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National Law University Odisha, Cuttack

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NATIONAL LAW UNIVERSITY ODISHA, CUTTACK

HUMAN RIGHTS LAW JOURNAL

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Editorial Note

The idea of human rights is central to humankind's struggle for a better world. Since its inception in the modern form after the Second World War, the concept of human rights has been the most important international discourse. Not that the idea of human rights is universally accepted in its validity but it no doubt forms the most important civilisational dialogue in modern human history.

For a country like India, where vast majority of people suffer from various forms of deprivation, realisation of human rights is not a mere aspiration but an existential necessity. A country which in the 21st century is defined by extremes of both wealth and poverty at the same time, the ideology of human rights presents a very peculiar challenge. The diversity of the nation presents the establishment and the civil society with a unique challenge of prioritisation. There are several vulnerable groups and multifarious strata of communities and evolving a coherent and all inclusive policy is a complicated challenge.

It is in this conceptual backdrop that National Law University Odisha, Cuttack has decided to launch a journal exclusively in the domain of human rights. We believe that regardless of the mountains of literature already available in the area of human rights, there is the pressing need to develop research and encourage initiatives which are more contextualised within the societal process. We believe that research interventions which are more targeted and specific are essential in many areas of human rights which escape the spotlight of the media attention. We also believe that human rights must not be confined only to abstract intellectualisation and should also be expressed more in terms of actual social problems and challenges.

The first issue of Human Rights Law Journal is a step in that direction. We have strived to create a qualitative human rights discourse on wide ranging matters of critical significance.

The article by Prof. Srikrishna Deva Rao raises pointed and searching questions on the tragic issue of custodial violence. He emphasises on the human rights obligations of custodial institutions and presents a comprehensive analysis

of the international norms and the Indian legal framework including significant decisions of the Indian courts. His article is revealatory about the grim reality of custodial violence in India and shocks the reader into contemplation.

The article by Prof. Proshanto Mukherjee focuses on a community who generally do not form a part of regular human rights concerns; the seafarers. Prof. Mukherjee highlights how the plight of the seafarers is generally forgotten as due to our physical distance from their lives, their problems also get pushed away from immediate societal consciousness. His article is a highly informative and critical commentary on the state of seafarers in the context of international human rights law.

Prof. Madabhushi Sridhar Acharyulu takes us to new frontiers of human rights discourse by arguing that right to information ought to be human right. His research is thorough and rigorous. He provides an exhaustive historical account of the evolution of law which has eventually culminated in the right to information being an essential component in the guarantee of good governance.

The article by Prof. Sheela Rai is an interesting study on the changing role of the state in the modern times and its impact on the human rights of people. She identifies the role of the state in modern times essentially as an arbiter between the market and the people and reflects upon the implications of this dynamics.

Dr. Srinivas Burra undertakes an evolutional study of the concept of genocide in the international law. His article provides a comprehensive account of the international jurisprudence on the concept of genocide as it has developed so far with a deeply critical insight on the implications of these developments.

The article by Renjith Thomas and Devi Jagani is a provocative study of the post 9/11 American counter-terrorism ideology. The authors highlight the human rights challenges in having a facility such as Guantánamo Bay and contend that the price for the war on terrorism is at one level subverting the very ideal for which the war is being sought to be fought. They argue that the war on terrorism instead of solving the challenges of human rights is raising few of its own.

While our attention is usually focussed on preserving the human rights of the common people, Prof. P. Ishwara Bhat has chosen to focus on the human rights of those who fight to protect the human rights of others; Human Rights Defenders. Prof. Ishwara Bhat's article is an eloquent and passionate exposition of the need to ensure adequate protection to human rights defenders so that the human rights regime does not remain only in paper.

Prof. Hydervali explores a current and highly contentious issue about the right of women to enter temples and shrines in India. He explores the gap between the march of law and the unyielding socio-religious dogmas and argues in favour of a more equal world for women.

The article by Suman Dash Bhattamishra is a stirring portrayal of the women victims of domestic violence and the challenges they face in interacting with the Indian legal system. She seeks to ascertain the truth behind the increasing perception that the laws made to protect women are generally misused. She posits the still persisting and sufficiently pervasive incidents of domestic violence against the ever growing perception of its misuse and seeks to rationalise the reality.

Usually, human rights obligations are associated with states and governmental authorities. Nidhi Chauhan and Rajat Solanki have explored the role of private corporations in protection and furtherance of human rights. They perceive private corporations as having considerable influence on the society and argue for the modalities by which they can be made to act more responsibly so as to ensure a more effective protection of human rights.

Zara Fathima Kaiser has looked into the precarious conditions of Rohingya refugees in Myanmar and presets a thorough socio-historic and legal assessment of the situation. She traces the origins of the problem through the history of Myanmar. She analyses the plausible reasons behind the apathetic response of the international community to the crisis of Rohingya refugees and seeks to identify rational and pragmatic solutions.

In terms of critical analysis of cases, we have four commentaries in diverse and interesting areas. Mr. Shailesh Gandhi deconstructs the case of Girish Ramchandra Deshpande v Central Information Commission and argues that the decision of the Supreme Court results in a virtual amendment of the Right to Information Act 2005 and expands the exemption under Section 8 (1) (j) beyond the spirit of the legislation.

Abhishek Sarkar and Anand Vardhan Narayan have analysed the decision of the European Court of Human Rights in Barbulescu v Romania which has deep and far reaching implications on an individual's right to privacy. They have looked into the issue of employer conducting surveillance on employee's work messaging account. The analysis is extremely pertinent to worker's rights in modern workplace environment.

Devarshi Mukhopadhayay tackles the issue of human rights of manual scavengers while analysing the case of Delhi Jal Board. He is critical of the Supreme Court's handling of the matter and has tried to analyse the problem from a socio-legal perspective.

Prof. Aruna Sri Laxmi and Ms. Kuntirani Pradhan have analysed the decision of the Supreme Court in the case of National Campaign Committee for Central Legislation for Construction Labour vs. Union of India in the context of the rights of construction workers. They have analysed the directions issued by the Supreme Court and have explored the status of the implementation of the said direction in the state of Odisha.

The book review of 'Princess' by Manisha Mishra is a bit unconventional autobiographical account of a member of a Soudi Arabian royal family. Manisha has quite deftly identified the human rights implications of the story narrated by the protagonist and noted the pervasive and routine abuse of human rights which women in Soudi Arabia experience.

Priyanka Anand reviews the book on child marriages in India by Prof. Jaya Sagade and presents an appreciable critical perspective on the book. She

identifies the dominant themes and underlying premises in the books and discusses eloquently both the strength and drawbacks of the book.

