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NLUO
HUMAN RIGHTS LAW JOURNAL

Volume – V | June - 2020

MESSAGE FROM THE VICE-CHANCELLOR

We are pleased to offer to you the fifth edition of the Human Rights Law Journal, NLUO.

The human rights corpus, taken as a whole, as a document of ideals and values, particularly the positive law of human rights, requires the construction of States to reflect the structures and values of governance that derive from liberalist ideals, especially the contemporary variations of liberal democracy practised in western democracies. Viewed from this perspective, the human rights regime has serious implications for questions of cultural diversity, the sovereignty of States and the universality of human rights. In light of the same, the Human Rights Law Journal focuses on legal research in the field of human rights. For this issue of Human Rights Law Journal we have received contributions from law professors, students and research scholars.

I hope and wish the human rights issues discussed in this journal will initiate further academic discussion on human rights. The journal will indeed widen the horizon of legal discourse with respect to the dynamic diaspora of human rights.

I congratulate the editorial team of Human Rights Law Journal, NLUO for bringing out this issue.

Prof. (Dr.) Srikrishna Deva Rao
Vice-Chancellor
National Law University Odisha, Cuttack

EDITORIAL NOTE

Since its inception in 2016 the NLUO Human Rights Law Journal has strived towards promoting awareness, knowledge and discussion on Human Rights Law and ancillary policy frameworks. The journal has endeavored to be a forum for an eclectic diapason of scholarships on the changing landscape of civil rights and civil liberties dialogue, the real-world implications of such changes on the socio-economic superstructure and the larger structural and systematic ramifications of these issues. The journal annually publishes a print edition endowed with a range of scholarly works featuring essays, reviews and commentary from emerging scholars, practitioners and students on contemporary human rights issues.

The review is involved in publishing articles considering human rights in its various facets from the national to international level, critiquing the recent jurisprudence and the functioning of regional human rights systems. In line with the same, this fifth issue of the journal deliberates on multitude of topics ranging from unconventional experimentations on human rights research such as the human rights of albinos, beggars, privacy and technology with specific reference to DNA profiling, the access to internet as a fundamental right to burning issues of contemporary relevance such as environment sustainability, the citizenship amendment act, the consumption versus conservation debate or the reproductive rights of same sex couples all of which entails a strong undercurrent of contemporaneous human rights issues.

The fifth volume is published in consultation with the editorial committee consisting of the faculties of National Law University Odisha, Editorial Advisory Board consisting of distinguished experts on the subject of Human Rights and the Student Editorial Board. The board hopes to achieve the highest stratum of jurisprudential and legislative research, ushered by an inspiration to invigorate scholarly, academic discursions and argumentations on the arena of human rights.

ARTICLES

Dr Prasanto K. Mukherjee provides an insight into the criminalisation of seafarers as a violation of their human rights in the article

"Criminalisation of Seafarers and their Human Rights". The article takes a first-person approach to enlighten us on the alarming issue of unwarranted criminalisation of seafarers and draws our attention to the detrimental effect it has on the maritime community, being a member of this community himself. The author discusses the contentious issue of ship-source pollution offences and argues that seafarers are used as scapegoats in order to fix criminal liability for such offences, especially when adequate safety measures have been taken to prevent accidents at sea. He broadly outlines the unfair criminalisation of seafarers due to these offences, which results in the violation of their human rights, and further argues for enforcement of international law over domestic law and holding the States criminally liable for such offences.

Accessibility and reasonable accommodation are the tools that can ensure to any person with disability to an independent and dignified life. *Dr Ananya Chakraborty* carefully dissects her article *"Challenges to Accessibility: Assessing the Committee Jurisprudence"* to analyse the evolutionary perspective of disability law with respect to both municipal and international law. Interestingly, the paper mentions that during the development of International Human Rights Law, the rights of differently abled people were left far behind and effectively neglected. However, there are certain nations which have appreciable rules and regulations to protect their rights. The author focuses on "right to accessibility" and "reasonable accommodation" as two integral parts of the rights which persons with disabilities are entitled to in order to lead a life of dignity. The first part of the paper focuses on the background of disability law with respect to international human rights law, leading to the formation of the second part which identifies the various challenges and loopholes in such laws and their implementation. The focal point of the paper lies in elaborately analysing the jurisprudential perspective as developed and designed by the Committee on the Rights of Persons with Disabilities. In the succeeding part, the author has provided various interpretations while considering the provisions of VCLT and the jurisprudence involved therein due to various judgments of ICJ and other judicial bodies while implementing such laws to eliminate the discrimination against differently abled persons and facilitating their right to lead a life with dignity.

At a time when society has become increasingly polarised, this article titled *"The Crumbling Cornerstones of Justice, Liberty, Equality and Dignity: An Era of Unbridled Hate Crimes"* authored by Mr *Divyanshu Chaudhary* assumes critical significance as it traces the rise of hate crimes

in India. In this article, the author juxtaposes the fundamental rights guaranteed by the Constitution of India with the unabated increase in hate crimes and analyses the factors which have led to the proliferation of this phenomenon. Drawing our attention to the failure of the State machinery to tackle this new phenomenon, the author argues that the rise in hate crimes is causing the erosion of the core concepts of justice, liberty, equality and dignity as enshrined in the Constitution of India.

The paper "Wave of Privacy Rubbing the Digital Footprint into Anonymity: A Human Right to be Forgotten in the Digital Age?" by Nimisha Priyadarshi, deliberates on individual privacy in the digital age by looking into the human "right to be forgotten" as a means of protecting one's personal data and identity in the present and the past tense. Focus is given on international law and various conventions talking about individual privacy as well as data protection.

Mr Akash Thomas Jose in the paper on *DNA Profiling in Parental Disputes* analyses the DNA Technology Regulation Bill, 2019 and tries to answer whether an eminent need arises for collection of DNA for mere instances of parental disputes. In this paper the author dissects a critical provision contained in the DNA Technology (Use and Application) Regulation Bill, 2019. The aforementioned bill allows the use of DNA for settling civil cases concerning parental disputes. While adopting modern procedures and technology to aid the distribution of justice is appreciable, yet it comes with certain drawbacks which if analysed carefully raises grave concerns. One such concern is identified by the author who forms the foundation of this paper. The author analyses the privacy issues relating to such collection of DNA. It is imperative to note that recent jurisprudential trend shows that privacy is an inalienable right which aids in the maintenance of human rights. Therefore to protect human rights, privacy should be allocated an equally important criterion that needs to be fulfilled. The paper not only lays bare the various privacy issues which plagues such regulation but also suggests measures such as obtaining of concern before data collection, etc. to protect the application and procedures during the implementation of the law from abuse which may result is severe human rights violation. Furthermore, one of the major objections that such bill possess is the manner in which such sensitive information is stored which leads to the questioning of security of such data, since it has been conclusively proved that many databases across the globe have been illegally breached and their security has been compromised. A comparative analysis has also been provided in this

paper which aids in understanding the evolutionary origin of the bill and the various similarities and differences that the Indian bill possess when compared to its global counterparts and the various loopholes that can lead to gross human rights violation with respect to privacy concerns.

"Human Rights and Economic Policy Analysis of Transgender Rights in India" by *Ms Sudatta Barik* and *Ms Madhubrata Raysingh*, allows a resourceful insight into the issue of transgender rights and their economic development in India. This writing primarily focuses on how after scrapping Section 377 of Indian Penal Code, the transgender community are treated in the society emphasising on issues of any change in their economic development; and suggests any further changes that may be enacted by the legislature to provide them equal status ensuring their dignity and respect is looked at par with the general populace.

In her article *"Revenge Pornography: The New Age Human Rights Infringement"*, *Ms Saheli Chakraborty* tries to trace the development of Revenge porn, by means of historical tools. The paper draws attention to the gender neutral stature of the offence and tries to discern whether non-consensual transference of private medias violate privacy rights under Article 21 of the Indian Constitution and Human Rights in consonance. The paper provides an interesting synthesis by deliberating on whether the Indian Legislature is sufficient to moderate the dichotomy and resolve the phenomenon that the offence has become.

Ms Divyanshi Shrivistava in the paper on *"Paternalistic Mandatory Vaccination Laws"* stress on the often coercive nature of vaccination programmes across the world, contravening privacy, right to choice or some other facets of basic human Rights. In this paper the author identifies two conflicting scenarios in policies relating to mandatory vaccinations. While right to health is a crucial aspect of human rights, enforcing it may lead to coercive policies which extinguish the right to choose and protect one's privacy. It may be argued based upon various incidents that anti-vaccine movements have the potential to not only endanger the supporters of the movement but also other members of the society who may be exposed to diseases that arises from lack of vaccination. To understand the global approach in regards to vaccination laws the paper provides a comparison between USA, Germany, European Union and India while keeping the legality of mandatory vaccination laws as the focal point. The author argues that vaccination laws which are compulsory in nature are against the principles of UDHR and ICCPR. The Indian jurisprudential

trend has also been highlighted to show that "bodily autonomy" constitutes an integral part of right to privacy under Article 21 of the Indian Constitution as per the Puttaswamy judgment. In the succeeding portions the author addresses the debate between informed consent and mandatory vaccinations. The National Vaccination Policy of 2011 has been critically analysed to contextualise the various issues involved therein. The author in this paper attempts to provide various solutions which can be utilised to prevent the violation of human rights due to such existing laws. It also focuses on various situations and the responses that should be undertaken to preserve the health as well as the human rights of the concerned stakeholder without exposing the other member of the society to potential health risks.

Ms Gursimran Kaur Bakshi in the paper *"Reproductive Rights of Same-Sex Couples in the Age of Human Rights vis-a-vis the Surrogacy (Regulation) Bill 2019: Is India trying to Bypass Navtej v. UOI"* interestingly compares the *Navtej Singh Johar* judgment in light of the Surrogacy Regulation Bill and brings to light the very contrasting effects of the two documents on same sex couples. While the judgment of the Supreme Court propounds the importance of self-identity and stresses on the role of State in protecting the rights of same-sex couples in regard to marriage and reproduction, the bill blatantly excludes same-sex couples to opt for surrogacy and the right to start a family. Perceiving the status of LGBTQ+ community in light of the developments, the author synthesise the social-economic machinery has still a long way to traverse to provide the queer community with equal rights.

Mr Badal Chatterjee in article on the *"Contemporary 'Let it Burn' Politics in a Human Rights era"* answers certain fundamental questions pertaining to environment sustainability in an ever growing world. How to protect something that has value to the whole world but is contained within the borders of a few countries? Who benefits the most from the cleaning of the rainforests by forest fires? Does the fate of these forests now solely rest on the political and the economic forces of a nation? How to curtail these wild fires and minimise their effect? The importance and relevance of the article lies in its attempt to listen with heightened regard to the voices of indigenous communities, voices that are regularly side-lined or purposefully quietened, and reduced to an inconsequential academic rant in the worldwide news.

In a world dominated by forces of globalisation and economic liberalisation the research article by *Ms Priyanka Preet and Ms Garima Verma*, titled *"Consumption versus Conservation vis a vis Indigenous Communities"* is a humble attempt to portray the rights enjoyed by indigenous communities across the globe to procure and consume food while sustaining their culture and traditions. The paper peculiarly, juxtapose the environmentalists' stance towards the preservation of endangered species like whales, seals, reindeers, on which the indigenous communities rely on for their livelihood and survival while adhering to principles of environment sustainability which have gained global attention due to a surge in threat to animal species.

Mr Somnashu Shukla in the article *"Climate Refugees and their Standing in International Law: A Human Rights Perspective"* ingeniously argues that Climate refugees, under the current international law paradigm, do not possess any recognition and protection and further argues the anachronistic international legal instruments, indeterminate and intra-State nature of a significant portion of climate migration and lack of political support of climate refugees are the factors responsible for them being undermined. This article looks at some of the possible solutions and stresses on the importance of creating a new international instrument in the form of a Climate Refugee Convention would be the more effective than just reforming and employing the existing international law provisions.

Mr Pratik Raj in his article *"The Saga of Beggars, Human Rights and the Vicious Law"* discusses the commonly overlooked topic of beggars' rights in India and makes us rethink our perception of beggars. This article sheds light on the deplorable plight of beggars in India by analysing the extant anti-panhandling laws which shape the State's perceptions towards beggars. In a country where 269 million people belong to the BPL category criminalising beggary is not enough to alleviate poverty. The paper provides an ingenious insight into possible real world solutions to palliate poverty. The article highlights the highly discriminatory provisions present in various anti-beggary statutes which only help further the abuse faced by beggars on a daily basis, forcing them to in a state of constant conflict with the law. This article makes a compelling case for scrapping the existing anti-beggary laws and overhauls the current legal framework governing beggars.

CASE COMMENTS

On 10 February 2020 the Supreme Court of India decided on a writ petition wherein Section 18-A of the Scheduled Castes and Scheduled Tribes Act was challenged as violative of constitutional provisions. The Supreme Court of India observed in its judgment the Section 18-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was inserted by an amendment in order to bring back the rigour of law and quash the judgment of the Supreme Court in *Dr Subhash Kashinath Mahajan* v. *State of Maharashtra, and upheld its constitutionality.* In the case comment Dr Rajat Solanki and Nidhi Chauhan analyses the background of the amendment made for inserting Section 18-A and the decision of the Supreme Court and details on the contribution of the decision to the existing literature.

Mr Vaayu Goyal and Mr Kunal Saini write a case comment on the case dealing with the internet shutdown in Kashmir – *Anuradha Bhasin* v. *Union of India.* The authors comment on how the court strikes a balance between the liberties enjoyed by citizens and the national security of the State, by progressively interpreting the provisions provided in the Constitution of India. The authors analyses this judgment through various lens and discuss how this judgment expands the contours of Article 19 of the Constitution in upholding the right to internet access, how it demands great transparency from the government in terms of publishing orders and laws, how the courts have rightly checked the arbitrary exercise of power by the government and how the judgment emphasises the importance of reasonable restrictions even when the government declares a public emergency. Although the authors critique the judgment for being ineffective in lifting the internet lockdown in Kashmir, they agree that this judgment greatly advances jurisprudence in this digital era. The authors have opted a multifaceted approach in deliberating on the concurrent relationship between the aspect of an internet shutdown and the rights and liberties affected along with in light of the democratic principles and constitutional provisions. The comment reflects on the unrestrained power in hands of the government while imposing the restrictions and the important role that may be played by the Indian judiciary in balancing out the interests of individuals and the State.

The Editorial Board is privileged to have received numerous contributions from scholars and researchers for its fifth volume. As Marie Curies said that *"Nothing in life is to be feared. It is to be understood. Now is the*

time to understand more, so that we may fear less" and the only way we can understand more is through discussion, deliberation and debate; our fifth volume of Human Rights Law Journal, NLUO is an attempt to revere this zeal of inquest and the aptitude of critical reasoning which has been vividly exhibited by our contributing scholars and students. Our endeavour through this volume of the Human Rights Law Journal was to imbibe opinions on diverse areas of human rights and to replenish the void in academic jurisprudence regarding contemporary human rights issues.

Amber Harding said *"Contrary to popular belief, there most certainly is an 'I' in 'team.' It is the same 'I' that appears three times in 'responsibility'."* This responsibility has been shared by a wonderful editorial team who have put in immense hard work. I extend my gratitude to Prof (Dr) Srikrishna Deva Rao for his vision and leadership in conceptualising and realising the Human Rights Law Journal. I am thankful to Prof (Dr) Yogesh Pratap Singh for his active interest and guidance. I sincerely thank Prof (Dr) Sheela Rai for her indispensable mentoring and invaluable insight during the course of bringing out this journal. I whole-heartedly appreciate and acknowledge the contribution and cooperation of the members of the peer review Editorial Board - Ms Kaushiki Brahma, Ms Rishika Khare, Ms Sonal Singh and Ms Nikita Pattajoshi. I extend my appreciation to the student editors - Mr Akash, Ms Ananmika, Mr Jyotirmoy, Mr Indrashish and Mr Priyadarshee for the hard work put in by them. Without the cooperation and assistance of the above people, this journal would not have been a reality.

We hope to continue in our endeavours to engage with legal scholars in strengthening the existing framework of human rights law and policy under the ambit of National Law University's Human Rights Law Journal in days to come.

We look forward to your valuable feedback that shall enable us to develop the future editions. We are hopeful that with your support and goodwill, we will be able to achieve our effort with greater vigour and greater support.

With much enthusiasm and pride, we present to you the fifth volume of Human Rights Law Journal, NLUO.

Dr Priyanka Anand
Editor-in-Chief

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CRIMINALISATION OF SEAFARERS AND THEIR HUMAN RIGHTS

Proshanto K. Mukherjee[*]

ABSTRACT

This article written in the first person is about criminalisation of seafarers as a violation of their human rights. The very unique peculiarities of the seafaring profession and vocation are first presented albeit in a rudimentary fashion followed by a discussion of the legal concept of human rights primarily under international legal instruments recognising that they are inalienable rights, universal in scope and are paramount among Fundamental Rights articulated in domestic constitutions and international legislation. In line with the central theme, the notions of criminality and criminalisation are discussed by reference to scholarly writings and case law. Ship-source pollution offences which appear to be the main grounds for criminalising seafarers are addressed in contextual detail citing a number of prominent cases of oil spills. Relevant provisions in the UN Convention on the Law of the Sea, 1982 and the MARPOL Convention of the International Maritime Organisation are discussed highlighting the unlawfulness of scapegoating and criminalising seafarers. In conclusion, sincere hope is expressed that in the end fairness and justice will prevail.

1. INTRODUCTION

This is a relatively short article, the central theme of which is criminalisation of seafarers, in particular, in cases involving ship-source pollution. The work is about seafarers and their human rights expressed in the same breath. I am taking the liberty to write this article in the first person which I normally do not do as it is generally considered to be inconsistent with legal writing etiquette and to which I have fervently adhered in almost

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all my writings. I am making an exception to my own pre-set rule in the present instance simply because as an erstwhile seafarer having spent 16 years of my life in that profession, I can relate to seafarer rights, human or otherwise, intimately, experientially and personally.

I have first and foremost presented in a rudimentary fashion, the peculiarities of the seafaring profession or vocation and its importance in contemporary land-based society. Secondly, I have addressed the notion of human rights as that it applies to seafarers, highlighting the fact that human rights are inalienable and paramount among fundamental rights belonging to the human race flowing from natural law. The third prong of this investigation is the notion of criminalisation and its application to seafarers extending to ignorant biases with regard to the seafaring profession emanating from both officialdom as well as the general public. Against this brief background and rationale, in this article I have ventured to examine analytically the plight of seafarers in terms of their criminalisation which, in my view, is a blatant violation of their human rights. The issue has been left woefully unaddressed in international convention instruments and relevant *para droit* with any degree of specificity in relation to seafarers, although in general terms the concept of human rights has been addressed albeit confusingly; that is to say, the connection between human rights and Fundamental Rights has been blurred and not clearly explored.[1]

2. SEAFARERS AND HUMAN RIGHTS

Without making any distinction between profession and vocation, I will simply say that seafaring is a calling of ancient vintage which has withstood the test of time in providing an indispensable service to humanity through centuries and millennia by way of global seaborne trade. It continues to do so even in this era where highly advanced and sophisticated technology touches on virtually every aspect of our existence in human society. The almost unique peculiarity of the seafaring profession or vocation is that a seafarer lives and works in the same confined premises, namely, the ship, for days on end and sometimes dies there in the midst of an unforgiving hostile marine environment. Other peculiarities associated with the physical confines of the seafarer's living and workplace are frequent changes in time zones as the ship traverses the oceans in the course of its voyages and the vagaries of the natural environment which

1. Proshanto K. Mukherjee, "The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective" (2017) 1 NLUO Human Rights Law Journal.

he or she must invariably encounter. In the ancient civilisations of the eastern hemisphere and latterly in the maritime countries bordering the Mediterranean Sea and those of Northern Europe, seafaring flourished in tandem with explorations and other forms of maritime adventures, mainly seaborne trade and transportation. However, despite the undaunted spirit displayed by seafarers as a species and their immense contributions to the historical rise and advancement of mercantilism, they have remained a secluded lot often ignored or marginalised by land-based society. I am quite familiar with the appalling lack of fair treatment accorded to seafarers which I have described in some of my other writings referred to in this article. In recent times, on various occasions seafarers have suffered a loss of human dignity culminating in gross violations of their human rights through criminalisation which has prompted me to make it the central theme of this article.

The notion of human rights can be at once perplexing and confusing. One author defines human rights as "rights which are inherent in our nature without which we cannot live as human beings".[2] It is a very basic and generalised explanation albeit one with which I have no reason to disagree. The same author goes on to say that these are rights which must be recognised by all civilised nations and it is their legal duty to protect and respect them.[3] But the question of what exactly are human rights is not devoid of complexities. In my own observation, human rights as a legal phenomenon falls within the wider spectrum of Fundamental Rights which have been enshrined in many a national constitution such as that of India in which six Fundamental Rights, namely, equality, freedom, right against exploitation, freedom of religion, cultural and educational rights, and the right to constitutional remedies are enumerated in Part III of that supreme legislation. Whether all of these can be considered to qualify as universal human rights is a question mark but in the Preamble to the Constitution and also in its Part IV, there are provisions that appear to constitute human rights within India's domestic legal domain.[4] Be that as it may, in what respect a Fundamental Right can also be characterised as a human right or can be distinguishable from it in terms of international

2. Jagat Konthoujam, "Human Rights under Indian Constitution and AFSPA in NE", *The Sangai Express* (9-4-2020). <http://www.e-pao.net/epSubPageExtractor.asp?src=news_section.opinions.Opinion_on_Killing_of_Manorama. Human_rights_under_Constitution_and_AFSPA_1> accessed 19-11-2019.
3. *Ibid.*
4. Durga Das Basu, *Introduction to the Constitution of India* (15th edn., New Delhi: Prentice Hall of India, 1993) 79.

law, remains unclear. As compared with the former, human rights are said to be inalienable rights which renders them relatively narrower in scope and character. To what extent Fundamental Rights also qualify as inalienable human rights of universal purport is thus not at all definitive although among the Fundamental Rights accorded to citizens of a State as exemplified in the Indian Constitution, I see human rights as being paramount in status.[5]

As remarked by Konthoujam cited above, human rights are rights inherent in all members of the human species. Those rights exist regardless of a person's "race, religion, colour, creed, nationality, ethnic origin, social class, age, gender, sexual orientation, linguistic background, and political persuasion".[6] That they are also universal in scope is aptly demonstrated in the title to the international instrument known as the *Universal Declaration of Human Rights* which was adopted in the wake of the end of the Second World War by the newly established United Nations Organisation.[7] In this instrument, 14 rights are enumerated[8] but the word "freedom" is conspicuous by its absence.[9] In my observation, it raises the question whether a stated freedom in national legislation or otherwise, qualifies as a Fundamental Right in the first instance and secondly, whether that Fundamental Right as a freedom is also a human right. At this juncture, I would draw the attention of the reader to the Constitution of

5. Proshanto K. Mukherjee, "The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective" (2017) 1 NLUO Human Rights Law Journal 46. See also Universal Declaration of Human Rights of the United Nations which states "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" <https://www.humanrights.com> accessed 19-11-2019.
6. Proshanto K. Mukherjee, "The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective" (2017) 1 NLUO Human Rights Law Journal 46, 47.
7. D. Fitzpatrick & M. Anderson (eds.), *Seafarers' Rights* (Oxford University Press, 2005) 44 where the authors have remarked that human rights must doubtless be of universal application.
8. These are right to be free from discrimination, right to life, liberty and security of the person, right to be free from torture or inhuman and degrading treatment or punishment, right to a legal remedy, right to a fair trial or public hearing, right to free expression, right to social security, right to just and favourable remuneration, right to work, right to free choice of employment, right to protection against unemployment, right to join trade unions, right to rest and leisure, right to a standard of living adequate for the health and well-being of the person and his family.
9. Proshanto K. Mukherjee, "The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective" (2017) 1 NLUO Human Rights Law Journal 46, 48.

Canada. It is instructive to note that the Charter of Rights and Freedoms, 1982 resides within that Constitution.[10]

Notable in the present context is that the Universal Declaration of Human Rights is not an international convention, but in my opinion, it is binding as evidence of customary law. Another significant point to be made is that the Universal Declaration is said to entitle every working individual to those enumerated human rights. It is needless to emphasise that the seafarer is a worker, albeit a worker on ships at sea and in port and is surely a human being. Thus, it is my firm submission that among others, the seafarer must without exception, be counted in as a beneficiary of such entitlement.

Flowing from my foregoing remark, I am well aware that violations of human rights against seafarers occur in numerous and multifarious ways including those committed by their employers and agents, shipboard management authorities at the behest of the owners as well as shore-based enforcement authorities including police and immigration. As I have previously stated in a published article, it is quite unfortunate that seafarers by reason of "the very nature of their calling, are exposed to the vagaries of abuse indiscriminately inflicted on them by persons in authority in one form or another".[11] Indeed, they are the ones who "bear the brunt of human rights violations in helpless situations and often without recourse or remedy".[12] Most others situated permanently on land frequently fail to appreciate the perpetually mobile existence of seafarers on board ships. Seafarers and those advocating their interests think of seafarers' rights as human rights in the same vein as the land-based public at large.[13] That said, I would wish to refer to the Maritime Labour Convention, 2006 (MLC) which in its Preamble and Articles III and IV point to human rights as the essence of its legal framework.[14]

10. Constitution Act, 1982 <https://laws-lois.justice.gc.ca › eng › const › page-15> accessed 19-11-2019.
11. Proshanto K. Mukherjee, "The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective" (2017) 1 NLUO Human Rights Law Journal 46, 48.
12. *Ibid.*
13. D. Fitzpatrick & M. Anderson (eds.), *Seafarers' Rights* (Oxford University Press, 2005) 53-74. See also KX Li and Jim Mi Ng, "International Maritime Conventions: Seafarers' Safety and Human Rights" (2002) 33(3) Journal of Maritime Law and Commerce 385-393.
14. 45 ILM 792 (2006). The Convention is referred to as a bill of rights for seafarers.

With regard to human rights of seafarers, one commentator has rightly stated that it is not simply the responsibility of flag States of ships whether of the open registry type or otherwise, on which seafarers are serving, to ensure that they are not deprived of their human rights. "These are indivisible rights regardless of race, nationality, culture, location or whatever".[15] Unequal treatment of foreign seafarers under national or international law reflects an unfortunate failure of due process which impinges on deprivation of their basic human rights.[16] This is germane to the central theme of this article. In democracies and other systems alike, perceptions of human rights and their applications in specific instances are not exactly uniform.[17]

2.1. Criminality and Criminalisation

At the outset, an explanatory exposé of the fundamentals of criminality and criminalisation in the context of what is a crime should be in order.[18] The renowned Professor Glanville Williams defines crime as "a legal wrong that can be followed by criminal proceedings which may result in punishment".[19] It is instructive to observe three elements of the term "crime" embedded in the above definition to appreciate the concept of criminality and the criminal law. These three elements are the substantive, the procedural and the punitive. The first is the substantive element; it is the legal wrongness of an act which makes it criminal under the law and makes the person committing it, a criminal in the eyes of the law. The second is the procedural aspect manifested in the words "criminal proceedings"; and the third, is the punitive element, reflected in the word "punishment" which alludes to criminal sanction. Incidentally, in *Proprietary Articles Trade Assn.* v. *Attorney-General for Canada*,[20] Lord Atkin in referring to criminal jurisprudence remarked that crimes are those acts that are declared by a State to be crimes and are prohibited by the law of that State and those who commit such acts are to be punished.

15. A.D. Couper and others, *Voyages of Abuse: Seafarers, Human Rights and International Shipping* (Pluto Press, 1999) 170 -171.
16. Birgitta Hed has referred to "many cases in which seafarers have been treated in a manner that violates their human rights." See James Brewer, "Scapegoating is 'backward step' for safety" Lloyd's List (16-1-2005) 9.
17. The issue of capital punishment is a case in point.
18. Proshanto K. Mukherjee, "Criminalisation and Unfair Treatment: The Seafarer's Perspective" (2006) 12(5) Journal of International Maritime Law 325-336.
19. Glanville Williams, *Textbook of Criminal Law* (2nd edn., London, Stevens & Sons 1983) 27-29.
20. 1931 AC 310.

Criminality is a legal phenomenon; that of being a criminal or committing a criminal act.[21] Criminalising an act is making an act criminal which was hitherto not criminal. Correspondingly, criminalisation of a person means making someone a criminal by criminalising an act which hitherto was not a criminal act according to the law, if that person engages in that act.[22] In other words, it is a description of conduct amounting to criminality. Thus, criminalisation, on the one hand, is making an act criminal and on the other, making a person committing such act a criminal or turning one into a criminal by making an act committed by that person criminally illegal.[23]

Although the words "crime" and "offence" are often used interchangeably, it is my submission that "offence" is but a general term. An offence is a contravention of a penal provision which may not bear the hallmarks of veritable criminality but may simply be characterised more suitably as a regulatory or public welfare offence;[24] or as used in civilian circles, an administrative offence. The distinction between those characterisations and that which is unequivocally a criminal offence cannot be overemphasised. Needless to say, criminal offences are far more serious than regulatory or public welfare offences. They require proof of wrongful intent or some other variety of *mens rea*. The penal prescription in domestic legislation relating to an offence indicates whether it is a *mens rea* or a regulatory offence. The attendant sanction is also prescribed in general or specific terms which could be by reference to the penal legislation of the jurisdiction. In terms of maritime offences, they are usually drawn from violations of pollution and safety-related international convention rovisions such as those in SOLAS[25] or MARPOL[26] and transformed into offences in domestic maritime legislation.[27]

21. Bryan A. Garner, *A Dictionary of Modern Legal Usage* (New York, Oxford University Press, 1987) 161.
22. Judy Pearsall (ed.), *The New Oxford Dictionary of English* (Oxford University Press, 1998, 2001).
23. Bryan A. Garner, *A Dictionary of Modern Legal Usage* (New York, Oxford University Press, 1987) 161; Judy Pearsall (ed.), *The New Oxford Dictionary of English* (Oxford University Press, 1998, 2001). See also *Nix* v. *Whiteside*, 1986 SCC OnLine US SC 35 : 89 L Ed 2d 123 : 475 US 157 (1986).
24. Glanville Williams, *Textbook of Criminal Law* (2nd edn., London, Stevens & Sons 1983) 322 and 936-937.
25. International Convention for the Safety of Life at Sea, 1974, 164 UNTS 113.
26. International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978, ATS 1988 No. 29.
27. For example, the UK Merchant Shipping Act, 1995 (UK), 1995, c 21, Ss. 131and 132 and the UK Merchant Shipping (Prevention of Oil Pollution) Regulations, 1996, SI

Regulatory offences at the lowest threshold can be characterised as absolute liability offences where only the *actus reus* of the offence need be proven for a successful prosecution to prevail. Traffic offences such as failure to stop at a "Stop" sign or a red light are typically such offences. In the maritime domain, non-compliance with certain provisions in the Collision Regulations[28] can be characterised as such an offence.[29] The downside of the absolute liability variety is that sanctions may be quite nominal in keeping with the principle that "the punishment must fit the crime". However, there is a third dimension, namely, the so-called "halfway house" in which initially the offence is treated as an absolute liability offence affording the accused the opportunity to prove on a balance of probabilities that he exercised due diligence to avoid committing the offence. If he succeeds, he goes free; if not, he can be punished as if it were a *mens rea* offence. SOLAS and MARPOL offences typically fit into this category.[30]

3. SHIP-SOURCE POLLUTION OFFENCES

The first point to note in the following discussion is that ship-source pollution law is almost all convention based, the most important of which from a public law point of view, is MARPOL. The second point is that international conventions such as MARPOL being regulatory in scope and design, provide for violations but do not create offences. Violations must be transformed into punishable offences through domestic legislation. How such offences should be articulated is a matter for discussion. If an offence is committed intentionally or knowingly, it should be considered a criminal offence albeit at a relatively low threshold level. Needless to say, the punishment or sanction should be commensurate with the seriousness of the offence. If the pollution is caused accidentally, that is without intention or knowledge, it should be treated possibly as an absolute liability or preferably as a half-way house offence.

1996/2154, Reg. 36.

28. International Regulations for Preventing Collisions at Sea 1972, 1050 UNTS 16.
29. See for example, the *Bradshaw* v. *Ewart-James*, 1983 QB 671 : (1982) 3 WLR 1000 : (1982) 2 Lloyd's Rep 564.
30. See *R.* v. *Corpn. of the City of Ste. Saint Marie*, 1978 SCC OnLine Can SC 37 : (1978) 2 SCR 1299, discussed extensively in Proshanto K. Mukherjee, "The Penal Law of Ship-Source Pollution: Selected Issues in Perspective" in Tafsir Malick Ndiaye & Rudiger Wolfrum (eds.), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Max Planck Institute for Comparative Public Law and International Law, Leiden, Boston, Martinus Nijhoff September 2007) 463 – 496.

Difficulties arise when such kinds of offences and their committers are criminalised through domestic law. These are typically the cases where seafarers are wrongfully criminalised in connection with accidental oil spills. The international convention regimes provide for safeguards, but they are often ignored in the process of their implementation and enforcement domestically.

The United Nations Convention on the Law of the Sea, 1982[31] (UNCLOS), provides in its Article 230 that only monetary penalties are allowed as sanctions under domestic law in certain situations. The provisions are as follows:

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a willful and serious act of pollution in the territorial sea.

3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognised rights of the accused shall be observed.

In Regulation 4 of MARPOL Annex I, it is provided that Regulation 15 which variously sets out prohibitions and controls on oil discharges from ships and Regulation 34 which provides for preventive measures in respect of oil pollution from ships in special areas *shall not apply* (emphasis added) to:

> 2. The discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:
>
> Provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing of preventing or minimising the

31. 1833 UNTS 397.

except if the owner or the Master acted with intent to cause the damage, or recklessly and with the knowledge that damage would probably result... *etc.*

This Regulation ostensibly provides for a "due diligence" defence in respect of accidental discharges resulting from damage to the ship or its equipment. The defence, however, is not available if it is proven that the owner or the master acted recklessly or with intent *and* (emphasis added) knowledge that the damage would probably result. In other words, an offence is committed only where there is a failure to take all reasonable precautions to avoid or minimise the damage caused by the discharge. Where such precautions have evidently been taken, liability of the owner or master can lie only if adequate proof of *mens rea* is adduced. It is important to point out here that sub-paragraph .2.2 in the above provision requires two *mens rea* elements to be proven. This is accentuated by the conjunction "and" coupling intent or recklessness with knowledge that damage would probably result. It needs no reiteration that violation of a MARPOL discharge requirement should not go unpunished. If a seafarer deliberately bypasses an oily water separator or knowingly enters false information in the oil record book, such act should be punished as a criminal offence, albeit accompanied by a sanction commensurate with the offence. In other words, whatever punishment is meted out, it must fit the offence. In any event, a clear distinction must be made between acts that inherently contain a mental element and those that are purely accidental. The latter are clearly not criminal in any real sense. It is noted by one author that the requirement of proof of wrongful mental element in a criminal offence has often been overlooked even by responsible legal minds in certain regimes. Seafarers continue to be criminalised in cases of accidental pollution pointing to a flourishing blame culture.[32]

In light of the above-noted convention provisions, it is my ardent submission that national law must give way to binding international law if the national law is inconsistent with it. If the international law is customary law or a treaty such as UNCLOS to which the State concerned is a party, the national legislation must be struck down or amended, if it is contrary to the international law. Incidentally notable in this context is the fact that UNCLOS for the most part reflects customary international law which has evolved over many years. Correspondingly, the national judiciary must make every effort to uphold the treaty. In a dualistic jurisdiction,

32. Birgitta Hed, "Criminalisation of Seafarer" (No. 1, The Swedish Club Letter, May 2005) 12.

the courts must, through their decisions, apprise the law makers of the conflict between the treaty and the domestic legislation purporting to give effect to it and prompt necessary revisions. Otherwise, it would constitute a failure of the State to carry out its treaty obligations.

4. SCAPEGOATING SEAFARERS

A State is free to criminalise an act or a person within the bounds of its international law obligations if the matter is of international concern and character. However, the use of criminalisation as a tool for scapegoating seafarers is manifestly deplorable and is clearly a violation of their human rights. One view is that imposing criminal liability against seafarers or scapegoating them is largely politically motivated and is a revenue raising mechanism.[33] The *Tasman Spirit* and *Prestige* cases are good examples of scapegoating of seafarers for the faults of dubious owners with deficient ships.[34]

An accident by definition is a fortuitous occurrence. If there is evidence of criminal negligence on the part of a seafarer, intention or recklessness and knowledge as the requisite mental elements, would have to be proven. But seemingly, it is more convenient for prosecutors and some courts to simply scapegoat the seafarer. In particular, if foreign seafarers are involved, scapegoating and criminalising them by the legal and enforcement authorities bodes well with politicians who would wish to appease their shore-based constituencies on whom their political fortunes depend through voting or re-election.

In March 2005, the European Parliament overwhelmingly approved a Directive which criminalises seafarers for accidental pollution. It is an example of how criminalising seafarers has become institutionalised at the highest levels.[35] It is noteworthy that the European Commission itself has stated that the Directive was driven "not by sound rational thought but

33. See James Brewer, "Scapegoating is 'backward step' for safety" Lloyd's List (16-1-2005) 9 in which he attributes this statement to Birgitta Hed of the Swedish P&I Club.

34. D. Fitzpatrick and M. Anderson, *Seafarer's Rights* (Oxford University Press, 2005) 35.

35. Richard Meade, "Legal Challenge Floated on EU Criminalisation" Fairplay (3-3-2005) 6. See also Directive 2005/35/EC of the European Parliament and of the Council of 7-9-2005 on ship-source pollution and on the introduction of penalties for infringements, (2005) OJ L 255/11 <https://eur- lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:255:0011:0021:EN:PDF> accessed 19-11-2019.

by political sentiment and expediency".[36] Seafarers are frequently treated as serious criminals before their guilt has been established. Even the European Parliament expressed the view that member States should be prevented from using the so-called "Criminalisation Directive" to carry out a "witch hunt" against seafarers.[37]

The Late H.E. Dr. Thomas Mensah, former judge of the International Tribunal for the Law of the Sea (ITLOS) and the Tribunal's first President, has remarked that a European Union State in giving effect to the above-noted Directive "would be in breach of its obligations to another State party to MARPOL if it seeks to apply sanctions to the vessel of that other State for a discharge that results solely from serious negligence".[38] In my observation, what Dr. Mensah has in effect stated is that a discharge can only be considered a criminal offence if the requisite *mens rea* of "intent" is proven. I would add that as per Regulation 4 sub-paragraph .2.2.2 of MARPOL Annex I, as an alternative to proving intent, the prosecution, to succeed, will have to prove that the perpetrator acted "recklessly and with the knowledge that damage would probably result". Incidentally, the expression "serious negligence" used in the Directive is alien to scholars and practitioners of common law persuasion who subscribe to the view that the phenomenon of negligence comes in two varieties, namely, *negligence simpliciter* and *crassa negligentia*. One distinguished author has stated that:

> *The notion of 'serious negligence' is not a legally established concept but is uncertain and prone to mislead. In the Directive it is unaccompanied by any criteria or guidance as to what it is intended to mean. Experience shows that in a significant oil spill there is a risk of subjective elements impinging on the decision to prosecute, as the seriousness of alleged negligence may all too readily be judged by the consequences of the incident rather than the culpability of the defendant's actions.*[39]

36. See Sandra Speares, "Continuous Fire at Directive on Criminal Sanction for Polluters" Lloyd's List (7-10-2005) 6.
37. Richard Meade, "Legal Challenge Floated on EU Criminalisation" Fairplay (3-3-2005) 6.
38. See Sandra Speares, "EU Criminalisation Rules Rapped by Law of Sea Judge" Lloyd's List (6-10-2005) 2. This write-up is a report on the Cadwallader memorial lecture delivered by Judge Mensah at the London Shipping Law Centre.
39. See Colin de la Rue, "Pollution from Ships: EU Directive on Criminal Sanctions for Ship-Source Pollution" (Paper presented at International Colloquium on Maritime Legal Liabilities, Swansea, 14-9-2006 to 15-9-2006) 3.

Furthermore, the Directive provides for a regime that is geographically wider in scope than MARPOL and is applicable on the high seas as well, contrary to UNCLOS Article 92(1) which vest such jurisdiction solely in the flag State except where Article 221 may be applicable.

Regarding the high seas, Professor Edgar Gold with whom I fully agree, has opined as follows:

> *International law is quite clear on what criminal action may and may not be taken against seafarers as a result of a maritime accident on the high seas. The jurisdiction for such criminal action is solely reserved to the flag State and the State of nationality of the persons concerned. Furthermore, within coastal State jurisdiction, States are not permitted to imprison anyone for polluting the marine environment except in cases of wilful and serious negligence. In other words, States are acting in contravention of widely accepted international law in taking this action against seafarers. Although such action is often taken out of frustration as flag States fail to undertake the required action, the use of criminal sanctions is clearly illegal.*[40]

The International Commission on Shipping reported in year 2000 that "Seafarers are considered and treated by some port States more as potential criminals or undesirables rather than respected professionals".[41] No doubt these are blatant violations against the human dignity of seafarers and are grossly repugnant to civilised societal norms. I would ask whether shore-based professionals such as doctors, lawyers, judges and accountants would be treated as potential criminals if in the course of their professional engagements or calling, an accident or fatality were to occur without their fault and preventive attempts failed. I wonder what response would emerge from the conscience of civilised society. It is instructive to note that former IMO Secretary General Admiral Mitropoulos in his 2005 World Maritime Day speech admonished the world maritime community to treat seafarers with respect and recognise "those who at the risk of losing their own life, commit acts of extreme bravery to rescue persons in distress at sea or prevent catastrophic pollution of the environment thus

40. Edgar Gold, "The Fair Treatment of Seafarers" (2005) 4(2) WMU Journal of Maritime Affairs 129, 130.
41. Report of the International Commission on Shipping, Inquiry into Ship Safety: Ships, Slaves and Competition (2000) 28.

exhibiting virtues of self- sacrifice in line with the highest traditions at sea and the humanitarian aspect of shipping".[42] He also stated on a different occasion that "The punishing treatment meted out to seafarers, on whom international sea trade and the prosperity of nations depend, not only was disrespectful, wrong, unfair and unjust, but also contrary to international law".[43]

There are other examples of outspoken personalities in the shipping world who have boldly expressed their opinions against criminalisation of seafarers. Lord Steyn, in his capacity as Chairman of the Cadwallader Forum 2004 hosted by the London Shipping Law Centre described the incarceration of seafarers as "a monstrous failure of justice". Mr. William A O'Neil, former IMO Secretary General who I was privileged to know personally and for whom I harbour the greatest respect, once remarked that authorities should be busy providing shore reception facilities instead of roaring around with criminal sanctions against seafarers who are easy targets without a constituency and provide a vehicle for deflection of attention from others.[44] Of all the distinguished individuals I have mentioned, perhaps the most telling statement was made by Captain Roger MacDonald, Secretary General of IFSMA when in referring to the *Prestige* oil spill, expressed his bewilderment at how "a democratically elected European Government got away with locking up a ship master for three months in a high security prison without charge and without access to lawyers. This demonstrated a collective failure to uphold the rule of law".[45]

Incidents of atrocities committed by way of criminalising seafarers are many. The *Erika* and *Prestige* episodes are striking examples of detention of seafarers without trial or grossly delayed trials. In the *Erika* incident, Captain Karun S. Mathur, the Indian master was criminally charged and eventually pronounced guilty under French law. Upon landing ashore, he was arrested and held in prison from December 1999 to January 2000. He was discharged in 2008, eight years from the date of the oil spill incident

42. *IMO News* (Issue 3, 2005) 4.
43. Aline de Bievre, "An Ill Wind Blows for Seafarers in this Wretched Climate of Fear" Lloyd's List (20-10-2004).
44. Michael Grey, "Speaking up for the Shipping Industry" in Lloyd's List (25-7-2005) 6.
45. Aline de Bievre, "An Ill Wind Blows for Seafarers in this Wretched Climate of Fear" Lloyd's List (20-10-2004).

which led to his trial and incarceration.[46] In the *Prestige* pollution case, Captain Apostolos Mangouras, the Greek master was arrested, charged and held in a Spanish prison for 83 days before being released on bail. He was given a two-year jail sentence; by that time, he was 81 years of age. The *Tasman Spirit* and the *Hebei Spirit* are other oil spill cases in which the seafarers were grossly criminalised. Incidentally, the Master, Captain Jaspreet Chawla and Chief Officer Shyam Chetan of the *Hebei Spirit* were both Indian nationals. I have dealt with these cases in relative detail in another publication.[47]

As a final footnote to the discussion, I would like to impress upon the readership that a State can and should be held criminally liable, vicariously or otherwise, for human rights violations even though *mens rea* cannot be imputed to a State.[48] Human rights violations are criminalised through the development of penal prescriptions with the object of preventing them.[49] Therefore, if the administrative or judicial machinery of State is dysfunctional and is in violation of a seafarer's human rights, instead of the seafarer being criminalised, the State should be subject to criminal sanction by the international community similar to how repressive States are treated under international law for *jus cogens* crimes against humanity. As stated by Bassiouni, "crimes that affect social, cultural and economic interests also have a human rights dimension".[50]

5. CONCLUSION

In bringing this work to conclusion, I would like to say that it is an expression of lamentations of an ancient mariner of better times provoked into pessimism observing the ignorance and apathy of the international community at large towards criminalisation of seafarers.

Most people living on *terra firma* simply view criminalisation of seafarers and their human rights as alien and irrelevant to their own lives ashore. They are oblivious to the immense contribution made by seafarers to global

46. Proshanto K. Mukherjee, "The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective" (2017) 1 NLUO Human Rights Law Journal 46, 59.
47. Proshanto K. Mukherjee, "The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective" (2017) 1 NLUO Human Rights Law Journal 46, 59-60.
48. M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn., New York: Transnational Publishers Inc. 1999) 248.
49. M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn., New York: Transnational Publishers Inc. 1999) 46, footnote 11.
50. M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd edn., New York: Transnational Publishers Inc. 1999) 46.

society. I feel compelled to point out that in reference to the International Labour Organisation (ILO) model of social justice, the duo of authors Fitzpatrick and Anderson have drawn to public attention the framework of various human rights instruments and that within its parameters, seafarers as workers have actually been inspirational in terms of economic and social rights development.[51] In this article I have attempted to highlight the disturbing matter of unwarranted criminalisation of seafarers and to draw public attention to the concerns of the detrimentally affected maritime community. In the last analysis, the indispensable role and contribution of seafarers to human society must be acknowledged by all concerned in a concrete way beyond lip service. Legal, judicial and administrative action must be taken to rectify the present deficiencies stained with unlawful criminalisation of seafarers. The human rights of seafarers must be upheld by States, their enforcement authorities and judiciaries, not to mention the relevant international bodies associated with seafarers and seafaring, as an honourable profession and vocation. I say this without compromising my firm conviction that no crime should go unpunished, but seafarers must not be criminalised without cause, which seems to be the current norm in ship-source pollution cases as exemplified in this article. I hope sincerely that in the end fairness and justice will reign.

51. D. Fitzpatrick & M. Anderson (eds.), *Seafarers' Rights* (Oxford University Press, 2005) 45.

CHALLENGES TO ACCESSIBILITY: ASSESSING THE COMMITTEE JURISPRUDENCE

*Ananya Chakraborty**

ABSTRACT

*The core ideas which have fuelled the development of Disability Laws both in municipal and international law are the concept of "Human Dignity" and "Equality". Differently abled people were left far behind during development of international human rights jurisprudence, while only a handful of nations because of special historical reasons shaped far better laws for bestowing dignity and thereby lessening the gap of opportunities available to a disabled person and an abled person. Some of the most elementary rights that must be catered to by both public and private entities are the "Right to Accessibility" and "Reasonable Accommodation". Articles 9 of the UN Convention on the Rights of Persons with Disability and other persuasive documents have established the right to accessibility. In pursuance of Article 34 of the said Convention, the Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2007 has established the Committee on the Rights of Persons with Disabilities. In nearly a decade the Committee has adopted views on individual complaints against their respective States on matters related to the issue of accessibility. The Right to Accessibility and Reasonable Accommodation are very crucial for facilitating a disabled person's right to live independently and participate fully and equally in society. To this extent the author proposes to divide the paper into four parts. The **first part** of the paper traces the development of Right to Accessibility through the international human rights framework. The **second part** showcases briefly the guaranteeing of accessibility and some newer challenges across jurisdictions. The **third part** examines critically the jurisprudence as developed by the Committee on the Rights of Persons with Disabilities in the last few years by referring to cases specifically deciding upon issues of accessibility and reasonable accommodation. The **fourth part** proposes that committee must refer expressly to the VCLT interpretive*

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provisions, in the light of emerging importance as bestowed by the ICJ and judicial bodies, while carrying out their functions.

INTRODUCTION

"Sarvepi Sukhinah Santu (Let all be happy)

Sarve Santu Niramayah (Let all be free from diseases)

Sarve Bhadrani Pashyantu (Let all see auspicious things)

Ma Kaschid Dukhabhag Bhavet (Let nobody suffer from grief)"

—Brihadāranyaka Upanishad

Accessibility and reasonable accommodation are two wings which can enable any person with disability to be independent and live a life with dignity. The paper focuses on how international human rights law in general and the Convention on rights of persons with disability has shaped these two concepts. It focuses on the views adopted by the Committee to further realise the goals set by the Convention.

PART-A: HUMAN RIGHTS VIS-À-VIS RELIGION: CONTEXT OF DISABILITY

The human rights instruments which existed before the Convention on the Rights of Persons with Disabilities had a disjointed approach towards their rights. In the absence of legal instruments, religion had shaped attitude towards people with disabilities. The objective of modern human rights jurisprudence is also about protecting human dignity, which finds mention in several human rights treaties. However it is widely accepted that human rights needs the resources of religious traditions, while religion too must attend to human rights in order to do justice and affirm human dignity.[1] It is surprising that all the value laden religious scriptures and the initial treatises on human rights fell short of extending the same standards of human dignity to people with disabilities. Hindus have treated it mostly as a result of bad karma which causes disability due to misdeeds done in the previous life[2]; Jewish attitudes to people with disabilities are filled with

1. Shelton D., *"The Oxford Handbook of International Human Rights Law"* (Oxford University Press, 2013).
2. Devdutt Pattanaik, "A Job for Disabled Gods", (Devdutt, 10-6-2014) <https://devdutt.com/articles/a-job-for-disabled-gods/> accessed 19-1-2020 (this article shows how in Hindu mythology disabled persons have found their place as gods).

indifference, dismissive nature to examples of treating them with respect.[3] Collectively we can conclude that no religion would in the modern times support any discriminatory practices against people with disabilities.

1. MDG AND SDG: DISABILITY FOOTPRINT

The UN General Assembly in the year 2015 adopted a resolution on Sustainable Development Goals (hereinafter *"SDG"*)[4], which is a significant way forward from the Millennium Development Goals (hereinafter *"MDG"*)[5]. The MDG failed to lay down a road map or even a specific article for the promotion and protection of the rights of the disabled. It spoke about collective responsibility *"to uphold the principles of equality, human dignity and equity at the worldwide level".*[6] In the light of the shortcomings the SDG, 2015 assumes more significance as to if it has been able to address the gaps left by MDG. It seeks the work ahead by laying down 17 SDG's and 169 targets, wherein the persons with disabilities have been referred more than 10 times. Out of 17 goals, 13 are particularly related to persons with disabilities, but only seven targets have an explicit reference.[7] These references find their place under the "New Agenda",[8] wherein the State parties reaffirm the importance of Universal Declaration of Human Rights (hereinafter *"UDHR"*) and every other human rights instrument, to seek compliance with the norms without any kind of discrimination including on the ground of any disability. Under the fourth goal the States are required to ensure and upgrade education facilities with the objective of making it sensitive to the needs of disabled

3. Michael Moore, "Religious Attitudes toward the Disabled" (The Secular Web, 2015) <https://infidels.org/library/modern/michael_moore/disabled.html> accessed 19-1-2020 (this article showcases the Jewish traditions towards the disabled by referring to Leviticus and Exodus. It also showcases examples where sometimes people with disabilities have also been highly respected and even worshipped); Rabbi S. Schwarz, "A Jewish Approach to the Differently-Abled", (Huffpost, 6-12-2017), (In this blog the author explains the teachings from Torah, like the idea that every human being is made in the image of the god).
4. General Assembly Resolution A/RES/70/1 on Transforming our World: The 2030 Agenda for Sustainable Development (2015).
5. General Assembly Resolution A/RES/55/2 on United Nations Millennium Declaration (2000).
6. *Ibid.*, 2.
7. International Disabilities Alliance, "The 2030 Agenda - Comprehensive Guide for Persons with Disabilities" (International Disability Alliance, 2016) <http://www.internationaldisabilityalliance.org/resources/2030-agenda-comprehensive-guide-persons-disabilities> accessed 19-1-2020 (It correlates the goals with respective provisions of the convention on the rights of persons with disability).
8. *Ibid,* (n 4).

and hence make it safer and inclusive in nature.[9] Countries have also set the goal of reducing inequality in social, political and economic sphere by making it all inclusive including the disabled. For the purpose of proper monitoring the capacity building efforts in the countries, it seeks to disaggregate the available data on several grounds including disability.[10] However for effective realisation of these goals and focusing especially on the disabled persons within 2030, it requires more effective legal principles and also enforcing mechanisms.

2. ISSUE OF ACCESSIBILITY: INTERNATIONAL HUMAN RIGHTS

The nexus between human rights and the disabled persons has been formalised by the adoption of the Convention on the Rights of Persons with Disability (hereinafter "*CRPD*") in 2007. It is the culmination of the experiences gained out of the struggles faced by disabled individuals in their own countries, for over more than three decades.[11] Disability rights movement has evolved through perspectives like "medical (bio)-model[12], the social model, the minority group model, the economic model, the Universalist model, the capabilities model, the Nordic relational model and others".[13] Unlike the social model and medical model asserted that the disadvantage faced by the disabled is because of the social, cultural, economic and environmental barriers imposed by the society on them.[14] In Michael Oliver's words, "according to the social model, disability is defined as all the things that levy restrictions on disabled people; ranging from individual bias to institutional discrimination and from unreachable public buildings to unusable transport systems, from isolated education to exclusive of work arrangements and so on".[15] Thereafter over a little more than two decades witnessed a shift in perceiving the disabled from

9. *Ibid,* 4(*a*).
10. *Ibid,* 17-18.
11. Americans with Disabilities Act of 1990, 42 USC § 12101 (2012); Canadian Human Rights Act RSC, 1985 c H-6; Equality Act, 2010 pt. 15; Disability Discrimination Act, 1992.
12. Michael Oliver, "Understanding Disability: From Theory to Practice", (1996) 23(3). The Journal of Sociology & Social Welfare, 193. (Michael Oliver was one of the significant proponents of this school of thought).
13. Theresia Degener, "Disability Human Rights Law Context" (2016) 5(3) Laws.
14. Bill Albert, "Project Enabling Disabled People to Reduce Poverty: The Social Model of Disability, Human Rights and Development", Disabilty Resource Centre <https://www.disability.co.uk/sites/default/files/resources/social_model_briefing.pdf> accessed 19-1-2020.
15. *Ibid,* (n 12) 33 (The British social model of disability places *impairment* in the biological domain, while *disability* in the social domain); *ibid* (n 13) at 9.

"objects" to "holders" of rights.[16] This over emphasis on the society has evoked criticism from feminists and others for ignoring the impairment itself and they have advocated for "social relational approach" which can better account for the psycho-emotional dimensions of disability.[17] However the social model of action has led to realising their will to live "independently and participate fully and equally in society"[18] by making the environment more accessible.

The World Health Organisation in its Report titled "World Report on Disability" in 2011 speaks about creating of "culture of accessibility"[19]; effective enforcement of laws and regulations. The very purpose of making structures accessible is to help them realise their right of equal opportunity to participate in different activities. This issue of accessibility has been spoken of in different soft law instruments has been interpreted into existing human rights treaties.

2.1. Developments Pre-CRPD

The period before the adoption of the convention had witnessed important developments like 1981 was declared as the "International Year of Disabled Persons" (hereinafter "*IYDP*")[20]. It called upon the stakeholders to *"enable the practical involvement of disabled people in their everyday life, like by improving their entree to public buildings and the public transportation systems".*[21] Building upon the World Programme of Action Concerning Disabled Persons,[22] the United Nations declared 1983-1992 as the decade of Disabled Persons,[23] which further led to the forming of the UN Standard Rules on the Equalisation of Opportunities for Persons with

16. United Nations, "From Exclusion to Equality Realising the Rights of Persons with Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol" <http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf> accessed 19-1-2020.
17. *Ibid,* (n 13) 11.
18. UN Committee on the Rights of Persons with Disability, "General Comment on Art. 9", (United Nations, 22-5-2014), <http://undocs.org/CRPD/C/GC/2> accessed 19-1-2020.
19. "World Report on Disability" (World Health Organisation, 2011).
20. "The International Year of Disabled Persons 1981", (United Nations).
21. United Nation General Assembly Resolution A/RES/31/123 on International Year of Disabled Persons (1976).
22. United Nation General Assembly Resolution A/RES/37/52 on World Programme of Action Concerning Disabled Persons (1982).
23. United Nation General Assembly Resolution A/RES/39/26 on United Nations Decade of Disabled Persons (1984).

Disabilities.[24] The standard Rules cites moral and political compulsion[25] sourced from the UDHR, ICCPR, ICESCR, CRC, CEDAW with a view to persuade the governments to convert them into customary rules with wide State practice. The Standards include the need to increase accessibility i.e. "Equalisation of Opportunities"[26] to facilitate socio-economic development. Right to Accessibility is considered fundamental as a pre-condition to equal participation.[27] Under Rule 5[28] of the UN Standards, the "Accessibility" is identified as the first target area for equal participation, because accessibility can help them realise the other rights like freedom of movement,[29] freedom of opinion and expression,[30] right to access to public service on terms of equality[31], facilitate right to education.[32] UN Standard has only persuasive force on the States. CESR General Comment No. 5[33] refers to regional developments[34] on human rights of the disabled while laying down the general obligations of the State Parties. It requires States to take measures to ensure access to all community services;[35] make workplaces accessible; provide accessible modes of transportation; access to counseling services; accessible housing; accessibility to places of cultural performances, etc. General Comment No. 9 (2006)[36] emphasised on physical accessibility of public transportation and other facilities, to counter marginalisation and exclusion of children with disabilities. General Comment No. 17 (2013) emphasised on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Article 31).[37]

24. General Assembly Resolution A/RES/48/96 on United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (1994).
25. *Ibid,* 13.
26. *Ibid,* 24-27.
27. General Comment on Art. 9, *supra* note 18, at ¶ 1.
28. R. 5, "Standard Rules on the Equalisation of Opportunities for Persons with Disabilities", 1993.
29. United Nation General Assembly Resolution 217(III) on A Universal Declaration of Human Rights, Art. 13 (1948).
30. *Ibid.,* Art. 19; Art. 19(2).
31. *Ibid.,* Art. 25(*c*).
32. United Nation General Assembly Resolution 44/25 on Convention on the Rights of the Child, Art. 23 (1989).
33. UN Committee on Economic Social and Cultural Right, "General Comment 5: Persons with Disabilities" (Refworld, 9-12-1994), <http://www.refworld.org/docid/453883f0.html> accessed 19-1-20.
34. African Charter on Human and Peoples' Rights, Art. 18(4) 179 INTs 89 (27-6-1981).
35. *Ibid* (n 33) 17.
36. UN Committee on the Rights of the Child, General Comment 9 (2006).
37. *Ibid.,* General Comment 17 (2013).

States are required to invest in universal design and engage with non-State actors to ensure implementation.[38]

Article 5 of the CERD[39] created a precedent by establishing Right to Access as a right *per se* in international human rights law. Child Rights Convention also mandates the State Parties to ensure the realisation of the rights by every child irrespective of any form of disability the child might suffer from.[40]

2.2. Accessibility – Scope under CRPD

The Convention,[41] created legally binding obligations for the member States without any exception or limitations [Article 4(5)]. The Committee under the Convention has the power to recommend measures to States on communications received from the victims of violation by the member States.[42]

The Convention has identified a list of General Principles and they are inter-dependent in nature. One of the principles is "Accessibility" [Article 3 (f)], which is further elaborated in Article 9 encompassing physical environment, transportation, information and communication, and services, which are open or provided to people.[43] Right to Access imposes *ex ante* duty upon States, i.e. set accessibility standards for the all the stakeholders before receiving any individual request. States have to take appropriate measures to enable their independent living and facilitating participation in all walks of life by taking suitable measures to "develop, promulgate and monitor the implementation of minimum standards for the accessibility of facilities"; ensuring private entities offer accessibility; "train stakeholders on accessibility issues"; make public signage accessible; "provide forms of live assistance and intermediaries"; ensure access to information, communication systems, internet; promote the design, development, production and distribution of accessible ICT,

38. *Ibid.,* 21.
39. International Convention on the Elimination of All Forms of Racial Discrimination Art. 5(*f*), 660 UNTS 195 (21-12-1965).
40. *Ibid.* (n 32) (to extend assistance to preferably free of any charge and especially ensure effective access to education training, health care services, rehabilitation services, recreation opportunities, etc).
41. United Nations General Assembly Resolution A/RES/61/106 on Convention on the Rights of Persons with Disabilities (2007).
42. *Ibid,* (n 41) Art. 1.
43. *Ibid,* (n 41) Art. 9(1).

possibly at a minimum cost.[44] Article 9 only gives the right a "perspective of disability".[45] It interprets the stakeholders in an inclusive way, to include "the authorities that grant permits for the building, chambers of engineers, broadcasting boards, urban developers, designers, architects, service providers, transport establishments, members of the academic community and disabled persons".[46] The States obligation also extends to make "reasonable accommodation" by making adjustments and modifications with causing undue pressure on the stakeholder, to ensure that they enjoy their rights on an equal basis.[47] *Reasonable accommodation* as a concept is used to redress individual situations; it is an *ex nunc* duty, enforceable usually when a person with an impairment needs it to enjoy rights on an equal basis. For e.g. reasonable accommodation will be the test to be applied when changes in structures needs to be made for persons with rare impairments. However the changes required must not be disproportionate or cause undue burden.

Part-B: Accessibility - Across jurisdictions

The struggle for accessibility was first fought in the domestic jurisdictions by enacting legislations ensuring that people with disabilities have access to all services in an equal manner, without any discrimination. The disability laws present in various countries speak about equality and civil rights of the individuals with disabilities. Some legislations related to accessibility are as follows: Disability Discrimination Act, 1995 - Sections 19, 20 and 21 (UK); Equality Act, 2010 - Section 20 (UK); Communications Act, 1934 (further amended by Telecommunications Act, 1996) - Section 255 (UK); IT Accessibility Act (USA); Rehabilitation Act - Section 501-508 (USA) Americans with Disabilities Act - Title I, III, IV (USA); Telecommunications Act Accessibility Guidelines - 36 CFR (Code of Federal Regulations) Part 1193; Disability Discrimination Act, 1992 (Australia) - Section 5. There have been numerous cases across jurisdictions which have further strengthened the law on accessibility.

In *David Allen* v. *Royal Bank of Scotland Plc.*[48], the plaintiff was suffering from muscular dystrophy, he then filed a claim against a bank for wheelchair access as mentioned in the Disability Discrimination Act,

44. *Ibid,* Art. 9(2).
45. *Ibid,* (n 18) 11.
46. *Ibid,* 16.
47. *Ibid,* (n 41) Arts. 2, 5(3), 14(2), 24(2)(*c*), 27(1)(*i*).
48. 2009 EWCA Civ 1213.

1995 (hereinafter "*DDA*"). The claimant was refused wheelchair access in a bank and was instructed to go to one of the other branches instead. Considering Sections 19, 20 and 21 of the DDA, the bank was bound to provide the accessibility services to the disabled people so that they can use the services of the bank in the same capacity as any other person and the refusal to do the same is unlawful and hence the court held the bank liable as it failed to observe the standard and terms of the service necessary.

In *Paulley* v. *FirstGroup Plc.*[49], Mr. Paulley, a physically disabled person who had to use a wheelchair, wished to board a public transport bus. According to the provisions given in Equality Act, 2010, it is the duty of the bus driver to accommodate a person on a wheelchair on the bus which demands co-operation from everyone including the other passengers. The claimant was denied entry into the bus because the space which was supposed to be occupied by a disable person was occupied by one of the other passengers. At the time of court proceedings, it was mentioned by the bus company that the bus driver did not have the power to move over passengers without their consent which was the true reason of the claimant not able to board the train. This defence was dismissed by the court as it held that under the Sections 20, 21 and 22 of the Equality Act, 2010, it is the responsibility of the bus driver to give justified treatment to a disabled person which he failed to perform.

Brooklyn Center for Independence of the Disabled v. *Uber Technologies, Inc.*[50], reflects new challenges in the peer-to-peer ride sharing industry. A class action lawsuit is pending against Uber Technologies in which it was mentioned that Uber is not taking the required steps to ensure that the people restricted to a wheelchair due to various reasons are provided with their services to make their mobility around the city easier. It was found out that less than 1 per cent of the Uber cars had facilities which made it possible for the disable people to access their service.[51]

Cole. v. *County of Santa Clara*[52] deals with inmates with mobility disabilities. There are actually no housing zones at the County jails compliant with State or federal standards of accessibility and mostly the

49. (2017) 1 WLR 423 : 2017 UKSC 4.
50. (S.D.N.Y. 1: 2017-cv-06399).
51. Jonathan Stempel, "Uber is Sued over Lack of Wheelchair-Accessible Cars in NYC",(Reuters, 18-7-2017) <https://www.reuters.com/article/uber-lawsuit-idUSL1N1K90TU> accessed 19-1-2020
52. (U.S.D.C. (N.D. Cal.), Case No. 5:16-cv-06594-LHK).

remaining County jails have some kind of architectural barricades. Due to these architectural barricades and some other discriminatory policies, Santa Clara County jail prisoners with movement disabilities are basically deprived of equal access to living in the house, programming and some jobs and the main reason was their disability. However, the Parties are presently in settlement negotiations.

