitution was registered, AIR 1992 SC 920, para 1

as a party in the writ petition and claimed that the completion of the project was a time-bound programme and the land earmarked for the project be made free from prohibitive directions of this court in the writ petition.

While noting the importance of the forests as a national asset, the court agreed with the proposal of the government to embark upon a scheme to generate electricity as equally of national importance and to be taken up on a priority.

In **B D Sharma v. Union of India**,¹² it was ruled that, “*The overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of oustees. They should be rehabilitated as soon as they are uprooted.*”

In **Narmada Bachao Andolan**¹³ case the apex court speaking about displacement observed,

“*The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than those they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress.*”

Similarly, in **State of Kerala v. PUCL, Kerala State Unit**¹⁴ the apex court held that,

“*Article 21 deals with right to life and liberty. Would it bring within its umbrage a right of tribals to be rehabilitated in their own habitat is the question? If the answer is to be rendered in the affirmative, then, for no reason whatsoever even an inch of land belonging to a member of Scheduled Tribe can ever be acquired. Furthermore, a distinction must be borne between a rights of rehabilitation required to be provided when the land of the members of the Scheduled Tribes are acquired vis-a-vis a prohibition imposed upon the State from doing so at all.*”

In **N.D. Jayal and another v. Union of India**¹⁵ the court held that, “*The right to development encompasses in its definition the guarantee of fundamental human rights. Thus,*

¹² 1992 Supp (3) SCC 93

¹³ *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751

¹⁴ AIR 1998 SC 1703

¹⁵ (2004) 9 SCC 362

the courts have recognized the rights of the oustees to be resettled and right to rehabilitation has been read into Article 21.”

Thus, from the above judgments, it is evident that acquisition of land does not violate any constitutional/fundamental right of the displaced persons. However, they are entitled to resettlement and rehabilitation as per the policy framed for the oustees of the concerned project.

REHABILITATION POLICY DECISIONS

In the year 1986, in the matter of **The Collector of 24 Parganas & others v. Lalit Mohan Mullick & others**¹⁶ while defining the meaning of “rehabilitation”, the Supreme Court highlighting the object of rehabilitation observed as:

“By rehabilitation what is meant is not to provide shelter alone. The real purpose of rehabilitation can be achieved only if those who are sought to be rehabilitated are provided with shelter, food and other necessary amenities of life. It would be too much to contend, much less to accept, that providing medical facilities would not come within the concept of the word rehabilitation.”

In **B.D. Sharma v. Union of India**,¹⁷ it was ruled that, *“The overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of ousted. They should be rehabilitated as soon as they are uprooted. Further, the Court provided a time frame by which the rehabilitation must be complete: before six months of submergence. Such a time limit fixed by the Court was reiterated in the Narmada's case.”*

In the matter of **Narmada Bachao Andolan v. Union of India**¹⁸ the Supreme Court noticed that displacement of people living on the proposed project sites and the areas to be submerged is an important issue and a properly drafted R&R plan would improve the living standards of displaced persons after displacement, and held:

“Displacement of people living on the proposed project sites and the areas to be submerged is an important issue. Most of the hydrology projects are located in remote and inaccessible areas, where local population is, like in the present case, either illiterate or having marginal

¹⁶ AIR 1986 SC 622, para 13

¹⁷ 1992 Supp (3) SCC 93

¹⁸ (2000) 10 SCC 664, para 241

means of employment and the per capita income of the families is low. It is a fact that people are displaced by projects from their ancestral homes. *Displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for the larger good.* A natural river is not only meant for the people close by but it should be for the benefit of those who can make use of it, being away from it or nearby. *Realizing the fact that displacement of these people would disconnect them from their past, culture, custom and traditions, the moment any village is earmarked for takeover for dam or any other developmental activity, the project-implementing authorities have to implement R&R programmes. The R&R plans are required to be specially drafted and implemented to mitigate problems whatsoever relating to all, whether rich or poor, landowner or encroacher, farmer or tenant, employee or employer, tribal or non-tribal. A properly drafted R&R plan would improve the living standards of displaced persons after displacement.”*

In **State of Punjab v. Raam Lubhaya Bagga**¹⁹ the Supreme Court while examining the state policy fixing the rates for reimbursement of medical expenses to the government servants held, “When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints. *For every return there has to be investment. Investment needs resources and finances. So even to protect this sacrosanct right finances are an inherent requirement. Harnessing such resources needs top priority. No State of any country can have unlimited resources to spend on any of its projects. That is why it only approves its projects to the extent it is feasible.*”

With respect to rehabilitation and resettlement of the government, the court viewed that “*judiciary cannot strike down a policy decision taken by the government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless*

¹⁹ (1998) 4 SCC 117, See also, *Ram Singh Vijay Pal Singh v. State of U.P* (2007) 6 SCC 44; *Villianur Iyarkkai Padukappu Maiyam v. Union of India* (2009) 7 SCC 561; and *State of Kerala v. PUCL* AIR 1998 SC 1703

*the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power.*²⁰

Therefore, considering the above judgments it emerges to be settled principles of law that the government has authority under law to change the R & R policy on the basis of ground realities. A public policy cannot be challenged through public interest litigation where the state government is competent to frame the policy and there is no need for anyone to raise any grievance even if the policy is changed. The public policy can only be challenged where it offends some constitutional or statutory provisions ‘as far as possible’.

Interpreting the aforesaid phrase the court observed that the phrase provides for flexibility, clothing the authority concerned with powers to meet special situations where the normal process of resolution cannot flow smoothly. The phrase can be interpreted as not being prohibitory in nature. The said words rather, connote a discretion vested in the prescribed authority. It is thus discretion and not compulsion. There is no hard and fast rule in this regard as these words give discretion to the authority concerned. Once the authority exercises its discretion, the Court should not interfere with the said discretion/decision unless it is found to be palpably arbitrary.²¹

In **N.D. Jayal v. Union of India**²² Supreme Court held that, “*Rehabilitation is not only about providing just food, clothes or shelter. It is also about extending support to rebuild livelihood by ensuring necessary amenities of life. Rehabilitation of the oustees is a logical corollary of Article 21. The oustees should be in a better position to lead a decent life and earn livelihood in the rehabilitated locations.*”

In the matter of **State of Madhya Pradesh v. Narmada Bachao Andolan & Other**,²³ the Supreme Court has clearly held that the land oustees are entitled to resettlement and rehabilitation as per the policy framed for the oustees of the project concerned and observed:

“It is evident that acquisition of land does not violate any constitutional / fundamental right of the displaced persons. However, they are entitled to resettlement and rehabilitation as per the policy framed for the oustees of the project concerned.”

²⁰ *Iridium India Telecom Ltd. v. Motorola Inc.*, AIR 2005 SC 514; and *High Court of Judicature for Rajasthan v. Veena Verma*, AIR 2009 SC 2938

²¹ *State of Kerala v. PUCL, Kerala State Unit* (2009) 8 SCC 46

²² 2003 Supp(3) SCR 152

²³ (2011) 7 SCC 639

As a result of judicial pronouncement UPA²⁴ Government made the proposal to repeal the inadequate land Acquisition act, 1894. As such to find solution to the issue of rehabilitation ad resettlement a unified legislation came into force since 1st January 2014. The Right to fair Compensation and Transparency in Land Acquisition, rehabilitation and Resettlement Act deals with the both acquisition and rehabilitation and resettlement in the process of acquisition.

Thus, it is evident that this phrase simply means that the principles are to be observed unless it is not possible to follow the same in the particular circumstances of a case.

BARTER OF LAND

In **Gramin Sewa Sanstha v. State of M.P. & Others**,²⁵ Court held that, “We are also informed that though land has been earmarked by the State Government for resettlement of the displaced tribals, such land is not available because it is already occupied by other persons who themselves will be uprooted if such land is acquired and made available for the tribals displaced on account of the Hasdeo Bango Dam Project. If this is true, the remedy might be worse than the disease because in order to re-settle one set of displaced persons the State Government would be displacing another set of persons. We would, therefore direct the State Government to consider in the meanwhile as to whether the cultivable land at any other place or places can be made available for the tribals who are displaced on account of the present project.”

In **State of Kerala v. Peoples' Union for Civil Liberties**,²⁶ the Supreme Court of India held that, “While allotting land to the members of the Scheduled Tribes, the State cannot and must not allot them hilly or other types of lands which are not at all fit for agricultural purpose. *The lands, which are to be allotted, must be similar in nature to the land possessed by the members of the Scheduled Tribes. If in the past, such allotments have been made, as has been contended before us by the learned counsel for the respondent, the State must allot them other lands which are fit for agricultural purposes.* Such a process should be undertaken and completed as expeditiously as possible and preferably within a period of six months from displacement date.”

²⁴ The United Progressive Alliance (UPA) is a coalition of centre-left political parties in India formed after the 2004 general election and remained in power till 2014.

²⁵ 1986 Supp SCC 578, para 2

²⁶ (2009) 8 SCC 46

Similarly, in **Narmada Bachao Andolan v. Union of India**²⁷, the court observed that, “*When the removal of the tribal population is necessary as an exceptional measure, they shall be provided with land of quality at least equal to that of the land previously occupied by them and they shall be fully compensated for any resulting loss or injury.* The rehabilitation package contained in the Award of the Tribunal as improved further by the State of Gujarat and the other States *prima facie* shows that the land required to be allotted to the tribals is likely to be equal, if not better than what they had owned.”

It has been observed that during resettlement the displaced persons encounter several problems relating to the location, quality and quantity of land and other ancillary resources necessary for agricultural activities. Sometimes disputed lands are allotted and at times authorities take long time allocate land.²⁸

PAYMENT OF COMPENSATION

Compensation means anything given to make the things equivalent; a thing given to or make good for loss. The term ‘compensation’ is used to indicate what constitutes or is regarded as equivalent or recompense for loss or privation.²⁹ On the other hand, constitute sum of money claimed or adjudged to be paid as compensation for loss of injury sustained, the value estimated in money of something lost or withheld. The term ‘compensation’ etymologically suggests the image of balancing one thing against the other.³⁰

Mere payment of compensation to the displaced may not be enough. Where the displaced is not able to purchase the land after getting the compensation; it is like having nothing at all.

The question of the quantum of compensation payable by the Government for the property acquired has been one of the most controversial aspects over the years. Under the normal circumstances, the compensation must be just (value and normal measure of a just value is the market price). It was on the basis that in **State of W.B. v. Mrs. Bela Banerjee**,³¹ the Court held that: To be just compensation one must pay the market value as on the date of acquisition together with compensation for being deprived of property.

²⁷ (2000) 10 SCC 664., See also *Gramin Sewa Sanstha v. State of M.P.*, 1986 Supp SCC 578; *State of M.P. v. Narmada Bachao Andolan* (2011) 7 SCC 639; *State of Kerala v. PUCL, Kerala State Unit* (2009) 8 SCC 46

²⁸ *K. Krishna Reddy v. Sp. Dy. Collector, land Acqn.*, AIR 1988 SC 2123.

²⁹ Dr. Awasthi’s, ‘Law of Land Acquisition and Compensation’, 14, (2008)

³⁰ *id*

³¹ AIR 1954 SC 92; AIR 1954 SC 170.

In **Food Corporation of India v. Makhan Singh**,³² it was observed by court that, the Court must take into consideration the market value of the land on the date of publication of notification under sub- section (1) of section 4 of the land acquisition Act 1894. This is the reason why Courts have looked for comparable sales of lands at or close to the date of the notification. Somewhere in the process, where difficulties crop up, the Courts employ the rule of thumb, since compensation has to be assessed and arms cannot be raised in despair. *It is the bounded duty of the Court while ascertaining compensation to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it; even if it be a public corporation set up for public needs.*

In **K. Krishna Reddy v. Spl. Dy. Collector, Land Acqn. Unit II, LMD Karimnagar**,³³ the Supreme Court of India expressed grave concern on the issue observing:

"After all money is what money buys? What the claimants could have bought with the compensation in 1977 cannot do in 1988. Perhaps, not even half of it. It is a common experience that the purchasing power of rupee is dwindling with rising inflation. The Indian agriculturists generally have no avocation. They totally depend upon land. If uprooted, they will find themselves nowhere. They are left high and dry. They have no savings to draw. They have nothing to fall back upon. They know no other work. They may even face starvation unless rehabilitated."