In being able to publish this journal, I am extremely thankful to Prof. Srikrishna Deva Rao, Vice-Chancellor of NLUO and Patron in Chief of this journal. His vision and leadership is the primary reason that the publication of this journal could be both conceptualised and realised. I express my gratitude to Dr. Dolly Jabbal, Patron of the Journal for her active interest and guidance. I am indebted to Prof. Upendra Baxi, Prof. Walter Kalin, Prof. Ranbir Singh and Mr. Miloon Kothari for accepting our request to be members of the Editorial Board and for extending their wholehearted support. I am also grateful to the peer-review group without whose guidance and support, this journal would not have been a reality. I extend my appreciation to my colleagues Mr. Owais Hasan Khan and Ms. Naditta Batra who are the Sub-Editor of this journal and Mr. Rajat Solanki for their invaluable help. I must also put on record the hard work put in by the three student editors without whose assistance this journal would not have been possible.

A step has been taken by us. To turn it into a stride, we will depend on the valuable feedback of our readers. We are hopeful that with your support and goodwill, we will be able to maintain our endeavour with greater vigour and greater purpose.

Dr. Rangin Pallav Tripathy
Editor in Chief

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Agonizing Domain of Custodial Violence

Prof. Srikrishna Deva Rao*

ABSTRACT

The National Human Rights Commission (NHRC) of India has been established in 1993 with primary mandate to prevent deaths in custody. The analysis of Annual Reports of National Human Rights Commission from 1993-94 to 2011-12 shows that the number of judicial custody deaths are increasing from 51 (1993-94) to 1789 (2007-2008) and in 2011-12 it was 1302. This increase in deaths in Judicial Custody is an alarming signal not only to NHRC but also to the Indian human rights jurisprudence. Human Rights law underscores the importance of respect for human personality and human dignity in all custodial institutions. Overcrowding of jails, prolonged detention of under trial prisoners, solitary confinement, unhygienic living conditions, denial of proper food, clothing and medical treatment are some of the causes of custodial violence. The plight of women, delinquent children, young offenders, destitute, vagrant, lunatic and psychiatric patients in Indian prisons is much more shocking. The police are charged with responsibility and equipped with public resources to manage the lives of others in their care and custody. This research paper throws light on the issues relating to custodial violence in India. It also discusses the role performed by National Human Right Commission and Indian Judiciary in curbing custodial violence by analysing Compensatory Jurisprudence, Custodial Justice Cell, Human Rights Courts, Cells Visitorial mechanisms, Police and Prison reforms.

"How much youth was interred here between these walls for no purpose, what great forces had perished in here to no avail, the most talents, the greatest strength perished here unnaturally, unlawfully, irrevocably, who is to be blamed for this."

-Dostoevsky

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Introduction

Human Rights are considered as the essential rights that are crucial for human existence and the entitlement of every human being. Human Rights law underscores the importance of respect for human personality and human dignity, which is the starting point of human rights theory. The notion of Human Rights reinforces the inter relationship and the inter connection of the word "human" with the term "rights". The Human Rights law recognizes the respect for the basic dignity of each person by the state and guarantees the core rights to life, liberty, equality and dignity.

The recognition of Human rights at the international level resulted in proclamation of the Universal Declaration of Human Rights (UDHR) on 10th December 1948.[1] The modern Human Rights Concept is more comprehensive in nature and content. It includes three forms of core rights: civil and political; economic, social and cultural; and, collective or group rights. In the Indian context, the Human Rights are protected in a better manner with adequate laws, independent judiciary and effective mechanisms.

The United Nations started addressing the issue of National Human Rights Institutions after realising the importance of human rights implementation at the national level. The UN international workshop on National Institutions for promotion and protection of human rights resulted in drafting of guidelines that were later adopted by the UN commission on Human Rights as "Paris Principles" in the year 1992.[2] The UN General Assembly later adopted the Paris Principles in the year 1993. The Vienna World Conference on Human Rights and its Declaration in 1993 also stimulated the setting up and strengthening of National Human Rights institutions for effective recognition of Human Rights.

The Paris Principles have become the central point for growth and expansion of National Human Rights Commissions all over the world. The principles deal with three important areas such as ; autonomy and responsibility; composition and methods of operations; and, competence to settle individual complaints. The National Human Rights Commissions are unique independent institutions and play a supportive and supplementary role to the already existing institutions in this area.

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[1] Universal Declaration of Human Rights,1948

[2] The Paris Principles, are a set of international standards to guide the work of National Human Rights Institutions (NHRIs) drafted at an international NHRIs workshop in Paris and adopted by the United Nations General Assembly in 1993.

The National Human Rights Commission of India was set up in the year 1993 under the Protection of Human Rights Act of 1993.[3] Another important factor which contributed to the setting up of the NHRC is the Amnesty International's report on Torture, Rape and Deaths in custody in 1992 which observed that 'torture has become a daily routine, practice in India'. Amnesty has documented 415 cases of custodial deaths in India. The State Human Rights Commissions have also been set up by various State governments in order to deal with the Human Rights violations within their states.

Conceptualization of Custodial Violence

Custodial Violence or Torture is the infliction of physical and psychological pain on the detainees by the law enforcement authorities during the investigation. One of the primary objective of the Torture Convention is that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[4]

The extensive definition of 'Custody' was developed by ICRC in 2013.[5] Custody' is considered to begin from the moment a person is apprehended, arrested or otherwise deprived of his or her liberty by agents of the State, or by agents of any other public or private entity or organization, including in particular correctional or medical institutions or security companies, operating within the jurisdiction of that State. It includes, notably, detention or imprisonment, or any other placement of a person in a public or private custodial setting that he or she is not permitted to leave at will. It ends when a person is free to leave and is no longer under the effective control of State agents, or of agents of a public or private entity or organization, including in particular correc-tional or medical institutions, or security companies, operating within the jurisdiction of that State.

The definition of Torture under the Convention Against Torture and the wider definition of Custody by ICRC offers multiple images and interpretations to unmask the strategies of torture. *Marjorie Agosin* has memorably observed

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[3] Amnesty International, Report on "India: Torture, Rape and Deaths in custody", 1992, London; See also, Protection of Human Rights Act,1993

[4] See Article 1 of UN Convention Against Torture for comprehensive definition of Torture. "Torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions

[5] ICRC Guidelines for Investigating Deaths in custody, ICRC, 2013, Geneva, page 4.

that, "to unmask the strategies of torture, one must visualize two images: the suffering open body exposed to the pain caused by the Torturer and the intimacy of act of Torture".[6] The 'suffering open body' remains invisible as what happens within the custodial institutions are not open to public scrutiny. The human rights violations committed within these institutions are discretely hidden away from the public view. This results in the denial of dignity and destruction of personality of detainees.

The accused or suspect brought to the custodial institutions end up dead in mysterious circumstances and the state circulates stories of 'suicide' or 'natural death'. The tortured body becomes a silent voice and mute in suffering and pain. If the victim survives, he or she can speak and bear witness. But in the process if the victim dies, there is no one to speak the tale marks of Torture and death.