Some new areas have emerged where the disabled seeking accessibility like online shopping websites. A class action has been filed in USA against Amazon.[53]

Part- C: Committee Jurisprudence

The Committee on the Rights of Persons with Disabilities can receive and consider communications from individual or group of victims themselves or on behalf of them[54], only from the Sates which are party to the optional protocol[55]. Committees interpret provisions of the main treaty in the context of emerging needs and challenges faced by the right holders. In about 10 years, it has adopted views on matters specifically related to accessibility cases covering a wide range of issues. The views adopted are of "soft law" character. General comments passed by such committees are considered to contain "significant normative guidance".[56] As observed with other committees, their decisions have limited and negligible effect.[57] The States are not bound to the views adopted by the committees; however they also have a duty to permit some measures on the interim basis and further they also have an obligation to take cognizance and immediate legal effect within their national legal order.[58] States don't consider them legally binding and retain the right to review and if necessary deviate from the committee's findings.[59] The other school of thought believes that the (perception of the) international legal status of decisions clearly effects the execution of views with the help of proceedings of national

53. Emily Sortor, "Amazon Class Action Lawsuit Says Website Not Accessible to the Blind" (Top Class Actions, 7-2-2018).
54. *Ibid*, (n 42) Art. 1.
55. *Ibid*.
56. Keller H. and Ulfstein G., *UN Human Rights Treaty Bodies: Law and Legitimacy*, (Cambridge University Press, 2015) 124.
57. Rosanne Van Alebeek and Andre' Nollkaemper, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law*, (Cambridge University Press, 2012) 356.
58. *Ibid*.
59. *Ibid*, 373.

court.[60] Enforceability of the views/recommendations is also challenging as domestic courts consider themselves unable to give effect; find it interfering with independence of judiciary.[61] Such experiences have made it essential that member States have enabling legislations to give effect to the non-binding decisions overlooking every tension and thereby upholding the treaty values. *"Consent"* which is the basis of any international obligation, is missing when it comes to giving effect to the committee views, as the optional protocols are silent. *In the light of such systemic failure to deliver justice to the complainants, it becomes essential that the committees while adopting views refer to international law principles, treaty law, general principles of law, and give directions which can be put in effect by the State Parties, and thereby uphold the rights of the disabled.*

All the discussed cases reflect different kinds of challenges to accessibility, faced by the complainants in their jurisdiction.

In *H.M.* v. *Sweden*,[62] the complainant/author, suffering from Ehlers-Danlos Syndrome, claimed violation of Articles 1, 2, 3, 4, 5, 9, 10, 14, 19, 20, 25, 26 and 28 of the Convention. She was bedridden for almost two years and advised hydrotherapy as last resort to help regain movement of the muscles. Her request for a building permission was rejected by the Local Housing Committee, on the ground that it will be violating the relevant housing laws. The opposite party the municipality won the case citing precedent of 1990 which refused to divert 125 sq. m.; also suggested that the "Planning and Building Act" was to apply to everyone in the same way whether or not there is any disability (Para 4.12).

The Committee rightly found the law on planning and building to be neutral and thereby promoting formal equality which failed to take into consideration of her kind of disability and thereby discriminated against her (Para 8.3). The Committee considered that the complainant was unable to substantiate her claims that Article 9 of the Convention (accessibility), Article 10 (right to life), Article 14 (liberty and security of the person), Article 20 (personal mobility) has been violated (Para 7.4). *However, this finding seems to be wrong as the facts stated by the author was self-explanatory about the nature of consequences she has been facing and*

60. *Ibid*, 374.
61. *Ibid*, 372-377.
62. UN Committee on the Rights of Persons with Disabilities "Communication No. 3/2011" (OHCHR, 21-5-2012).

hence the consequent violations. The Committee not being a judicial body and taking her special condition in to account it should be reasonably flexible. Sweden by not having taken any measures to eliminate obstacles, like making the laws disabled friendly did end up violating the treaty obligations. Sweden should have taken initiatives to see that she can access hydrotherapy at her home, keeping the principle of "reasonable accommodation" into account. *The Committee doesn't explicitly mention that Sweden has failed to fulfill its duty as per the principle of reasonable accommodation and thereby violated the Convention. The Committee hereby is also criticised with respect to the finding that her "right to life", and "liberty and security of person" violation was unsubstantiated. The facts stated by both the complainant and the State clearly show that the later had not taken any measures which could help her in effective enjoyment of her inherent Right to Life (Article 10). The Committee could have clearly explained in its findings as to how the State by its inaction has violated Article 14 in not even adhering to the guarantees in other international human rights instruments and the present treaty objectives while turning a blind eye to the obligation of reasonable accommodation. The Committee could have referred to the obligations of the State under the other human rights treaties like ICCPR, which have a rich jurisprudence and also because it forms the part of the Convention Preamble, under Clause (d), ICCPR.*

In *Szilvia Nyusti and Péter Takács* v. *Hungary,*[63] two complainants suffered from severe visual impairment, complaining about violation of Article 5(2 &3), Article 9 and Article 12 (5) by Hungary. Their complaint involved a private Bank (OTP Bank Zrt. credit institution) and the government. Complainants were unable to use the said banks ATMs as they were not marked with Braille and absence of audible instructions and voice assistance for banking card operations. They had paid the same fees as the sighted clients of the bank, but still they were denied their right. Their request for changes in the ATMs near their homes from the bank citing the Equal Treatment Act,[64] was turned down. Questions arose as to whether ATMs were part of building as under the Built Environment Act, which would give the authors the Right of Accessibility. On review the Supreme Court, held that ATMs designed for sighted persons put blind or visually impaired persons in a disadvantageous situation, as there is no Braille on

63. UN Committee on the Rights of Persons with Disabilities, "Communication No. 1/2010 *(Szilvia Nyusti and Péter Takács* v. *Hungary)*", (OHCHR, 21-6-2013).
64. Office of the United Nations High Commissioner for Human Rights, (OHCHR 11-10-2018).

the ATMs and the banking card owners do not have the support of voice assistance while using the machines; *agreed with all the major arguments* of the second instance court with respect to the exemption of OTP's from the compulsion to provide for equal or similar treatment under the Equal Treatment Act; that the authors by their implied conduct have agreed to their disadvantaged situation including the facility of limited use. *They complain that the Supreme Court has violated the Convention obligations by not reading an obligation of equal treatment into the long-standing contract with the bank and thereby leading to a violation of Article 5(2) of the Convention.* Meanwhile Hungary offered to address the situation.[65] Complainants admitted that "other banks in Hungary, except OTP, made efforts to install ATMs accessible for persons with disabilities",[66] proving that the private entities were addressing discrimination.

The Committee focused primarily on Article 9, given the broader claim made by the complainants about the State taking suitable actions to safeguard the availability of the services of banking card by the whole network of ATMs operated by OTP for people with visual impairments. It reiterated the obligation of the State under Article 9.[67] It found Hungary violating Article 9[2(b)] and recommended it to remedy the lack of accessibility for the authors to the banking card services provided by the ATMs operated by OTP. *However, the Committee while giving the recommendations could have stressed upon the need for harmonious interpretation of the municipal laws with the States treaty obligations. The Committee should have also given more stress on the principle of reasonable accommodation, by which the State could have been shown as not taking adequate measures. Committee recommendations must in general not just depend on the treaty provisions, but source it even from the other treaties which would support the cause of the complainants.*

In *X* v. *Argentina*[68] the complainant had undergone a harrowing experience while being detained in prison facility in Argentina. He requested "house arrest", having suffered stroke resulting in sensory balance disorder, a cognitive disorder and impaired visuo-spatial orientation. *It involves*

65. *Ibid.* (n 64) 4(3).
66. *Ibid.,* 5(6).
67. *Ibid.,* 9(4).
68. UN Committee on the Rights of Persons with Disabilities "Communication No. 8/2012 (*X* v. *Argentina*)", (OHCHR 18-6-2014), <https://undocs.org/en/CRPD/C/11/D/8/2012> accessed 19-1-2020 (the victim claimed violations by Argentina of Arts. 9, 10, 13, 14(2), 15(2), 17, 25 and 26 of the Convention).

a prisoner and a State's obligation to provide access to treatment and accessible physical environment in the prison. The prisoner was in a critical condition, while Argentina had taken substantial measures to address his requirements, though their efforts fell short. *Such cases showcase the challenges that developing countries face while implementing its provisions in true spirit.* The particular facts showcase the importance of applying "*reasonable accommodation*", like in the present case in spite of genuinely trying to facilitate the complainants treatment,[69] they failed to accommodate changes in the bathroom and placed him in the first floor which made it difficult for him, as even little travelling would have huge impact on his deteriorating health. The Committee observes that State Parties are under an obligation to ensure that prisons afford accessibility to all persons with disabilities who are deprived of their liberty. While acknowledging the efforts taken by the prison authorities, it reiterates that "*State Parties have to take all the necessary measures and there shall be no barrier and obstacle to access, so that the disabled persons shall not be deprived of any liberty and will enjoy their life with full freedom and participation*".[70] This case establishes the obligation of the State Parties to make reasonable accommodations so that even sick detainees can access prison facilities and services on an equal basis with other prisoners.

"*F*" v. *Austria*,[71] dealt with access to live real time information in public transport system on an equal basis others while examining States violation of Article 5 and Article 9. The complainant is a blind person and he depended on tram, i.e. public transport system on a daily basis for every kind of commuting. The tram line which was used by the complainant didn't have digital audio system. One of the criteria for not installing digital audio systems is that it had installed such systems in only 44 out of more than 700 stops and the criteria was that the former were major traffic junctions.[72] The other reasons for non-installation was that there were other ways of accessing the same information, by using internet services or call up customer care services,[73] about the timings of the train and other details; the trains are very regular in their

69. *Ibid*, 8(4).
70. *Ibid*, 8(5).
71. UN Committee on the Rights of Persons with Disabilities: Communication No. 21/2014 ("*F*" v. *Austria*), OHCHR (September 2015), <https://undocs.org/en/CRPD/C/14/D/21/2014> accessed 19-1-20.
72. *Ibid*, 4(2).
73. *Ibid*, 4(8).

timing,[74] hence unless an exception situation arises there was no need for the information to be made separately available. The complainant had to ask around people about the timing and stops while travelling which prevented him from leading an independent life. The State failed to meet the standards of "*two-sense principle of accessibility*".[75] The Committee also acknowledges the argument *that accessibility in relation to public transport, like tram, is not just being physically capable of using it, but it would also include accessibility to the information available to avail the public transport.* This case reflected facts, where the concept of "reasonable accommodation" is applicable and Committee supports its findings from the Convention and the General Comments on Article 9.[76] *It found that "due to non-installation of audio system, it amounts to denial of the access to information and will be considered as a violation of Articles 5(2); and 9(1) and (2)(f) and (h) of the Convention."*[77] The State was directed to "remedy the lack of accessibility to the information visually available for all lines of the tram network".[78]

On April 1, the Committee gave its views on two matters[79] concerning "*participation of deaf people in jury duty*", i.e. involvement in judicial process. They were aggrieved by the action of the sheriff of New South Wales, Australia. Both the complainants were required to carry out their jury duties on several occasions, in separate cases. However, owing to their being deaf, the Sheriff office refused to offer steno-captioning to Mr. Michael and an Australian Sign Language (Auslan) interpreter of formal communications to Ms. Beasley, on their request respectively. The cases are significant in laying down that the need to ensure non-discrimination; duty to reasonably accommodate; to ensure accessibility; to ensure access to justice; to ensuring freedom of expression and opinion and access to information; participation in political and public life *require the State to treat them collectively and not separately. The Committee has collectively referred the General Comment on Articles 9 and 12, as well as its previous*

74. *Ibid*, 4(6).
75. *Ibid*, 3(1).
76. *Ibid*, 8(4), 8(5).
77. *Ibid*, 8(7).
78. *Ibid*, 9(a).
79. UN Committee on the Rights of Persons with Disabilities, "Views adopted by the Committee under Article 5 of the Optional Protocol, concerning Communication No. 13/2013 (*Michael Lockrey* v. *Australia*)", (OHCHR, 30-5-2016), <http://juris.ohchr.org/Search/Details/2143> accessed 19-1-20.

views/decisions,[80] while determining States obligation under these cases. These cases have established the following:

a. A prejudiced effect of a measure or rule which is neutral at face value or with no intention to discriminate, but that suspiciously affects people with disabilities, has the effect of causing "complete discrimination on the basis of disability" (Article 2).

b. Assessment for making reasonable accommodation must be made in a thorough and objective manner.

c. Ensuring reasonable accommodation promotes equality and eliminates discrimination as laid down in Article 5(1) and (3).[81]

d. Non-fulfillment of requests preventing participation in an activity which constitutes a sign of active citizenship violates Article 9 and Article 21(b) separately and in conjunction with Articles 2, 4, and 5(1) and (3) of the Convention.

e. Jury duty is an integral part of judicial system constituting "direct and indirect participation" in legal proceedings (Article 13). Refusals by the Sheriff amounted to a violation of Article 13(1), read alone and in conjunction with Articles 3, 5(1) and 29(b) of the Convention.[82]

f. The Committee noted that other methods should be explored like oath taking, without affecting the confidentiality of the deliberations of the jury.

The Committee has interlinked the denial of accessibility and reasonable accommodation with the other protected rights in the Convention. Committees are not bound by the rule of precedent, but still they have referred to their previous views, not because they are bound by it, but because it was relevant. It has consistently in every case made it clear that these rights can't be just treated as progressive by States and delay its implementation. Developing nations might not still find it difficult to fulfill the obligations because of lack of trained human resource, funds, technology, etc.

80. UN Committee on the Rights of Persons with Disabilities, "Communication No. 10/2013", (OHCHR, 2-10-2018), <https://tbinternet.ohchr.org/Treaties/CRPD/.../CRPD-C-12-DR-10-2013_22288_E.doc> accessed 19-1-2020.
81. Art. 5, Convention on the Right of Persons with Disabilities (CRPD).
82. *Ibid.* (n 80) 8(9).

Fiona Given v. *Australia*[83] represented the problem faced by disabled people in the voting process. The complainant suffered from severe form of disability[84] and her main contention was to exercise *"right to vote by secret ballot"*. The Committee after noting all the facts determined that her rights under Article 29(a)(i) and (ii)[85], read alone and in conjunction with Articles 5 (2), 4 (1) (a), (b), (d), (e) and (g) and 9(1) and (2)(g) of the Convention stand violated.[86] *The Committee like the previous cases gave a harmonious interpretation to the concerned articles for fulfilling the objectives of the Convention.*

In *Simon Bacher* v. *Austria*[87] the State was found to have violated its obligations though the problem was solely between private parties involved in case involving property rights. The domestic courts decided the disputed matter only as a property matter, while turning a blind eye to the fact that the laws need to be interpreted in the light of convention provisions, which require accessibility and reasonable accommodation. The Committee states *"although disputes resulting from the construction of a roof on a path are between two individuals, the State party has an obligation, inter alia, to guarantee that the decisions adopted by its authorities do not infringe upon the rights of the Convention"*[88]. The Committee rejected all the arguments put forward by the State[89]. The domestic court was found wrong to have treated it as pure case involving property rights, when it should have analysed the special needs of the disabled person, thereby ignoring the multidimensional consequences on the accessibility rights of Mr. Bacher. The decision left the family to find other ways to enable his access to his home and other places. The courts had caused a violation of Article 9 alone and also jointly with Article 3.[90]

83. UN Committee on the Rights of Persons with Disabilities, "Views adopted by the Committee under Article 5 of the Optional Protocol, concerning Communication No. 19/2014 (*Fiona Given* v. *Australia*)", (OHCHR 29-3-2018).
84. *Ibid,* 2(1). *"The author has cerebral palsy and, as a result, she has limited muscle control and dexterity and no speech. She uses an electric wheelchair for mobility and an electronic synthetic speech generating device for communication."*
85. Art. 5, Convention on the Right of Persons with Disabilities (CRPD).
86. *Ibid,* (n 85) 8(10).
87. UN Committee on the Rights of Persons with Disabilities, "Views adopted by the Committee under Article 5 of the Optional Protocol, concerning Communication No. 26/2014 (*Simon Bacher* v. *Austria*)", (OHCHR, 6-4-2018).
88. *Ibid,* 9(2), 9(3).
89. *Ibid,* 9(8).
90. *Ibid,* 9(9).

Part D- Committee Jurisprudence and Treaty Interpretation

In the previous section it is shown that the Committee has been able to establish links between the right of access and reasonable accommodation with the other rights in the Convention. In this part the author examines the usage of VCLT interpretive provisions and how does it enrich the meaning of the Convention text in the light of VCLT provisions.

The committee is a core component under the treaty and it carries out multiple functions, like examining reports submitted by State Parties; make suggestions and recommendations on the State Parties, and examine individual complaints with respect to alleged violations of the Treaty by the respective State Party. The success of these functions is essentially dependent upon the proper interpretation of the respective human rights treaty (i.e. in this case, the CRPD).[91] Interpretation is a process of establishing the real meaning of a treaty, which must reflect the expressed intention of the parties in the light of the surrounding circumstances.[92]

The present paper has been focusing only on one of its function, with respect to interpretation of the treaty requirement of ensuring "accessibility". These decisions are reached by independent experts, serving in personal capacity. At present the Committee has 18 experts, of whom eight of them have formal degrees in legal education and some of them are practicing advocates, while the other 10 experts have non-legal background, however with experience in working on disability issues in their respective countries, while also being familiar with the working processes of the United Nation.[93] Such a well-balanced committee can be expected to frame their views in individual complaints in a legalistic manner, especially explaining the applicability of the principles of treaty interpretation which are now accepted as part of the customary international law.[94] The ICJ views the Vienna rules of interpretation are universally binding as customary international law, as it is widely applied by several tribunals, like International Tribunal for the Law of the Seas, European Court of Human Rights, Dispute Settlement Body [WTO], and

91. Mechlem K., "Treaty Bodies and the Interpretation of Human Rights" 42 Vanderbilt Journal of Transnational Law 908.
92. *Ibid,* (n 12) 522.
93. Office of the United Nations High Commissioner for Human Rights, "Committee on the Rights of Persons with Disabilities" (OHCHR) <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx> accessed 19-1-2020.
94. Zemanek Karl, "United Nations Audiovisual Library of International Law" (United Nations) <https://legal.un.org/avl/ha/vclt/vclt.html> accessed 19-1-2020.

Arbitral Institutions which settle investment law disputes.[95] ICJ itself has directly considered the practice of a treaty body, i.e. Human Rights Committee in Advisory Opinion on the Wall[96] in 2004; *Diallo case*;[97] *Belgium* v. *Senegal*;[98] and the IFAD case. In the *Diallo case* ICJ attached great weight to the interpretations adopted by independent bodies, like the Human Rights Committee and others as established supervise and apply the respective treaties. ICJ refers to committee jurisprudence with the sole objective to "achieve necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[99] The court also mentions that the reliance on the committee interpretive case laws is not out of any obligation to shape its own judgments' in the committee lines. It is clear that ICJ has been increasingly referring to committee literature to corroborate its own interpretation of treaty provisions. Afore-mentioned cases clearly prove that committee jurisprudence which is judicial in character can be interpreted as a source of international law under Article 38 (1) (d)[100] of the ICJ Statute, i.e. as a subsidiary means of *source of international law.*

UN Treaty Bodies are not courts and accordingly, their outputs are not binding on States, hence seen as weak.[101] However with the passage of time these committee views on individual complaints have gained footing under international law. However, on close analysis it is seen that committee jurisprudence should enjoy similar importance as judicial decisions. *The Human Rights Committee in its General Comments No. 33,*[102] *clarifies that the views given by the Committee while considering individual communications, exhibit important characteristics of judicial decision, like judicial spirit; impartiality and independence of*

95. *Ibid,* (n 12) 524-525.
96. Legal consequences of the construction of a wall in the Occupied Palestinian Territory Advisory opinion of 9-7-2004, 109-112. The opinion noted that the Committee findings were in the lines of the *travaux preparatoires.*
97. *Republic of Guinea* v. *Democratic Republic of the Congo*, 2010 ICJ Rep 639, concerning Ahmadou Sadio Diallo judgment of 30-11-2010, para 66-68.
98. *Belgium* v. *Senegal*, 2012 ICJ Rep 422. Questions relating to the Obligation to Prosecute or Extradite judgment ICJ Reports 2012422.
99. *Ibid,* (n 99) 66.
100. Statute of the International Court of Justice, 1945, Art. 38(1).
101. Andenæs M. and Bjorge E., *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press, 2015) 88.
102. United Nations Human Rights Committee, "General Comment No. 33" (United Nations Human Rights Committee, 5-11-2008).

the members, interpretation of the covenants language and finally the determinative character of the decisions.[103] It goes on to say that the views given in the individual complaints reflect authoritative pronouncements by the organ established by the covenant and bestowed with the task of interpreting the instrument.[104]

In the light of the importance that has been bestowed upon committee jurisprudence, it is imperative that committees while drafting views must refer to the tools of treaty interpretation as under the *VCLT* provisions. *None of the adopted views*, discussed in this paper, have anywhere referred to the general rules of interpretation or even mentioned the Vienna Convention of Law of Treaties. The committee has restricted itself to only referring to the Convention and the optional protocol, specifying the provisions so referred in each document.

CONCLUSION

It can be fairly concluded that on an international plane the Committee has established very strong links between the Right of Access and Reasonable Accommodation with the other rights in the Convention. However, the fact remains that the level of compliance sought by the Committee will not be easily met by the countries which have poor infrastructure, untrained human resources and less awareness of the rights. Still by its consistent uncompromising stand on the rights of the disabled, it is setting the path right for all the disabled persons fighting for the right of accessibility in their own jurisdictions. However it is suggested that the Committee having flexibility in framing its views must also consider including the interpretations done by other Committees, through their views or General Comments use principles of treaty interpretation under Vienna Convention on Law of Treaties, 1969[105] by urging States to act in the fulfillment in the of object and purpose of the Convention in pursuance to Article 31(1).[106] To conclude it is emphasised that these committees are essentially involved in determining rights and obligations under a treaty and while doing so, referring to the rules of interpretation, as is universal practice by any judicial or quasi judicial body, would make their views logical, coherent, predictable, legitimate, and reproducible, while upholding the principles of legal certainty and rule of law.

103. *Ibid*, 11.
104. *Ibid*, 13.
105. Vienna Convention on the Law of Treaties, (1969) 1155 UNTS 331.
106. *Ibid*, Art. 31(1).

THE CRUMBLING CORNERSTONES OF JUSTICE, LIBERTY, EQUALITY AND DIGNITY: AN ERA OF UNBRIDLED HATE CRIMES

*Divyanshu Chaudhary**

ABSTRACT

Crimes being an inseparable part of the civil society have always challenged the very idea of the instrumentality of State; similarly, the State being under an inevitable obligation is duty-bound to protect its people against the ill-effects of these adverse activities and thereby imparts justice (in case the rights are violated). Therefore, the State is consistently required to maintain and protect the equilibrium of rights of the people. It certainly also necessitates (to fulfill its indispensable obligations) on the part of the State to devise new channels to tackle the emerging crimes. However, in recent times, the State seems to be not so active in performing its duty against the rapidly growing (although not a new phenomenon) hate crimes in India. The present legal system also does not provide solid legal mechanism to tackle this emerging evil because of which the very idea of justice, liberty, equality and dignity as enshrined within the organic fabric of the Constitution of India seem to be shattered .Consequently, this not only questions the existence of the entity of State but also highlights the idea of rights. This paper, therefore, is an attempt to highlight the emergence of hate crimes in India and how its emergence violates various constitutional rights of people. The research further intends to show as to how the State is failing in tackling these crimes and therefore what possible solutions (by the way of comparative approach) the State can adopt.

1. INTRODUCTION

The monumental end of lamentable British Empire and over two years of long deliberations of the constituent assembly endowed the incredible India with one of the most powerful (not only in the sense of arms but in

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terms of culture, traditions and civilisation) democracies in the world. Consequently, the Preamble to the Constitution of India, 1950 constituted India into a (Sovereign Socialist Secular Democratic Republic)[1]*; undoubtedly, the highest regards may be rendered to these connotations as they not only just represent India as a free and non-dependent nation but also further the very spirit and strength of what WE, THE PEOPLE OF INDIA have envisaged into this organic document by ploughing it with, amongst other attributes, the holy seeds of socialism and secularism. Unquestionably, what is to be taken into consideration is whether these seeds of the basic structure*[2] *are being protected or the very concept of this refined idea of having such a constitution is being suppressed by certain structures (formal or informal) or is the instrumentality of State merely being a mute spectator or is it also participating (directly or indirectly)?*

However, the above discourse entrusts one with the foundational questions as to what are those "ends" which WE, THE PEOPLE OF INDIA achieve by adopting the very basic structure and why such "ends" bestow such extraordinary significance. Undeniably, these "ends" being the *justice, liberty, equality* and *dignity* are the indefeasible characteristics, which if attempted to be thwarted, will result in the tyranny of the Constitution of India. Therefore, it becomes indispensable to deliberate upon such hostile situations when these basic values may grossly be transgressed; the existing state of affairs in India demonstrates one of those unfavorable conditions for the realisation of such rights wherein the citizens are scuffling with the new species of crime referred to as "Hate Crimes".

Following this approach, an attempt has to be made to scrutinise the adverse phenomenon of Hate Crimes that pose to suppress the basic values, and also how the State machinery is accountable to protect those fundamental "ends". All these interrogations have to be emphasised upon in order to conceive the understanding of what the present society in India is encountering.

Purposely, the researcher undertakes to explore the various facets relating to the emergence of the hate crimes in India and its diabolic effects on the basic human rights of the citizens under the Constitution of India. Accordingly, this paper *firstly* deals with the Constitution of India being

1. Originally constituted as (Sovereign Democratic Republic) to which the words "Socialist" and "Secular" were added by the 42nd Amendment 1976 to the Constitution of India, 1950.
2. *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225.

the guarantor of the foundational rights to the citizens; *secondly*, it strives to emphasise the emergence of Hate Crimes in India; *thirdly*, it demonstrates how the human rights of the people have been exhibited to gross violation; *fourthly*, it depicts the role of the State and its approach to tackling the new species of crime; *fifthly*, it deliberates as to how the extra-territorial bodies considered this evil in their own jurisdictions; and *lastly*, the paper concludes, adhering with the whole discourse, outlining certain suggestions.

2. CONSTITUTION OF INDIA: THE GUARANTOR OF THE FOUNDATIONAL RIGHTS

In order to appreciate the entire matrix of hate crimes and its impacts, *undisputedly*, it is a pre-requisite to discuss all those foundational rights, which are being suppressed today by this emerging evil. These foundational rights are those keystones which certainly convert the Indian Constitution into an organic document, which if not properly safeguarded by the State, will fade away. Therefore, it is indispensable to analyse the concept of these rights which are enshrined under the Constitution of India not only for citizens but also for non-citizens (*at places*).

The importance of these rights is also evident from the fact that they were the subject of extensive deliberations by the Constitution makers in the constituent assembly. Resultantly, they were finally incorporated in Part III of the Constitution of India as the justiciable[3] rights. Furthermore, what also needs to be understood is that the basic features such as of *equality, liberty, justice,* and *dignity* sewed within the preamble to the Constitution of India[4] cannot be realised in their real essence until the State promotes and protects the rights under Part III. It is, *for these reasons*, pertinent to analyse these rights under Part III which are unconditionally guarded by the Constitution of India.

2.1. Rights under Part III of the Constitution of India

2.1.a. *Articles 14 and 15 of the Constitution of India*

The text of Article 14[5] clearly states and assures one, of the guarantee of the "*right to equality*" by the State. The rights contained herein inculcate

3. *Black's Law Dictionary*, 944 (9th edn., 2009) defines it as, "Capable of being disposed of judicially".
4. The Constitution of India, 1950, Preamble.
5. *Ibid*, Art. 14: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

the idea of equality amongst equals that is to say the equal treatment of those who are similarly circumstanced. The right of equality as enshrined herein is of greatest significance as to abolish all kind of possible adversaries, which would have arisen in its absence.

Article 15[6] has been drafted in furtherance of concept of equality under Article 14 of the Constitution of India. It, *therefore*, prohibits every kind of discrimination on the grounds of religion, race, caste, sex or place of birth. The provision contains the principle of non-discrimination in two-fold i.e.—*firstly*, it eradicates the existing discrimination and *secondly*, it invalidates its practice in future. The importance is also derived from the fact that the true realisation of equality cannot take place amidst the increasing appreciation for discrimination in civil society. This Fundamental Right has also been instrumental into the mainstreaming of those citizens who are socially and educationally backward in society.[7]

2.1.b. *Article 17 of the Constitution of India*

This provision, *furthering the idea of justice, equality and human dignity*, clearly prohibits[8] the practice of the evil of untouchability in free India. The underlying principle under Article 17 not only abolishes untouchability but also significantly furthers the idea of upliftment of those marginalised class of people who have been deprived of the most basic rights including the scheduled castes and tribes.[9] The idea of this provision becomes more important in present time when the perpetrators are committing hate crimes on the basis of a specific caste.

2.1.c. *Article 21 of the Constitution of India*

The foremost right which Article 21[10] inculcates is the paramount right to life and personal liberty without which the other rights will certainly turn useless and redundant. Therefore, it is not only limited to life and liberty,

6. *Ibid,* Art. 15: "Prohibition of discrimination on the grounds of religion, race caste, sex or place of birth".
7. *Post Graduate Institute of Medical Education & Research* v. *K. L. Narasimhan,* (1997) 6 SCC 283.
8. Constitution (n 4) Art. 17: "Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law".
9. See *State of Karnataka* v. *Appa Balu Ingale,* 1995 Supp (4) SCC 469 : AIR 1993 SC 1126.
10. Constitution (n 4) Art. 21: "No person shall be deprived of his life or personal liberty except according to a procedure established by law".

but includes all those facets which are helpful in realising this very right. Purposely, *for such reasons*, it is the Indian Supreme Court that has, *from time to time*, not left any stone unturned and explored every possible connotation which is necessary to fulfill all its debated ambitions thereby nurturing the ideals envisaged in the preamble. Starting from *Maneka Gandhi* v. *Union of India*[11] *(rendering the true definition of human dignity)* to *K. S. Puttaswamy* v. *Union of India*[12] *(the right to privacy)*, the court has always upheld the true essence of the rights of the people.

2.1.d. *Article 25 of the Constitution of India*

The freedom of religious activities is guaranteed under this provision of the Constitution.[13] What is essential to note is the concept of secularity within this provision that is to say that the State plays a neutral role in the matters of religion and religious practices thereof; a slight look at the Preamble to the Constitution of India also approves of this basic feature. In this manner, each religious denomination has the equal rights with respect to their religion under Articles 26, 27 and 28 of the Constitution of India.

2.2. Rights under Part IV of the Constitution of India

Along with foundational rights in Part III of the Constitution of India, Part IV, *which although is non-justiciable,*[14] also highlights various rights and obligations that certainly aid the attainment of these intrinsic rights of the people. The provisions enumerated under Part IV exhibit two-fold concepts—*firstly*, it recognises the socio-economic rights and justice for the citizens; *secondly*, it casts an obligation on the state to protect these rights by making policies. The crucial provision that has to be taken into account for the purpose of our study is Article 46[15] of the Constitution of India which furthers the protection to the weaker sections of the society.

11. *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248.
12. *K. S. Puttaswamy* v. *Union of India,* (2017) 10 SCC 1.
13. Constitution (n 4) Art. 25: "Freedom of conscience and free profession, practice and propagation of religion. (1) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion".
14. *Ibid,* Art. 37: "The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws".
15. *Ibid,* Art. 46: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the

Unquestionably, the rights enshrined under Part III and IV of the Constitution of India are those which need to be protected in every circumstance by the State and the State being the representative of the people cannot make an excuse in times of their violation. Therefore, what becomes pertinent is to know how these rights can be affected that too in the era of *hate crimes*.

3. HATE CRIMES IN INDIA: MEANING AND EMERGENCE

No wonder it may arise in holding that a civil society consists of various phenomena; one of them is the evil in the form of criminal activities. It is based on the principle that no society is free from the wide array of crimes and a section of it, *therefore*, always affected by its prevalence. So is the case with the Indian society too, the criminal activities have significantly affected the lives of Indian people and society. What is, *amongst all*, noteworthy is the emergence of crimes with a distinct character—here in our case, the hate crimes.

Unfortunately, Indian society for the last few years, along with its confrontation with the conventional crimes, is experiencing the diabolic incidents of hate crimes. The traditional understanding of criminal law, *in this regard*, entails certain elements of a crime including the *mens rea* or the mental state of the accused in whose absence an act does not qualify to be a crime.[16] However, *in Black's Law Dictionary*, the concept of hate crime is defined as *"a crime motivated by the victim's race, color, ethnicity, religion, or national origin"*.[17] What is important to be considered here is the existence of element of personal bias and hate on the part of accused which plays a pivotal role in commitment of crime against the victim; the concept of hate here has to be examined in the light of various constitutionally protected characteristics that are the victim's *race, caste, religion, colour,* etc. Therefore, it can be summarised that a crime can be termed as a hate crime only when it was committed[18] on the basis of *mens rea* and *motivation* arising out of hate towards the above-mentioned characteristics of the victim.[19]

scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation".

16. Eugene J. Chesney, "Concept of Mens Rea in the Criminal Law", (1939) 29 American Institute of Criminal Law & Criminology 627.
17. *Black's Law Dictionary* (n 3) 428.
18. Phyllis B. Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies* (1st edn., Sage Publications, 2004) 9.
19. *Ibid.*

However, the above-mentioned definition cannot be strictly applied to all jurisdictions; rather it requires domestic investigation of the problem. Therefore, Indian adoption of the definition also attracts appreciation of other characteristics such as one's freedom of speech, personal beliefs and choices[20] (*for example: honour killing for marrying a person of one's choice that is certainly a constitutionally protected right*), profession and sexual orientation.

While discussing the various facets of hate crimes with respect to India, it is similarly unavoidable to note that this is not completely alien to our country but such acts have been occurring in Indian society since ages (*including that on the basis of caste, etc*); *however*, what is worrying is an instantaneous growth in the commitment of hate crimes that has altogether unveiled India to reconsider its stance against the prevalence of such atrocities against people. Therefore, what needs to be problematised is the legal, philosophical and political approach towards the problem of hate crimes in India.

This also leads one to the reasoning as to what actually are the factors which have resulted in caste and religion[21] based hate crimes in India; a close look into the recent scenario may provide one with the glimpse of certain powerful social and political structures whom hundreds of millions of people subscribe to. For example, the Rashtriya Swayamsevak Sangh (RSS), a strong Hindu organisation, has always been in controversy for making remarks which reflect an adverse outlook on the constitutional philosophy of India.[22] Similarly, the influence of RSS philosophy can also be seen in the present political power and government led by BJP that can further be confirmed by analysing the hate crimes data in the States where it is in power.[23] Moreover, *among others*, the fact that it is the BJP ruled States that have seen significant rise in the rate of hate crimes could

20. See "Honour Killings: More than 300 cases in last three years" *The Times of India* (India, 22-9-2018) <https://timesofindia.indiatimes.com/india/honour-killings-more-than-300-cases-in-last-three-years/articleshow/65908947.cms.> accessed 19-12-2019. See also *Black's Law Dictionary* (n 3) 805.
21. Alison Saldanha, "Cow-Related Hate Crimes Peaked in 2017, 86% of Those Killed Muslim", *The Wire* (India, 8-12-2017) <https://thewire.in/communalism/cow-vigilantism-violence-2017-muslims-hate-crime> accessed 19-12-2019.
22. "RSS Chief Bhagwat declares India a Hindu Nation" *The Citizen* (18-8-14) <https://www.thecitizen.in/index.php/en/NewsDetail/index/2/173/RSS-CHIEF-BHAGWAT-DECLARES-INDIA-A-HINDU-NATION> accessed 19-12-2019.
23. Singdha Jain, "BJP and its Hindutva politics—The Slow Saffronisation of India" *The Week* (India, 25-4-2018) <https://www.theweek.in/news/india/2018/04/25/bjp-and-its-hindutva-politics-the-slow-saffronisation-of-india.html> accessed 19-12-2019.

also not be undermined.[24] These factors prevalent at the very grass root level in the State are somehow legitimising the continuance of the hate crimes in society.

4. SUPPRESSION OF HUMAN RIGHTS: IMPACT OF HATE CRIMES

Undoubtedly, the end result of a crime is nothing but the depredation of those rights which are so foundational that the life of a human being cannot be imagined in their absence; hate crimes, *in the similar manner* also targets at some of the very intrinsic values (*rights which are paramount*[25], *sacrosanct*[26] *and inviolable*[27]) of a human life as also defined under the Constitution of India as equality, justice, liberty, freedom, dignity, etc. Therefore, it turns out to be of utmost relevance as to critically analyse the devastating results due to the prevalence of hate crimes in India and how they have taken shape to become a threat to these basic values.

Crimes being committed on the ground of religion, caste, honour, sexual orientation (including the LGBT community), profession (including cow vigilantism), free speech and choice have threatened the very values enshrined in the form of Articles 14[28], 15[29], 17[30], 19[31], 21[32], 25[33], etc. of the Constitution of India. There are numerous reasons why these rights are so important, ranging from the constituent assembly arguments[34] to the broad interpretation[35] by the Supreme Court. The statistics[36] from Amnesty International show the high rise in hate crimes in India in the last few years. Consequently, people are not being allowed to enjoy their rights; for

24. Jayshree Bajoria, "Holding Killers to Account for Hate Crimes in India", *Human Rights Watch* (Asia, 21-3-2018) <https://www.hrw.org/news/2018/03/21/holding-killers-account-hate-crimes-india> accessed 19-12-2019.
25. *A. K. Gopalan* v. *State of Madras,* AIR 1950 SC 27.
26. *State of Madras* v. *Champakam Dorairajan,* AIR 1951 SC 226.
27. *Ujjam Bai* v. *State of U.P.,* AIR 1962 SC 1621.
28. Constitution (n 5).
29. Constitution (n 6).
30. Constitution (n 8).
31. Constitution (n 4), Art. 25: "Freedom of conscience and free profession, practice and propagation of religion".
32. Constitution (n 10).
33. Constitution (n 13).
34. CAD Vol. VII, 1948-49, 610.
35. Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (1st edn., Oxford University Press, 2000) 41.
36. "Halt the Hate" (Amnesty International India) <http://haltthehate.amnesty.org.in/map.html> accessed 20-12-2019.

example, the fundamental right to trade, commerce and business under Article 19 is, *nowadays*, being transgressed upon by certain groups in the name of cow vigilantism.[37] Another diabolic example attracts the incident took place in Uttar Pradesh wherein a *Dalit* boy was killed for merely bearing a high caste surname.[38] Similarly other hate crimes have also been reported which tremendously target the very roots of foundational rights of the people.[39]

Furthermore, what also needs to be taken into consideration is that a significant number of such crimes go unreported in India that altogether signifies a denial of justice to the equal Fundamental Rights of the individuals.[40] Therefore, what the present prevailing scenario in India hints at is the destruction of those constitutional ideals which have been thought to be the cornerstone of the free India.

5. THE INSTRUMENTALITY OF STATE VIS-À-VIS HATE CRIMES: GROSS FAILURE OR DELIBERATELY CONFINED

The discourse revolving around hate crimes would certainly be incomplete without addressing the questions as to its prevention and control in the civil society. What needs, *therefore*, to be problematised is the existence and role of various machineries of the State. Addressing their silence to tackle these evils is also indispensable. Answering these questions, *firstly*, altogether also requires an understanding of the relationship that exists between the State and its citizens. Purposely, *to define a State in true sense*, its approach towards maintenance of rights of people (*how well does it maintain them*) must be analysed.[41] For this purpose, it is apposite to state that "*to establish a welfare State wherein the people have access to all these basic human rights, the instrumentality of State is postulated with the duty to protect and further cherish these fundamental values*".

37. Annie Gowen and Manas Sharma, "Rising Hate in India", *The Washington Post* (India, 31-10-2018) <https://www.washingtonpost.com/graphics/2018/world/reports-of-hate-crime-cases-have-spiked-in-india/?noredirect=on> accessed 20-12-2019.
38. "India Dalit Boy Killed over High-Caste Man's Name", *BBC* (India, 2-12-2011) <https://www.bbc.com/news/world-asia-india-15997648> accessed 20-12-2019.
39. Amnesty International India, "Why Hate Crimes Remain a Grave Problem in India", (India, 22-8-2018) <https://amnesty.org.in/why-hate-crimes-remain-a-grave-problem-in-india/> accessed 20-12-2019.
40. Neeraj Chauhan, "75% of People Do Not Report Crimes as Cops are Unfriendly", *The Times of India* (India, 9-11-2017) <https://timesofindia.indiatimes.com/india/75-of-people-do-not-report-crimes-as-cops-are-unfriendly/articleshow/61569006.cms> accessed 20-12-2019.
41. Harold J. Laski, *A Grammar of Politics* (1st edn., Routledge, 2016).

Certainly, the existence of State is itself an evidence of its purpose that is to serve the people and protect their rights. Similarly, the insertion of Article 12[42] of the Constitution of India before the Fundamental Rights suggests and at the same time casts an inevitable duty on the shoulders of the State that is the protection and enforcement of these rights. Such a finding becomes clearer and binding by slightly looking at Dr Ambedkar's speech in the *Constituent Assembly* where he greatly emphasised the need and intention for the efficacious enforcement of Fundamental Rights.[43] Resultantly, *after much discussion and crossing various hurdles*, Article 12 was finally included within the Constitution of India; it, *therefore*, authorises people to enforce their rights against all those machineries of the State which retain power or exercise power over them.[44]

It is, *therefore*, well established that the State cannot escape from its duty of protection, promotion and proper enforcement of these rights. Moreover, *to make the mechanism more effective*, Article 32[45] and 226[46] were also included within the Constitution of India that provides the constitutional remedies against the pillars of executive[47] and legislature[48] also.

Therefore, the answer to the aforementioned question is quite visible in the organic text of the Constitution of India as to which functionaries are responsible for maintaining law and order in the country and also protecting the rights of the people. But what is evident today is the complete failure on the part of the executive and the legislature. The incidents of hate crimes are increasing at a shocking rate[49] but no substantive action is seemed to be taken against the perpetrators. The present government (*that has accepted the growth in crimes*) also does not seem to be serious for the

42. Constitution (n 4), Art. 12: "Unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India".
43. CAD Vol. VII, 1948, 607-610.
44. Udai Raj Rai, *Fundamental Rights and Their Enforcement* (1st edn., Prentice Hall of India, 2011) 690.
45. CAD Vol. VII, 1949, 953.
46. Constitution (n 4), Art. 226: "Power of High Courts to issue certain writs".
47. *S. Pratap Singh* v. *State of Punjab,* AIR 1964 SC 72.
48. *Powers, Privileges and Immunities of State Legislatures, In re,* AIR 1965 SC 745.
49. "Alarming Rise In Hate Crimes", *The Hindu* (Bengaluru, 16-3-2018) <https://www.thehindu.com/news/national/alarming-rise-in-hate-crimes/article23264748.ece> accessed 23-12-2019.

matter.[50] The legislature also seems to have maintained a distance from touching the contours of hate crimes and so far has not taken any action to come up with any new legislation or an amendment in the existing Indian Penal Code, 1860; even some attempts made by some of the members seemed to have been ignored.[51]

All such events lead one to the conclusion that the State is deliberately confining its attention to other issues and therefore, *in a way*, is working as a catalyst in the growth of the crime. Certainly, the State seems to have failed in its highest duty of preserving the rights of the people that consequently attacks at the values which are fundamental to the Constitution of India.

6. HATE CRIMES IN OTHER COUNTRIES: IDEALS TO TACKLE IT

Undeniably, the above-discussed facts related to hate crimes crisis in India apprise one to arrive at the conclusion that India as a welfare State seems to have succumbed to the present circumstances. Therefore, it is at this juncture that the idea of comparative approach becomes relevant; such a comparative exercise not only allows the understanding of the similar problem in other jurisdictions but also furnishes the mechanism of timely and effective intervention to tackle the menace of hate crimes. For this purpose, it is important to analyse the similar developments in the United Kingdom, Belgium and the USA.

In United Kingdom, the Crime and Disorder Act, 1998,[52] in order to tackle the crimes based on hate, etc., was enacted by the British Parliament in 1997. The intention behind the enactment of the statute is to prohibit the behavior which is anti-social; *therefore*, the conducts based on race, religiously aggravated grounds, on fear or provocation of violence, sexual orientation, etc. are prohibited and punished under the Act. What is also

50. "Indian Govt. Admits Rise in Religion-Based Hate Crime" *UCA News* (New Delhi, 9-2-2018) <https://www.ucanews.com/news/indian-govt-admits-rise-in-religion-based-hate-crime/81477> accessed 23-12-2019.
51. S. Rosamma Thomas, "M.P. Husain Dalwai Introduces Bill to Amend IPC to Prevent Hate Crimes", *The Times of India* (India, 5-8-2017) <https://timesofindia.indiatimes.com/india/mp-husain-dalwai-introduces-bill-to-amend-ipc-to-prevent-hate-crimes/articleshow/59934472.cms> accessed 23-12-2019.
52. Crime and Disorder Act, 1998 <https://lx.iriss.org.uk/sites/default/files/resources/036.%20Crime%20-and-%20Disorder%20Act%201998.pdf> accessed 26-12-2019.

relevant to note is that this Act particularly addresses the crimes that can be categorised as hate crimes.

Another example can be taken of Belgium wherein the Act of February 25, 2003,[53] which has come an amendment to the Act of February 15, 1993, has expressly criminalised all the offences based on grounds such as religion, race, colour, descent, sexual orientation, nationality, etc. Additionally, the Act also provides for the enhance punishment for the perpetrators and requires on the part of the centre to collect and publish the data showing the crimes based on racism and discrimination.

In a similar manner, the United States of America also learned from its past mistakes of not enacting legislation to particularly combat the evil of hate crimes. The Civil Rights Act of 1968 proved to be a failure by various instances of hate crimes in USA including those of Shepard and Byrd who were killed because of the personal biasness of the accused.[54] Though the Act of 1968 only protected certain categories of crimes, it is certainly the origin of the Act, 2009.[55] Therefore, Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 2009 came into existence which included crimes based on sexual orientation, gender identity, race, color, religion, national origin, disability of the victim, etc. The Act not only provides for the specific legislation in this respect but also educates the society that if they commit such an offence then they might attract the enhanced punishment for the same.[56]

Talking in the context of India, the need of the hour requires the present government and the legislature to come up with some stringent changes in the IPC or to introduce a new legislation recognising this different category of crimes in India. Section 153-A[57] of IPC has not been drafted with the intention to cover the crimes based on caste, sex, sexual

53. Act of 25-2-2003 pertaining to the combat of discrimination <https://www.unia.be/en/law-recommendations/legislation/act-of-february-25-2003-pertaining-to-the-combat-of-discrimination> accessed 26-12-2019.
54. Meredith Boram, "The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act: A Criminal Perspective" (2016) 45(2) University of Baltimore Law Review 343, 354.
55. William J. Krouse, Hate Crime Legislation (Congressional Research Services, 2010) 6-7 <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1801&context=key_workplace> accessed 26-12-2019.
56. Boram (n 54) 359.
57. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

orientation, gender identity, personal beliefs, profession of the victim, etc. which are a current phenomenon. The government, *therefore*, must also fulfill its *constitutional and international obligation in the form of various covenants and* conventions which it has signed. India being a signatory to International Covenant on Civil and Political Rights, 1966[58] and International Convention on the Elimination of All Forms of Racial Discrimination, 1969[59] is also bound by certain obligations to protect the citizens from all kind of discrimination and to protect their rights. The framework of various discussed jurisdictions, *in this regard*, presents a holistic comparison and view as to the idea of the development of a policy in Indian jurisdiction also.

7. CONCLUSION AND SUGGESTIONS

After deliberating all the fundamental facets related to the problem of hate crime, what is apparent is that, the problem in hand is certainly grave and the ignorance by the concerned authority is not only turning the problem more serious but is also striking at the very roots of their rights under the Constitution of India. Many suggestions have been furnished above in the form of comparison with other jurisdictions and legislations, etc. and many more can be expressed in detail here, but the problem still does not seem to have been addressed; what is, *therefore*, required at the first instance is the acceptance of the prevalence of hate crimes by the instrumentality of the State. Until this realisation takes place, the suggestions will be redundant.

However, once over with the realisation part by the so-called welfare State, the State must approach to address this evil with the principles of non-discrimination and non-biasness towards a particular group or class of people. Retaining all these principles into consideration, it is imperative that all the three functionaries of the State–the executive, the legislature and the judiciary–take steps to ensure the proper rendition of their functioning as per the constitutional mandate. What is significant for them is that they fulfill their roles as per the doctrine of separation of powers and must respectively maintain law and order, legislate or enact the required law, and must lay down certain guidelines (such as in

58. International Covenant on Civil and Political Rights, 1966, Arts. 2, 6 and 9.
59. International Convention on the Elimination of All Forms of Racial Discrimination, 1969, Arts. 1 and 4.

Vishaka v. *State of Rajasthan*[60]) or ensure proper justice for the victims of such crimes.

Again, what is required at the point to perform all these duties is the *unbiased* and *even* conduct of the State functionaries which seems to be missing throughout the above observations of the present societal conditions. It may, *in this way*, be well concluded that the vision envisaged at the time of making the constitution by the constituent assembly is certainly not taking place today; the so-called representatives of the people also appear to shun the constitutional values and sanctity of oaths and seem to have succumbed to certain political entities. What can be said at this juncture is that a complete re-visit to these established principles is needed to understand and fix the growing unholy evil of hate crimes.

60. (1997) 6 SCC 241.

WAVE OF PRIVACY RUBBING THE DIGITAL FOOTPRINT INTO ANONYMITY: A HUMAN RIGHT TO BE FORGOTTEN IN THE DIGITAL AGE?

*Nimisha Priyadarshi**

ABSTRACT

The pervasive use of internet, ever-growing thirst for knowledge coupled with constant technological development has led to the generation and storage of massive data daily. This has played an important role in re-conceptualising privacy. Informational privacy, as an aspect of Right to Privacy, includes granting autonomy to the individual to control the way his personal information is disseminated. It is essentially a "condition under which there is a control over acquaintance with one's personal affairs by enjoying it"[1] or "the individual's ability to control the circulation of information relating to him."[2] Right to be forgotten grants an individual the right to get his personal data removed and hence, ensures informational privacy. Thus, the concept of privacy has given birth to "right to be forgotten" as a legal way of enforcing an individual's identity in the online world. This right is crucial since it recognises an individual's need to construct an identity in today's social construct. Owing to its "eternity effect",[3] the internet "preserves bad memories, past errors, writings, photos or videos which we would like to deny later."[4] Our past moves like a shadow, no matter how much we try to "move away". Hence, right to be forgotten not only ensures privacy of the individuals

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1. Hyman Gross, "Privacy and Autonomy" (1971) 13 Privacy-NOMOS 169.
2. Arthur R. Miller, *The Assault on Privacy* (Mass Market Paperback, 1972).
3. Walz, 19th International Data Protection Commissars Conference, Report on "Relationship between the Freedom of the Press and the Right to Informational Privacy in the Emerging Information Society" (September, 1997).
4. De Terwagne, *The Right to be Forgotten and the Informational Autonomy in the Digital Environment* in Â. G Pereira., A. Ghezzi., L. Vesnic Alujevic (eds.), *The Ethics of Memory in a Digital Age: Interrogating the Right to Be Forgotten* (Houndsmills, Palgrave Macmillan, England, 2014).

but also human dignity by letting the individual to be different not just from others but also from one's past self. However, this right comes in conflict with freedom of speech and expression and right to information of individuals. It is against this backdrop that this paper attempts to analyse right to be forgotten as a human rights concept in the age of data privacy.

1. INTRODUCTION

> *"Personal information stays within the internet in perpetuity. Even those who have reached physical mortality can live-on in the digital sphere. Because of this, no one, living or dead, can outrun their past online."*[5]

It is a well said dictum that *"data is the new oil."* Massive databases are set up by huge corporations and government regimes to store countless information of the citizens. Further, with the emergence of the digitalised world, cheaper costs and easy accessibility of network, every other person is seen browsing through the internet and thereby, leaving a trail of data in the online world. This has made personal information available to every Tom, Dick and Harry. It has, therefore, created *"little big brothers out of all of us."*[6] In fact, a vicious cycle is created – searching and browsing even for others' personal information leads to marking up his own digital footprint. Such countless generation and storage of data has created a *"panopticon beyond anything Bentham ever imagined."*[7]

On the other hand, the growing concern over privacy has led to a new wave that directly challenges this *"digital immortality"*[8] – a right that entitles an individual to convert his *"immortality"* into *"anonymity"*. The confluence of the two different worlds of Digital Privacy and Digital Mortality has, therefore, given birth to a right-based, control-based concept, that is known as "right to be forgotten".

The United Nations Educational, Scientific and Cultural Organisation (the UNESCO) has recently remarked, *"[i]nternational human rights law does not provide for such a "right" ..... [and] the issue has become topical ..... because in the digital age, it may be impossible for past wrongs to be forgotten, given the ability for people to find a post, comment, picture, or record about someone wherever they may work or reside."*[9] However, UNESCO has failed to recognise Article 12 of the Universal Declaration of Human Rights (the UDHR) that states, *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*[10]

With the advent of digital age, a stigmatising incident of the past is easily accessible by click of a mouse button. By simply putting a name on the search engine, unlimited information of that person's name comes on the screen which is a breach of his privacy. With the European Union's judgement in *Google Spain case*[11] and GDPR principles, there have been considerable requests made to the search engines to delete or remove personal information.[12] As such, this has sparked debate as to the extent of the application and interpretation of right to be forgotten. This paper analyses this right in context of data privacy as a subset of indispensable human right.

2. ANALYSING RIGHT TO PRIVACY

> *"The sanctity of privacy lies in its functional relationship with dignity"*[13]

Privacy, as elusive as the concept, is a postulate of the natural rights of human beings. As a facet of a democratic society, privacy ensures the development of the individual to his fullest capacity. It is the idiosyncrasies of the individual that distinguishes him from another and ultimately leads to the plurality of the State. Since a democratic society is founded upon

5. Cayce Myers, "Digital Immortality versus The Right to be Forgotten: A Comparison of US and EU Laws Concerning Social Media Privacy" (2014)16 Romanian Journal of Communication and Public Relations 47.
6. Jef Ausloos, "The 'Right to be Forgotten' - Worth remembering?" (2012) 28 Computer Law and Security Review 143.
7. *Ibid.*
8. Cayce Myers, "Digital Immortality versus The Right to be Forgotten: A Comparison of US and EU Laws Concerning Social Media Privacy" (2014) 16 Romanian Journal of Communication and Public Relations 47.
9. UNESCO, "Keystones to Foster Inclusive Knowledge Societies: Access to Information and Knowledge, Freedom of Expression, Privacy and Ethics on a Global Internet" (2015) <http://unesdoc.unesco.org/images/0023/002325/232563e.pdf> accessed 6-1-2020.
10. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (10-12-1948), <http://www.un-documents.net/a3r217a.htm> accessed 7-1-2020.
11. *Google Spain* v. *AEPD and Mario Costeja González*, Case C-131/12.
12. Lance Whitney, "Google Hit by More than 144000 Right to be Forgotten Request" *CNET.com* <http://www.cnet.com/uk/news/google-hit-by-more-than-144000-right-to-be-forgotten-requests/> accessed 6-1-2020.
13. *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

the idea of solidarity in diversity, the need to protect the privacy of its individual strikes at the core of any constitutional and democratic ideal, for in the private space, the individuality is guarded and is realised to the hilt. Thus, essentially it is a guarantee to every individual, whether a child or an adult, a man or a woman, a homosexual or a heterosexual, a public figure or a government servant, to have autonomy over their personal space to the exclusion of others, transcending all time and space.

2.1. Defining Privacy

"Privacy" as a concept, was first mooted in the United States of America in 1988 by Thomas Cooley when he defined it as *"a right to be left alone."*[14] It was fairly a nebulous concept and varied jurists had their own interpretation of what it actually entailed. Two years later, Samuel D. Warren and Louis D. Brandeis analysed this concept and cultivated the notion that it was the culmination of the political, economic and social changes that resulted in the recognition of new rights. Therefore, *"right to life has come to mean right to enjoy life, the right to be let alone."*[15] The main thrust of Warren and Brandeis' analysis revolves around on two points, *firstly,* it is a "negative right" in which it is to be treated as a privilege rather than a claim, and, *secondly,* there has to be a legal mechanism to protect the "inviolate personality". William L. Prosser questioned the definition given by Warren and Brandeis by reviewing several cases and coming down to a conclusion that *"Right to Privacy is a compound of four different torts"* which are as follows:[16]

1. Intrusion upon the plaintiff's seclusion or solitude or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eyes;
4. Appropriation for defendant's advantage of the plaintiff's name or likeness.

14. Thomas M. Cooley, *Torts* (First published in 1988) 91.
15. Samuel D. Warren, Loius D. Brandies, "The Right to Privacy" (1890) 4 Harvard Law Review 193.
16. William L. Prosser, "Privacy" (1960) 48 California Law Review 389.

Hymen Gross seems to consider "privacy" as a *"condition of life"* and as a *"form of control."*[17] He substantiates his meaning of control by giving an example: "if A voluntarily exposes himself to B, by either giving B some information or enabling B to overhear A's conversation and if B is bound by one conversation obligating him not to disclose the information thus acquired; A losses no 'control' over the information although he opens himself to a risk of loss of 'control'. Voluntary exposure without the presence of restrictive convention or acquisition of information about A against his wish despite his efforts to prevent it is instances of loss of control."[18]

The definitions by Gary L. Bostwick and Alan F. Westin provide for a wider definition of privacy where they discuss it in reference to "control over information by them." Botswick defines privacy as a component of *"repose, sanctuary, and intimate decision."*[19] Of all the three, the third component is the most dynamic facet of privacy and as opined by Professor Tribe, *"of all decisions as person makes about his or her body the most profound and intimate relates to two sets of questions first, whether, when and how one's body is to become the vehicle for another human being's creation."*[20] Similarly, Allan F. Westin defines privacy as *"the claim of individuals, groups or institutions to determine for themselves, when, how and to what extent information about them is communicated to others."*[21]

2.2. Privacy as a Fundamental Right

The interpretation of "Right to Privacy" as an implicit right under Article 21 guaranteeing "Right to Life and Personal Liberty" is important – it implies that it is an inviolable right that cannot be snatched away by the State without *"procedure established by law"*. Further, it entails that the State has the duty to ensure that fundamental Right to Privacy is provided to every individual. However, the path of being elevated to the position of a Fundamental Right under Article 21 of the Indian Constitution has been a crooked one.

17. Hyman Gross, "The Concept of Privacy" (1967) 42 New York University Law Review 46.
18. *Ibid.*
19. Gary L. Botswick, "Repose, Sanctuary, and Intimate decision" (1976) 64 California Law Review 1447.
20. Professor Tribe, *American Constitutional Law* (3rd edn., University Treatise Series, 2000).
21. Allan F. Westin, "Privacy and Freedom" (1970) 25 Washington and Lee Law Review 7.

- *March, 1953: Supreme Court refused to recognise Right to Privacy as a Fundamental Right:* In *M.P. Sharma* v. *Satish Chandra*,[22] the petition challenged the issue of search warrants issued by judicial officers as an infringement of Right to Privacy. The decision rejected the contention and held that Right to Privacy is not guaranteed by the Indian Constitution.

- *December, 1962: Supreme Court recognised Right to Privacy in minority decision:* In *Kharak Singh* v. *State of U.P.*,[23] surveillance by police authority was challenged in the Supreme Court. The majority decision rejected the contention that Right to Privacy is a Fundamental Right. However, the minority decision opined that Right to Privacy is a Fundamental Right under the Indian Constitution. But since it was a minority decision, it was non-binding.

- *March, 1975: Right to Privacy was recognised as a Common Law Right:* In *Gobind* v. *State of M.P.*,[24] the regulations that allowed police surveillance was challenged on the ground that it violated the Fundamental Right. Though, the Supreme Court did not recognise it as a Fundamental Right under the Indian Constitution, it recognised its existence as a common-law right.

- *October, 1994: Supreme Court related Right to Privacy as Right to Life and Personal Liberty under the Indian Constitution:* The Supreme Court in *R. Rajagopal* v. *State of T.N.*,[25] that involved a known criminal opposing the publication of a news related to him in a magazine, ruled that Right to Privacy is linked to Right to Life and Personal Liberty guaranteed under Indian Constitution. Though, it opined that it is not an absolute right.

- *August, 2017: Supreme Court declared Right to Privacy as a Fundamental Right under Article 21 of the Indian Constitution:* The Supreme Court in *K.S. Puttaswamy.* v. *Union of India*,[26] held that Right to Privacy is a Fundamental Right under Article 21 of the Indian Constitution. It was the first time that the Supreme Court ruled it to be a right that can be enforced against the State.

22. *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300.
23. *Kharak Singh* v. *State of U.P.*, AIR 1963 SC 1295.
24. *Gobind* v. *State of M.P.*, (1975) 2 SCC 148 : AIR 1975 SC 1378.
25. *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632 : AIR 1995 SC 264.
26. *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

Against this backdrop of judicial evolution of Right to Privacy, the stage is set for a new facet of "privacy" – that is, right to be forgotten.

3. ANALYSING RIGHT TO BE FORGOTTEN

> *"Humans forget, but the internet does not forget and does not let humans forget. Any endeavour to remove information from the internet does not result in its absolute obliteration. The footprints remain. It is thus, said that in the digital world preservation is the norm and forgetting a struggle."*[27]

Forgetfulness by a human is a characteristic that defines his nature, but, by a technology, it points to the fallibility of that technology. Hence, in a world where oblivion is associated with failure, technology is set with an algorithm to remember even the minutest details. In fact, the "memory" of the person is no longer limited to the entries made in books or logs, it is stored in the form of bytes in digital chips or clouds. The "memory" is thus, a hybrid, *"resulting from the variety of material and immaterial containers in which we choose voluntarily or involuntarily to 'store' experience and knowledge in a broad sense."*[28] In sharp contrast to remembering, the developing jurisprudence around privacy is advocating "digital forgetfulness".

3.1. Defining Right to be Forgotten

According to De Terwangne, the right to be forgotten covers three perspectives: *firstly, "right of oblivion to judicial past"*[29], *secondly, "right to oblivion established by data protection regulations"*[30] which allows for the right to remove the data once the purpose of it has been achieved, and, *thirdly,* the right to remove data once it is no longer relevant or has *expired.* This exposes the definition to criticism on the ground that the three categories are overlapping and inaccurate, and further, it lacks those circumstances where a third party is involved.[31]

27. Ravi Antani, "The Resistance of Memory: Could the European Union's Right to be Forgotten Exist in the United States" (2015) 30 Berkeley Technology Law Journal 1173.
28. Alessia Ghezzi, Ângela Guimareãs Pereira, et al., *The Ethics of Memory in Digital Age: Interrogating the Right to be Forgotten* (Palgrave Macmillan, England, 2014).
29. De Terwangne, *The Right to be Forgotten and the Informational Autonomy in the Digital Environment* (Publication Office of EU, 2013).
30. *Ibid.*
31. Ioana Stupariu, "Defining the Right to be Forgotten: A Comparative Analysis between the EU and the US" (LLM Thesis Central European University, 2015).

Rouvory, covers two aspects: *right to be forgotten* and *right to forget*. While the former imposes the duty on third parties to "forget" about the data concerning data subject by deleting it from their own source, the latter focuses on the right which the data subject has to "forget" his past by deleting the data which concerns him.[32]

Koops define this right in two concepts. *Firstly,* the right of the individual to delete data concerning his personal information in due time which covers a *"wider range of strategies that resemble the art of human forgetting."*[33] In this case, he places importance to individual control and ownership over his data. *Secondly,* the *"clean-slate"* principle that recognises that *"outdated negative information should not be used against people."*[34]

3.2. Choosing an Appropriate Terminology: Right to be Forgotten Or Right to Erasure?

The starting point of a regulation rests on the terminology that is to be used so as to understand the ambit of that right. When right to be forgotten entails that if a person has his personal information online, he can request the service provider to get it removed, this opens up a plethora of interpretation–does "removing" the information mean that it is deleted but still exists somewhere which cannot be accessed? This comes up with its own set of technological question and limitation. As a corollary to this dilemma, are the right to forget and right to erasure same?

While some authors advocate the view that these rights are synonymous with each other, others opine that there exists a marked difference between them. De Terwangne believes that right to be forgotten is different from right to erasure and *"the right to be forgotten should not be reduced to right to erasure."*[35] She analysed the EU Legislative Framework to differentiate between the two and came to a conclusion that while erasure limits and stops the unauthorised use of the personal information when it is no longer relevant, forgotten *"adds an extra layer of protection"* by allowing for two more ways to protect the data: by withdrawal of consent [Article 17 (1b)] and by raising an objection to process the data [Article 17(1c)]. Thus, for an example, if A has posted something online

32. *Kharak Singh* v. *State of U.P.,* AIR 1963 SC 1295.
33. Bert-Jaap Koop, "Forgetting Footprints, Shunning Shadows: A Critical Analysis of the 'Right to be Forgotten' in the Big Data Practice" (2012) Tilburg Law School Legal Studies Research Paper 36.
34. *Ibid.*
35. *Ibid.*

voluntarily but later on, she wishes it to be removed, she can not only ask for erasing it from the source where it was posted (erasure) but also ask for a prohibition on its further publication or removal from other sources where it was re-posted (forgotten). Therefore, while erasure is removing the content from the source itself, forgotten is removing or de-indexing of a link where it was posted.[36]

Based on above discussions, the definition of right to be forgotten can be concisely explained as (1) a right of an individual to request (2) deletion of his personal information (3) that is irrelevant or have served its purpose (4) which has been posted by (*i*) the data subject himself, or, (*ii*) by a third party, or, (*iii*) has been obtained legally. It further entails (5) restriction rights within its ambit that allows the person to obtain restriction on further processing his personal information.

3.3. Right to be Forgotten in the Privacy Age

> *"The history of the future is now written in bytes. Current and emerging information technologies are mediating and shaping the narratives we build both about ourselves as individuals and ourselves as a collective"*[37]

The dawn of digital age has made the use of internet an intrinsic part of our daily lives. Even if we avoid using social networking sites, which is nearly impossible in this age, the chances that our personal information exist somewhere in the online world is not rife. This is on two accounts: *firstly,* trillions of data are, nevertheless, stored in sporadic sources that are trapped through cookies while we casually browse through different sites on the internet; and, *secondly,* the wave of digitalisation has prompted the government to transform the system into a fully-digitalised one – papers have been converted to digital bytes and manual signatures to biometrics – leading to massive generation and storage of data in gigantic and inaccessible databases by the government.