In **Suresh Kumar v. Town Improvement Trust Bhopal**³⁴ the Supreme Court has been observed that:

"In determining the amount of compensation the Court should not only look at the present use to which the land has been put to, but also the probable uses of the land. The agreement between government and claimant cannot defeat the statutory right of compensation. Another interesting aspect with regard to the payment of compensation is whether the claimants are entitled for compensation under the provisions of the Act, when the assigned lands are resumed by the Government for a public purpose. There was a dichotomy of judicial opinion on this point." However the legal position was finally settled in the case of LAO-Cum-

³² 1992 SCR (2) 615

³³ AIR 1988 SC 2123

³⁴ 1989 SCR (1) 908

Revenue Divisional Officer, **Chevella Division & Orsection v. Mekala Panda & Orsection.**³⁵

In **Pawan Bawri v. State of Meghalaya and Others**³⁶, the apex court has held that where the acquisition proceedings under the old Act were pending on the date of commencement of the LARR act 2013, section 24 of the new Act shall govern the pending acquisition proceedings.

CONCLUSION

Development qualifies to be an integral part, when it comes to accessing the efficiency of the National economy. However, this term '*development*' has to be understood from a wider perspective that is along with economic development, there has to be parallel human development. The same idea is being reiterated at length in this study focusing upon the agony of the development induced displacement people.

An analysis of the cases reveals that the courts have given decisions that helped in legitimizing government's abuse of power. Thus, even though the court granted formal rights by expanding the scope of Article 21, it desisted from applying the same to real fact situations such that the abstract could be contextualized.

³⁵ AIR 2004 AP 250

³⁶ 2014 CC 6721/2014, para 16

CYBER LAUNDERING: AN OBSTACLE IN TRANSPARENCY AND ACCOUNTABILITY OF INDIA

Nidhi Tewari & Srishti Vaishnav

INTRODUCTION

The advent of digital technology has made the world interconnected and has made the entire economy of a nation or a world at large increasingly reliant upon a single, network infrastructure called-*the Internet*. Although, it offers tremendous opportunities to many industries like, financial, telecommunications, health, and transportation but, it can create serious security issues if appropriate preventive measures are not taken. The nature of cyber space is such that, regulating and controlling it completely is not possible. It is for this very reason many crimes such as theft, fraud and extortion can occur in greater magnitude within a few seconds and the feature of anonymity, sometimes, makes it impossible to reach the offender. Thus, the new network-mediated economy paradoxically presents unparalleled opportunities for the creation of good outcomes or the perpetuation of bad ones.

One such internet crime is, Cyber Laundering. It is money laundering through internet i.e. it is a new way to hide the illegally obtained money and integrating it in the mainstream economy as legitimately earned money. Its advance technological nature has eliminated the need for time and space as compared to the traditional way of money laundering. Money laundering in any form imposes a serious threat to the nations' economy but cyber laundering imposes an increased threat as in a virtual space, where identities can be easily hidden or changed, it becomes a difficult task for enforcement authorities to control the same. The reasons to take serious and immediate measures against Cyber Laundering are numerous for example, over throwing governments, turning black money into white money, financial frauds, hiding the source of income, drug dealing and black market of weapons of mass destruction and last but not the least it is because of the gains involved in this business.

Since it is 'world wide web', the preventive measures should also be such which covers the complete world. Governments of the world are working towards preventing cyber laundering. They have come up with various combating mechanism at international level which will be dealt with in this paper. At national level, India has laws to curb money laundering but, there is no specific provision regarding cyber laundering.

The authors, through this paper, will deal with the concept of cyber laundering in detail and discuss the combating mechanism at both, national and international level. Suggestions to improve the present condition will also be put forth.

MONEY LAUNDERING AND ITS STAGES

Prior to taking a leap into what cyber laundering is, the understanding of the concept of money laundering and how it is carried on is vital. In simple words money laundering is the process by which black money is converted into white money.

Black money is the generic term used for the money acquired through illegal sources, which range from tax evasion to terrorism. Since the money has been acquired through illegal means, it is not accounted for and hence, kept hidden because transactions can be traced back to the illegal source. To save themselves from the apprehended trouble, the black money holders adopt the method of money laundering.

It is like washing all the dirt off the money and hence, the term ‘laundering’ is used. It is a process, which builds an illusion that the black money was acquired through a legitimate source. To make the meaning more lucid and specific, we will use the definitions of money laundering.

The first one is given by ***International Compliance Association*** and it states: Money laundering is the generic term used to describe the process by which criminals disguise the original ownership and control of the proceeds of criminal conduct by making such proceeds appear to have derived from a legitimate source.¹

The second is the definition listed in the ***Business Dictionary***: Money Laundering is the Legitimization (washing) of illegally obtained money to hide its true nature or source (typically the drug trade or terrorist activities). Money laundering is effected by passing it surreptitiously through legitimate business channels by means of bank deposits, investments, or transfers from one place (or person) to another.²

¹ *What is money laundering?* (2016) Available at: <http://www.int-comp.org/careers/a-career-in-aml/what-is-money-laundering/> (Accessed: 2 April 2016)

² Web Finance, ‘What is money laundering? Definition and meaning’, in Available at: <http://www.businessdictionary.com/definition/money-laundering.html> (Accessed: 1 April 2016)

And, the third is the one used by **INTERPOL**: INTERPOL's definition of money laundering is: "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources".³

All three definitions point out that there are three main components:

1. Source used is black money
2. There is a process to make the black money appear as white money
3. The product is white money, or to be more specific, black money with an appearance of white money

The source and product are, both, clear and palpable. What attracts curiosity is the process and therefore, we shall now be dealing with the process in detail.

Stages of Money Laundering:

The process of money laundering, conventionally, has three main stages:

1. Placement
2. Layering
3. Integration

Figure 2.1⁴



Placement: It is the first step, i.e. the step, which introduces the black money into the financial system. Generally, this stage serves two purposes: (a) it relieves the criminal of holding and guarding large amounts of bulky cash; and (b) it places the money into the legitimate financial system. It is during the placement stage that money launderers are the

³ 2016, I. (2016) *Money laundering / financial crime / crime areas / Internet / home*. Available at: <http://www.interpol.int/Crime-areas/Financial-crime/Money-laundering> (Accessed: 8 April 2016)

⁴ *Money-laundering cycle* (2007) Available at: <https://www.unodc.org/unodc/en/money-laundering/laundrycycle.html> (Accessed: 18 March 2016)

most vulnerable to being caught. This is due to the fact that placing large amounts of money (cash) into the legitimate financial system may raise suspicions of officials.⁵

There are a number of methods, which are adopted to introduce the dirty cash into the financial system. Some of them are as follows:

1. Loan Repayment – Repayment of loans or Credit bills with the illegal proceeds
2. Gambling – Using black money for the purchase of gambling chips or placing bets/wagers on sports events
3. Currency Smuggling – Physical movement of illegal cash over and across borders
4. Currency Exchanges – Purchasing Foreign money with illegal funds through foreign currency exchange
5. Blending Funds – Using a legitimate cash focused business to co-mingle dirty funds with the day's legitimate sales receipts⁶

The above listed methods are mere illustrations. The black money holders come up with new tips and tricks to launder the dirty cash and the innovation is unparalleled.

Layering: Once the money is introduced in the financial system, the second stage of layering comes into picture. Layering, basically, comprises of certain transactions, which conceal the illegal source of the money introduced. There are multiple transactions done in order to hide the actual source of the dirty money. The transactions act as layers to camouflage the illegal origin and hence, this stage is called layering.

Layering can be done through all or any of the following methods:

1. Sending funds to different onshore and offshore banks
2. Creating complex financial transactions
3. Loans and borrowing against financial and non-financial assets
4. Letters of credit, bank guarantees, financial instruments et cetera
5. Investment and investment schemes
6. Insurance products⁷

⁵ *bout business crime solutions - money laundering: A Three-Stage process* (2015) Available at: https://www.moneylaundering.ca/public/law/3_stages_ML.php (Accessed: 25 March 2016).

⁶ *Ibid* Note 5

⁷ Renner, P. (2012) *What is money laundering?*. Available at: <http://kycmap.com/what-is-money-laundering/> (Accessed: 25 March 2016).

Integration: Post layering, comes the final stage of money laundering – Integration. Integration refers to the acquirement of the money, which has been generated through the transactions under the second stage. Here, the illegal proceeds are reintroduced in the legitimate financial system. This gives it an appearance of having been acquired through legitimate means. The money, hence, comes back to the criminal and can be used in any way he fancies. Again, there are several ways in which it can be done, for example:

1. Buying business
2. Investing in luxury goods
3. Buying commercial property
4. Buying residential property⁸

There are many different ways in which the laundered money can be integrated back with the criminal; however, the major objective at this stage is to reunite the money with the criminal in a manner that does not draw attention and appears to result from a legitimate source.⁹

There are three stages, but together they form one single transaction of money laundering. Also, it should be noted that the entire transaction is impossible to execute without the involvement of banks. Banks are doing business as a service industry and as an intermediary in formal sector dealings in finance. Entry of cash into the financial system requires banking services. A bank's source of funds are deposits received from depositors in return for various kinds of services and placement of funds for exchange of value (sale of goods and property) and land in banking accounts.¹⁰

Banks are the most widely used institutions because of the advantages they offer. These advantages are convenient, accessible and safe for money launderers to use banks and to access to International payment system, which offers them the ability to transfer money through modern electronic methods instead of using the traditional methods.¹¹

⁸ *Ibid Note 7*

⁹ *About business crime solutions - money laundering: A Three-Stage process* (2015) Available at: https://www.moneylaundering.ca/public/law/3_stages_ML.php (Accessed: 26 March 2016).

¹⁰ Kidwai, A.J. (2006) 'Money laundering and the role of banks', *Pakistan Horizon*, 59(2), pp. 43–47. doi: 10.2307/41394125.

¹¹ *The positive and negative role for banks in money laundering operations* (2012) Available at: <http://www.cscandia.net/index.php/css/article/view/j.css.1923669720120805.1742/3111> (Accessed: 30 March 2016).

Having understood what money laundering is and how it is carried out, we shall now proceed to discuss what cyber laundering is.

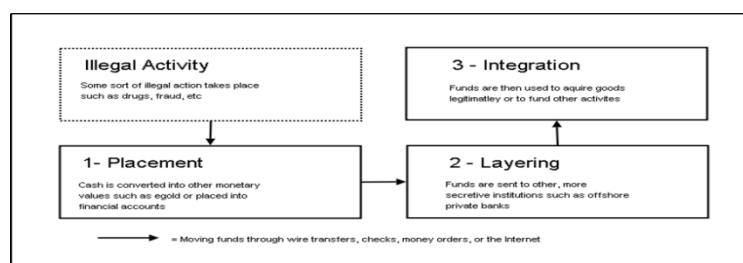
CYBER LAUNDERING: MEANING AND STAGES

The advancement of technology has benefitted everyone, including criminals. Fiscal transactions, as it is, are complex and cash transactions are difficult to trace. The conventional methods of monetary transactions are barely used nowadays. Most of the people, who have an access to Internet, prefer executing transactions over cyberspace. As already discussed in the previous chapter, to wash the filth off the dirty money, a number of transactions are performed using that money. Now, with the help of online transactions, money laundering is also carried out. This form of money laundering is popularly called as cyber laundering.

Cyber laundering can be defined as: utilizing Internet-based electronic wire transfer methods, such as Internet banking or online gambling, in furtherance of disguising the source of illegally obtained money.¹²

To break it down in simple words, money laundering executed over cyberspace is cyber laundering. Sometimes, it is also referred to as cyber money laundering.

The stages of cyber laundering, obviously, are similar to that of traditional money laundering. The different lies in the modes adopted.