The arrest and detention in a Police station creates a terrible scare in the minds of citizens. The family structures are shaken as a result of the victims arrest and indefinite detention. From the moment of arrest, the detainee is defenseless and undergoes several phobic reactions in detention and develops anxiety, fear and psychological trauma. The emotional problems and experiences of victims in the sanctum sanctorum of custodial institutions fall outside the purview of the law. The present concern in all cases of custodial violence is the agonizing domain of custodial violence, which is still a complex and neglected area in the human rights discourse in India.

The police are charged with responsibility and equipped with public resources to manage the lives of others in their care and custody. Whenever the State takes a person into its custody, it is responsible for the care, wellbeing and guardianship of that person. If anything happens to that person, it is the failure of the State to meet that responsibility. The circumstances surrounding these deaths and factors contributing to such deaths must be inquired into by the Institutions and agencies involved in preventing these deaths.

The nature and incidents of custodial violence demonstrated the quality of state institutions in treatment of detained. The National Human Rights Commission has been mandated to inquire and examine such incidents and suggest what needs to be done to enhance the quality of these institutions and practices to reform them.

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[6] See Srikrishna Deva Rao, Torture, Medical Ethics and Health Professionals: A case study of India, Paper presented to the VII International Symposium on 'Caring for Survivors of Torture: Challenges to Medical and Health Professional' at cape town, South Africa,15-17,1995

Classification of Custodial Violence

The National Human Rights Commission classified the custodial violence into illegal detention and arrest, torture, custodial death and disappearance. The Custodial deaths are further classified into deaths in judicial custody and deaths in police custody. The commission added another category into custodial deaths called as Deaths in Defence or Paramilitary custody from the year 2003. The Extra judicial executions which are colloquially called as Encounter Deaths have also been added into the human rights violations from the year 1997.

The National Human Rights Commission of India has extended the definition of Custodial Deaths to include Deaths in different custodial settings, such as Police station, Prison and Army and Paramilitary forces. There are still number of important issues relating to definition of custodial Deaths, which needs to be addressed. The distinction between Torture and Cruel, Inhuman or Degrading treatment and Punishment and related issues also needs to be clearly defined as to what acts would come under its ambit. Unfortunately, Torture didn't figure as a separate category of custodial violence under the National Human Rights Commissions classification of complaints. It is subsumed under the 'other police excesses', which has not been clearly defined. The 'other police excesses' constitutes a major chunk of around half of the complaints every year[7].

The Article analyses three major forms of custodial violence reported to the National Human Rights Commission in India over the last two decades and attempts to examine the contribution of NHRC in prevention of these practices. A cursory analysis of Annual Reports of NHRC from 1993 till the latest available Report of 2012 reveals interesting data on custodial violence in India.

Custodial Deaths Reported to NHRC from 1993-2012

Annual Report of the year	Police Custody	Judicial Custody	Defence/ Para-military Custody	Encounter Deaths
1993-1994	**N.A.**	**N.A.**	**N.A.**	**N.A.**
1994-1995	111	51	-	-
1995-1996	136	308	-	-

[7] For instance, the total number of complaints admitted on police system during 1993-2001 are about 36,941 and among these 16,741 complaints were classified in the category of 'other police excesses' which constitutes 45%.

1996-1997	188	700	-	-
1997-1998	191	807	-	71
1998-1999	180	1106	-	65
1999-2000	177	916	-	115
2000-2001	127	910	-	109
2001-2002	165	1140	2	113
2002-2003	183	1157	0	83
2003-2004	162	1300	1	100
2004-2005	136	1357	7	122
2005-2006	139	1591	4	157
2006-2007	119	1477	1	301
2007-2008	188	1,789	4	177
2008-2009	127	1527	6	132
2009-2010	124	1473	2	111
2010-2011	146	1426	2	199
2011-2012	129	1302	2	179

Source: Annual Reports of National Human Rights Commission

1993-94 to 2011-12

On the study of the report, it can be said that the case of custodial violence such as deaths in Police custody(No.of Cases,111, 1994-95) and judicial custody were (41, 1994-95). This is beginning of data relating to custodial deaths in India. The highest numbers of death in police custody were reported ie in the year 1997-98(188) and also in the year 2007-2008(no. persons.188). the highest number of judicial custody deaths are increasing from 1993-14 from 51 to 1789 (2007-2008) and in 2011-12 it was 1302, the report clearly provides that the deaths in Judicial custody are increasing.

The alarming rate of increase in the number of deaths in judicial custody reported to NHRC over the years demanded in the imperative of needs for NHRC to monitor these type of cases and to take proactive measures to humanize Indian

prisons. However, strengthening the visitorial measuring including appointment of boards of visitors and encouraging last pool legal aid clinic and legal supports groups in Inida to be part of continuous visits to Indian prisons may be step in the right direction. NHRC also start receiving records about encounter death from the year 1997-98. Highest number of encounter of deaths were received in the year 2006-07 followed by 2010-11. The death in defence and paramilitary custody were reported to NHRC from the year 2011-12. Increase in the number of complaints to NHRC received by the Commission signifies spreading of awareness of human rights and it is a reflection of people's confidence in the Commission.

The commission has to take extra measure in preventing these deaths. The sordid story of the Indian prisons is : overcrowding of jails, prolonged detention of under trial prisoners, solitary confinement, unhygienic living conditions, denial of proper food, clothing and medical treatment. The plight of women, delinquent children, young offenders, destitute, vagrant, lunatic and psychiatric patients in Indian prisons is much more shocking.[8] It is the travesty of justice that despite new prison jurisprudence emanating from Indian Supreme Court it remains non-existent for a large percentage of population of this country.

NHRC and Custodial violence

One of the important mandate of the NHRC is to prevent custodial violence. NHRC developed a 'multi pronged' policy addressing the various issues related to the custodial violence. Some of the developed areas are as follows:

Mandatory Reporting of Custodial Violence

The National Human Rights Commission in its first year initiated the process of mandatory reporting of custodial rapes and deaths within 24 hours by the District Magistrate and Superintendent of Police in every district.[9] This is a significant factor contributing to the systematic documentation of custodial violence in India. This mandatory reporting for the first time provided official data on custodial deaths in India. The mandatory reporting was later extended to reporting of 'Encounter Deaths' and Deaths in Defence and Para military custody.

Standardization of autopsy procedures

The medical examination of both ante-mortem and post-mortem and opinions of doctors have special relevance for investigation into custodial deaths. The medical

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[8] Ibid

[9] One of the first instructions of NHRC issued on 14th December 1993 directed the state governments to report custodial death and rape within 24 hours. Annual Report of National Human Rights Commission (1994-95), p.16.

evidence helps in determining the injury, death, manner of its causation and helps in corroborating or disputing the prosecution version. Several judicial inquiries have pointed out the lapses on the part of the doctors not giving truthful versions of the post-mortem reports.