What constitutes the present would remain in the "memory" for years to come. *"By the click of a mouse button,"*[38] all the information related

36. Manuel Galea, "The Right to be Forgotten: A Balance between Privacy and Public Rights" (LLD Thesis, University of Malta, 2015).
37. Alessia Ghezzi, Ângela Guimareães Pereira, et al., *The Ethics of Memory in Digital Age: Interrogating the Right to be Forgotten* (Palgrave Macmillan, England, 2014).
38. Althaf Marsoof, "Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression" (2011) 19 International Journal of

to past or present of the subject, whether relevant or irrelevant, becomes accessible which threatens an individual's privacy. Once personal information is given, whether voluntarily or involuntarily, the right to have a personal space is considered to be automatically given up. In *Whalen* v. *Roe*,[39] Justice Brennan warned that there exists a *"threat to privacy in the accumulation of vast amounts of information... in computerised files."*

The upsurge in privacy concern in digital age is, hence, not unwarranted with multiple cases of privacy breach. Smart phones,[40] huge corporations[41] and even the governments[42] have come under the dock for data leaks and selling the data of people to third parties; and, internet companies have been criticised for changing their privacy policies.[43] In light of it, the demand for getting the personal data deleted, once and for all, does not seem too far.

Further, with the emergence of advanced technology, trillions of personal information is being stored in huge databases. One is not even aware of the location where his own personal data is stored, that it becomes next to impossible to ensure his own privacy. Moreover, technology has prompted a paradigm shift from *"the default of forgetting"* to *"default of remembering"*[44] which raises the possibility of manipulation or inaccuracy of the data. In such a scenario, right to be forgotten seems to be a plausible solution.

The Right to Privacy is elevated in Indian Constitutional jurisprudence to the position of a Fundamental Right. It is treated as a facet of human dignity in other jurisdictions like Germany, EU and so on. It means, in simplest form, the right to be let alone and to live without unwanted

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39. *Whalen* v. *Roe*, 1977 SCC OnLine US SC 21 : 51 L Ed 2d 64 : 429 US 589 (1977).
40. John Leyden, "Smartphone Users Sue Apple, Facebook over Mobile App Privacy", *The Reuters* (16-3-2012) <http://www.theregister.co.uk/2012/03/16/smartphone app privacy lawsuit/> accessed 4-1-2020.
41. Liana B. Baker, Jim Finkle, "Sony PlayStations Suffers Massive Data Breach", *The Reuters* (26-4-2011) <http://www.reuters.com/article/2011/04/26/us-sony-stoldendata-idUSTRE73P6WB20110426> accessed 5-1-2020.
42. "Why Didn't You Tell us of Breach: Govt. to Whatspp", *The Times of India* (2-11-2019).
43. Client Boulten, "Google Privacy Policy Update Challenged by Lawmakers" *eWeek* (28-1-2012) <http://www.eweek.com/c/a/Security/Google-Privacy-Policy-Update-Challenged-by-Lawmakers-625688/> accessed 4-1-2020.
44. Jef Ausloos, "The 'Right to be Forgotten' - Worth Remembering?" (2012) 28 Computer Law and Security Review 143.

intrusion by the public in matters with which the public is not necessarily concerned.[45] Essentially, it is a condition that allows the individual to control the communication of information about him.[46]

On a discourse by Mill in his book "On Liberty", he advocates that only that part of the person's conduct is answerable to the society that affects others; whereas, the conduct of the person which concerns only himself, *"his independence becomes absolute, i.e. he acts as a sovereign over his own body and mind."*[47] Hence, acting as a sovereign, a person has a right to have his personal information to himself and not to let it into public domain which includes controlling its dissemination.

3.4. Right to Informational Privacy: Providing a Base for Right to be Forgotten

Amidst the growing concern over privacy in this digitalised world, the need for having an "informational autonomy" is advocated. It entails that every person has a right to informational self-determination – a right that allows him to have autonomy over his personal information at all times. The term was first used by German Constitutional Courts in 1983[48] as *informationelleSelbstbestimmung.* The court held that:

> *[. . .] in the context of modern data processing, the protection of the individual against unlimited collection, storage, use and disclosure of his/her personal data is encompassed by the general personal rights of the German constitution. This basic right warrants in this respect the capacity of the individual to determine in principle the disclosure and use of his/her personal data. Limitations to this informational self-determination are allowed only in case of overriding public interest.*[49]

The Parliamentary Assembly of the Council of Europe later specified that *"in view of the new communication technologies which make it possible*

45. Gaurav Goyal, Ravinder Kumar, *The Right to Privacy in India: Concept and Evolution* (Patridge India, 2016).
46. L. Lusky, "Invasion of Privacy: A Clarification of Concepts" (1972) 87 Political Science Quarterly 693.
47. John Stuart Mill, *On Liberty* (Penguins Book, 2010).
48. Eibe Riedel, "New Bearings in German Data Protection-Census Act, 1983 Partially Unconstitutional" (1984) 5 Human Rights Law Journal 67.
49. *Ibid.*

to store and use personal data, the right to control one's own data should be added to the definition of privacy."[50] Informational autonomy gives control and ownership rights to the data subject and *"guarantees the authority of the individual in principle to decide for himself whether or not his personal data should be divulged or processed."*[51]

The UK courts have noted this concept by holding that *"if information is my private property, it is for me to decide how much of it should be published."*[52] The need for a check over the amount and frequency with which we give away our personal data is imperative especially when *"individuals surrender their privacy bit by bit by giving away their data too often and too cheaply"*[53] and right to be forgotten provides a plausible solution to it.

The Constitutional Bench of the Supreme Court in *K.S. Puttaswamy* v. *Union of India*,[54] extensively discussed the concept and scope of *"informational privacy."* The court noted that *"informational privacy deals with the person's mind and therefore recognises that an individual may have control over the dissemination of material that is personal to him."*[55]

Justice D.Y. Chandrachud explained that in this age, where an individual leaves a trail of data everywhere, it is *"ubiquitous"* and has an *"all-encompassing presence"* and when these data are aggregated, it presents a *"picture of the beings."*[56] The privacy of the individual is compromised in such a context. Moreover, he also noted that *"Data mining processes together with knowledge discovery can be combined to create facts about individuals. Metadata and the internet of things have the ability to redefine human existence in ways which are yet fully to be perceived. This results in the creation of new knowledge about individuals; something which even she or he did not possess."*[57] Hence, not just the privacy of the individual but also of those around him is breached.

50. Alessia Ghezzi, Ângela Guimareãs Pereira, et al., *The Ethics of Memory in Digital Age: Interrogating the Right to be Forgotten* (Palgrave Macmillan, England, 2014).
51. *Ibid.*
52. *McKennit* v. *Ash*, 2008 QB 73 : (2007) 3 WLR 194 : 2006 EWCA (Civ) 1714, § 55.
53. A. Michael Fromkin, "The Death of Privacy?" (2000) 52 Stanford Law Review 1502.
54. *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*

He acknowledged that where everyone is slowly moving towards *"quantified self"* a consent-based model cannot solely work to protect data. At this juncture, the right to delete provides a viable solution to do away with data that has served its purpose or has become inaccurate:

> *... The rise in the so-called 'quantified self', or the self-tracking of biological, environmental, physical, or behavioural information through tracking devices, Internet-of-things devices, social network data and other means) may result in information being gathered not just about the individual user, but about people around them as well. Thus, a solely consent-based model does not entirely ensure the protection of one's data, especially when data collected for one purpose can be repurposed for another.*

Justice S.K. Kaul before commenting on the necessity of right to be forgotten cautioned:

> *The advancement in technology has created not just new forms of data, but also new methods of analysing the data and has led to the discovery of new uses for data. The algorithms are more effective and the computational power has magnified exponentially. A large number of people would like to keep such search history private, but it rarely remains private and is collected, sold and analysed for purposes such as targeted advertising.*

He noted that everyday individuals leave digital footprint, whether actively or passively and there maybe instances where it may not only be a detriment to his physical safety but also to his mental well-being. For instance, while booking for an Ola or an Uber taxi, we leave a trail of digital footprint. It makes the individual's whereabouts or his frequent visits known to a third party. This opens the individual susceptible to crimes against him.

Further, he took note that children these days have easy access to the internet world. They, from the beginning, learn the *"ABCs- apple, bluetooth, chat, download, e-mail, Facebook, Google, hotmail and Instagram"*[58] Anything done in naivety on the internet should not haunt

58. Michael L. Rustad, Sanna Kulevska, "Reconceptualising the Right to be Forgotten to Enable Translantic Data Flow" (2015) 28 Harvard Journal of Law and Technology 349.

them once they grow up. Everyone changes and nobody would appreciate the past, embarrassing moments to follow him like a shadow. In light of these two reasons, Justice Kaul opined that every individual should have the right to control the processing and storage of his personal information, including the right to remove it if it *"is no longer necessary, relevant or is incorrect and serves no legitimate purpose."*[59]

Right to be Forgotten as an Extension of Right to Dignity

> *"Continental privacy protections are, at their core, a form of protection of a right to respect and personal dignity."*
>
> *James Q. Whiteman*[60]

Right to be forgotten has its genesis in granting the right to personal dignity to every individual. While privacy allows a man to live in his own shelter and comfort, it helps him to realise his true potential. When he is open to the scrutiny of others, he loses all the comforts of his personal space. The European privacy rights rested on the premise that every individual deserves respect, reputation and image in the society which is *"afforded to a person by virtue of his participation in a society that values such rights."*[61] Therefore, it is the duty which is imposed on every member of the society to ensure privacy of the each other.[62] As Robert Post notes:

> *An individual does not earn or create.....honour through effort or labour; he claims a right to it by virtue of the status with which society endows his social role. For example a king does not work to attain the honour of his kingship, but rather benefits from the honour which society attributes to his position. The price of this benefit is that society expects him to aspire to 'personify' these attributes and to make them part of his personal honour.*

Many authors attribute this right of informational privacy to German Constitution that places human dignity at a very high pedestal and

59. Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 California Law Review 700.
60. James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 113 Yale Law Journal 1161.
61. Robert C. Post, "Three Concepts of Privacy" (2001) 89 Georgetown Law Journal 2087.
62. Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 California Law Review 700.

establish privacy and reputation as one of the many aspects of human dignity. The importance of these personality rights as an extension to unrestricted right of human dignity is pointed out in the following lines:

> *At the heart of the constitutional order stand the worth and dignity of the person who acts through free self-determination as a member of a free society. Their protection is guaranteed by the general personality rights guaranteed in Article 2, paragraph 1.....of the GG, which has become particularly significant in view of modern developments and the associated new risks to human personality.*[63]

Hence, as a dignified individual living in a free society, he has the right to self-determine his course of action which includes right to refuse to be in the public memory. Right to be forgotten is, therefore, an extension of right to dignity.

Right to be forgotten: Creating a Conflicting Premise

> *"A society has no other intelligence, no other fertility and no other raw material than what individuals give or disseminate out of what they know, to the public at large. If a society were to determine what should be kept as a record and what not, it has no criterion except the old stock of ideas and knowledge already in hand to be recognised."*[64]

An open access to information allows the person to be informed about the matters that concern him the most – matters which initiate a healthy discussion for the fruitful advancement of the society as a whole. By providing him with a limited knowledge that can be turned into an obscurity, the right to be forgotten poses a complex dilemma in light of its conflict with freedom of speech and expression and the right to know.

As Earnest William Hocking once said, *"the destiny of private thought is to gain power and effect through shaping public behaviour or public enactment. It would be a mental sterilisation of the community."*[65] The freedom to speak freely adds to the reservoir of ideas and thought of the

63. *Ibid.*
64. Devansh Dubey, Payas Jain, "The Right to be Forgotten: A Right Against Rights?" (2018) 3 NLUO Student Law Journal 44.
65. Earnest William Hocking, *Freedom of the Press: A Framework of Principle* (University Press Chicago, 1947).

society. The amount of freedom that a State gives to its citizens to speak, determines the extent of its progress.

On the other hand, a right to be forgotten, it is argued, would *"constitute a concealed form of censorship".*[66] By allowing a person to delete or remove information about him would be a detriment to freedom of speech and expression exercised by others. The abuse of defamation and privacy laws has already given wave to censorship culture; a right to be forgotten is adding another layer for the same. Furthermore, the right goes against the "theory of marketplace of ideas". According to this theory, *"the usual, and constitutionally preferable, solution to most problems of offensive speech is not censorship, but 'more speech'."*[67] By enforcement of right to be forgotten, the access and dissemination of information would be limited that would stall the *"effectiveness of a more speech solution."*[68]

Moreover, a right to be forgotten is detriment not only to the speech and expression of the general public but also a bane for investigative journalism. Many authors have opined that this right would act as a tool by perpetrators of mass human right violators to cover up or obscure their misdeeds.[69] It would be an understatement that knowledge is a fuel that drives the society towards perfection. The quality of life in any society is measured by the quantity of knowledge that its citizens possess. Moreover, in an expanding horizon of human rights, we need to learn from the past mistakes – *"from actions or inactions, commissions or omissions, deeds or misdeeds"*[70] for the society to rectify itself. And, we cannot learn from the historical blunders if we dwell in secrecy.[71] Therefore, to achieve the societal goal of a revelation, we need to have access to previous records. "Forgetting"', thus, cannot be used as an impediment in achieving a larger societal goal.

66. Peter Fleischer, "Foggy Thinking about the Right to Oblivion" (Privacy…?, 9 March 2011) <http://peterfleischer.blogspot.com/ 2011/03/foggy-thinking-about-right-to-oblivion.html> accessed 4-1-2020.
67. Richard Delgado, "The Language of the Arms Race : Should the People Limit Government Speech?" (1984) 64 Berkley University Law Review 961.
68. *Ibid.*
69. Edward L. Carter, "The Right to be Forgotten" (2016) Oxford Research Encyclopaedia <https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-189?print> accessed 4-1-2020.
70. Devansh Dubey, Payas Jain, "The Right to be Forgotten: A Right Against Rights?" (2018) 3 NLUO Student Law Journal 44.
71. Shiva Sharma, Right to Know Versus Government Secrecy (The Bright Law House, 2009).

Further, a blanket exercise of "right to be forgotten" creates another pertinent issue – either it leads to "creation" of history or "removal" of history. Past records of the events make the citizens aware of their present and assists in making sense of "how" and "why" they are at this position. It makes them aware of the happenings in their surroundings. When information is related to a political event, it helps them to even form an opinion on the sort of authority that they wish to have over them and leads to a greater political self-determination and discussion.

Right to be forgotten allows a person to delete his personal information or allows a past conduct to be removed from public domain. It is a serious concern since when selfish interests come in a way, society gets manipulated at large. For instance, A, a very prominent political leader has expressed a very controversial view, say, on racial phobia, in his past and years later, he is successful in removing it. It would not only give him a clean slate on his thought process but would also undermine the general public's right to know about their leader. Moreover, it may lead to the creation of an Orwellian Society as depicted in the book, "1984" where previous misdeeds of the government were removed and it was replaced with a manipulated one. This is possible by the combined effort of "right to be forgotten" and advancement in the Artificial Intelligence technology. And camouflaging history, even, with the best of intentions, is a bad idea.[72] It keeps the citizens in the dark, in the veil of ignorance, which is detriment to the progress of the society, as a whole.

"A generalised right to be forgotten, would lead to the rewriting of history in ways that impoverish our insights not only into anecdotal lives (which is justified in a small class of recent cases) but also into the larger patterns and trends of history. If we remember this, we better forget it."[73]

4. SUGGESTIONS

While it is a settled law that public interest should take precedence over private interest; there must be checks and balances to ascertain whether data generation, collection or storage falls squarely within privacy policies or not. From the inception of 1960s, principles, known as *"fair information practices"* to govern this personal information, were

72. Devansh Dubey, Payas Jain, "The Right to be Forgotten: A Right Against Rights?" (2018) 3 NLUO Student Law Journal 44.
73. Antoon De Baets, "Historian's View on the Right to be Forgotten" (2016) International Review of Law, Computers & Technology <http://dx.doi.org/10.1080/13600869.2015.1125155> accessed 4-1-2020

developed by international authorities.[74] These Principles have been noted by Indian Judiciary in the *Puttaswamy case*.[75] On an international forum, these principles have been adopted, practised and regulated by bodies like the UN General Assembly,[76] the Commonwealth,[77] the Council of Europe,[78] European Union's EU Data Protection Directive and Asia-Pacific Economic Corporation.[79] Following are the principles:

- ***Collection Limitation Principle*:** This principle entails that data concerning personal information of an individual should be collected by lawful and fair means and only under reasonable circumstances. Consent must be taken from the data subject wherever possible.
- ***Individual Participation Principle*:** This principle allows the data subject to obtain a confirmation from the data controller that the disputed information has been deleted, amended, rectified or otherwise within a reasonable time in a reasonable manner at a reasonable cost. In case his request has not been allowed, a reason has to be given for the same.
- ***Use Limitation Principle***: The use of personal information should be limited to the purpose for which it was sought. The data shall not be disclosed to the third parties *(a)* without the consent of the data subject or *(b)* by an authority of law.
- ***Data Quality Principle*:** The personal data stored should be as accurate and updated as feasible and there should be zero manipulation in the content of the personal information.

74. OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980). US Department of Health, Education and Welfare, Records, Computers and the Rights of Citizens, Report of the Secretary's Advisory Committee on Automated Personal Data Systems July, 1973.
75. *K.S. Puttaswamy* v. *Union of India.*, (2017) 10 SCC 1.
76. Guidelines for the Regulation of Computerised Personal Data Files, G.A. Res. 45/95, 14-12-1990, <https://www.un.org/documents/ga/res/45/a45r095.htm> accessed 3-11-2019.
77. Commonwealth Secretariat, Model Data Protection Act, 2002, available at <https://thecommonwealth.org/shared_asp_files/uploadedfiles/%7B82BDA409-2C88-4AB5-9E32797FE623DFB8%7D_protection%20of%20privacy.pdf> accessed 4-1-2020.
78. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, ETS 108, 1981.
79. APEC Privacy Framework, 2005.

- ***Accountability Principle*:** There must be guidelines to make a party liable for the breach of privacy policies, in circumstances where erasure request has not been complied with.

A provision could be laid to set an expiration date of data after which it would become inaccessible. This entails that every data must be generated with a pre-specified time. This provision may come with certain exceptions where data fixation is not a pre-condition.

Privacy issues must be dealt by a separate and independent authority that is established by a statute. The members must have special knowledge to deal with privacy matters. Under the present Draft Personal Data Protection Bill, 2018, an Adjudicating Officer determines if a data is to be deleted or not which leads to a cumbersome legal process. A plausible solution, therefore, must be following the rule under GDPR of EU Legislation that states that an authority must come in the picture only after the data principal has turned downed the deletion request or has not complied with it adequately.

Moreover, every right and power of the authority must be specified under the Statute to avoid any arbitrary misuse of authority. A leeway may be given to the data controllers by making a provision of "right to recall" to allow for re-generation of deleted data under certain conditions such as when the data subject has given his consent for it or when the data is needed for public interest. This would ensure a balance between Right to Privacy and right to freedom of speech and expression. The deleted data must be stored in a particular database that is under the control of an *independent* statutory authority. Nominal and pre-determined fee could be charged for such re-generation of data.

5. CONCLUSION

> *"The common law has always recognised a man's house as his castle, impregnable, often even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?"*[80]

In pre-internet age, there was a duty to maintain confidentiality in human relationships. With post-internet age came a new relationship – the

80. S. Warren, L. Brandeis, "The Right to Privacy"(1980) 5 Harvard Law Review 193.

relationship of the individual with search engines - hence, a duty arose to maintain confidentiality *"to configure oneself"*.[81]

Where personal information is in the public radar, it becomes a herculean task for an individual to recede into his private space. Universal accessibility and cheaper internet costs have opened the gates for infinite exchange of knowledge. However, it has also made an individual vulnerable to unrestricted scrutiny and intrusion into his private life by placing personal details about him in the public domain. Hence, right to be forgotten is mooted and needed. However, this right has its own set of flaws. Not only does it conflict with freedom of speech and expression and right to know but also comes up with huge economic costs in enforcing it and social costs in forgetting.

As a 21st century right, it faces the *"intellectual coherence"*[82] with privacy and data protection. Whether this right acts as a salve or salt to individual's rights would be answered in times to come. But, it cannot be gainsaid that the path to perfection of this right shall be rough and it may face difficulties as a new-born right just as Brandeis remarked on his lack of confidence over his historic law article on "Right to Privacy"

> *"The proofs have come of the article on "Privacy"... I have not looked over all of it yet, the little I read did not strike me as being as good as I had thought it was."*[83]

81. Omer Tene, What Google knows: Privacy and Internet Search Engines" (2008) Utah Law Review 1492.
82. Christopher Kuner, "The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines" (2015) LSE Law, Society and Economy Working Papers 3/2015 <https://poseidon01.ssrn.com/delivery.php?ID=008123105009024098075115005076086123023052060049063082078071065111007127123118001101097117049063005046045109119080102020011114053007027029064065109125102064073019024076031021090082065109113126112022088026009066089097084025028076064081019092084022119&EXT=pdf> accessed 6-1-2020.
83. Melvin I. Urofsky & David W. Levy (eds.), *Letters of Louis D. Brandeis* (Vol. I, State University of New York Press, 1971).

PRIVACY AND TECHNOLOGY: DNA PROFILING IN PARENTAL DISPUTES

*Akash Thomas Jose**

ABSTRACT

Privacy is basic for the conception of human rights. The draft legislation introduced in the Parliament titled as DNA Technology (Use and Application) Regulation Bill, 2019 provides for the use and regulation of the DNA for the purpose of establishing the identity of certain categories of individuals. The draft Bill specifies that the provisions of the Act apply in civil cases of parental disputes as well. However, there are no specific provisions provided to give effect to the same. The author during the course of this article analyses as to whether an eminent need arises in the collection of DNA for a mere parental dispute and addressing the need of obtaining consent before collecting such data. Additionally, the author shall also address the necessity of storing the DNA Profile on a database and the security related concerns of such databases. The said analysis shall be done in the backdrop of the need to provide privacy rights in light of the draft legislation. The author after analysing the said issues shall also provide suitable alternative or suggestions which can be duly incorporated before implementing the legislation. This is a requirement as a legislation devoid of providing safeguards would lead to a gross violation of the human rights. This is the focal point of the present Article.

1. INTRODUCTION

Human rights are those set of rights that make it obligatory for the duty bearers to protect, respect and to facilitate the rights to those who claim it. Privacy is a right in rem and it is that right which is kept away from the public eye.[1]The privacy laws are important in the realisation of human rights and international treaties such as the International Covenant on

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1. Salvor Nordal and others, "The Languages of Privacy",*The Ethics and Governance of Human Genetic Databases*, (2013) CLJ 37.

Civil and Political Rights[2] and the European Convention on Human Rights[3] have included within its framework the substantive protection of privacy and thereby recognising its importance. There has been a perceptible increase in the use of DNA[4] technology (hereinafter referred to as "technology") around the world. The technological improvements and increased accuracy of such results have revolutionised the way in which courts deal with the matter and are now used as an efficient tool in order to solve disputes relating to parental disputes. Though such technology has revolutionised and proved to be beneficial, however this technology is not free from errors and legal complications which signal for a strong caution to be exercised while using them. The reliability of the tests, human right concerns and the various interpretations of data are some of the grounds to exercise caution.[5]

A Bill has been introduced in the Parliament titled as "The DNA Technology (Use and Application) Regulation Bill, 2019"[6] to regulate the application and use of Deoxyribonucleic Acid Technology for establishing the identity of certain individuals. The need for consent, the need arising and appropriate security in storing such information in the databases with specific reference to the legitimate expectation of privacy in the backdrop of parental disputes needs some grave consideration and deliberation and hence the legislation requires a close scrutiny before implementing the Bill and depriving humans of their basic rights. Part II of the Article deals with the DNA Technology in brief and an overview of the Bill. Part III of the Article deals with the aspect of consent and infringement of privacy rights and suggests an alternative to tackle the problem. Part IV questions the necessity of storage of DNA profiles on databanks and highlights the privacy related issues and Part V of the Article provides with the concluding remarks and amendments that can be incorporated into the Bill. The Bill is presently pending before the Standing Committee.

2. International Covenant on Civil and Political Rights, 1966, Art. 17.
3. European Convention on Human Rights,1953, Art. 8.
4. Richard Charles Lewontin, "[DNA Fingerprinting: A Review of the Controversy]: Comment: The Use of DNA Profiles in Forensic Contexts", (1994) 9 Statistical Science 259.
5. Peter Alldridgeand Katherine Williams, "DNA Profiling and the Use of Expert Scientific Witnesses in Criminal Proceedings", (1955) Oxford: Clarendon Press 269.
6. The DNA Technology (Use and Application) Regulation Bill (2019) (No. 128 of 2019).

2. DNA TECHNOLOGY AND THE BILL

2.1. DNA Technology

DNA technology and profiling was first discovered by Sir Alec Jeffreys who was studying diseases transmitted hereditarily and he focused on methods to resolve mainly parental disputes[7]. The DNA taken from cheeks, skins, swabs, semen or other intimate substances can be used reliably to establish the DNA profile of an individual. There has been an increased acceptance of such procedures especially by various courts and Judges.[8] The DNA technology is widely used by investigation agencies, the public prosecutors, defence counsels and various other law enforcement agencies. Such technologies allow the persons to defend the innocent and afford punishment to the guilty.

There is indeed no doubt that the development in the present-day technology accurately detects the differences in the genetic makeup as there is a variation among individuals. If proper methods are undertaken to examine samples of DNA, an analysis can be carried out to determine if the patterns match. However, there are concerns that arise from the application of such profiling methods due to the nature of the samples that are obtained. The technology as such has been lauded as a great tool in investigation and also for resolving parental disputes. However, the DNA profiling has not been completely fool proof and it is prone to faulty results.[9] The sample of the DNA might be prone to contamination as it is not always obtained from a sterile source.[10] There is also a question of rapid degradation of DNA as it is outside the body of a living organism.[11] Another important concern is regarding the aspect of reliability of the sample which includes within its purview the procedure adopted, laboratory tools and record control and quality.

7. Alec John Jeffreys, V. Wilson and Swee Lay Thein, "Individual-Specific 'Fingerprints' of Human DNA", (1985) Letters to Nature 76.
8. *Narayan Dutt Tiwari* v. *Rohit Shekhar*, (2012) 12 SCC 554; *Bhabani Prasad Jena* v. *Orissa State Commission for Women*, (2010) 8 SCC 633 : AIR (2010)SC 2851.
9. Wilson Wall, *Genetics & DNA Technology: Legal Aspects*, (2004) Routledge-Cavendish43.
10. Sophie Weiss and Amnon Amir, "Tracking Down the Sources of Experimental Contamination in Microbiome Studies", (2014) Genome Biology 564.
11. Lewontin (n 4) 259.

2.2. An overview of the Draft Bill

The Draft Bill titled as the DNA Technology (Use and Application) Regulation Bill, 2019 (hereinafter referred to as the "Bill") has been drafted with a purpose of regulating the use and the application of the said technology to establish the identity of categories of individuals that include victims, under trials, missing persons, suspect, deceased persons. Under Part C of the Schedule annexed, Parental Disputes is a matter for DNA Testing that the Bill seeks to regulate. The Bill provides for the establishment of a DNA Regulatory Board[12], accrediting laboratories, the obligations of the DNA Laboratories and Establishment of Data Banks. The obligations listed which to be followed by the DNA Laboratories are centric to criminal investigation and do not heed to the requirements in other case scenarios especially parental disputes and the data banks are a threat to the privacy of the individuals and the same needs to be addressed. The need for privacy in parental disputes looms over the both the procedure of collecting bodily samples i.e. without consent of the individual and with the storage of the samples or data in DNA databanks. The collection of samples when a compelling necessity does not exist and without consent breaches the privacy in one part and storage of samples without any adequate provisions regulating the same can amount to the misuse of such data for performing familial search or conducting other forms of investigation which leads to a breach of privacy in the second part. The relevance of such issues comes to the forefront in wake of recognition of Right to Privacy as a Fundamental Right.[13] Such issues shall be addressed during the course of the article. The said privacy needs shall be examined in the backdrop of parental disputes during the course of the present article.

3. CONSENT AS AN ELEMENT IN DNA PROFILING OF PARENTAL DISPUTES

3.1. Notion of Consent and Privacy Rights

Whether consent must be given due importance while addressing the need to conduct DNA test to establish parenthood should be determined in the backdrop of privacy expectations of individuals. Consent and individual autonomy have been considered as an integral element in the international

12. DNA Bill (n 6) S. 3.
13. *K.S.Puttaswamy* v. *Union of India*,(2019) 1 SCC 1.

framework of human rights.[14] The law in force across various legislations seeks to preserve the autonomy of the individual involved and always give due regards to the decision and recognises the need to preserve the choice of the individuals. As informed consent is required in all aspects of trials, similarly in obtaining crucial information regarding an individual, his consent is duly required.

The Bill does not define consent hence it becomes pertinent to address the definition of consent and the wider implications of the term used. The notion of consent is to grant someone the permission to do something that they would not have the right to do, without such permission.[15] Though no strict definition for the term consent exists, however there are instances when it said that consent may be vitiated. When force or coercion is applied on a person in order to obtain something, when a person is incapable of giving consent or when a person assents to an activity under a wrong assumption or a mistake, consent is said to be vitiated.

Right to Privacy is a Fundamental Right guaranteed by the Constitution after the Interpretation of Article 21 by the Supreme Court of India.[16] The Right to Privacy can only be curtailed if there is countervailing interest superior to it.[17] Since consent has been recognised as element of privacy, any form of invasion to collect data of the individual without a just and probable cause would amount to its breach. The Supreme Court yet in another case had highlighted the necessity of obtaining consent when the Central Bureau of Investigation had sought for access to the database of UIDAI for a criminal investigation; however the same was not allowed by the court as there was no written consent.[18] Such judgments also portray that prior consent is an element of privacy and the same shall not be infringed upon without a just reasonable cause and due procedure of law.

3.2. Lack of Consent Resulting in Infringement of Privacy

In the Bill, in order to obtain the bodily samples of a person arrested, his consent is to be obtained in writing, however if the consent is refused by a person or it cannot be obtained, an application can be made to the

14. Peter B. Gilbert, "Consent, Rights and Choices in Health Care for Children and Young People", British Medical Association, (2003) Journal of Medical Ethics.
15. Greg Horton, "DNA Fingerprinting: Informed Consent and the Admissibility of Evidence", (1992) 7 AUL Rev. 165.
16. *K.S. Puttaswamy*(n 13) 1.
17. *Gobind* v. *State of M.P.*,(1975) 2 SCC 148 : AIR (1975)SC 1378.
18. *UIDAI* v.*CBI*, (2017) 7 SCC 157.

magistrate who may approve of the same in case he is satisfied that a reasonable cause exists in order to collect the body sample to ascertain if the person arrested has committed the crime in question or not.[19] The aspect of consent for a crime has been made explicit in the Bill, however considering the nature and gravity of the crime involved, it becomes quite clear as to why the consent need not necessarily be obtained and a mere approval of the magistrate is sufficient in order to ascertain the same. However, in the case of a parental claim, the question of consent would be more important because of the competing claims or rights at hand which may not weigh as heavily as a crime committed by an individual and the courts in India habitually tend to direct the individual in question to undergo a DNA test which can be seen as a gross violation of human rights.

The common law aspect governing the establishment of parenthood came up for consideration in *J.* v. *N.*[20], where the issue was whether, if consent is not provided for, can a provincial judge pass an order requiring the mother to necessarily undergo the testing. The Court held in negative and further stated that "a person of full age and capacity cannot be ordered to undergo a blood test against his will". This decision of the English Court went on to establish the human right of individual liberty and the protection of a person of prescribed age and adequate mental capacity from being interfered with his personal liberty.[21] The Court further went onto hold that, to subject a person to tests against his will necessarily amounts to assault and battery. In *United States* v. *H. Amerson,*[22] the Court had held that compulsory DNA testing triggers a fourth amendment right.

In India, the courts have at different points adopted varying views. In *Goutam Kundu* v. *State of W.B.*[23], the Court had stated that the courts must refrain from adopting scientific measures to arrive at a judgment. Courts cannot order blood tests as a matter of course, as the Code of Criminal Procedure, Evidence Act or the Civil Procedure Code does not provide for the same. There must be a strong preponderance of evidence and not merely a balance of probabilities. The court must also take into due consideration the effect of ordering a paternity test to be conducted.

19. DNA Bill (n 6) S. 21.
20. (1976) 5 WWR 211.
21. Gerald D.Chipeur, "Blood Testing without Consent: The Right to Privacy versus the Right to Know (Part 1)" (1993) 12 Med & L 521.
22. 483 F 3d 73 (2nd Cir 2007).
23. (1993) 3 SCC 418 : AIR 1993 SC 2295.

If a child is born out of the wedlock, there is a presumption of parenthood under Section 112 of the Indian Evidence Act.[24] A blood test or any test on a person must only be conducted upon a voluntary consent given by the individual.[25] To compel and subject a person who does not consent for a medical test to determine paternity would be against the mandate of the Fundamental Right to life and personal liberty under Article 21 of the Constitution.[26] The court in yet another ruling had stated that a father alleged to be the father cannot be compelled to submit himself to a DNA test. [27]

The Madras High Court had stated that if there is a claim for legitimacy of the plaintiff, unless the parties are willing to give their blood sample, the court cannot force them to provide the same. The Delhi High Court in *X* v. *Y*[28] the Court had enunciated that no DNA test can be warranted against an individual against whom claims existed for an interim maintenance of his child.

The Hon'ble Supreme Court in *Sharda* v. *Dharmpal*[29] had stated that as the "Right to Privacy" is not a Fundamental Right, the courts are not violating the right to life and personal liberty by merely directing to a DNA test. However, the judgment having being delivered in 2003 would fall short of being correct as in 2019, in *K.S. Puttaswamy* v. *Union of India*[30] had recognised privacy within the ambit of Article 21 and in essence recognised the same as a Fundamental Right. This being the present position, the court forcefully subjecting an individual to a DNA test would be intrusive and an infringement of his Right to Privacy vis-a-vis Right to Life and Personal Liberty. There will not arise any reasonable justification, as there is an alternative which the courts can resort to instead of forcing a person to forgo a basic human Right to Privacy.

3.3. An alternate approach

There is an alternative, which have been restored to, by the courts in the past while rendering judgments, which can be effectively used to

24. *Ibid*, 2295.
25. *Sajeera* v. *P.K. Salim*, 1999 SCC OnLine Ker 468 : 2000 Cri LJ 1208.
26. *Ningammav.Chikkaiah*,1999 SCC OnLine Kar 369 : AIR 2000 Kar 50; *Revamma* v. *Shanthappa*, 1971 SCC OnLine Kar 196 : AIR 1972 Mys 157.
27. *Syed Mohd. Ghouse* v. *Noorunnisa Begum*, 2001 SCC OnLine AP 218.
28. 2003 SCC OnLine Del 271 : AIR 2003 Del 195.
29. (2003) 4 SCC 493 : AIR 2003 SC 3450.
30. *K.S. Puttaswamy* (n 13) 1.

remedy the gap instead of forcefully ordering a person vide the order of a magistrate to provide DNA samples. The courts can use the concept of "Adverse Inference"[31]while rendering justice to the claimant and protecting the right of the respondent individual, which satisfies the needs of both the parties.

If a person has been ordered to undergo a DNA test and he refuses to do so, the courts can take up an adverse inference instead of compelling for such a test. The consideration of a child to have a right to know his origin can be understood however it cannot be at the stake of forgoing the right of a person to give his consent. The constitutional considerations must be given due recognitions in order to ascertain the same question. The Indian Evidence Act, 1872 provides for the concept of Adverse Inference[32] wherein if a person has not consented to the process of collection of DNA, then the courts can construe that aspect as an adverse inference in order to resolve the dispute.

The concept of adverse inference holds that the court may presume the existence of a fact which it thinks likely to have happened, in relation to the facts of the particular case.[33] Where a man withholds information of such nature, which if produced would be unfavourable to the person withholding it.[34] The courts while exercising such a judgment is not restricted to any strict form of law. These presumptions are inferences which are a result of the logical facts. It can be used as a suitable tool to fill the gaps in the evidence required.

The courts in various jurisdictions have also resorted to adopting an adverse inference. In the instance, an adult refusing to subject himself to a DNA test, the court may consider his refusal to amount to an adverse inference against the individual.[35]Section 114[36] is to be read with Section 112[37] of the Evidence Act which establishes that if a child is born during the subsistence of wedlock or other criteria specified, the presumption of the legitimacy of the child is that he was born out of the wedlock. The

31. Evidence Act, 1872, S. 114.
32. *Ibid.*
33. *Ibid.*
34. *Prem Shankar Shukla* v.*Delhi Administration*,(1980) 3 SCC 526.
35. *B. (B.R.)* v.*B. (J.)*, (1968) 3 WLR 566 : (1968) 2 All ER 1023.
36. Evidence Act (n 31) S. 114.
37. Evidence Act (n 31) S. 112.

onus to disprove the same lies against the person who wishes to establish the illegitimacy.[38]

The courts can take into consideration the period of marriage, whether there was an access while adjudicating the same claim and raising the presumption under Section 112 and Section 114.[39] Hence such a step taken can also protect the needs of the child in terms of maintenance or protection from bastardisation.

This method developed has the additional benefit of not infringing upon any of the rights of the individuals to the dispute. In order to disprove the presumption, the individuals will have to establish a strong preponderance of evidence and not a mere balance of probabilities.[40] It is also quite important that such aspects be dealt in detail in the DNA Application Regulation Bill in order to ensure that the various authorities do not overstep the boundaries in order to mandate a person to undergo the DNA tests.

4. DATABANKS

4.1. Introduction to DNA Databanks

The DNA Databanks (hereinafter referred to as "Databanks") is a repository of DNA data. Through the Bill, under Section 25 provides for the establishment of National Databanks as well as Regional Databanks which shall share all the information stored by it with the National Databank. Section 34 of the Bill provides that the DNA profiles, samples stored in the DNA Databank shall be made available for the purpose of civil disputes enshrined in the Schedule annexed with the Bill. An empirical study conducted in the Estonian Genome Project suggests that 97 per cent of the individuals believed that it is necessary to obtain a written consent from donors for the data to be stored in databanks.[41]Section 34 of the Bill provides that the DNA profiles, samples stored in the DNA Databank shall be made available for the purpose of civil disputes enshrined in the Schedule annexed with the Bill. This necessarily implies that DNA profiles from civil disputes, namely to establish parenthood shall be stored in DNA Databanks. Storage of DNA may necessarily lead to hampering

38. *Dukhtar Jahan* v.*Mohd.Farooq*,(1987) 1 SCC 624 : AIR 1987 SC 1049.
39. *Kamti Devi* v.*Poshi Ram*,(2001) 5 SCC 311.
40. *Dukhtar Jahan* (n 38) 1049.
41. Nordal (n 1) 50.

the privacy of an individual. The said breach can occur in two folds: (i) lack of security, (ii) necessary index not provided for.

4.2. Lack of Security and Whether A Compelling need arises to Store Data?

The present Bill mandates that the DNA collected during the course of a criminal investigation are to be stored in a database.[42] Parental disputes being mere civil disputes and in comparison, to a criminal investigation where a necessity with respect to gravity of the crime becomes far more compelling, a question arises if there is there a probable cause and a necessity to store the data for parental disputes? Additionally, what compelling need arises for the law enforcement agencies to store the data for the said dispute?

"Dracula's castle" – A common phenomenon noted by jurists who advocate for the privacy rights of individuals, was a term likened to portray the plethora of information that can derived from the DNA of individuals.[43] The type of information includes the drug use, hereditary information, susceptibility of genetic diseases and prevalence of diseases like AIDS. Such forms of data are of importance to insurance companies and employers.

The retention of DNA samples on a databank allows a form of "biological tagging" or "bio-surveillance".[44] Concerns regarding the same extend to anyone who may infiltrate the system and gain access to the data.[45] Some countries like Germany destroy each individual's DNA samples, which prevents these samples from being re-analysed. Indefinite retention of the profiles is in breach of European Convention on Human Rights[46]

While determining the privacy needs of an individual, the courts in the United States have developed a balancing test which seeks to weigh the intrusive nature of the procedure adopted, the purpose of such an intrusion and level of expectation of privacy.[47] It is true to state that when a heinous

42. DNA Bill (n 6) S. 31.
43. Andrea De Gorgey, "The Advent of DNA Databanks: Implications for Information Privacy" (1990) 16 Am JL & Med 381.
44. Dr Sarla Gupta and Beni P. Agarwal, *DNA Test in Criminal & Paternity Disputes (Scientific Investigation & Trial)* (Premier Publishing Company 2014) 345.
45. *Ibid,* 345.
46. *Ibid,* 350.
47. Debra Herlica,"DNA Databanks: When Has a Good Thing Gone Too Far", (2002) 52 SL Rev. 951.

crime is committed, the level of expectation of privacy diminishes and there is a probable cause attached with it, however for a establishing a case of parenthood, does a person forsake his privacy? Hence, storing of data of offenders would not amount to a breach of privacy, yet for civil disputes storing of such information would be contrary to the legitimate expectation of privacy.

A few safeguards have been made in the Bill, wherein the proviso to Section 29 states that DNA profiles which are not a part of the offenders, suspects, or under trial index shall not be compared with the same and Section 30 which states that the DNA samples and profiles shall solely be used for the purpose of identification and not for facilitating any other purpose. Though such minimal safeguards have been provided for, there is no dearth in leaking of data to the public and hacking of such data or even divulging of such information for unwarranted uses. Though the method provides with efficacious punishment, yet additional safeguards must be provided in order to protect the rights of the individuals. With the creation of a central database of DNA data, there is a concern about the misuse of such data. Such data can be misused for the purpose of additional research which include familial search[48] which is not within the purview of the need arising to collect such data. The judiciary in the United States have explicitly denied research to be conducted on data stored in the databanks. Additionally, conducting research about familial history allows researchers to find additional data concerning an individual, which is also against the right of his privacy.[49]In the case of voluntarily providing consent, though the individuals voluntarily submit their DNA and relinquish their rights, their near relatives have never relinquished such rights and the procedure undertaken while researching tends to infringe such rights in toto.[50] The only possible answer in order to retain the data should be to provide an environment where the enforcement agencies can rematch the data, however privacy advocates generally vouch for destruction of such data before they can be utilised for improper use by the law enforcement.[51]Since the Bill also explicitly provides for not re-matching data for other purposes than what the collection contemplated for, hence there arises no necessity for storing the

48. Erin Murphy, "Relative Doubt: Familial Searches of DNA Databases", (2010) 109 Mich.L. Rev. 291.
49. *Ibid.,* 293.
50. *Ibid.,* 291.
51. Mark A.Rothstein and Sandra Carnahan, "Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks", (2002) 67 BrookL. Rev. 127.

profiles of the cases dealing with parental disputes or even mere simple civil disputes. Though the draft legislation also provides for an exhaustive use of the data, yet in the near future by virtue of an amendment to the Bill, they can be modified for other purposes or if the data is used by unauthorised personnel, it can lead to an infringement in privacy as the data will be used for purposes not intended while being collected. Such use of data would amount to deriving data from individuals who do not provide any form of consent without a just and probable cause.

There is a frequent improvement in the field of biology as well as information technology. With the improvement in biology, more information regarding humans can be derived from the DNA samples whereas the improvement of information technology creates a network connecting growing information resources.[52]The existence of a regional as well as a National Databank might lead to a breach in safekeeping of data, hence appropriate measures must be undertaken to only establish a National Databank and adequate standards to be adopted to secure the data in those cases where a necessity arises to store them.

4.3. Necessary Index not Provided

Under the scheme of the Bill, there is a creation of an exhaustive list of indices namely, a crime scene index, suspect's index, offender's index, missing person's index and unknown deceased person's index. The list being exhaustive in nature do not provide for any more indices under which the data can be stored. DNA profiles and samples being stored in databanks can be made use for the purpose of investigation of civil matters enumerated under the schedule.[53]

If a DNA sample is obtained from an individual to establish parenthood and no procedure is made for its destruction, where is the data stored? This question requires consideration, in the case a mandate is made to store data.

This question raises the concern regarding storage of data in a database where a necessary index is not provided for. The provision of a necessary index allows a procedure to be followed by the individual to erase the data or provides exhaustively the reasons for which the said data might

52. Alex Samuel and Swati Parikh, *DNA Tests in Criminal Investigations and Paternity Disputes* (A Modern Scientific Technique) (Dwivedi & Company 2009).
53. DNA Bill (n 6) S. 34.

be used. In the case of individuals who voluntarily submit themselves to a DNA Test to disprove their paternity and a mandate exists to store the data, in the absence of such a specific index to store DNA data would lead to the detriment of the individuals. There is no procedure which can be adopted to delete the data and hence, the enforcement agency can use the above said data for purposes which cannot be restricted and the data will be stored indefinitely as well since no procedure exists to delete the data nor a time frame for storage of data exists. The above said problems give rise to a necessity of granting privacy protection to individuals.

5. CONCLUSION

Right to Privacy is fundamental in the conception of human rights and specifically Fundamental Rights in India. The Bill which is pending before the Standing Committee has lacuna in various respects however, the Article focuses on the need of protection of privacy of those individuals against whom a claim lies in a paternity dispute. In the opinion of the author, the courts in India have always subjected the individual to a paternity test and from the analysis drawn in the paper, it can be seen that it gives rise to gross violation of human rights. It is trite to state that a child has the right to know his origin, however during the course of the Article, a comprehensive alternative has been provided for, which helps combating both the rights namely, right to know the origin by the child and the right to privacy of the alleged parent. Though the Bill aims at regulating the collection and storage of DNA, the Bill has in no manner helped in addressing the said objective, especially in terms of civil disputes with specific reference to parental disputes. Though no eminent need arises for storage of samples in a case of parental disputes, if it is sought or mandated to be stored, a necessary infringement of privacy would occur because of lack of security and no specific index has been provided for. There arises a need to make amends to the present Bill in order to protect individuals and secure their rights. The necessity of removing parental disputes as a ground to conduct DNA test must be removed and an index has to be provided for to store data not pertaining to those indices provided for. Hence, if these necessities are fulfilled, it can go a long way in achieving the protection of such basic and fundamental human rights.

HUMAN RIGHTS AND ECONOMIC POLICY: ANALYSIS OF TRANSGENDER RIGHTS IN INDIA

Sudatta Barik and Madhubrata Rayasingh***

ABSTRACT

In India, the LGBTQ+ community still remains one of the most ignored, neglected and deprived community which still faces hate, disdain and discrimination for having a non-conventional gender choice. The community faces all hurdles and problems with respect to their basic rights and necessities even after the acknowledgement of the same by the Supreme Court. This article has enabled the authors to have a resourceful insight into the issue of transgender rights and their economic development in India. This writing will mainly focus on how after scrapping Section 377 of Indian Penal Code, the transgender community are treated in the society focusing on issues of any change in their economic development; further changes to be made by the legislature to provide them equal status and their dignity and respect will be looked at par with the general populace. In 2014, the Supreme Court passed the NALSA judgment, which proved to be a relief for the transgender community. The community hoped some respite in form of legislative action but much to their disappointment, the recent Transgender Persons (Protection of Rights) Bill, 2019 fails to recognise the gist of the challenges of the community let alone satisfy their needs and requirement. The community has called back this regressive Bill and has claimed that it has pushed the gender right progression multiple years back. In light of its allegedly erroneous provisions, the legislation faces severe backlash from the community[1]. *One of the major challenges in front of the legislators was to tackle and transform the public perception and societal morality against the people of the third gender, needless to say they have failed terribly. In connection to this, the community was not able to get the same status in workplace,*

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1. "Why the Indian LGBTQ Community Rejects the 'Progressive' Trans Bill"(*Justice News*, 15-7-2019) <https://www.justicenews.co.in/why-the-indian-lgbtq-community-rejects-the-progressive-trans-bill/>.

public places, religious events and places, etc. Before we discuss on the important topic of transgender and their economic development in India, we need to discuss what basic rights are provided to transgenders and what are denied. After scrapping the provisions also how the transgender rights are affected and which reflects in the low economic index.

1. INTRODUCTION

The perpetual challenges of discrimination and inequality do not appear to be a new hurdle for the transgender community and it reflects in the employment opportunities. In the matter of *National Legal Services Authority* v. *Union of India*,[2] it was held that the education and employment sector remain the most backward sector where the transgender/third gender community is discriminated and ill-treated. To support the decision, Court cited the Article 21(1) of the Constitution of India providing for Right to Life and Human Dignity. On the basis of the judgment and recommendation, the Transgender Persons (Protection of Rights) Bill, 2019 was passed by the Lok Sabha. The Bill provides claims to provide non-discriminatory provisions for transgender in education and employment sector. But in no case it clarifies any specific or special facilities to be provided to a transgender individual for their upliftment. As per data provided, the employment opportunities are very low as compared to society at large.

International Acknowledgement: There exist international Conventions and Declarations for the protection of the third gender against discrimination and violence. Predicated on basic thoughts of nobility, uniformity and security of personhood, the key global conventions that administer human rights articulate significant rights-based cases that are relevant to every individual, including trans individuals. The International Covenant on Civil and Political Rights (ICCPR), marked by 195 nations, explicitly denies segregation dependent on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[3] In 1994, the United Nations Human Rights Committee decided that "sex" as utilised in the ICCPR additionally incorporates sexual direction, subsequently making victimising sexual minorities a violation. An understanding of this sort is a significant point of reference; it can possibly extend justification for insurance against separation inside "other status" in the ICCPR to issues, for example,

2. (2014) 5 SCC 438 : AIR 2014 SC 1863.
3. The International Covenant on Civil and Political Rights, 1966, Art. 26.

sexual orientation personality and sex articulation. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which has been marked by 189 nations, perceives the fairness of women in all circles of life, especially education, business and wellbeing. The CEDAW Committee, the Convention's reporting instrument, has gotten shadow reports featuring the human rights worries of trans individuals. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been marked by 164 nations, perceives the privilege to appreciate "the most noteworthy feasible standard of physical and psychological well being" of all people.[4] The United Nations Human Rights Council also focused on the sexual direction and sex character in 2011, attested the standards of all-inclusiveness of human rights and carried center to viciousness and separation dependent on sexual direction and personality. A 2011 report by the UN High Commissioner for Human Rights (likewise refreshed in 2014) approached UN part states to rescind prejudicial strategies, authorise against separation laws and guarantee security to sexual minorities. A second report by the High Commissioner was given in 2015. The 2015 WHO distribution on Sexual wellbeing, human rights and the law tends to the specific vulnerabilities of trans individuals. Local regional components likewise articulate crucial human rights for all people inside their purviews, rights which apply as a lot to trans individuals as to other people: The Inter-American Convention against All Forms of Discrimination and Intolerance was affirmed in 2013 by the General Assembly of the Organisation of American States (OAS). In view of the American Convention on Human Rights, it prohibits any type of separation and bigotry explicitly on grounds of sexual direction, sex character and sex articulation. The Inter-American Commission on Human Rights, an OAS body, organised a rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons, planned for checking the human-rights circumstance, exhorting and giving specialised help to the Commission and part States and getting ready reports and suggestions on law and strategy change according to LGBT and intersex people. The African Charter on Human and Peoples' Rights, marked and endorsed by everything except one nation on the landmass, stipulates the rights to life, individual freedom, free articulation, sympathetic treatment, intrinsic poise and equity for all people. In 2010, the 47 part conditions of the Council of Europe consented to take a wide scope of measures to battle separation dependent on sexual direction and sex personality through The European Convention on Human Rights. These apportions

4. The International Covenant on Economic, Social and Cultural Rights, 1966, Art. 12.

are set in a Council of Europe proposal, which was the principal extensive intergovernmental concurrence on the privileges of LGBT individuals. Expanding on this, the Board's Parliamentary Assembly received goals on measures to forestall oppression trans individuals in Europe.

The Indian legislature was expected to draft and present a law on the similar rights of non-discrimination and equality. The current National Bill provides for freedom of speech and expression which includes right to self-identified gender, freedom to move freely in India, freedom of trade and profession under Article 19(1)(a) of the Constitution of India. Self-identified gender can be recognised through words, behavioural pattern, dress code and any other form. However, the transgender people are not encouraged in the work place as general people. They were usually not employed due to their dressing style and other behavioural issues which impliedly violate their Fundamental Rights and access to employment opportunities.[5]

2. CRITIQUE ON TRANSGENDER PERSONS (PROTECTION OF RIGHTS BILL) 2019 PERTAINING TO GENDER ECONOMICS

The Transgender Bill is a very proactive step towards providing protective framework for the sexual minorities. But at the same time some provisions are against the NALSA judgment. The following are as follows:

1. Trans-person identity identification process is impacted by the same problems with the previous Bill. Although the District Screening Committee has been abolished, it is up to the District Magistrate to recognise the identity of a transgender person and issue the certificate on the basis of the documentation required. This follows on with another set of issues that muddle how gender identity is to be decided. If a person is to then change their preferred gender to male or female, the Transgender Persons Bill harks back to the archaic understanding, enforcing the need for a Sex Reassignment Surgery (SRS) in order to change their gender identity to their preferred gender of either male or female. Moreover the validity of the SRS would be decided by the District Magistrate. The Bill is completely silent about the any subsidised health facilities for an SRS which will be of great benefit to the transgender community.

5. ManasiBhusan, "Analysis on Transgender Persons (Protection of Rights) Bill, 2019" (Indian Law Journal2019)<https://www.indialawjournal.org/analysis-on-transgender-persons.php>.

2. The Bill is completely silent on the prescription of horizontal or vertical reservations for trans-persons in educational institutions and public appointments.

3. The Bill does not specify any specific type of offences and penalties for the transgender community. There are no punitive damages prescribed for any type of violation by a transgender.

4. There is no independence on the working of National Council for transgenders. Out of 30 members, only five will be from transgender community which in itself says hints at them belonging from a minority class and substantial representation is not provided to them.

3. LACK OF EDUCATION LEADS TO INEQUITABLE ACCESS TO EMPLOYMENT OPPORTUNITIES

The major concern in this paper is the diminished inclusion of the transgender community in the education and employment sector. Due to inefficient and inappropriate schemes and policies by the Central and State Government, transgenders do not get proper education and employment facilities at par with others. The Central and State institutions should start looking into providing special reservations and benefits for transgender people for educational purposes like other categories such as Scheduled Castes, Scheduled Tribes and Other Backward Classes.

About 99 per cent of the transgender suffer from social rejection in many occasions. According to the Census Report of 2011, the population of transgender is 4.6 lakh,[6]but 30,000–40,000 transgender people vote and others prefer to keep the gender category secret to avoid discrimination. Mostly they are denied jobs due to which they are forced to work in low paying jobs, as home maids, sex workers and also many other undignified jobs.[7]

Transgender communities suffer from a variety of social security issues. Most of them run away or are asked to leave their own home. They do not get full support from their biological family members.

6. Rema Nagarajan, "First Count of Third Gender in Census: 4.9 Lakh", (*The Times of India*, 30-5-2014). <https://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms>.
7. About 96% of Transgenders are Denied Jobs, 60% have Never Attended Schools: Study, (Moneycontrol, 13-8-2018) <https://www.moneycontrol.com/news/india/about-96-of-transgenders-are-denied-jobs-60-have-never-attended-schools-study-2836281.html>.

Subsequently, they face a lot of hurdles when they are not in a position to earn due to health concerns, lack of employment opportunities leading to psychological issues. Some initiatives were taken to bring in the transgender participation in the employment sector such as agents for Life Insurance Corporation of India, NGO's and self-help groups.[8] Education and skill development plays a pivotal role in enhancing jobs and economic opportunities for an individual. Right to Education Act, 2009 provides for transgender community children to study in schools and colleges with provision of all facilities as provided to those of general category and other reserved category children. But the problem lies with societal acceptance and behavioural norms which forces them to not go to school. Majority of population in India is illiterate which does not allow them or let them participate in social, cultural, religious and public discussion. The transgender community face a high level of stigma in education and employment sector.

Due to the above leading factors, the literacy level of the community did not improve inspite of benefits and policy measures being introduced for their upliftment in India. Under Right to Education Act, 2009 the community comes under the definition of "disadvantaged group". Despite this, the admission of transgender community children is very low and the dropout rate is very high.[9] In India, some of the States like Tamil Nadu, Maharashtra, Madhya Pradesh, Gujarat and Odisha have introduced transgender welfare policies for the upliftment of the transgender community. Government of Odisha, for instance, has announced the Transgender Welfare Policy wherein a Below Poverty Line (BPL) household will be provided with housing, food and pension. It is one of the initiatives taken by the government to uplift the community to some extent.[10]

Furthermore, due to lack of education, transgender community suffers economic disparities. Inclusion of transgender in schools and colleges is a big struggle. Till 2004, nobody thought to include transgender in the mainstream and they were denied the Right to

8. KonduruDelliswararao and ChongneikimHangsing, "Socio–Cultural Exclusion and Inclusion of Trans-genders in India", (2016) 12 International Journal of Social Science and Management 122.
9. Dr Rajkumar, "Education of Trangenders in India: Status and Challenges", (2016) 6(11) International Journal of Research in Economics and Social Sciences.
10. Reuters, "Odisha Becomes First State to Give Welfare to Transgender Community", (*India Today*, 2-6-2016) <https://www.indiatoday.in/india/story/indias-odisha-state-becomes-first-to-give-welfare-to-transgender-community-12032-2016-06-02>.

Education.[11] Thus government jobs or private jobs remained inaccessible for the transgender community which resulted in inequality in employment and socio-economic status. One also needs to design policies and systems by which transgender children will be able to get admission into schools and will also able to feel secure and protected and do not have to drop out of school because of bullying and mockery. The manner in which children are introduced to the concept of gender fluidity is important so that they approach transgender persons without fear and without hatred and it would go a long way in shaping an attitude of acceptance. To build economic independence, one need to begin with economic rights, which can ensure that transgender persons are able to live a life of dignity even when abandoned by their own.[12]

The Ministry of Social Justice and Empowerment in its 2013 Expert Committee Report[13], observed that a lack of recognition before the law is in itself a human rights violation and this is a major barrier for the transgenders in realising other basic rights. The Report stated that "Article 5 of the Constitution identifies the person who is entitled to be a citizen of India. None of the conditions specified therein require a determinate sex or gender identity as a pre-condition of acquiring citizenship." Though there is no articulate mention of transgender in either the statutes of India or the legislation, leaving them invisible and dependent on how general clauses relating to their human rights protection are interpreted. In India, there are some legal provisions which passively provide rights to the transgender community. Further, India has ratified most of the international treaties with specific reference to human rights, be it in regard to children, women, disabled or the elderly but since long there has been a disconnect between the plight of the transgender and the Yogyakarta Principles, which were developed by a coalition coordinated by the International Service for Human Rights and the International Commission of Jurists and were formally adopted by a panel of leading international law experts way back in November 2006.[14] These provide authoritative guidance on the human

11. Katarina Tomasevski, The Education Deficit: Failures to Protect and Fulfill the Right to Education through Global Development Agendas, (Human Rights Watch, 30-6-2019) <https://www.hrw.org/report/2016/06/09/education-deficit/failures-protect-and-fulfill-right-education-through-global>.
12. MousumiPadhi and Purnima Anjali Mohanty, "Securing Transgender Rights through Capability Development", (2019) 54 Economic and Political Weekly 13.
13. SitharamamKakarala, *India and the Challenge of Statelessness: A Review of the Legal Framework Relating to Nationality*, (NLUD Press,2012) 213.
14. Manfred Nowak, 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, (Human Rights Watch, 26-3-2007) <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights>.

rights of LGBT and the obligations of States to promote and protect rights of transgender community ensuring full equality and addressing discrimination. It is because of this disconnect that the perpetration of human rights violations, on grounds of sexual orientation and despite the ratification, on ground of gender identity, is a common practice and is entrenched in India, to the point of being systematic, while discrimination on the same ground is institutionalised. After the landmark judgment of Section 377 of Indian Penal Code, though the transgenders were recognised by law but the societal stigma remains the same as before.

4. TRANSGENDER RIGHTS AND ECONOMIC DEVELOPMENT

The existing body of literature, survey reports and research documents depict the vulnerable situation experienced by the trans-people in sectors of education, health and employment opportunities. Development of human capital aids in increasing productivity of the individuals in particular and capacity expansion of the economy in general. The presence of any barriers to individual participation in economic activities is detrimental to the nation's income generation as a whole. For example, according to Becker, employers who discriminate between workers on the basis of sexuality might end up in earning lower profits.[15]It's an undeniable fact that every individual is part and parcel of the circular flow of income in a four sector open economy. So the exclusion of one, disrupts the economic process, leading to underutilisation and wastage of resources, resulting in deficiency of aggregate demand.[16]This is the major reason as to why Keynes believed in the idea of under employment equilibrium in the economy as opposed to the full employment equilibrium concept advocated by the classical economists like Adam Smith and JB Say.[17] Even the proponents of the New Modern Monetary Theory propose that every individual should be employed so that there is price stability of the economy.[18]

15. M.Corcoranand G.J.Duncan, "Work History, LaborForce Attachment, and Earnings Differences between the Races and Sexes", (1979) 23 Journal of Human Resources 378.
16. Deming, W. Edwards, *The New Economics for Industry, Government, Education*,(2ndedn., MIT Press, 2018).
17. Aaron Einbond, "To What Extent was Keynes's General Theory Revolutionary and to What Extent was it Based on Past Economic Theories", (1993) 14 International Economic Journal 89.
18. Thomas I. Palley, "Money, FiscalPolicy, and Interest Rates: A Critique of Modern Monetary Theory", (2015) 27 Review of Political Economy 23.

Creative disruptions are always beneficial to an economy in contrast to destructive disruptions in the form of exclusive discrimination towards a certain community. Such gender-based discriminations are one of the reasons for low human development index in those economies where gender inequality is pervasive. For example, there are some European countries which have gender friendly economic setup whereas in India, we are still in the phase of transition towards a gender inclusive economic environment.

In this context, it becomes essential to highlight the status of trans community specifically in India in the light of the recent Transgender Bill, 2019. The transgender population stands at 4.9 lakh according to the 2011 census though unofficial figures estimate the figures between 60-80 lakh as a number of people from this community do not disclose their real identity in the fear of discrimination. In one of the first ever study conducted by the NHRC

(National Human Rights Commission) on the living standards of the transgender community,[19] it provided a bare minimum quantifiable aspect of their economic and social exclusion. The study said that the transgender persons are totally invisible in all spheres of economic activities. Low level of education and social exclusion limits their employment and livelihood opportunities. According to the report, only 8 percent of Indian trans-persons as per the 2011 census are earning a decent living, in contrast to the other 92 percent who are unable to find work due to the existing stigma and discrimination against them.[20] The failure to make their ends meet forces them to take low paying work like sex trade, *badhai*s and begging activities which is derogatory to their dignity as individuals. The extent of transgender exclusion from the workforce certainly shall lengthen the process of formalisation of the economy, further accentuating the jobless growth syndrome and reduction in economic gains. The economy is missing out on the economic engagement of around 4,50,800 trans-persons, who are utilising the share of the national pie without making productive additions to it. The dependency burden could cost both, the Indian and Global Economy. The essence of the economic argument

19. Kerala Development Society, Study on Human Rights of Transgender as a Third Gender(NHRC,February 2017)<http://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf> accessed 25-8-2019.
20. Walter Bockting, "The Impact of Stigma on Transgender Identity Development and Mental Health" in *Gender Dysphoria and Disorders of Sex Development: Progress in Care and Knowledge* (Boston Springer, 2014) 319-330.

remains simple that expansion in economic capacity is dependent upon a productive inclusive labour force and it's a disincentive to the people who are routinely excluded from health care, jobs, schools and subjected to different forms of violence and discrimination. The performance in education parameters is also shocking as the literacy rate amongst the transgenders is very poor with less than half of them having access to schooling and higher education facilities; 62 percent of the ones experience abuse and harassment (18 per cent are physically abused,62 per cent are verbally abused in school and 15 per cent are harassed by students as well as teachers). The health scenario is not encouraging as well with the majority grappling with the issues of HIV/AIDS, depressions, suicides and around 57 per cent of transgender persons wanting to undergo sex reassignment surgery but failing to do so due to monetary constraints.

5. INSTANCES OF ECONOMIC DISCRIMINATION

One of the prominent cases of economic discrimination is the case of *Nangai* v. *Supt. of Police*[21] which deals with an individual who was terminated from service on the ground of being a transgender. This is in contravention to Article 16(2) of the Constitution of India that guarantees equality of opportunity in matters of public employment and it further directs that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against in respect of, any employment or office under the State. The courts have dealt with a number of cases and enforced laws relating to specific gender like male and female, but there was no such statutory, customary, civil or penal law pertaining to the third gender, i.e. the transgender (who do not fit into the binary classification of sex).

In another instance, the Tamil Nadu Uniformed Services Board also inadvertently, declared the petitioner as a "transgender" and denied her employment.[22] She was recorded as a female in the family card, census record and in all the other government records. Fate took a turn when she got selected through direct recruitment to the post of Grade II Police Constable [Women] for the year 2009-2010 and on appearing for the medical examination, she was declared as a transgender and was terminated from the job.

21. 2014 SCC OnLine Mad 988 : 2014 4 Mad LJ 12.
22. *Ibid.*,21.

Further, there are cases that have never been brought up before the judicial authorities. A reference may be made to individuals like Shanthi Soundararajan, a girl from Pudukkottai District, who won a Silver Medal in 800 meters race in Doha Asian Games held on 15 December 2006. But she was stripped of the medal after declaring that she was not a female as per the medical examination.[23]There is another recent incident of a principal in West Bengal who was forced to quit her job due to apathetic attitude of her employer and her colleagues and another instance is that of a person (Shanavi Ponnusamy), who was denied a job as a trainee female cabin crew in Air India due to her being transgender.[24]In a similar instance, around 8 out of 23 transgender persons employed by the Kerala's Kochi Metro Rail Limited were forced to give up their jobs as they were refused accommodation by several landlords.[25]

These cases of workplace discrimination or job denial are not the only cases faced by the transgender persons and it is heart breaking to note that in spite of the Supreme Court Ruling that recognised transgender people as the third gender in 2014, it didn't have much impact on many sectors, the corroboration of which can be obtained from the examples related to work discrimination discussed above. It is shocking that such instances take place frequently and we can just lament that animals in India are at a far better legal position than the transgender, given the fact that we have certain statutory framework (such as The Wildlife Protection Act, 1972, The Prevention of Cruelty to Animals Act, 1960, etc.) for protection of animals, but no such statutory framework and protection mechanism for the third binary equivalent.