Placement: As already discussed in the previous chapter, this stage involves the introduction of dirty money in the financial system. The traditional methods have already been enumerated and in cyber laundering, the placement is done through internet transactions and e-cash. E-cash is Electronic cash. Examples include prepaid cards, payment cards, special electronic checks from electronic bank accounts; micro-payments, anonymous cash, also

¹² Stephen Jeffrey Weaver, Modern Day Money Laundering: Does the Solution Exist in An Expansive System of Monitoring & Record Keeping Regulations?, 24 Ann. Rev. Banking & Fin. L. 443, 444 (2005).

coupons, scrip, smart cards as well as debit cards and electronic wallets.¹³ There are various e-cash service providers and the most popular ones are google checkout and paypal. The reason why e-cash or internet transactions are used is that it provides for anonymity. The identity of the one making transactions is protected and the transactions go undetected.

Layering: Traditionally, layering involves a number of complex transactions to hide the source of black money. Because a high number of transactions are involved, there is a risk of exposure at one level or the other. In this reference, cyber laundering provides for a much safer platform. The launderers have made the optimum use of internet services to bring layering into effect. The launderer usually finds an institution, such as an online gambling site that will permit him to set up an account without physical verification or documentary identification. This makes it extraordinarily difficult for enforcement authorities to trace the account back to the cyber launderer. Furthermore, the internet provides near instantaneous transfer of funds which can occur anywhere in the world, as the only requirement is to possess an internet connection. Online bank transfers are particularly difficult to trace back, particularly where there is use of disguised IPs etc.¹⁴ As the money moves from one transaction to another, it becomes more and more difficult to trace its source, and hence, cyber laundering is being practiced far and wide.

Integration: Mingling the ‘clean’ money back into the system so that the investor can gain it back is, again, a complicated process. Cyberspace, however, makes it easier. Internet gambling, online casinos, pre-paid debit cards and virtual economies are a few ways adopted by the launderers to regain their money back. For instance, a launderer could setup an online gambling site and transfer illegal funds, mixing it with the proceeds of the site itself. The funds then appear legitimate to authorities tracing the audit trail of the profits. In fact, the launderer could use legitimate bankers and lawyers at this stage, without too much hassle. Other modes of integration include using debit cards issued by offshore banks to make purchases online, fake loans from offshore companies, or simply executing a traditional integration measure, like purchase of real estate, online.¹⁵

¹³ *The definition of e-cash - electronic cash* (no date) Available at: http://www.itvdictionary.com/definitions/e-cash_definition.html (Accessed: 1 April 2016).

¹⁴ Jonathan P. Straub, The Prevention of E-Money Laundering: Tracking the Elusive Audit Trail, 25 Suffolk Transnat'l L. Rev. 515, 522 (2002)

¹⁵ Steven Philipsohn, The Dangers of New Technology – Laundering on the Internet, 5 J. Money Laundering Control 87 (2001).

A merely reading of the stages of traditional and cyber money laundering makes it so evident that the use of internet has given the crime of money laundering new dimensions and made it easy for the criminals to camouflage and money, but extremely difficult for the authorities to trace the transactions. It is discernable why cyber laundering cases have increased by leaps and bounds in the last one decade and there is an urgent need to keep a check on the issue, in order to keep the nation away from the perils of fiscal crisis.

THREATS DUE TO CYBER LAUNDERING

Money laundering (whether in physical form or through cyber space) can impose following threats-

Terrorism Financing: To combat terrorism, it is necessary to destroy support systems that aid execution of a terrorist attack. This would include the financing of terror groups, which is usually done using laundered money. The scale of the problem came to light immediately after the September 11, 2001, attack on the World Trade Centres in New York. Terrorists themselves are not too concerned about disguising the origin of the money, but rather on concealing its destination and purpose. The widespread availability of the internet provides a convenient method for terrorist organizations to transfer funds, both illegal and legal, to cells across the globe.¹⁶

Fuel for Organized Crime: The concept of money laundering is applied mainly to carry out organized crime like drug trafficking. With most countries having strict laws on drug control, money collected from the sale of drugs will always need to be laundered. Large-scale drug traffickers face a unique problem of managing large sums of cash, much of it in small bills obtained from the payments made by customers and therefore, they tend to launder the amount so earned.

Corruption: Corrupt public officials have to launder their illegal money earned through bribes, kick-backs and siphoned public funds. The famous Koda Scandal, involving money laundered by the former Jharkhand Chief Minister, Madhu Koda, is a prime example of such threats.¹⁷

¹⁶ Stephen I. Landman, Funding Bin Laden's Avatar: A Proposal for the Regulation of Virtual Hawalas, 35 Wm. Mitchell L. Rev. 5159, 5169-5171 (2009).

¹⁷ News Report, Madhu Koda and Associates Laundered a Staggering Rs. 3356 crore, INDIA TODAY, February 20, 2012, New Delhi.

Negative Impact on the Economy of the Country: Money-laundering may affect a nation's economy by increasing the rate of inflation, making the interest and exchange rates high and reducing the value of rupee.

Loss of foreign investment: Nations with weak anti-money laundering mechanism attract less foreign investors as, these countries lack to fulfil the two key requirements of such investors i.e., stable conditions and good governance.

BENEFITS OF CYBERSPACE- WHAT ATTRACTS LAUNDERERS?

- **Anonymity:**

The Internet provides a virtual world where anyone can hide his/her actual identity and pretend to be someone else. But it seems that is no longer true, since there are some legal obligations put on Internet Service Providers to record and keep log files for a long period of time. However, there are some means to circumvent them and to keep the anonymity. They include Internet Protocol (IP) spoofing, use of modem connections (every time user connects he gets different IP address), Wireless Fidelity technology which allows to abuse publicly open so called "hot spots". Also the use of encryption technology (widely available on the Internet) and many proxy servers hinders the efforts of law enforcement to catch cybercriminals.

- **No face-to-face contacts:**

The whole process of placing orders (making requests) and executing them is fully (or partially) automatic without the presence of a human factor. So in fact we can very easily pretend to be someone else each time we "visit" bank in the cyberspace. The financial institution's server checks only two things, the Login ID and the password – not the true identity of a customer and grant access. As a result, it would be harder to detect and hold up transactions related to money laundering activities

- **Speed of the transactions:**

New payment technologies permit to move funds more rapidly on long distances and make law enforcement work even more complicated.

- **Globalization process: free movement of goods, services, people and new payment technologies:**

The globalization of economy includes the necessity for people (entrepreneurs and customers) to move, invest and spend money wherever they want to. In order to achieve that with the help of developing information technology, there have emerged

new payment technologies. They allow freeing ourselves from carrying large quantities of cash, as well as to do businesses at a long distance.

- **Cross border activity: involves several jurisdictions, mutual legal assistance treaties issues:**

The on-line service provider's abode usually differs from the place where the servers are located in reality, from where these servers are administrated, or from where the client accesses the Internet and thereby involves different countries & several jurisdictions, in the case of an offence. The cooperation between law enforcement, revenue services and judiciary is one of the most difficult tasks as far as the trans-national criminality is concerned.¹⁸

MECHANISM AND WORKING OF CYBER LAUNDERING

As discussed above, the concept of cyber laundering mirrors the traditional concept of money laundering. However, the method in which the money is laundered varies in the virtual space. Cyber laundering has eliminated the physical effort of actually transporting currency as was the case with classic methods which included, flying hard cash out of one country and depositing it in a foreign bank, bribing a bank teller, discretely purchasing property, or for "smurfs" to deposit small cash amounts at a bank to avoid reporting requirements.¹⁹

These methods have now evolved with advent of cyber laundering. Now, the goal of any mechanism applied by the launderer is to convert one liquid asset into another asset, which is preferably in a less liquid form. This helps in making the identification of the source of the acquisition as difficult as possible. In cyber laundering, the principle followed is "dispositional imperative" of money, which treats money only as medium of exchange and not an end in itself. According to it, it is useless to keep money as a product in itself, and needs to be "disposed" to yield any benefit to the holder.²⁰

Mechanism and techniques carried out by cyber launderers largely focus on two aspects-

¹⁸ Wojciech Filipkowski, Cyber Laundering: An Analysis of Typology and Techniques, available at <http://www.sascv.org/ijcs/Wojciechijcisjan2008.pdf>, (Accessed 6th April 2016)

¹⁹ Sarah N. Welling, Smurfs, Money Laundering and the Federal Criminal Law, 41 Fla. L. Rev. 287, 290 (1989)

²⁰ Brett Watson, The Global Response To Money Laundering, available at <http://www.aic.gov.au/events/aic%20upcoming%20events/2002~/media/conferences/2002-ml/part1.pdf> (Accessed 5th April, 2016)

- 1) To legitimize illegal obtained money, 2) To dupe the enforcement authorities so as to escape without being noticed.

The mechanisms and incidents of cyber laundering can be read under two heads, firstly, the traditional mechanism and secondly, the modern approach.

TRADITIONAL APPROACH-²¹

- **Wire transfers:**

Wire transfers i.e. electronic transfers allow swift and nearly risk free channel for moving money between countries. As, on average 700,000 wire transfers occur daily in any major jurisdiction like the US, UK or India, moving billions of dollars, illicit wire transfers are easily hidden. This is often employed for bulk-cash movements across jurisdictions and into banks where the regulations are not so strict.

- **Cash incentives business:**

Any business typically involved in receiving large cash inflows will use its accounts to deposit both legitimate and criminally derived cash, claiming all of it as legitimate earnings, as the source of the funds is difficult to trace when payments are made in cash. Any service-based online business is best suited for such a mechanism of laundering as the source of the funds is difficult to trace when payments are made in cash.

One such example is **Online Casinos**. They are the hotbed for cyber laundering activities. Cash may be taken to a casino to purchase chips which can then be redeemed for a casino cheque. Person could deposit cheques in the bank account and claim it as gambling winnings. For this amount, he would have to pay a negligible amount of tax as compared to his total illegal earning. Hence, the illegal money is easily integrated with the mainstream economy. Moreover, non-requirement of physical cash in the whole process has made this mechanism all the more viable for launderers. E-cash can be used and later converted into legitimate physical earnings.²²

²¹ Jagdish Menzes, Cyber Laundering: The new Internet Crimes, available at- <http://thegiga.in/LinkClick.aspx?fileticket=pxlb4qgFTw%3D&tabid=589> (Accessed: 4th April, 2016)

²² Financial Action Task Force, Report on the Vulnerabilities of Casinos and the Gaming Sector, 1 February 2012, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf> (Accessed: April 5 2016)

Having a physical address over the internet does not really mean that something exist there. Due to huge financial support from the criminals these online casinos sometimes operates anonymously without the need to have a physical address (IP-address) and to register this anonymity on the internet the owners of the online casino pays huge monthly and annual fees to the government of that country. Due to the non-existent background checks by the jurisdiction of these online casinos website it is difficult to regulate this market to restrict Cyber laundering.

- **Trade Base Laundering**

In order to disguise the movement of illegal funds through trade based transactions, under-valuing or over-valuing of invoices could be done. Similarly, in cyber laundering invoices can be quickly created and easily tampered so as to adjust illegal amounts with legal payments.

- **Round tripping**

In this mechanism, money would be deposited in a controlled foreign corporation offshore, such as in a tax haven with minimum regulatory requirements, and then shipped back as foreign direct investments, exempt from taxation.²³ In respect of cyber laundering, all jurisdictions allowing related transactions to be done in electronic form would be preferred by the launderers.

- **Shell companies / Black Salaries / Fictitious Loans**

Shell companies are meant to disguise the true beneficial owner of the assets. Black salaries are either where salaries are “paid” to employees who don’t actually exist, or illegal funds are used to pay parts of the salaries of employees. Fictitious loans are advanced to launderers who “repay” them using their illegal funds. Each of these mechanisms is facilitated by moving the associated transactions online, which further disguises the identities of the beneficiaries.²⁴

Open a bank account for this shell company and you don’t even need to render service but rather use this shell company to make it appear that the services are being provided in return

²³ See the definition given by the Supreme Court of India in Vodafone International Holdings B.V. v. Union of India, (2012) 6 SCC 369, ¶105.

²⁴ Kim-Kwang Raymond Choo and Russell G. Smith, Criminal Exploitation of Online Systems by Organised Crime Groups, Asian journal of criminology 3(1) 37-59, 46 (2008).

of payment of funds that have passed through layering process. This way the wealth of the owner looks legitimate which can be said as the profit of the service provider.²⁵

- **Bank capture:**

In this, launderer buys a controlling interest in a bank and uses it at his whim mainly for the purpose converting illicit money into legal money. The advent of online banks and payment portals, like PayPal and DigiCash mean that such a mechanism can easily be moved online. Recent cases involving PayPal will be discussed later in this paper.