The National Human Rights Commission has taken initiative to develop Model Autopsy forms to standardize the procedure of inquest. The Commission held consultations with the Indian Medical Association and other professional groups and accordingly developed the model autopsy form and additional procedures for inquest.[10] The Commission needs to ensure that these procedures have been followed strictly while conducting inquiries into custodial deaths.

Recognizing the importance of autopsy reports, the Commission recommended that all post-mortems in respect of deaths in police or judicial custody be video filmed and the video cassettes be sent to the Commission together with the written reports.[11] The Commission independently scrutinizes the video with the assistance of 'forensic experts' at the Commission. There are doubts over ensuring the accuracy and impartiality of postmortem through video film. Another problem is absence of availability of 'in-house' expertise in the commission for independent scrutiny of the postmortem reports.

In this context, the Calcutta High Court's observation about the video tape of the post mortem in case of custodial death demonstrates the manner in which video filming is done by police; "(The tape) was incomplete in that after showing the picture of the body of Budhan in the cell there was a ban portion for about 33 seconds. The next shot had no continuity with the first … There was a repair of the tape between the two shots which was torn/cut and struck together with some adhesive/glue… This incomplete and edited video tape therefore suggests not only that the postmortem was properly conducted but also that inconvenience parts of the evidence were obliterated."[12] Obliterated, just as shoddily as the police put together their various affidavits.

It is observed by Justice Ruma Pal, "that the documents maintained by the police have been tampered with and fabricated. There is also prima facie evidence that Bhudan suffered injury while in the police lock up. There is also evidence that

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[10] Annual Report of National Human Rights Commission (1996-97), p. 21

[11] The National Human Rights Commission was disappointed at the quality of the postmortem reports and noticed that the reports have been 'doctored' under police or other extraneous pressure. Annual Report of National Human Rights Commission (1995-96), p.15

[12] Quoted by DilipD'Sourza Branded as Criminals - The State of Denotified Criminal Tribes in India, Penguin (2002). On 10th February 1998 Budhan was going to the relatives house on his

the police have acted in violation of the law in effecting the arrest and detention of Budhan."[13]

Amnesty International has observed that, the doctors who are experts in forensic medicine have commented to them, that using video to assess the accuracy and impartiality of postmortems is unrealistic. They pointed out in particular to the practical problems of showing details of injuries using video equipment which distorts colour and image and which is often operated in conditions of insufficient lighting etc.[14] The Commission needs to rethink on its strategy of video filming and to assess how far this method led to the improvement in the quality of post–mortem reports.

The Indian Medical Association research study on 'Knowledge, Attitude and Practice of physicians in India concerning medical aspects and torture' 1995 has observed that the medical association should take the responsibility f protecting the doctors who fearlessly testify the cases of torture besides disciplining doctors who facilitate torture.

According to ICRC Report,[15] Deaths in custody are not uncommon. They may be due to natural causes; but they may also be instances of unlawful killing, or

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bicycle with his another friend. On the way they stopped for a *paan*. Ashok Roy, officer incharge of Barabazar police station came up to them at the paan shop and took Budhan on his motor cycle. The police stated that Budhan is wanted for investigation in a pending criminal case, that is the reason for his arrest. The police beat Budhan in the next few days on the morning of 13th, a police party raided one place in search of stolen goods that Budhan had supposedly told the police about it. They brought the Budhan with them. The only goods recovered during this raid are two pieces of pant cloth and one blanket. While the raid is being conducted, a few villagers spoke to Budhan who was sitting in the police jeep. He told them of the non stop torture and suffering pain. On 17th February 1998 he was dead. The police claimed that he had committed suicide that evening by hanging himself in jail cell with his *gamchha* (a thin towel). Six days later *PaschimBangaKheriaSabarKalyanSamiti* wrote a letter to Calcutta High Court which was treated as a writ petition and admitted for hearing. The court after examining the evidence has concluded that Budhan had not committed suicide but had otherwise met his death in jail custody and directed state of West Bengal to pay one lakh of compensation.

The Calcutta High court found a lot of inconsistencies and lies in the police report. The judge pointed out that "The police records do not show that Budhan was carrying a *gamchha*(A thin towel) at any time. It was found to be new … where did the gamchha come from ? It is true that in the column headed, private property received with the prisoner, it has been written : 'full pant, G. Shirt Punjabi and gamchha'. But the word *'gamchha'* appears to have been subsequently inserted!'

[13] ibid.

[14] India, Words Into Action: Recommendation for the Prevention of Torture, Amnesty International London (Jan 2001) p. 48

[15] ICRC Guidelines for investigating Deaths in Custody, ICRC Report, 2013 page.no.7

the result of ill-treatment or inadequate conditions of detention. Proper investigation into deaths that occur in custody serves several purposes: it assists the bereaved by providing objective and timely information and helps them to obtain death certificates; it contributes to dispelling concerns about inadequate care or foul play when the death was due to natural causes; it is indispensable when a criminal investigation is required; and it provides information that is essential for preventing such deaths in the future.

There are a number of pertinent international standards for investigating deaths in custody. These are embodied mainly in the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the United Nations Economic and Social Council in 1989.2 Practical complementary guidance may also be found in the 1991 *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. The *Manual* includes: a Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (the "Minnesota Protocol"); a Model Autopsy Protocol; and a Model Protocol for Disinterment and Analysis of Skeletal Remains.[16]

In addition to this, ICRC also provides the preventive measures for deaths in custody, these are namely i. respect for professional medical ethics ii. Comprehensive medical screening upon arrival in custody; iii. Regular medical checkups; and wel organized, adequately resourced and accessible medical services.[17]

Inquiries into Human Rights Violations

One of the basic functions[18] of the NHRC is to inquire into the cases of Human Rights violations reported to the commission. Once a complaint is received, the commission directs further inquiry or investigation. However, if the commission does not find any substance in the complaint, the complaint can be dismissed. The commission calls for report from the state governments. Subsequently, a detailed report on the merits of the case is prepared and placed before the Commission. The complaint is closed if the commission feels that no further enquiry is required or if the concerned State Government has taken the required action.

If the commission discovers that there was a violation of Human Rights then in that case, the commission may recommend initiating the proceedings for

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[16] Ibid page 20

[17] Id page 22

[18] See Section 12 Protection of Human Rights Act 1993

prosecution against the guilty persons. The Commission can recommend the concerned government for the grant of immediate relief to the victim. The Commission can also approach the Supreme Court or the High Court for the implementation of its orders. The commission has its own investigation staff; however, the commission has also been empowered to utilize the services of any officer or investigation agency of any State or Central government. The compensation and action against the violators are recommended after a prima facie case is established.