Barriers to employment opportunities arise when there is difference noticed between the sex assigned at birth and sex assigned by the society at large which largely depends upon the physical attributes. Sans of

23. Sonam Joshi, "A Decade after being Banned For Failing a Controversial Gender Test, Athlete ShanthiSoundarajan Gets a Government Job", (Huffington Post, 19-10-2016)<huffingtonpost.in/entry/a-decade-after-being-banned-for-failing-a-controversial-gender-t_in_5c12b30be4b0e6c47f88d93d>.
24. ApurvaVishwanath, "Transwoman Sues Air India for Denying Her Job, Airline to Sue Her Back for 'Loss of Goodwill'", (*ThePrint*,26-8-2018)<https://theprint.in/india/governance/transwoman-sues-air-india-for-denying-her-job-airline-to-sue-her-back-for-loss-of-goodwill/88899/>.
25. SreedeviJayarajan, "Not Real Inclusion, Just a PR Gimmick: Why Many Trans Employees Quit the Kochi Metro",(The News Minute, 31-8-2019) <https://www.thenewsminute.com/article/not-real-inclusion-just-pr-gimmick-why-many-trans-employees-quit-kochi-metro-108151>.

income earning avenues, the transgender community suffer from the issues of both primary and secondary poverty wherein accessibility and affordability of food, becomes a huge matter of concern.[26]Impoverishment and marginalisation have been endemic to the transgender population. Of course the essence of food security is the same for the transgender as it is to the general population. Hence the vicious circle of poverty amongst the transgender culminates in food insecurity.[27]

Inaccessibility to jobs, denial of educational opportunities and housing facilities and ostracism by families, can put the transgender people in precarious economic positions. Although the third gender face common barriers yet those who live in abject poverty would have inadequate income and means through which they could have eliminated the stigma attached to them.

6. COSTS AND BENEFITS OF TRANSGENDER INCLUSIVE DEVELOPMENT

According to the empirical study report published by the Williams Institute as part of USAID's LGBT Development Partnership, the correlation between economic prosperity and human rights is so much pervasive that the greater the LGBT inclusion, the greater shall be the level of economic development at both micro and macro levels, eventually leading to prosperity and wellbeing of nation as a whole.[28]

Including transgenders in various fields and giving them opportunities to participate in various economic activities means that we are including them in the stock of human capital which increases the human resource. When human resource is increased, an economy incurs huge profits and level of output and production increases due to increased participation which in turn increases gross domestic product and national income. An increase in national income results in increased per capita income which in turn increases standard of living and reduces the number of people living below the poverty line. This chain results in overall growth of economy and country as a whole develops and grows. But in order to

26. C.R.Snorton, *Black on Both Sides: A Racial History of Trans Identity*, (Uni. of Minnesota Press, 2017) 476.
27. Patterson Russomanno, and Jabson, "Food Insecurity among Transgender and Gender Nonconforming Individuals in the Southeast United States: A Qualitative Study", (2019) 4 Transgender Health 1, 89-99.
28. Andrew Flores and Andrew Park, "Polarized Progress: Social Acceptance of LGBT People in 141 Countries, 1981 to 2014", (2018 UCLA Press) 63.

achieve this, the very first thing that is required is inclusion of transgender in the society in order to consider them as a valuable human resource.

In a report published by the Peter Tatchell Foundation,[29] it has been emphasised that while advocating for the cause of human rights violation of LGBT (lesbian, gay, bisexual and transgender community), the entire focus is levied on the extent of discrimination and hate crimes, they are suffering in everyday life. It is always the moral and humane considerations, which ponders over the economic impact of the exclusion of sexual minorities from the mainstream economy. In fact, in a virtuous economy, the role of economic arguments should supplement the human rights considerations.

Hence, it is imperative to highlight the costs of anti-transgender sentiments in every nation irrespective of their status of economic development. Transgender discrimination and marginalisation and exclusion, leads to retardation in economic growth and subsequent loss in GDP.[30] In the neo liberal era today, the cost benefit analysis of inclusion and exclusion of sexual minorities has broader monetary implications in the long run than in the short run frame of time.

In a recent study by UMass Amhert University in America[31], it is emphasised that in the absence of recognition of transgender rights, the Indian economy suffers an estimated loss of up to 1.7 per cent of GDP in one year. This is a primary cost to the economy associated with other secondary costs like loss of labour productivity, decline in output levels and increase in mortality rates, which further could generate costs of up to USD 31 billion in India alone. The study is silent on the brain drain cost of transgender people leaving India due to stigmatic environment. These preliminary estimates shall jump in leaps and bounds once there is recorded evidence on transgender population and their human rights violation. Nonetheless, the sustainability of progressive nations is more so less dependent upon the gender friendly legislative, legal, social and

29. Claire Thurlow andthe Peter Tatchell Foundation, The Economic Cost of Homophobia, (June 2018) <www.petertatchellfoundation.org/wp-content/uploads/2018/06/report-a4-lo-res-1.pdf> accessed on 22-8-2019.
30. D. Nambiar, P. Ganesan, Aditya Rao, Gitan Motwani,"Who Cares?" (2015) Urban Health Care and Exclusion: India Exclusion Report29-66.
31. DrLee Badgett, "The Economic Cost of Homophobia & the Exclusion of LGBT People: A Case Study of India"(WBOFebruary 2014) <https://www.worldbank.org/content/dam/Worldbank/document/SAR/economic-costs-homophobia-lgbt-exlusion-india.pdf> accessed on 28-8-2019.

economic framework. This is evident from the pink economy which is a core contributor to countries like USA and Brazil. According to the report on "A Manifesto for Trans Inclusion in the Indian Workplace",[32]the global LGBT market has a lot of potential and should be unequivocally harnessed. To an irony India is still struggling to take advantage of the enormous potential of the transgender people.

India being a knowledge-based economy, will instantly witness a rise in tax payers with the inclusion of transgender people within the existing workforce.[33] The broadening of tax base is the need of the hour today given the fact that the nation is having a low taxable capacity. According to Colin Clark, we are far behind the limit of taxable capacity which is partly due to non-taxation of agricultural income and partly due to unorganised money market.[34] Increase in tax collections will help in optimising the public expenditure programmes towards betterment of the society and economy at large. Given the number of trans people to the total population, though change will be miniscule, but will be a step-in right direction. In fact, the engagement of trans people in the job sector will economically secure them, thus saving a huge quantum of government expenditures on providing them shelter homes, assisting them in earning *jeevika*, treating endemic and sexually transm itted diseases, etc. Inevitably the instances of hate crimes will eventually diminish with the government saving money which would have otherwise been spent on the upkeep of the prisoners and maintenance of prisons as well.

Increased equitable access to economic opportunities by the transgender people at par with the general population will ensure competitive environment and incentivise the beginning of a new phase of consumerism boom with the emergence of a new class of consumers in the economy.[35] The inherent ripple effects will substantially benefit the domestic economy

32. NayanikaNambiarandParmeshShahani, "A Manifesto for Trans Inclusion in the Indian Workplace" (December 2018)<indiaculturelab.org/assets/Uploads/Godrej-India-Culture-Lab-Trans-Inclusion-Manifesto-Paper3.pdf> accessed on 21-8-2019.
33. Nambiar and Shahani, "A Manifesto for Trans Inclusion in the Indian Workplace" (2014) Journal of Gender Studies 97.
34. S. Tillotson, "Policy Forum: Then and Now—A Historical Perspective on the Politics of Comprehensive Tax Reform", (2018) 43 Canadian Tax Journal/Revue FiscaleCanadienne 66(2).
35. VivekDivan, Clifton Cortez etal., "Transgender Social Inclusion and Equality: APivotal Path to Development", (2016) 32 Journal of the International AIDS Society 98.

and create a breaking pathway for inflow of more tourism revenues and foreign direct investments.

A nation will be at an economic disadvantage if the potential nature of transgender inclusivity is underestimated.

7. RECOMMENDATIONS AND SUGGESTIONS

Though the Transgender Persons (Protection of Rights) Bill, 2019 is a baby step in the right direction, the need of the hour is more affirmative action by the State in following ways:

It is suggestive to conduct awareness programmes or inclusion courses on transgender community at school level so that the outlook of the community will change in society. This will reduce discrimination and inequality among the people.

Special commissions or Tribunal should be established to resolve the dispute relating to the transgender community in India as has been done for cases pertaining to atrocities against SCs, STs and OBCs.

Suitable amendments may be made to existing civil and criminal laws to provide gender specific provisions with clear specification like that of sanctions under the rape laws, sexual harassment and personal laws. It is suggestive to amend the laws in relation to the transgender people or a special Act to be enacted to provide civil and penal laws for offences relating to marriage, rape, divorce, etc.

The government should provide for special fund during the budget allocation for the upliftment of the transgender community. Fund allocation may be utilised in developing their economic status by providing them skilled training, constructing housing areas, clubs, etc. in order to make the community feel inclusive. A part of the gender budgeting provisions should be spent exclusively for their upliftment.

Affirmative action in the employment sector should be provided for the transgender community, in order to improve their economic condition.

State counselling centres with District Branch Offices should be established for the emotional wellbeing of the community.

One Stop Centres may be established for providing instant relief to the transgender who are victims of various forms of violence in the society.

REVENGE PORNOGRAPHY: THE NEW AGE HUMAN RIGHTS INFRINGEMENT

*Saheli Chakraborty**

ABSTRACT

The world has become a global village, with developing technology. Different fractions are equating distance and time due to increased pace in communication. However, at the downfall, this communication is also increasing the pace of information and privacy is being curbed. When the world leaders are thinking of international policies for data protection, there another global problem is growing of an epic proportion. "Revenge Porn" means the non-consensual usage of individual's intimate or private media online. It has been in practice over a long time in different forms. However, in the times of over-dependence on technology and rapid speed of internet, it has become a harbinger of wrath times. The dissemination of any media without the consent of the victim not only affects the person morally but impacts significantly on the person's rights. With the fear of location, identity being leaked, the victim is further under the threat of livelihood and kin being defamed, as well as harmed. The basic privacy of one's own body or words are in the edge of being viewed by millions of predators, is an exceptional example of human rights violation and further sexual violation. Gendered abuse against women is not a new phenomenon, but social media and digital technology allow it to occur "on an unprecedented scale and in new transformations.[1]

This paper tries to trace the development of Revenge Porn, using historical tools. Further, it draws attention that the offence is gender-neutral. Secondly, this paper attempts to understand whether non-consensual transmission of private media infringes privacy rights and further human rights. Lastly, the sufficiency of the Indian legislation to resolve issue is discussed.

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1. Emily Reynolds, "Why there is no 'Silver Bullet' for Ridding the Web of Revenge Porn" *Wired* (26-3-2017).<https://www.wired.co.uk/article/revenge-porn-facebook-social-media> accessed 30-3-2020.

Due to the paucity of time and limitation, under the nature of work, the paper is limited to doctrinal form of research, using historical and analytical tools, analysing revenge porn only from the electronic form. An attempt has been made to compare between the general laws and special laws specifically, that is Indian Penal Code, Informational Technology Act and Provisions of Protection of Children from Sexual Offences Act, 2012.

1. INTRODUCTION

Before the digital revolution took place, revenge porn was pre-existing in a different format and is not a phenomenon grown over a fortnight. However, the digital era has increased the exposure and the reach of the media affecting the global scenario at large. Interestingly, the omnipresence of portable, camera-equipped, internet-connected devices, which allow for the instantaneous taking, uploading, storage and sharing of intimate media, has placed ordinary individuals perennially at risk of exposure.[2] It has outgrown all other forms of sexual violence online, for being much more accessible and convenient, which should make the lawmakers more serious about the matter.

The modern version of revenge porn finds itself rooted in the growth of pornography in digital technology, increasing the production and dissemination of media at a faster pace. The etymology of pornography can be traced to graphos (writing or description) and porneia (prostitutes) and hence it means the description of the life, manners of prostitutes and their patrons.[3] The first known use of the word to describe something similar to pornography as understood today was in the 18th century, when the city of Pompeii was discovered. The entire city was full of erotic art and frescoes, symbols, inscriptions and artefacts that were regarded by its excavators as "pornographic". All these finds were kept at the secret museum and only men of a particular upper class were allowed and

2. Ros Setterfield, "The Bare Truth about 'Revenge Porn': Revealing the Regulatory Challenges Exposed by an Exploration of Revenge Porn's Roots in Pornography and Technology" (2017) 3 Edinburgh Student L Rev 38.
3. Namita Malhotra, "Pleasure and Pornography: Initial Encounters with the Unknown" (Centre for Internet and Society, Raw Blog, 3-2-2009) <https://cis-india.org/raw/histories-of-the-internet/blogs/law-video-technology/xxx-files-initial-encounters-with-the-unknown> accessed 30-3-2020.

"trusted" to have access to these objects and not the "easily corruptible rabble or women".[4]

From the scope of drawing women in illicit position, pornography transitioned to printing format, in the 18th century, when men started picturing their mistresses in modern pornography.[5] Such texts and images were used in France and England for political expression, during the time of social and political changes. Due to such reasons, there was a massive campaign against pornography as early as 1860s,[6] to control the population. As per this campaign, pornography was encouraging sexual communications, ideas and thoughts, which needs to be curbed in order to control the overgrowing population of the country. With the growth in technology, the introduction of photography in the Victorian era increased the scope of pornography further. There was a massive increase in the consumption of pornography due to the accessible, fast and at a minimal cost of the production.

The outbreak of the 20th century saw a new type of pornography, which normalised shooting individual private sexual actions. With advancements of technology and the accessible WiFi, internet, phones, saving mechanism like pendrive, CD-ROM, etc. production and commercial exploitation of private pornography had an outburst.

Furthermore, amateur pornography was introduced as an offence, in this context. It is not necessarily commercial in nature until it has to be put under the purview of an offence. With the onset of smartphones, faster internet, it is no more a rare occasion of shooting sexually explicit footage of oneself. Furthermore, the images or videos are set over to other individuals over the medium of internet or sometimes through portable data storage mediums. The activity is commonplace amongst teens in particular and derives directly from the combined forces of technological advancements and relaxed attitudes towards sex.[7]

4. Walter M. Kendrick, *The Secret Museum: Pornography in Modern Culture* (University of California Press, 1996).
5. Jordan Fairbairn, "Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age" in Jane Bailey and Valerie Steeves (eds.), *eGirls, eCitizens* (Ottawa Press, 2015).
6. Kendrick (n 4).
7. Nicky Woolf, " 'Revenge porn king' Hunter Moore Pleads Guilty to Hacking Charges" *The Guardian* (19-2-2015) <https://www.theguardian.com/technology/2015/feb/19/revenge-porn-hunter-moore-pleads-guilty-hacking-identify> accessed 30-3-2020.

2. WHAT IS REVENGE PORN?

With the increase in consumption of pornography, its demand has also increased further amongst the consumers, which has pushed for other key technologies to increase the production and transmitting. These developments have let to non-consensual pornography is one of the highly commercial and consumed pornography.

The first time revenge porn came into limelight, was with the launch of a popular website "Is Anyone Up"[8] in 2010, then brought down subsequently in 2012. The purpose of this site was to upload any explicit sexual photographs, which also included nude photographs. On legal inquiry, it was found that most of the pictures that were uploaded, were of ex-lovers or of someone being in close relation. Furthermore, the website not only limited to uploading photographs but also had embedded social media profile links of those, whose pictures were uploaded. This led to identity, personal data and social humiliation, all at once being compromised.

Non-consensual pornography has been recently referred to as revenge porn[9]. There is no legal basis or mention of such terminology in any conventional documents, statute, or precedents. Though there is mention of "pornography" in Indian Statute, "revenge porn" is not referred.

There is an issue with the terminology. As not all "non-consensual pornography" is caused due to any vengeful motive or to seek "revenge". To bring the entire type of offence under the purview of hate crime would result in not considering those offences, where there has been non-consensual pornography transmitted, uploaded or threatened to be brought to the public domain, for either sexual favours or commercial negotiation.

2.1. Case Study 1:

Hollywood actress Mischa Barton had to pay the brunt of revenge porn. She had neither sent any explicit sexual medium, to any person nor had she consented for being clicked any whatsoever way. A video was recorded of hers, in sexual activity with her partner. This video was, therefore, doing rounds in the prime pornography sites. Some of those sites sold the

8. *Ibid.*
9. Natália Neris and Juliana Pacetta Ruiz and Mariana Giorgetti Valente, "Comparative Analysis of Strategies to Face Revenge Porn around the World" (2017) 7 Braz J Pub Pol'y 334.

video at a jaw-dropping amount of $5,00,000.[10] During the trial, it was found that the video was recorded and sold by her partner, for commercial benefits. Irrespective, it being an offence under the purview of voyeurism, it also falls under the gambit of non-consensual pornography, for seeking monetary benefit and not for vengeful reasons. She further won the legal battle but was subjected to enormous defamation and loss of movies, in spite of being a celebrated person.

2.2. Case Study 2:

The commercial exploitation of the sexual pictures without the consent of the owner of such media has emerged in India as well. In Anoushka Shankar's story an old friend threatened to publish all the "compromised pictures" of hers if she does not pay the quoted price for the same. In the FIR filed by her father Pandit Ravi Shankar, it was alleged that the pictures[11] were retrieved when her laptop was given at the service centre and was used against her for extorting money.

2.3. Case Study 3:

Hackers, is a website, an online portal that had hosted pictures and videos of various female celebrities around the globe, in an uncompromising position. This portal was basically finding its source from hacking into the "icloud"[12] or the storage database of such celebrities. This was purely a move for seeking revenue out of posting illicit pictures of the celebrities.

From these three case study, we can infer that the offence of non-consensual pornography is not limited for any "revenge" or "vengeful" reasons. Apart from seeking revenge, this offence is also used for other reasons like commercial extortion and defamation. Therefore, not all non-consensual pornography should be refereed as "Revenge Porn".

10. Gemma Mullin, "What is the Mischa Barton Sex Tape, Who is Adam Shaw and What is Revenge Porn?", *The Sun* (8-6-2017) <https://www.thesun.co.uk/tvandshowbiz/3095508/mischa-barton-sex-tape-actress-revenge-porn-ex-boyfriends-adam-shaw-jon-zacharias-won-case/> accessed 30-3-2020.
11. Anoushka Shankar's, "Blackmailer held", *The Times of India* (20-9-2009). <https://timesofindia.indiatimes.com/videos/news/Anoushka-Shankars-blackmailer-held/videoshow/5033952.cms> accessed 30-3-2020.
12. Lauren Fruen, "Hacker posts 'Revenge Porn' Images of 20 Girls to Message Board Leaving Victims Devastated", *The Sun* (27-9-2016) <https://www.thesun.co.uk/news/1854068/hacker-posts-revenge-porn-images-of-20-girls-to-message-board-leaving-victims-devastated/> accessed 30-3-2020.

3. IS REVENGE PORN - GENDER NEUTRAL?

The history of revenge porn says, it was brought to the limelight, by a petty commercial action of a man, as mentioned above. However, dissemination of confidential or private images, mostly sent to an ex-lover or someone of trust could be of any gender.

The fundamental element of the offence is that a delinquent has accessed any sexually explicit medium, i.e. pictures, video, etc., of the victim and then for vengeful purpose, or commercial exploitation, without the victim's consent, deliberately released such information on any online medium or is used for transmission amongst peers group or others for consumption, or defamation. Therefore, the perpetrator not necessarily is of one gender. It could be caused by any gender and caused to any gender to harm their reputation or seek any monetary benefits.

In the course of the literature review for this paper, ironically all the research papers have referred the victim as "she". Unlike other written materials, on all subjects and format, "he" is the universal pronoun. A brief observation would infer that men are not victimised by revenge porn. Therefore, to understand the purview of gender neutrality, this paper has to resort to newspaper articles. Interestingly, most of the articles mentioned that a man is responsible for different revenge porn cases, with the woman being the victim. We could conclude that – No mention of men as a victim, not because it is logically not possible, but because the societal concept of morality and recognition of such is different for both men and women. Furthermore, there is an underlying double standard towards women, in this case. The woman, who is a victim, is blamed for her callousness or illicit communications that have provoked the man to exploit the situation. Victim shaming by society as well as the criminal, administrative system is the most common phenomenon when it comes to the women. Thus, the consequences of the revenge porn are detrimental for one gender, the women.

In the case of *JPH* v. *XYZ*,[13] a male actor who had been in a relationship with a woman was subjected to revenge porn, where the latter disseminated a few pictures of him in public to extort money. The Court of England held further that it is a gross human rights infringement. Therefore, it can be concluded that revenge porn is gender-neutral, even though the battle

13. *JPH* v. *XYZ*, (2015) EWHC 2871.

fought by the women is much more than any other gender. But, there is a need for gender-neutral legislation to curb the situation from both sides.

4. REVENGE PORN: A SEXUAL VIOLENCE

There are various kinds of violence that take place against women. Some of whom are confined to the four walls of her house, some on the public domain, like social media. In order to understand the scope of revenge, porn and sexual violence, an attempt is made to understand what violence against women is.

The 1993 United Nations Declaration on the Elimination of Violence against Women defines violence as any act that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life.[14] As mentioned above, violence has various facets and women are harmed on many levels.

Revenge porn is structural violence against a woman's sexuality, where her gender, individual liberty and sexual consent are under encroachment. Due to different dimension, sexual violence can be defined in various ways. Primarily, it is the violence, where an individual is subjected to aggression by any third party, to which she has not consented to, infringing her fundamental sexual privacy.

World Health Organisation defines it as any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or otherwise directed against a person's sexuality using coercion by any person regardless of their relationship to the victim, in any setting including but not limited to home and work.[15]

Inferring from the definitions of the international organisation and referring to them as conventional definitions, we can see that sexual violence have various facets, due to its various cause and effect. But, there is no doubt, about its presence could be cyber-based, or, social platforms over the internet. One such violence that has emerged on cyberspace is revenge porn.

14. Declaration on the Elimination of Violence Against Women, 1993.
15. World Health Organisation, Sexual Violence (World Report on Health and Violence, 1999) Ch. 6.

Interestingly revenge porn, unlike other cybercrime, is not limited to cyberspace, even though it emerged from that platform, its effect victimises an individual on various parameters. As the lines between the online and offline medium get blurred, there is an increase in the integration of professional and personal life, for which the actions on the cyberspace is mainly affecting the life beyond such space.

Just like other sexual violence against women, like marital rape, sexual harassment, etc. the social onus falls on the victim, that she had not stepped beyond the lines of "social acceptance" or the edgy idea of "safety", which is mostly written down by the prevalent morality of the society. Furthermore, such violence is expected to be tolerated, or she shall be blamed for her victimisation. Revenge porn is one such of a kind where the double victimisation is rampant, for it is assumed that, that the woman should not have sent any text/image/media, which is illicit, as it is morally uncouth and encourages such crime. Further, the criminal administration adds to the victimisation for the same purpose.

4.1. Right to Privacy

Law protects our important data, from leakage through various statutes and precedents, which have been discussed in Chapter III of this paper. From our constitutional right of the vote being anonymous to safeguarding our financial information and other personal data that we feed or provide to the government databases are considered private data and are subjected to governing statutes, to safeguard them against exploitation by any third party.

The data are not just limited to physical data, but even the biometric data, which is collected by the employer is subjected to restricting rules, under the IT Act.[16] One of the exemplary judgment which discusses the matter in hand, in length is *K.S. Puttaswamy* v. *Union of India*.[17] The mentioned precedent is a big leap in the abstract of the concept of "privacy". Privacy has been addressed as an umbrella protecting other facets of rights. If liberty and freedom are the rights that everyone is promised to, then privacy is what enables them to access those rights.

16. Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.
17. *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

The *prima facie* discussion here, is what constitutes a private date or information, depending on which it lies, whether the data ought to be protected or not? These primarily depend on the context it is used in and how detrimental it would be, on its exploitation.

On daily communication we inbuilt a compartmental interaction some of which we have in our private space and some in distant others. We tend to distinguish amongst people, for sharing our information as well on social media platforms. These information or data are a consensual decision of one, about one's own privacy. However, these information are now under threat, being exploited and assaulted by those who have it, without prior knowledge or consent. Hidden cameras film people in bedrooms and restrooms, and "up their skirts" without permission. People are coerced into sharing nude images and making sex videos under threat of public disclosure. And, to top this list of sexual violence, is the emergence of morphed pornography, which inserts people's faces, body or other sexually explicit images are posted online without their subjects' permission.[18]

The media, which could be pictures, videos or even conversation of being under the purview of sexually explicit be referred to in the category of data's that are to be protected under the right to privacy. To which it can be concluded that such data's would be termed as sexual privacy of one. Considering the magnitude of interest and balancing the other data, already adjudged to be private in nature and sexual privacy. The latter should be given much more priority, as it is a person's most private space and internal core, which is left for the public to consume on digital or non-digital platforms, with such person's consent. It is the gross infringement of one's moral, privacy and human rights. The consequences of revenge porn have been discussed in the following chapters.

4.2. Sexual Privacy

Sexual privacy is a broad spectrum to define in a statement or a definition. It would not limit to any body parts or any action. It's the conglomeration of confidential communications, thoughts, information. It includes any sexual (excluding sexual intercourse) actions, in the street or in home. Most definitely, it would encompass the body parts, especially genitals.[19]

18. Danielle Keats Citron, "Sexual Privacy" (2019) 128 Yale Law Journal 1792.
19. *Ibid.*

Anything that is intimate, involving sexual orientation, gender or experiences that constitute sexual privacy

Revenge porn, encompasses media of sexual actions, to pictures of body parts or even sexually explicit communication. It can be inferred on such level, that media or data in such pornography is most definitely under the ambit of sexual privacy. Moreover, it is a gross fundamental infringement of one's privacy. Nevertheless, does India recognise sexual privacy under rto privacy?

Sexual privacy is at the core, it is synonymous to freedom of an individual, contouring one's independence, based on two factors consent and choice.

However, when we speak about India and its stance towards women privacy-it is dependent mainly on popular morality. Therefore, it is vital to discuss where morality and any injustice towards women stand from the legal perspective.

4.2.a. *Morality and Privacy: American Judiciary Perspective*

The American Supreme Court had a declared Right to Privacy over morality over a series of precedents. It had declared various social interests as the Right to Privacy, removing the importance of socially construed morality.[20] Public morality, without its mention, was superseded by the importance of marital privacy, in the context of birth control. Similarly, in *Lawrence* v. *Texas*[21] in the question of the legality of consensual sexual conduct between persons of the same sex, the court addressed that no "majoritarian sexual morality"[22] can prevail of privacy

4.2.b. *Morality and Injustice Towards Women : India Judiciary*

In modern progressive society, one can exercise his idea of morality through his interactions with the other factors of the same society. It remains in the purview of private morality. When such actions are generalised, a contour of the same is required, to come under the umbrella of "public morality". Morality, the most misconstrued concept and have

20. *Griswold* v. *State of Connecticut,* 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479, 482 (1965).
21. *Lawrence* v. *Texas,* 2003 SCC OnLine US SC 73 : 539 US 558 (2003).
22. Thulasi K. Raj, "This too is a Right: The Right to Sexual Privacy", *The Hindu*, (6-1-2018).<https://www.thehindu.com/opinion/op-ed/this-too-is-a-right/article22378799.ece> accessed 30-3-2020.

been provided various undertone, over time. As we consider a wide range of moral issues, we may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most apparent demands of social living and extends upwards to the highest reaches of human aspirations[23].

This yardstick is either pulled back by the voluminous issues or pushed up by the transformations targeting excellence. The location of this imaginary pointer depends on the balance between law and morality. The debate about this location has been a long tussle for ages. From the principles of justice, it follows that government has neither the right nor the duty to do what it or a majority (or whatever) wants to do in questions of morals and religion[24]. From the principles of justice, it follows that government has neither the right nor the duty to do what it or a majority (or whatever) wants to do in questions of morals and religion. Its duty is limited to underwriting the conditions of equal moral and religious liberty.[25]

A similar stance was taken in case of Sabarimala case, i.e. *Indian Young Lawyers Assn.* v. *State of Kerala,*[26] which is a landmark judgment in the road of women empowerment and equality. Constitutional morality prevailed over popular morality, in this case. Former Chief Justice of India, Dipak Misra mentioned "morality" that is mentioned in the Constitution shall mean Constitutional morality if there has been an infringement of Fundamental Rights. Here, in the battle of morality construed by traditional knowledge and violence, in the name of discrimination against women, the latter was sought to be considered much more significant. Hence, the judgment is a milestone. These above-mentioned judgments have re-established equality, removing discrimination against women, over the long-running popular morality.

Therefore, popular morality cannot decide the course of a legal framework for recognition of sexual privacy safeguard, nor can it be the basis of de-recognition. It is the duty of the government to protect the confidential images or information and not put under the scanner of morality.

In this ongoing dialogue, *Joseph Shine* v. *Union of India,*[27] where the Supreme Court shattered the 158 years old sexist law, acts as a premier landmark in women rights. The court adjudged Section 497 of Indian

23. Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964).
24. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).
25. John Rawls, A Theory of Justice, (Harvard University Press, 1971).
26. *Indian Young Lawyers Assn.* v. *State of Kerala* (2017) 10 SCC 689.
27. *Joseph Shine* v. *Union of India,* (2019) 3 SCC 39 : 2018 SCC OnLine SC 1676.

Penal Code unconstitutional stating, "the husband is not the master of the wife". Where the husband was at liberty to bring litigation against another man, with whom his wife has an adulterous relationship. In this case "sexual privacy" was considered as a right. In this context, we conclude that sexual privacy is a right, though its parameters have not yet been decided by the court.

5. REVENGE PORN AND THE INDIAN LEGISLATION

Non-consensual pornography or as referred as revenge porn, has become a global phenomenon, yet, the first case that has been convicted in India is in 2018.[28] In the case of *State of W.B.* v. *Animesh Boxi,*[29] the convicted had uploaded private pictures and videos of a girl, without taking the consent from her, to take revenge on her for ending their relationship. She was under the promise and was compelled to send illicit pictures and further under threat to be put on the public domain was asked to send more pictures. Adding to such threats, the convicted further accessed her phone without her knowledge to retrieve more private pictures and videos. When the complainant refused to continue their relationship, he uploaded this material onto a popular pornographic website along with both her and her father's names. The Court directed the State Government to treat the victim as a survivor of rape and grant the appropriate compensation. The perpetrator, on the other hand, was convicted under Sections 354-A, 354-C, 354 and 509 of the Indian Penal Code, as well as Sections 66-E, 66-C, 67 and 67-A of the IT Act.

There are no specific judicial orders that provide, whether pornography is legal or not? In the case of *Kamlesh Vaswani* v. *Union of India*[30] the Court had directed the government to ban 857 pornography websites,[31] from which no conclusion that being drawn that pornography is completely banned in India, from production to consumption. However, there is a

28. TNN, "BTech Student gets 5 Years in Prison for Revenge Porn", *The Times Of India*, (8-1-2019, 12.05 IST) <https://timesofindia.indiatimes.com/city/kolkata/btech-student-gets-5-years-in-prison-for-revenge-porn/articleshow/63211045.cms> accessed 30-3-2020.
29. CRM No. 11806 of 2017.
30. *Kamlesh Vaswani* v. *Union of India,* (2014) 6 SCC 705.
31. Neha Alawadhi , "The Government has sent a Notice to Internet Service Providers to block more than 850 Porn Websites", *Economic Times*, (3-8-2015, 05.10 a.m. IST).<https://economictimes.indiatimes.com/news/politics-and-nation/government-directs-internet-providers-to-block-857-porn-sites/articleshow/48322983.cms?from=mdr.> accessed 30-3-2020.

lack of monitoring and policing, which could not curb the situation even after banning several pornographic websites.

At present, there is no exclusive legislation on pornography and have to be resorted to Indian Penal Code for the general provisions and specific provisions of Information Technology Act, if it is uploaded on a public portal. Furthermore, there are no legal provisions, which directly deal with revenge porn. Again, it resorts to IPC and IT Act. But that fails the objective as general provisions cannot address the complexity and merits of individual cases, especially if they are not commercially available on the website or on any online medium.

5.1. The Provisions of Indian Penal Code

5.1.a. *Assault or criminal force to woman with intent to outrage her modesty*

Section 354 of the Indian Penal Code, says that:

> *"Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

This provision is likely used for nonsexual pornography that targets women. It is not a general neutral provision and will not suffice for the offences against any other gender, including transgender.

5.1.b. *Sexual Harassment*

A man committing any of the following acts—

(a) physical contact and advances involving unwelcome and explicit sexual overtures; or

(b) a demand or request for sexual favours; or

(c) showing pornography against the will of a woman; or

(d) making sexually coloured remarks shall be guilty of the offence of sexual harassment.

Similar to the previous discussion, this Section 354-A of IPC, is limited to its scope with regard to the gender neutrality. Furthermore, there has not been any judgment where offline non-consensual pornography has been considered under the radar of "revenge porn". Therefore, any online dissemination of private pictures does not directly infringe any of the laid down criteria's under the provision, if such offence has been done for the sole reason of revenge.

5.1.c. *Voyeurism*

Section 354-C, Explanation (ii) of IPC says that:

> *"Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section."*

This provision clearly sums up the term "revenge porn" that is, it is the only provision that has defined the essence of the offence altogether. But, it defines the "female" as a victim and "male" as the offender or perpetrator. Therefore, its scope is limited.

5.2. The Provisions of Information Technology Act

5.2.a. *Transmission of images depicting the private areas of a person*

> *Whoever intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under the circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three exceeding two lakh rupees, or with both.*

This section further explains "private area" as "the naked or undergarment clad genitals, pubic area, buttocks or female breast" further, it can be an offence, even in public or private areas as per this provision.

This section can penalise offences, where only private parts were visible, its applicability is limited, of cases where any sexual activity is captured without the image of the private parts. The cases of intimate position without showing the private areas would be brought under this section.

5.2.b. *Publication or transmission of material containing the sexually explicit Act*

Section 67-A of IT Act, says:

> *Punishment for publishing or transmitting of material containing the sexually explicit act, etc. in electronic form -Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit Act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.*

This provision acts as the two-way path, where it can not only penalise the offender but also it can penalise the victim for who have captured the pictures or videos voluntarily and have consented to share it with the perpetrator.

5.3. Child Pornography

We cannot limit the discussion of pornography and not include child pornography because they are misused and exploited by various perpetrators for commercial exploitation. Interestingly, with the development of technology and accessible production system, revenge porn is much more prevalent amongst teens. In the case of Bazee.com,[32] which is also referred as the Delhi MMS scandal, is one of the earliest traits of revenge pornography, even though it was not penalised under the provisions nor had mentioned the term "revenge porn". Furthermore, it shows the emerging trend amongst the teens being a victim to pornography, in non-consensual form.

5.3.a. *Provisions of Protection of Children from Sexual Offences Act, 2012*

As per the Protection of Children from Sexual Offences (Amendment) Act, 2019, Section 2 (*da*) has been inserted which defines "child pornography"

32. *Avnish Bajaj* v. *State of NCT of Delhi*, 2004 SCC OnLine Del 1160 : (2005) 116 DLT 427: (2005) 79 DRJ 576.

as: *"any visual depiction of sexually explicit conduct involving a child which include a photograph, video, digital or computer-generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child".*

Furthermore, a child is someone below the age of 18 years of age. As per Section 14(1) of the said Act, punishes anyone found guilty of using a child for pornographic purposes, *"with imprisonment of either description which may extend up to five years and also shall be liable to fine and in the event of subsequent conviction with imprisonment of either description for a term which may extend to seven years and also liable to fine."*

The provisions of this statute have encompassed the offence of "child pornography" specifically, also have left it in broad, for bringing in various offences under the ambit. This provision can be invoked not just for non-consensual pornography offences offline, but also online as it expressly does not limit the medium of offence. Due to such broad scope of these provisions, revenge porn committed against a teen or any child below 18 years of age can be brought under this statute. It is further, a gender-neutral statute, for which children of all gender can invoke the provisions, seeking for relief.

5.3.b. *Provisions of the Information Technology Act, 2000*

Section 67-B of the said Act, specifically puts down the punishment for publishing and transmitting any sexually explicit act, depicting children, in electronic form. Considering the characteristics of offence – Revenge Porn, 67-B(a) and 67-B(b) can be invoked. Where, 67-B(a) says *"whoever publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in a sexually explicit act or conduct and 67-B(b) says that creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in an obscene or indecent or sexually explicit manner."*

This provision can be invoked for cases of revenge porn against children. Limitation of this provision is that it can penalise the offence only when the explicit media is in the electronic or online medium. Any offline, or transmitting amongst peers group, in order to seek revenge, cannot be brought under this provision. Investigation for offline transmitting of pornography is cumbersome, and has not been considered as an offence, under this statute.

6. CONCLUSION

Revenge porn is not a new concept, which has emerged with the development with the technology. As mentioned in Chapter I, of this paper, it had parallel growth with printing press and recording system. But, now it has become a significant source of cybercrime against men and women, seeking for revenge or for commercial benefits. The terminology of revenge porn doesn't suffice the entire perimeter of the offence that is. Some of the global perpetrators of revenge porn have committed the same, for monetary benefits. At the same time, in the world of artificial intelligence, there is very less monitoring being done on behalf of the government to curb the situation. The lawmakers need to look for a better and comprehensive international formula, which will prevent and protect the victims because monetary compensation cannot provide redressal to the injury done. This would become the most significant phenomenon of cyber bullying, if not taken actions immediately. To add further, due to the accessibility of the latest technology, children or teens are the most common victims. In spite of laws being prevalent, the implementation lacks efficiency. Therefore, a particular law, in consonance with better technological monitoring has to be enacted.

Firstly, there has to be a specific stand from the judiciary, to state whether pornography is illegal in India, or not. Also, there is much difference in private consumption and forcing someone to be on pornographic video or image. A person consuming it privately that is watching it has the Fundamental Right to do so, as per the Right to Privacy judgment in *K.S. Puttaswamy* v. *Union of India*.[33]

On the other hand, someone who is being exposed to pornographic sites, without consent is having his/her Right to Privacy infringed. Therefore, it is the two extreme situations of the same action, which needs different redressal mechanism.

To understand the complexities of the offence and also provide exclusive legislation to deal with such situation, there is a need of separate legislation, which can protect, punish and provide a system of monitoring for offences like non-consensual pornography. It would decrease the dependency on other general statutes and not dilute the complexities of the offences.

33. *K.S. Puttaswamy* v. *Union of India,* (2017) 10 SCC 1.

In the landmark case of, Right to Privacy brings down the privacy in an abstract construct. It does not put down the perimeter to provide, what all can be put down under the ambit of "privacy". For, which sexual privacy is a right or not, is ambiguous. In the USA, copyright law is used to protect the victim from rapid spread of any explicit medium to fight revenge porn,[34] especially if such pictures have any selfie. In India, such offences can be brought under copyright law, on bringing down the material. This mechanism would act as a protection, while or before a criminal trial is brought. We need to consider the judicial pronouncements would take time, which has already done the injury to the reputation and privacy of the victim.

Social media, legal policies need to be stringent. There is a requirement of a stage-wise filter and privacy settings that need to be brought to limit the public viewing and dissemination of any such offensive or explicit images or videos.

Need to address the offence as a gender-neutral offence, to ensure the men can come forward to invoke the various provisions, in order to seek relief. Further, the administration needs to be more empathetic, if not sympathetic and not double victimise the victim.

The government has to improvise its internet monitoring system. Banning of 857 websites, ended up with the opening of more pornographic websites,[35] but some of the websites that were banned were used to sell medicines, that could not be procured from medical stores due to social judgements. Therefore, it has to increase its monitoring before blindly banning any website or portal. Also, internet is a borderless weapon, for which the lawmakers need to make a more concrete international system, which will protect their as well other citizens from around the world being victimised by the perpetrators.

34. Erica Fink, "I had to Copyright my Breasts", *CNN Business*, (27-4-2015). <https://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html> accessed 30-3-2020.

35. IANS, "Despite Ban, Porn Sites back by Tweaking their Portal Names", *The National Herald*, (29-12-2019, 10.03 a.m.) <https://www.nationalheraldindia.com/india/despite-ban-porn-sites-back-by-tweaking-their-portal-names> accessed 30-3-2020.

PATERNALISTIC MANDATORY VACCINATION LAWS: A BENEFIT TO HUMANKIND OR AN INFRINGEMENT OF HUMAN RIGHTS

Divyanshi Shrivastava and Rohit Debnath***

ABSTRACT

The Right to Health is a fundamental part of our human rights and of our understanding of a life in dignity. Vaccines have made a key, cost-effective contribution to the prolongation of human life and health. Vaccines thus are an achievement of civilisation, a human right, our health insurance for the future, however relinquishment of vaccines to promote some cliché propaganda lead to compromise with the health of thousands, therefore lead many States around the world to implement mandatory vaccination programmes. These programmes are sometimes coercive in nature, hence contravening privacy, right to choice some facets of basic human right. This paper discusses those facets and proposes solutions to resolve this obfuscated situation by giving freedom of informed consents to parents. This paper also discusses global approach of various countries like USA, Germany, European Union, India on legality of mandatory vaccination.

1. INTRODUCTION

In 2019, anti-vaccine campaigns in Samoa attributed to measles outbreak leading to fatal deaths[1]. Another lethal virus which has infected masses around in China and affected Global community is the novel coronavirus, a less known virus which has thrusted scientists to develop a vaccine against this diabolical virus to save mankind. But anti-vaccine campaigns

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1. Agence France-Presse, "Samoa Measles Outbreak: WHO Blames Anti-Vaccine Scare as Death Toll Hits 39", *The Guardian* (Samoa, 27-11-2019) <https://www.theguardian.com/world/2019/nov/28/samoa-measles-outbreak-who-blames-anti-vaccine-scare-death-toll> accessed 30-3-2020.

in the world are rising gradually[2] by linking vaccination to autism,[3] brain damage,[4] religious principals[5] and other unsubstantiated claims, with the World Health Organisation (WHO) including vaccine hesitancy among its list of "Ten Threats to Global Health in 2019".[6]

Samoa as above discussed in one of those many examples, where relinquishment of vaccines to promote some cliché propaganda led to compromise with the health of thousands, therefore this led many States around the world to implement mandatory vaccination programmes.

This is the premise of this article which scrutinises on mandatory vaccination programmes through human rights perspective and aims to answer the modalities of these vaccination programmers through lenses of human rights.

The Right to Health is a fundamental part of our human rights and of our understanding of a life in dignity[7]**.** Vaccines have made a key, cost-effective contribution to the prolongation of human life and health.

2. "Coronavirus: All You Need to Know About Symptoms and Risks" (*Al Jazeera*, 25-1-2020) <https://www.aljazeera.com/news/2020/01/coronavirus-symptoms-vaccines risks-200122194509687.html> accessed 10-2-2020.; Jan Hoffman, "How Anti-Vaccine Sentiment Took Hold in the United States" *The New York Times*, (Washington DC, 23-9-2019), 5; Royal society for public health, "Moving the Needle: Promoting Vaccination Uptake across the Life Course" (RSPH, April 2019).<https://www.rsph.org.uk/uploads/assets/uploaded/f8cf580a-57b5-41f4-8e21de333af20f32.pdf> accessed 31-3-2020.; Julia Belluz, "Religion and Vaccine Refusal are Linked. We Have to Talk About it". (*Vox*, 19-7-2019) <https://www.vox.com/2019/6/19/18681930/religion-vaccine-refusal> accessed 30-3-2020.
3. Jeffrey S. Gerber, Paul A. Offit, "Vaccines and Autism: A Tale of Shifting Hypotheses" (Clin. Infect. Dis.,15-2-2019) < https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2908388/> accessed 30-3-2020.
4. Sharyl Attkisson, "Vaccines, Autism and Brain Damage: What's in a Name?" (*CBS*, 14-9-2010) <https://www.cbsnews.com/news/vaccines-autism-and-brain-damage-whats-in-a-name/> accessed 31-3-2020.
5. Haider J. Warraich, "Religious Opposition to Polio Vaccination", Emerg. Infect. Dis. (2009) 15(6): 978. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2727330/> accessed 30-3-2020.
6. "Ten Threats to Global Health in 2019" (WHO, April 2019) <https://www.who.int/news-room/feature-stories/ten-threats-to-global-health-in-2019> accessed 30-3-2020.
7. Office of the United Nations High Commissioner for Human Rights, The Right to Health <https://www.ohchr.org/> accessed 10-2-2020.

It can be said that vaccinations are an achievement of human civilisation, human right and also a health insurance for the future.[8]

Vaccines and vaccination have emerged as key medical scientific tools for prevention of certain diseases. In past there has been popular resistance to universal vaccination based on unsubstantiated assumptions hence leading to loss of human lives.[9] However, with successful immunisation programs,[10] there has been a gradual awakening thus leading to global eradication of lethal diseases like smallpox, polio[11] and measles.[12]

However the question that arises is whether high mortality and morbidity can be curbed compromising freedom of individual. This is because if mandatory vaccination is the solution to proliferating diseases, there is parallel development of transformative constitutionalism valuing individualism and individual rights.[13]

2. GLOBAL APPROACH TO MANDATORY VACCINATION

Vaccination is the global development with most countries adopting it either by incentivising vaccination with tax benefits or other monetary allowances or through awareness programmes but on the other side of the spectrum there are countries that are implementing compulsory vaccination as either through statutory laws or through deterrent methods like heavy fines, restriction to education and health care, etc. Hence the question arises whether these laws and policies are in derogation to human rights. Vaccination is the global development with most countries adopting it by incentivising vaccination with tax benefits "like Australia which reduces its citizens Family Tax Benefit Part 'A' payments by about $28 Australian dollars once every two weeks for every child who doesn't

8. Rappuoli, Santoni, Mantovani, "Vaccines: An Achievement of Civilization, A Human Right, Our Health Insurance for the Future" (Epub, 3-12-2018) <https://www.ncbi.nlm.nih.gov/pubmed/30510147> accessed 9-2-2020.
9. Virginia A. Leary, The Right to Health in International Human Rights Law, Health and Human Rights, (1994) Vol. 1, No. 1, 24-56.
10. Gomber, D.K. Taneja, Mohan K., "Awareness of Pulse Polio Immunisation" (WHO, January 2019) <https://www.who.int/countries/eth/areas/immunization/pei/en/> accessed 31-3-20.
11. "Measles (Rubeola)", (Centers for Disease Control and Prevention, 4-10-2019) <http://www.cdc.gov/measles/about/history.html> accessed 9-1-2020.
12. "Measles (Rubeola)", (Centers for Disease Control and Prevention, 4-10-2019) <http://www.cdc.gov/measles/about/history.html> accessed 9-1-2020.
13. *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

follow the prescribed vaccinations by the government".[14] Some countries also provide monetary allowances like Austria which recompenses parents if they have their children vaccinated.[15] Many countries adopt awareness programmes like India[16] and Pakistan,[17] but on the other side of the spectrum there are countries that are implementing compulsory vaccination as either through statutory laws like Germany which passed the "Measles Protection Act, 2019" to levy fines up to 2750 US dollars on parents for not vaccinating their child and also includes residences for asylum seekers, refugee shelters and holiday camps.[18]

In USA, Italy, Germany and Australia schooling is banned for unvaccinated children.[19] German law for instance prevents children who have not taken mandatory vaccinations from admission in schools and

14. "No Jab, No Pay – New Immunisation Requirements for Family Assistance Payments" (Australian Government, Department of health, April 2019) <https://www.health.gov.au/sites/default/files/no-jab-no-pay-fsheet.pdf> accessed 31-3-2020; Jullia Belluz, "The Global Crackdown on Parents who Refuse Vaccines for their Kids is on" (*Vox*, 15-11-20219) <https://www.vox.com/science-and-health/2017/8/3/16069204/vaccine-fines-measles-outbreaks-europe-australia> accessed 2-1-2020.
15. David Hemenway, "Financial Incentives for Childhood Immunisation", (1995) Journal of Policy Analysis and Management, Vol. 14, No. 1 (Winter, 1995), 133-139.
16. "India Launches Largest ever Campaign to Tackle Polio Epidemic" (WHO, 5-2-2003) <https://www.who.int/mediacentre/news/releases/2003/pr8/en/> accessed 31-3-2020.
17. Associated Press of Pakistan, "Effective Polio Awareness Campaign to be Launched" *Daily Times* (Islamabad 9-10-2019) <https://dailytimes.com.pk/481092/effective-polio-awareness-campaign-to-be-launched/> accessed 30-3-2020; Muhammad Taimoor, "Anti-Polio Campaign to Kick off in Various Parts of the Country Today" *Dawn* (Lahore, 26-8-2019) <https://www.dawn.com/news/1501782/anti-polio-campaign-to-kick-off-in-various-parts-of-the-country-today> accessed 31-3-2020.
18. Melissa Eddy, "Germany Mandates Measles Vaccine" *The New York Times* (Berlin, 14-11-2019) <https://www.nytimes.com/2019/11/14/world/europe/germany-measles-vaccine.html> accessed 30 March 2020.; Kate Connolly, "German Parliament Approves Compulsory Measles Vaccinations" *The Guardian* (Berlin, 14-11-2019) <https://www.theguardian.com/world/2019/nov/14/german-parliament-approves-compulsory-measles-vaccinations> accessed 30-3-2020.
19. Susan Scutti, "How countries around the world try to encourage vaccination" (*CNN*, 2-1-2018) <https://edition.cnn.com/2017/06/06/health/vaccine-uptake-incentives/index.html> accessed 31-3-2020.; Julia Belluz, "The Global Crackdown on Parents who Refuse Vaccines for their Kids is on" (*Vox*, 15-11-2019) <https://www.vox.com/science-and-health/2017/8/3/16069204/vaccine-fines-measles-outbreaks-europe-australia> accessed 30-3-2020; Anthony Ciolli, "Mandatory School Vaccinations: The Role of Tort Law" (2008) Yale J Biol Med 14; "State Vaccination Requirements" (Centres for Disease Control and Prevention) <https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html> accessed 30-3-2020.

also denies various other benefits.[20] Hence, the question arises, whether these laws and policies are in derogation to human rights.

For consideration, in *Jacobson* v. *Massachusetts,*[21] the Supreme Court of United States held that *"State compulsory vaccination laws are constitutional when they are necessary for the public health or the public safety. While the spirit of the Constitution is to be respected not less than its letter, the spirit is to be collected chiefly from its words."*

The Court held that laws promoting public health or safety fall under a State's police power and are under the sole discretion of the State unless the law violates the Constitution. Additionally, individual rights may need to yield to the State's police power in order to preserve public health and safety. The court observed, "*There are manifold restraints to which every person is necessarily good subjected for the common good".* Since then, the US Courts have affirmed the constitutionality of State compulsory vaccination laws in cases like *Zucht* v. *R.*,[22] which upheld childhood vaccination requirements for entrance to public schools.

Recently, Germany passed ***The Measles Protection Act***[23] which orders "that of March 2020 children and staff in kindergartens and schools, medical facilities and community facilities must be vaccinated.[24] These include residences for asylum seekers, refugee shelters and holiday camps. The German Law further punishes, parents who do not vaccinate their children of school age shall face hefty fines of up to €2,500 ($2,749), while younger children could face a ban from day care facilities."[25]

However, the EU has a tangentially opposite approach to USA mandate on vaccination. EU is more tilted towards human rights approach which includes informed consent and free will to vaccination. This can be inferred from various statutes and conventions which bolsters this perspective like "*Convention for the Protection of Human Rights and*

20. Abi Carter, "Germany Passes Compulsory Measles Vaccination Law" (Expat, 18-7-2019).<https://www.iamexpat.de/expat-info/german-expat-news/germany-passes-compulsory-measles-vaccination-law> accessed 19-1-2020.
21. *Jacobson* v. *Massachusetts,* 1905 SCC OnLine US SC 51 : 49 L Ed 643 : 197 US 11 (1905).
22. *Zucht* v. *R.,* 1922 SCC OnLine US SC 157 : 67 L Ed 194 : 260 US 174 (1922).
23. German Parliament Votes to make Measles Vaccination Mandatory <https://www.bmj.com/content/367/bmj.l6558> (BMJ 2019; 367) accessed 8-2-2020.
24. Reuters Staff Report, German Kindergartens must Report Parents for Refusing Vaccine Advice under New Law, Reuters, (Berlin, 26-5-2017) 5.
25. *Ibid.*

Dignity of the Human Being with regard to the application of Biology[26] *and Medicine: Convention on Human Rights and Biomedicine (Convention of Ovied)*"[27] and even ensures **Reparation for unjustified damage**[28] **who has suffered due to intervention of State due to vaccination injuries. On the contrary** recommendations of the Parliamentary assembly of Council of Europe[29] aimed to develop or reactivate mass vaccination programs for their populations which constitute the most efficient and cost-effective means of combating infectious diseases and to ensure effective epidemiological surveillance systems.

Another crucial charter in EU jurisprudence is the European Social Charter of the Council of Europe, Article 11, i.e. "Right to Protection of Health" which urges "*States to implement vaccination policies to combat infectious diseases and develop effective epidemiological surveillance*".[30] The approach of EU on obligation to vaccinate and sanctions on mandatory vaccination appears befuddled.[31]

Hence this obfuscates the approach of EU Law towards vaccination policies, laws and creates a divide amongst various EU States.

Moving towards French approach to vaccination, vaccines against whooping cough, measles are only recommended when these diseases cause severe health problems than polio, diphtheria and tetanus[32] as the National Academy of Medicine[33] created an obligation to vaccinate against the whooping cough, diphtheria and poliomyelitis.

26. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997) Oviedo, 4.IV.1997.
27. *Ibid.*
28. Art. 24, *ibid.* Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997) Oviedo, 4.IV.1997, Art. 24.
29. Recommendation 1903 (2010) of the Parliamentary Assembly of the Council of Europe (PACE), titled "Vaccinations in Europe".
30. European Social Charter, 1996, Art. 11.
31. Pavel Vavřička et autres c. Républiquetchèque (No. 47621/13).
32. World Health Organisation, Information Sheet Observed Rate Of Vaccine Reactions Diphtheria, Pertussis, Tetanus Vaccines, (Vaccines, May 2014).<https://www.who.int/vaccine_safety/initiative/tools/DTP_vaccine_rates_information_sheet.pdf> accessed 9-1-2020.
33. *Ibid.*

The Czech Supreme Court in Pavel VAVŘIČKA case[34] held compulsory vaccination as unconstitutional on ground of respect to human rights of parents. Moreover the death toll remained the same (despite vaccination) and the detrimental effect of viruses continued to mount on therefore Czech Court did not favour compulsory vaccinations and did not consider it exception to freedom which might jeopardise public health. This judgment clarifies the nebulous path created by EU Court as it says; the legitimate aim of compulsory vaccination should be *"less constraining and more respectful of the Fundamental Rights of parents and their children"*.

Moreover ICCPR jurisprudence on human right, under Article 7 of ICCPR states *"no one shall be subjected without his free consent to medical treatment*[35]*"* and further Article 17 of ICCPR states that "compulsory vaccination without free consents is an arbitrary interference to privacy of a family whose entire gene gets disturbed or affected by vaccination".[36]

Compulsory vaccination if have had successful history in some countries then it cannot be denied it also has a devastating effect too. In *N.W, L.W, C.W* v. *Sanofi Pasteur MSD SNC,*[37] in which a major vaccination corporation was held liable as the administration of vaccine was the plausible cause of vaccination injury. Hence the claims of pharmaceutical industry that vaccinations are completely safe are farfetched reality which calls for a caveat.

The legitimate aim sought by compulsory vaccination could be reached through measures both less constraining and more respectful of the fundamental and human rights of parents and their children and will fall in the framework of human rights as well.

3. MANDATORY VACCINATION AND HUMAN RIGHTS CONFLICT

Human rights approach as reflected in UDHR, ICCPR rejects the idea of compulsory vaccination[38]. As seen from various courts around the globe

34. *Pavel Vavřička* v. *Czech Republic* (No. 47621/13).
35. International Covenant on Civil and Political Rights (1966) 2200-A (XXI), Art. 7. International Covenant on Civil and Political Rights, 1966, Art. 7.
36. *Ibid.*, Art. 17. International Covenant on Civil and Political Rights, 1966, Art. 17.
37. ECJ, 21-6-2017, Case C-621/15, *N.W, L.W, C.W* v. *Sanofi Pasteur MSD SNC,* Caisse primaire d'assurance maladie des Hauts-de-Seine, Carpimko.
38. United Nations Human Rights Office of High Commission, "Human Rights" (Inter-Parliamentary Union, 2016) <https://www.ohchr.org/ > accessed 9-2-2020.

on mandatory vaccination, India though not with many precedents but also has a unique position on mandatory vaccination.

To begin with Delhi High Court, "*Vaccination should be given only with the informed consent of parents or guardians. The forcible vaccination without informed consent violates 'bodily autonomy' and 'informational privacy'*",[39] which are recognised to be facets of the fundamental Right to Privacy under Article 21 [40]of the Constitution of India as per the Supreme Court decision in *K.S. Puttaswamy* v. *Union of India:*[41] "*It is settled principle that choice of an individual, even in cases of life-saving medical treatment, is an inextricable part of dignity which ought to be protected. The law and procedure, authorising any kind of interference with personal liberty and right to privacy, must also be right, just and fair and not arbitrary, fanciful and oppressive*".

The American jurisprudence on privacy defines the right to privacy as; "*the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person.*"[42] Therefore vaccination mandate needs to be under such a framework where they actually are not violating privacy of individuals. Therefore, the law to protect health which is an essential human right cannot actually come at a cost of another pivotal right that is privacy; a facet of transformative constitutionalism[43] being increasingly recognised as a crucial part of human rights jurisprudence.[44]

3.1. Informed Consent and Mandatory Vaccination Laws

The doctrine of informed consent assumes that an individual is free to exercise his or her free will when making important decisions concerning medical treatment and care.[45] Common Law recognised constitutional support for informed consent in *Cruzan* v. *Missouri Department of*

39. *Hridaan Kumar* v. *Union of India,* Dy. No. 84763 of 2019 in W. P. Civil 343 of 2019.
40. Constitution of India 1950, Art. 21.
41. *K.S. Puttaswamy* v. *Union of India,* (2017) 10 SCC 1.
42. *Eisenstadt* v. *Baird,* 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 405 US 438 (1972).
43. German Parliament (n 23).
44. Universal Declaration of Human Rights, Art.12.
45. Beauchamp T.L., Childress J.F. Principles of Biomedical Ethics (6th edn. New York: Oxford University Press, 2009).

Health,[46] holding that "*[t]his notion of bodily integrity has been embodied in the requirement that informed consent.*"

Article 8 of UDHR provides that everyone with a right to a "private and family life," and ensures "no interference by a public authority with the exercise of this right.[47]" Mandatory vaccination would surely need to include consideration of Article 8 and the impact on family life for both the disabled individual and the family in cases of vaccine induced injury.

Further, Article 24 of the ***United Nations Convention on the Rights of the Child,***[48] ensures children have the access to medicines and proposals to implement mandatory vaccination would need to include consideration of Article 24 in respect of the children whose health, whether mentally, physically or socially may be negatively affected by vaccination. Article 36[49] of the same convention aims to protects the child from "*any activity that takes advantage of them or could harm their welfare and development*" which would surely include any vaccine-induced harm which impacts on their wellbeing and their development. Consideration of any anticipated "irreparable damage" from the implementation of mandatory vaccination needs to include consideration of any potential violation of children's human rights.

In early times, crucial issue on the ethical and legal challenges in vaccination, particularly in the context of developing countries like India, solely focused on the measures needed for universal access to vaccination.[50] The policies focused on achieving equity and justice especially to prevent deaths of children, national assets of country. However, public health policies and laws often contradict human rights norms established by human rights law. Hence this urges for complete information on the vaccine to protect bodily integrity and human choices.

It thus becomes pivotal that people be convinced about the safety and effectiveness of vaccines. But how can this be done if the research data

46. *Cruzan* v. *Missouri Department of Health,* 1990 SCC OnLine US SC 123 : L Ed 2d 224 : 497 US 261 (1990).
47. The Universal Declaration of Human Rights (General Assembly Resolution 217-A) Art. 8.
48. Convention on the Rights of the Child (General Assembly Resolution 44/25 of 20-11-1989), Art. 24.
49. *Ibid,* Art. 36.
50. Amar Jesani, Veena Johari, "Ethical and Legal Challenges of Vaccines and Vaccination: Reflections" Indian Journal of Medical Ethics < https://ijme.in/articles> accessed 20-1-2020.

on vaccines are protected as trade secrets of companies (patented) which carried out research on those vaccines and this befuddles the matter into a dilemma and hence amongst all this the paternalistic state actions seem subsuming individual's human right under umbrella of mandatory vaccination and patent rights.[51]

3.2. Right to Privacy and Mandatory Vaccination Laws

Medical freedom is a basic human right,[52] Article 6 of Universal Declaration on Bio Ethics and Human Rights on Consent states "*any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned*". But mandatory vaccination actually deprives this basic human right, so it can't be said to protect health of masses which is pivotal duty of State it can snatch medical freedom a basic eminent human right of the common masses.[53]

The National Vaccine Policy 2011,[54] under "Introduction of New Vaccines in UIP", recognises and directs that in vaccine administration, the concerns of parents are to be adequately addressed. It states that respects the choice of parents and consent towards vaccination cycle.

Also, forcing vaccination into children without the prior consent of the parents is a violation of Article 16 of the UN Convention on the Rights of Child.[55] Also, forcing vaccination into children without the prior consent of the parents is a violation of Article 16 of the UN Convention on the Rights of Child[56] as it expressly protects a child's privacy from arbitrary and unlawful interference. The said Article is in consonance with the "right to privacy" as held by the Hon'ble Supreme Court in *K.S. Puttaswamy* v. *Union of India*[57] where "medical information, informational autonomy" are seen as different manifestations of the "Right to Privacy". Furthermore, the Hon'ble Supreme Court held that the "concerns of privacy" arise when

51. Havlor Nordby, "Should Paramedics ever Accept Patients' Refusal of Treatment or Further Assessment" <https://bmcmedethics.biomedcentral.com/> accessed 14-1-2020.
52. Office of the United Nations High Commissioner for Human Rights, "The Right to Health" <https://www.ohchr.org/> accessed 1-1-2020.
53. Universal Declaration on Bioethics and Human Rights, Art. 6.
54. National Vaccine Policy, 2011, <https://www.google.com/url?q=https://mohfw.gov.in/> accessed 27-1-2020.
55. UN Convention on the Rights of Child, Art. 16.
56. UN Convention on the Rights of Child, 1989, Art. 16.
57. (2017) 10 SCC 1; German Parliament (n 23).

the State seeks to intrude into the body of the subjects. The Court further observed that the fundamental Right to Privacy would cover at least three fundamental aspects "(i) intrusion with an individual's physical body, (ii) informational privacy and (iii) privacy of choice, privacy concerns arise when the State seeks to intrude into the body and the mind of the citizen."

Thus, if the State forcibly vaccinates its citizens it would violate all the above three aspects of the fundamental Right of Privacy. Forcible vaccination would be intrusion in an individual body as well as against his/her privacy of choice.

Moreover, as per Section 88 of the Indian Penal Code, "*a person above the age of 18 years can give valid consent to suffer any harm from an act, not intended or known not to cause death and done in good faith and for his benefit.*"[58] Similarly "a child below the age of 12 cannot give *valid consent to suffer any harm that may result from an act done in good faith and for the benefit of the patient*". For individuals falling in the age group of 12–18 years, nothing specific has been described in Indian law and practically the same consent rules as of a child hold true for this age group.[59]

As for the safety of vaccines, there are a number of reported vaccine related deaths in India with four deaths in Gujarat in 2018, several deaths of children in Noida, UP and in Nagpur, Maharashtra.[60] This shows that even modern vaccines are not totally safe. As for the safety of vaccines, there are a number of reported vaccine related deaths in India with four deaths in Gujarat in 2018, several deaths of children in Noida, UP and in Nagpur, Maharashtra.[61] In 2010[62], 128 children died in India due to vaccine injuries which increased to 133 in 2011,[63] then in 2012-2014, the National Adverse Event following Immunisation Committee (NEFI)

58. Penal Code 1860, S. 88.
59. R.N. Karmakar, "*State Medicine, Medical Ethics and Law*" in J.B. Mukherjee (ed.), *Forensic Medicine and Toxicology*, (Academic Publishers, 2007).
60. "4 Children Reportedly Dead After Measles Rubella Vaccination in Gujarat" *Indo-Asian News Service* (Gandhinagar, 29-7-2018).
61. *Indo-Asian News Service*, "4 Children Reportedly Dead After Measles Rubella Vaccination in Gujarat" (*NDTV*, 29-7-2018) <https://www.ndtv.com/india-news/4-children-reportedly-dead-after-measles-rubella-vaccination-in-gujarat-1891488> accessed 30-3-2020.
62. Arun Ram, "128 Kids Died After Vaccine in 2010, Govt. Can't Say Why", *The Times of India*, (Chennai, 29-5-11) 1.
63. Kounteya Sinha, "Immunisation Side-Effects Claimed 133 Children's Lives in 2011", *The Times of India* (New Delhi, 25-8-2012) 3.

reported 367 causalities.[64] However, the Government of India hasn't adopted the WHO recommended Brighton Collaboration criteria on adverse effects after immunisation (AEFI) deaths.[65] Under this criterion, a vaccine should be considered a "probable reason" for death if no other is established. So, the actual number of AEFI deaths in India could be much more than the official data indicates. Even, the US Government paid more than four billion US dollars in AEFI compensation in the last 30 years with more than 7,000 proven cases of AEFI.[66] This indicates that modern vaccination programs are not absolutely safe. Unfortunately, India doesn't have any dedicated vaccine compensation programme for vaccine-related injuries or deaths.[67] The recourse that victims in India have is to approach the courts, whose costs are generally out of reach to an average Indian and is a protracted process. Also proving the link between causality and fault is an arduous task.[68]

Further under the doctrine of informed consent, the Supreme Court of Ireland has held that "the manufacturers of a vaccine has a duty to exercise all reasonable care to avoid exposing recipients to danger and harm from the use of their products".[69] Failure to meet this standard of reasonable care will subject the manufacturer to liability for any resulting injury".[70]

The Supreme Court of India in *Samira Kohli* v. *Prabha Manchanda*[71] has discussed about the essentials elements of informed consent. It held that a doctor must give a patient adequate information for him to understand the various aspects of the proposed treatment so that he can make a balanced judgment as to whether to submit himself to the particular treatment or

64. Sarojini Nadimpally, Sneha Banerjee, Deepa Venkatachalam, Divya Bhagianadh, "An Idea whose Time Has Come: Compensation for Vaccine-Related Injuries and Death in India", Indian Journal of Medical Ethics, (S.l), v.,n., p. 93, April (2017) ISSN 0975-5691 <https://ijme.in/articles/an-idea-whose-time-has-come-compensation-for-vaccine-related-injuries-and-death-in-india/> accessed 1-1-2020.
65. *Ibid.*
66. United States Department of Health and Human Services, National Vaccine Injury Compensation Program Data Report (Health Resources & Services Administration, 1-3-2020) <https://www.hrsa.gov/vaccine-compensation/data/index.html> accessed 31-3-2020.
67. *Ibid* (n 51).
68. *Ibid.*
69. *Best* v. *Wellcome Foundation Ltd.,* (1994) 5 Med LR 81.
70. *Ibid.*
71. *Samira Kohli* v. *Prabha Manchanda,* (2008) 2 SCC 1.

not .[72] Such aspects are—the nature and procedure of the treatment; its purpose and benefits; its likely effects and any complications which may arise; any alternatives if available; an outline of the substantial risks; and adverse consequences of refusing treatment, such adequate information need not include remote risks, rare complications and possible results of a hypothetical negligent surgery[73]."