- **Real estate and online auctions:**

With advent of online property portal like, MagicBricks²⁷, 99 Acres²⁶ etc., money laundering through purchase of real estate has now moved online. Online auctions are another mechanism, by creating fake auctions, or grossly overstating the price or worth of goods.

MODERN APPROACH-

- **Online games:**

Online games are arguably the most notorious space for money laundering online that is available today as they provide nearly a fool proof way to disguise and move money across the jurisdictions. Multiplayer online role-playing games, called Massive Multi-player Online Role Playing Games (MMORPG), like Linden Lab's "Second Life" and Blizzard Entertainment's —World of Warcraft, are some of the examples for it. Most of these games have various opportunities for money based transactions, such as buying of virtual property, or gaming props etc. For instance, Second Life, which has approximately 21.3 million account holders globally, uses a virtual currency called —Linden dollars|| for its transactions. Although the exchange rate fluctuates, on average, approximately 100 Linden dollars is equivalent to 1 US\$. The virtual account is tied up to an actual bank account, and the daily turnover generated by the game is estimated at almost 1.5 million US\$. Earlier, digital earnings had to be converted into real currency directly through the use of virtual currency arbitrage trading websites, which was at least a small opportunity for regulators to keep an eye on transactions. But in May 2006 Entropia Universe introduced real world ATM cards to

²⁵ Mohammad Salman Jamali, Cyber Laundering,

²⁶ See <http://www.magicbricks.com/>; <http://www.99acres.com/>

its 250,000 players, allowing them to instantly withdraw hard cash from their virtual world assets. This was followed by other game developers and now the entire process is wholly outside the ambit of authorities.²⁷ Enforcement agencies find it difficult to take actions against such practices because-

- a. The transactions in the games involve small amounts that are hard to detect as they are funnelled in to a master account held by the launderer;
 - b. The digital transfer taking place need not be reported to any regulatory agency;
 - c. Jurisdiction of investigation, prosecution and enforcement authorities.²⁸
- **Online Banking:**

Online banking has created threat of cyber laundering for Online Banks in two ways-

- 1) Account holder may be carrying out the process of Cyber laundering through a phenomenon called ‘smurfing’.
- 2) Enabling people to open accounts in online banks without verifying the identities of their customers creates a greater threat which is exploited by criminals in hiding their real identities.

Online banking is regulated by the policies of the banking regulations that require knowing your customer and their business. In case of any suspicious transaction, banks are required to report it to the law enforcement agencies. The criminals can easily avoid such restrictions by opening online accounts with so many unregulated electronic banking companies that use electronic payment systems to provide online banking like functionalities with the added layer of hidden transaction. Prepaid cards provide anonymity feature which gives the criminal an edge over the physical banking systems as anonymity feature of the card helps in the layering and integrity stage of Cyber laundering.

Lack of international standard of regulation makes it difficult to regulate online banks accounts. A lot of the countries are still not cooperating with the international treaty to share

²⁷ Angela Irwin & Jill Slay, Detecting Money Laundering and Terrorism Financing Activity in Second Life and World of Warcraft, International Cyber Resilience Conference (2010), available at <http://ro.ecu.edu.au/cgi/viewcontent.cgi?article=1004&context=icr> (Accessed: April 2, 2016)

²⁸ Wendy J. Weimer, Cyberlaundering: An International Cache for Microchip Money, 13 DePaul Bus. L.J. 199, 220 (2001)

intelligence and suspicious transaction records with the member countries to monitor and control Cyber laundering.²⁹

Recent examples of Cyber Laundering:

- **HSBC Case (2012)**

This is a famous case of cyber laundering with PayPal and HSBC bank. In this case launderers created a set up through which up to \$800 million were laundered using PayPal to deposit money into HSBC. The key here was that the money launderers had a man on the inside at HSBC opening multiple fraudulent accounts and allowing large transfers without triggering AML investigations.

A normal person depositing more than \$10,000 in cash into a bank account in person has to fill out official suspicious activity reports, but a corporate account in which tens or hundreds of thousands of dollars are flowing through the account monthly avoids scrutiny as long as the bank officer establishing and managing the account within the bank reports the transactions as normal for the business involved. Now, the man on the inside of HSBC opened several corporate banking accounts for various companies. He then made some prototypic arrangements to check the working of the process set by the launderers. In the beginning, small amount of \$1 were received from PayPal which were then moved on to other accounts, just to see if the process itself works. After a grace period of 60 to 90 days the accounts were off the heightened scrutiny list of newly opened accounts. Then the payments became larger. Initially around \$10,000 a piece, and later \$200,000 to \$300,000, flowing into the HSBC client's corporate account from Paypal, and shortly after that out of the account into other accounts within and outside the bank. Because the HSBC employee involved in the scam was solely responsible for the monitoring and alerting of suspicious transactions, nobody inside or at the regulators knew about the suspicious money flows and payment patterns. There was no automatic pattern recognition software.

PayPal was particularly suited because as a corporation it exists to mask the accounts or credit card facilities from which a person pays into another account. PayPal's stated goal is to protect innocent Internet buyers for identity theft and subsequent credit card fraud. But seen through the eyes of criminal money launders, PayPal provides a convenient service for hiding

²⁹ *ibid* 7

their identities and masking where suspicious deposit transfers originate. A PayPal transfer to fraudulent account only needs to show up once – the first time the money comes into the bank. After the money is in the bank, the PayPal-derived funds can be transferred into multiple other fraudulent accounts, without PayPal being listed a second time as the source of the funds transfer.

In total, \$800 million were laundered through the scheme in six short months. The Whistleblower was fired for “poor job performance,” after, he claims, he refused to stop investigating, documenting and reporting suspicious activity he encountered almost daily in doing his job. A penalty of \$1.9 billion was imposed on HSBC³⁰

COMBATING MONEY AND CYBER LAUNDERING

International Regime

From an international perspective, there are three main institutions that are working to counter the issue of money and cyber laundering, namely, The United Nations, The Finance Action Task Force on Money Laundering and INTERPOL.

The United Nations

In 1998, UN held a special session on drug trafficking. It was then that the issue of money laundering as also identified, as it was one of the sources of finance for drug trafficking. Consequently, a number of conventions were brought into force.

The first is United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. Popularly known as the Vienna Convention was the first instrument to recognize the issue of money laundering as a crime. Article 3(v)(b)(i) and Article 3(v)(b)(ii) criminalize the financing of any of the offences covered under the Convention and attempts to disguise the source of funds used for such financing.

Although, this instrument criminalizes money laundering, it has no provisions to combat the issue of cyber laundering.

The next in row is the UN Convention against Transnational Organized Crime, 2000 or the

³⁰ Viswanatha, A. and Wolf, B. (2012) *HSBC to pay \$1.9 billion U.S. Fine in money-laundering case*. Available at: <http://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121211> (Accessed: 3 April 2016).

Palermo Convention. While the Vienna Convention dealt with money laundering related to drug trafficking, the Palermo Convention broadened the scope of the same by applying it to the proceeds of all serious crimes. Article 6 criminalizes the laundering of proceeds of crime by requiring State parties to adopt legislative and other measures against conversion or transfer of property⁴, knowing that such property is the proceeds of a crime, for the purpose of concealing or disguising the illicit origin of such property. Another interesting provision is Article 19 of the Convention, which provides for joint investigation by States for cross border offences. This provision is of significance in the context of cyber laundering, which always has an international element.

The third in row is the United Nations Convention Against Corruption, 2003. Article 23 of the Convention deals with the laundering of the proceeds of an act of corruption. Article 24 criminalizes “concealment” of property when then person involved knows that such property is the result of any of the offences under the UNCOC. Article 27 criminalizes the participation and attempt to launder money as well, while Article 28 clarifies that knowledge, intent or purpose, established from objective circumstances is required to prove the offence.

The UNCOC also has a specific provision covering cyber laundering. Article 14(3) deals with preventive measures against money laundering and requires financial institutions and money remitters include on forms for the electronic transfer of funds and related messages, certain accurate and meaningful information on the originator, maintain such information throughout the payment chain, and apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator. This provision is an excellent trend to dealing with the problem of cyber laundering.

Apart from these three major conventions, there are a couple of more instruments like the International Convention for the Suppression of the Financing of Terrorism, 1999 and The Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism, which is an ongoing program led by the UN Office on Drugs and Crime (UNODC) to assist the member nations to draft legislations, which give effect to the various adopted conventions.

Financial Action Task Force on Money Laundering: or Groupe d'action financiere (French) was established in 1989. It is an intergovernmental organization, which frames policies to combat money laundering. The main objective of the FATF is “the development

of and promotion of policies, both at national and international levels, to combat money laundering and terrorist financing.” The FATF’s primary policies issued are the Forty Recommendations on money laundering from 1990 and the 9 Special Recommendations (SR) on Terrorism Financing (TF). Together, the Forty Recommendation and Special Recommendations on Terrorism Financing set the international standard for anti-money laundering measures and combating the financing of terrorism and terrorist acts. The 2003 Forty Recommendations require states, among other things, to:

1. Implement relevant international conventions
2. Criminalise money laundering and enable authorities to confiscate the proceeds of money laundering
3. Implement customer due diligence (e.g., identity verification), record keeping and suspicious transaction reporting requirements for financial institutions and designated non-financial businesses and professions
4. Establish a financial intelligence unit to receive and disseminate suspicious transaction reports, and
5. Cooperate internationally in investigating and prosecuting money laundering

In 2012 February, the SR VIII or Recommendation 8 was introduced by FATF, which includes new rules on wire transfers. The FATF, hence, has proved to be the most competent organization, which deals with the issue of cyber and money laundering.

INTERPOL: INTERPOL has been working to combat money laundering through the global exchange of data, supporting operations in the field, and bringing together experts from the variety of sectors concerned. The INTERPOL General Assembly has passed a number of resolutions calling on member countries to concentrate their investigative resources in identifying, tracing and seizing the assets of criminal enterprises.

These resolutions have called on member countries to increase the exchange of information in this field and encourage governments to adopt laws and regulations that would allow access, by police, to the financial records of criminal organizations and confiscation of proceeds gained by criminal activity.³¹

³¹ 2016, I. (2016) *Money laundering / financial crime / crime areas / Internet / home*. Available at: <http://www.interpol.int/Crime-areas/Financial-crime/Money-laundering> (Accessed: 8 April 2016)

The resolutions passed by INTERPOL, however, are specifically targeted to deal with traditional money laundering and do not contain any specific provisions related to cyber laundering.

National Regime

In India, the legislation to combat money laundering is **Prevention of Money Laundering Act, 2002 (PMLA)**. The central objective of the Act was to provide for confiscation of property derived from, or involved in, money laundering. However, after the amendment in 2012, its scope has been widened to some extent. The term ‘cyber laundering’ is not defined or specified under the Act. However, going by the judicial definition of money laundering as held in the case of **Hari Narayan Rai v. Union of India** as “any process or activity by which the illicit money is being projected as untainted.”; the term ‘process’ and ‘activity’ could be widely interpreted to include the acts of cyber laundering as well. This is because the Act is concerned with the penalizing the act and not with the process. The FATF did point out several concerns with the PMLA, when India sought membership initially in 2006, including certain concerns relating to cyber laundering. On the basis of which, certain amendments have been made in the Act in 2012. But still, the Act fails to specifically address the key issue on hand i.e. cyber laundering. This is a major lacuna in the law against cyber laundering in India.

Apart from PMLA, there is Information Technology Act, 2000 (As Amended In 2008) which deals specifically with cyber-crimes. However, there is no specific provision in the Act which deals with the offence of cyber laundering. Also, the existing provisions of the Act are insufficient to prosecute a launderer under the IT Act based on even a wide interpretation.

One thing positive about the Act is that it applies to and recognizes the cross-border nature of offences. The words “computer” and “computer system”, in Section 2(i) and 2(l) respectively, have been also widely defined to include all electronic devices with data processing capability.