Compensatory Jurisprudence

Compensation is essentially a remedy available under civil suits. As far as criminal case is concerned, prime objective is on punishing the wrongdoer to cause the deterrent effect on the mind of wrongdoer and other persons. But, victim gets nothing from punishing of wrongdoer except the satisfaction that the person who infringed his rights got punished. However, latest legislative developments and judicial response to the provision of compensation shows that relevance of compensation is fully recognized even in criminal justice administration. The Constitution does not contain an express right to reparation. However it is settled now that a violation of rule against torture would entitle the victim to compensation as a public law remedy.[19] Writ Jurisdiction under Article 32 and 226 for contravention of fundamental rights are being invoked for granting compensation to victims. The doctrine of sovereign immunity has been held no defense in such circumstances.

NHRC awards compensation as per its power under section 18(3) of the Protection of Human Rights Act to provide 'immediate interim relief' in a case where a strong prima facie violation of human rights has been made out., In several cases the Commission has been awarding the compensation in cases of custodial violence with a "free hand." But there are no consistent policy guidelines for awarding compensation.

However, the Commission developed a consistent policy in defending its power of compensation under section 18(3) at several occasions. In that process it developed certain important principles, contributing to a progressive interpretation of compensatory jurisprudcence. In *Hari Kale's* case, the Commission stated that culpability of criminal action is not a condition precedent for awarding compensation and this principle was maintained in several other cases and set the compensatory jurisprudence of the Commission in the right direction. In *Atal Bihar Mishra* case the principle was followed and further substantiated. It was

[19] Nitya Ramakrishnan , *In Custody- Law, Impunity and Prisoner Abuse in South Asia,* Sage Publications: New Delhi at p. 21

followed in *Gothandam*and Case of *Enforcement Directorate*. In *Rita Divan* case the Question raised was does a conviction set rest the claim for compensation? The Commission held that the assumption was not only wrong but diametrically opposite. The Commission in this case highlighted the legislative intention under Section 18(3) of the Act and stated that state cannot absolve from liability for compensation in case of violation of human rights.

In *Mohammed Khan's* case, the commission clarified that pendency of criminal case can not be a bar on prosecution and departmental action when prima facie case of violation of human rights by public servant has been established. In *Nambi Narayana* case, the Commission stated that even pendency of a civil suit does not bar the claim for compensation. Lastly in *Sambhai* case it used the tort law principle of "*res ipsaloquitor*" to prove the negligence in prevention of human rights violations. The Commission in a number of cases provided only the monetary relief and the other alternative methods of compensation have not been effectively used. The Commission needs to develop consistent and uniform principles while awarding compensation. It can take a lead from the European Court of Human Rights and also from Sri Lankan Supreme Court in evolving its principles.

Use of force and misuse of authority by the police on people not in their custody is another instance where gross violation of basic rights of people was reported. In the case of *Saheli v. Commissioner of Police*[20]*,* the son of KamleshKumari died due to ill treatment by a S.I. of Delhi Police, the Supreme Court directed the Delhi Administration to pay the compensation of Rs.75,000. The Case of *Harikishan and State of Haryana v. Sukhbir Singh and others*[21] court reaffirmed its stand on method of determining compensation in following words;

"The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay."

In *Sube Singh v. State of Haryana*[22] court noted that cases where custodial death or custodial torture or other violation of the rights guaranteed under Article 21 is established, courts may award compensation in a proceeding under Article 32 or 226. Court noted that custodial violence requires to be tackled from two ends, that is, by taking measures that are remedial and preventive. Award of compensation is one of the remedial measures after the event. Effort should be made to remove the very causes, which lead to custodial violence, so as to prevent

[20] AIR 1990 SC 513

[21] AIR 1988 SC 2127

[22] (2006) 3 SCC 178, AIR 2006 SC 1117

such occurrences. To assess compensation for the wrongful death of any person, the principles for assessing compensation under the Motor Vehicles Act, 1988 can be applied.[23]

Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity.[24] In *Nina Pillai v. Union of India*[25] sixteen years after the death of Singapore-based businessman Rajan Pillai in judicial custody due to negligence on the part of the Tihar Central Jail medical officers, the Delhi High Court directed the Delhi Government to pay his widow, Nina Pillai, Rs.20 lakh as compensation and litigation costs.Justice Muralidhar decided the quantum of compensation not on the basis of the income i.e. of Rajan Pillai at the time of his death but for the purpose impelling the State machinery to prevent such instances in future the Court also issued a series of directions for improvement of medical care facilities in the jail. The Court also issued a series of directions for improvement of medical care facilities in the jail. The Court directed the Delhi Government to purchase an ambulance within three months for exclusive use by the jail authorities with a team of dedicated medical personnel and trained staff.

There is explicit recognition in *D.K Basu* case, that state has obligation to investigate and prosecute instances of illegal detention and custodial violence and that the burden of such prosecutions should not fall on the victims. However, in cases regarding claim of compensation or petition of habeas corpus is invariably brought to the notice of the court either through the victim or through any civil society organisation. Beside this, there is absence of well articulated judicial principle on payment of interim compensation. Victims families wait for long years for compensation before the case is decided.

Recently, in *Kewalbai v. State of Maharashtra*[26] Maharashtra government was held vicariously liable for custodial death for carelessness of Respondent No.4. The court ordered the compensation of amount Rs.10,00,000/-. The Court considered the age and income of the victim and fixed the amount depending on the facts of the matter. The court also ordered for creation of special fund to be created for compensation of victims.

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[23] T.Sekaran v. State of T.N. & Ors., 2010 CIJ 73 IPJ

[24] Dalbir Singh v. State of U.P (2009) 11 SCC 376

[25] W.P. (C) 1894/1998 decided on May 13, 2011

[26] In the High Court of Bombay (Aurangabad Bench), Criminal Writ Petition No. 1077 of 2012.

Custodial Justice Cell

The Commission has standardized its procedure and processing of complaints of custodial deaths and constituted internal mechanism like the 'custodial Justice Cell' to deal exclusively with cases of custodial deaths. It has also set up Special Rapporteurs and Special Representatives to appraise the commission of ground realities and to facilitate its function.

In this context, the National Human Rights Commission can learn from the Australian Royal Commission On Aboriginal Deaths in Custody established in 1987[27] to investigate the causes of deaths of Aboriginal people in Australia. The Commission examined all deaths in custody in each State and Territory which occurred between 1 January 1980 and 31 May 1989, and the actions taken in respect of each death. The Commission's terms of reference enabled it to take account of social, cultural and legal factors which may have had a bearing on the deaths under investigation.