Further, the consent obtained by the doctor from the patient before commencing a treatment (including surgery) "*should be real and valid,* which means that; the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what is consenting to".[74]

It is interesting to note that even after the various guidelines regarding informed consent to the person in India, "*if the State proceeds towards compulsory vaccination then to be committing the tort of battery*". Salmond defines the tort of battery as *"the application of force to the person of another without lawful justification"*.[75] The tort of battery is an important weapon for protection of patients' rights of self-determination. As Justice Cardozo comments,[76] "Every human being of adult years and sound mind has a right to determine what should be done with his body." Thus without a person's consent, the state would be committing a tort of battery. An English court of family division has opined that "the right of an adult of sound mind to self-determination would prevail over any countervailing interest of the State".[77] Also with a plethora of cases under right to life of the Constitution of India, will flow from Fundamental Right of self-determination enshrined under Article 21 of the Constitution.[78]

Thus, before every dosage of vaccine administered, a patient must be made aware of its risks and benefits that carry with it so as to make an informed decision. However, with countries like India and China where huge population exists and the vaccination drives being carried out by mostly medical workers and not medical professionals, it become difficult

72. *Ibid.*
73. *Ibid.*
74. *Ibid.*
75. Salmond, Hueston, *Law of Torts* (20th edn., 3rd Indian reprint, 1997).
76. *Schloendorff* v. *Society of New York hospital,* (1914) 105 NE 92.
77. *Secy. of State for Home department* v. *Robb,* (1995) 2 WLR 722 : (1995) 22 BLMR 43.
78. Constitution of India, 1950, Art. 21.

to follow the principle of informed consent.[79] However, it is proposed that the government while carrying out awareness programs for vaccination and its benefits should also list the potential risks that it carries so as to aid the people to make an informed decision.

It is pertinent to note that the World Health Assembly which is the supreme decision-making body of the WHO has not endorsed any global eradication program on qua measles and Rubella H[80] whose vaccines ate most commonly used vaccines in the world today.

3.3. Solution to debate on mandatory vaccination and vacillating human rights

It has long been accepted that when a patient is incapable of giving consent for a treatment, the doctor can lawfully treat the patient if the treatment is in the best interests of the patient.[81] However the treatment shall be in the best interests of the patient only if it carried out in order either to save their lives or to ensure improvement or prevent deterioration in their physical or mental health.[82] So, in cases of emergency, all considerations of all consent are set aside and the doctor shall do whatever necessary that we take to save the life of patient.[83]

As Lord Donaldson MR stated in Re T (Adult: Refusal of Treatment),[84]

> *This situation gives rise to a conflict between two interests, that of the patient and that of the society in which he lives. The patient's interest consists of his right to self-determination—his right to live his own life how he wishes, even if it will damage his health or lead to his premature death. Society's interest is in upholding the concept that all human life is sacred and*

79. Meena Rajput, Luv Sharma, "Informed Consent in Vaccination in India: Medicolegal Aspects" (Taylor & Francis Online, 2011) <https://doi.org/10.4161/hv.7.7.15411> accessed 10-1-2020.
80. *Hridaan Kumar.* v. *Union of India,* Dy. No. 84763 of 2019 in W.P. Civil 343 of 2019.
Ibid., 5.
81. *R.* v. *Bournewood Community and Mental Health N.H.S. Trust, ex p* L., (1999) 1 AC 458 : (1998) 3 WLR 107 : (1998) 3 All ER 289; *F* v. *West Berkshire Health Authority,* (1989) 2 All ER 545; *Gillick* v. *West Norfolk and Wisbech Area Health Authority,*1986 AC 112 :(1985) 3 WLR 830 : (1985) 3 All ER 402.
82. *F.* v. *West Berkshire Health Authority,* (1989) 2 All ER 545.
83. *Re, T (adult: refusal of medical treatment),* (1992) 9 BLMR 46.
84. *Ibid.*

> *should be preserved if at all possible. It is well established that in the ultimate the right of the individual is paramount.*

Thus, it can be said that during life threatening situations, consent need not be taken.[85] Also emphasising the paramount duty of any "welfare State the Supreme Court of India stated *that "Article 21 imposes an obligation on the State to safeguard the Right to Life of every person."*[86] Preservation of human life is thus a paramount importance. Therefore, the Supreme Court held "that every doctor has the duty to protect the lives and health of the patients and is a right of the patient under Article 21".[87]

Therefore, these principles of emergency can also be extended in case of vaccination. If the patient is unable to give consent or informed consent and if the doctor contemplates that it is in the best interest of patient that the vaccine should be administered, then in this case compulsory vaccination should be permitted. However, in cases when these situations do not arise or as the Czech Supreme Court observed in *Pavel Vavřička* v. *Czech Republic*[88] "when situations arise that even by not vaccinating, a person has good chance to healthy life and there are not enough scientific evidence that it might also harm other citizens, vaccination can be exempted". (The Court gives example of hepatitis B which is not prescribed as mandatory by Czech National Health Institute).

Thus, we see that when an emergency situation or when the patient cannot give informed consent and the doctors feel that it is in the best interest of the patient that he should be vaccinated then compulsory vaccination should be allowed this is in line with the long list of precedents which discard consent when the above situations arises however if the patient has strong reasons to suspect that vaccine is neither helpful nor healthy for him/her and there are enough scientific data then by not vaccination the patient will not harm the health of the general population then the patient has the right to refuse vaccination.

4. CONCLUSION

In this evolving world where medical sciences are taking strides in improving human life and health, vaccine plays an important role in improving human life. However, there are risks to vaccines that cannot

85. *Samira Kohli* v. *Prabha Manchanda,* (2008) 2 SCC 1.
86. *Ibid.*
87. *Ibid.*
88. *Pavel Vavřička* v. *Czech Republic,* (No. 47621/13).

be denied. With people suffering short-term medical damages to lifelong medical injuries, this creates reasonable apprehension on the minds of people with the usage of vaccines. However, it cannot also be denied that vaccines are one the most important elements that helped in improving the life of human beings in the 20th century.

The controversy regarding compulsory vaccination has flared up in many countries around the world. The question that arises is that whether they are against human rights.

This paper proposes two approaches towards compulsory vaccination, first is the emergency approach and second is the voluntary approach. The difference between the two approaches is mainly of the capability of the patient to give informed consent as discussed above. Consent is that aspect of right which blurs or entirely fades all the debates and the authors aptly believe this is the solution to debate on mandatory vaccination. This is because anything coercive to human body is barbaric and also epidemics taking away lives of millions.

After all, *"the only part of conduct of anyone, for which man is amenable to society is that which concerns other. In the part which concerns him, his independence is of right absolute including his body".*[89]

89. J.S. Mill, *On Liberty* (Batoche Books, 1859) 13.

REPRODUCTIVE RIGHTS OF SAME-SEX COUPLES IN THE AGE OF HUMAN RIGHTS *VIS-À-VIS* THE SURROGACY (REGULATION) BILL, 2019: IS INDIA TRYING TO BYPASS *NAVTEJ SINGH JOHAR* v. *UNION OF INDIA*?

Gursimran K. Bakshi *

ABSTRACT

The overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our Fundamental Rights that have eluded certain sections of our society who are still living in the bondage of dogmatic social norms, prejudiced notions, rigid stereotypes, parochial mindset and bigoted perceptions.[1] *The innate prejudice around gender identity and sexual orientation creates a "less than equal class" of the society that deprives an individual of their basic Fundamental Rights enshrined under the Constitution of India.*

Navtej Singh Johar v. UOI, celebrates the unique gender identity of an individual. It considers the right to self-determination as an intrinsic part of the right to personal liberty and dignity protected under Article 21. The right to self-determination is inclusive of the liberty to choose one's sexual orientation. The dictum apart from granting the right to self-determination, crucially examines the role of a State in promoting and protecting the rights of same-sex couples in aspects of marriage and reproduction to bring them at par with the mainstream society.

But what if the State adopts a paternalistic approach to regulate these rights? The Surrogacy (Regulation) Bill, 2019 is an example of paternalism wherein, the State feels the necessity to deprive basic rights to a certain

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1. *Navtej Singh Johar.* v. *Union of India,* (2018) 1 SCC 791, para 3 (hereinafter "Navtej").

class of individuals. The bill puts a blanket-ban on same-sex couples to opt for surrogacy. It arbitrarily deprives a particular class of individuals of their reproductive rights to Assisted Reproductive Technologies including surrogacy. The bill threatens the fundamental human right to "have/found" a family. The author argues that the ban goes against the spirit of transformative constitutionalism enshrined in Navtej. It also goes against India's international commitment to protect the human rights of the LGBTQI community through of Yogyakarta Principles.

1. INTRODUCTION

> *It is far more questionable whether any State can rationally be indifferent to sustaining its population by giving public marital sanction to the individual who, because of physical reality and the nature of their sexual relationship, cannot procreate.*[2]

Traditional family versus Modern-day family: How gender roles and rights associated with it have changed with time

There has been a rapid transformation from the idea of traditional old family based on natural, hierarchical private association made up of heterosexual couples with biological children to a modern-day family consisting of same-sex couples with adopted or surrogate children. The paradigm shift has challenged the stability of traditional family boundaries based on natural ties of heterosexual attraction, coital procreation and biologically based family lineages.

The author through this paper has made an attempt to understand the formation of modern-day family based on freedom and personal choice. In furtherance of this, Part I is dedicated to the understanding of the difference between the definitions of a traditional family versus a modern-day family. In the understanding of the same, we look at how gender roles have changed drastically with time. This, however, has challenged one of the essential features of a traditional family that is the ability to procreate. It is argued that the meaning of a modern-day family has to be understood beyond the ability to procreate naturally.

Part II of the paper focuses on the Surrogacy (Regulation) Bill introduced in 2019. One of the major drawbacks of the Bill is that it bans same-sex couples to opt for surrogacy. The Bill is regressive in nature and

2. Douglas W. Kmiec, "The Procreative Argument for Proscribing Same-Sex Marriage" (2005) 32 Hastings Constitutional Law Quarterly 653, 657.

deprives a class of individuals to exercise their right to have a family. Most importantly, the Bill goes against Navtej; one of the most celebrated judgment of the Supreme Court in the 21st century. The author has further explored the right to have a family through Assisted Reproductive Technologies (hereinafter "ART") such as surrogacy and how the current Bill hampers this right in the absence of adoption laws and marriage rights favour of same-sex couples.

Further, Part III analyses the ban in reference to landmark cases of *National Legal Services Authority* v. *Union of India*[3] (hereinafter "*NALSA*") and *Navtej*. It focuses on the right to self-determination, sexual orientation and reproduction rights. It further dwells into the concept of same-sex parenting and how adoption and marriage laws in India are not favourable to same-sex couples. Lastly, the Part IV of the paper focuses on India's need to honour the Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity (hereinafter "Yogyakarta Principles"). The Supreme Court for the first time in *NALSA* relied on the importance of these principles to understand whether the international community has a consensus on certain common-set of rights for the LGBTQI community including the right to have a family.

1.1. Modern-day family is based on personal choices

No particular definition can be construed of a modern-day family. But the formation of the family is based more on individual freedom and choices of the family members, unlike in a traditional family.[4] Although, the variations in a modern-day family reflect the exercise of personal choice for some, but for others, it seems like a never-ending moral conflict. The moral conflict seems to uproot from the significant alterations of "gender roles" through the waves of feminism. The third wave of feminism emerged with post modernism. It questioned the strict gender roles and rights associated with those roles. Politics of gender started with the third-wave of feminism and meant to accommodate the rights of minority and other radical groups and eventually, the fourth wave of feminism shattered the rigid notions of gender roles and saw the rise of homosexual relations unravelling the stagnant relationship between gender and rights associated with it.

3. *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438.
4. Carlos A. Ball, *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law* (OUP, 2014).

However, even today the rigidity in the bondage of social norms, prejudiced notions and stereotypes attached towards a particular class of individuals remain deep-rooted in the parochial minds of individuals. These classes of individuals are unnamed and they constantly face social exclusion and identity seclusion from mainstream society. One side can always argue that the inherent difference in terms of sexual orientation, identity and behaviour secludes them from the mainstream and hence, as they are unable to pass the societal standards of a community. However, fallacy lies in the fact that these standards are subjective in nature and are always subjected to change.

Unfortunately, the prejudiced societal standards attached to these communities reflect opposite to the notions of equality. The notion of equality is deprived by the very existence of bigoted perception, wherein the less than equal section of the society is often neglected and subsequently, their passage to basic rights and justice is blocked. This does not makes us a free society where individuals are liberated from the shackles of bondage created around their sexual-identity, ideas of chauvinistic perceptions including the prejudice and injustice embodied due to centuries of social conditioning.

1.2. Understanding gender identity and sexual orientation

Gender identity is one of the fundamental aspects of one's life and it refers to a person's intrinsic sense of being a male, female or transgender or transsexual person. It is a deeply felt internal and external experience of gender that may or may not correspond with the sex assigned at birth, including a personal sense of the body appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerism.[5] Right to choose one's gender identity is guaranteed under Article 21 of the Constitution of Indian [hereinafter "Constitution"].[6] To exercise rights over one's identity is an intrinsic part of dignity that encapsulates the values of privacy, choice, freedom of speech and expression.[7]

Whereas, sexual orientation refers to an individual's enduring physical, romantic and/or emotional attachment towards another person.[8] The term

5. *NALSA* (n 3) para 19.
6. No person shall be deprived of his life or personal liberty except according to procedure established by Law.
7. *Navtej* (n 1) para 5.
8. *NALSA* (n 3) para 20.

"transgender" is generally described as an *umbrella* term for an individual whose gender identity, gender expression or behaviour does not conform to their biological sex.[9] Whereas the terms like "gay" or "lesbian" are social constructs, indicating the sexual orientation of the person. But the gender identity and sexual orientation are both theoretically and practically identified as different terms. However, they are an integral part of the personality of an individual and connote aspects of self-determination, dignity and freedom.[10]

1.3. Essence of marriage in a modern-family is beyond the ability to procreate

One of the inherent obvious aspects of the right to sexual orientation is the right to choose one's companionship. Another not-so-highlighted aspect of this is the right to marry and have a family/found a family. Marriage has traditionally been defined as a social institution. This definition discourages certain class of individuals from making decisions related to their reproductive rights as they are deemed harmful to society.

George Peter Murdock defines family as, "*The family is a social group characterised by common residence, economic co-operation and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship and one or more children, own or adopted, of the sexually co-habiting adults*".[11] This definition suggests that family is universal. But this is not the case in the present times. It would be too conventional to say that a family comprises of at least one adult of each sex. The characteristic of the heterosexual couple differs from that of the homosexual couples in the criteria that the former can procreate through sexual intimacy. The primary reason why society provides married couples with the structure and benefits of marriage is to encourage parents, especially men, to take responsibility for their offspring. The recognition of same-sex unions as marital undermines the institution's primary social function because it awards marital status to couples who cannot procreate.[12]

The ongoing efforts to deprive lesbians and gay men the opportunity to marry is only the most recent instantiation of status-based marital

9. *Ibid*, para 11.
10. *Ibid*, para 20.
11. George Peter Murdock, *Social Structure* (Macmillan, OUP, 1949).
12. Carlos A. Ball, *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law* (OUP,2014).

classification grounded in the perceived need to promote procreation and the raising of children in ways that are deemed socially optimal.[13] The issue with same-sex marriage is the sexual orientation of the respective spouse and the inability to procreate. Consequentialist argues that same-sex marriage would harm the social fabric of the society as the consequence of the marriage is the social stigmatisation and a household headed by homosexual couple is not the socially optimal setting for the raising children. As a result of this, the children are at greater risk of suffering psychological and social harm. This is also where the role of a State becomes dogmatic and paternalistic in nature. The State, for instance India would argue essentially on two points.

First, marriage and procreation are together a part of human conduct. The biological reality that the sexual intimacy of same-sex couples could not lead to the formation of a new life is justified in limiting marriage to opposite-sex couples. But the idea of sexual intimacy has got nothing to do with the ability to procreate. Sexual intimacy can be between homosexual partners as well as heterosexual partners and the end-result of sexual procreation does not necessarily have to be procreation. Secondly, the role of the State is essential in constraining the rights of the individuals to exercise their capability to procreate otherwise it would prove against the traditional nature of how society is formed. The liberal approach on the part of the State would encourage tabooed relationships such as incestuous relationships-sexual activities between family members. This notion to deprive rights to same-sex couples just because there is a possibility of others indulging in tabooed relationship is incorrect. The possibility of something is well not good enough to deprive a class of individuals of their human rights.

2. AN OVERVIEW OF THE "DISCRIMINATORY" BILL BANS COMMERCIAL SURROGACY

Surrogacy in terms of commercialisation has always been a matter of debate in India. This is because parenthood in Indian society is understood in terms of the emotional bond existing between parents and their children. Recently, the Surrogacy (Regulation) Bill, 2019 (hereinafter "Surrogacy Bill") was passed on 5 August 2019 in the 17th Lok Sabha, the lower house of the Parliament. Unfortunately, the Bill was passed without any discussion and deliberation; a sigh of growing majoritarianism

13. Carlos A. Ball, *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law* (OUP,2014).

in parliamentary democracy. It was passed on the same day as the Transgender (Protection) Bill, 2019. Ironically, the former deprived the transgender of their reproductive rights to opt for surrogacy whereas; the latter is meant to recognise the rights to the transgender community even though in a restricted manner. The Bill was introduced for the first time in 2016 but it lapsed as the house was dissolved.[14]

The current Bill has been introduced at the time when the fertility rates are declining in India at a faster pace.[15] Albeit the reports of declining fertility rates, India has emerged as the hub for surrogacy since the last decade. Factors such as medical facilities that are comparatively cheaper than the rest of the developing or developed countries coupled with high poverty rates and lower cost of living are the reasons for the emerging industry. The main objective of the Bill is to regulate surrogacy in India. In furtherance, it aims to ban commercial surrogacy as specified under Section 37 of the Bill. According to the text of the bill, commercial surrogacy is explained as:

> *"Commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother".*

The Bill was proposed on the recommendation of the 228th Law Commission Report to ban commercial surrogacy in India. Reasons attributed to the ban include the constant exploitation of surrogate mother and the child at the hands of clinics performing surrogacy without legal license. However, it allows altruistic surrogacy in restricted terms. The Bill in the process of altruistic surrogacy excludes any kind of monetary compensation to the given to the surrogate mother except medical

14. Discussion on Surrogacy Bill Inconclusive in RS Outlook (19-11-2019)<https://www.outlookindia.com/newsscroll/discussion-on-surrogacy-bill-inconclusive-in-rs/1666429>accessed 15-1-2020.
15. Special Correspondent, "Lok Sabha passes Surrogacy (Regulation) Bill", *The Hindu* (5-8-2019)<https://www.thehindu.com/news/national/lok-sabha-passes-surrogacy-bill/article28824277.ece> accessed 15-1-2020.

expenses and insurance coverage. This surrogacy is a form of gestation process where the surrogate mother is a close relative or shares a tie of kinship to the family of the child but is not biological mother of the child.

2.1. Moral and ethical issues surrounding the bill

The Bill declares commercial surrogacy as an offence with imprisonment that may extend up to five years with a fine up to 5 lakh rupees for the first-time offenders.[16] Subsequent attempts would attract imprisonment up to 10 years with a fine up to 10 lakhs. Every offence specified under the Bill makes it cognizable, non-bailable and non-compoundable. By this, one could infer that the categorisation of crimes is to be considered as heinous.

But would a blanket ban on commercial surrogacy be an appropriate answer to the above issue? Unfortunately, the answer is not affirmative. To substantiate my concern over the blanket ban, the first possible issue prevails around the existing clinics and their validity to perform surrogacy. Possibilities are high that the clinics, not recognised legally under the Bill may go underground. Most importantly, what about the validity of those surrogacies performed during the phase when the bill has not become a law?

The Standing Committee of Parliament in 2016 had recommended against a blanket ban on commercial surrogacy on the same line of reasoning. But the Bill nevertheless lapsed due to the lack of majority in the lower house. Thereafter, the Bill seeks to regulate altruistic surrogacy but fails to define how it would do so without having the required technology for it. The technology regulating surrogacy is governed through the ART Bill, 2008 prepared by 288th LCR.[17] The 228th report was based on the landmark of *Manji Yamada* v. *Union of India,*[18] wherein the court pointed out the need to regulate and define the rights of stakeholders in the process of surrogacy. An amendment to the ART Bill was further suggested in 2010. But the Bill is still pending in the Parliament.

One of the impediments of the current Bill is that it is deeply flawed and discriminatory. It out-rightly bans *same-sex couples, single-parents and live-in couples* to opt for surrogacy. Moreover, it bans people of Indian

16. The Surrogacy (Regulation) Lok Sabha Bill (2019-2020) (Bill No. 156 of 2019) "Surrogacy Bill".
17. Law Commission of India, Report No. 228 (2009).
18. (2008) 13 SCC 518.

origin as well.The Bill was sent to the standing committee of Rajya Sabha, the upper house of the Parliament for recommendations. The parliamentary committee that is responsible for reading the Bill has opposed the outright ban as it is inflexible to the stakeholders involved in the process.[19]

2.2. Rights of the stakeholders involved

On the point of rights of the stakeholders, the Bill fails to address any of it properly. The stakeholders we referring to here are: 1) surrogate mothers, 2) intending couples, 3) the child born from the surrogate mothers, 4) the anonymous donors of eggs and sperms if any. The issues with each stakeholder have been enunciated below. The Bill puts restrictions on different stakeholders involved in the process of surrogacy. The Bill limits the number of attempts at surrogacy to one.[20] The surrogate mother needs to be a close relative of the intending couples. The phrase "close relative" is left undefined by the legislature however intentionally or unintentionally it is.[21] The intending couples are supposed to arrange two certificates that area certificate of essentiality and a certificate of infertility on the part of both the parents. The intending parents can only opt for surrogacy after five years of their marriage.

One argument in favour of this restriction could be that five years is sufficient enough for the couple to decide whether they want to opt for surrogacy or not. This reasoning is inspired by precedents where the intending couples have separated surrogacy thereby creating uncertainty for the child to be born. But this reasoning would fail in the long run. The reason is twofold. Firstly, not all couples decide to separate during the birth phase of their surrogacy child. Thus, the above reasoning is an exception to the situation and not the obvious expected outcome. Secondly, the possibility of intending couples deciding to separate can also arise even after the waiting period of five years. Hence, putting a restriction for five years does not work.

Further important issues that are not discussed in the Bill are the maternity and visitation rights of the surrogate mother. These rights are recognised

19. Aniruddha Ghosal, "The New Surrogacy Bill Won't Let Live-in and LGBTQ Couples Become Parents"(20-12-2018) <https://www.news18.com/news/india/the-new-surrogacy-bill-wont-let-live-in-and-lgbtq-couples-become-parents-1979055.html> accessed on 18-1-2020.
20. Surrogacy Bill (n 16) S. 4(iii)(*b*)(IV).
21. Surrogacy Bill (n 16) S. 4 (iii)(*b*)(II).

in certain countries since the process of surrogacy impacts the surrogate mother emotionally and psychologically. The standing committee of Rajya Sabha has recommended on the allowances to be given to the surrogacy mother in addition to the medical coverage and insurance. The rationale behind the need to grant allowances to the surrogate mother could be traced from the fact that the process of surrogacy is quite cheap in India.[22] The surrogate mother is often someone belonging to a poor family and to become a surrogate mother is to earn temporary employment. This line of reasoning does not have to be necessarily understood in terms of tending the womb for monetary gains but for the welfare of the mother.

One of the most important and often overlooked stakeholders in the whole process is the child born out of the surrogate process. The Bill falls flat on the rights of the child. Certain questions to be asked here are—What will happen to the child in case the intending parents decide to separate during the surrogacy phase? As happened in the case of *Jan Balaz* v. *Anand Municipality*[23] and what if the child suffers from certain diseases and the intending parents refuse to accept the child?

These are some of the issues that need to be considered before the Bill becomes a law. However, our main focus in this article is the ban on same-sex couples. This concern has been substantiated below.

2.2.a. *Ban on same-sex couples is not based on intelligible differentia*

What could be the plausible rationale behind the ban on homosexual couples to opt for surrogacy? The answer to this is simple and straightforward. There is no reasonable rationale behind this except that the government does not want to recognise the rights of the LGBTQI community. This is further backed by the fact that government has introduced the controversial Transgender (Protection) Bill, 2019 that ironically was also passed in Lok Sabha on the same day as that of the Surrogacy Bill.[24] It was passed in Rajya Sabha on 26 November. The transgender bill obligates a transgender person to obtain a certificate of his identity from the District Magistrate.[25]

22. Alice George and Aviral Chauhan, Surrogacy Bill and Art Bill: Boon or Bane? (1-4-2019)<https://corporate.cyrilamarchandblogs.com/2019/04/surrogacy-bill-and-art-bill-boon-or-bane/> accessed on 9-2-2020.
23. 2009 SCC OnLine Guj 10446 : AIR 2010 Guj 21.
24. Transgender Protection Lok Sabha Bill (2019-2020) (Bill No.169 of 2019).
25. Transgender Bill (n 24) S. 5.

It has been argued that the ban would hamper the progressive view we have achieved through various landmark cases. The ban would take us back to the colonial period where existence of the regressive laws reflected the stagnant nature of the society.

2.3. Right to self-determination includes right to sexual orientation

Homosexuality, bisexuality and heterosexuality are socially constructed terms with socially invested meanings and nuances. Nature is what it is. It is we the humans who endeavours to classify or carve up to it, with names and labels that match our perceived social requirements, prejudice and preferences. Homosexuality in India was criminalised under Section 377 of the Indian Penal Code, 1860. Section 377 defined it as an act against the order of the nature.

A part of Section 377 that criminalises homosexuality was challenged for the first time in India in the case of *Naz Foundation* v. *Govt. of NCT of Delhi* (hereinafter "*Naz Foundation*"). [26]It was read down by the Delhi High Court as unconstitutional to an extend it criminalises sex between two consenting homosexual adults. The Court called out to State that the criminalisation deprived them of certain Fundamental Rights such as the Right to Equality, Right to Legal Recognition before the law, Right to Dignity, Personal Freedom, and Liberty to choose one's gender.

In *Naz*, the Judges A.P. Shah, CJ and Muralidhar, J quoted a statement of the solicitor general of India, responding to the Universal Periodic Review of India's treatment of LGBTQI minorities before the United Nations Human Rights Councils.

It is as follows: "*In 1860, we got the Indian Penal Code. It brought in the concept of sexual offences against the order of nature. Now, in India, we don't have this concept. It was essentially a western concept that has remained over the years*".[27]

Unfortunately, *Naz Foundation* was overturned by the Supreme Court in *Suresh Kumar Koushal* v. *Naz Foundation* (hereinafter "*Suresh Koushal*") in 2014.[28] However, the right to identity and the determination of self-autonomy was recognised in NALSA but the case did not deal with Section

26. 2009 SCC OnLine Del 1762 : (2009) 111 DRJ 1.
27. *Naz Foundation* (n 26) p 8.
28. (2014) 1 SCC 1, para 9.

377.[29] The court stated that the protection to gender identity is enunciated in Article 15[30] and 16[31] of the Indian Constitution. Further, in the much celebrated case the constitutional bench in *Navtej*[32] decriminalised homosexuality and stressed on the need of judicial recognise to be given to these rights as an inextricable component of Article 21 and decries that any discrimination of these rights would violate Article 14[33]; the "*fon juris*" of our Constitution.[34]

The Constitution in this context was interpreted by Bhagwati, J, in *National Textile Workers' Unions* v. *P.R. Ramakrishnan,*[35] wherein the Justice stated that the law is dynamic and should respond to the needs of the ever-changing society. But with the changing times, justice manifests itself in a different time, different generation and the era to ensure the protection and preservation of the rights and that is what is known as the brooding spirit of the law, the collective conscience and the intelligence of future day that has found their mention under Article 14 as well as 21. Privacy is an example of dignity which is a subset of liberty.[36]

2.4. Justice K.S. Puttaswamy v. Union of India: Right of homosexuals an important facet of Right to Privacy

In *K.S. Puttaswamy* v. *Union of India, (hereinafter "K.S. Puttaswamy")*[37] the right to choose the companionship of one's choice was recognised as a part of right to sexuality that is an extended facet of the Right to Privacy and impliedly a part of the Right to Life under Article 21. The freedom of an individual to conduct his sexual and personal life as according to his wishes subjected to permitted exceptions countervails the public interest.[38]

The landmark judgment of the Supreme Court had a major impact on the LGBTQI rights. The Right to Privacy protects the inner sphere of the individuals from the unnecessary intrusion of the State and non-State actors. Though the lesbians, gays, and transgender form the

29. (2014) 5 SCC 438.
30. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
31. Equality of opportunity in matters of public employment.
32. (2018) 1 SCC 791.
33. Equality before law.
34. *Navtej* (n 1) para 8.
35. (1983) 1 SCC 228.
36. *K.S. Puttaswamy* v. *Union of India,* (2017) 10 SCC 1, para 40.
37. *Ibid*
38. *Mosley* v. *News Group Newspapers Ltd.*, 2008 EHWC 1777.

minuscule parts in India, the concept of majoritarianism doesn't apply to constitutionally protected core rights. Courts in various cases have gone for the non-majoritarian view to ensure checks and balances envisaged under the Constitution are fulfilled. Individuals have a psychological need to *preserve an intrusion free zone for their personality and family.* The freedom of an individual stems from the freedom of expression, and the liberty which enhances individual life in a democratic community.[39]

2.5. Right to sexual health includes the right to reproduction and family

One of the facets of the *Navtej* case was relating to the rights to sexual health. According to World Health Organisation, sexual health was first defined in a 1975 WHO Technical Report series as:

> *"the integration of the somatic, emotional, intellectual and social aspects of sexual being, in ways that are positively enriching and that enhance personality, communication and love".*[40]

One of the central aspects of the sexual health includes the right to reproduction. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors. Individuals belonging to sexual and gender minorities experience discrimination, stigmatisation and, in some cases, denial of care on account of their sexual orientation and gender identity.[41]

Sexual rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. They rest on the recognition that all individuals have the right—free of coercion, violence and discrimination of any kind—to the highest attainable standard of sexual health; to pursue a satisfying, safe and pleasurable sexual life; to have control over and decide freely and with due regard for the rights of others, on matters related to their sexuality,

39. Geoffrey Robertson, QC and Andrew Nicol, QC, *Media Law* (5th edn., Penguin, 2008).
40. World Health Organisation, "Gender and Human Rights: Defining Sexual Health" (2002).
41. Alexandra Muller, "Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa" (2016) BMC International Health and Human Rights Journal 30-5-2017 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5395001/> accessed 21-1-2020.

reproduction, sexual orientation, bodily integrity, choice of partner and gender identity; and to the services, education and information, including comprehensive sexuality education, necessary to do so.[42]

2.6. Same-sex Parenting

Parental rights are generated by the performance of parental work. The attribution of parenthood does not necessarily require a genetic relationship. This is known as the investment theory of parental rights. It states, "*Ceteris Paribus*: The extent of an agent's stake in an entity is proportional to the amount of appropriate work he or she has put into the entity".[43] The investment principle does not require that both the parents are from opposite sex for optimally responsible parents. It requires that both the parents must substantially invest in taking the responsibility of the children. This reasoning essentially connotes the same line of reasoning giving to marriage.

Adoption in India is not permitted in the personal laws of Muslims, Christians, Parsis and the Jews. The alternative available to them is the guardianship of the child through the *Guardians and Wards Act, 1890*. Hindu law is the only law that treats the adopted child as being equivalent to the natural born. The law that concerns adopting is the *Hindu Adoption and Maintenance Act, 1956*. Before that, the marriage between two same-sex couples was not recognised in the *Hindu Marriage Act, 1954* which defines marriage between two heterosexual adults.

The Supreme Court of US in 2016 recognised gay marriages on equal footing to that of the marriages between heterosexual couples including same rights and responsibilities.[44] Concerning adoption, India does not have any provision in favour of same-sex couples. Because same-sex couples don't have the privilege to reproduce, alternative methods to form a family should not be taken from them. Non-recognition of same-sex marriages (Indian Special Marriages Act, 1954), availability of adoption, surrogacy, IVF (for LGBTQ only) violates Articles 14,[45] 15,[46] 19,[47] 21[48]

42. International Women's Health Coalition, "Sexual Rights are Human Rights" (2014).
43. Joseph Millum, *The Moral Foundations of Parenthood* (OUP, 2018).
44. *Obergfell* v. *Hodges*, 576 U.S. 644.
45. Equality before law.
46. Equality of opportunity in matters of public employment.
47. Protection of certain rights regarding freedom of speech etc.
48. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

and 29.[49] There are various researches done to understand how same-sex parenting is different from that of others. These researchers often tell us that homosexual couples are better parents.[50] They are better in terms of the upbringing of the children, in terms of the performance of the children and otherwise.

2.6.a. *Yogyakarta Principles: India must honour its international commitments towards the LGBTQI Community*

The Yogyakarta principles were recognised for the first time by the Court in the *NALSA* judgment. The Court in the subsequent judgment of *Suresh Koushal* criticised the lower court for relying on the non-binding principles. However, in *Navtej*, all the five Judges spoke on the importance of these principles to understand the international standards on the common set of rights India should grant to these communities. The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity.[51]

Right to found a family has been recognised in Article 16 of the Universal Declaration on Human Rights 1948 (hereinafter "UDHR")[52], Article 10 of the International Covenant on Civil and Political Rights, 1966 (hereinafter "ICCPR")[53] and Article 12 of the European Convention on the Protection of Human Rights and Fundamental Freedom, 1950 (hereinafter "ECHR").[54] This right is natural and fundamental group unit of the society and is entitled to protection by the society and the State.

49. Protection of interests of minorities.
50. Deni Mazrekaj, Kristof De Witte And Sofie Cabus, "School Outcomes of Children Raised by Same-Sex Couples: Evidence from Administrative Panel Data" (2018) Semantic Scholar<http://paa2019.populationassociation.org/uploads/191716> accessed on 1-2-2020.
51. International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007.
52. Universal Declaration of Human Rights (adopted 10-12-1948 UNGA Res 217-A (III) (UDHR).
53. International Covenant on Civil and Political Rights, (entered into force 23-3-1976) 16-12-1966), UNTS, 999, p. 171 (ICCPR).
54. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

Article 24[55] of the Yogyakarta principles explains the Right to Found a Family as:

> *"Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members".*

There are other human rights instruments which recognise sexual rights as human rights such as *World Association for Sexual Health (WAS) Declaration on Sexual Rights, 2014* that aims to explain sexual rights norms and link sexuality and sexual health with human rights principles and standards.[56] The objective of such international standards is to

55. States shall:
(A) Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity.
(B) Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family related social welfare and other public benefits, employment, and immigration.
(C) Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests; In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child.
(D) Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners; take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners; ensure that marriages and other legally recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.

56. World Health Organisation, "Gender and Human Rights: Defining Sexual Health" (2002).

recognise the rights of these communities are human rights for which the State will have to provide necessary protection. It is also a caveat for the State to not violate these rights through their own instrumentality. The State can no more regulate the bodily rights of the individuals in the society. The State can restrict certain factions of the society from doing immoral acts, for instances incestuous relationship cannot be promoted as it directly challenges the very root of maternal and paternal lineage and institution of marriage.

3. CONCLUSION

The Bill should not be allowed to become a law as it would overturn the progress we have achieved for the LGBTQI community. The Union Cabinet has approved certain recommendations suggested by the standing committee of Rajya Sabha. According to the approved Bill, widows and divorced women are allowed to be surrogate mother, however, the ban on certain class of individuals including same-sex couples remain intact. Unfortunately, if the Bill is passed in the Parliament the judiciary must come to its rescue. The court has the burden to protect constitutional morality that requires the rights of individuals ought not to be prejudiced by popular notion of the society.[57]

Rights to the universal enjoyment of human rights, right to equality and recognition before the law are essential to uplift the LGBTQI community from the centuries of denial of justice. The laws for the LGBTQI community must be made in consensus with the international standards to honour our constitutional duty towards international law under Article 51 of the Constitution.[58] The believers of public morality, here in our case the legislature might believe that human rights of the LGBTQI community in terms of recognition, marriage and reproduction are against the societal standards. But it is not the public morality the Constitution aims to protect. It is the morality that safeguards each and each minuscule and vulnerable section of the society. The compelling State interest has to pass the rest of constitutional morality and that may not always be an majoritarian stand.

The Court in *Navtej* imbued the Constitution with the idea of Transformative Constitutionalism. This is a jurisprudential concept the Court has gained from the Constitutional Court of South Africa. According to it, the purpose of the constitution is in fact to transfer the society and with

57. *Navtej* (n 1) para 141.
58. Promotion of International Peace and Security.

every new generation, certain rights are to be imbued in the constitution. The growing set of consensus found in the international law and other comparative jurisdictions should be looked upon by the legislature not as a necessary obligation but to set an example of how a progressive society should move with changing times and most importantly to nourish the transformative constitutional standards we encompass. To devoid the right to love on the basics of the archaic societal standards is to devoid the growth of our living document.

The pattern of historic subordination and discrimination needs to be broken. When we deny love and equality rights to a particular community, it is the Constitution that weeps. In addressing and recognising the rights of the LGBTQI community, the living document asserts itself as a text that governance the true value of equality and it is through the true notions of equality we see the hope to achieve a free society where constitutional values would prevail over inherent prejudices that has entwined the society for so long. But as for now, it is sure that opponents of same-sex rights will tomorrow be at the wrong side of history.

CONTEMPORARY "LET IT BURN" POLITICS IN A HUMAN RIGHTS ERA: BURNING NEED FOR THE PROGRESSIVE DEVELOPMENT OF GLOBAL WILDFIRE LAW AND POLICY

*Badal Chatterjee**

ABSTRACT

How to protect something that has value to the whole world but is contained within the borders of a few countries? Who benefits the most from the cleaning of the rainforests by forest fires? Does the fate of these forests now solely rest on the political and the economic forces of a nation? Who are the stakeholders and what is the cost of a forest fire? And most importantly, how to curtail these wild fires and minimise their effect? The people, author reckons, need to listen with heightened regard to the voices of those who call the tropical rainforests home, voices that regularly are sidelined or purposefully quietened, their records reduced to an inconsequential analysis in the worldwide news broadcast and also to those whose voices cannot reach us. We have no reason now for not listening to them. Within my own limitations, I have strived to get as close as possible to answer these perennial questions and also review the fire policy measures across the globe with increased emphasis on the Amazon wildfires along with the Indonesian, American and Australian bushfires.

1. INTRODUCTION

> *"All forests in the world need to be given the same name, so that people can understand that there is only one forest in the world and that every burning forest is his own forest, no matter where in the world!"*[1]
>
> — *Mehmet Murat Ildan*

* Student, LLM, Department of Law, Central University of Kerala.

1. Mehmet-murat-ildan-quotes at <https://www.goodreads.com/quotes/tag/forest-fire> accessed 7-2-2020, 09.11.

The recent alarming wildfires[2] in the Amazon rainforest raised the perennial concern of "how to protect something that has value to the whole world but is contained within the borders of a few countries."[3,4] What takes place in the Amazon rainforest has international significance, which is why several countries have taken a keen notice in preserving it.[5] "The Amazon, 60 per cent of which is in Brazil, is the earth's biggest tropical rainforest. It is regarded a biodiversity hotspot, with innumerable unique species of flora and fauna.[6] The dense forest absorbs a huge amount of the earth's carbon dioxide (CO2), a greenhouse gas understood to be the biggest aspect in climate change, so scientists discern that preserving the Amazon forest is crucial to fighting global warming."[7]

And the Amazon is not the only forest that is burning! Similar vast forest fires, *inter alia*, Indonesia, India, Malaysia, United States and Australia receive way too less attention. In the twin parts of the world, "wildfires usually arise as controlled burns set by farmers or plantation companies desiring to clear land for farming: soybeans, corn or cattle ranching in the Amazon forest and palm oil in Southeast Asia. All of these products are sold at high rates to foreign markets, such as the European countries,

2. "The United Nations' (UN) Food and Agricultural Organisation (FAO) defines Wildfire as any Unplanned and Uncontrolled Wildland Fire which Regardless of Ignition Source may Require Suppression Response, or other Action according to Agency Policy" (Food and Agriculture Organisation of the United Nations (FAO), Fire management glossary (online) <http://www.fao.org/forestry/firemanagement/87925/en/> accessed 8-2-2020.
3. Umair Irfan, "Why it's been so Lucrative to Destroy the Amazon Rainforest" (*Vox*, 30-8-2019 7.00 a.m.) <https://www.vox.com/platform/amp/energy-and-environment/2019/8/30/20835091/amazon-rainforest-fire-wildfire-bolsonaro> accessed 7-2-2020, 11.54.
4. "In a bid to assist efforts to protect the forest, G-7 countries agreed to provide more than $20 m to help fight the fires. Canada and the UK pledged an additional $11 m and $12 m of aid respectively. Norway and Germany too had halted millions of dollars of Amazon protection subsidies to the Amazon Fund, accusing Brazil of turning its back on the fight against deforestation." David Child , "The Amazon is Burning: What you Need to know Where are the Fires? Why is the Amazon Important?" (*Al Jazeera*, 27-8-2019) <https://www.aljazeera.com/news/2019/08/amazon-burning-190823082046821.html> accessed 7-2-2020, 18.41).
5. *Ibid.*
6. Jake Spring, "Explainer: Why are the Amazon Fires Sparking a Crisis for Brazil - and the World?" (*Reuters*, 25-8-2019) <https://www.reuters.com/article/us-brazil-environment-amazon-explainer/explainer-why-are-the-amazon-fires-sparking-a-crisis-for-brazil-and-the-world-idUSKCN1VF0TX> accessed 7-2-2020, 17.17.
7. *Ibid.*

United States, etc."[8] However the situation down south is much worse,[9] fires currently raging in Australia have already burnt out an area equal to the size of about 80 Singapore,[10] as the nation battles one of its worst bushfire seasons. Since the beginning of the wildfire season in September, an approximated 2.55 crore acres of forests have burned in Australia alone, according to Reuters, and at least 25 people have died.[11] It is also estimated that over than a 1000 crore animals have succumbed to the wildfires[12] and an approximated 2000 or so houses have been reduced to ashes.[13] Lakhs and lakhs of civilians have been coerced to evacuate their native lands. The estimated damage and financial losses are capped to exceed 1,00,000 crore dollars, according to Accuweather.[14]

Fire has played a significant role in the kinetics of the earth's atmosphere and in the growth of biomes since its extensive occurrence started 35-40 crore years prior.[15] Fire is one of the central environmental components that keep up differing biological processes and social values in the people world over.[16] It is generally utilised in tropical land change and re-growth

8. Christianna Parr, Nives Dolsak, & Aseem Prakash, "The Amazon isn't the only Forest that's Burning. Can Consumer Pressure Stop the Destruction?" (*The Washington Post*, 26-12-2019) <https://www.washingtonpost.com/politics/2019/10/14/amazon-isnt-only-forest-thats-burning-can-consumer-pressure-stop-destruction> accessed 7-2-2020, 13.49.
9. It has been speculated thus far that the hot and humid conditions might have started the bushfires in Australia and no political links can be established so far.
10. "Over 60,000 sq km of Land has been Burnt so far, about Seven Times the Size of the Amazon fires." Read more at <https://www.todayonline.com/singapore/explainer-australia-fire-how-bad-are-bushfires-and-what-can-singaporeans-do-help> accessed on 7-2-2020.
11. Aylin Woodward , "Australia's Fires are 46% Bigger than Last year's Brazilian Amazon Blazes. There are at least 2 months of Fire Season to go" (*Business Insider*, 8-1-2020, 5.57 p.m.) <https://www.businessinsider.com/australia-fires-burned-twice-land-area-as-2019-amazon-fires-2020-1/amp?IR=T> accessed 7-2-2020.
12. Kelly McLaughlin, "More than a billion Animals are Feared dead in Australia's Bushfires" (*Insider*, 7-1-2020, 4.07 p.m.) <https://www.insider.com/australia-bushfires-one-billion-animals-feared-dead-2020-1> accessed 7-2-2020.
13. *Ibid. at* 9.
14. John Roach , "Australia Wildfire Damages and Losses to Exceed $100 Billion", (*AccuWeather*, 8-1-2020, 7.54 p.m.) <https://www.accuweather.com/en/business/australia-wildfire-economic-damages-and-losses-to-reach-110-billion/657235> accessed 7-2-2020.
15. He T., Belcher C.M., and Lamont B.B., "A 350-Million-Year Legacy of Fire Adaptation Among Conifers", J. Ecol 104, Lim SL 2015 (352–363), (10.1111/1365-2745.12513). *See also* Chatterjee and Mathew, Global wildfires–Its Impact on Wildlife, Environment, International trade and Human Rights.
16. Steen-Adams M.M., S. Charnley, and M.D. Adams, "Historical Perspective on the Influence of Wildfire Policy, Law, and Informal Institutions on Management

since it is a financially alluring administration instrument to ranchers and farmers lacking access to hardware or manure and pesticides.[1718] As a result, fire management helps bolster 30 crores of the world's jungle-based poor[19] as well as hundreds, if not a huge number, of steer farmers and industrial scale ranchers.[20] The use of fire and the management all through the tropics is sentry and depends on context. In the twin systems of wetland and savannah, indigenous fire management assumes a significant job in keeping up biological system benefits and forestalling enormous scale cataclysmic fires and is progressively coordinated with land management strategies.[2122] The escalation of fire in tropical woods portrays a serious danger to human prosperity, biodiversity,[23] over the ground carbon storage, carbon mitigation mechanisms[24] and at last climate regulation.[25]

"Given the seriousness of the issue, it is essentially critical to comprehend the reasons for tropical fires as well as determine possible solutions to fire

and Forest Resilience in a Multiownership, Frequent-Fire, Coupled Human and Natural System in Oregon, USA" (2017) Ecology and Society 22(3):23 <https://doi.org/10.5751/ES-09399-220323> accessed 7-2-2020, 12.31.

17. Malingreau, J. P., and C. J. Tucker, 1988, Large-Scale Deforestation in the Southeastern Amazon Basin of Brazil, Ambio 17, 49-55.
18. Eva H., and E.F. Lambin, 2000, "Fires and Land-Cover Change in the Tropics: A Remote Sensing Analysis at the Landscape Scale". Journal of Biogeography 27, 765-776.
19. Brady, N.C., Alternatives to Slash-and-Burn: A Global Imperative. Agriculture Ecosystems & Environment 58, 3-11 (1996).
20. Carmenta, R., L. Parry, A. Blackburn, S. Vermeylen, and J. Barlow, 2011, "Understanding Human-Fire Interactions in Tropical Forest Regions: A Case for Interdisciplinary Research across the Natural and Social Sciences". Ecology and Society 16(1), 53 (online) URL: <http://www.ecologyandsociety.org/vol16/iss1/art53/>.
21. Bird, R.B., D.W. Bird, B.F. Codding, C.H. Parker, and J.H. Jones, 2008, "The 'Fire Stick Farming' Hypothesis: Australian Aboriginal Foraging Strategies, Biodiversity, and Anthropogenic Fire Mosaics". Proceedings of the National Academy of Sciences of the United States of America 105, 14796-14801.
22. "Thus fire is both a significant agricultural instrument and a significant driver of worldwide environmental change."
23. Barlow, J., and C.A. Peres, 2006, "Effects of Single and Recurrent Wildfires on Fruit Production and Large Vertebrate Abundance in a Central Amazonian Forest". Biodiversity and Conservation 15, 985-1012.
24. Aragão, L., Y. Malhi, N. Barbier, A. Lima, Y. Shimabukuro, L. Anderson, and S. Saatchi, 2008, "Interactions Between Rainfall, Deforestation and Fires During Recent Years in the Brazilian Amazonia". Philosophical Transactions of the Royal Society Biological Sciences 363, 1779-1785.
25. *Ibid* at 17.

management and decrease accidental fire spread."[26] In any case, however strong and harsh the inclination about forest fire is as an ecological calamity, we should never dismiss the way that it is also a human disaster.[27] We have to tune in with increased consideration to the voices of the individuals who call the rainforest home, voices very frequently sidelined or intentionally quieted, their accounts a minor reference in the global newspapers.[28] We have no reason for not paying attention now.[29] The endurance and prosperity of these indigenous people should overshadow the drive for "advancement and development" that serves just a desire for utilisation and comfort.[30] The fact that this doesn't appear to be an undeniable moral need should make all of us embarrassed.[31]

2. WHO PROFITS THE MOST OUT OF THESE WILDFIRES AND WHY IS IT SO LUCRATIVE TO DESTROY FORESTS?

Fire has been, much of the time, reported as an instrument utilised for intentional land conversion.[32] While crusading for presidentship a year ago, "Mr. Jair Bolsonaro broadcasted that Brazil's enormous protected lands were an obstacle to financial improvement and promised to free them up to business exploitation.[33] Less than a year into his term, that already happened."[34] Additionally, the palm oil industry was responsible for, in any event, 39 per cent of woodland loss on the biodiversity rich island of Borneo, somewhere between 2000 to 2018, information from an

26. *Ibid.*
27. Rowan Williams, "Amazon Fires are a Shameful Indictment of our Lust for Excess" (*The Guardian*), <https://amp.theguardian.com/global-development/2019/sep/06/amazon-fires-shameful-indictment-of-our-lust-for-excess> accessed 8-2-2020, 12.26).
28. *Ibid.*
29. These indigenous people group have for a considerable length of time been subject to assaults, unlawful attacks and deforestation. (*Id.)* Their privileges have been abrogated notwithstanding the insatiability of different ground-breaking monetary interests, and theirs is a story that talks about the distinct financial imbalance cursing and debasing such a large amount of our reality (*Id.).*
30. *Ibid* at 12.
31. *Ibid.*
32. "Examples are found across the tropics: the decline in forest and closed woodland in Benin, savannisation in Roraima, tropical forest conversion to pasture in Brazil, clearing for plantations in Africa and clearing savannas for agriculture and of course not to mention Brazil, Indonesia, & Malaysia" (*Id.)*
33. Alexandria Symonds, "Amazon Rainforest Fires: Here's What's Really Happening" (*The New York Times*, 23-8-2019) <https://www.nytimes.com/2019/08/23/world/americas/amazon-fire-brazil-bolsonaro.html?auth=link-dismiss-google1tap> accessed 8-2-2020, 12.36.
34. *Ibid.*

exploration firm situated in Indonesia discerned.[35] Palm oil organisations represented about 24 lakh hectares (60 lakh sections of land) of the loss while pulpwood firms were responsible for 4,61,319 hectares (11 lakh sections of land).[36] Indonesia and Malaysia produce around 85 per cent of the earth's palm oil, which is used in everything from chemicals, lipstick to pizza and biodiesel.

In the Indonesian forest fire case, the culprits engaged with the intentional burning of the timberlands seem, by all accounts, to be private people or business entities with no proper connections to the Indonesian State.[37] The Indonesian Constitution[38] rests command over all land and natural resources in the State; it tends to be contended that the devolution of power to misuse natural resources speaks of devolution of government functions to private business bodies as per the latter's ability as agents of the government.[39] This contention is fortified by the fact that the exercises concerned included the clearing of land for farming and settlement, which is completely in accordance with the Indonesian Government's legitimate "transmigrasi" or transmigration approach of resettling residents from the more thickly populated islands to distant, less crowded ones. Subsequently, these elements would successfully be leading economic activities for the benefit of the State, though procuring benefits for themselves in business adventures as an end-result of concession or permit expenses payable to the State.[40]

Meanwhile, Bryan Fisher has blamed the California fires in the United States on the strict regulations of the country. According to him, "Regulations on logging are so severe that employment in the timber industry has collapsed and is now half of what it was at the turn of the century. We now import our lumber from Canada and China while our

35. A. Ananthalakshmi, "Palm Oil to Blame for 39% of Forest Loss in Borneo Since 2000: Study" (*The Star*, 20-9-2019) <https://www.thestar.com.my/business/business-news/2019/09/20/palm-oil-to-blame-for-39-of-forest-loss-in-borneo-since-2000-study> accessed 8-2-2020, 14.32.
36. *Ibid.*
37. Alan Khee-Jin Tan, "Forest Fires of Indonesia: State Responsibility and International Liability" (Oct. 1999), The 48(4) International and Comparative Law Quarterly, 826 <https://www.jstor.org/stable/761736>.
38. Undang-Undang Dasar Negara Republik Indonesia 1945 (1945 Constitution of the Republic of Indonesia), Art. 33(3).
39. Tan (n 37).
40. *Ibid.*

forests decay and the combustible fuel load soars."[41] He added, "This leads to forest fires that burn so hot they sterilise the soil, making regrowth difficult."[42]

The vast majority of the fires burning in the Amazon right now were started by humans in administration of mining, logging, and agriculture.[43] Perhaps the greatest driver of deforestation is dairy cattle farming. Brazil is currently the world's biggest beef exporter.[44] In 2018, these offshore sales produced 670 crore US dollars for the nation's economy. Brazil is additionally the second-biggest producer of soybeans on the planet and around 80 per cent of the soy developed in the Amazon is utilised for animal food.[45] With China's ongoing tariffs on US soybeans, China has expanded its hunger for soybeans from Brazil. There are likewise gold, aluminum, and oil stores in the Amazon. Illicit mining has flooded to extraordinary levels,[46] as per the Amazon Georeferenced Socio-Environmental Information Network (RAISG),[47] a natural guard dog gathering. Timber request has additionally prodded unlawful logging."[48][49]

41. Bryan Fischer, "Who's to Blame for California Wildfires? Politicians" (American Family Radio, 17-10-2019, 11.32) <https://www.afa.net/the-stand/culture/2019/10/who-s-to-blame-for-california-wildfires-politicians/> accessed 8-2-2020, 16.35.
42. *Ibid.*
43. Irfan (n 3).
44. Christopher Ingraham, "How beef demand is accelerating the Amazon's deforestation and climate peril", (*The Washington Post*, 27-8-2019 at 4.58 p.m. GMT+5.30) <https://www.washingtonpost.com/business/2019/08/27/how-beef-demand-is-accelerating-amazons-deforestation-climate-peril/?noredirect=on> accessed 7-2-2020, 12.02.
45. Isis Almeida, Shuping Niu, and Alfred Cang, "China Ramps up Brazil Soybean Imports, Rebuffing US Crops", *Bloomberg News*, 16-8-2019, 11.08 a.m. GMT+5.30 updated on 16-8-2019, 10.39 p.m. GMT+5.30, available at <https://www.bloomberg.com/news/articles/2019-08-16/china-ramps-up-brazil-soy-imports-as-u-s-trade-war-worsens> (last visited 29-12-2019, 12.07).
46. "Bolsonaro's pick for environment minister, Ricardo Salles, was found guilty late last year of altering maps in an environmental protection program to benefit mining companies during his tenure running the environment agency of São Paulo State." (Umair Irfan, Why it's been so Lucrative to Destroy the Amazon Rainforest (*Vox*, 30-8-2019 7.00 a.m.) <https://www.vox.com/platform/amp/energy-and-environment/2019/8/30/20835091/amazon-rainforest-fire-wildfire-bolsonaro> accessed 7-2-2020, 11.54).
47. Official website at <https://www.amazoniasocioambiental.org/es/> accessed 8-2-2020, 12.36.
48. Stop Illegal Logging, Rainforest Foundation us, available at <https://rainforestfoundation.org/illegal-logging/> accessed 8-2-2020, 12.40 p.m.).
49. Irfan "Why it's been so Lucrative to Destroy the Amazon Rainforest" (n 3).

3. HOW MUCH OF THE FORESTS HAVE THE WORLD LOST SO FAR?50

(i) One football pitch of forest [was] lost every second in 2017, data reveals.[51]

(ii) India's forest cover loss in 17 years is four times the size of Goa.[52]

(iii) Australia's fires are 46 per cent bigger than last year's Brazilian Amazon blazes.[53]

(iv) The world lost a Belgium-sized area of primary rainforests last year.[54]

(v) California has 149 million dead trees ready to ignite like a matchbook.[55]

50. "There are two main data sources for tree loss, and they are increasingly contradictory. One, the Global Forest Watch (GFW), is compiled from satellite images by the World Resources Institute, a Washington think tank. It paints a gloomy picture, putting the decline in tree cover last year at 72.6 million acres, almost 50 percent more than in 2015. The other main source for deforestation data, the Global Forest Resources Assessment (FRA), which is compiled from government inventories by the Rome-based UN Food and Agriculture Organisation, is less bleak. It estimates the annual net loss, once forest re-growth is taken into account, at barely a tenth as much: just 8.2 million acres. And it says deforestation rates have declined by more than 50 per cent in the past decade." (Fred Pearce, Conflicting Data: How Fast Is the World Losing its Forests?, Yale Environment 360, Yale School of Forestry and Environmental Studies, 9-10-2018 < https://e360.yale.edu/features/conflicting-data-how-fast-is-the-worlds-losing-its-forests> accessed 8-2-2020, 17.03)).
51. Damian Carrington, Niko Kommenda, Pablo Gutiérrez and Cath Levett, "One Football Pitch of Forest Lost Every Second in 2017, Data Reveals", *The Guardian*, 27-6-2018 08.00 BST.
52. Jayashree Nandi, "India's Forest Cover Loss in 17 Years is Four Times the Size of Goa", (*Hindustan Times*, 29-12-2019).
53. Aylin Woodward, "Australia's Fires are 46% Bigger than Last year's Brazilian Amazon Blazes. There are at least 2 months of fire Season to go", *The Insider*, 8-1-2020, 11.27 p.m.
54. Mikaela Weisse and Elizabeth Dow Goldman, "The World Lost a Belgium-Sized Area of Primary Rainforests Last Year", (*World Resources Institute*, 25-4-2019) <https://www.wri.org/blog/2019/04/world-lost-belgium-sized-area-primary-rainforests-last-year> accessed 7-2-2020, 11.17).
55. Umair Irfan, "California has 149 Million Dead Trees Ready to Ignite Like a Matchbook 18 million Trees Died just Last Year". (*Vox*, 15-2-2019) <https://www.vox.com/2019/2/13/18221822/california-149-million-dead-trees-wildfire> accessed 8-2-2020.

(vi) More than 942,000 hectares (2.3 million acres) of forests and land were burned in Indonesia in 2019.[56]

4. HOW HAS THE LEGAL MACHINERY PROVED INEFFECTIVE TO KEEP THE FIRES UNDER CHECK?

4.1. Consumer approach

Environmental organisations and other NGO associations have attempted to name and disgrace the companies that benefit from the cleared land, reassuring consumer boycotts and investor pressure hoping to compel change without governments mediating. However, such endeavors can provoke 'green washing' certification schemes with provisos planned to dazzle customers about safe growing practices without requiring genuine checks.[57]

Importing firms and producers are forced by NGOs, clients and investors to shun items from unlawfully cleared lands, for example, the Amazon and Indonesia.[58] These organisations at that point request abroad providers to demonstrate that their items don't originate from deforested land. Providers must exhibit this by either creating or joining forest certification standard grown normally through multi-partner initiatives that include NGOs and firms.[59] Firms could then tell the NGOs and clients their overseas providers are not ensnared in wildfires.[60] Research verifies that similar kinds of pressure[61] have helped enforce environmental norms[62], labor rights, workplace safety and human rights.[63]

56. "Forest Fires Cost Indonesia $5.2bn and Counting: World Bank" (*Al Jazeera*, 11-12-2019 <https://www.aljazeera.com/ajimpact/forest-fires-cost-indonesia-52bn-counting-world-bank-191211030034859.html> accessed 8-2-2020.
57. Christianna Parr, Nives Dolsak, & Aseem Prakash, "The Amazon isn't the only Forest that's Burning. Can Consumer Pressure Stop the Destruction?" (*The Washington Post*, 14-10-2019, 12.51), <https://www.washingtonpost.com/politics/2019/10/14/amazon-isnt-only-forest-thats-burning-can-consumer-pressure-stop-destruction> accessed 8-2-2020.
58. *Ibid.*
59. Cao, X., Greenhill, B., & Prakash, A., (2013), "Where is the Tipping Point? Bilateral Trade and the Diffusion of Human Rights". British Journal of Political Science, 43(1), 133-156. doi:10.1017/S000712341200018X.
60. *Ibid* at 59.
61. *Ibid* at 60.
62. Aseem Prakash & Matthew Potoski, "Racing to the Bottom? Trade, Environmental Governance, and ISO 14001" (2006) 50(2) AJPS350, 364.
63. *Ibid.*

For instance, the cosmetic industry purchases huge amounts of palm oil. Outright public objection about the destruction of Asian forests to build up palm oil manors drove some cosmetic organisations[64] to reformulate items to bypass from palm oil altogether. Others have requested that providing estates buy in to an assortment of accreditation frameworks[65] that guarantee to distinguish best practices for palm oil development. Therefore, foreign purchasers can, without much of a stretch, case that they are utilising sustainable palm oil.[66]

4.2. Why the consumer approach and certification schemes have failed?

Notwithstanding these endeavors, fires still blaze in South Asia. This proposes palm oil sustainability guidelines are not so much changing consumer behavior.[67] The story is comparative in the Amazon, where the cows business represents around 80 per cent of woods clearing. Since 2009, Brazil's greatest meatpacking organisations, JBS, Minerva and Marfrig, have worked with Greenpeace[68] not to purchase steers from farmers who brought the animals up in recently deforested territories. The issue is that in spite of the fact that beef are purchased and sold more than once before they arrive at slaughterhouses, the meat bundling organisations screen just the farm from which the cows was obtained not the full dairy cattle production network. Farmers are abusing this escape clause. They keep on raising dairy cattle by clearing woodlands yet then offer them to farms that conform to the understanding. A few associations and activists are asking an enormous scale purchaser boycott[69] of Brazilian meat.[70] But with boycotts and NGO pressure failing to deliver strong enough

64. Andew McDougall, "Naturex takes Palm Oil-Free Demand as Serious as Manufacturers", available at <https://www.cosmeticsdesign.com/Article/2013/07/25/Naturex-takes-palm-oil-free-demand-as-seriously-as-manufacturers> (last visited on 29-12-2019, 13.13).
65. *Ibid at* 65.
66. *Ibid.*
67. Parr , Dolsak and Prakash (n 58).
68. Clifford Krauss, David Yaffe-Bellany and Mariana Simões, "Why Amazon Fires Keep Raging 10 Years After a Deal to End Them" (*The New York Times*, 10-10-2019) <https://www.nytimes.com/2019/10/10/world/americas/amazon-fires-brazil-cattle.html> accessed 8-2-2020, 18.04.
69. "Leading Burger Supplier Sourced from Amazon Farmer using Deforested Land" (*The Guardian*, 17-9-2019) <https://www.theguardian.com/environment/2019/sep/17/leading-burger-supplier-sourced-from-amazon-farmer-guilty-of-deforestation> accessed 8-2-2020, 1.09.
70. Parr, Dolsak and Prakash , "The Amazon isn't the only Forest that's Burning. Can Consumer Pressure Stop the Destruction?" (n 58).

results, those who wish to halt such fires may turn to government action.[71] Such methods could include offers of international aid and threats of sanctions, new technologies for monitoring hotspots and paying farmers for eco-services.[72]

5. INTERNATIONAL COOPERATION IN PREPARING FOR AND RESPONDING TO WILDFIRE

5.1. Attribution of conduct and State "due diligence"

Even without explicit treaties relating to forest fires there are general commitments and obligations under international environmental law that expect States to work with their neighbors to moderate transboundary perils that could incorporate both fire and smoke.[73]

In the Trail Smelter Case, the Arbitral Tribunal stated that:

> *"Under the principles of international law... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein"*[74]

Similar statements are expressed in other international legal doctrines too.[75] The 1992 Rio Declaration on Environment and Development states that:

> *"States have...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the*

71. "For instance, the European Union has decided that because of the environmental destruction involved, palm oil cannot be labeled a biofuel. In response, the palm oil industry may be forced to tighten its standards and improve its own policing." (Christianna Parr, Nives Dolsak, & Aseem Prakash, "The Amazon isn't the only forest that's burning. Can consumer pressure stop the destruction?" (*The Washington Post*, 14-10-2019, 12.51), <https://www.washingtonpost.com/politics/2019/10/14/amazon-isnt-only-forest-thats-burning-can-consumer-pressure-stop-destruction> accessed 8-2-2020).
72. Parr, Dolsak and Prakash, "The Amazon isn't the only Forest that's Burning. Can Consumer Pressure Stop the Destruction?" (n 58).
73. Michael Eburn, The International Law of Wildfires, Research Handbook on Disasters and International Law (2016) 343.
74. Trail Smelter Case (United States v. Canada) Intl Arb Rep 1905 (1941) (Arbitral Tribunal, 11-3-1941), 1965.
75. *Ibid.*

environment of other States or of areas beyond the limits of national jurisdiction".[76]

The International Law Commission's (ILC) Draft Articles on Prevention of Transboundary[77] Harm from Hazardous Activities say that States should:

> *"Take all appropriate measures to prevent significant transboundary harm or at any event to minimise the risk thereof."*[78]

The draft articles also say that

> *"States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organisations in preventing significant transboundary harm or at any event in minimising the risk thereof."*[79, 80]

The growing arena of global disaster law urges States to guarantee that they have set up courses of action to recognise when and from who they will look for help and set up procedures to encourage the receipt of that help.[81] For example what sets firefighting apart from post-debacle recuperation is that firefighting administrations and assistance are generally given by governments.[82] In the event that there is to be worldwide help to battle

76. Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I) (12-8-1992) Annx. I (Rio Declaration) principle 2; See also UNFCCC.
77. "The ASEAN Agreement on Transboundary Haze Pollution was finalised in response to the impact of haze pollution caused by forest fires in 1997–1998."(Haze Action Online, "ASEAN Agreement on Transboundary Haze Pollution" (2015) <http://haze.asean.org/aathp/> accessed 7-2-2020.) "For the purposes of the ASEAN Agreement, 'haze pollution' means 'smoke resulting from land and/or forest fire which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment.' " [ASEAN Agreement on Transboundary Haze Pollution, ASEAN Legal Instruments 77 (opened for signature 10-6-2002, entered into force 25-11-2003)].
78. "ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (Rep of the ILC on the work of its fifty-third session, 2001) (Draft Articles on Prevention of Transboundary Harm from Hazardous Activities) Art. 3."
79. *Ibid.*
80. Smelter case (n 75).
81. Michael Eburn, The International Law of Wildfires, Research Handbook on Disasters and International Law (2016) 338.
82. *Ibid.*

a rapidly spreading fire, this will originate from different governments, either through their common firefighting office or every so often a defense force.[83] This can encourage worldwide participation. First, since offices that are liable for dealing with the reaction to a fire in their own domain are probably going to have continuous associations with the fire administration in neighboring States.[84] Subsequently, influenced States will know from whom they will look for help and will have the option to promptly distinguish individuals from the helping organisation.[85] Second, as help will originate from government organisations, issues of responsibility and duty will be clear.[86] Firefighting organisations are organs of the helping State thus the State is mindful and responsible for guaranteeing that their offices work with the influenced State and convey fitting, requested help.[87]

5.2. Multi-lateral arrangements

5.2.a. *Human Rights Conventions*

The International Covenant on Civil and Political Rights (ICCPR) states that "everyone has the right to life."[88] The International Covenant on Economic, Social and Cultural Rights (ICESCR) affirms a "right to work in safe conditions,[89] the right to social security,[90] an obligation to protect the family,[91] and confirms that it is the right of everyone to (enjoy) an adequate standard of living for himself and his family, including adequate food, clothing and housing"[92, 93]. A rapidly spreading fire can have an effect upon these rights by causing casualty, displacement, and the obliteration of homes and employments. States have commitments to secure and propel the privileges and rights of their people.[94]

83. *Ibid.*
84. *Ibid.*
85. *Ibid.*
86. *Ibid.*
87. Eburn (n 82) 338.
88. International Covenant on Civil and Political Rights (opened for signature 1-12-1966, entered into force 23-3-1976) (ICCPR) Art. 6.
89. International Covenant on Economic, Social and Cultural Rights (opened for signature 16-12-1966, entered into force 3-1-1976) (ICESCR) Art. 7(ii)(*b*).
90. *Ibid* Art. 9.
91. *Ibid* Art. 10.
92. *Ibid* Art. 11.
93. Eburn (n 74) 339.
94. *Ibid.*

Under the ICCPR the parties have agreed to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.[95] It discerns that a "State will have a worldwide commitment not exclusively to find a way to address the adversity of a populace influenced by the fierce blazes", yet in addition, where conceivable, to find a way to control fire that is compromising homes, lives or significant financial resources, for example, farming territories.[96]

5.2.b. *Human rights impact of forest fires and deforestation*

Timberland based merchandise and ventures are integral to the financial, social, and cultural (ES&C) privileges of a huge number of individuals around the globe.[97] The World Bank assesses that 90 per cent of the 120 crore individuals living in extraordinary destitution rely upon backwoods for some piece of their business[98, 99]. In spite of the significance of backwoods to the acknowledgment of ES&C rights, forest tribes are regularly denied access to jungle resources.[100] A 2019 report of the Special Rapporteur on human rights and nature expresses that "the privilege to a protected, perfect, sound and reasonable environment incorporates a safe atmosphere and climate and that failure to fulfill international climate change commitments is a *prima facie* violation of the States' obligations to protect the human rights of its citizens."[101]

95. ICCPR Art. 2(1).
96. *Ibid* at 94.
97. "In Indonesia, for example, more than 10 million poor people live in State forest zones with good forest cover, while millions more depend on forest for their income." (Wollenberg, E., Belcher, B., Sheil, D., Dewi, S., Moelino, M., 2004. "Why are forest areas relevant to reducing poverty in Indonesia?" Governance Briefing, CIFOR). In the Democratic Republic of Congo, 40 million people rely on forests for food, medicines, energy, and income (Debroux, L. Hart, T., Kaimowitz, D., Karsenty, A., Topa, G., 2007. Forests in Post-Conflict Democratic Republic of Congo: Analysis of a Priority Agenda, CIFOR, World Bank, CIRAD).
98. World Bank 2004, *Sustaining Forests: A Development Strategy*, World Bank, Washington, DC. Available at <siteresources.worldbank.org/INTFORESTS/Resources/SustainingForests.pdf>.
99. United Nations Development Program, United Nations Environment Program, World Bank, *World Resources, 2005: The Wealth of the Poor: Managing Ecosystems to Fight Poverty*, Washington DC 264.
100. Frances Seymour, "Forests, Climate Change, and Human Rights: Managing Risk and Trade-offs" (October 2008) Human Rights and Climate Change, CPU.
101. How Violence and Impunity Fuel Deforestation in Brazil's Amazon, Human Rights Watch, <https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon> accessed 9-2-2020, 13.25.