Section 43 deals with the civil offence of theft of data and damage to computers, computer system. There is no real scope to seek damages for cyber laundering activities under this section. Section 43-A is a more relevant provision, making a body corporate that is negligent in implementing reasonable security practices and thereby causes wrongful loss or gain to any person, liable to pay damages by way of compensation to the person so affected. The practices extend to protection of “sensitive data”, which includes password, details of bank

accounts or card details, medical records etc. Under the Rules³², in the event of an information security breach, the body corporate shall be required to demonstrate that they have implemented security control measures as per the documented information security program. These provisions and Rules thus cover civil liability and corporate responsibility.

The cyber-crimes covered under the Act are quite limited. Section 65 criminalizes tampering with source documents. Section 66 covers several computer related offences, including criminal liability for data theft covered under Section 43, when done dishonestly and fraudulently. The other offences covered from Section 66A to Section 66F, introduced by the Amendment in 2008, are sending offensive messages, dishonestly receiving stolen computer resource, electronic signature or other identity theft, cheating by impersonation using a computer resource, violations of privacy and cyber terrorism respectively. All these offences are cognizable and non-bailable.

Thus, it can be seen that no law provides specific and exhaustive provision in this regard. Apart from this legislation, there are few regulations of some statutory bodies as well. They are as follows-

- **RBI's Know-Your-Customer Guidelines:**

It was introduced by The RBI applicable to banks in India to reduce financial frauds and identify money-laundering transactions.

- **IRDA:**

It issued anti-money laundering guidelines applicable to insurers. Insurers are also required to maintain records of their transactions under these guidelines.

- **SEBI³³:**

It has issued a circular with guidelines for Intermediaries in the securities markets. The guidelines include due diligence measures (Guideline 4.1), and a detailed Know-Your-Client procedure (Guideline 5.3), with special attention to be given to all complex, unusually large transactions or patterns of transactions which appear to have no economic purpose.

³² Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

³³ Securities and Exchange Board of India, Master Circular on Anti Money Laundering (AML) Standards/Combating Financing of Terrorism (CFT) Obligations, ISD/AML/CIR-1/2008, December 19, 2008.

TUSSLE BETWEEN RIGHT TO FINANCIAL PRIVACY AND COMBATING MECHANISM

Along with the immediate need to take action against the problem of money laundering in cyber space, it is also necessary to contemplate the effects of doing so. Since the internet offers anonymity and financial privacy, any changes made in the Indian law in this regard will, directly or indirectly, affect the right of financial privacy of citizens. Thus, it would be a tough task to make a balance between the concerns of the financial privacy on the one hand and combating mechanism on the other.

PRIVACY AS REGARDS ‘CORRESPONDENCE’

The right to privacy has been recognized as an extension of the Right to Life, guaranteed under Article 21 of the Constitution.³⁴ However, data privacy as such was not discussed in these cases.

The Universal Declaration of Human Rights, Article 12, lays down that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence...” Similarly, terms are found in Article 17 of the International Covenant on Civil and Political Rights, to which India is a signatory. The focus, for the present purpose of regulations against cyber laundering, is on the term “correspondence”. The European Convention on Human Rights also stresses that “everyone has the right to respect for his private and family life, his home and his correspondence.” It goes on to prohibit interference by a public authority “except such as is in accordance with law and is necessary in a democratic society in the interests of national security....or the economic wellbeing of the country”. While the ECHR does not bind India, the approach taken therein as regards restrictions in the interest of “economic well-being” is relevant to cyber laundering. Nevertheless, it is submitted the privacy rights as regards “correspondence” do not and should not be extended to financial transactions or the documents used to execute such transactions.³⁵

FINANCIAL PRIVACY

³⁴ *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295; *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632

³⁵ Jagdish Menzes, Cyber Laundering: The new Internet Crimes, available at <http://thegiga.in/LinkClick.aspx?fileticket=xpxlb4qgFTw%3D&tabid=589>, accessed 4th April, 2016

Financial privacy specifically refers to an evolving relationship between technology and the legal right to, or at least, the public expectation of privacy of one's financial data.³⁶ This right has not specifically been declared to be part of the right to privacy in India. The IT Act has substantial emphasis on data privacy and information security, but Section 69 empowers the Government or certain agencies, to intercept, monitor or decrypt any information generated, transmitted, received or stored in any computer resource, subject to compliance with the procedure laid down. It may be exercised for security of the state and preventing incitement to the commission of any cognizable offence, both of which may be read broadly to encompass cyber laundering and terrorist financing using the internet.

The issue, with respect to India, was decided recently by the Supreme Court in the Black Money case i.e. **Ram Jethmalani v. Union of India**³⁷ wherein the court held, revelation of a person's bank account details, without establishing *prima facie* grounds of illegality violates their rights to privacy. The State could not compel citizens to reveal details of their bank accounts to the public at large, unless it had properly conducted investigations, to show wrongdoing. Thus, the Court recognized a limited right of financial privacy, which would protect transactions, unless laundering was established *prima facie*.

CONCLUSION AND SUGGESTIONS

We cannot deny that man, by nature, is ambitious. In this materialistic world, ambition ultimately means money. Sometimes, the greed overpowers everything else and then man forgets about what is right and what is wrong. For a few, money is necessary, regardless of how it is earned.

Thankfully, the government keeps a check on it. But the criminals have found ways to retain and use such illegally and illicitly earned money. Popularly known as black money, this dirty wealth is a threat to the financial system of various countries, including India. Therefore, to keep a check on the same, all fiscal transactions are monitored. The criminals have taken shelter of money laundering to make the illegal money appear as if it has been acquired through legitimate sources.

The process of money laundering involves three stages. The money is first introduced in the system, and then it goes through various channels and transactions to hide the source. And

³⁶ Benjamin E. Robinson, Financial Privacy & Electronic Commerce: Who's in my business 1-2 (2000)

³⁷ (2011) 8 SCC 1

finally, the money is returned back to the person introducing it. When reintegrated, the money appears to be clean. Time and again several international and national organizations, through conventions and legislation, have tried to address the issue of money laundering as it posed severe threat to the economies.

With the advancement of technology, the methods and modes of commitment of crimes have also advanced. Money laundering is done over cyberspace and using internet. The procedure and stages remain the same, only the interface differs. Transactions are done online, without any physical interaction. Accounts can be created and deleted. Hence, this method not only is quick and easy to operate, but also secures identity of the criminals.

It will have to be admitted that when it comes to cyber laundering, the remedies fall short. This is maybe because the transactions are too complex to decipher and too quick to trace that issue has not been addressed to adequately.

However, the treat of cyber laundering is real and the problem has to be combated at the earliest. Therefore, we put forth the following suggestions:

- All institutions involved in preventing and combating money laundering and terrorist financing, especially supervisory and law enforcement bodies, urgently need to strengthen their IT knowledge to keep up pace with criminals across the world. This includes increased training and, if needed, the hiring of former hackers,
- Criminals and terrorists can often operate largely anonymously due to lax enforcement of due diligence, in particular in areas outside the financial industry. We therefore have to introduce better ID checks with new financial instruments (e.g. prepaid storage cards), especially outside the financial sector. This could help reduce the use of anonymous payments.
- Cyber-savvy users can relatively easily avoid the tracking of their online identity by using proxy servers and software that trace anonymity. Although a certain degree of online anonymity is acceptable, especially in politically delicate regions of the world, financial operations should never be conducted anonymously. We therefore need better IP tracking to prevent criminals from hiding their online identities.
- Criminals can easily exploit the lack in international co-operation by moving from country to country. We therefore need much better international co-operation and co-ordination to prevent and combat money laundering and terrorist financing. We have

to strengthen national and international efforts and instruments aimed at combating online money laundering and terrorist financing, for example by allowing for faster exchange of information and speeding up requests for mutual legal assistance.

- Additionally, as banks play a crucial role in the process of laundering, it is important that they make schemes to implement the following:
 1. Making effective provisions for determining the true identity and beneficial ownership of accounts
 2. Understanding and tracing sources of funds
 3. Understanding the nature of the customers' business
 4. Understanding reasonable account activity

The crime of laundering is committed on various levels and hence, there should be a check on every level. It is a little difficult, but not at all impossible to combat the issue. The “objective” aspect of laundering has been covered under PMLA. However, cyber laundering should be made a specific offence under IT Act so as to make have a proper “mechanism” to combat the same. Therefore, we propose an amendment to the IT Act (by adding of Section 66G) wherein whoever commits intentionally, by use of a computer, computer system or communication device, any transfer or acquire any property or tries to disguise/conceal the true nature or source of such property is made guilty of the offence of cyber laundering and shall be punished in accordance with provisions of IT Act and Prevention of Money Laundering Act, 2000.

THE RECENT ROLBACK OF EPF REFORMS IS A GOOD SIGN OF GOOD GOVERNANCE

Aniruddh Shastree*

Abstract

The Employees' Provident fund (EPF in short) was created with the objective of instituting provident fund, pension funds and deposit linked insurance. The radical changes that were proposed recently have been suggested shuddered the hope of members of the EPF about their control over their fund kept secure with the government as their retirement kitty to rely upon. In the wake of fixed term employment and conditions that tend employees to leave their service or change employment for better prospects or employees may leave an employment to start entrepreneurship, this fund is a useful fund. Moreover EPF helps in bringing employees into organized employment sector which can help Government with a fund as well as employees to have pension from their contribution as well as interest income as a surplus. The article discusses about recent proposals in EPF and its implications.

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CURRENT ROLL BACK OF EPF REFORMS IS A WELCOME MOVE IN THE ERA OF ON CONTRACT WORK

Contract workers constituted about one-fourth of all workers in formal manufacturing in India in 2008.¹ A total of 384 million persons are employed at various levels and out of the total employed 51% are self-employed, while 33.5% are engaged as casual labour and 15.6% are employed as regular wage or salaried employees as per 66th Round of NSSO, 2009-10.² Economic globalization is undermining economic development by driving many workers into low-paid, insecure jobs.³

In the wake of rising insecurity of sustainability of jobs and fixed-term contract system, it would be tougher to keep money fixed till a person reaches age of 58, moreover need for money for basic amenities such as food, transport, rent, expenses of family members do not end with a loss of job and having a sum surplus available in these times is a blessing indeed. Hence locking money in National Pension Scheme is not a proper solution to secure income in future when the future itself has become uncertain.

On 10 February 2016, it made amendments to withdrawal rules that forbade employees resigning or retiring before the age of 58 from withdrawing the employer's share of accumulation till the employee attained the age of 58 which means even if you resign at the age of 35, you will get every rupee in your PF account provided you had completed 5 years of completed service with one or more employers and remained unemployed for 60 days from the date of resignation. So the government is telling us, if you die before 58, we will pay your family, but won't pay you if you are alive and starving.