Human Rights Courts and Cells

The commission recommended setting up of "Human Rights Courts" at the district level for speedy trial of complaints and "Human Rights Cells" in police departments of all states to monitor investigations and to supervise the prompt reporting and ensuring the implementation of directions of the commission. The Protection of Human Rights Act, 1993 envisaged to notify for each District and Sessions Court to be a Human Rights Court. It could not lead to any substantial result due to ambiguities in offences to be tried and procedures to be followed. Commission expressed its desire to pursue the idea of Human Rights Courts "if necessary by appropriate legislative or judicial action". Nothing is known about developments later. Extra care needs to be taken regarding the independent operation of the Human Rights Cells located within the police department. The commission also recommended a "District Police Complaints Authority' in each district to examine complaints of police excesses which would make appropriate recommendations to the government and National Human Rights Commission or state Human Rights Commissions. These institutions and mechanisms should work together in coordination to prevent torture.

Visitorial Mechanisms

The visit to prisons is a simple and effective mechanism for prevention of torture. The visitorial system in India is in practice only in prisons. The official and non-official visitors were entrusted with prisoners has the responsibility to monitor

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[27] See also http://www.naa.gov.au/collection/fact-sheets/fs112.aspx last visited 01.05.16

the treatment of prisons and conditions of prisons. But in reality in a number of states the governments have not constituted the Board of visitors, even if they are constituted, there are no regular and periodic visits. The NHRC under the chairmanship of J. Venkatachaliah extended visitorial mechanisms to police stations. There is an imperative need to develop effective mechanisms of visits to prison and police station and review the experiences year after year.

Under the Optional Protocol to the Convention against Torture OPCAT, the state parties agree to international inspections of places of detention by the United Nations Subcommittee on the Prevention of Torture (SPT). State parties are also are required to establish an independent National Preventive Mechanism (NPM) to conduct inspections of all places of detention. This would include prisons, juvenile detention, local and offshore immigration detention facilities and other places where people are deprived of their liberty. This mandate is provided under Article 4 of the OPCAT.

The Commission exercises its powers conferred by the Protection of Human Rights Act, 1993, to visit custodial institutions but only under 'intimation'. But the commission reserves its right to undertake 'suo-moto' decision to make 'Surprise visits' to police stations due to 'increasing reports of violence in Police lock ups'. The commission is also in the process of strengthening the official and non-official Board of visitors to prisons and streamlining the procedures and extending it to the police lock ups. This would not only ensure transparency and accountability of custodial institution but also in the long run leads to prevention of torture.

Police and Prison reforms

In a democratic society the police have a prominent role, a duty to protect rights of citizens as enshrined in the Constitution. Jerome H Skolnick has rightly posed some basic questions regarding the preservation of democratic order and the rule of law. "For what social purpose do the police exist? What values are police to preserve in a democratic society? Are the police to be principally an agency of social control with their chief task being the efficient enforcement of the prohibitive norms of substantial criminal law? Or are the police to be an institution falling under the hegemony of the legal system with a basic commitment to the rule of law, even if this obligation may result in a disruption of social order? How do these demands of democratic society hamper the capacity of the police, institutionally and individually to respond to legal standard of law enforcement?" These are the precise questions to be discussed and debated. The Commission has undertaken measures for reforms of police and prisons. The Commission has prepared a Model Prison Bill which is awaiting enactment.

The Commission 'suomotu' assessed its approach in the area of custodial violence. In the Third Report, it observed that, "it was not enough for the Commission to be informed promptly of instances of custodial deaths or rape and to press thereafter for justice. The Protection of Human Rights Act requires an all together different perspective and approach which have to be pro-active". The custodial violence needs to be prevented before it occurs. The Commission could not simply react to deaths that have already occurred.

It further stated that, this had systematic implications on the Commission to look into the reasons of police violence, nature of training, conditions of service and the need for reform. It is also necessary to examine procedure and practices including the manner in which investigations and post-mortem were conducted and the adequacy of laws, conditions of jails, sub-jails and lock-ups, had to be corrected and this led to the drafting of an all together new and revised Indian Prison law to replace that of 1894"[28]

It is further noted that, the log delay and failure to book higher officials to book will surely cast a shadow on the quality of justice and meted out in such cases. In troubled times, uniformed men tend to resort to extrajudicial killings not only to wreak vengeance on militants or extremists tareting their colleagues and civilians, but also to garner rewards and promotions. It can only be hoped that a verdict fixing responsibility will help end the culture of impunity seemingly enjoyed by the security forces, and bring a sense of closure to instances of such excesss.[29]

The Commission envisaged a "pro-active" role "in letter" but could not implement it "in practice". Of course, in dealing with custodial violecne cases, it used as a variety of technique. In some cases, it called the senior officials to appear before the Commission personally to explain the conduct of the state governments, directed investigations to be undertaken by the Central Bureau of Investigation. NHRC in a number of cases directed investigations by its own investigatory division and in cases of grave and massive violations of human rights it approached directly the Supreme Court.

Judicial Trends and Custodial Violence

Indian judiciary has created new tools and strategies to defend and safeguard the rights of the accused through innovative interpretation of Right to Life and Personal Liberty guaranteed under Article 21 of the Indian Constitution. This trend was triggered by several important cases such as, Nandini Satapathy, Khatri, Sheela Barse, Joginder Kumar, Nilabati Behera and D.K. Basu. Nandini , Khatri

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[28] See the Third Annual Report of National Human Rights Commission (1995-96), p. 4.

[29] Lessons from a Massacre, Editorial, The Hindu, April 6,2016

and Sheela Barse highlighted the role of legal Aid and services, whereas the other cases were instrumental in developing custodial jurisprudence to humanize the Police Process.

Legal aid services for the detainees is an essential right which provides not only effective access to justice but also effective legal protection of their human rights. Articles 14, 21, and 39(a) of the Indian Constitution can be referred to as the golden triangle to right to legal aid.

In *Khatri*[30] case Justice Bhagwati stated that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate as also when he is remanded from time to time. The Court directed the magistrates and Session Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The Court further felt that "the provision inhibiting detention without remand is a very healthy provision which enables the Magistrates to keep check over the police investigation and it is necessary that the Magistrates should try to enforce this requirement and where it is found to be disobeyed, come down heavily upon the police."

The legal services could be provided at the court during trial and major legal services could be required at the police station and in prison. Any person who has been arrested and held in custody at a police station for investigation can ask for legal services at police station. The legal aid board should provide facilities for the legal services counter at the police station, court and prison. The Supreme Court in *Sheela Barse*[31] (1983) and other cases has given direction to this effect but no meaningful measures have been taken to implement these directions.

The Supreme Court of India issued directions regarding control and structural mechanism of police in Prakash Singh v. Union of India.[32] Justice J.S. Verma committee constituted in 2013[33] also recommended the implementation of the directives issued in Prakash Singh's Case and took the view that in line with

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[30] Khatri And Others vs State Of Bihar & Ors., 1981 SCC (1) 627.

[31] Sheela Barse v. Union of India, (1983) 3 SCC 632.