On 22 August 2019, a number of groups standing for indigenous people of Amazon announced an environmental and humanitarian emergency in an open letter.[102] They called on the Office of the High Commissioner for Human Rights and the Special Rapporteur on the Rights of Indigenous Peoples to the United Nations to take action as the violent fires threatened their people with what the letter calls extinction.[103, 104]

Community resistance to land grabs and forest clearing regularly results in brutality being used against them, including: coerced evictions, police pestering, terrorising, death threats and violent assaults, arbitrary arrest, and retaliatory litigation and false criminal charges on community leaders, human rights defenders and activists.[105] In 2016, in excess of 1,000 individuals in 25 nations were killed, pestered, detained or terrorised while battling for their peoples' privileges.[106] Worldwide the number of total exploited people is likely a lot higher as dependable data on wrongdoings against human rights safeguards isn't accessible for some nations, for example, Paraguay, Guyana and Liberia.[107] In the Colombian case, the ombudsman revealed in excess of 100 killings of human rights activists in 2016 and a further 52 murders in the initial half of 2017.[108]

> *"Oil palm, pulp and paper plantations are creating health and environmental crises for our communities. Children are sick from the forest fires. Deforestation and land drainage are making water scarce and there are food shortages. People are being pushed off the land, which is becoming concentrated in the hands of large companies. Inequality is growing. Self sufficiency is being lost. People are being forced into exploitative work for the companies."*[109]
>
> *Indigenous Leader and Representative of Pusaka, Indonesia*

102. Sofia Svensson, "Indigenous Peoples Declare Amazon Fires a Humanitarian Emergency" (*International Observatory Human Rights*, 27-8-2019) <https://observatoryihr.org/news_item/indigenous-peoples-declare-amazon-fires-a-humanitarian-emergency/> accessed 5-2-2020.
103. *Ibid.*
104. Kumi Naidoo, Secretary General of Amnesty International, said in a statement: "We must stand together behind the Indigenous communities and leaders across the Amazon region – from Brazil to Ecuador and beyond. For them the Amazon is more than the lungs of the world, it is their home."
105. Human Rights Impacts of Deforestation, <https://rightsanddeforestation.org/policy-papers/human-rights-impacts-of-deforestation/> accessed 9-2-2020, 10.27.
106. *Ibid.*
107. *Ibid.*
108. *Ibid.*
109. *Ibid.*

"Due to industrial logging...we no longer have enough resources. The honey, mushrooms and game animals have disappeared. There are fewer large trees. We have problems getting water during the dry season."[110]

Village Resident, Mambasa Province, Drc

Raffaella Fryer-Moreira, an anthropologist at University College London, informed the magazine "Earther" that there is no difference between environmental rights and human rights for many of these communities.[111]

Fryer-Moreira said[112]

"The forest fires we are witnessing today will be understood by many communities not only as an ecocide but as a genocide,"

For the Amazon's indigenous people groups, the obliteration of their house is the same old thing. It's a grievous reality they've needed to manage since the Portuguese looted their territories in the sixteenth century.[113] Presently, under far-right supremacist crazy person President Jair Bolsonaro, this pulverisation is working to another fever as the progressing fires in the Amazon Rainforest appear.[114] What's more, this inferno is practically sure to affect Brazil's indigenous people groups in manners all of us can just envision.[115] Their home actually is ablaze.[116]

Bolsonaro ran his presidential crusade assuring to privatise the great rainforest and hand it over to the agribusiness and mining industries.[117] He's been unambiguous since the beginning that the necessities of the indigenous constituents of the forest are the least of his priorities. Just days in the wake of getting the chance to work in January, Bolsonaro began to dismantle[118]formal government securities for indigenous individuals,

110. *Ibid.*
111. Eburn (n 74) 339.
112. *Ibid.*
113. Yessenia Funes, "The Amazon Forest Fires are a Form of 'Genocide' " (Gizmodo, 23-8-2019, 12.30) <https://earther.gizmodo.com/the-amazon-forest-fires-are-a-form-of-genocide-1837507793> accessed 2-8, 20.00.
114. *Ibid.*
115. Brian Kahn, "Smoke Has Blotted Out the Sun in São Paulo as the Amazon Burns" (Gizmodo, 20-8-2019, 5.19 p.m.) <https://earther.gizmodo.com/smoke-has-blotted-out-the-sun-in-sao-paulo-as-the-amazo-1837413488> accessed 8-2-2020, 20.05.
116. *Ibid* at 102.
117. *Ibid* at 103.
118. Yessenia Funes, "Brazil's New President Moves to Kick Indigenous People off their Land Just Hours After Taking Office" (Gizmodo, 01-04-2019) <https://earther.gizmodo.com/brazil-s-new-president-moves-to-kick-indigenous-people-1831466539> accessed 8-2-2020, 20.16.

including taking out Fundacao Nacional do Indio (FUNAI), Brazil's agency for indigenous undertakings.[119]

Indigenous people group help ensure the land and protect it against excavators and lumberjacks hoping to wreck it even as the threat from private interests is developing increasingly risky.[120] More individuals die a year battling to secure their condition than certain soldiers pass on every year battling wars and Brazil has seen an outsized number of environmental defenders kick the bucket guarding their people and the forests they depend on.[121]

6. HERE'S WHAT WE KNOW ABOUT FOREST FIRES AND ITS IMPACT ON CLIMATE CHANGE

*"The Amazon is reaching a **dangerous tipping point.**[122] We need to scale solutions now if we have any chance of saving it"*[123]

World Economic Forum

The Amazon bowl[124] is the focal point of the audience in the discussion over the causes for and answers for a dangerous global warming.[125] Traversing more than 70 lakh sq. km., it represents more than 40 per

119. Syensson (n 103).
120. *Ibid.*
121. *Ibid.*
122. "The critical point in a situation, process, or system beyond which a significant and often unstoppable effect or change takes place", Merriam-Webster <https://www.merriam-webster.com/dictionary/tipping%20point>.
123. Paulo Barreto & Robert Muggah, "The Amazon is Reaching a Dangerous Tipping Point. We Need to Scale Solutions now if we have any Chance of Saving it" (World Economic Forum, 23-8-2019) <https://www.weforum.org/agenda/2019/08/amazon-dangerous-tipping-point-forest-fires-brazil/> accessed 9-2-2020, 13.43.
124. "In total, the Amazon Rainforest Holds the Equivalent of 10 years' Worth of Global Greenhouse Gas emissions." (Andrew Freedman, Amazon fires could accelerate global warming and cause lasting harm to a cradle of biodiversity, *The Washington Post*, published on 22-8-2019 at <https://www.washingtonpost.com/weather/2019/08/21/amazonian-rainforest-is-ablaze-turning-day-into-night-brazils-capital-city/?utm_campaign=Carbon%20Brief%20Daily%20Briefing&utm_medium=email&utm_source=Revue%20newsletter> accessed 9-2-2020, 17.16.
125. Nova Xavantina And Santarém, "The Amazon is Approaching an Irreversible Tipping Point" (*The Economist*, 1-8-2019) <https://www.economist.com/briefing/2019/08/01/the-amazon-is-approaching-an-irreversible-tipping-point> accessed 9-2-2020, 14.02.

cent[126]of the world's whole stock of tropical backwoods, 20 per cent of the worldwide fresh water supply and regulates precipitation, cloud cover and oceanic currents.[127]

Researchers are worried that the Amazon is hazardously near a tipping-point making conditions so hot and dry that nearby species couldn't recover.[128] In the event that 20-25 per cent of the tree spread is deforested, the bowl's ability to retain carbon dioxide would crumple.[129] In the event that this occurs, the world's biggest tropical rainforest will turn into its greatest fix of scrubland.[130] This would not just prompt fast weakening of biodiversity but also it would significantly irritate the procedure of evapotranspiration which impacts cloud cover and the flow of ocean currents.[131]

The above calculations are derived from a study published in 2016 in *Proceedings of the National Academy of Sciences*[132] and conducted by Carlos Nobre, chair of Brazil's National Institute of Science & Technology (INCT) for Climate Change and other researchers at the INPE, the National Space Research Institute (from which Nobre is a retired researcher), the Natural Disaster Surveillance & Early Warning Center (CEMADEN) and the University of Brasília (UnB).[133]

> *"Although we don't know the exact tipping point, we estimate that the Amazon is very close to this irreversible limit," Mr Nobre spoke "Deforestation of the Amazon has already reached 20 per cent, equivalent to 1 million sq. km., although 15 per cent (150,000 km²) is recovering."*[134]

126. Rhett A. Butler, "The Amazon Rainforest: The World's Largest Rainforest" (*Mongabay*, 1-4-2019) <https://rainforests.mongabay.com/amazon/> accessed 9-2-2020, 14.05.
127. Syensson, "Indigenous Peoples Declare Amazon Fires a Humanitarian Emergency" (n 103).
128. Jonathan Watts, "Amazon Deforestation Accelerating towards Unrecoverable 'Tipping Point' " (*The Guardian*, 25-7-2019) <https://www.theguardian.com/world/2019/jul/25/amazonian-rainforest-near-unrecoverable-tipping-point> accessed 9-2-2020, 14.09.
129. FAPESP, "Amazon Deforestation is close to Tipping Point" (Phys.org, 20-3-2018) <https://phys.org/news/2018-03-amazon-deforestation.html> accessed 9-2-2020, 14.12.
130. Thomas E. Lovejoy and Carlos Nobre, "Amazon Tipping Point" (Science Advances, 21-2-2018) <https://advances.sciencemag.org/content/4/2/eaat2340> accessed 9-2-2020, 14.15.
131. *Ibid.* at 116.
132. Available at <https://www.pnas.org/content/113/39/10759> accessed 9-2-2020, 14.31.
133. Syensson, Indigenous Peoples Declare Amazon Fires a Humanitarian Emergency (n 103).

6.1. How does rising temperature give rise to wildfires?

Plants take in carbon dioxide, which they need to survive, through little pores in their leaves called stomates.[135] Be that as it may, they likewise lose water through these equivalent pores each time they open and the higher the surrounding temperature, the more water they lose.[136] Hotter climate can likewise make more water vanish from dead plants littering the ground.[137]

> *"A warmer world will have drier fuels and drier fuels will mean it's easier for fires to start and spread." -Mike Flannigan*[138]

6.2. More fires could contribute to a perilous "Climate Feedback Loop"

A few scientists are furthermore stressed that "if wildfires become progressively continuous or outrageous, the carbon emissions discharged could aggravate the movement of climate change, prompting a sort of feedback loop - with all the more warming prompting more flames, which in turn discharge more carbon dioxide, which causes all the more warming."[139]

> *"This is of particular concern for boreal forests in North American and Eurasia, which contain overwhelming stores of carbon-rich peat, according to Flannigan"*[140][141]. *"One good fire*

134. *Ibid.*
135. Julia Rosen, "The Amazon Rainforest is on Fire. Climate Scientists Fear a Tipping Point is near" (*The Los Angeles Times*, 26-8-2019) <https://www.latimes.com/environment/story/2019-08-25/amazon-rainforest-fires-climate> accessed 9-2-2020, 14.21.
136. *Ibid.*
137. *Ibid.*
138. Director of the Western Partnership for Wild land Fire Science at the University of Alberta in Canada.
139. Chelsea Harvey, "Here's What We Know about Wildfires and Climate Change Scientists think that Global Warming may already be Influencing Fire Seasons" (*Scientific American*, 13-10-2017) <https://www.scientificamerican.com/article/heres-what-we-know-about-wildfires-and-climate-change/> accessed 9-2-2019, 15.32.
140. *Ibid at* 140.
141. Xavantina and Santarém (n 125).

that burns a meter or two deep could release many thousands of years of carbon accumulation in one blast, he said."[142]

6.3. How do we reverse the damage and close the loop?

According to Paulo Barreto and Robert Muggah, "The most obvious and effective steps involves doling out penalties.[143] This includes:

- imposing heavy fines on companies with dirty supply chains,[144] divestment strategies
- targeting key violators,
- publicised product boycotts and
- Environmental campaigns[145] shaming those involved in illicit activities."[146]

In any case, the above-mentioned need better evidence, in addition to more financing in the accurate detection of illegal deforestation and sustained enforcement of present laws identified with environmental wrongdoings.[147] The trick is to diminish land-grabbing and useless land utilisation. In doing thusly, this can reduce deforestation while simultaneously raising the estimation of agrarian creation by expanding profitability of under-utilised deforested zones.[148]

People in general and the private sectors can likewise boost reasonable land use and forest protection.[149] Think about the Brazilian alliance of

142. *Ibid.*
143. Xavantina And Santarém, "The Amazon is Approaching an Irreversible Tipping Point" (n 125).
144. Ajit Niranjan, "Amazon Deforestation: EU Firms Linked to Illegal Logging in Brazil" (dw.com, 25-4-2019) <https://www.dw.com/en/amazon-deforestation-eu-firms-linked-to-illegal-logging-in-brazil/a-48442226> accessed 9-2-2020, 15.58.
145. Karla Mendes, "Brazilian Companies Illegally Degrading the Amazon Continue to Operate with Impunity" (*Pacific Standard*, 6-5-2019) <https://psmag.com/environment/brazilian-companies-continue-to-degrade-amazon-with-impunity> accessed 2-9-2019, 16.01.
146. Xavantina And Santarém, "The Amazon is Approaching an Irreversible Tipping Point" (n 125) .
147. *Ibid.*
148. *Ibid.*
149. Ana Toni, "Strategic Agenda of the Coalition Brazil for the government" (Coalition Brazil Climate, 4-12-2019) <http://www.coalizaobr.com.br/home/index.php/posicionamentos/item/991-agenda-estrategica-da-coalizao-brasil-para-o-governo> accessed 9-2-2020, 17.32.

environment, forest and agriculture ministries that is mooting for open and private organisations to check deforestation, aid in land rebuilding and increment land-use proficiency.[150] The alliance comprises the banking sector, beef trading and parceling industries, farm producers and landlords who are dedicated to efficient and sustainable commercial operations.[151] They are carrying on of greed and selfishness, particularly since the worldwide lenders and sponsors are demanding cleaner and environment friendly supply products and chains.[152]

The beef industry holds the key for curbing deforestation as 80 per cent of the cleared territories under farming use are secured with fertile land.[153] Numerous worldwide shippers and vendors are quick to make their chains environment friendly[154] so as to please and gain the confidence of the global consumer. Marfrig Global Foods, one of the world's largest beef producers, recently launched sustainability bonds[155]. Marfrig's 50 crore dollar worth years of contribution" unites various enormous banks to help acquire investments from them for practices which promote curbing deforestation and decrease carbon discharges.[156] Marfrig as of now has initiated many activities to urge importers to receive zero carbon discharges and ensure items certified by the Rainforest Alliance. For the framework to work, detectability guarantees are a prime necessity.[157]

7. LEGAL FRAMEWORKS FOR WILDFIRE MANAGEMENT: "INTERNATIONAL AGREEMENTS" AND "NATIONAL LEGISLATIONS":

With upbeat enthusiasm for the management of fire, especially as for the wildfires, and perceiving the requirement and dire need for universal collaboration, the 2005 Food and Agriculture Organisation (FAO) Ministerial Meeting on Forests directed the FAO to build up the

150. Funes (n 118).
151. *Ibid.*
152. *Ibid.*
153. *Ibid.*
154. Kavita Prakash-Mani & Justin Adams, "2019 Can be the Year we Begin to Save the World's Forests. Here's How" (World Economic Forum, 20-1-2019) <https://www.weforum.org/agenda/2019/01/we-have-a-year-to-halt-deforestation-heres-how-to-do-it/> accessed 9-2-2020, 17.38.
155. Marfrig issues sustainability bonds <https://www.marfrig.com.br/en/documentos?id=839> accessed 2020-02-9, 17.41.
156. Xavantina And Santarém, "The Amazon is Approaching an Irreversible Tipping Point" (n 125).
157. *Ibid.*

"Strategy to Enhance International Cooperation on Fire Management."[158] This strategy was reinforced by a "Global Assessment of Fire and Fire Management"[159] (Review of International Cooperation in Fire Management[160]) and "Voluntary Guidelines on Fire Management"[161].

The general objective of FAO's program in wildfire management is to aid and bolster the national preparedness against wildfires and to help the signatories to decrease unfortunate impacts of wildfires, for example, casualties and damage to property, the annihilation of farm cover, loss of significant natural inexhaustible resources and debasement of environments for the flora and fauna prompting dangers to the carbon cycle, soil degradation, smoke, murkiness and air contamination.[162]

One of the zones where the FAO has been as of late supporting nations to create is the ability to screen earthbound environments in an all encompassing way.[163] The "Global Observation of Forest and Land Cover Dynamics (GOFC-GOLD) program" of the "Global Terrestrial Observing System (GTOS)" will empower nations to monitor their fires and map them as and when they occur, accordingly improving their capacity to meet their international commitments.[164]

After a concourse on "Public Policies Affecting Forest Fires" conducted in 1998, F.A.O in a joint effort with International Tropical Timber Organisation set up an "Expert Meeting on Forest Fires" in the March of 2001.[165] This Expert Meeting gave various suggestions which were embraced by the Fifteenth Session of the Committee on Forestry (COFO).[166] The FAO following such meets has incorporated a survey and investigation of existing International Forest Fire Agreements and the documentation of data on related lawful viewpoints.[167] In light of this

158. FAO, Strategy to Enhance International Cooperation on Fire Management <http://foris.fao.org/static/pdf/fms/FMStrategy1une2008.pdf> accessed 3-7-2015.
159. FAO Forestry Paper 151 Fire Management Global Assessment, 2006 (FAO 2007) (FAO Forestry Paper 151).
160. FAO, Fire Management Working Paper 18: Fire Management: Review of International Cooperation (FAO 2006) (FAO Working Paper 18).
161. FAO, Fire Management Working Paper 17: Fire Management: Voluntary Guidelines (FAO 2006) (FAO Working Paper 17).
162. Mike Jurvélius, "Forest Fires And International Action" <http://www.fao.org/3/XII/0820-B3.htm#P10_167> accessed 9-2-2020, 18.38.
163. *Ibid.*
164. *Ibid.*
165. *Ibid.*
166. *Ibid.*
167. *Ibid.*

work, regular parts of global and other respective wildfire understandings were distinguished and rules were drafted to escort the nations that wished to set up comparable understandings somewhere else.[168]

Following on from a past report by Bob Mutch and Maresa Bors titled "Follow-up Report for FAO/ITTO International Expert Meeting on Forest Fire Management", in July 2001, the FAO Representatives in signatory nations were appealed to find global agreements and guidelines on wildfires with the end goal of refreshing the rundown of those effectively accessible with the FAO.[169] By the end of 2002, more than 30 responses were obtained from the following countries: Bolivia, Brazil, Burkina Faso, Burundi, Chile, Colombia, Cyprus, El Salvador, Ecuador, Eritrea, Ethiopia, Haiti, Honduras, Indonesia, Laos, Lebanon, Lesotho, Mauritius, Morocco, Peru, Rwanda, Seychelles, Sierra Leone, Sri Lanka, Syria, Thailand, Togo, Tunisia, Uruguay and Venezuela.[170]

The instruments on wildfires that were found by 2004 by the FAO "included:

(i) 20 emergency response international agreements;

(ii) 9 international agreements not dealing with emergency response but covering other aspects of co-operation on forest fires; and

(iii) 204 documents on national legislation, of which 95 are specific to wildfires, and the others deal with forestry generally and relate to wildfire to some extent."[171]

7.1. Examples of emergency response international agreements

- Spain/Portugal, "Protocol between the Kingdom of Spain and the Republic of Portugal regarding technical co-operation and mutual assistance on civil protection, 1993"; "Preparation and execution of projects on scientific and technical co-operation regarding civil protection" (Article 1)[172]

168. *Ibid.*
169. Mike Jurvélius, "Legal Frameworks for Forest Fire Management: International Agreements and National Legislation", Proceedings of the Second International Symposium on Fire Economics, Planning and Policy: A Global View, General Technical Report PSW-GTR-208.
170. Strategy to Enhance International Cooperation on Fire Management (n 158).
171. Their full text is accessible at the FAO Forestry Department's website <http://www.fao.org/forestry/foris/index.jsp?start_id=5288>.
172. *Ibid* at 170.

- Mexico/United States of America, "Wildfire protection agreement between the Department of the Interior and the Department of Agriculture of the United States of America and the Secretariat of Environment, Natural Resources, and Fisheries of the United Mexican States for the common border, 1999", "The rationale for this accord was to: 1. empower wildfire controlling assets starting in the dominion of one nation to cross the USA-Mexico border so as to stifle rapidly spreading fires on the opposite side of the border inside the zone of shared help in suitable conditions; 2. give guidelines for the parties to participate on other fire curtailing exercises outside the zone of shared support." (Article 1)[173]

- China/Russia, "Agreement on Joint Control of Forest Fire between the Government of the People's Republic of China and the Government of Russian Federation, 1995", The goal is to advance wildfire containment in outskirt areas of the parties, to share involvement with wildfire containment, and to help each other to forestall fires and to decrease misfortunes there from.[174]

7.2. Examples of other agreements:

- Indonesia/Malaysia. "Standard procedures of the Memorandum of Understanding on Natural Disasters." "This is the document establishing the procedures to implement the Memorandum of Understanding."[175]

- Ghana/Province of British Columbia (Canada). "Memorandum of Understanding between the Government of the Republic of Ghana and the Government of the Province of British Columbia, 1999" (on schooling and indoctrinating about the fire suppression strategies and means).[176]

- "European Parliament and Council Regulation (EC) No 2152/2003 of 17 November 2003 concerning monitoring of forests and environmental interactions in the Community (Forest Focus)."[177]

173. *Ibid.*
174. Jurvélius (n 162).
175. *Ibid.*
176. *Ibid.*
177. These agreements are available through FAOLEX, the FAO legislative database.

7.3. Legislation specific to forest fires

98 legal instruments of this type were found and listed in Annex 5 of the Report. Thirty eight countries were identified as having this type of legislation, namely: Albania, Antigua and Barbuda, Argentina, Belize, Bolivia, Brazil, Canada, Central African Republic, China, Colombia, Comoros, Costa Rica, Croatia, Dominica, Fiji, France, Grenada, Hungary, Indonesia, Israel, Italy, Madagascar, Mali, Mexico, Morocco, Namibia, New Zealand, Nicaragua, Niger, Philippines, Portugal, Russian Federation, South Africa, Spain, Syria, Tanzania, Togo, Uruguay and Vietnam.[178, 179]

Starting late, seven South American nations have concurred measures to secure the Amazon River, in the midst of worldwide worry over gigantic fires on the planet's biggest tropical woods.[180] Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru and Suriname marked a settlement, setting up a fiasco reaction system and satellite observing. At a summit in Colombia, they additionally consented to coordinately aid in reforestation.[181] And also California is enacting nearly two dozen laws eyeing to prevent and fight the devastating forest fires that have burned huge swaths of the state in last few years and killed thousands of people. Democratic Governor Gavin Newsom also affirmed that he signed the 22 bills, saying others also would assist the state meet its clean energy targets.

7.4. Recommendations made following the 2004 report

Considering the discoveries of this report, "the accompanying suggestions are made for future activity by FAO comparable to the legal aspects of wildfire management"[182]:

- *Refreshing legal data*: The data accessible to FAO on worldwide agreements and national enactments on wildfire management ought to be routinely refreshed with the end goal of keeping up a total and dependable database of legal frameworks on wildfire.

178. *Ibid* at 175.
179. All the legislation mentioned above can be accessed through the FAO Forestry Department website <http://www.fao.org/forestry/foris/index.jsp?start_id=5288> or through FAOLEX <http://www.fao.org/Legal/default.htm>.
180. "Amazon Fires: Seven Countries Sign Forest Protection Pact" (6-9-2019) <https://www.bbc.com/news/world-latin-america-49609702> accessed 9-2-2020, 20.31.
181. *Ibid.*
182. Jurvélius, "Legal Frameworks for Forest Fire Management: International Agreements and National Legislation" (n 169).

- *Creating rules for international agreements*: The blueprint for creating universal understandings contained right now be additionally expounded as detailed guidelines; outlines for creating operational rules and working plans, which intermittently detail the strategy for actualising such understandings, ought to likewise be readied.[183]

- *Surveying national enactments*: The national enactments managing wildfires that were recognised in the report be additionally checked on and surveyed with the end goal of assessing its adequacy to better guide other nations on the revision or plan of national enactment on wildfires.[184]

Current fire management organisations face unquestionably increasing "complex decision making troubles". The advancement of current transportation and media communications frameworks have upheld the formation of national and worldwide communitarian understandings that make it feasible for fire managers to rapidly prepare a lot bigger and more exorbitant suppression forces than was ever the situation previously. Fire management is getting progressively mind boggling and environmental change, changing fuel paradigms, land use patterns, cultural desires, and spending imperatives will keep on confounding fire management much more. Fire directors and fire management can profit by FMDSS (fire management decision support systems) that can be utilised to help sort out such information and rapidly process it to foresee and assess the potential effect of elective procedures and strategies.[185]

8. WHY IS IT STILL FALLING APART DESPITE THE REGULATIONS?

8.1. Failure to investigate and prosecute

Culprits of savagery in the Brazilian Amazon are infrequently brought to equity. Of the 300+ murders that the Pastoral Land Commission has enrolled since 2009, just 14 eventually went before the jury.[186] Of the 28

183. *Ibid.*
184. *Ibid.*
185. Research David L. Martell, "A Review of Recent Forest and Wild land Fire Management Decision Support Systems" (19-4-2015) 1 Curr Forestry Rep 128, 137.
186. How Violence and Impunity Fuel Deforestation in Brazil's Amazon, (Human Rights Watch, 17-9-2019) <https://www.hrw.org/report/2019/09/17/rainforest-mafias/

murders archived right now, two did reach its end.[187] Also, of the in excess of 40 instances of assaults or intimidations, none went to preliminary and criminal accusations have, until this point in time, been documented in just one case.[188] Central police and investigators disclosed to "Human Rights Watch" that such exclusions were typical in the examinations of killings by lumberjacks directed by State Police, who have jurisdiction and authority over common instances of murders.[189]

8.2. Inadequate protections for forest defenders

Since 2004, Brazil has had a program to secure protectors of human rights, including environmental defenders, which, in principle, ought to have the option to give insurance to forest protectors who get death threats.[190] In any case, government authorities and forest defenders questioned by Human Rights Watch consistently concurred that practically speaking the program gives minimal meaningful protection. By and large, it includes simply infrequent telephone check-ins.[191]

8.3. The human cost of inadequate environmental enforcement

In 2016, Brazil consented to the Paris Arrangement on Climate Change and focused on dispensing with unlawful deforestation by 2030 in the Amazon. Somewhere in the range of 2004 and 2012, the nation had decreased generally speaking deforestation in the Amazon by in excess of 80 per cent, from right around 28,000 sq. km. of woodland devastated every year to under 4,600.[192] In any case, deforestation started to move in 2012, and by 2018 it had arrived at 7,500 square kilometers. That total is expected to shoot up by 2020.[193]

9. CONCLUSION AND SYNTHESIS

No country in the world has the moral right to talk about the Amazon. You have destroyed your own ecosystems[194] Otherwise a rhetoric, the Brazilian

how-violence-and-impunity-fuel-deforestation-brazils-amazon> accessed 9-2-2020, 20.59.
187. *Ibid.*
188. *Ibid.*
189. *Ibid.*
190. *Ibid.*
191. *Ibid.*
192. How Violence and Impunity Fuel Deforestation in Brazil's Amazon (n 186).
193. *Ibid.*
194. A statement made by President Jair Bolsonaro (Zoe Sullivan, "The Real Reason the Amazon is on Fire" (*Time*, 26-8-2019) <https://time.com/5661162/

premier does have substance, however, that still doesn't give a State the carte blanche to go ahead and destroy the ecology held in common as and when their circumstances demand. These rhetorics only breed precedents and groundwork for the illegal spreading of wildfires and deforestation.

They say that the ultimate solution for stopping the forest fires is political. So will it be audacious, if in the circumstances, to ask for and justify one sided action by one sovereign in the jurisdiction of the other sovereign if the times so demand to protect and preserve the forests from an imminent and substantial wildfire threat if the latter is not willing to take action for the same. Economic and political pressures from different nations can obviously moot for the cause of preserving the wildlife and forests but the most impactful of all other measures has to in any condition come from the leader of the state. The personality of the leader of the State shall determine in any period of time the fate of the people, wildlife and the environment.

Still, how do we stop the wildfires or at least curtail its effect? The answer is pretty straightforward. It's money. The destruction caused by the fires can be reduced by a manifold if the forests are managed actively, the undergrowth been removed frequently and also culling the trees along the fire lines regularly. With boycotts and NGO pressure failing to deliver strong enough results, those who wish to halt such fires may turn to government action. Such methods could include "offers of international aid[195] and threats of sanctions, new technologies for monitoring hotspots and paying farmers for eco-services", and condemning the perpetrators at all levels globally.

why-the-amazon-is-on-fire/> accessed 10-2-2020, 15.59).

195. Christianna Parr, Nives Dolsak & Aseem Prakash, "The Amazon isn't the only Forest that's Burning. Can Consumer Pressure Stop the Destruction?" (*The Washington Post*, 26-12-2019) <https://www.washingtonpost.com/politics/2019/10/14/amazon-isnt-only-forest-thats-burning-can-consumer-pressure-stop-destruction> accessed 2020-02-9-20, 11.43.

CONSUMPTION VERSUS CONSERVATION *VIS-À-VIS* INDIGENOUS COMMUNITIES

Priyanka Preet and Garima Verma***

ABSTRACT

The research article is our humble attempt to portray the rights enjoyed by indigenous communities across the globe to procure and consume food in consonance with their culture and ancient traditions. We, simultaneously, juxtapose the environmentalists' stance towards the preservation of endangered species like whales, seals, reindeers, which are consumed by Inuits, Eskimos, tribals, nomads and herders. We explore this sensitive balance between the rights of these communities and the principle of sustainability which have gained global attention due to a surge in threat to animal species.

This article is carefully dissected into two Chapters: the first presents to the readers a general explanation of the principle of self determination which gifts to all peoples (including indigenous communities) their identity and diverse character. Further, the meaning and extent of the idea of Right to Food is scrutinised and then we narrow down our research to the native peoples. We argue for their right to use and manage their natural resources in a manner suitable to their culture and traditions. This includes their right to access meat from animals on or off the land. We give pertinent examples from various geographies: the Makah tribe from the United States of America, the Inuits from Greenland and Canada and the Sami reindeer herders from Norway.

The second chapter is dedicated to our contention that it is not the activity of the indigenous peoples, rather, the blatant exploitation of the civilised world that has threatened the animal species. This, in turn violates the right to environment of the natives making their traditional exercises a misconceived threat. We then suggest a cohesion and balance between the two warring principles of consumption and conservation and then

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provide solutions in the concluding remarks. For the purpose of this research, we have employed copious international law documents, books from esteemed authors, articles from reputed Universities and of course, our own creativity.

1. INTRODUCTION

Any discussion on the rights of indigenous communities is incomplete without delving into the Right of Self-Determination in espoused in Article 1 of the Charter of the United Nations.[1] This Right is further protected by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights:

> *"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

It is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies.[2] Self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm.[3] The origins of the principle lie in the New World (America) where the western liberal ideas of democracy, liberty and equality were beginning to ferment. President Woodrow Wilson laid down, in his 14 points, the first-known idea of self-determination:

> *"Self determination is not a mere phrase; it is an imperative principle of action."*

It marked the demise of the era of colonialism, imperialism, suffocation of culture, suppression of adult suffrage and reposed in all peoples the ability "to choose the form of government under which they will live."[4]

Further, the term "all peoples" gives a collective or group character to this principle. This principle is not limited to individuals- it concerns itself with the functioning of a group of people having similar identities, culture, social and political attributes. The general comment on Article

1. Charter of the United Nations, 1945, Art. 1, Ch. I.
2. S. James Anaya, *Indigenous Peoples in International Law* (Oxford Publishing House, 2000) 75.
3. Ian Brownlie, *Principles of Public International Law* (4th edn., 1990) 515.
4. The *Atlantic Charter*, 14-8-1941, Art. 3.

27 propounds that "*this article establishes and recognises a right which is conferred on individuals belonging to minority groups and which is distinct from... individuals in common with everyone else, they are already entitled to enjoy under the Covenant.*"[5] Self determination acknowledges the diverse features of a defined set of people and seeks to integrate them in an ever evolving world order. That is not to say that the diversity or originality is lost in this process of integration, rather it is this overlapping and interrelationship which forms the prime feature of self determination.

Indigenous communities, unfortunately, have suffered similar inequities under democratic governments as they did under colonialist era. Hence, documents such as the Draft United Nations Declaration on the Rights of Indigenous Peoples grant recognition to the language, culture, traditions, and practices of these peoples and strive to protect them against the scourge of authoritarianism or majoritarianism.

> *"Peoples are seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater self-management and autonomy, free from undue interference from Central Governments."*[6]

This Principle is indeed cardinal when it comes to discerning the rights of these native communities to access and avail adequate amount of food which is in consonance with their prevailing cultural norms and inherent traditions. Let us first examine the extent of this right to consume food which is intrinsic to human life and culture and is pledged to all human beings by major human rights documents and covenants.

2. REALISING THE EXTENT OF THE RIGHT TO FOOD

> *"Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food ..."*[7]

The right to adequate food embedded across all human rights instruments, national and international. As an innate constituent of human rights, is recognised as a *jus cogens (*peremptory norm) today. Many contend that

5. General Comment No. 23: The Rights of Minorities, Art. 27, CCPR/C/21/Rev1/Add 5.
6. Australian Government Delegation, Speaking Notes on Self-Determination, at 2 (24-7-1991).
7. Universal Declaration of Human Rights (UDHR), 10-12-1948, Art. 25.

a State may not always have the resources to provide for adequate food to all its citizens and hence imposing an obligation on it is not justified. However, in actuality there only a few States which have scanty food resources. Further, the fact that the State is unable to devise methods to allocate adequate food to its citizens should not vitiate the *jus cogens* characteristic of the Right to Food.[8] The ICESCR proffers solutions in this regard by obligating States to improve the "*production, conservation and distribution mechanisms*", "*reforming agrarian systems*" and encouraging the cooperation between food importing and food exporting nations.

Right to Food is a human right, envisaged to protect human life, health and dignity. The right to food is not about charity, but about ensuring that all people have the capacity to feed themselves in dignity.[9] "*The right to be free from hunger, closely linked to the right to life, is considered an absolute standard, i.e. the minimum level to be guaranteed to all people, regardless of the degree of development of the state in question.*"[10] Simply put, this right is not only confined to providing the bare minimum of calories and proteins to the people. Rather, it is a right to secure all human beings a nutritional diet for them to lead a healthy and fulfilling life. This leads us to conclude that there are three elements to comprehend the scope of this right:

a. Availability

b. Adequacy

c. Accessibility

Availability refers to the convenient obtainability of food through direct procurement from natural resources, hunting, fishing, gathering or cultivation or animal husbandry. Further, food was must be readily available for delivery from the site of production to the location of demand.

Accessibility implies that the people should have financial and physical access to adequate amount of food. This means that the cost of food

8. Francisco Forrest Martin, Stephen J. Schnably, Richard Wilson, Jonathan Simon, Mark Tushnet, *International Human Rights And Humanitarian Law: Treaties, Cases, And Analysis* (First published in 2011, Cambridge Publishing House) 38.
9. Jean Ziegler, What is the Right to Food? <https://www.righttofood.org/work-of-jean-ziegler-at-the-un/what-is-the-right-to-food/> accessed 5-2-2020.
10. Food and Agriculture Organisation of the United Nations, The Right to Food within the International Framework of Human Rights and Country Constitutions <http://www.fao.org/3/a-i3448e.pdf> accessed 6-2-2020.

should be affordable at a rate that other intrinsic amenities should not have to be compromised upon.

Adequacy forms the crux of this research. It refers to the availability of nutritional food which can ably satisfy the nutritional needs of a person based on gender, occupation, geographical location and significantly, culture.[11] It stipulates that food should be free from adverse substances and should not be in violation of one's traditions or culture.

Over time, the general comment[12] has added two other components to the premises of the Right to Food, namely:

Stability necessitates that there should be a stable food supply at all times and places.

Sustainability or *Intra-Generational Equity* calls upon States to ensure a just and equitable utilisation of resources among past, present and future generations. Thus, food resources should not be so exhausted that future generations cease to derive benefits.[13]

The comment expressly recognises the *Cultural or Consumer Acceptability* principle, as well. "*It implies the need also to take into account, as far as possible, perceived non nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.*"[14]

In the succeeding sections, we inquire into this sensitive balance between the principles of adequacy of food of indigenous communities (tribals, Eskimos, Inuits, etc.) and the sustainability of their hunting and fishing practices.

11. Food and Agriculture Organisation of the United Nations, The Right to Food within the International Framework of Human Rights and Country Constitutions <http://www.fao.org/3/a-i3448e.pdf> accessed 6-2-2020.
12. United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12, The Right to Adequate Food, E/C12/1999/5.
13. Priyanka Preet and Vini Srivastava, "Future Of Whaling Vis-À-Vis Japan's Withdrawal From IWC", ISSN 2510-2567, <https://Voelkerrechtsblog.Org/Future-Of-Whaling-Vis-A-Vis-Japans-Withdrawal-From-Iwc/> accessed 3-2-2020.
14. United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12, The Right to Adequate Food, E/C12/1999/5, Cl. 11.

2.1. Indigenous communities and their Right to Food

The indigenous communities are the most vulnerable to the scourge of hunger and malnourishment. This is predominantly due to the social, political and economical exclusion and the discrimination purported towards them by the States, modern society and mainstream media, alike. Further, their adequate food requirements are inextricably linked to their socio-cultural norms and hence often very complex for our comprehension. Their lives are directly dependant on hunting, gathering, fishing, cultivation, animal rearing. Food and its procurement and consumption are often an important part of their culture, as well as of social, economic and political organisation.[15] To facilitate their food procurement, it is crucial for the tribal communities to enjoy proprietorship over their land. When their lands are snatched away unjustifiably, they not only lose their property rights but also the access to adequate food. International and domestic law have begun to recognise their rights and have enacted several documents to secure their ownership. Convention 169 of the International Labour Organisation mandates States "*to take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.*"[16] The FAO Right to Food Guidelines[17] recommends States "*to prevent the erosion of and ensure the conservation and sustainable use of genetic resources for food and agriculture*" The United Nations Declaration on the Rights of Indigenous Peoples was also enacted for this purpose. Article 26[18] states that "*indigenous peoples have the right to use and develop the lands that they possess by reason of traditional ownership*" and due recognition and access needs to be given "*to indigenous land tenure systems.*"[19] UN Resolution of 1973[20] also

15. United Nations Human Rights, The Right to Adequate Food, Fact Sheet No. 34 <https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf> accessed 20-2-2020.
16. Convention 169 of the International Labour Organisation (ILO) concerning Indigenous and Tribal Peoples in Independent Countries, 76th Session, 7-6-1989, Art. 14(2).
17. Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security, 127th Session of the FAO Council, 2004, Guidelines 8-D.
18. The United Nations Declaration on the Rights of Indigenous Peoples, 13-9-2007, A/61/L67, Art. 26.
19. The United Nations Declaration on the Rights of Indigenous Peoples, 13-9-2007, A/61/L67, Art. 27.
20. UN General Assembly, Permanent Sovereignty over Natural Resources, 17-12-1973, A/RES/3171, 28th Session, Supp No. 30 at 5, UN Doc A/9400 (1973).

recalls "*the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries.*"

With a plethora of Conventions, Declarations and Resolutions enumerating their rights, the Right to Food of the indigenous communities is deeply embedded in the International Law and Municipal Law framework. We now peruse the cultural aspect associated with the Right to Food of the indigenous communities which encourage indigenous communities to indulge in whaling, seal-hunting, reindeer herding, etc.

3. RIGHT TO CULTURE: A CONSTITUENT OF RIGHT TO FOOD

Indigenous peoples view culture as the outcome of their relationship with other human beings, plants, animals and the land. Culture is not associated with the concept of commercial exchange.[21] The UNESCO Declaration on the Principles of International Cultural Cooperation states that "*each culture has a dignity and value which must be protected and preserved*" and significantly, that "*every people has the right and duty to develop its culture.*"[22] Culture does not only belong to only a certain community. It is "*a common heritage of mankind and its defence is imperative*"[23] for the sake of human dignity. The right to culture pervades all aspects of life: knowledge, beliefs, art, morals, law, customs and other habits.[24] This implies that the traditions of consuming certain kinds of meat or plant, cooked in a particular fashion, over a period of time would fall within the peculiar habits of a people and hence deserves our respect and due protection.

The Human Rights Committee surmises that "*a violation of the indigenous rights to engage in traditional economic activities amounts to a violation of their right to enjoy their culture.*"[25] The Committee further states that if an activity "*is an essential ethnic or cultural practice*"[26] and the State or any other body prohibits it, it acts in contravention to Article 27 of

21. Alexandra Xanathaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) 207.
22. UNESCO Declaration on the Principles of International Cultural Cooperation, 14th session 1966, ST/HR/1/Rev.5 Art. I.
23. UN Educational, Scientific and Cultural Organisation (UNESCO), UNESCO Universal Declaration on Cultural Diversity, 2-11-2001, Art. 1.
24. Thornberry, *International Law and the Rights of Minorities*, (Oxford University Press) 188.
25. *Ominayak* v. *Canada,* Communication No. 167/1984, UN Doc A /45/40 (1990).
26. *Ivan Kitok* v. *Sweden,* Communication No. 197/1985, UN Doc CCPR/C/33/D/1971985 (1988).

the ICCPR. This unambiguously postulates the symbiotic relationship between the food and culture. The Committee goes even further by saying that deeming the practices of both indigenous and non-indigenous communities as equal may have adverse consequences for the traditional activities of the indigenous communities. The traditional rights of the indigenous peoples take precedence.

Till now the international community has been harsh by restricting the rights of indigenous peoples, especially when they have lands rich in natural resources. This injures their right to procure and produce food out of natural resources. Both ICCPR and ICESCR stipulate that all peoples have a right to "*freely dispose of their natural wealth and resources*" and to "*not be deprived of their means of subsistence.*"[27] Indigenous peoples often use food as a way of running a local economy where they indulge in barter and trading. Hence, using these rich natural resources is not merely a hunting-gathering exercise but also a mechanism to run a nature-based local economy.

There are many cases worth perusal which indicate the Human Rights Committee's orientation towards the peoples' "*right to participate in the use, management, and conservation of these resources*" laid down in ILO Convention No. 169. In the *Ominayak* v. *Canada* case, the Committee opined that carrying out commercial timbering activities by the government would violate the traditional lifestyle of the native Indians. In *Lansman* v. *Finland*, the Committee warned that extreme mining activities could steal the rights enjoyed by the natives under Article 27. The Committee was also critical of Thailand's Community Development plan of 1992 since it had the potential to impact the livelihood and lifestyle of the native community.[28]

Keeping these legislations, remarks and observations in mind, we now scrutinise some case studies across the globe to better grasp the hunting and fishing practices of some communities and bring their sustainability into question.

27. International Covenant on Civil and Political Rights, 1966, Art. 1(2); International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Art. 1(2).
28. Concluding Observations of the Human Rights Committee, Thailand, UN Doc CPPR/CO/84/THA, 2004, para 24.

4. EXAMPLES ACROSS THE GLOBE

Whaling activity is intrinsic to the Makah tribe's culture and way of life. Makah is an indigenous community based in the Pacific coast of Washington. This tribe considers whaling sacred and whalers are deemed as respectable members of the community. The wives of the whalers, away at sea, start fasting and also behave in a certain manner spiritually so as not to impede the whaling process. The mainstream citizens have a hard time accepting the relevance of the practice in the 21st century. There has been a 70-year lapse in whaling and opponents have really questioned the "need" of carrying out the practice. This practice, however, is consistent with the International Whaling Convention which permits aboriginal subsistence whaling. The IWC recognised the "*importance and desirability of accommodating, consistent with effective conservation of whale stocks, the needs of aboriginal people who are dependent upon whales for nutritional, subsistence and cultural purposes.*"[29] The Chukotkas tribe of the erstwhile Soviet Union is also a relevant example. The community restarted whaling in 1994 and the IWC gives no regard to the fact that their practice is only a hundred years old. The Alaskan natives too carry on subsistence whaling and do not encounter any restriction from the International Whaling Commission. Opponents of subsistence whaling are well-intentioned and do not want commercial whaling to occur under the garb of a cultural activity. It is integral to note that these traditional activities are not merely a food procurement exercise. Rather, they encourage community settings, honouring of ancestors and upholding traditions.[30] There are severe health consequences for natives who are compelled to change their diets. In this instance, the Makah people are lactose intolerant due to their lack of connection with dairy or cattle products. In the same vein, the Inuits (of Canada, Greenland and Alaska) are heavily dependent on seal meat and cannot be expected to resort to cultivation in such extreme climate. A light diet of small fish or vegetables would anyway be *inadequate* for their well-being and would violate their Right to Food. The whaling by Makah people is indeed "culturally incoherent" for many Americans or other mainstream communities but that does not take away the legitimacy of the right to practice it. Whale

29. Report of the Thirty-Fifth Meeting of the International Commission on Whaling 38, Appendix III, Office of the Commission (1983).
30. Jeremy Firestone and Jonathan Lilley, Bridging the Dominant-Indigenous Peoples Cultural Divide: Reflections on Makah Whaling, *Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide* (Cambridge University Press, 2008) 358.

meat is a significant food source for these communities and is also used for other products such as wax and cooking oil as well. These communities are a distinct nation, a sovereign by themselves and "*they have a right to decide for themselves when and under what conditions they exercise their treaty and human rights.*"

The *Selbu case*[31] of Norway is also a poignant illustration of the rights exercised by the Sami herders. The case was brought forth by private persons asking whether the Sami reindeer herders had the right to carry on reindeer pasturing on undisclosed private land. The Supreme Court ruled in favour of the Sami herders since they had been carrying on the practice for time immemorial. The Court took into consideration the special conditions of their activity. The Sami people had a nomadic lifestyle and there was lack of visible activity on their part due to a very traditional lifestyle. The case is deemed a milestone in Norway since many herders had attempted to obtain rights over lands to no avail and today they enjoy the rights over the management and use of these natural resources.

In Canada, the traditional activity of hunting seals by Inuits was met with protests such as "*Save the Seals*", questioning the sustainability of their practice on several occasions. The goal of the protests was to restrict commercial exploitation of the Harp Seal. However, it was the subsistence activity of the Inuits which came under fire. The culture of hunting is pinned upon the relationship between the seals, harsh icy conditions and the strategic location of the Inuit villages. Canadians believed that Inuits were indulging in the seal-hunting activity using non-traditional means and had mechanised the entire procedure. The protests grew vehement over time and mid-1982, the European Economic Community imposed a ban on seal products. In the 1983 IUCN summit, the Inuits of Greenland and Canada made a representation and akin to the arguments made for aboriginal sustenance whaling by the Alaskan Eskimo Whaling Commission, they too argued for the deeply traditional activity of seal hunting. Today the Inuits nutritional impoverishment if a certain minimal level of ringed seal harvesting is unsustainable versus reliance on unsustainable dietary alternatives.[32]

31. *Jon Inge Sirum* v. *Esslan Reindeer Pasturing,* District No. 4B/2001 (21-6-2001).
32. George Wenzel, "I was Once Independent: The Southern Seal Protest and Inuit, Anthropologica", Vol. 29, No. 2, Trans-National Problems and Northern Native Peoples (1987), 195-210, <https://www.jstor.org/stable/pdf/25605231.pdf?refreqid=excelsior%3A907137d28f91d2f7d11fa15332e6b7f3> accessed 9-2-2020.

5. INDIGENOUS COMMUNITIES AND THE RIGHT TO ENVIRONMENT AND BIODIVERSITY

Having appreciated the right to procure and produce adequate food in consonance with one's culture, we now enter the second chapter of this research article. The threats to biological diversity are not unknown, and include the undue exploitation of flora and fauna, species extinctions, habitat loss, ever-increasing pollution, expanding tourism, globalisation and climate change. These factors also threaten the sustainability of culture. We have seen in the previous sections, that the people in general and indigenous communities, specifically, on whom this piece of literature focuses, have a customary and fundamental right to food and culture. This section focuses on their right to a healthy and sustainable environment and habitat (for the wild is also their home). In addition to providing a human rights perspective to environmental concerns with regards to the indigenous communities, this section also attempts to bust the common myth that the hunting, fishing and other food accumulation activities of these indigenous communities are a threat to the environment.

5.1. Right To Environment

Let us start with a fact that is not unknown to any of us. Biodiversity contributes directly (through provisioning and regulating ecosystem services) and indirectly (through supporting ecosystem services) to many aspects of human well-being, including security, provision of essential goods and resources, employment, health, social and cultural relations,[33] and "*freedom of choice and action.*"[34] Now, the observation of how modern societies generally function, as institutions, would help us understand the issue better. Modern societies are generally engaged in a profit-earning rut for benefitting only their own species by promoting agriculture, manufacturing, housing, and transportation etc. and interested only in industrialisation, which facilitates these activities. Consequently, forests are felled for timber and mountains are hollowed-up for minerals and ores. In these processes, wild-dwelling animals are replaced with livestock, forests and wetlands are filled with houses, and the courses of free flowing rivers altered to produce hydropower and used

33. Michael I. Jeffery, Biodiversity Conservation in the Context of Sustainable Human Development: A Call to Action in Michael I. Jeffery and ors. (eds.), *Biodiversity, Conservation Law and Livelihoods: Bridging the North-South Divide* (Cambridge University Press, 2008).
34. Millennium Ecosystem Assessment, 2005; Ecosystems and Human Well-being: Biodiversity Synthesis (Washington, DC: World Resources Institute, 2).

as outlets to carry away wastes. This is what we do; it is how the modern economy functions. We may term it development or industrialisation, but nevertheless, it is essentially an economy that has altered and played with the natural course of things. It is these civilised societies which perform commercial activities and threaten the environment and not the indigenous communities, which harmoniously co-exist with nature and are far from commercial corruption.

Indeed, we need houses, crops, and meat. We are not suggesting that the system be remodelled in a way that would impede development, or that would take us back to the wild. The question we raise is whether our dominion over the land that we hold, is so supreme, that we can exploit it to any extent to suit any of our whimsical needs? The idea of unlimited ownership is the root argument of the groups focused on commercial development. However, it, most certainly, is not the way of nature and customs.

The principle of intergenerational equity[35] states that every generation holds the Earth in common with members of the present generation and with other generations, past and future. The principle articulates a concept of fairness among generations in the use and conservation of the environment and its natural resources (see also Conservation of Natural Resources; Environment, International Protection).[36] The principle is the foundation of sustainable development.[37]

As recognised by the Principle 21 of the Stockholm Declaration[38] and the Principle 2 of the Rio Declaration,[39] which impose a responsibility on States to ensure that activities on their territory do not cause damage to others, obligations to observe the right to the environment have been defined in environmental agreements and statutes in all of Earth's regions.[40] Breaches of the duties may entail the same factors that the UN

35. Edith Brown Weiss, "Intergenerational Equity" in Max Planck Encyclopaedias of International (OUP) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421> accessed 3-2-2020.
36. *Ibid.*
37. *Ibid.*
38. Declaration of the United Nations Conference on the Human Environment, 1972 (Stockholm, Sweden) Principle 21.
39. Declaration of the United Nations Conference on Environment and Development, 1992 (Rio de Janerio, Brazil) Principle 2.
40. Prof. Nicholas A. Robinson, "Environmental Law: Is an Obligation Erga Omnes Emerging?" (Panel Discussion at the United Nations, 2018).

International Law Commission has delineated in the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[41]

Unguided and unregulated use of natural resources threatens the long-term continuity of the environment. Extensive use of resources has always been encouraged by States in general. Their policies are mainly concerned with augmenting growth rates and strengthening economies. Numerous countries have benefited from the exploitation and conversion of natural ecological units to human-controlled ones and this has come at the cost of exploitation of biodiversity.[42]

Thus, it becomes imperative for the States to perform their obligation to protect and preserve the environment.[43] This obligation contains no qualification[44] and has attained the status of Customary International Law.[45] States need to cooperate on a global basis and through appropriate organisations and also comply with the standards laid down within the convention.[46]

> *An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.*[47]

This problem has far reaching repercussions–depletion of our biological heritage being the most talked about. Another equally grave repercussion is the destruction of habitat for not just the wildlife but also our fellow humans, the indigenous communities. Indigenous communities like Indians, Eskimos and Inuit, etc. dwell away from the so called "developed" areas, in the serene and undisturbed forest lands and mountains, etc., where they can be closer to their natural instincts. The commercial activities exercised by States and private entities under the garb of development and industrialisation contribute to global warming, climate change, excessive and undue exploitation of natural resources and what

41. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (International Law Commission, Session 53, 2001).
42. Millennium Ecosystem Assessment, 2005. Ecosystems and Human Well-being: Biodiversity Synthesis (Washington, DC: World Resources Institute, 4).
43. UNCLOS Art. 192.
44. Yoshifumi Tanaka, *The International Law of the Sea* 276 (2nd edn. 2015).
45. M.H. Nordquist and ors. (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary* ¶ 192.8 (1991).
46. UNCLOS Art. 197.
47. *Just* v. *Marinette County,* 201 NW 2d 761 (1972).

not. This, in turn, leads to the melting of glaciers at polar regions, which is habitat destruction for Eskimo and Inuit populations. It is also a cause for the depleting forest cover, which is proving to be a habitat crisis for tribal communities around the world. The constant erosion of the natural resources, on which development and industrialisation depends, proceeds unabated. These developmental activities are the major contributing factor to the prevailing environmental issues.

The indigenous communities, however, often depend directly on natural resources and functioning ecosystem services for their livelihoods. They are also particularly vulnerable to environmental hazards, such as floods, droughts, and landslides.[48] It is also important to note that because this is a threat to the wildlife, as it leads to their habitat destruction, it also becomes a cause of serious concern for the indigenous communities because they also lose their natural habitat. The threat to wildlife also has a direct impact on their right to food, as already established in the previous section, since the indigenous communities are dependent on wild species like seals, whales and reindeers, for their nutritional as well as medicinal requirements.

The Declaration of Principles adopted by the Indigenous Peoples Preparatory Meeting in 1987 urged indigenous control of their biodiversity and sharing of the benefits of biodiversity.[49] This draft declaration recognises rights of control of indigenous medicines and health practices, including plants, animals and minerals, and protects indigenous sciences, technologies, genetic seeds, medicines, flora and fauna.[50] It is worth noting here, that States have expressly noted their disagreement with these provisions.[51] The Convention on Biological Diversity, 1992, (hereinafter "CBD") brings in a welcome change in this orientation. The Preamble of the Convention acknowledges the close and traditional dependence

48. Michael I. Jeffery, Biodiversity Conservation in the Context of Sustainable Human Development: A Call to Action in Michael I. Jeffery and ors (eds.), *Biodiversity, Conservation, Law and Livelihoods: Bridging the North-South Divide* (Cambridge University Press, 2008).
49. Declaration of Principles Adopted by the Indigenous Peoples (Preparatory Meeting of UNWGIP, 1987) <http://www.nzdl.org/gsdlmod?e=d-00000-00---off-0ipc--00-0----0-10-0---0---0direct-10---4-------0-1l--11-en-50---20-about---00-0-1-00-0--4----0-0-11-10-0utfZz-8-00&a=-d&c=ipc&cl=CL1.4&d=HASH0132272776139b13a8967ac4> accessed 6-2-2020.
50. *Ibid.*, para 21.
51. Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) 224.

of many indigenous communities on biological resources, the vital role that such resources play in their lives and livelihoods and the important contribution that traditional knowledge can make to the conservation and sustainable use of biological diversity.[52] This provision is extremely important, as it forms the genesis of the global recognition of indigenous biodiversity rights, despite the fact that these rights are still nascent and merely declaratory in nature.

We cannot jeopardise indigenous peoples' right to live freely, their right to adequate food and their right to continue their cultural and traditional practices, just as they cannot ours. Their perspectives and problems need to be brought forth and granted the same attention as the others. The frontrunners in international and municipal legal frameworks have the authority and opportunity of environmental governance and they urgently need to take the indigenous communities into consideration in their administrative tasks.

5.2. A Misconceived Threat

Here, it is also significant to draw the attention of the readers towards a misconceived and misinterpreted fact. Civilised communities believe that the hunting-gathering lifestyle of the indigenous people is a threat to the biodiversity. We contend otherwise. Indigenous people hunt for their sustenance, and they use traditional methods for hunting, which are hardly a threat. The threat arises wherever hunting gets commercialised and the use of highly mechanised tools and weapons comes into picture, which makes it very easy for the animal species to fall prey to human hands. As the process becomes convenient, the frequency of hunting for commercial purposes soars and the wildlife species fall endangered.

For instance, illegal fishing is fishing without a license, excessive limits, catching prohibited species and other violations of standards that have been laid down by regional fisheries management organisations.[53] Indigenous communities understand the value of nature well, probably better than most of us. There are hardly any instances of illegal fishing, or fishing and hunting in excessive limits by indigenous communities.

Another glaring example of the same is of the Makah tribe, which has already been discussed in the earlier section. The Makah see the whales

52. Convention on Biological Diversity, 1992.
53. Tim Stephens, *The Oxford Handbook of the Law of the Sea* (2nd edn., 1982).

they hunt as the most respected members of their tribe and they treasure the sea resources, on which they are largely dependent above all else. On an occasion, a Makah chief made this point eloquently when he said, "*I want the sea. That is my country.*"[54] The Makah's close relationship with the sea mirrors their traditional dependence on it for subsistence purposes as most of their food supply came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal.[55] It can safely be concluded, that the Makah, although engaged in whaling and hunting, continue it for sustenance and cultural purposes only and value the wealth of the resources of the sea above all. It is the people given to commercial objectives, who need to be invigilated, if we are to conserve our environment and biodiversity. This is very aptly illustrated by another example, that of commercial whaling by Japan. Commercial Whaling was prohibited by the International Whaling Commission and until recently Japan was a part of it. In 1986, all IWC members agreed to a hunting moratorium to allow whale numbers to recover.[56] Japan has maintained that their last commercial hunt was in 1986, while they continued commercial whaling under the garb of research missions. There were exceptions in the moratorium, allowing indigenous groups to carry out subsistence whaling and allowing whaling for scientific purposes.[57] Japan exploited this clause abundantly. Since 1987, Japan has killed between 200 and 1,200 whales each year, claiming to have established sustainable quotas, which was also later criticised by the IWC. In 2018, Japan tried one last time to convince the IWC to allow whaling under sustainable quotas, but failed, so it left the body in July, 2019.[58] Ever since Japan's departure from the IWC, it has resorted to commercial whaling in its territorial waters, unchecked by any appropriate international commission.

5.3. The Friction between Conservation and Development and why Cohesion between The Two becomes Essential

With this being said, there is one issue that always arises and is never addressed in certain terms. The conservation of biodiversity and the right

54. Ann M. Renker, Whale Hunting and the Makah Tribe: A Needs Statement (International Whaling Commission, IWC/54/AS2, Agenda Item 5.2, 2002).
55. Firestone and Lilley (n 30).
56. "Japan Whaling: Why Commercial Hunts Have Resumed Despite Outcry" (*BBC News*, 2-7-2019) <https://www.bbc.com/news/world-asia-48592682> accessed 4-2-2020.
57. *Ibid.*
58. *Ibid.*

to environment of the indigenous community often comes in conflict with the developmental policies of States. It is a very apparent observation, that the focus on developmental policies, mainly by developed nations, always dilutes the impact of environmental concerns in global summits and conferences.[59] This is probably one of the many reasons why the duty to protect the environment has still not attained the status of a peremptory norm, despite the growing concerns and activism for the conservation of the biodiversity globally.

If not yet acknowledged to be *jus cogens*, the obligation to protect the environment is important for human civilisation. The duty is at least *erga omnes*.[60] In the same regard, an Advisory Opinion of historic import, by the Inter-American Court of Human Rights of 15 November 2017, recognises that the right to a healthy environment is an autonomous right, that has collective scope as a universal norm owed to present and future generations and at the same time has individual application in itself and in relation to other substantive rights, such as the right to health, life or personal integrity.[61] The Court also recognises the paradigm of procedural rights within the right to a healthy environment, such as the rights of access to environmental information, access to participation in environmental decision-making and access to justice.[62] As the scientific community's confirmations make the requirement to obviate environmental damage more evident, the duty to conserve becomes more and more unambiguously accepted. Time and again, the significance of conservation of the environment, the biodiversity and natural resources by every human being has been substantially emphasised. However, a conflict arises when this duty to protect the biodiversity and the right to environment for one group intersects with the developmental concerns and livelihood of another.