High income inequality is nowadays accepted as a damaging force for economic development. As there are many indications of a causal link between precarious work and income inequality, this could push precarious work higher up the political agenda.⁴ In the push to make labor markets more flexible, employers adopted an agenda for transferring risks and insecurity onto workers and their families.⁵ Flexible labour markets create greater job

¹ Available at: http://www.ideasforindia.in/article.aspx?article_id=364#sthash.ltCrRtYi.puf

² Available at: <http://www.aioe.in/htm/IndustrialRelations.pdf> : p. 5

³ Available at: <http://www.thebrokeronline.eu/Articles/Low-wages-and-job-insecurity-as-a-destructive-global-standard>

⁴ Available at: <http://www.thebrokeronline.eu/Articles/Low-wages-and-job-insecurity-as-a-destructive-global-standard#t7>

⁵ Available at: <http://cepr.net/documents/publications/inequality-insecurity-2012-11.pdf>

insecurity and stress. Job security is often as important to workers as the level of wages. This insecurity could lead to lower morale and lower productivity for the firm in the long-run.⁶ It is evident that decreased economic security is also a current problem that results partially from the rise in the increasing contractual employment. The increasing mechanization of production creates a further problem of unemployment. The uncertainty of steady employment coupled with the problem of coming old age, works towards a need to produce a greater feeling of secure future than towards a feeling of economic insecurity. Currently 90% of working population is not having facility for pension or Provident fund account.⁷

What I don't question here is why management/ industrialists should not be concerned about economic insecurity of employees; it is accepted fact as of now. The reaction to the problem of job and economic insecurity can lead to the formation of labour unions in order that they might acquire a measure to control over some of the factors bearing on economic security.{India, like many other developing countries in the world, is presently witnessing rapid ageing of its population. According to World Population Prospects, UN Revision, 2006, the population of aged in India is currently the second largest in the world. Even though the proportion of India's elderly is small compared with that of developed countries, the absolute number of elderly population is on the high. There has been tremendous increase in the number of elderly population since independence in India from 20.19 million in 1951 (5.5 per cent of total population) to 43.17 million in 1981 and 55 million in 1991. According to 2001 census around 77 million populations is above 60 years which constitutes 7.5 per cent of the total population of the country. This number is expected to increase to 177.4 million in 2025. (The growth rate of the population (1991-2001) of elderly has been higher (2.89) than overall growth rate (2.02) of the total population. According to World Population Data Sheet- 2002, 4 per cent of the Indian population is in the age group of 65+ which accounts for 41.9 million. This phenomenon of growing population of senior citizens has been the result of recent successes in the achievement of better health standards and a longer span of life for our citizens. Due to this dependency ratio for the old had raised from 10.5 per cent in 1961 to 11.8 per cent in 1991; it is projected to be 16.1per cent by 2021.⁸

⁶ Available at: <http://www.economicshelp.org/labour-markets/adv-disadv-flexible-lm/>

⁷ Available at: http://planningcommission.nic.in/data/ngo/csw/csw_15.pdf : p.6

⁸ Available at: <http://yojana.gov.in/problems-of-aged.asp>

The announcement of a very sharp reduction of interest rates on small savings schemes across the board, including the Public Provident Fund⁹, Kisan Vikas Patra, Senior Citizen Savings Scheme, the Post Office Savings and the Sukanya Samriddhi Yojana. We now have a situation of something of robbing the small-saver -- PPF accounts which is a promise of an assured decent return; the government has let down the honest, hard-working Indian.

As a part of its February 16 2016, decision to revise interest rates on small savings every quarter, the interest rate on Public Provident Fund (PPF) scheme will be cut to 8.1 per cent for the period April 1 to June 30, from 8.7 per cent, at present.

Similarly, the interest rate on KVP will be cut to 7.8 per cent from 8.7 per cent, according to a Finance Ministry order. While the interest rate on Post Office savings has been retained at 4 per cent, the same for term deposits of one to five years has been cut. The popular five-Year National Savings Certificates will earn an interest rate of 8.1 per cent from April 1 as against 8.5 per cent, at present. A five-year Monthly Income Account will fetch 7.8 per cent as opposed to 8.4 per cent now. Girl-child saving scheme, Sukanya Samriddhi Account will see interest rate of 8.6 per cent as against 9.2 per cent. Senior citizen savings scheme of five-year would earn 8.6 per cent interest compared with 9.3 per cent. Post Office term deposits of one, two and three years command an interest rate of 8.4 per cent but from April 1, a 1-year Time Deposit will get 7.1 per cent, 2-year Time Deposit will earn 7.2 per cent and 3-Year Time Deposit will attract interest of 7.4 per cent. Five-year time deposit will fetch 7.9 per cent interest in the first quarter as against 8.5 per cent while the same on five-year recurring deposit has been slashed to 7.4 per cent from 8.4 per cent.

“The Sukanya Samriddhi Yojana, the Senior Citizen Savings Scheme and the Monthly Income Scheme are savings schemes based on laudable social development or social security goals. Hence, the interest rate and spread that these schemes enjoy over the G-sec rate of comparable maturity viz., of 75 bps, 100 bps and 25 bps respectively have been left untouched by the Government.” Government reduced the rates on these three schemes too by 60-70 basis points.¹⁰

⁹ Available at: <http://www.financialexpress.com/article/budget-2016/interest-rate-on-public-provident-fund-cut-to-8-1-from-8-7/227393/>

¹⁰ Available at: <http://www.hindustantimes.com/india/interest-rates-on-ppf-other-savings-to-be-slashed-from-friday/story-MI1oDmQMRg8fJuahfB1N2H.html>

Figure 1¹¹

INTEREST RATE ON SMALL SAVING SCHEMES

Instrument	Existing Rate (April 1, 2015 to March 31, 2016)	New Rate (April 1, 2016 to June 30, 2016)
Savings Deposit	4%	4%
1-Year Time Deposit	8.4%	7.1%
2-Year Time Deposit	8.4%	7.2%
3-Year Time Deposit	8.4%	7.4%
5-Year Time Deposit	8.5%	7.9%
5-Year Recurring Deposit	8.4%	7.4%
5-Year Senior Citizen Savings Scheme	9.3%	8.6%
5-Year Monthly Income Account Scheme	8.4%	7.8%
5-Year National Savings Certificate	8.5%	8.1%
Public Provident Fund Scheme	8.7%	8.1%
Kisan Vikas Patra	8.7%	7.8%
Sukanya Samridhhi Account Scheme	9.2%	8.6%

Source: Finance Ministry

Many people have currently invested in small savings schemes by millions of households across India. Lower earnings on small savings schemes could force millions of households to move their savings without the safety net of the government.



¹¹ Available at: <http://images.indianexpress.com/2016/03/small-savings-759.jpg>

What I perceive is that Government wants to give a signal that just as the government cannot bear the cost of providing for an ageing population, you will yourself find it hard to fend for your needs with higher cost of living and lower returns.

These savings are not just about the small-savers. The government also depends on this pool of money, called the National Small Savings Fund, to finance a part of its union budget. With the Government intent on pushing away that money, should the poor Indian be prepared for another hike in cess and excise in items of daily use?

In contrast, big corporate houses who have not repaid their loans are allowed to run away to foreign lands by Government. ‘Kingfisher’ Credit Suisse in its report states that Debt servicing ratios for most of the firms have deteriorated YoY. Interest cover ratios at groups such as Essar, GMR, GVK and Lanco are already under 1. Interest cover ratios at Adani and Jaypee have also fallen to less than 1.5. We believe debt servicing strain is likely to intensify further given that currently capitalised interest for most of these companies is 30- 250% higher. Moreover, 40-70% of many of these groups' debt is forex denominated, and with INR depreciation the increase in liabilities on account of the currency depreciation was larger than FY13 PAT. With the currency down another 12% YTD, debt stress should now be even higher.¹²

Debt levels at those 10 corporate groups have shot up 15% in the past year and profits continue to be under pressure are The corporates, in order of their gross debt levels, are: Anil Ambani’s Reliance ADA Group, Vedanta, Essar Group, Adani Group, Jaypee Group, JSW Group, GMR Group, Lanco Group, Videocon Group and GVK Group.¹³

The largest increases have been at GVK Power & Infrastructure, Lanco Infratech Ltd. and Anil Ambani’s Reliance ADA where the gross debt levels are up 24% from last year, according to Credit Suisse.

While many of these groups have projects, including several infrastructure projects, under construction, the net debt increase has outpaced the capital expenditure during this period, the

¹² Available at: https://doc.research-and-analytics.csfb.com/docView?language=ENG&source=emfromsendlink&format=PDF&document_id=1021449371&extdocid=1021449371_1_eng_pdf&serialid=9IEtj9tC9wxAGa5r2NuYSCyQ3AtHVhY88a0%2bhKfpy3E%3d

¹³ Available at: <http://www.forbes.com/sites/meghabahree/2013/08/19/top-indian-companies-burdened-with-debt/#a0e94c3af220>

report says. Meaning, they are borrowing more than they are investing which is now being perceived as burdening the poor with additional taxes and cess, while the rich make merry.

In the face of a global economic downturn a reason for the Indian economic slowdown as the target should be to increase savings rate but now by dis-incentivizing small savings in such instruments, the overall savings rate will decline and this would mean lower levels of money available for public investment. Therefore this move makes neither economic sense nor common sense at this time.

Central government's withdrawal of its office order and restore the rate of interest on various small savings instruments and taxing Employee provident Fund money to as it was till is a welcome move. Just like the EPF taxation proposal, this draconian and heartless proposal also needs to be shelved, adding to its Govt. won't contribute to pension scheme of staff getting higher wages, the govt. move, which will be effective 1 September, is applicable to employees drawing a salary of more than Rs15, 000 a month. The government contributes 1.16% to the pension kitty of every PF member as part the employees' pension scheme (EPS) run by the EPFO, and this costs the government at least Rs.1,250 crore a year. With the wage ceiling enhanced from Rs.6, 500 to Rs.15, 000 for mandatory EPF compliance, this EPS contribution cost to the government can more than double.

"With effect from 01.09.2014, wherever employer and employees have opted to contribute on salary exceeding Rs.6,500 per month, such employer and employees will have to exercise a fresh option to contribute the government's share of 1.16% on the salary exceeding Rs.15,000 per month from his/her contribution," EPFO said in a circular to all its offices for implementation.¹⁴

Do 'highly-paid' individuals need to be indirectly forced to subscribe an annuity product for 'pension security'? Can't they decide what is good for them? Don't the people earning less than Rs15, 000 actually need the 'pension security'? Secondly, if a person does not wish to invest in low return annuity products, why penalize him by taxing 60% of the corpus? How does help in financial protection to senior citizens?

The Government entered the scene with Employees' Provident Fund Act 1952, to resolve the requirement to form a retirement kitty, with the aim, "*An Act to provide for the institution of*

¹⁴ Available at: <http://www.livemint.com/Politics/bWl05ddREYDaUP5WAHxfbO/Govert-wont-contribute-to-pension-scheme-of-staff-getting-hig.html>

*provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments*¹⁵ in turn creating a kitty for the Government itself to invest various schemes for growth and welfare of the general public.

Installing a pension scheme along with a comprehensive saving scheme which evolved with evolution of Employees Provident Fund Scheme.

Salary or wage is taxed by Income Tax Department by Govt. of India. With current attacks on economic insecurity and the proportion of people employed in formal employment being less than compared to unorganized informal employment; the step to tax provident fund on its withdrawal from EPF Account disincentives resolution of problem of enhancing inclusiveness of more employment into formal and organized employment.

Further, with effect from 1st June 2015, Income Tax shall be deducted at source (TDS) if at the time of payment, the accumulated PF balance is more than or equal to Rs 30,000 with service less than 5 years. TDS will be deducted at the rate of 10 percent provided that PAN is submitted.

Earlier in 2014, the Employee Pension Scheme was withdrawn for new employees who joined the workforce after September 1, 2014 and whose basic pay plus dearness allowance exceeded Rs. 15,000. For existing employees before this cut-off date, 8.33 per cent of the employer contribution (of the total of 12 per cent) goes to the Pension scheme, promising a regular though small pay out from this when he turns 58. Secondly, EPF withdrawal rules were also made more stringent last month, just before the Budget. Earlier, you could withdraw your EPF balance entirely when you left a salaried job and didn't join another. Recent changes mandate that beginning with contributions from this year onwards, only the employee contribution and interest can be withdrawn entirely. The employer contribution will be locked-in till you turn 58. Whether this money would sit idle or would earn interest is a grey area. Third, Budget 2016 also proposed capping employer contribution to EPF at Rs 1.5 lakh (for taking tax benefit), thus bringing down the savings potential through this route for the high income group.¹⁶

¹⁵ Available at: http://www.epfindia.com/site_docs/PDFs/Downloads_PDFs/EPFAct1952.pdf

¹⁶ Available at: <http://www.thehindubusinessline.com/economy/pushing-investors-away-from-epf/article8327496.ece>

The present roll back of all changes that Central Government proposed and tried to implement were an indication can also be seen as an indication of image makeover in the wake of recent elections that start from 4th April 2016 in the states of West Bengal, Assam, Kerala, Tamil Nadu, Pondicherry and vote counting on May 19, 2016.¹⁷

These states are predominantly having influence of regional parties and who will not favour safer and fixed stable income. No one will be impressed by a party that takes anti-populist measures.