[32] (2006) 8 SCC 1

[33] *See Justice Verma Committee Report* http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma% 20committe%20report.pdf

Prakash Singh, implementation of the Supreme Court directions need not await the framing of a new Police Act.

In *Nilabati Behera v. State of Orissa*[34] , a provision in the ICCPR was referred to support the view taken that 'an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

The Supreme Court of India, While interpreting Article 21, has comprehended such diverse aspects as children in jail entitled to special treatment[35], right of speedy trial[36], handcuffing of prisoners[37], delay in execution of death sentence, immediate medical aid to injured persons[38], Providing human conditions if prisons[39] and protective homes[40] The common golden thread which passes through all these pronouncements is that Article 21 guarantees enjoyment of life by all citizens of this country with dignity, viewing this human rights in terms of human development. Indian judiciary has taken help of international covenants to expand the jurisprudence of human rights in India. Joginder Kumar and DK Basu institutionalized 'custody' and 'Injury Memo' first time in Indian Police process to document arrest and prevent illegal arrest and detention.

The European Committee for Prevention of Torture (CPT) at Strasbourg attaches importance to 'trinity of rights' to safeguard the persons in police custody. The three important rights are, the right of persons to have the fact of detention notified to a third party of a choice (family member, friend, consulate) the right of acess to a lawyer and the right to request a medical examination by a doctor of his choice.

CPT also suggests as a single comprehensive custody record of all aspects of custody and action taken regarding them., The custody memo should record, the date, time place and reasons of arrest, when told rights, signs of injury, health

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[34] MANU/SC/0307/1993: 1993CriLJ2899

[35] Sheela Barse v. Union of India (1986) 3 SCC 596

[36] Reghubir Singh v. State of Bihar AIR 1987 SC 149

[37] Aeltemesh Rein v. Union of India AIR 1988 SC 1768

[38] Parmanand Katara v. Union of India AIR 1989 SC 2039

[39] Sher Singh v. State of Punjab AIR 1983 SC 465

[40] Sheela Barse v. UOI: (1986) 3 SCC 596

disorders, information to friends, relatives, legal aid Board, Lawyer, when offered food, when interrogated, when transferred or released. The items in persons of possession, the fact of notification of rights and signature of the detainee should be obtained. The right of access to a doctor including the right to be examined if the person detained so wishes by a doctor of personal choice in addition to any medical examination carried out by a doctor called by police authorities. The United Nations Principles on the Effective Investigation and Documentation of Torture mentions that the medical report of investigations into torture should be promptly prepared after arrest and detention of a person in the police station.

Conclusion

The establishment of National Human Rights Commission in India in 1993 provided for the first time in India some form of systematic data on custodial violence. However, NHRC is yet to formulate clear operational definitions for each category of custodial violence, information and characteristics - kinds of abuses, circumstances, legal process, methods, agent, time, site, physical and social description of the victims, witnesses. In this regard, NHRC can borrow the classification of custodial deaths and operational definitions from Australian Institute of Criminology and the Custodial Justice Cell of NHRC needs to be further developed as a special research centre.

The major dissatisfaction in custodial justice has been the lack of independent, impartial and transparent investigation of deaths in custody. The present mechanism for investigation often compounds the sense of exclusion felt by families and the feeling that the authorities have something to hide. The inquests also face the problems and need to address the complex issues of law and controversial and difficult questions of forensic science.

Justice T. S. Thakur's observations in July, 2015 in the case of ***D. K. Basu***, as continuing mandamus, further strengthens the custodial jurisprudence in India. In this case the State Governments were directed to set up of Human Rights Courts. In addition to this the Supreme Court directed that; the State Governments to install CCTV cameras in all the prisons within one year and in police stations in a phased manner. Further, the State Governments were directed to consider appointment of non-official visitors to prisons and police stations. The State Governments shall also launch prosecution in all cases where an enquiry establishes culpability of the persons in whose custody the victim has suffered death or injury.[41]

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[41] D. K. Basu v. State of West of West Bengal and Ors. AIR 2015SC2887

Thus, custodial jurisprudence needs to be developed as part of a wider process of social change to humanise and democratise the custodial institutions. We need a comprehensive law preventing Torture and other forms of custodial violence. Custodial justice refers to the principles, processes, methods and practices developed to prevent custodial violence. The Judiciary, Civil Society, Human Rights Commissions together can play a vital role in implementing custodial justice[42]

[42] The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Christof Heyns, submitted report to UN Human Rights Council (UNHRC) in Geneva in June 2013. It recommends a series of legal reforms and policy measures aimed at fighting impunity and decreasing the level of unlawful killings in India. The report states that India should repeal, or at least radically amend, Armed Forces Special Powers Act, 1958 and the Jammu and Kashmir Public Safety Act, 1978. The report also recommends the immediate ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol and the International Convention for the Protection of All Persons from Enforced Disappearance. India has signed the Torture Convention on 14 October 1997 and yet to ratify it. India had also signed but not ratified Convention for the Protection of all persons from Enforced Disappearance.

Right to Information: A new Human Right

Prof. Madabhushi Sridhar Acharyulu*

ABSTRACT

Right to good governance and right to information are being debated as new generation human rights in democratic society. There are instances when all the human rights of people were breached because of lack of good governance and sufficient notice. Right to ask is basic and right to petition is a basic need. Right to information is added as a significant necessity of civilized society. Freedom of information is a fundamental human right and the touchstone of all the freedoms. Right to Freedom of Expression includes freedom to seek, receive and impart information and ideas of all kinds. The author, in this article, has started the discussion with the Right to Petition in Magna Carta where the author deals with fourteen consequential rights to 'right' to petition. Thereafter, the author has discussed the right to information as a human right. The author has covered the concepts of freedom to information, fundamental human rights, freedom of information laws, and the objectives of RTI. Under the discussion on principle of maximum disclosure, the author has criticised the lack of transparency and accountability on the part of government. Further, the author has discussed RTI as value addition to right to petition. In the end, the author concludes with saying that Administrative ethics and law demand accountability in administration. Accountability is possible only through transparency.

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Introduction

Like love & pleasure, the knowledge also increases on distribution defying the logic and mathematics. Science proved that even the liver increases on distribution. Information is source of knowledge. Information empowers. We should 'know'. Indian Constitution under **Article 51-A (h)** mandates:

"*It shall be the duty of every citizen of India to develop the scientific temper, humanism and the spirit of inquiry and reform*".

Right to good governance and right to information are being debated as new generation human rights in democratic society. Devastating floods in Chennai during November last week and December first week in 2015 was more a man-made a disaster than a natural calamity as the investigative reports in media poured about mismanagement of inflows and outflows at water bodies and reservoirs in and around the city. Several persons lost their lives as the notice about sudden release of water to save the reservoir was not sufficient. It is not only loss of lives but everything being flooded out making thousands of families' poor overnight.