The friction between the conservation of biodiversity on one hand, and development, on the other, is perhaps best reflected in Section 8(*j*) of the 1992 CBD. This section calls upon the States to conserve biological diversity and to "*respect, preserve and maintain*" indigenous cultures while at the same time promote the wider sustainable use of

59. United Nations Conference on Environment and Development 1992, Principle 2.
60. Prof. Nicholas A. Robinson, "Environmental Law: Is an Obligation Erga Omnes Emerging?" (Panel Discussion at the United Nations, 2018).
61. *Ibid.*
62. *Ibid.*

the components of biological diversity.[63] This Section in the CBD is recognised and understood by many, including head of States of various nations, but the actual implementation and incorporation of the same in State policies and strategies, and the understanding of the essence of the same by the peoples in general is still an unattained goal.

6. SUGGESTIONS AND CONCLUDING REMARKS

While the concern of the "conservation necessity" doctrine is well-founded, the tribes' *"fair share"* to whales, seals, reindeers or other threatened species cannot be taken away. A plausible solution is fixing quotas. In the case of the Makah people, subsistence quotas on the grey whales and right whales were set post deliberations with the tribe leader. The IWC gave due recognition to their aboriginal rights and to other such communities as well. However, before such quotas are set, a thorough Environment Impact Assessment needs to be performed. Quotas have also been fixed on the Indians of America for the bald and golden eagle hunting. In terms of fishing, territories and regions can be delineated for optimal utilisation of meat. This, of course, should be in consonance with the principles of adequacy and accessibility envisaged in the Right to Food. The appropriate institutions, for instance, the IWC or IUCN should monitor the hunting exercise of the indigenous communities, closely, and collaborate in terms of re-harvesting of the species. We must always remember that no matter how well-intentioned the objectives of ICRW are, they have been drafted and consequently imposed on the indigenous tribes by the developed States. It is important to work cohesively towards a balance of opinions from all the aggrieved sections. When the ICRW and the Fur Seals Agreement are perused, we notice that the indigenous communities have been treated as the responsibility of the State. Today, there is a change in this orientation as the voices of these peoples are increasingly being seen as independent and sovereign.

It is integral that States commence assimilating biodiversity and environmental issues of the marginalised communities into the sustainable development goals and devise adequate strategies. It is necessary to achieve a functional cohesion between developmental and environmental concerns. The involvement of the civil society in conservation and environmental management, focusing on the at-risk groups like the indigenous communities and improving environmental regulations and their enforcement are some of the foremost improvements needed for

63. Convention on Biological Diversity, 1992, S. 8(*j*).

the conservation of biological resources. Indigenous biodiversity rights need to be globally recognised and given normative protection, not mere declaratory importance, as the status quo is.

Above all, it is required that the Right to Environment of the indigenous communities, or the Right to Environment of the people in general, be recognised, not just as *erga omnes*, but as *jus cogens* under international and municipal laws and precedents, akin to right to food and right to culture. Although, the mere recognition might seem frivolous, recognition under law is always a compelling contributor in moulding people's consciousness.

Indigenous communities all around the world are those marginalised sections of the human population, who have never been fully accommodated by international law and human rights regimes. Through various struggles, they have found some recognition, but they still lack adequate representation. They form an important part of the evolution of our species, and hence, it becomes imperative, that their rights to culture, adequate food, appropriate habitat, favourable environment and biodiversity be recognised and protected. These rights are consistent and compatible with the spirit of international law. The existing norms in international law favour the preservation of the indigenous collective identity, but they impart only declaratory recognition to their rights. The normative protection of these rights becomes essential, if we are to come up with human rights regimes that are pluralistic, inclusive and appreciative of all human beings, and not just the ones that are already recognised.

CLIMATE REFUGEES AND THEIR STANDING IN INTERNATIONAL LAW: A HUMAN RIGHTS PERSPECTIVE

*Somanshu Shukla**

ABSTRACT

The article argues that climate refugees, under the current international law paradigm, do not possess any recognition and protection. It further argues that the anachronistic international legal instruments, indeterminate and intra-State nature of a significant portion of climate migration, and lack of political support of climate refugees are the factors responsible for this. This article, after establishing the need to change the status quo, looks at some of the possible solutions in Part-II and argues why the creation of a new international instrument in the form of a Climate Refugee Convention would be the most suitable one instead of just reforming and employing the existing international law provisions. Among the several proposed solutions are: the application of international human rights, Guiding Principles of Internal Displacement (GPID) for providing protection to climate refugees, and the extension of the jurisdiction of the United Nations Framework for Convention on Climate Change (UNFCCC) for providing protection to climate refugees. However, all these proposed resolutions suffer from limitations that make them unsuitable for alleviating the problems of climate refugees. A new legal instrument in the form of a Climate Refugees Convention, however, emerges as a suitable solution as it would address the unique needs of climate refugees, while allowing for the incorporation of measures and provisions from various sources that provide for proper rectification of the grievances of climate refugees. It would also provide incentives to States to uphold the convention and protect climate refugees. However, certain challenges also lie in the formulation and implementation of a Climate Refugee Convention before putting forward some suggestions as to how these challenges may be tackled.

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1. INTRODUCTION

Human activities threaten to exacerbate climate change, which is bound to exacerbate the problem of climate migration. While preventive measures are the need of the moment, this article highlights the need of a framework to protect those who will be displaced by the climate change-related extreme weather occurrences. This article dwells upon the lack of recognition and protection to climate refugees in international law, highlighting a plethora of grievances that threatens the human rights of climate refugees. The article then looks at various possible resolutions in order to highlight why a new international Convention focused on according protection to climate refugees is the most suitable solution. This article attempts to add the body of literature already available on the issue by providing a holistic perspective of the scenario concerning climate refugees and draws upon a variety of ideas and proposals to present the ideal solution to deal with the lacuna in International law with regard to climate migration and the infringement of human rights of those affected. The article develops ideas that have been brought forth as providing alleviation to climate refugees. It highlights the drawbacks of other solutions and shows why it is imperative to adopt the solution proposed in the article. By doing so, it hopes to bring focus to the problems faced by climate refugees and urge people to think about the how to resolve the situation. This would contribute in the push for reforms needed to rectify the problems facing climate refugees.

2. CLIMATE CHANGE AND CLIMATE REFUGEES

Climate change is a natural phenomenon that has occurred throughout the ages naturally. But a wide variety of human activities, including those involving the fossil fuel consumption, have caused rapid climate change by exacerbating processes that confine significant amounts of heat in the earth's atmosphere.[1] Climate change, therefore, has been defined by the UNFCC as a "change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable periods"[2]. As a consequence of the aforementioned activities, there has been a substantial increase in the concentration of carbon dioxide in the earth's atmosphere over the past few centuries and especially in

1. Albert C. Lin, "Evangelising Climate Change" (2009) 17 NYU Envtl. LJ 1135.
2. United Nations Framework Convention on Climate Change, (adopted 9-5-1992, entered into force on 21-3-1994) 1771 UNTS 107 Art. 1.

the past 150 years, causing the global mean temperatures to rise.[3] The evidence indicates that a doubling of CO_2 from preindustrial levels would result in a temperature increase between 1.5°C and 4.5°C by the century.[4] Even in the best case scenario, such a rise in temperature would lead to alteration in global weather and climatic patterns. This threatens rising sea levels due to melting glaciers, erratic rainfall pattern, and more severe storms, floods and droughts that will displace millions of people in the coming years.[5] Such displaced people may be defined as "climate refugees" or "environmental refugees". There is still no clear-cut definition of the term "climate refugees" as the relationship between climatic and environmental changes is not a straightforward stimulus-response mechanism but a multidimensional relationship involving environmental, economic, political and cultural factors.[6] However for the purposes of this paper, this term refers to people displaced across international boundaries permanently due to a marked environmental disruption caused by global climate change such as severe desertification, rise in sea-level, etc.,[7], [8] that adversely affect their lives or living conditions.

3. CLIMATE REFUGEES IN INTERNATIONAL LAW

Climate change is, perhaps, one of the most documented phenomena of the 21st century, but while most of us might have been acquainted with it through the writings of others, some others have had the misfortune of experiencing it for themselves. More than 24 million people have been forced to migrate due to climate and weather-related disasters in 2016.[9] With human activities continuously exacerbating climate change,

3. Jullee Kim, "Reframing Humans (Homo Sapiens) in International Biodiversity Law to Frame Protections for Climate Refugees" (2018) 42 Wm & Mary Envtl. L. & Pol'y Rev. 805.
4. Daniel A. Farber, "The Case for Climate Compensation: Justice for Climate Change Victims in a Complex World" (2008) 2008 Utah. L. Rev. 382.
5. Albert C. Lin, "Evangelising Climate Change" (2009) 17 NYU Envtl. LJ 1135.
6. Jullee Kim, "Reframing Humans (Homo Sapiens) in International Biodiversity Law to Frame Protections for Climate Refugees" (2018) 42 Wm. & Mary Envtl. L. & Pol'y Rev. 805.
7. Myers N. (2005), Environmental Refugees: An Emergent Security Issue, Session III-Environment and Migration, 13th Meeting of the OSCE Economic Forum, Prague, Czech Republic <https://www.osce.org/eea/14851> accessed 25-3-2020.
8. Benoit Mayer, "The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework" (2011) 22 Colo. J. Int'l Envtl. L. & Pol'y 357.
9. 2017 Global Report on Internal Displacement (Internal Displacement Monitoring Centre) <https://www.internal-displacement.org/global-report/grid2017/> accessed

migrations due to climatic disruptions are bound to increase. Estimates show that up to 200 million people could be displaced due to climatic disruptions by 2050.[10] The true significance of this figure can be grasped by the fact that it represents a ten-fold increase over today's documented refugee and internally displaced population.[11] Rising sea levels, frequent floods and droughts, desertification, and powerful storms will be among the primary reasons behind this change, and will in all probability, permanently displace millions of people.[12]

3.1. Anachronistic International Legal Instruments

Various steps can be taken to minimise the damage caused by climatic aberrances but lack of a well-oiled mechanism to redress the grievances of the victims would infinitely aggravate their suffering. Take for instance the case of Tuvalu, a small island nation in the Southern Pacific inhabited by 11,000 people, which is predicted to get submerged completely due to rising sea level in the next 50 years.[13] So, in such a scenario, the only viable recourse can be migration to other countries. But the lack of a mechanism to facilitate such migration would, undoubtedly, accentuate their problems tremendously. This is the exact problem facing "climate refugees". Although they flee from catastrophic events that imperil their human rights,[14] they do not come within the ambit of the traditional legal definition of "refugee",[15] thereby depriving them of the rights available to refugees under various international conventions. The 1951 Convention relating to the Status of Refugees and its 1967 protocol has been described as the "cornerstone" and "centre of international legal framework for the protection of refugees".[16] The convention defines the term "refugee" as "someone unable or unwilling to return to their country of origin

25-3-2020.
10. *Ibid.*
11. Brown O., "Migration and Climate Change" (2008) 31 IOM Migration Research Series 1.
12. Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv. Envtl. L. Rev. 349.
13. Tiffany T.V. Duong, "When Islands Drown: The Plight of 'Climate Change Refugees' and Recourse to International Human Rights Law", (2010) 31 U. Pa. J. Int'l L. 1239.
14. Tiffany T.V. Duong, "When Islands Drown: The Plight of 'Climate Change Refugees' and Recourse to International Human Rights Law", (2010) 31 U. Pa. J. Int'l L. 1239.
15. Siobhan McInerney-Lankford, "Climate Change and Human Rights: An Introduction to Legal Issues" (2009) 33 Harv. Envtl. L. Rev. 431.
16. Joan Fitzpatrick, "Revitalising the 1951 Refugee Convention" (1996) 9 Harv. Hum. Rts. J. 229.

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[17] This means that "climate refugees", who migrate due to catastrophic climatic events, have no recognition under the convention as it stands today. Even the discourse about whether climate displacements come within the ambit of the convention revolves around whether climate change can be considered "persecution",[18] which is dominated by opinions holding that the aforementioned group of persons cannot be classified as "persecuted".[19] Since this convention along with its 1967 protocol are the only recognised instruments of international law to redress the grievances of the displaced, climate refugees have, effectively, found themselves out of the legal framework of international law.

3.2. Indeterminate Nature of Climate Migration

This is not the only difficulty in creating a legal framework that can protect climate refugees. The fact is that it is really difficult to correlate climate change and other environmental factors with migration.[20] The variability of natural phenomenon and their interaction with other socio-political factors makes it difficult to determine the extent to which migration, due to climatic factors, might occur.[21] This is exemplified by the wide range of predictions, regarding the displacement of people due to climatic factors, which lie between 50 million to 200 million by the year 2050.[22] This, coupled with regional variance incapacity to withstand climate change, makes it difficult to distinguish climate change displacements from other kinds of environmental displacements.[23] The difficulty in determining the true extent of climate displacements can be grasped by the fact that some

17. Convention Relating to the Status of Refugees, (adopted on 28-7-1951, entered into force on 22 April) 606 UNTS 267.
18. Heather Alexander and Jonathan Simon, "Unable to Return in the 1951 Refugee Convention: Stateless Refugees and Climate Change" (2014) 26 Fla. J. Int'l L 531.
19. Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv. Envtl. L. Rev. 349.
20. Jaswal, P., & Jolly, S., "Climate Refugees: Challenges and Opportunities for International Law" (2009) 55(1) Journal of the Indian Law Institute 45.
21. Anthony Oliver-Smith, *Nature, Society, and Population Displacement: Toward an Understanding of Environmental Migration and Social Vulnerability* (2009) 8 Publication Series of UNU- EHS 8.
22. *Ibid.*
23. Stellina Jolly and Nafees Ahmad, "Climate Refugees under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice" (2014-2015) 14 ISIL YB Int'l Human & Refugee L. 216.

scholars refrain from using "climate displacements" and instead employ the term "environmental displacements".[24]

Also, while there is consensus as to the tremendous magnitude of displacements that climate change might cause due to rising sea-level and changing weather patterns, most of the migration that might occur due to climate change will, in all probability, occur within State boundaries, with increasing magnitude of transnational migration. This was evident in the case of Bangladesh, where 500,000 people were displaced after half of Bhola Island became permanently flooded. They were described as "world's first climate refugees".[25] However, there is a substantial population of people that will inevitably become climate refugees which in itself justifies recognition and grant of protection, even if we were to disregard the existence of climate refugees. The ideal example of this is the case of small island States under the threat of submergence, where internal displacement will be impossible.

3.3. Lack of Political Will

Despite there being a need for reform, countries are becoming reluctant to perform their obligations as laid down in international treaties and conventions relating to refugees, due to the increasing social and economic costs of the burgeoning number of conventional refugees,[26] it seems highly unlikely that there will be any eagerness on part of the States to widen the scope of the 1951 refugee convention to include climate refugees. This is evident by the refusal of UNHCR to support the Refugee Convention and has adopted the reasoning that "refugee" is a legal term with a settled meaning centred on persecution,[27] the expansion of which would weaken the existing notion of the right to asylum as a universally recognised human right because the discretionary power of the government to deny or accept asylums would also increase.[28]

24. Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv Envtl. L. Rev. 349.
25. *Ibid.*
26. Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv. Envtl. L. Rev. 349.
27. McAuliffe M. and Koser K., *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-Making* (ANU Press, 2017).
28. Marta Picchi, "Climate Change and the Protection of Human Rights: The Issue of Climate Refugees" (2016) 13 US-China L. Rev. 576.

There have been initiatives by some countries with regards to offering legal protection to "climate refugees". For instance, New Zealand has established a special annual quota of citizens from Tuvalu to be offered residence in the country.[29] However, even such initiatives are accompanied by stipulations that leave much to be desired. New Zealand's Pacific Access Category that was created to enable Tuvaluans to migrate to New Zealand required applicants to be between eighteen to forty-five with "an acceptable offer of employment" and basic English proficiency.[30] There are some regional conventions as well which do not exclude climate refugees from their framework. For example the 1969 OAU (Organisation of African Unity) Refugee Convention offers an inclusive definition of refugees.[31] But, these, on their own, are insufficient to address the concerns arising out of a global problem such as climate displacement. The aberrational protection accorded to climate refugees needs to be juxtaposed with the apprehensions of certain countries like the United States of America, concerning climate change and acceptance of responsibility for the environmental degradation that has been caused by their activities.

Taking into consideration all the aforementioned grievances, we can say, with some certainty that climate refugees do not have access to legitimate legal protection under the prevailing international law system and mechanisms.

3.3.a. *Potential Policy Reforms*

Efforts to provide climate refugees with protection have often been clamped down upon based on the assertion that most climate migration occurs within national boundaries. Further, it is asserted that it is difficult to determine the true extent of International migration based on environmental factors.

It is now accepted that there is a clear link between climate change and displacement even if there might not be a mono-causal relationship between the two. While most of climate migration does occur internally

29. Jaswal, P., & Jolly, S., "Climate Refugees: Challenges and Opportunities for International Law" (2009) 55(1). Journal of the Indian Law Institute 45.
30. Benoit Mayer, "The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework" (2011) 22 Colo J Int'l Envtl. L. & Pol'y 357.
31. "OAU Convention Governing the Specific Aspects of Refugee Problems in Africa" (adopted on 10-9-1969, entered into force on 20-7-1974) 1001 UNTS 45.

within countries, it is likely that cross-border migration due to climate change will occur more and more frequently.[32] One such instance is of the migration of the people living in low-lying island countries. With the inevitable rise in sea level, people in such countries will have no other option than to migrate from their countries to other countries. Maldives is an archipelago in the Indian Ocean with numerous islands inhabited by 350,000 people. 80 per cent of the islands are less than 1.5 metres above sea level with the highest point being 2.3 meters. [33] Projections show that the global sea level-could rise by 0.98 meters by the end of the 21st century.[34] This will lead to submergence of large parts of Maldives and leave around 300,000 people homeless.[35] In such a scenario, most of the displaced would have no option except to migrate to other countries and in the absence of a mechanism that addresses the concerns of climate refugees, a humanitarian crisis wherein the human rights of the affected would effectively stand violated. Another instance that highlights how climate change might leave people with no recourse other than migrating to another country is that of the Republic of the Marshall Islands which could lose 80 per cent of the land of its largest city Majuro Atoll due to rise in sea level.[36] Then there is the case of Kiribati, which may become inhabitable due to climate change long before it gets submerged under the sea.[37] This process is already in motion due to rising sea-water breaching fresh water-ponds leading to the abandonment of many villages in the region. Underdeveloped and developing countries such as Bangladesh, Egypt, and Nigeria that are facing high demographic pressure will be unable to cope with the "foreseeable loss of inhabitable territory" due

32. World in Transition: Climate Change as a Security Risk, (WBGU) <https://www.wbgu.de/en/publications/publication/welt-im-wandel-sicherheitsrisiko-klimawandel> accessed 21-11-2019.
33. Simran Dolla, "International Legal Protection for Climate Refugees: Where Lies the Haven for the Maldivian People" (2015) 6 J. Sustainable Dev. L. & Pol'y 1.
34. Church, J.A., P.U. Clark, A. Cazenave, J.M. Gregory, S. Jevrejeva, A. Levermann, M.A. Merrifield, G.A. Milne, R.S. Nerem, P.D. Nunn, A.J. Payne, W.T. Pfeffer, D. Stammer and A.S. Unnikrishnan, IPCC Fifth Assessment Report, WGI Ch. 13: Sea Level Change (2014). Intergovernmental Panel On Climate Change, <https://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter13_FINAL.pdf.> accessed 21-11-2019.
35. Simran Dolla (n 33).
36. Jullee Kim, "Reframing Humans (Homo Sapiens) in International Biodiversity Law to Frame Protections for Climate Refugees' (2018) 42 Wm & Mary Envtl. L. & Pol'y Rev. 805.
37. Xing-Yin Ni, "A Nation Going under Legal Protection for Climate Change Refugees" (2015) 38 B. C. Int'l & Comp. L. Rev. 329.

to climate change.[38] This is so because such countries possess a large population due to which their environmental resources are already subject to competition.[39] In a scenario of massive internal displacement, such countries are unlikely to be in a position to provide proper protection to those displaced due to which they are likely to migrate to other countries. The situation of countries like Tuvalu, Maldives, Republic of Marshall Islands and Kiribati and the potential crisis awaiting countries such as Bangladesh and Egypt show that there is a substantial population of people that may be forced to migrate to other countries in the future. Even if the problem of climate refugees is not severely grave at the present time, conducting extensive research and studies on environmentally related international migrations should be a priority as it would serve as a useful resource in making more precise prediction of how climatic and environmental factors will cause international migration in the future, as the problem of cross-border climate migration is bound to get severely aggravated.[40]

Despite the absence of mechanisms that provide resettlement rights or financial assistance to climate-induced migrants,[41] many argue that international human rights law and the home country may provide complementary protections. However, there exists a protection chasm for climate refugees who are:

(1) forced to move to another country,

(2) do not otherwise qualify as a refugee or refugee in the new country,

(3) are without protection from its country of origin or from the new country's domestic immigration laws, and

(4) are not adequately given assistance through international human rights mechanisms.[42]

Another resolution that is put forward is the expansion of the refugee convention to climate refugees. However, the purpose and object of the refugee convention is the protection of civil and political right of people

38. Benoit Mayer (n 30).
39. *Ibid.*
40. *Ibid.*
41. *Ibid.*
42. Jullee Kim, "Reframing Humans (Homo Sapiens) in International Biodiversity Law to Frame Protections for Climate Refugees" (2018) 42 Wm & Mary Envtl. L. & Pol'y Rev. 805.

from persecution of oppressive governments.[43] Such an expansion would not only lead to the dilution of protection accorded to conventional refugees but would also be inefficient in providing for the unique needs of climate refugees as environmental hazards were never intended to be accounted for by the convention. Another argument against the extension of the Refugee convention to climate refugees is that it protects populations only after they venture outside the confines of their home country.[44] To avoid assimilation of refugees, many States, instead of providing protection to climate refugees would reinforce their borders so as to prevent climate refugees seeking asylum from entering their territory. This would, effectively, prevent climate refugees from escaping perilous conditions prevailing in their home countries. So, because of the aforementioned reasons extension of the existing refugee convention would not be an ideal solution.

With there being a substantial number of people who will be forced to migrate across international boundaries due to climate change and a vacuum in international law where there should have been provisions for mechanisms for the protection of climate refugees; it becomes imperative to seek resolutions that address the needs and concerns of climate refugees.

3.4. Human rights protection framework

It has been suggested that one of the possible means of mitigating the concerns of climate refugees is employing the framework of universal human rights to place obligations on States to protect climate refugees on a similar footing as conventional refugees. Interpretations of international and regional human rights provisions have extended the groups of persons that may be described as being entitled to protection against refoulment in recent years beyond 1951 Convention refugees and may provide a limited basis for the protection of climate displaced. [45] Non-refoulment under Refugee Convention refers to non-return of refugees to persecution, arbitrary deprivation of life, torture or cruel, inhuman, or degrading treatment or punishment; however, some suggest that any sufficiently serious human rights violation could give rise to an obligation of non-

43. Stellina Jolly and Nafees Ahmad, "Climate Refugees under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Criminal Justice" (2014-2015) 14 ISIL YB Int'l Human & Refugee L. 216.
44. Benoit Mayer (n 30).
45. Rosemary Rayfuse and Shirley V. Scott (eds.), *International Law in the Era of Climate Change* (Edward Elgar, 2012).

refoulment. With climate change adversely affecting human rights that are specifically recognised under international law, such as the right to life, health, water, food, etc., climate refugees are argued to be entitled to protection under international human rights law and non-refoulment. The UN Commission on human rights has stated that: "*The right to life encompasses existence in human dignity necessities of life*".[46] This is reflective of a growing body of jurisprudence which argues that the right to life includes the right to live with dignity. Such an argument envisages that right to life is inclusive of issues such as standard of life, means of livelihood and protection of life, which might be affected due to environmental factors.[47] It is further asserted that there is potential in arguing that it is against the general human rights obligation to return individuals to their countries of origin or nationality which have been devastated by climatic disasters, either due to serious threat to life or due to cruel, inhuman or degrading treatment.

International human rights law recognises human dependency on the environment and obligates States to take steps to guarantee the rights necessary for the wellbeing of humans, but there is a lack of an enforcement mechanism and leaves individual countries to provide domestic protection of human rights. This leads to the biggest drawback of this recourse which is it is far from a guaranteed route to protection for the climate displaced. This is so because it is up to the States to uphold the rights of climate refugees, which they might outright refuse to. As the principles of international law may have some normative value and may provide arguments for assisting climate refugees,[48] any form of protection will have to be enforced by litigation before courts. This is because States are unlikely to accept the obligation of protecting the rights of climate refugees due to ambiguity over the extent of obligations that are likely to be placed upon them. Such a process of enforcement is unlikely to be able to cope with large scale migration of people, as is predicted in the case of climate-induced migration, because of the litigation process being extremely long and difficult.[49] As international human rights law is

46. UN Commission on Human Rights, Report on the Question of Human Rights and Extreme Poverty, 11-2-2005, E/CN.4/2005/49 <https://www.refworld.org/docid/42d66e751.html> accessed 21-11-2019.
47. McAuliffe M. and Koser K., *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-Making* (ANU Press, 2017).
48. Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv. Envtl. L. Rev. 349.
49. Rayfuse and Scott (n 45).

too vague, it leaves too much room for "State interpretation" to provide speedy and efficient protection of climate refugees.[50]

Another problem with this option is that even if we were to disregard the problem of reliability, it would still require the harm faced to be sufficiently severe and "imminent". With regards to refugee protection, this may imply unavoidable movement, while migration in anticipation of slow-onset environmental or climate change impacts is more likely to be regarded as voluntary and would not be considered eligible for protection.[51] Hence, Human Rights Protection framework can be regarded as inadequate for addressing the complexities of predicaments faced by climate refugees.

3.5. Guiding principles on internal displacement

A large portion of climate-induced migration occurs within international boundaries. Such migrants are argued to have better protection as they are protected by all human rights guarantees binding upon States because they remain citizens or residents of their own country and continue to be entitled to the full range of guarantees available to the general population.[52] Moreover, they are better protected by international norms, which is evident by the adoption of Guiding Principles on Internal Displacement (GPID) by governments around the world.[53] Although they are not legally binding, they are accepted to be reflective of existing binding obligations under international human rights and humanitarian laws.[54] GPID defines internally displaced persons (IDPs) as:

> *..Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or to avoid the effects of...violations of humans rights or natural or human-made disasters, and who have not crossed international boundaries.*[55]

50. Benoit Mayer, "The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework" (2011) 22 Colo. J. Int'l Envtl. L. & Pol'y 357.
51. Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2012).
52. *Ibid.*
53. Xing-Yin Ni (n 37).
54. Rosemary Rayfuse and Shirley v. Scott (eds.), *International Law in the Era of Climate Change* (Edward Elgar, 2012).
55. United Nations, "Guiding Principles on Internal Displacement" (U_{NHCR}) <https://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.

It has been argued that the policymakers could usefully apply GPID to solve the predicament of climate refugees. This could be done by the borrowing of its provisions for a new convention that would grant recognition to climate refugees and place obligations on States to assist them. GPID has been appreciated for the fact that it not only provides the IDPs with the right to resettle in another part of the country but also places a duty on the authorities to "provide or assist these persons to obtain appropriate compensation or another form of just reparation"[56].

The main objection against GPID is that they are inclined towards sudden-onset disasters, and do not recognise those displaced due to slow-onset environmental degradation or those migrating in the anticipation of the same due to its stated requirement that people should have been forced or obliged to move. Also, as the GPID principles are non-binding, the States might not agree to the application of the principles in a binding capacity for addressing the concerns of climate refugees. To be legally binding, GPID has to be domestically ratified, but very few governments have done it, often through incomplete laws and policies.[57] Since it neither has legal force nor is it likely to have so if it is applied in the context of climate refugees the principles of GPID, therefore, cannot be considered as a viable solution to protect all climate refugees.

3.6. United Nations Framework Convention on Climate Change (UNFCC)

A few scholars have proposed a global governance system for the protection of climate refugees within the UNFCCC framework. This proposal put forward by Biermann and Boas, defined climate refugees as "people who have to abandon their settlements, immediately, or in the near future, due to rapid or gradual alterations in their surrounding natural environment related to any one or more of the following three manifestations of climate change: sea-level rise, extreme weather events, and drought and water scarcity."[58] The proposal further suggests that a protocol or amendment to the UNFCCC could be suitable for the purposes for bestowing recognition, ensuring protection and resettlement of climate refugees as it would draw

html> accessed 21-11-2019.

56. Rayfuse and Scott (n 45) 64.
57. Marta Picchi, "Climate Change and the Protection of Human Rights: The Issue of Climate Refugees" (2016) 13 US-China L. Rev. 576.
58. Biermann F. and Boas I., "Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees" (2010) 10 Global Environmental Politics 60.

on widely established principles and the authority of COP (Conference to Parties) to UN Climate Change Convention.

Although at first glance it may seem like an amicable solution but it suffers from certain drawbacks. First, UNFCCC's mandate is limited to preventive measures intended to protect the environment and not ensuring the alleviation of the effects of climate change, which is clearly stated in the UNFCCC. It is designed not to provide protection of human rights and humanitarian assistance but to prevent and reduce the magnitude of the causes of climate change.[59] Secondly, the UNFCCC lacks any reference or element that incorporates human rights. It refers to the effects that climate change may have on "human health and welfare" but does not include any specific rights for individuals or communities.[60] It is essential for any convention for the protection of climate refugees to draw from the notion of human rights which provides the most suitable basis of justification of such a convention. Lastly, the institute has been ineffective in achieving its purpose of tackling climate by the reduction of global carbon dioxide emissions. In fact, emissions have only increased after the framework entered into force. Besides, there still remain contentions between the stakeholders, i.e. developed and developing countries, regarding emissions limit and whether such limits will be enforced. In such a situation, expanding the scope of the framework to the protection of climate refugees would most likely be unfruitful.

3.7. A Specialised Climate Refugee Convention

A specialised convention for climate refugees has been argued to be justified both by the scale and novelty of the problem of migration of climate change refugees.[61] Climate refugees often suffer from grievances different from those of conventional refugees, the most significant of which is the inability to return to their home countries due to environmental degradation. Climate refugees displaced due to the submergence of low-lying islands would be the most apt example of this. Climate refugees, due to their inability to return home, require provision for settlement and livelihood and in many cases, facilitation in integration within the

59. Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv. Envtl. L. Rev. 349.
60. United Nations Framework Convention on Climate Change (adopted 9-5-1992, entered into force on 21-3-1994) 1771 UNTS 107 Art. 1.
61. Bonnie Docherty and Tyler Giannini, "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugee" (2009) 33 Harv. Envtl. L. Rev. 349.

countries of destination. Taking into consideration the clear lacuna in the existing international system and the inability of the prominent proposed solutions to address the plight of climate refugees comprehensively, it becomes evident that a specialised, interdisciplinary climate refugee treaty is the need of the hour.

Such a convention would provide many potential advantages, which include:

a) Prioritisation of the grave and substantial problems of climate refugees;

b) Flexibility required for creating a specialised framework that combines principles and solutions from varied sources such as international human rights and environmental law, GPID, and regional conventions.

With climate change projected to exacerbate displacement to unprecedented levels, a dedicated legal regime in the form of a specialised climate refugee convention tailored to the needs of those displaced is not only a crucial part of a larger adaption strategy but an essential short-term alleviation measure.

3.7.a. *Prioritisation of Climate Refugees*

A climate refugee convention would, first of all, provide unequivocal recognition to climate refugee which international law, as it exists today, can be found wanting for. The number of climate refugees is estimated to be substantially higher than the number of people under the ambit of and protected by the 1951 Refugee Convention.[62] With the requirements of climate refugees differing from those of normal migrant and refugees, it becomes paramount to address their concerns through a separate framework. Many of the other proposed solutions attempt to accommodate a climate refugee legal instrument into existing legal frameworks which would inevitably result in the inadequate resolution of the grievances of climate refugees. This is evident through the drawbacks of the proposal to appropriate the principles of GPID or the Human Rights Protection Framework. A convention built from scratch would provide the opportunity to tailor alleviation measures according to the needs of the climate refugees.

62. Brown O. (n 11).

3.7.a.i. A Specialised Framework

An independent convention has the benefit of allowing for the incorporation of provisions and solutions from multiple sources and distinct regimes into a specialised framework. It could draw from the provisions of GPID in terms of the obligations it places upon the States while invoking the principles of human rights to provide climate refugees with protection. The framework could also adopt an inter-disciplinary approach and bridge the gap between the environment and human rights through humanitarian assistance. Though human rights, humanitarian assistance and international environmental law have not usually been linked with each other in a single convention climate refugees would benefit immensely due to such linkage.[63]

A new convention would have substantial freedom in employing specific tools and measures from multiple disciplines to ensure protection of climate refugees. It could have provision for a burden-sharing mechanism, based on the principle of subsidiarity,[64] in which countries would distribute their responsibilities according to their capabilities and limitations. This would be a manifestation of the principle of common but differentiated responsibilities found in environmental law.[65] Besides this, the convention may also employ a global fund created based on the aforementioned principle to assist countries in assisting climate refugees as the effects of climate change tend to vary significantly from region to region. Some countries may find themselves to be overwhelmed by the sheer number of climate refugees due to being in the vicinity of a country struck by the catastrophic effects of climate change. The burden-sharing mechanism and the provision for a common fund would ensure effective protection of the human rights of the climate refugees by empowering particular States to provide quality assistance to climate refugees. This is a good example of a multi-disciplinary approach and involves incorporation of environmental law with human rights.

Besides, an independent instrument would provide better opportunities to address the unique concerns of climate refugees. The convention could also have provisions that provide for rehabilitation of climate refugees

63. Docherty and Giannini (n 48).
64. Benoit Mayer, "The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework" (2011) 22 Colo. J. Int'l Envtl. L. & Pol'y 357.
65. Docherty and Giannini (n 48).

and their incorporation into the host countries through obligations placed on signatory countries. Since climate refugees, in many cases, would not be in a position to go to their countries of origin, this provision would become central to providing security and the means to live life with dignity to the climate refugees. Another measure that the convention may possess to ensure better management of displacement and assistance of the refugees would be to provide them passage to countries beyond the proximity of their home countries. This would ease some of the burdens that some countries might have to face due to the variable nature of climate change and its effects and also allow for different States to provide better assistance to climate refugees, thereby benefitting the refugees and placating to some measure the political opposition to this convention.

3.7.a.ii. Incentives for States

Some might object to the idea of developing a convention from scratch due to the efforts required to get various stakeholders, i.e. the States, to ratify the convention and to enforce it diligently. There are, however, good reasons to believe that States and general society at large, would agree to a novel international instrument due to various incentives to pursue such an international instrument. Host States may not want to encourage climate refugees to flee to them but despite this would be unable to stop migration because refugees, as history has shown, will find various ways to cross the borders despite governmental efforts to stop them.[66] In such a situation, they would want to avail of the assistance available in the form of a burden-sharing mechanism or financial help available through a global fund and, so, would accept an international convention. Home States, on the other hand, would agree to the convention due to the assistance they would get in the form of remedial measures provided to their citizenry migrating to other countries as well as to mitigate the effects of the disaster itself. The convention would help in the identification of populations at risk and therefore prompt action towards preventive measures by improving the adaptive capacity of vulnerable populations to prevent migration. This would happen as the countries in the vicinity of the vulnerable regions would want to prevent the migration of the people in the first place. The convention would also be attractive as it would be largely cost-effective. This is so because instead of migration of climate refugees en-masse, there would be a framework for the management of displacement which would allow for effective regulation of migration in

66. *Ibid.*

a way that not only minimises it but also distributes it effectively while ensuring the protection of climate refugees. Besides this, humanitarian motivations and the potential to dissolve conflicts and tensions due to climate-related movement would make this an attractive proposition for the society at large.

To ensure operational efficiency, the convention could also have a provision for an executive committee responsible for enforcing duties of the States. The composition and procedures of the committee might be a source of difference that may lead to contentions but a reasonable arrangement might be reached as has been shown by precedents. One such example is the Montreal Protocol on Substances that Deplete the Ozone layer, which is controlled by committees consisting of equal number of affected and resource contributing countries with the provision of a double-weighted majority rule that allows both the sides to hold a collective veto over the future development and implementation of the regime.[67]

3.7.a.iii. Challenges for a Climate Refugee Convention

Although the idea of an overarching international convention for climate refugees, that accommodates regional initiatives and treaties, is inherently attractive; many object to this idea due to certain apprehensions about its feasibility and its effects on efforts to provide protection to climate refugees. Jane McAdam argues that an international convention for climate refugees would channel vast amounts of resources for convention related advocacy at the expense of other, more appropriate and community-attuned, responses.[68] However, such an assertion is based on the assumption that such a convention would not take cognizance of regional efforts to provide protection to climate refugees through bilateral/multilateral and regional negotiations,[69] agreements and treaties, national intervention of the States whose citizens face climate displacement and international assistance of such States. However, the Climate Refugees Convention envisioned in this paper is an overarching structure that would accommodate regional initiatives and efforts while consolidating them through universal duties and obligation that it would place on States.

67. Biermann F. and Boas I., "Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees" (2010) 10 Global Environmental Politics 60.
68. Jane McAdam, "Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer" (2011) 23 Int'l J. Refugee L. 2.
69. Benoit Mayer (n 64).

Another objection raised regularly against the proposed resolution is that there is a lack of political will to negotiate a new instrument requiring States to provide protection to climate refugees.[70] It has already been addressed as to why the States would be incentivised to support such a regime. Host countries would benefit from the sharing of the humongous burden of climate refugees, on the basis of the principle of subsidiarity, which would have otherwise been on those few countries due to varying effects of climate change. Home countries would be benefitted due to assistance that would be accorded to their citizens, both within and outside their borders. Other countries might assent to such an arrangement due to the conflicts that it would prevent which would otherwise have affected them as well. Humanitarian concerns might also encourage countries to adopt such an arrangement. But the reason why countries, which otherwise would be reluctant to accept the creation of new obligations might be incentivised to accept such an arrangement is that such a system would be more cost-efficient and would bring focus on the need to build capacity to withstand the effects of climate change of vulnerable populations. Such a system, as has been envisioned in the convention proposed, would effectively distribute the costs of providing protection to climate refugees while also encouraging States towards capacity-building of vulnerable populations, thereby reducing the number of climate refugees. Due to all the aforementioned reasons, a climate refugee convention would be attractive to all the concerned political actors.

4. CONCLUSION

Climate change, due to human actions, is poised to displace millions of people in coming years and yet there exists a vacuum in international law with regard to climate refugees. The 1951 Refugee Convention, which is the cornerstone of refugee protection, does not recognise climate refugees due to a plethora of factors, such as the unique circumstances prevailing at the time of its creation. Political actors shy away from its reformation due to their reluctance to widen their obligations to an uncertain extent as the magnitude of climate-induced migration remains unclear. This effectively means that climate refugees find themselves in a limbo as to their position in international law. It necessitates an international response that alleviates their unique concerns and needs. In furtherance of this, many solutions have proposed to provide relief to climate refugees. A protection framework based on human rights, an alleviation structure based on Guiding Principles on Internal Displacement (GPID) and a legal instrument within the UNFCC are among the prominent solutions offered.

However, all of them fall short on various fronts and therefore prove to be inadequate for addressing the grievances of climate refugees.

Taking into consideration the gravity of the situation and certain unique needs of climate refugees, a new legal instrument in the form of a Climate Refugee Convention may be the best recourse available. It, by its nature, prioritises climate refugees and would endeavour to redress their idiosyncratic needs through a multi-disciplinary approach in the adoption of measures and provision. Such a convention would be ideal for placating the concerns of the States while providing definite protection to climate refugees. It would also attract the support of the world at large due to a variety of considerations, such as altruistic and humanitarian concerns. It would provide incentives to all the stakeholders to uphold it in a way that any of the other proposed solutions might not be able to do. Therefore, a climate refugee convention independent from the existing refugee and climate conventions would be the most suitable way to overcome the limitations of existing and proposed legal regimes.

THE SAGA OF BEGGARS, HUMAN RIGHTS AND THE VICIOUS LAW

*Pratik Raj**

ABSTRACT

Beggary is an offence in at least 20 States in India and if convicted, most States prescribe detention in an institution for a period ranging between one year and three years. Though activists have been condemning the anti-beggary laws for a long time now and rightly so, with beggary being decriminalised in Delhi recently by the Delhi High Court, their demands have gained more weight and credibility. In a country where 269 million people live below the poverty line with not enough food and jobs, making beggary a crime speaks volumes about the State's perception of beggars as a burden. In the first and second part, this paper attempts to highlight the State-sanctioned abuse and exploitation of the destitute by analysing the draconian provisions of the various anti-panhandling legislations prevailing across India. Next, it strives to assess the constitutionality of these provisions by studying two major judgments regarding beggary. In the fourth part, the paper offers two categories of suggestions. The object of the first category of suggestions is to provide immediate relief to the destitute and that of second category of suggestions is to address the issue of beggary in the long run. In the last part, the paper offers concluding remarks.

1. INTRODUCTION

In the month of January 2017, during an inspection of a beggar's home in Delhi, the team from Delhi Commission for Women ("DCW") was told by women detainees that they were being subjected to "physical check of their private parts" by the staff on their arrival at the home.[1] In its report to Deputy Chief Minister Manish Sisodia, DCW, while calling it a crude

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1. "Human Rights Violated at Beggar Home: DCW", *The Times of India* (14-2-2017) <www.timesofindia.indiatimes.com/city/delhi/human-rights-violated-at-beggar-home dcw/articleshow/57134585.cms> accessed 15-5-2019.

archaic practice, raised apprehensions about this being a form of sexual abuse.[2] In another incident, 286 deaths were reported over a period of eight months in a beggar's home at Bangalore, back in the year 2010.[3] The issue came to light when 26 inmates died within a short span of five days.[4] The then Social Welfare Minister of Karnataka was quoted as saying that his government merely released funds to the beggar's home and could not be held responsible for what happened there.[5] Later, tests confirmed gastroenteritis,[6] a disease which spreads through contaminated food and water and touching or using contaminated items like blankets. While one can only imagine the plight of those at beggar's home, it is important to note that it is not only the staff and administration of these government-run beggar homes that are responsible for the gross violations of human rights but also the State. The State punishes destitute and its laws are the biggest violators of their human rights and even the "Fundamental Rights"[7] guaranteed by the Constitution of India to its citizens. As of now, beggary is a crime in 20 States and one Union Territory (two prior to decriminalisation of beggary in Delhi).[8]

A model Bill which decriminalised beggary and focused on the rehabilitation of the destitute, had been drafted by the Ministry of Social Justice and Empowerment in 2016,[9] but now it has been scrapped as the Centre informed the Delhi High Court that "the proposal is dropped and the States are empowered to do on their own" leading to sharp remarks by the Hon'ble Bench and terming the Centre's stance as unfortunate.[10] Later in August 2018, the Delhi High Court struck down all the anti-beggary

2. *Ibid.*
3. Bageshree S. and Afshan Yasmeen, "Beggar's Death Probe Yet to Reach CID", *The Hindu* (28-12-2010) <www.thehindu.com/news/cities/bangalore/Beggars-death-probe-yet-to-reach-CID/article15611779.ece> accessed 15-5-2019.
4. "26 Deaths in 5 Days in Bangalore Beggar's Home", *Times of India* (22-8-2010) <www.timesofindia.indiatimes.com/city/bengaluru/26-deaths-in-5-days-in-Bangalore-beggars-home/articleshow/6389904.cms> accessed 15-5-2019.
5. *Ibid.*
6. *Ibid.*
7. *Harsh Mander* v. *Union of India,* 2018 SCC OnLine Del 10427 : AIR 2018 Del 188 (17), (33), (44).
8. Press Information Bureau, "M/O SJ&E Organises Pre-Legislative Consultation Meeting on Persons in Destitution Model Bill- 2016" (19-10-2016) <pib.gov.in/newsite/PrintRelease.aspx?relid=151786> accessed 3-5-2019.
9. The Persons in Destitution (Protection, Care and Rehabilitation) Model Bill, 2016 (not introduced in the Parliament).
10. "Centre takes U-Turn, Scraps Draft Bill on Decriminalising Begging; Delhi HC Terms Change in Stance 'Unfortunate'", *Firstpost* (14-9-2017) <http://www.firstpost.

provisions of the BPBA, 1960 (the version of BPBA, 1959 extended to the NCT of Delhi in 1960), thus decriminalising beggary in the national capital.[11] Few provisions were allowed to remain in the statute book as they did not treat beggary *per se* as an offence. For instance, Section 11, as it provides for imprisonment of those who cause others to beg. The court in its historic verdict observed:

> *Criminalising begging is a wrong approach to deal with the underlying causes of the problem. It ignores the reality that people who beg are the poorest of the poor and marginalised in society. Criminalising begging violates the most Fundamental Rights of some of the most vulnerable people in our society. People in this stratum do not have access to basic necessities such as food, shelter and health and in addition criminalising them denies them the basic Fundamental Right to communicate and seek to deal with their plight.*[12]

Nonetheless, the situation is still grim as even now 20 States in India have their anti-panhandling laws intact and each of them criminalises beggary or rather, as Professor Usha Ramanathan points out, criminalises poverty.[13] A glimpse at these laws would elicit their barbaric nature. BPBA, 1959, while making beggary a cognizable offence,[14] thus allowing the police to arrest beggars without a warrant, goes on to give Judges the power to detain the destitute in beggar's home for as long as 10 years, in which two years can be converted into a sentence of imprisonment,[15] by conducting a summary trial.[16] Further, the law provides for indefinite detention of the "blind, cripple and incurably helpless" destitute,[17] and also if the court deems fit, it can order the detention of persons wholly dependent on a beggar[18]- clearly dehumanising the destitute and their families. Professor Ramanathan has rightly said that "the anti-beggary law is a sordid tale

com/india/centre-takes-u-turn-scraps-draft-bill-on-decriminalising-begging-delhi-hc-terms-change-in-stance-unfortunate-4044101.html> accessed 16-5-2019.

11. *Harsh Mander* v. *Union of India,* 2018 SCC OnLine Del 10427 : AIR 2018 Del 188.
12. *Mander* (n 11) (31).
13. Usha Ramanathan, "A Constitution Amid Dire Straits" (WE THE PEOPLE: a symposium on the Constitution of India after 60 years, 1950-2010, India Seminar, November 2010) <http://www.india-seminar.com/2010/615/615_usha_ramanathan.htm> accessed 16-5-2019.
14. The Bombay Prevention of Begging Act, 1959 (BPBA).
15. BPBA, S. 6(2).
16. BPBA, S. 7.
17. BPBA, S. 10.
18. BPBA, S. 9.

of disrespect for human life and an abandonment from the constitutional norms".[19]

Most of the laws while defining singing, dancing, fortune telling, performing or offering any article for sale in a public place for soliciting alms as an act of beggary,[20] extends up to convict even those who have no visible means of subsistence and are wandering in any public place in such condition or manner, as makes it likely that they solicit alms.[21] There have been reports of police rounding up tribes on the mere suspicion of them being beggars.[22] An English teacher, while walking back to his room from a library was caught and dumped into a beggars home in Bangalore, based on his dirty clothes and unkempt hair.[23] There are countless other examples where people, sleeping on roads,[24] mentally ill[25] and even just walking at railway stations,[26] have been forcibly thrown into beggars home because of their mere appearance. There are certain tribes which engage in fortune telling, snake charming,[27]etc. - activities, which as per law, are considered as begging. Also, there are transgender people for whom begging is a significant source of income and their livelihood depends on it.[28] Without providing them with any kind of support or alternative, the

19. Ramanathan, "A Constitution" (n 13).
20. BPBA, S. 2(1)(*a*).
21. BPBA, S. 2(1)(*d*).
22. Sukanya Shantha, "Bombay High Court Orders Release of 49 Persons Detained under Beggary Law", *The Wire* (19-7-2018) <www.thewire.in/rights/bombay-high-court-orders-release-of-49-persons-detained-under-beggary-law> accessed 16-5-2019.
23. "Look Who Has Landed in Beggars' Home", *The Hindu* (14-5-2010) <www.thehindu.com/news/cities/bangalore/Look-who-has-landed-in-Beggars-Home/article16300664.ece> accessed 5 -5- 2019.
24. Zeeshan Shaikh, "Beggars Can Be Choosers, if Govt Gets its Act Together", *The Indian Express* (13-8-2014) <www.indianexpress.com/article/cities/mumbai/beggars-can-be-choosers-if-govt-gets-its-act-together/> accessed 5 -5-2019.
25. Vinod Menon, "Shocking! 80% of People in Mumbai Beggar's Home Are Not Beggars", *Mid-Day* (29-3-2014) <www.mid-day.com/articles/shocking-80-of-people-in-mumbai-beggars-home-are-not-beggars/15183058> accessed 5-5- 2019.
26. *Ibid.*
27. Malia Politzer, "Past, Present, Future | Bandunath: The Snake Charmer", *Mint* (29-12-2011) <www.livemint.com/Companies/riFfrZafACcNAfkNE4c9uL/Past-Present-Future--Bandunath-The-snake-charmer.html> accessed 16-5- 2019.
28. Prosenjit Naskar and others, "An Assessment of Quality of Life of Transgender Adults in an Urban Area of Burdwan District, West Bengal" (2018) 5 International Journal of Community Medicine and Public Health.

law outrightly bans their source of income by terming them as beggars and thus making them vulnerable to abuse and exploitation.[29]

According the Census 2011, a total of 4,13,670 destitute people have been classified as beggars.[30] But these figures seem to be highly under-reported because Census 2011 puts the number of beggars in Delhi at 2,187,[31] but previous estimates by Delhi's Social Welfare Department shows the number being 60,000 in the year 2010.[32] In a country having 22 per cent of its population below poverty line[33] and millions of people displaced[34] due to conflicts, violence and disasters, the rationality and constitutionality of anti-panhandling laws criminalising "poverty" comes into question.

2. LAW AND HOW IT PERSECUTES THE DESTITUTE: AN OVERVIEW

2.1. Historical Background

Historically, there has never been a law against beggary in India until 1874, when the European Vagrancy Act was extended to the country.[35] However, according to Aaravind Ganchari, the reason behind this was not to control Indian vagrancy but European beggars because in those days a lot of the vagrants were low profile Europeans who had migrated to India

29. Ondede, A Report on the Human Rights Violations Against Transgenders in Karnataka, 2014, (Ondede, 2014) <www.orinam.net/content/wp-content/uploads/2015/08/FINAL-REPORT-ON-HUMAN-RIGHTS-VIOLATIONS-OF-TRANSGENDER-PERSONS.pdf> accessed 5-5-2019.
30. Press Information Bureau, "Empowerment of Beggar Population" (26-2-2015) <www.pib.nic.in/newsite/PrintRelease.aspx?relid=115990> accessed 16-5-2019.
31. *Ibid.*
32. Saroj Pattnaik, "Delhi's Anti-Beggar Drive Faces Practical Problem", Outlook (New Delhi, 14-2-2010) <www.outlookindia.com/newswire/story/delhis-anti-beggar-drive-faces-practical-problem/674559> accessed 16-5-2019.
33. Task Force on Elimination of Poverty in India, Report of the Task Force on Elimination of Poverty in India (Niti Aayog 2018) <www.niti.gov.in/sites/default/files/2018-12/presentation-for-regional-meetings-NITI-AAYOG.pdf> accessed 16-5-2019.
34. "Nearly 2.4 Million People Internally Displaced in India: Report", *The Economic Times* (22-5-2017) <www.economictimes.indiatimes.com/news/politics-and-nation/nearly-2-4-million-people-internally-displaced-in-india-report/articleshow/58793766.cms?from=mdr> accessed 15-5-2019.
35. Manas Raturi, "Raj and the Begging Brawl: The Colonial Roots of India's Anti-Beggary Laws Echo Even Now" (The Leaflet, 27-6-2018) <www.theleaflet.in/raj-and-the-begging-brawl-the-colonial-roots-of-indias-anti-beggary-laws-echo-even-now/> accessed 16-5-2019.

in search of a better future and this made the Britishers apprehensive of losing their image in the eyes of locals.[36]

It was only in the year 1943 that the Bengal Vagrancy Act was introduced to directly provide for the Indian "vagrants". The law provided that any person found asking for alms in a public place, or wandering about in a public place in such conditions that makes it likely that such person exists by asking for alms may be permanently detained at a "vagrants home".[37] Avishek Ray argues that the context of 1943 Bengal Vagrancy Act was the Bengal famine as it led to large scale migration from the villages to the cities and the initiative of rounding up the vagrants was basically directed towards sanitising the cityscape of Kolkata.[38] Soon the 1943 Act was followed by the Tamil Nadu Prevention of Begging Act, 1945 and the Bihar Prevention of Beggary Act, 1951. In the year 1959, the Bombay Prevention of Begging Act (BPBA) was passed and today a total of 20 States and one Union Territory have their own anti-panhandling legislations, most of which have been modeled on the BPBA, 1959.

2.2. Who Is A Beggar?

According to Section 2(1)(i) of the BPBA, 1959, "begging" means:

(a) Soliciting or receiving alms, in a public place whether or not under any pretence such as singing, dancing, fortune telling, performing or offering any article for sale;

(b) Entering on any private premises for the purpose of soliciting or receiving alms;

(c) Exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound injury, deformity of diseases whether of a human being or animal;

(d) Having no visible means of subsistence and wandering, about or remaining in any public place in such condition or manner, as makes it likely that the person doing so exist soliciting or receiving alms;

36. Aravind Ganachari, "White Man's Embarrassment' European Vagrancy in 19th Century Bombay" (2002) 37 *Economic and Political Weekly* 2477.
37. The Bengal Vagrancy Act, 1943, Ss. 2(9), 2(10).
38. Avishek Ray, "Colonial Constitutionalism and the Case of Bengal Vagrancy Act" (2013) SSRN Electronic Journal <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2361980> accessed 16-5-2019.

(e) Allowing oneself to be used as an exhibit for the purpose of soliciting or receiving alms.

It means that one can be termed as a beggar by mere appearance of not having any visible means of subsistence and thus can be detained, even though that person is not actually begging. There are countless reports of this provision being used to harass the poor and the homeless.[39] Besides, the very idea of detaining someone who "looks like a beggar is" preposterous and reflects the State's perception of "beggars" as a burden, a nuisance. However, while rest of the States do so, the States of Assam and Tamil Nadu do not consider mere appearance of not having any visible means of subsistence as begging.[40]

Section 2(2)(i) of the Karnataka Prohibition of Beggary Act, 1975 provides that "a person shall not be deemed to be a beggar if he is a religious mendicant licensed by the Central Relief Committee to solicit alms". Similarly, Section 2 of the Assam Prevention of Begging Act, 1964 provides that "the State Government may, by order, direct that begging shall not include soliciting alms in or about any temple or mosque". These two States sanction begging in the name of religion. Nevertheless, the logic behind this exception is flawed, to say the least.

While most of the State legislations consider receiving alms in a public place by way of singing, dancing, fortune telling or selling articles as begging, Tamil Nadu excludes those "earning a livelihood by displaying skills and talents such as street artists and performers in the oral traditions, bards, jugglers and street magicians".[41] Criminalising traditional professions is no different than criminalising the identity of the people practicing it, as these professions and identities are intertwined in such a manner that each one of them determines the value attributed to the other in society.[42]

39. Shaikh (n 24); Menon (n 25); Politzer (n 27).
40. The Assam Prevention of Begging Act, 1964, S. 2; The Tamil Nadu Prevention of Begging Act, 1945, S. 2. See also Nyaaya, "You Can Be Arrested For 'Looking Poor' in Most Indian States, Union Territories", *Hindustan Times* (1-4-2017) <www.hindustantimes.com/india-news/you-can-be-arrested-for-looking-poor-in-most-indian-states-and-union-territories/story-Tvssf0mLY7NnVFvApYy5XO.html> accessed 5-5-2019.
41. The Tamil Nadu Prevention of Begging Act, 1945, S. 2(1)(*a*).
42. P. Avinash Reddy, "Prohibition of Beggary Acts: Criminalising A Way of Life and the Need to Amend These Laws" (11-7-2017) <www.blogs.lse.ac.uk/humanrights/2017/07/11/prohibition-of-beggary-acts-criminalizing-a-way-of-life-and-the-need-to-amend-these-laws/> accessed 15-5-2019.

2.3. Arrest and the "Summary Trial": The Abuse Begins

Many States consider begging as a cognizable offence, making it possible for the police to arrest the destitute without a warrant.[43] Under the Code of Criminal Procedure, 1973, crimes of serious nature like murder, rape, dowry death, kidnapping, etc. are treated as cognizable offence because they require immediate intervention by the police. Putting beggary in the same category as these heinous crimes is appalling, although this is only the beginning of the abuse. After being arrested without a warrant, the destitute is produced before a beggar's court which ascertains guilt based on a "summary inquiry". According to Section 5(1) of the BPBA, 1959:

> *Where a person who is brought before the court under the last proceeding section is not proved to have previously been detained in a Certified Institution under the provisions of this Act, the court shall make a summary inquiry, in the prescribed manner, as regards the allegation that he was found begging.*

After making a summary inquiry, if the court finds the person to be a beggar, it can order that person to be detained in an institution.[44] But the picture here is not complete without knowing how these summary inquiries are made. In *Manjula Sen* v. *State of Maharashtra*,[45] a committee of five persons was formed to investigate and look into the implementation and other aspects of the BPBA, 1959. Among several recommendations that the committee gave in its report, it also recommended to discontinue the institution of beggar's courts.[46] The committee witnessed the proceedings in a court and on that day, a total of 33 remand cases and 21 new cases were disposed of in about eight minutes.[47] According to the committee's report:

> *When the names of the new cases beggars were called, the Judge had just glanced at them and remanded them to custody in the beggar's home. Out of the 33 remand cases, most of them*

43. BPBA, S. 4(1). See also Nyaaya, "You Can Be Arrested For 'Looking Poor' in Most Indian States, Union Territories", *Hindustan Times* (1-4-2017) <www.hindustantimes.com/india-news/you-can-be-arrested-for-looking-poor-in-most-indian-states-and-union-territories/story-Tvssf0mLY7NnVFvApYy5XO.html> accessed 5-5-2019.
44. BPBA, S. 5(5).
45. *Manjula Sen* v. *State of Maharashtra,* WP No. 1639/1990 (Bombay HC).
46. Usha Ramanathan, "Ostensible Poverty, Beggary and the Law" (2008) 43 Economic and Political Weekly 33.
47. *Ibid,* 38.

(31) were released and only two were detained. The whole proceeding was over in eight minutes.[48]

The question arises that how is just a glance sufficient enough to detain a person for up to three years in an institution? How does the law assume that a summary inquiry would be sufficient enough to prove guilt for a "crime" so serious in nature that it has to be classified as a cognizable offence? Is not this an abuse of a person's right to a fair trial?[49] Unfortunately, all this abuse is legally sanctioned as the law treats the destitute population as non-citizens and allows the authorities to deny them their constitutional and natural rights.

2.4. Punishment: From Bonds to Indefinite Detentions

Moving ahead, Section 5(5) of the BPBA, 1959 states that the person found to be a beggar shall be detained in a certified institution for a period "not less than one year, but not more than three years" provided that if the court is satisfied that the person is not likely to beg again, it may release the beggar on a "bond". It is highly insensitive on the part of a welfare State to ask for a bond from a person who has been found surviving by asking for alms. In order to ensure that the person does not beg again, will not it be a better measure if the government provides for that person's rehabilitation instead of asking for a bond?

For first time offenders, majority of the States prescribe their detention in government run institutions called by different names like certified institution, workhouse, special homes, beggar's home or relief center.[50] However, in some of the States such as Tamil Nadu and Andhra Pradesh, the court can send even the first time offenders to jail.[51]

According to Andhra Pradesh Prevention of Begging Act, 1977, a person found to be a beggar, who is not a child or a lunatic or a leper in the opinion of court and has completed 16 years of age and is physically capable of ordinary manual labor may be:

48. *Ibid.*
49. *Ram Lakhan* v. *State,* 2006 SCC OnLine Del 1501 : (2007) 137 DLT 173 (2), (3), (13).
50. Nyaaya, "You Can Be Arrested For 'Looking Poor' in Most Indian States, Union Territories", *Hindustan Times* (1-4-2017) <www.hindustantimes.com/india-news/you-can-be-arrested-for-looking-poor-in-most-indian-states-and-union-territories/story-Tvssf0mLY7NnVFvApYy5XO.html> accessed 5-5-2019.
51. Tamil Nadu Prevention of Begging Act, 1945, S. 3(1); The Andhra Pradesh Prevention of Begging Act, 1977, S. 6.

(i) Detained in a workhouse for a period not less than one year but not more than three years; or

(ii) Punished with imprisonment for a term not less than six months but not more than two years.

Here, it is at the discretion of court to either send the first-time offenders to jail or to detain them in an institution. The case is similar with courts in Tamil Nadu.

For persons with disability, the provisions of the various anti-panhandling legislations get even worse. According to Census, 2011, more than 17 per cent beggars in India are disabled.[52] As per Section 10 of the BPBA, 1959:

> *When any person who is detained in a Certified Institution under Section 5, Section 6 or Section 9 is considered, whether on an application by him to the Chief Commissioner or otherwise by the Chief Commissioner to be blind, a cripple or otherwise incurably helpless, the Chief Commissioner may order that he shall after the expiry of the period of detention be further detained indefinitely in a Certified Institution.*

It essentially means that if the person is blind, crippled or incurably helpless, then the law allows that person to be detained indefinitely. Most of the legislations treat them similarly and none of them define "incurable helplessness" allowing the authorities to apply this provision arbitrarily. The notion of a legally sanctioned indefinite detention goes against the spirit of our Constitution as it is antithetical to the ideas of justice and liberty enshrined in its preamble.

In West Bengal, the law does not require the authorities to detain a person found begging for a fixed period. The Controller just has to decide whether or not the person is a "vagrant" and then can send such person to a vagrant's home without even specifying the period of detention.[53] According to Section 18(1) of the Bengal Vagrancy Act, 1943, once detained in a vagrant's home, a person can be released only if any of the four conditions provided in the section (on obtaining employment, on possession of "sufficient income", on a bond entered into by a relative or

52. Press Information Bureau, "Empowerment of Beggar Population" (26-2-2015) <www.pib.nic.in/newsite/PrintRelease.aspx?relid=115990> accessed 16-5-2019.
53. The Bengal Vagrancy Act, 1943, Ss. 8(1), 9(1), 18(1).

on good reasons to be recorded by the Controller in writing) are fulfilled, thereby leaving the scope to detain people indefinitely.

This was the case for first time offenders. For repeat offence, all the legislations prescribe harsher punishments. The maximum prescribed punishment for repeat offenders' ranges from three years to 10 years, though in West Bengal a person can be detained indefinitely until the required conditions are fulfilled, making beggary a more serious crime in one State than in another. As per Section 6(2) of the BPBA, 1959:

> *When a person is convicted for the second or subsequent time under sub-section (1) the court shall order him to be detained for a period of ten years in a Certified Institution, and may convert any period of such detention (not exceeding two years) into a sentence of imprisonment extending to a like period.*

So, in Maharashtra a repeat offender can get a maximum punishment of 10 years of which two years could be in jail. Same is the case in seven other States (Bihar, Goa, Gujarat, Punjab, Sikkim, Tamil Nadu and Daman and Diu), while in others a similar model is followed although with a shorter duration of maximum punishment for subsequent offenders. In few States such as Andhra Pradesh and Telangana, a person can be detained either in a workhouse or in a jail and there is no provision to convert any such period of detention in a workhouse into a sentence of imprisonment.[54]

Confinement of 10 years for someone soliciting alms because of dire need to survive or because that person is being forced to do so is extremely harsh and disproportionate.

2.5. Detaining the Dependents: No Rights for Them Either

Sadly, but not surprisingly, most of the laws do not stop here and with the exception of Karnataka, Bihar and West Bengal, around 16 States also provide for the detention of people who are "dependent" on the person arrested for begging.[55] As per Section 9(1) of the BPBA, 1959:

54. The Andhra Pradesh Prevention of Begging Act, 1977, S. 6.
55. "Model Anti-Begging Law: Focus Rightly Shifts from Punishing Beggars to Rehabilitating Them", *The Financial Express* (4-4-2017) <www.financialexpress.com/india-news/model-anti-begging-law-focus-rightly-shifts-from-punishing-beggars-to-rehabilitating-them/613866/> accessed 3-5-2019.

> *When the court has ordered the detention of a person in a Certified Institution under section 5 or section 6 it may, after making such inquiry as it thinks fit, order any other person who is wholly dependent on such person to be detained in a Certified Institution for a like period:*
>
> *Provided that before such order is made such dependent person shall be given an opportunity of showing cause why it should not be made.*

So, a person with a wife and old parents, is the sole bread winner in the family and if he gets convicted of beggary, along with him his wife and parents can also be detained in an institution. What crimes have the rest of the family members committed to deserve punishment? Again, the reasoning behind this provision is contrary to the very spirit of our Constitution as it dehumanises the destitute and their families.

Section 4(1) of the Himachal Pradesh Prevention of Beggary Act, 1979 is even more absurd and goes on to punish a person over the age of 18 years who "knowingly" lives, wholly or in part, on the earnings of a beggar, for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both. This provision has the potential to be applied despotically and anyone associated with the accused can be imprisoned.

2.6. Inside the Institution: Disciplinary Rules and Punitive Measures

Once in an institution, most of the States require the inmates to follow predefined disciplinary rules, a breach of which could invite punitive measures. For instance, as per Section 20(1) of the Gujarat Prevention of Begging Act, 1959:

> *"... [A]nd the Court may thereupon, if satisfied that the person has willfully disobeyed or neglected to comply with any such rule convert the balance of the period of his detention in a Certified Institution or part thereof into a term of imprisonment."*

The Delhi Prevention of Begging Rules, 1960, though now irrelevant after decriminalisation of beggary in Delhi, had a list of 15 activities which

the inmates must not undertake.[56] Refusal to receive any training or even refusal to eat food as per the prescribed diet scale could invite punishment. Further, there are reports of ferocious dogs being kept by the caretakers which have bitten a number of inmates and countless other reports of physical violence being regularly administered against the inmates to break and subjugate their will.[57]

To summarise the conditions of an inmate within the institution, it will be best to quote Professor Usha Ramanathan:

> *There is no rule regarding the right to receive training or education. There is no power in the person to resist violence. There is no guarantee that it is wholesome food or clean water that is provided in the institution. And, with visiting committees only found in the provisions of formal law, there is no appeal or extramural oversight. Into this melee, add a dispirited workforce, and there, it may be, is a recipe for a routine of intramural death and institutionalised violence.*[58]

3. LANDMARK JUDGMENTS ON BEGGARY: ASSESSING THE CONSTITUTIONALITY AND RATIONALITY OF THESE LEGISLATIONS

The anti-panhandling legislations in this country, no doubt, are some of the most archaic and obsolete laws which display scant regard for human life and reflect the colonial mindset of the State towards its poor. But what exact constitutional provisions do they violate and in doing so, how they render the constitutional right of destitute as mere "symbolic and scriptural rather than a shield against unjust deprivation"?[59]

The Delhi High Court, on two separate occasions has discussed these questions in detail with respect to BPBA, 1959 (extended to Delhi in 1960). While the first verdict, i.e. *Ram Lakhan* v. *State*,[60] dealt with a revision petition challenging the imprisonment of a "beggary" convict, the other one, i.e. *Harsh Mander* v. *Union of India*,[61] dealt with writ petitions challenging the validity of the Act itself.