It is quite possible that the Central Government might re-implement the amendments that are rolled back for now if the present sarkar comes back in power in majority after the elections results are out. Looking at such a scenario, the point to contemplate and decide is whether employees should withdraw the money as much as possible whenever possible or trust the present Government on the issue that the dilemmas on issues of Employees Provident Fund is buried deep for the present term of this Government at least.¹⁸

Some other proposals¹⁹ than those discussed above are,

- (i) Raising age of retirement from 55 to 58.
- (ii) Tightened rules governing withdrawals,
- (iii) Quarterly revision of interest,
- (iv) No interest on dormant/inoperative accounts. This raised middle class anger.
- (v) Proposals in paragraph 138 and 139 of my Budget speech were that the proposal of 40 per cent exemption given to NPS subscribers at the time of withdrawal remains.

Paragraph 138 proposed to tax money withdrawn from EPF beyond 40 per cent, if the sum is not invested in annuity. Paragraph 139 proposed to tax contribution made by an employer exceeding Rs 1.50 lakh in EPF a year. Both the proposals were to come into effect from April 1, 2016. After this, no amount withdrawn from EPF account would be taxed, whether it is invested in annuity or not.²⁰

¹⁷ Available at: <http://www.elections.in/upcoming-elections-in-india.html>

¹⁸ Available at: http://www.business-standard.com/article/economy-policy/govt-buries-epf-tax-after-massive-protest-from-salaried-middle-class-11603090059_1.html

¹⁹ Available at: http://www.business-standard.com/article/opinion/epf-dilemmas-116042801451_1.html

²⁰ Supra Note 18

Moreover today ‘middle class’ is a new group of vote bank which is beginning to be banked upon by ‘Aam Aadmi Party’ as well as ‘Communist Party’ DMK, AIADMK, Trinamool Congress and Congress. This is seen in the quote by Ms. Mamta Banerjee, “*EPF Roll Back A victory for the common people. Happy that we were the first to raise this issue*”.²¹

Prime Minister Narendra Modi changed the employee provident fund (EPF) withdrawal rules. Only 50 percent of the fund savings can now be withdrawn; the rest remains with the government till you turn 58. This is tyranny of the unelected people like Finance Minister Arun Jaitley ji. They have no idea of the pulse of the people. They are disconnected from reality, Kejriwal tweeted.

“*I demand that the prime minister and the finance minister roll back this rule as soon as possible,*” he tweeted. Kejriwal’s reaction came after the central government on Tuesday said it had decided to withhold till July 31 its decision on tightening rules on the withdrawal of provident fund.

“*I was an employee myself and I stand with all employees against this draconian rule. PF is our only savings. We adults have the wisdom to manage it. Why is the government interfering? Why should my hard-earned savings remain with the government?*” Kejriwal tweeted.²²

Looking at the scenario, why shouldn’t a retiree decide, based on needs and risk appetite, to invest his or her corpus in bank deposits, monthly income mutual funds or medical insurance in place of low-return annuities? Why shouldn’t a retiree decide, based on needs and risk appetite, to invest his or her corpus in bank deposits, monthly income mutual funds or medical insurance in place of low-return annuities? Given that 90 per cent of India’s workforce has no form of retirement savings, any move to shrink the existing EPF cover makes no sense. If an entire generation of Indians faces a pension shortfall 20 or 30 years hence, the problem would certainly come back to haunt policymakers.²³

²¹ Available at: http://www.business-standard.com/article/pti-stories/epf-rollback-a-victory-for-common-people-mamata-116030800452_1.html

²² Available at: http://www.business-standard.com/article/news-ians/kejriwal-demands-rollback-of-new-epf-withdrawal-norms-116041901066_1.html

²³ Available at: <http://www.thehindubusinessline.com/opinion/editorial/right-rollback/article8327948.ece>

The government has also proposed that 14 per cent service tax on services provided by Employees' Provident Fund Organisation (EPFO) to employees, being exempted, with effect April, 2016.

The budget has also proposed to increase the threshold for deducting tax deducted at source (TDS) on payment of accumulated balance due to an employee in EPF Rs 50,000 from existing Rs 30,000.

Last year budget had provided that the members of private provident fund trusts will not have to pay tax on pre-mature withdrawals provided the amount is either less than Rs 30,000 or their tax liability is nil even after including the withdrawn sum to their income.²⁴

Pension plans, which are low yielding, should not be the only option when it comes to parking such proceeds. Why not give an array of schemes - including options such as Post Office Senior Citizens' Scheme or for that matter low-risk mutual funds and government bonds to ensure investors create their own 'income' stream?

Unfortunately, this did not happen in the recent Budget. However, the roadmap laid thus far is pointing to only one direction: a move towards market-linked products if you are saving for retirement.

Although some good things did happened in the Provident Fund Scheme such as,

- i. No more revenue stamps on PF claims is required to be fixed in respect of payment made through NEFT. EPFO has discontinued the practice of affixing revenue stamp on claim forms with effect from 18/08/2015, in case; claim amount is paid through NEFT.
- ii. After leaving employment, employees need not get their forms for withdrawals attested through employer as earlier, now after launch of UAN the process of withdrawal for such employees is made very simple as the employee is not required to verify the form by his employer.
- iii. EPFO launches an Incentive Scheme for employers to encourage partnership in allotment of Universal Account Number (UAN) to their employees; employers can

²⁴ Available at: <http://www.firstpost.com/business/budget-2016-tax-on-epf-shocks-the-salaried-unions-warns-of-agitation-govt-on-back-foot-2649066.html>

get refund upto 10% of administrative charges payable to EPFO under a new incentive scheme. This UAN remains constant despite change of jobs.

- iv. Now employers in India can use Digital Signature Certificates (DSC) for submitting their employee PF transfer claim form online. Digital Signature makes your work easier, convenient and cost saving in handling your employee PF transfer claim forms.

The moves on restrictions on release of funds and other above discussed issues were making the positive improvements get overlooked.

The rollback of the controversial EPF tax proposal is a step in the right direction and will bring welcome relief to the salaried class. Freedom to use retirement savings is of paramount importance to salaried group, which is created to take care of their sunset years. People often tend to dream of a face lift change in lifestyle by purchase of either a car, television, a new house, marriages of children, a source of income for family in case of job loss of any of the family members or put in a monthly income plan in banks and many more things with the lump sum of provident fund amount that employees get after retirement. Again, in case a person wishes to buy or take a ship on rent or start up a consultancy, or start any enterprise or self-enterprise ,dealership of some product of a company on employee's name or his/her sons' or daughter's name, this fund can be useful for starting a second professional life of employee or employee's family. Hence compelling an employee to shift to NPS account by showing the stick of tax deduction as tax can form a significant part of the fund amount is not a sign of good governance.

THE CHANGING NOTIONS OF SOVEREIGNTY UNDER INTERNATIONAL LAW: A CRITICAL ANALYSIS

Swati Singh Parmar*

Abstract

Sovereignty is one of the basic principles of state arrangement at global level and also one of the most poorly understood concepts in international law. Sovereignty was understood as a separate identity of a nation from others. It was often used interchangeably with statehood. The interpretation of this principle is open to change across time and space in the backdrop of historical and political contexts, offering full array of analysis. The strict construct of sovereignty, as in its earlier form, has been debated and has also been revisited, rethought and re-conceptualized as per the changes in the global legal and political order.

Keywords: State sovereignty, International law, Treaty of Westphalia, Basket theory, Chunk theory, Humanitarian intervention, popular sovereignty, Responsibility to protect

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INTRODUCTION

“The time of absolute sovereignty and exclusive sovereignty...has passed; its theory was never matched by reality”

- Boutros-Ghali 1992¹

Sovereignty, one of the basic principles of state arrangement in the world, is one of the most poorly understood concepts in international law. The interpretation of this principle is open to change in spatial and temporal dimensions in the backdrop of historical and political contexts, offering full array of analysis.

A considerable increase has been witnessed in the interest shown to the concept of sovereignty by scholars from the fields of international relations, political science and international law. This can be explained at least in part by the end of the cold war as well as the emergence of “new world order” that challenged many established traditional concepts including that of ‘state sovereignty.’

The concept of sovereignty has long been seen as a “*fundamental pillar of the international system*”² and even a “*grundnorm of international society*”³. Sovereignty is defined by Weber and Biersteker as: “*a political entity’s externally recognized right to exercise final authority over its affairs*”⁴. Their definition lays stress on the external aspect of one’s sovereignty. On the other hand, Ruggie, explains it as “*the institutionalization of public authority within mutually exclusive jurisdictional domains*”⁵, thereby highlighting its territorial context.

BACKGROUND

The word, ‘Sovereignty’, derived from Latin through French *souveraineté*, is one of the most discussed concepts throughout history. It has changed considerably in its definition, form and

¹ Bhoutros Ghali B., (1992) An Agenda for Peace, dated 17/6/1992, available at http://www.unrol.org/files/A_47_277.pdf, accessed on 5/1/2016

² Badescu C.G., *Humanitarian Intervention and the Responsibility to Protect: Security and Human rights*, Oxon: Routledge, at 20, 2011.

³ Reus-Smit, C., *Human Rights and the Social Construction of Sovereignty*, Review of International Studies, Vol 27, at 519, 2001.

⁴ Biersteker T., & Weber C., *The Social Construction of State Sovereignty*, In: Biersteker T., & Weber C., *State Sovereignty as Social Construct*, Cambridge: Cambridge University Press, at 2, 1996.

⁵ Ruggie J. G., *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, World Politics, Vol 35:2, pp. 261-28, 1983.

concept since its early inception. Initially, it was understood as a political construct. It was taken to be a modern notion of ‘political authority’ and was conceived by the scholars as the fundamental organizing principle of the system of States in the international regime. Its idea essentially emerged as an idea of ‘impossibility of destroying’. It usually started to be taken to mean absolute independence. The idea of sovereign power of the supreme authority can be traced in the works of the thinkers of early modern times like Nicolò Machiavelli, Jean Bodin, and Thomas Hobbes.

Jean Bodin is considered to have pioneered this theory of sovereignty in his celebrated work ‘*De Republica*’ in 1576. In his famous work, he has tried to find out the secret of stability in an unstable world. And being a Frenchman as well as a patriot, he decided in favour of the monarchy. He concluded that a state, in order to be a state, must have one and not more, supreme authority from which laws derive their force.

Strikingly, the middle age did not know anything about the national sovereignty. That time was marked with the political superiority of the two: Pope and the emperor. It is remarked that the jurists shaped up the concept of sovereignty as a weapon of defence and a justification of this royal supremacy.

The early interpretations of sovereignty thereby made it identifiable with the concept of ‘nation-state’, and often the term ‘Sovereignty’ and ‘statehood’ could be used interchangeably. Moreover, the quest for power and struggle for stability in the authority, political philosophers have put under test the meanings and forms of sovereignty of a state. It is often argued by the philosophers that interpreted the concept of ‘sovereignty’ in a manner so as to establish the unquestionable and absolute authority of the state. It has been given varied meanings and roles by different thinkers. ‘Basket theory’ and ‘Chunk theory’ are such examples.

WESTPHALIAN SOVEREIGNTY

The concept of Sovereignty, which formally was widely accepted to be the resultant of the Peace Treaty of Westphalia in 1648, has undergone profound changes. The Treaty of Westphalia earns its fame as the first formal world charter of sovereign nations as it is viewed as a triumph of sovereignty over empire. The treaty contains 128 clauses and no clause mentions ‘sovereignty’, but it is by way of interpretation that most of the thinkers owe the Westphalian model the basis of sovereignty. And this is, probably, why the Westphalian

sovereignty was adopted by most of the nations in strict sense and it has had a lasting effect on international politics as well as international law. Many contemporary thinkers have argued that the Westphalia is an *aetiological myth* (i.e., a myth of origin), created by the international community.

In its earliest form, the concept was a purely political construct as it developed with the emergence of the theory of ‘nation-state’ as the primary unit of political Organisation. ‘Sovereignty’ played an important role in defining the status and rights of the nation-states. In its strict sense, sovereignty was viewed as having an absolute character. In that sense, ‘sovereignty’ also implies a right against any interference or intervention by a foreign body.

At its core, sovereignty is traditionally taken to mean the possession of ‘absolute authority’ within a specified territorial limit. With the passage of time, sovereignty came to be identified as an absolute power above the law. As the ‘independence’ of a political entity gained importance, this ‘absolutist’ sovereignty was widely accepted as an international norm.