56. The Delhi Prevention of Begging Rules, 1960, S. 15.
57. Ramanathan, "Ostensible Poverty'" (n 46) 41.
58. *Ibid.*
59. *Gopalanachari* v. *State of Kerala,* 1980 Supp SCC 649 : AIR 1981 SC 674 (4).
60. 2006 SCC OnLine Del 1501 : (2007) 137 DLT 173.
61. 2018 SCC OnLine Del 10427 : AIR 2018 Del 188.

3.1. Ram Lakhan v. State: A Different Perspective On "Beggary"

This judgment, delivered in 2006 by Justice Badar Durrez Ahmed, offers a unique perspective towards beggary, for it makes a detailed study on its causes and based on them it classifies beggars into different categories. In the present case, only the imprisonment of a person convicted of beggary under BPBA, 1959 was challenged but as the learned Judge observes:

> *I am mindful of the fact that I am not deciding a writ petition where the validity of the said Act is in question. It is true that the case before me is only a revision petition challenging the judgment passed in an appeal under the said Act. But, an examination of these aspects touching upon the constitutional validity of the said Act is necessary because such a discussion would reveal the manner in which and the limits to which the provisions of the said Act can be taken.*[62]

The petitioner, found to be a beggar was ordered to be detained in a certified institution for a period of one year by the Metropolitan Magistrate and later the duration was reduced to six months by the additional sessions Judge. However, instead of being detained in a certified institution, the petitioner was sent to Tihar jail. While deciding the case and acquitting the petitioner, the court remarked that "this senseless and illegal act" to detain petitioner in Tihar jail, "whereas he should not have been in jail for even a single day", "heaped insult upon injury".[63] This "injury" is what the court explains throughout the judgment.

The "injury" includes describing someone's hands as "front paws" and that too by a Metropolitan Magistrate, a person supposed to serve justice. This incident, as specifically pointed out by the court while deciding the present case, shows the unfortunate reality that the destitute, today, are treated as lesser human by every quarter of society, be it State, its laws, its officials, the general public or even the judiciary. To this the court says "they are human beings and they should be treated as such".[64]

In order to analyse the various reasons as to why a person begs, the court classifies those soliciting alms into four categories:

62. *Lakhan* (n 60) (10).
63. *Lakhan* (n 60) (14).
64. *Lakhan* (n 60) (4).

> *There are various reasons for a human being to solicit alms. Firstly, it may be that he is down-right lazy and doesn't want to work. Secondly, he may be an alcoholic or a drug-addict in the hunt for financing his next drink or dose. Thirdly, he may be at the exploitative mercy of a ring leader of a beggary "gang". And, fourthly, there is also the probability that he may be starving, homeless and helpless.*[65]

Solution to all these, the court argues, cannot be the same and each category requires a different approach:

> *Professional beggars who find it easier to beg than to work may be appropriately dealt with by passing orders under Section 5(5) of the said Act for their detention in Certified Institutions. But, what about the beggar who falls in the second category? His is not really a problem of "begging" but a problem of addiction. The solution lies in attempting to de-addict him and help in ridding himself of the malady. Then there is the third category of "beggars" who are exploited and forced into begging by other ring leaders. A different approach is required here. The person found "begging" need not and ought not to be detained in a Certified Institution. Because, his act of solicitation was not voluntary but, under duress, the result of exploitation at the hands of others. The ring leaders need to be rounded up and penalised under Section 11 of the said Act and these "beggars" need to be released from their exploitative clutches. Lastly, I come to the fourth category of "beggars" mentioned above. They are persons who are driven to beg for alms and food as they are starving or their families are in hunger. They beg to survive; to remain alive. For any civilised society to have persons belonging to this category is a disgrace and a failure of the State.*[66]

To subject them to further ignominy and deprivation by ordering their detention in a certified institution, adds to the "injury".

For those belonging to the fourth category, the court recognises the defense of necessity and to illustrate this defense more clearly, it goes on

65. *Lakhan* (n 60) (6).
66. *Lakhan* (n 60) (6).

to cite the case of *Hibert* v. *Queen* in which the Supreme Court of Canada observed:

> *The defenses of self-defense, necessity and duress all arise under circumstances where a person is subjected to an external danger, and commits an act that would otherwise be criminal as a way of avoiding the harm the danger presents. In the case of self-defense and duress, it is the intentional threats of another person that are the source of the danger, while in the case of necessity the danger is due to causes, such as forces of nature, human conduct and other than intentional threats of bodily harm, etc. Although this distinction may have important practical consequences, it is hard to see how it could act as the source of significant juristic differences between the three defenses.*[67]

So those who beg to remain alive, on conviction, can invoke the defense of necessity and even if they don't, the court firmly asserts that "The duty is therefore cast upon the courts to satisfy themselves that the accused did not have a defense of necessity".[68]

Similarly, the third category of "beggars", who are the victims of "exploitation and compulsion" by the ring leaders of a "begging racket" and beg "under the compulsion of fear for bodily harm from them", are entitled to invoke the defense of duress.[69] The court further observes:

"The common feature of both defenses being the element of involuntariness or, shall I say, lack of legitimate choices. It is the absence of legal alternatives that provides the defense of duress or necessity."[70]

The "injury" also includes the denial of these defenses to those who are helpless and those who are victims of a begging racket.

Dealing with the question of legitimacy of begging, the court says that the idea of "begging" being a constitutionally protected speech under Article 19(i)(a), "may appear a little quaint" on the first impression, but goes on to make its point in the following manner:

67. *Hibert* v. *R.*, (1955) 2 SCR 973.
68. *Lakhan* (n 60) (6).
69. *Lakhan* (n 60) (7).
70. *Lakhan* (n 60) (7). See also Jeremy Horder, "Self-Defence, Necessity and Duress: Understanding the Relationship" (1998) 11 Canadian Journal of Law & Jurisprudence 143.

> *What does the beggar do? He solicits alms by words spoken or actions expressed. And, it would be instructive to remember that Article 19(1)(a) of the Constitution of India guarantees to all citizens the right to "freedom of speech and expression". Would "begging", therefore, not be covered by this guarantee? Just as an advertisement of a product would be within the perimeter of this valuable fundamental right, begging, too, could fall within it. After all, begging involves the beggar displaying his miserable plight by words or actions and requesting for alms by words (spoken or written) or actions. Does the starving man not have a Fundamental Right to inform a more fortunate soul that he is starving and request for food? And, if he were to do so, would he not be liable under the said Act for being declared as a "beggar" and consequently being deprived of his liberty by being sent for detention at a certified institution? Does this not mean that the said Act leads to deprivation of liberty on the basis of a law which runs counter to the Fundamental Right of Freedom of Speech and Expression? Does this, therefore, not mean that even the Fundamental Right of Protection of Life and Personal Liberty, which is enshrined in Article 21 of the Constitution, is also violated?*[71]

The violation of these Fundamental Rights guaranteed by the Constitution of India, too forms part of that "injury".

To further substantiate its point, the court cites the case of the *People of State of New York* v. *Eric Schrader* highlighting the following:

> *It would be unreasonable to conclude that the Federal Constitution does not provide the same free speech protection to the individual in need as it does to the solicitor for a charity, to stand on the same public street corner and ask for money. No rational distinction can be made between the message involved, whether the person standing in the corner says "Help me, I'm homeless" or "Help the Homeless".*[72]

After all the analysis and reasoning, the court, however, clarifies that it does not mean that "beggary" cannot be prohibited but the prohibition must be "within limitations" to the constitutional provisions. Moreover, if

71. *Lakhan* (n 60) (9).
72. *People* v. *Schrader,* 617 NYS 2d 429.

beggary persists, it is the failure of State and to hide its failure, the State doesn't have any right, morally or legally, to penalise its citizen for that as the court remarks, "Prevention of begging is the object of the said Act. But, one must realise that embedded in this object are the twin goals- Nobody should beg and nobody should have to beg".[73]

3.2. Harsh Mander v. UOI: A Beacon of Hope

In this historic judgment, the Delhi High Court, in August 2018, decriminalised begging in the national capital. It struck down all those sections of BPBA, 1960, which treated beggary *per se* as an offence, as unconstitutional.[74] This judgment is a beacon of hope for all the poor and marginalised people, who in their respective States are still waiting for the "sheer poverty" to be decriminalised. After all, it's the State which promises, in exchange for the citizens ceding their autonomy partially, by way of the social contract, their security and a life with dignity[75] and "the presence of 'beggars' is evidence that the State has not managed to provide these to all its citizens".[76] As the Bench remarks, "The State simply cannot fail to do its duty to provide a decent life to its citizens and add insult to injury by arresting, detaining and, if necessary, imprisoning such persons, who beg, in search for essentials of bare survival, which is even below sustenance".[77]

Further in the judgment, the court, while deciding on the constitutionality of BPBA, 1959, mentions some "essential concomitants and contours of Article 21", which have been elucidated by the Supreme Court from time to time. These include:

- Food, clothing and shelter as the essential needs of every human being.[78]
- The Right to Education flows from Article 21.[79] Later Article 21-A was incorporated in the constitution providing the right to free and compulsory education for all children between the ages of 6 to 14, as a Fundamental Right.

73. *Lakhan* (n 60) (6).
74. *Harsh Mander* v. *Union of India,* 2018 SCC OnLine Del 10427 : AIR 2018 Del 188.
75. *Mander* (n 74) (12).
76. *Mander* (n 74) (29).
77. *Mander* (n 74) (33).
78. *Shantistar Builders* v. *Narayan Khimalal Totame,* (1990) 1 SCC 520.
79. *Unni Krishnan, J.P.* v. *State of A.P.,* (1993) 1 SCC 645.

- Right to health is integral to right to life.[80]
- Right to live with human dignity is enshrined in Article 21.[81]

The court notes:

> *It remains a hard reality that the State has not been able to ensure even the bare essentials of the right to life to all its citizens, even in Delhi ...a person who is compelled to beg cannot be faulted for such actions in these circumstances. Any legislation penalising the people therefore, is in the teeth of Article 21 of the Constitution of India.*[82]

The court also declares the definition of "begging" as in the Act, as violative of Article 14 of the Constitution of India for it being manifestly arbitrary. As the Supreme Court of India, in the case of *Shayara Bano* v. *Union of India*, has held that "a statute can be invalidated on the anvil of being violative of Article 14 for it being manifestly arbitrary",[83] the Bench in the present case explains that "the law does not make any distinction between types of begging" and its definition, in its sweep, includes all types of begging- voluntary and involuntary.[84] To this, the court observes: "the absence of any such distinction exposes the statue to a judicial evaluation on the ground of being arbitrary ...this in our view is manifestly arbitrary".[85]

Out of a total 36, 25 sections of BPBA, 1959 could not "sustain constitutional scrutiny" of the court and were, therefore, struck down as unconstitutional.[86] Other sections, however, "which did not criminalise begging directly or indirectly" were allowed to remain in the legislation.[87]

However, just decriminalising begging is not enough as it does nothing to help the destitute come out of the vicious circle of poverty. A legislation with focus on rehabilitation of the destitute is the need of the hour. Beyond Delhi, the situation is even bleaker as majority of States still consider "beggary" as crime. First and foremost, they need to scrap these laws as

80. *State of Punjab* v. *Mohinder Singh Chawla*, (1997) 2 SCC 83.
81. *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161 : AIR 1984 SC 802.
82. *Mander* (n 74) (33).
83. *Shayaro Bano* v. *Union of India*, (2017) 9 SCC 1.
84. *Mander* (n 74) (16).
85. *Mander* (n 74) (17).
86. *Mander* (n 74) (44).
87. *Mander* (n 74) (43).

they are responsible for an extensive loss of human rights and then steps can be taken to rehabilitate the destitute.

4. SUGGESTIONS

Beggary is a menace to the society, and it must be controlled. But criminalising it is certainly not the solution. Two major reasons for this are:

1. Anti-panhandling laws have been in existence in India for over 50 years now and India still has a large population of beggars. The State having such law since the longest, i.e. West Bengal, has the highest population of people classified as beggars, i.e. 81,244.[88] So clearly these laws are not the solution as they have not helped control beggary; and
2. It is "legally" as well as "morally" wrong to just criminalise beggary without giving due regard to the circumstances under which a person begs.[89]

India is a welfare State and its policies must be moral and for the upliftment of the poor and marginalised sections of the society. Criminalising beggary "ignores the reality that people who beg are the poorest of the poor and marginalised in society".[90]

As Rahim puts it in one of his famous couplets, "one's soul is dead before he begs to someone but the one who denies, his soul is dead long before than the one who came to beg to him". If we analyse the role of State in India, we'll find that the State has not only been denying to help but also punishing the destitute for needing the help. It's an urgent need that the State stops being a soulless entity and does justice to its poor by playing a constructive role in controlling the menace of beggary.

Keeping in view all the legal, rational and moral grounds, here are a few steps that could be taken:

88. Press Information Bureau, "Empowerment of Beggar Population" (26-2-2015) <www.pib.nic.in/newsite/PrintRelease.aspx?relid=115990> accessed 16-5-2019.
89. *Mander* (n 74) (12), (29), (33).
90. *Mander* (n 74) (31).

4.1. Immediately Required Steps

These are the steps, in my opinion, that need to be taken as quickly as possible to provide immediate relief to the destitute people by putting an end to the State sanctioned violations of their human rights.

4.1.a. *Decriminalise begging:*

The first and foremost need is to decriminalise begging in the entire country. All the current laws punish the poor for showing their extreme poverty, which is nothing short of dehumanising them. Criminalisation make the destitute vulnerable to abuse and exploitation. Thankfully, the process has started with Delhi, but it needs to extend to other States as well.

4.1.b. *Scrapping the anti-panhandling legislations altogether:*

All the non-panhandling legislations in the country should be struck down altogether. There is no need to keep a part of these laws. The Delhi High Court in *Harsh Mander* case spared 11 sections of BPBA, 1960 (a version of BPBA, 1959 extended to NCT of Delhi in 1960), as they did not, directly or indirectly criminalise begging.[91] But just because those sections are not unconstitutional, it does not mean that they are important or even useful. For instance, Section 11 of BPBA, 1959 deals with forced beggary and prescribes "imprisonment for a term which may extend to three years but which shall not be less than one year", as punishment. However, it is submitted, that keeping this section in the statute book does more harm than good. The reason being that there is a real possibility of police booking the beggar mafia under this section even when for that specific offence more severe punishment is provided under IPC, as their responsibility then stops with the arrest.[92] For example, maiming a minor child for begging is punishable by life imprisonment under IPC,[93] but in most of the anti-panhandling legislations there is no such specific provision and the culprits, if booked under the anti-panhandling laws, can escape with a much lighter punishment, i.e. three years maximum.[94] So, in order to check the menace of forced beggary, it would be better if this section is removed completely. Similarly, the remaining sections which

91. *Mander* (n 74) (43).
92. Sumita Sarkar, "Beggary in Urban India: Reflections on Destitution and Exploitation" (2007) 68 The Indian Journal of Social Work 531, 539.
93. Penal Code, 1860, S. 363-A.
94. BPBA, S. 11.

the Delhi HC did not strike down are of minimal to no practical utility. Hence, scrapping these legislations altogether is necessary as it will make way for a fresh legislation that may actually help the destitute.

4.1.c. *Need for a fresh legislation with focus on rehabilitation and vocational training:*

It is submitted that a fresh, humane, uniform and rehabilitative legislation which respects the constitutional and Fundamental Rights of the destitute should be drafted and implemented throughout the country. In this regard, a model bill was drafted in 2016,[95] but sadly it could not be implemented.[96] This bill decriminalised begging and had its focus on rehabilitating the destitute rather than punishing them. Other than a few amendments which could have been made to ensure an even better application of the law,[97] the Bill provided almost everything that the activists have been demanding. The Bill did away with arresting of the destitute and provided that the Outreach and Mobilisation Units will recognise the people in need and make them aware of the schemes that they can avail.[98] Only when the destitute consent to it, they may be enrolled in the center where they can get vocational training.[99] Also, people in need could approach the center and get themselves enrolled.[100] Further the Bill provided for issuance of identity cards to the destitute so that they can avail the benefits of various welfare schemes.[101] Provision for separate rehabilitation centers for women and differently abled destitute was also there.[102] The Bill also had provision for a counselling unit attached with each rehabilitation center for those in need of emotional and psychological support.[103] All in all, it can be said that a lot of inspirations can be drawn from the Model Bill, 2016 while drafting a new legislation.

95. The Persons in Destitution (Protection, Care and Rehabilitation) Model Bill, 2016 (Model Bill, 2016).
96. "Centre takes U-Turn, Scraps Draft Bill on Decriminalising Begging; Delhi HC Terms Change in Stance 'Unfortunate' ", *Firstpost* (14-9-2017) <www.firstpost.com/india/centre-takes-u-turn-scraps-draft-bill-on-decriminalising-begging-delhi-hc-terms-change-in-stance-unfortunate-4044101.html> accessed 16-5-2019.
97. Manas Raturi, "A Critique of the Persons in Destitution Model Bill, 2016" (2017) 6 RGICS Policy Watch.
98. Model Bill, 2016, Ss. 2(6), 5.
99. Model Bill, 2016, S. 5(2)(*b*).
100. Model Bill, 2016, S. 4.
101. Model Bill, 2016, S. 6.
102. Model Bill, 2016, S. 7(4).
103. Model Bill, 2016, Ss. 2(9), 9.

One additional care that needs to be taken while drafting the new legislation is that it should be sufficiently detailed so that it does not give rise to any confusion. For instance, there should be clarity about the people (age group, gender, etc.) to whom particular provisions of the Bill applies. In *Master Prem* v. *State (NCT of Delhi)*a juvenile aged 12 years was convicted of beggary and ordered to be detained at a beggar's home for one year as BPBA, 1959 does not provide for juveniles separately.[104] The Delhi District Court in this case observed that:

> *... [E]ven if the person produced before the court namely Prem S/o Mukesh was found to be a beggar but then if he was a child and covered under the definition of a child in need of care and protection then certainly, he was required to be protected by the Child Welfare Committee. Sending such a child to a certified institution which was meant for adult abled and disabled beggars was a violation of the rights of the child sought to be protected under the Juvenile Justice (Care and Protection) Act.*

Therefore, in order to avoid such confusions, the legislation should be sufficiently detailed.

4.2. Steps to Ensure Eradication of Beggary in the Long Run

4.2.a. *Need for stringent anti-human trafficking laws:*

According to Global Slavery Index, 2018, India has the largest estimated absolute numbers of people in modern slavery- almost 8 million.[105] Forced begging is one of the many forms of modern slavery and in India, the situation is alarming as "at least 300,000 children across India are drugged, beaten and forced to beg every day, in what has become a multi-million rupee industry controlled by human trafficking cartels".[106] These cartels regularly inflict wounds and even maim the children so that they

104. *Master Prem (Aged 12 Years)* v. *State (NCT of Delhi)*, Criminal Appeal No. 55/2009 (Delhi District Court).
105. "The Global Slavery Index:India Findings" (4th edn., Walk Free Foundation, 2018) <www.globalslaveryindex.org/2018/findings/country-studies/india/> accessed 15-5-2019.
106. Anuradha Nagraj, "Traffickers in India Force 300,000 Children to Beg in Streets – Police", *Reuters India* (1-6-2016) <www.in.reuters.com/article/india-trafficking-children-beggars/traffickers-in-india-force-300000-children-to-beg-in-streets-police-idINKCN0YN4VJ> accessed 16-5-2019.

became more pitiable and therefore draw more alms from a sympathetic passerby on the streets.[107] CNN-IBN news channel, in an undercover investigation in Delhi, caught on tape, doctors agreeing to amputate the limbs of beggars for as little as Rs 10,000.[108]

Seeing all this, stringent anti-human trafficking laws are an urgent need. The first-ever comprehensive anti-human trafficking law in India, the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, has been passed in the Lok Sabha in July 2018 but is still pending in the Rajya Sabha.[109] The Bill provides for rescue and rehabilitation of the victims of human trafficking and prescribes harsher punishments for certain offences which it considers as "aggravated form of trafficking".[110] Trafficking a person for the purpose of begging has been listed down as one of the aggravated forms of trafficking,[111] and for the offenders, the Bill prescribes, "rigorous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life".[112] These provisions could be an effective deterrent to the practice of forced beggary.

However, ever since the drafting of the bill, it has been marred in controversies over accusations of victimisation of sex workers. While the opponents of the Bill allege that the Bill is against the consensual sex workers and transgender people as it does not differentiate between trafficking and consensual sex work and it forces rescue and rehabilitation,[113] the supporters of the Bill argue that it "attempts to find a middle path between the debates and attempts to empower sex workers

107. "How Children are forced into Begging by Cartels" (Save the Children India, 2016) <www.savethechildren.in/resource-centre/articles/how-children-are-forced-into-begging-by-cartels> accessed 16-5-2019.
108. Randeep Ramesh, "Indian Doctors Accused in 'Arms-For-Alms' Scandal" *The Guardian* (31-7-2006) <www.theguardian.com/world/2006/jul/31/india.randeepramesh> accessed, 15-5-2019.
109. Jagriti Chandra, "Lok Sabha Passes Anti-Trafficking Bill", *The Hindu* (27-7-2018) <www.thehindu.com/news/national/lok-sabha-passes-anti-trafficking-bill/article24523977.ece> accessed 4-5-2019.
110. Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, LS Bill, (2018-2019) (89) Ss. 31, 32.
111. Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, LS Bill, (2018-2019) (89), S. 31(*ix*).
112. Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, LS Bill, (2018-2019) (89), S. 32.
113. Pari Saikia, "Anti-Trafficking Bill, 2018: Comprehensive or Flawed?", *Tehelka* (2-8-2018) <www.tehelka.com/anti-trafficking-bill-2018-comprehensive-or-flawed/> accessed 15-5-2019. See also Tripti Tandon, "India's Trafficking Bill, 2018 is neither Clear nor Comprehensive" (2018) 53(28) EPW Engage <www.epw.

by, first and foremost, providing them with an exit strategy if they seek it".[114] It is submitted that, though the provisions of this Bill could prevent the practice of forced beggary, the government should first settle all the concerns raised, through discussion and proper amendments in the bill as ignoring them can give rise to another right-less class of people in the society. Though, it is advisable to expedite the whole process.

4.2.b. *Alternative source of income for transgender people:*

A report on transgender people notes:

> *They are pushed to the margins of the society by making education, healthcare, housing and employment inaccessible to them. Most transgender persons are unable to complete primary and secondary education due to hostile environment at school created by the insensitivity of fellow students and teachers. Being forced out of school, results in higher education becoming a distant dream for many members of the transgender community. Lack of higher education forces them to stay out of the organised workforce and pushes them into sex work and begging as the only means of survival. Police harassment, violence from family and insensitive medical institutions makes matters far worse.*[115]

It, however, does not mean that beggary should be allowed to persist or cannot be eradicated, but outrightly criminalising it will abruptly snatch away the major source of their income and will leave the transgender people in peril. Rather incremental steps should be taken to bring the community members to the mainstream by creating public awareness and addressing the social stigma attached with the community. One of these steps is to provide the transgender people with alternative sources of income so that they can feel that they too are a part and parcel of social life.

in/engage/article/trafficking-of-persons-prevention-protection-and-rehabilitation-bill-2018-is-neither-clear-nor-comprehensive> accessed 16-5-2019.

114. Abza Bharadwaz, "Anti-Trafficking Bill: No, It does not Take Away Sex Workers' Rights. Here's How" (*Daily O*, 20-12-2018) <www.dailyo.in/voices/anti-trafficking-bill-sex-work-rajya-sabha-trafficking-of-persons-prevention-protection-and-rehabilitation-bill-2018/story/1/28434.html> accessed 16-5-2019; cf Saikia (n 113); cf Tandon (n 113).
115. Ondede (n 29) 9 (emphasis added).

As for example, Kochi Metro in May 2017, hired 21 transgender people across various positions in ticketing and housekeeping.[116] But within a week, eight of them quit.[117] The major reason being lack of accommodation as nobody wanted to rent out houses to them.[118] But after initial hiccups and struggle, people started to accept them as a member of society. Ragarenjini, one of the recruits says that "our coworkers are now approachable and helpful".[119] Sandra, another recruit says about passengers that, "they mostly behave decently with us".[120] The good news is that the Kochi Metro is now taking steps to increase the strength of the transgender staff from an existing 14 to 60.[121] Certainly, the struggle is far from over and the transgender people have a long way to go before they achieve equality but initiatives like these provide them with alternative source of income, which in turn will be monumental in eradicating beggary.

4.2.c. *Effective programs to alleviate poverty:*

It is rightly said that "Poverty is the root of all evil". In *Harsh Mander* case, the court observed that "[I]f we want to eradicate begging, artificial means to make beggars invisible will not suffice. A move to criminalise them will make them invisible without addressing the root cause of the problem",[122] which is poverty. As per Suresh Tendulkar Committee report, the population below the poverty line in India in 2011-12 was 269.3 million (21.9 per cent of the population).[123] That's a huge number, though

116. John L. Paul, "In A First, Transgenders Get Jobs at Kochi Metro", *The Hindu* (11-5-17) <www.thehindu.com/news/cities/Kochi/giving-them-their-rightful-share/article18423424.ece> accessed 5-5-19.
117. Ramesh Babu, "In One Week, Eight Transgender Employees Quit Working for Kochi Metro", *Hindustan Times* (25-6-18) <www.hindustantimes.com/india-news/in-one-week-eight-transgender-employees-quit-working-for-kochi-metro/story-XDp6xgnA2Y6dhaAYcs8abP.html> accessed 5-5-2019.
118. *Ibid.*
119. Vidhya C.K., "Nine Months Later, Transgenders Employed at Kochi Metro Say Things are Moving on The Right Track" (YourStory, 22-1-2018) <www.yourstory.com/2018/01/nine-months-later-transgenders-employed-at-kochi-metro-say-things-are-moving-on-the-right-track> accessed 5-5-2019.
120. *Ibid.*
121. Jovita Aranha, "Kochi Metro All Set to Deploy 60 Transgender Employees in the Next 2 Years!" (*TheBetterIndia*, 5-9-2017), <www.thebetterindia.com/114255/kochi-metro-transgender/> accessed 16-5-2019.
122. *Harsh Mander* v. *Union of India,* 2018 SCC OnLine Del 10427 : AIR 2018 Del 188 (30).
123. Task Force on Elimination of Poverty in India, Report of the Task Force on Elimination of Poverty in India (Niti Aayog, 2018) <www.niti.gov.in/sites/default/

it's a sign of relief that that the same in 1993-94 was 403.7 million (45.3 per cent of the population).[124] This process can be expedited by bringing in sound policies and launching effective programs for rural and urban areas.

Job creation is one of the best ways to alleviate poverty. According to a report from PWC, India will need to create nearly 100 million jobs by 2027 to absorb the growth in the working age population.[125] If enough new jobs are not created, in the coming years a large section of the society faces unemployment and thus poverty. For India to prosper, the report states, it is the need of the hour to place equal focus on job creation and not just economic growth by leveraging transformative solutions that build upon the business as usual growth of the economy.[126]

5. CONCLUSION

All the prevailing anti-panhandling legislations in India, with no exceptions, are vile, dehumanising and outdated. They are not even double-edged swords, with advantages and disadvantages both. Rather they serve just one purpose, i.e. violating the constitutional and Fundamental Rights of the destitute. These laws are good for nothing. Not for solving the menace of forced beggary, not for someone soliciting alms in dire need and certainly not for their rehabilitation. Decriminalising beggary is the most urgent and fundamental need and the process had already started with Delhi High Court striking down anti-beggary provisions of BPBA, 1959. It is strongly recommended that all the anti-panhandling legislations across India should be scrapped altogether making way for a new legislation, to be applied uniformly throughout the country, with focus on rehabilitation and vocational training of the destitute.

In this whole context, the case of transgender people deserves special consideration. As begging is one of their significant sources of income, incremental steps should be taken in order to reduce their dependency on begging and bring them into the mainstream. Providing them with alternative sources of income and creating public awareness may help the

files/2018-12/presentation-for-regional-meetings-NITI-AAYOG.pdf>accessed 16-5-2019.

124. *Ibid.*

125. Nagarik, Inclusive Growth through Large-Scale Employment Generation (Summary) (PwC India, 2018) <www.pwc.in/assets/pdfs/publications/2018/nagarik.pdf> accessed 15-5-2019.

126. *Ibid.*

cause. In a praiseworthy move, Kochi Metro employed 21 transgender people across various positions in ticketing and housekeeping but more and more such initiatives are needed from public as well as private sector to address the issue sufficiently.[127] Lastly, India being a welfare State, its role towards its poor needs to be scrutinised and changed accordingly as it is the responsibility of the State to ensure that "nobody should beg and nobody should have to beg".[128] Since poverty is the root cause of begging, poverty alleviation is the *sine qua non* (an absolutely necessary condition) for a full-proof solution to it in the long run. As long as there is poverty, no matter what punitive or rehabilitative plans we have, there is always the chance of people resorting to beggary. Creating new jobs and introducing effective poverty alleviation programs in rural and urban areas can go a long way in realising the goal of eradicating beggary from the country.

127. Paul (n 116).

128. *Ram Lakhan* v. *State*, 2006 SCC OnLine Del 1501 : (2007) 137 DLT 173 (6).

PROTECTING HUMAN RIGHTS OF SCHEDULED CASTES & SCHEDULED TRIBES:

A COMMENT ON *PRATHVI RAJ CHAUHAN* v. *UNION OF INDIA*

Nidhi Chauhan and Rajat Solanki***

ABSTRACT

On 10 February 2020, the Supreme Court of India decided a Writ Petition where Section 18-A of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was challenged as violative of Constitution of India. The Court, while upholding the constitutional validity, observed that th e section was inserted by an amendment in order to bring back the rigour of law and to render the judgment of the Supreme Court in Dr. Subhash Kashinath Mahajan v. State of Maharashtra, toothless. The Court stated that Section 18-A has been rendered for academic use only after its decision in the Review Petition where the Court recalled its earlier mandate. This case comment analyses the background of the amendment made for inserting Section 18-A and the decision of the Supreme Court, excluding the applicability of provisions relating to anticipatory bail, responsible for the amendment.

1. INTRODUCTION

The sphere of human rights is growing. In India, the human rights debate mostly revolves around the Universal Declaration of Human Rights. However, India has not been able to meet the obligations given thereunder. Discrimination on the basis of caste is the most important human rights challenge faced by the world. In this regard, the Scheduled Castes (SCs) and Scheduled Tribes (STs) in India have been deprived of basic human rights. They face all kinds of discrimination and denial of their human rights. India has made several efforts to eliminate the discrimination based on caste by adopting several domestic and international measures.

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In spite of that, the SCs and STs experience discrimination and undignified treatment. This is happening due to lack of protection of their human rights.[1] It is believed that the reason behind this is lack of political will to enforce the laws. It has resulted in failure of India in promoting human dignity and providing social, economic and cultural rights. The SCs and STs are facing various types of atrocities including denial of the right to life and property, inadequate living conditions and denial of basic human rights and freedom. The Human Rights Commission and human rights activists have compiled and documented evidence of violence and discrimination against the SCs and STs. The newspapers have also highlighted the atrocious behaviour of criminal justice system and the upper-caste persons towards the minorities. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has, in order to prevent atrocities against them, a provision where a person who has been accused of an offence under the Act shall not be given an anticipatory bail.

The presumption of innocence is also recognised as a human right.[2] There have been grievances of violation of human rights of innocent citizens owing to indiscriminate arrests. The power of arrest is considered as a tool of oppression and harassment which brings humiliation and curtails freedom.[3] The Supreme Court had issued directions in order to check abuse of power to arrest in the case of *D.K. Basu* v. *State of W.B.*[4] The Supreme Court had also observed that unlawful arrest violates Article 21 of the Constitution and, therefore, victim is allowed to claim compensation.[5] The Code of Criminal Procedure, 1973 makes a provision for anticipatory bail under Section 438 with the object to give freedom from confinement to a person before he is held guilty. The Supreme Court had laid down the issues and boundaries that have to be taken into consideration while dealing with the anticipatory bail in *Joginder Kumar* v. *State of U.P.*[6] This case comment is focused on the provision excluding the applicability of the provisions relating to anticipatory bail in case of offences committed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

1. Sesha Kethineni and Gail Diane Humiston, "Dalits, the Oppressed People of India: How are their Social, Economic, and Human Rights Addressed" (2010) 4 War Crimes, Genocide & Crimes against Human 99.
2. International Covenant on Civil and Political Right, Art. 14(2).
3. *Arnesh Kumar* v. *State of Bihar,* (2014) 8 SCC 273.
4. (1997) 1 SCC 416.
5. *Rini Johar* v. *State of M.P.,* (2016) 11 SCC 703.
6. (1994) 4 SCC 260.

2. BACKGROUND

The Parliament of India, with the intention to prescribe punishment for preaching and practicing "Untouchability", enacted the Untouchability (Offences) Act, 1955. It was renamed by an amendment in 1976 as the Protection of Civil Rights Act, 1955.[7] The enforcement of social practices associated with untouchability and disability were outlawed and made the subject matter of penalties. However, it was felt that the Protection of Civil Rights Act, 1955 did not provide sufficient deterrence to social practices which continued unabated and in a widespread manner.

Later, due to inefficacy of the Protection of Civil Rights Act, 1955, the Parliament of India enacted the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("Act"). The Statement of Objects and Reasons to the Act states that:

> *Despite various measures to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes, they remain vulnerable. They are denied a number of civil rights. They are subjected to various offences, indignities, humiliations and harassment... A special legislation to check and deter crimes against them committed by the non-scheduled castes and non-Scheduled tribes has, therefore, become necessary.*

So, with the objective of preventing commission of crimes or atrocities against the members of Scheduled Castes and Scheduled Tribes, the Act made provisions for Special Courts and rehabilitation of the victims of such crimes. The Act provides for punishment for various types of caste based insults.[8] Under Section 18 of the Act, it has been clearly stated that the provision relating to anticipatory bail under the Code of Criminal Procedure shall not apply to persons arrested for committing an offence under the Act. This provision remained controversial due to allegations of misuse of the Act. The Act was alleged to have been used as an instrument of blackmail and therefore, the issue of anticipatory bail has been a subject matter of many cases.

In *State of M.P.* v. *Ram Kishna Balothia*,[9] the Supreme Court upheld the constitutional validity of the provision contained in Section 18 of the Act

7. Act 106 of 1976 (wef 19.11.1976)
8. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, S. 4.
9. (1995) 3 SCC 221.

and stated that it does not violate Articles 14 and 21 of the Constitution. The Court observed that "the exclusion of Section 438 of Code of Criminal Procedure had to be viewed in the context of prevailing social conditions and the apprehension the perpetrators of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of these offenders, if they are granted anticipatory bail."[10]

The Supreme Court revisited the issue when the constitutional validity of Section 18 of the Act was challenged in *Subhash Kashinath Mahajan* v. *State of Maharashtra*.[11] The appellant was accused of committing various offences under the Act. He was granted anticipatory bail by the High Court in exercise of powers under Section 482 of the Code of Criminal Procedure, 1973 ("CrPC"). However, the High Court rejected his petition for quashing the proceedings under the Act. The High Court observed that the inherent power of quashing criminal proceedings could not be exercised in the case as it will give an erroneous indication to the weaker sections of the society. The appellant, therefore, approached the Supreme Court. The Supreme Court observed that "there is a need to balance the societal interest and peace on one hand and the protection of rights of victims of false allegations on the other".[12] While dealing with the issue of anticipatory bail, the Court held that the exclusion of Section 438 of CrPC is applicable when a *prima facie* case of commission of crime under the Act is made out. However, if the allegations are found *prima facie* false and motivated, then such exclusion will not apply.[13] The Court, further, held that the exclusion of the Section will not be applicable where no *prima facie* case is comprehended or the case is patently mala fide or false.[14] However, the Court clearly stated that "the efficacy of Section 18 of the Act is not being diluted in deserving cases where the Court finds a case to be *prima facie* genuine, warranting custodial interrogation and pre-trial arrest and detention."[15] The Court was of the view that the exclusion of anticipatory bail will be limited to cases where the protection of Fundamental Right guaranteed under Article 21 of the Constitution is essential. The Supreme Court also held that public servants could be arrested only after approval of the Senior Superintendent of Police.

10. (1995) 3 SCC 221.
11. (2018) 6 SCC 454.
12. (2018) 6 SCC 454 (22).
13. (2018) 6 SCC 454 (57).
14. (2018) 6 SCC 454 (65).
15. *Ibid.*

The Supreme Court concluded by issuing prospective directions and laying down the following guidelines:

(i) Proceedings in the present case are clear abuse of process of court and are quashed.

(ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide.

(iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinised by the Magistrate for permitting further detention.

(iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

(v) Any violation of directions (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.[16]

3. AFTERMATH

After the judgment of the Supreme Court in *Subhash Kashinath Mahajan,*[17] the Union of India filed a Review Petition before the Supreme Court. The Division Bench of the Supreme Court, citing importance of the matter, referred the petition to a larger bench. Under the said review petition,[18] the Supreme Court observed that the direction given by it in the case of *Subhash Kashinath Mahajan*[19] "encroaches upon the field reserved for the legislature and runs against the concept of protective discrimination in favour of downtrodden classes under Article 15(4) of the Constitution and is also impermissible within the parameters laid down by this Court for exercise of powers under Article 142 of the Constitution

16. (2018) 6 SCC 454 (83).
17. (2018) 6 SCC 454.
18. *Union of India* v. *State of Maharastra,* (2019) SCC OnLine SC 1279.
19. (2018) 6 SCC 454.

of India."[20] The Court was of the opinion that the ultimate aim of the Act is to create a casteless society. The Supreme Court, further, observed that Section 18 has been enacted "to take care of an inherent deterrence and to instil a sense of protection amongst members of Scheduled Castes and Scheduled Tribes."[21] Diluting the same would frustrate the very purpose of the mechanism to prevent the offences of atrocities. The Court observed that the directions issued in *Subhash Kashinath Mahajan*[22] would cause miscarriage of justice even in deserving cases. The Court observed that the direction amounts to a mandate having legislative colour.[23] The Court further observed that direction (iv) issued in *Subhash Kashinath Mahajan*[24] cannot survive as it puts the members of the Scheduled Castes and Scheduled Tribes in a disadvantageous position in the matter of procedure *vis-a-vis* to the complaints lodged by members of upper caste. The Supreme Court, allowing the review petition,[25] partially recalled the directions given by it in the case of *Subhash Kashinath Mahajan.*[26]

However, before the review petition was filed before the Supreme Court,[27] the Parliament brought an amendment in 2018 to The SC/ST (Prevention of Atrocities) Act in order to render the judgment of Supreme Court in *Subhash Kashinath Mahajan*[28] toothless and to restore the law to its earlier rigour. The said amendment inserted Section 18-A in the Act overriding the directions of the Supreme Court in the aforesaid case. It reads as follows:

> *Section 18-A: (i) For the purpose of this Act- (a) preliminary enquiry shall be required for registration of a First Information Report against any person; or (b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made, and no procedure other than that provided under this Act or the Code shall apply.(ii) The provisions of section 438 of the Code shall not apply to a*

20. (2019) SCC OnLine SC 1279 (75).
21. (2019) SCC OnLine SC 1279 (7).
22. (2018) 6 SCC 454.
23. (2019) SCC OnLine SC 1279 (66).
24. (2018) 6 SCC 454.
25. (2019) SCC OnLine SC 1279 (75).
26. (2018) 6 SCC 454 (83) (Direction Nos. (*iii*) and (*iv*) recalled).
27. (2019) SCC OnLine SC 1279.
28. (2018) 6 SCC 454.

case under this Act, notwithstanding any judgment or order or direction of any Court.

In *Prathvi Raj Chauhan* v. *Union of India*,[29] the above-mentioned Section 18-A was questioned on the ground that it has been enacted to nullify the judgment of Supreme Court in *Subhash Kashinath Mahajan* v. *State of Maharashtra*.[30]

4. JUDGEMENT

In *Prathvi Raj Chauhan* v. *Union of India*,[31] the petitioner alleged that the provisions of the Act are being misused and Section 18-A inserted by an amendment is arbitrary, unjust, irrational and violative of Article 21 of the Constitution of India. The Supreme Court upholding the provisions under Section 18-A observed that the directions given in the case of *Subhash Kashinath Mahajan* v. *State of Maharashtra*[32] have been recalled by the Supreme Court. The court stated that the Section has to be interpreted as per the law laid down in *Lalita Kumari* v. *Govt. of U.P.*[33] by the Constitutional Bench of the Supreme Court which held that the registration of FIR is mandatory without preliminary inquiry if the information discloses commission of a cognizable offence.[34] The Court also observed that Section 18-A was inserted due the decision of the Supreme Court which made it mandatory to obtain approval of the appointing authority concerning a public servant in the case of arrest of accused persons.

The Supreme Court held that the provisions contained in Section 18-A of the Act have been rendered of academic use only.[35] The Court observed that the said provision was enacted in order to take care of judgment of the Supreme Court in *Subhash Kashinath Mahajan*[36] and the same has been recalled in *Union of India* v. *State of Maharashtra*.[37] The Court, further, stated that the provisions relating to anticipatory bail were already there under Section 18 of the Act. However, while making it clear that the

29. (2020) SCC OnLine SC 159.
30. (2018) 6 SCC 454.
31. (2020) SCC OnLine SC 159.
32. (2018) 6 SCC 454.
33. (2014) 2 SCC 1.
34. (2014) 2 SCC 1 (120).
35. (2020) SCC OnLine SC 159 [9].
36. (2018) 6 SCC 454.
37. (2019) SCC OnLine SC 1279.

provisions relating to anticipatory bail shall not apply to the offences under the Act, the Court said that the bar created by Section 18 and 18-A shall not apply if the complaint does not make out a *prima facie* case for applicability of the Act. The Court, however, concluded by stating that the High Courts can quash the cases in order to prevent the misuse of the Act by using the inherent powers under Section 482 of the CrPC in exceptional cases.

In the concurring judgment, Justice S. Ravindra Bhat said that the power under Section 482 of the CrPC should not be used so as to convert the jurisdiction into that under Section 438 of the CrPC. It should be used only in exceptional cases where no *prima facie* offence is made out according to the First Information Report (FIR) and the denial of bail would inevitably be a miscarriage of justice. The Court ultimately observed that the liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.

5. CONCLUSION

There is a need of having a robust mechanism for protection of the human rights of the Scheduled Castes and Scheduled Tribes. However, only having a proper mechanism will not suffice, until and unless there is a political will to enforce the laws made for protection of their human rights. The enforcement of such laws shall promote human dignity and provide social, economic and cultural rights to the SCs and STs. It must guarantee their right to life, property and basic human rights and freedom.

As far as this case in concerned, there had been allegations of abuse of the provisions of the Act by filing of false cases. The Supreme Court responded to the same by introducing certain safeguards *inter alia* the removal of bar on granting anticipatory bail in *Subhash Kashinath Mahajan*.[38] However, the Supreme Court appeared to have made a prejudiced observation as far as the functioning of the Act was concerned. After the judgment of the Supreme Court, the Union of India filed a review petition. There were protests against this judgment and due to severity of the uproar, Parliament amended the Act to undo the said judgment without waiting for the decision in the review petition. The amendment to the Act brought back the rigour of law which was diluted by the Supreme Court. Later, while considering the review petition, the Supreme Court partially recalled its

38. (2018) 6 SCC 454.

directions under the *Subhash Kashinath Mahajan*[39] case. In *Prathvi Raj Chauhan* v. *Union of India*,[40] the validity of Section 18-A of the Act was challenged. While upholding the validity of the provision, the Supreme Court observed that the Section 18-A inserted by the amendment is of academic importance only as the Court has recalled its direction while considering review petition and provisions with respect to anticipatory bail were already there under Section 18 of the Act. However, the Supreme Court clearly stated that if there is abuse of process of law under the Act, then the High Court can grant pre-arrest bail by exercising its inherent powers enshrined in Section 482 of the CrPC. The judgment of Supreme Court goes a long way in protection of human rights of the Scheduled Castes and Scheduled Tribes as the legislative intent to deny anticipatory bail to offender under the Act was recognised and sheltered. The Court has rightly upheld the provision so that the objective of checking and deterring offences against the Scheduled Castes and Scheduled Tribes can be achieved. The socio-economic conditions will improve only when they are not denied their basic human rights and also by putting an end to the atrocities against them.

Although Section 18-A of the Act has been declared as valid and of academic use only, it is also important to keep in mind that there had been a number of instances where the provisions of the Act has been misused in order to harass the innocent citizen. Due to the misuse of the law, the Fundamental Rights of citizens guaranteed under the Constitution have also been violated. It is important to prevent the abuse of process of law and therefore, the High Court, by using its inherent power under the CrPC, is authorised to quash such proceedings in case of abuse of process. The inherent power of the High Court is not taken away by the provisions of the Act. The High Court can exercise its discretion to protect human right to liberty of an innocent citizen against *mala fide* arrests. Ultimately, it can be said that the provisions of the Act must be interpreted in order to promote the constitutional values of fraternity and integration of society. A check on false cases under the Act is required. Moreover, there is a need of balancing the social need with human rights so as to achieve the constitutional goals.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is a transformative law and it requires strengthening by way of proper implementation for protection of basic human rights. However,

39. (2018) 6 SCC 454.
40. 2020 SCC OnLine SC 159.

there is a requirement of having provisions in the Act so as to safeguard and protect innocent citizens from being wrongly prosecuted under the Act. Such a provision can be included only by way of having discussions with all the stakeholders. The Act must not be allowed to be used as an instrument of blackmail. Howsoever, the Courts may use their inherent powers to prevent the abuse of law in such cases. It is also important to use the Act as a tool to eradicate discrimination and improve fraternity. This can only happen by way of constant community action in order to change the ingrained caste rigidity. The objective of protecting human rights of a person can be achieved only after changing the societal perception towards the Scheduled Castes and Scheduled Tribes.

CASE COMMENT

ANURADHA BHASIN v. *UNION OF INDIA* AND *GHULAM NABI AZAD* v. *UNION OF INDIA* 2020 SCC ONLINE SC 25

Vaayu Goyal and Kunal Saini ***

1. INTRODUCTION

The Right to Access to the Internet is an ongoing topic of intense discussion taken up around the world and is being increasingly considered as a basic human right by various international organisations such as the United Nations. The multitude of economic, social and human rights impacts that arise as a result of the threat to access to internet are staggering in nature, which ultimately cast a shadow upon rights of citizens including human rights and civil rights. The large number of internet shutdowns imposed by the government especially in the last couple of years, raise multiple questions around the justification and correctness of the same. Often, the State resorts to public emergencies to impose such shutdowns. This brings about the need to reconsider this path resorted to by the State as the power is yielded in an uncontrolled manner and it may be exercised excessively and arbitrarily by the State. Suspension orders under the suspension rules should not be passed as a matter of ordinary course of operation. The protocol needs to be backed by sufficient procedural safeguards, in line with principles of proportionality, necessity and reasonableness. Post this judgment, our user-intensive country may be expected to move towards a cyber democracy where public participation is appreciated and encouraged.

2. FACTUAL MATRIX OF THE CASE

The genesis of the issue had started when curtailments were imposed on the journey of the Amaranth Yatris and tourists were advised to restrict their travel to the valley, following which certain educational institutions

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and government offices were ordered to be shut down. On 4 August 2019, mobile phone networks, landlines and internet services were shut down by the government, followed by a constitutional order which was promulgated by the President, thereby applying all the provisions of the Constitution of India to the State of Jammu and Kashmir and modifying Article 367 of the Constitution of India. On the same day itself, a number of District Magistrates imposed restrictions on movement and public gatherings by virtue of powers enshrined under Section 144 of the Criminal Procedure Code. The instant matter involves two separate writ petitions, i.e. WP (C) No 1031 of 2019 and WP (C) No 1164 of 2019, the former filed by the Executive Editor of Kashmir Times and the latter filed by Congress MP Ghulam Nabi Azad. The writ petition filed by the journalist deals with the restrictions imposed upon the Freedom of the Press and the restrictions on the distribution of the newspaper, i.e. Kashmir Times, whereas the latter writ petition deals with the Restriction on Movement wherein Mr. Ghulam Nabi Azad was not allowed to travel to his constituency in the State of Jammu and Kashmir.

3. LEGAL AND PROCEDURAL BACKGROUND

A recent AcessNow.org report portrays a clear picture of the number of times the Indian Government has shutdown the Internet, which has reached a staggering figure of 134 times, the most recent one being the massive internet shutdown in Jammu and Kashmir.[1] On similar lines, it is pertinent to note that the legal mandate for the internet shutdowns is threefold: the first being the Information Technology Act through Section 69[2], the second being Section 144 of the Criminal Procedure Code 1973 ("CrPC"), through which a restrictive measure to access the internet could be taken by a Magistrate, and the third mandate being the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 which lays down the procedure to be followed when bringing about such restrictions. Ultimately, what has prompted the Judiciary to intervene in the situation is the outright abuse of unbridled powers granted to the Central and the State Governments, and the same power being carried out in the normal course of operation.

1. Berhan Taye and Sage Cheng, "The State of Internet Shutdowns: KeepItOn Report 2018" (access now, 8-7-2019) <https://www.accessnow.org/the-state-of-internet-shutdowns-in-2018/> accessed 19-1-2020.
2. Information Technology Act, 2000, S. 69-A which deals with the blocking of access to information on the internet. See also Information Technology (Procedures and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

4. APPRAISAL AND CRITICISMS OF THE JUDGMENT

4.1. Appropriateness of the Decision

The judgment starts on a light note by quoting Charles Dickens' poem in "A Tale of Two Cities" and then limits its scope in the preliminary stage as to what aspects the court will delve into. The court limits its scope by not transgressing into the political reasons for the said suspension of telecom services, and attempts to strike a balance between the liberty and security concerns in order to ensure the Right to Life. The Judges start off by appreciating the history of the beautiful land which is also famously known as the "Paradise on Earth" and take cognizance of the magnitude of the task before the Hon'ble Court. Pertaining to one of the parts of the judgment which deals with production of orders, the court observes that the States should take a proactive approach in providing all the necessary orders before the court to ensure proper judicial scrutiny of the same. It is also pertinent to note that the Supreme Court establishes the principles of Natural Justice in terms of denial of evidence by citing the case of *Ram Jethmalani* v. *Union of India*[3] and articulating the aspect of Right to Know of an individual under the Fundamental Right to Information of a citizen. Such observations reflect the ideals of an open democracy and values enshrined in a welfare State. Simultaneously the court directs the State authorities to review the need for the continuation of the existing Section 144 of CrPC orders passed, which acts as a duty on the State to not prolong such restrictions hitherto and effectively take necessary actions in a restricted manner. However, despite holding that the suspension orders should adhere to a necessary duration, the decision still does not take into account the sunset clause to be prevalent in such orders which fixes a specific time period for the suspension orders[4], which will be reiterated in a later part of this case comment.

The next part of the judgment deals with the fundamental rights and the court grants constitutional protection to the Freedom of Speech and Expression over the internet while at the same time also considering the freedom to practice any trade, business or profession on the internet. The decision is aimed at expanding the contours of the Fundamental Right and has adopted elastic and evolving nature given to Fundamental Rights and at the same also cherished the modern approach towards the Constitution

3. (2011) 8 SCC 1.
4. Nakul Nayak, "It's Time to Fix our Internet Shutdown Laws", Hindustan *Times* (16-1-2020).

also termed as the "Transformative Constitutionalism".[5] This comes as a relief for the citizens since the access to the internet is to be treated as right enshrined under the Constitution. The most quintessential part of the decision deals with internet shutdown where the Court has deliberated upon the procedural adherence and the applicability of the substantive law, which includes the situation of public emergency by citing a plethora of cases while establishing a concurrent link with the suspension rules and the effective need for the suspension orders. The decision also takes into account the International Conventions on declaring a situation as a public emergency[6] and giving due regards to the principles adopted by various countries around the world, thereby incorporating the general accepted principles followed. The latter part of the decision deals with the freedom of the press, and one of the contentions was in regard to the "chilling effect" of the restriction on the freedom of press but the court has not accepted this submission as there was no evidence on whether other individuals were also restricted to publish a newspaper.

The authors will not be addressing the Production of Orders and Section 144, CrPC orders in much detail as the authors would like to stick to the aspect of access to internet as a human eight and the Fundamental Rights violations which arise out of such shutdowns.

4.2. Expanding horizons of Article 19 of the Constitution

The decision has modified the interpretation of Article 19 which lays down the freedoms guaranteed to a citizen. Post this decision, the Freedom to Speech and Expression and Freedom of Trade and Commerce over the medium of internet has been constitutionally protected, after deliberating upon the aspect of protection given to freedom of print medium in previous judgments by this Court.[7] This decision comes as a huge relief for the masses in India as it had been recently reported that India has one of the highest number of internet users in the world;[8] restrictions on Freedom

5. *Navtej Singh Johar* v. *Union of India,* (2018) 10 SCC 1.
6. International Covenant on Civil and Political Rights, Art. 19(2) of the Covenant states that every human has a right to freedom of expression on any form of media and the same also includes the expression in any form i.e. orally, writing or print.
7. *Indian Express Newspaper (Bombay) (P) Ltd.* v. *Union of India,* (1985) 1 SCC 641; *Odyssey Communications (P) Ltd.* v. *Lokvidayan Sanghatana,* (1988) 3 SCC 410.
8. Harsh Walia and Shobhit Chandra, "How Internet Access is Integral to Freedom of Speech and Expression" (*Fortune India*, 13-1-2020) <https://www.fortuneindia.com/opinion/how-internet-access-is-integral-to-freedom-of-speech-and-expression/103987> accessed 31-1-2020.

of Access to Internet act as an impediment to the fundamental freedoms. Such observations by the court signifies the dynamic nature of law which is ever growing to accommodate the technological development in modern times, which ultimately leads to adequately serving the evolving needs of the citizens. It is pertinent to note that protecting such freedoms over the internet also upholds the civil liberties which are enshrined by our law makers as an important facet of modern democracy and may possibly lead to a road towards a balanced cyber democracy in the future. However, an equally acceptable criticism has also been considered by the court in terms of modern terrorism over the medium of internet which can be used as a method to propagate terrorism. In an attempt to balance these competing concerns, the court has attempted to safeguard the interests of individuals by upholding the test of proportionality.

4.3. Promoting Transparency and Public Participation

The decision also takes into account the aspect of Right to Know granted to the citizens, which finds its mandate through Right to Information under Article 19 of the Constitution with reference to the production of orders related to the suspension of the telecom services. This helps in bringing in transparency and accountability in passing such orders and ensuring procedural regularity. It is extremely essential to not leave the citizens out in the dark and shut down all means of communication as it will pose a great harm to the individual's right to know in a modern democracy. On similar lines, it is pertinent to point out that the Federal Communication Commission had issued a public comment request to the public of the United States on whether or when the police should interrupt the cell phone and internet service to protect public safety.[9] After this decision, it is evident that stakeholder involvement will be encouraged before taking such restrictive measures and the public will be involved in the process before enforcement of such suspension orders. Thus, such a decision also promotes prior approval by the public in taking a restricted measure in imposing such internet blackouts, which is another remedial measure pointed by the Court in this decision to be carried out by the State.

9. Elinor Mills, "FCC Seeks Comment on Police Shutdowns of Cell Service", *CNet* (2-3-2012).

4.4. Arbitrary Action of the State

The Hon'ble Bench, in the present case, has expressed its distress over the failure of the government to publish all orders in force at the time. This inadequacy of material on record led to a situation that prevented the court from issuing a clear order to quash or uphold the validity of the action of the government.[10] The court thus had to switch to the alternative of constituting a Review Committee as provided under the Suspension Rules, 2017.[11]

While providing such a relief, the Hon'ble Court failed to consider the fact that the Review Committee prescribed under the Suspension Rules, 2017 is entirely composed of the members of the Executive. Ideally, such a committee should have been constituted of members that can function without a bias. The review process may therefore be possibly undermined by conflicting interests of the members of the Committee. Furthermore, even if the Committee does come up with a finding, the Rules do not stipulate any powers upon the Committee to take an action to strike down the orders issued arbitrarily.

This implies failure in curtailing the unchecked and arbitrary use of power by the functionaries of the State in the present case, and the decision of the Hon'ble Court does not entail an actual relief for the affected citizens of Kashmir.[12] The holding of the Court in this case is more of a "declaration" of law rather than an "application" of law.

4.5. Scope of "Reasonable Restrictions"

The Hon'ble Bench did not recognise access to internet as a Fundamental Right in the present case as the same was not contended by the parties. However, the court laid down that the Right to Freedom of Speech and Expression[13] and Freedom of Trade and Commerce[14] through the medium of internet was constitutionally protected under the ambit of Article 19

10. V. Venkatesan, "Verdict on Internet Curbs in J&K in Defence of Free Speech, but Relief Remains Elusive", *Frontline, The Hindu* (11-1-2020).
11. Ujjaini Chatterji, "The Sweet Taste of Liberty – As the Supreme Court Reminds" (*The Leaflet*, 11-1-2020) <https://theleaflet.in/the-sweet-taste-of-liberty-as-the-supreme-court-reminds/> accessed 27-1-2020.
12. "India's Top Court Orders Review of Kashmir Internet Shutdown" (*Al Jazeera*, 10-1-2020).
13. Indian Constitution, Art. 19(1)(*a*).
14. Indian Constitution, Art. 19(1)(*g*).

of the Constitution. This holding furthers the growth of jurisprudence relating to the use of internet in the present era.

Further the court highlighted the importance of Article 19(2) as discussed in the case of *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*.[15] Reasonability is interpreted by the court to mean that the restriction must be either with a view to further the interests of the sovereignty, security and integrity of the State, foster friendly relations with foreign States, maintain public order, uphold decency or morality, or as a safeguard against contempt of court, defamation of incitement of an offence.[16] Such restrictions must however be imposed only in times of necessity. Another test discussed by the court to determine the reasonableness of a restriction was the Proportionality Test which attempts to strike a balance between free speech on one hand and national security on the other hand.[17] This decision of the court undoubtedly steers the interests of the constitution makers in the right direction, however the road remains incomplete because of lack of conclusiveness as to the scope of the term "reasonable restrictions". The explanation supplied by the court uses terms with a very wide meaning, and therefore fails to lay down a framework to define the scope of restrictions that can be reasonably levied by the State.

4.6. Public Emergency and Internet Shutdown

In the present case, declaration of Public Emergency was followed by an internet shutdown in the State of Jammu and Kashmir. The Suspension Rules do not lay down the grounds on which a shutdown may be ordered; it broadly states that such an order may be passed in cases of public emergency or public safety in conjunction with the Telegraph Act, a colonial legislation. No prior intimation is provided for it under the rules. This leads to serious implications as rights of individuals are seriously restricted in cases of internet shutdowns across the State.[18]

15. (2005) 8 SCC 534.
16. "Right to Internet is Part of Fundamental Right: *Anuradha Bhasin* v. *Union of India*" (VidhiWise, 17-1-2020)<https://www.vidhiwise.in/right-to-internet-is-part-of-fundamental-right-anuradha-bhasin-v-uoi/> accessed 25-1-2020.
17. Aditya Gaggar, "Access to Internet, now a Constitutional Right – Supreme Court in *Anuradha Bhasin* v. *Union of India and Ors.*" (*Law Street Journal*, 11-1-2020) <https://lawstreet.co/speak-legal/accesstointernet-constitutionalright-supremecourtofindia-sc/> accessed 25-1-2020.
18. Niha Masih, Shams Irfan and Joanna Slater, "India's Internet Shutdown in Kashmir is the Longest Ever in a Democracy" (*The Washington Post*, 16-12-2019) <https://www.washingtonpost.com/world/asia_pacific/indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html> accessed 27-1-2020.
19. Venkatesan (n 10).
20. Nayak (n 4).

While the court rightly directed the Committee to review all such orders passed, there remain certain points that have not been addressed by the court. For instance, the court does not adequately deal with the implications of such public emergencies upon human rights of individuals and the permissible limits therein. This is a very important aspect considering the UNESCO report that highlighted that in 2017-18 India experienced the maximum number of internet shutdowns in the world.[19]

The Hon'ble Court accepted the merits in the submissions of the Solicitor General of India regarding the necessity of the declaration considering the vulnerabilities of terrorism and circulation of misinformation. However, a wider perspective highlights the need for development of a framework for timeline and instances wherein such orders may be passed. The power to impose such a declaration must not be used by the State in the ordinary chain of circumstances; it must be used sparingly, only at times of necessity.

4.7. Judiciary – The Guardian of the Constitution

The circumstances require the courts to function actively to safeguard the constitutional mandate. The role of the courts should not be confined to only interpreting the law, rather sufficient regard must also be given to the implementation and enforceability of such interpretation. Mere interpretation of law unaccompanied by mechanisms to enforce it effectively results in a dead letter. For instance, the court can rightly lay down instances that would not fall under the ambit of reasonable restrictions, or even constitute a body to review such declarations before they have been imposed. The court rightly ordered the legislature to review the loopholes in the Suspension Rules. Prior intimation in case of internet shutdowns is a very important aspect that has been left unaddressed in the Rules. A framework prescribing the timeline of such shutdowns may effectively meet the ends. This would, in fact, greatly limit the multiplicity of internet shutdowns on account of Public Emergency being imposed in States. This may be achieved by framing a sunset clause as seen in Roman legislation.[20] Such a clause shall clearly lay down the time limit after which the declaration will cease to have effect.

5. CONCLUSION

The judgment of the Hon'ble Court in the present case is undoubtedly an advancement of jurisprudence pertaining to the dynamic digital age. The principles laid down by the court in the present case will greatly supplement future claims against violations of Fundamental Rights associated with the use of internet. The judgment is ineffective in the sense that it does not provide any conclusive relief to the affected citizens of the State. A possible reasoning behind such a decision can be the Doctrine of Separation of Powers which allows the judiciary limited powers to interfere with the discretionary powers of the Executive as laid down under the law. The authors believe that an effective solution to the grave problem at hand can be in the form of increased Judicial Activism. This would ensure that the constitutional mandate prescribed by the law makers is not fiddled with by the elected representatives as a result of the exercise of discretionary powers by the State.

The directions of the court with respect to re-looking into the Suspension Rules in fact are seen as a necessary step which would strengthen the procedural aspect of the legislation. Recognition of the importance of transparency by the State in passing such orders is also a positive step towards actualising the concept participation of citizens in the democracy of the country. Further, such participation ensures that the rights of individuals are not taken away arbitrarily by the State without prior intimation of the same.

In essence, the decision of the court, though well intended, does not sufficiently strengthen the state of the country which is facing repeated internet shut downs under the garb of public emergencies, citing national security as the interest sought to be protected. Nevertheless, the principles laid down under this case and the criticism thereof that have surfaced are big steps toward the development of the country and ensuring the rights and interests of individuals in its attempt to sustain in a digital age.

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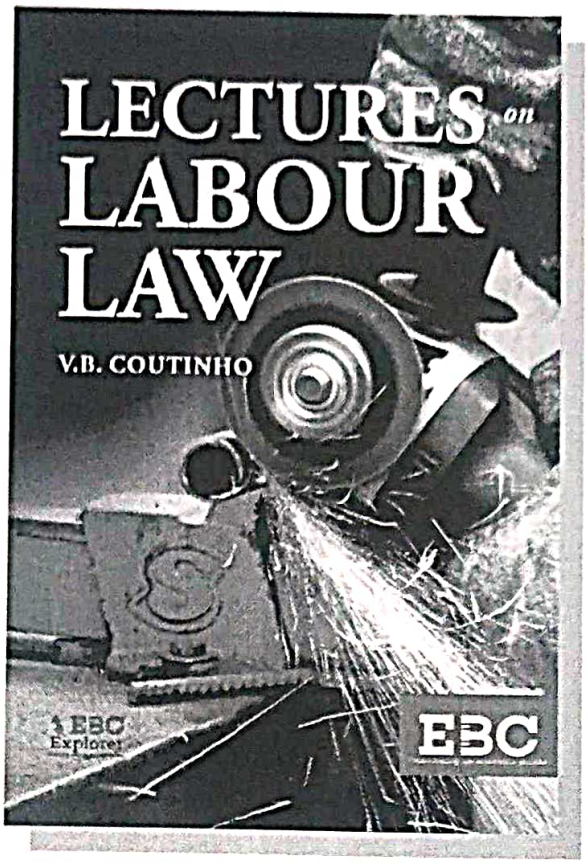

The learned author has written the book with the primary objective of making the understanding of labour law and the grasping of its fundamentals easy for law students. The work provides the gist and important aspects of the topics/issues involved in the labour law legislations in simple terms supported with illustrations for the complete understanding of the law.

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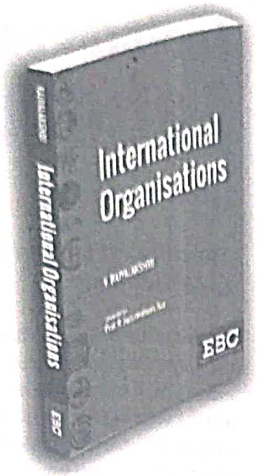

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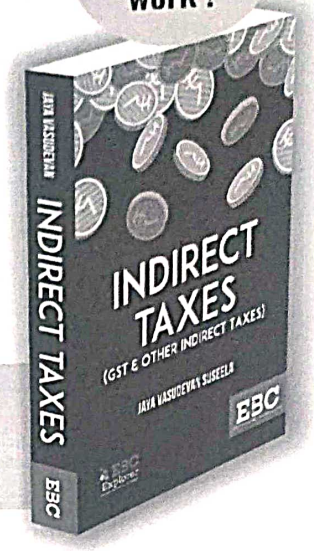

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