Earlier, sovereignty was taken to be an internal i.e. authority of superiors over inferiors. But as the nation-state theory gained importance in international affairs, sovereignty manifested itself in an internal and external dimension. Internally, a sovereign government is considered as a permanent and supreme authority with population that possesses a monopoly on the use of force. Internal sovereignty is marked by the supremacy of the authority within its territory. Externally, sovereignty implied that the authority of a state is independent and has a separate entity against other states of the world. Sovereignty has been earlier interpreted strictly in the sense that a state is internally as well as externally supreme within its territory and its existence is independent of other states. It was taken as a concept that would ensure a state of its supremacy and independence and at the same time could guard a state against aggression or intervention by other states in an international order.

‘Sovereignty’, as understood of scholars at its inception stage, has encountered a fade because of the multi-lateral treaties signed after the World War II that laid down prescriptions for the signatories. This resulted in a paradigm shift in the conception of sovereignty, where the international obligations of a state were now conceived to be prior to the sovereignty of the states. The view of scholars about the ‘indivisibility’ of ‘sovereignty’ has been discredited in the recent times. Also, the Westphalian sovereignty has in part eroded as a result of certain

phenomena in the international regime, such as ‘globalisation’ and emergence of international organisations.

With the changing nature of human societies as well as the emergence of new international legal order, many contemporary issues placed increasing limits on the construct of the concept of sovereignty. Three main issues: the rise of human rights, globalisation and the emergence of supranational bodies (like international organisations) forced the researchers to interpret ‘sovereignty’ in a liberal and subjective manner.

As the international organisations emerged, the nation-states voluntary gave up the ‘external aspect’ of their sovereignties to become a member-state of these organisations. Thus, the notion that the states are sovereign and they cannot be subjected to law was refuted. Acceptance of the terms of the provisions of an international convention or an international treaty, by way of ratification by a state demands a liberal connotation of the concept of sovereignty.

An international legal order could only be established when the states’ sovereignty was interpreted in a subjective manner. The old idea of ‘omnipotent’ state could not let the international law develop. Sovereignty creates international law. And it is the procedural weaknesses and loopholes in international law that allow the states to exaggerate their claims of sovereignty. It is even believed that sovereignty is a license to arbitrariness and it makes an effective international legal order unachievable. But also, on the other hand, International law functions only with the mutual restraints and some concessions of the absolute rights of the states.

The emergence of the concept of human rights has posed a threat to the so conceived traditional concept of sovereignty, or the sovereignty in its strict sense. Human rights and sovereignty are seen as competing and conflicting concepts. Their regimes are taken to be juxtaposed. Human rights give primacy to individuals and non-state actors, thereby undermining the traditionally notion of state sovereignty.

Further, on the basis of humanitarian grounds, the international community may take an action against a state in which such humanitarian crisis has occurred and where that state either fails or refrains from handling the situation. In such a scenario, where the international community can intervene in the internal affairs of a state on humanitarian grounds, the sovereignty of such a state, what we know in strict sense, is marginalized. Moreover, it is

important to note here that traditionally the ideals of international human rights may seem to be antithetical to the concept of state sovereignty; many thinkers argue that practically it is subordinate to it.

SOVEREIGNTY: A POSTULATE

It is a recently developed concept which essentially is relatable to the concept of statehood. Its origin is linked to the emergence of the nation-state theory. It used to be used interchangeably with ‘statehood’ as well. It was mainly a political construct at its inception. Sovereignty is so deeply embedded in the minds of the nations that it is no more a principle, which it used to be, but is a postulate.

Sovereignty, in its earlier form, was taken to mean an absolute and supreme authority. In that sense, it was unquestionable too. It has basically two manifestations: external and internal. A state is internally sovereign so that so it has complete authority over its subjects and is free to make its political, social or economic decisions as well as policies within its territory. Externally, a state is independent and has a free will. It cannot be forced by other countries in matters of foreign relations.

It has been interpreted by various authors across the world. In middle ages, it emerged as a concept although we do not find the origin of the word ‘Sovereignty’. Sovereignty finds a mention in the work of thinkers like Machiavelli, Jean Bodin, Thomas Hobbes, Rousseau, Austin and others.

The Treaty of Westphalia is regarded as the first formal source which established ‘sovereignty’ as a concept in the international arena. The Westphalian model of sovereignty was adopted widely by the states and was accepted as a norm an international level. It gave the states an inviolable right of non-interference, non-intervention and self-governance. The states were independent in their own spheres and other members of the international community were prohibited from snatching away these rights. This also later gave rise to the principle of non-intervention, of which we find mention in the Charter of the United Nations.

DOCTRINE OF SOVEREIGN EQUALITY

Moreover, the concept of “equality of states” is, in essence, connected with the concept of sovereignty as ‘sovereignty’ has fostered the idea that no other body is superior to the state.

‘Sovereign equality’ is a concept that is a result of amalgamation of two basic principles of international law: ‘sovereignty’ and ‘equality’: sides of the same coin. These two fundamental norms have been strongly established as unquestionable in modern international law.

Being the subjects of the international law, the states are equal to each other. By nature, states are unequal in terms of political or military strength, economic structure, geographical area, etc. but they are all on the equal platform under the eyes of international law. Thus, international legal order consists of separate independent entities that are sovereign and have absolute authority within their territorial borders. These sovereign entities have a relationship of parallel equality amongst themselves regardless of the inequalities in terms of geographical area or political strength. And this essentially is the basis of ‘Sovereign equality’ which is the foundational principle of the United Nations. Enshrined in Article 2.1 of the UN Charter, it embodies the principle that all states are equal under international law in spite of asymmetries of inequality. In the absence of any supranational body, the states claim to be sovereign externally and from within. It is noteworthy, that this sovereign equality is not political in nature but is juridical, i.e., equality of the states before law.

As per the principle, a sovereign state shall not act in manner that the ‘sovereign equality’ of the other states of the world community is violated or marginalized. So, in a way, this principle imposes a restraint on the uncontrolled authority of a state.

States are, by nature, unequal in terms of political strength, geographical limits, or financial status. But ‘sovereign equality’ gives an idea of the states equality before the law. Despite the inequalities amongst the states, they are treated as being on the same platform. In the absence of any supranational control, every state is sovereign internally as well as externally. Moreover, sovereignty is an internal concept: a concept within the state, i.e., a state can, in no case, exert its sovereignty on the other states. And no state is sovereign in relation to other state. A state is sovereign in itself. This creates a need for a formula that enables to establish a relation between the sovereign states of the world. This is done by the principle of ‘sovereign equality.’

In an international order, the states voluntarily submit their external dimensions of sovereignty so that the international regime may smoothly function. This explains that the law of nations is not superimposed on the nations but it derives its validity from the consent

of the nation's itself. Rather, it is the submission of the external aspect of sovereignty of the states that gives strength to the international legal order.

Where there is constant interaction amongst the nations of the world, the scenario calls for the doctrine of sovereign equality, where the states remain sovereign in their own internal spheres but when they interact with each other at a global level, they are regarded as being on the same platform. It is noteworthy that this sovereign equality does not relate to political equality but a juridical equality.

RECONCEPTUALISATION OF THE CONCEPT UNDER 'RESPONSIBILITY TO PROTECT'

The interpretation of the concept of sovereignty has been done differently across time and space. In present times, it is being shaped as a responsibility of the state at an international platform, meaning thereby that sovereignty is now conditional. The states that fulfil their responsibilities have the right to enjoy their sovereignty. This philosophy has developed in the backdrop of the doctrine of 'Responsibility to Protect'.

'Sovereignty' that was earlier viewed as a 'control' is now regarded as a 'responsibility'. The interpretation of 'sovereignty' in terms of responsibility is constantly gaining strength due to the ever increasing limits of international human rights as well as the expanding dimensions of the concept of human security. It is the new backdrop for the change in our understanding of the concept of sovereignty.

Responsibility to Protect is a global political commitment to check the war crimes, genocides, ethnic cleansing and other cruelties against humanity. The member states of the United Nations have committed to this responsibility. This doctrine has placed limits on the traditional approach to the national sovereignty and has refined its meaning. This doctrine has effectively given a solution to the issue of the competing claims of 'intervention' and 'state sovereignty' that was debated during the 1990's.

In the last decade, the importance of national security faded away and the security of individuals gained its ground. This shift was evident in the thinking of the international community as well. International human rights norms and national accountability towards its citizens was scrutinized internationally. As a result, 'popular sovereignty' was re-conceptualized in the background of the responsibility of a state that it has towards its

individuals. And so, sovereignty in the form of a responsibility has gained the status of an international legal norm.

This doctrine has made the concept of sovereignty conditional. The members of the international community are reposed with certain responsibilities, as towards their subjects, and it is only after the fulfilment of these responsibilities that they can enjoy their sovereignty. It is a new international security and human rights norm which has indirectly altered the conception of sovereignty and it is still yet to influence it even more in the coming years. The key to this dilution of the concept of traditional sovereignty is to rethink sovereignty as responsibility. The responsibility of the states, in this sense, is three fold: firstly, the states are responsible for the safety and well-being of their subjects; secondly, the state authorities are responsible to their citizens internally, and to the international community through the United Nations and thirdly, the agents of the states are responsible for their actions.

The notion of sovereignty as responsibility recognizes that “*sovereignty carries with it responsibilities for the population*”⁶ and that “*a government that allows its citizens to suffer... cannot claim sovereignty in an effort to keep the outside world from stepping in*”⁷.

The responsibility of the states has gained importance as an international norm primarily due to the ever increasing dimensions of the human rights and increasing importance of human security. This has also been established as a state practice. The Universal Declaration on Human Rights, Covenant on Civil and Political Rights and Covenant on Social, Economic and Cultural Rights are few examples. This is so, partly, because the last decade witnessed changes in the international thinking in respect of the concept of security: in earlier decades the emphasis was laid on the security of a nation-state and so we find principles of non-intervention and thus, the strict connotation of sovereignty. But the last decade shifted its thinking on security to people where states were reposed with the responsibilities of physical, mental, social and financial security of its citizens. Thus, the security concern has clearly shifted from states to the people. This has definitely catalysed the liberal construction of the concept of sovereignty in the present international regime.

⁶ Deng. F.M., Kimaro S., Lyons T., Rothchild D., & Zartman D., *Sovereignty as Responsibility: Conflict Management in Africa*. Washington: Brookings Institution Press, at 32, 1996.

⁷ *Ibid.*

Such facets of international law have placed clear limits on sovereignty as it puts the so-conceived ‘sovereign states’ under some obligations to be followed.

CONCLUSION

Sovereignty is the basic organizing principle for states under international law, yet it remains the most debatable concept. Sovereignty was understood as an absolute and unquestionable authority of the state, which could not even be subjected to law.

The Westphalian system of sovereignty that ruled the international order since 17th century has been altered and adjusted in today’s global regime.

It has travelled a long distance since its inception, in terms of various connotations to have arrived at its present interpretation. It has been interpreted by the thinkers in ways to suit and justify their political set ups. Earlier it was interpreted in a strict sense when it used to be relatable to the concept of statehood. However, Sovereignty is no more taken as an objective concept. The ‘absolutist’ conception of sovereignty now became inconsistent with the international society. It emerged as a political concept and transformed into a legal one. As the global regime was infused with globalisation and emergence of international organisations, the concept of sovereignty was relaxed or in a way, moulded to suit the present international legal order. It was only because of the liberal approach given to the concept of sovereignty that the modern international law could develop.

The principle of sovereign equality kept the sovereignty of the state’s intact but kept it at an equal platform with the sovereignty of others. In a way, it preserved sovereignty as a concept but infused a liberal approach in its spirit.

Today, it is made comparable to a responsibility which the states are reposed with. The doctrine of ‘Responsibility to protect’ has trimmed ‘sovereignty’ to mean a responsibility. In an era where the importance has shifted from the nation-states to the individuals, the importance of fulfilling one’s responsibilities towards its citizens comes on the centre stage and so, has the interpretation of the ‘sovereignty’ being done in the respect of that responsibility.

Accompanying all such reasons, there has been a gradual transition from the era of absolute and traditional form of sovereignty to the culture of national and international accountability,

transparency and international human rights jurisprudence that lay a burden of responsibility on the states. And probably, in present global scenario, sovereignty in terms of responsibility is the most comprehensive and suitable interpretation to the age old concept of sovereignty.

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