All the human rights of people were breached because of lack of good governance and sufficient notice. This is the illustration to prove that the right to good governance and to information are essential human rights in constitutionally governed states. Every recognized right is a declared limitation on authority of the state. Every violation of right is result of the abuse of authority.

When right to petition was first contemplated the human rights as an idea or a provision of law was not known. In June 2015 we have completed eight hundred years of ***magna carta***[1]***;*** looking at the humanity from rights angle, this guarantees an individual's right to something against the powers that be.

Magna Carta became a potent international rallying cry against the arbitrary use of power. Most of the 63 clauses of Magna Carta granted by King John dealt with specific grievances relating to his rule. Magna Carta 800 years ago and the RTI a decade ago drastically changed relationship between the citizens and the government.[2]

Magna Carta of 1215 did not remain the same, some rights deleted, some rewritten and most of them repealed. Still it remains cornerstone of the British and American Constitutions, so also of Indian Constitution. After deletions and changes, only three clauses of the 1225 Magna Carta remain on the statute book today. One defends the liberties and rights of the English Church, another confirms the

[1] Magna Carta (Charter of Liberties) of 1215. Magna Carta means "the Great Charter" art 61

[2] Magna Carta (Charter of Liberties) of 1215, art 63

liberties and customs of London and other towns, but the third is the most famous right to fair trial:

"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice."[3]

Right to Petition in Clause 61, *Magna Carta*

What is essential in social living? Is it right to life? Do we get it without asking for it? How do we ask without any guaranteed right to ask? Right to ask is basic; right to petition is a basic need. If that is given as right, an individual can ask for life and for everything he needs. Filing a petition or making a representation was also not allowed in certain regimes. It was almost impossible to complain or questioning the grievance. The petitioner or complainant was threatened by authorities. There were instances of complainants being jailed.[4]

Petitioning is equated with questioning, or challenging the authority of Emperor. Kings considered it as seditious libel. It's a complaint against the royal rule. They looked down the seeker of something.[5] The people should take whatever is given, should not ask. Right to demand was unimaginable in dictatorship regimes world over. When Magna Carta was under contemplation during 12th Century in England, voice against inequalities based on caste discrimination was being raised in southern part of India. Basaveshwara was demanding equality in Karnataka. Reformers Jagadguru Ramanujacharya and Shankaracharya were striving for spreading the knowledge which was limited as secret to a few top creamy layers of society. There was a demand for right of lower caste women to wear the upper cloth. It was an offence to use footwear. Going in front of palaces of rich persons was considered an affront to supremacy of rich. Asking for something was considered challenge to their authority.

Permitting someone to file a petition itself is a great relief. The Article 44 of the Charter of Fundamental Rights of the European Union ensures the right to petition to the European Parliament. This right can be traced back to the Magna Carta (1215), the Petition of Right (1628), the Basic Law for the Federal Republic of Germany, the Bill of Rights 1689, and the UNDHR in 1948 followed by the listed Fundamental Rights in Indian Constitution.

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[3] Magna Carta (Charter of Liberties) of 1215, art 61

[4] Magna Carta (Charter of Liberties) of 1215, clause 61

[5] Ibid

The Magna Carta, Article 61 says.[6]

"The peace and liberties we have granted and confirmed to them by this our present Charter, so that if we or any one of our officers shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offence be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us and, laying the transgression before us, petition to have the transgression redressed without delay..".[7]

Right to Redressal within 40 days: It provided time of 40 days for redressal:

"…And if we have not corrected the transgression… within forty days, reckoning from the time that it has been intimated to us… the four barons aforesaid shall refer the matter to the rest of the five and twenty barons…"[8]

Right to rebel: It will be totally unimaginable that the consequences include even right to rebel, if grievance is not redressed, it says:[9]

"…And those five and twenty barons shall together with the community of the whole realm disdain and distress us in all possible ways, namely by seizing our castles, lands, possessions and in any other way they can until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations toward us…[10]*"*

The development of our common law understanding of the Right of Petition began, but didn't end with the Magna Carta. Over the next 450 years it became the cornerstone upon which the House of Commons built its relationship with the King.[11] *Then in 1669, Commons resolved with authority*

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[6] *See* Constitution of The United States Of America, Analysis And Interpretation 1188 (1992)

[7] Ibid

[8] *See Generally* 12 Encyclopedia of The Social Sciences 98 (1934)

[9] Ibid

[10] **Full text of clause 61 of Magna Carta is**: Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance forever, we give and grant them the underwritten security, namely the barons choose five and twenty barons from the kingdom, whomever they will, who will be bound with all of their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we … or any one of our officers shall in anything be at fault towards anyone, or shall have broken any one of the articles of this peace or of this security, and the offence be notified to four barons of the foresaid five and twenty, the said four barons shall repair to us and, laying the transgression before us, petition to have the transgression redressed without delay. And if we have not corrected the transgression […] within

that every commoner in England had "the inherent right to prepare and present petitions" to Commons "in case of grievance" and for Commons to receive the same and judge its fitness.[12]

Twenty years later, after the "Glorious Revolution" Chapter 5 of the "Bill of Rights" of 1689 declared the Right of the Subjects to Petition the King directly, and "all commitments and prosecutions for such petitioning to be illegal.[13]"

John E. Wolfgram further says:

"The Magna Carta's focus is almost entirely substantive: And if we have not corrected the transgression within forty days, a state of moderate to severe war exists where the governed may lawfully ravage the government, and that continues until redress has been obtained as they deem fit. It could hardly be more powerfully stated that substantive redress is the issue, and process is only the lubricant to obtain substantive justice."[14]

Questioning or criticizing or even embarrassing the government was a crime. England has created a crime 'seditious libel'17th Century:*"...Communicating words, pictures, or signs that defamed, discredited, criticized, embarrassed, or questioned the government, its policies, or its officials. Filing a petition was considered as seditious libel. Not only that a citizen does not have a right to submit a petition but that also was a crime against state"*

Unless legally recognized as specific right, a person filing a petition for redress would be a prosecuted as a 'criminal'. A mere mention of Right to petition is of no use without guaranteeing protection from the criminal prosecution. Several such auxiliary or consequential rights to 'right to petition' were discussed. Those 14 supplementary rights are:

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forty days, reckoning from the time that it has been intimated to us […] the four barons aforesaid shall refer the matter to the rest of the five and twenty barons, and those *five and twenty barons shall together with the community of the whole realm disdain and distress us in all possible ways, namely by seizingour castles, lands, possessions and in any other way they can until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations toward us.* And let whoever in the country desires it, swear to obey the orders of the said five and twenty barons for the execution of all the aforesaid matters, *and along with them, to molest us to the utmost of his power;* and we publicly and freely grant leave to everyone who wishes to swear, and we shall never forbid anyone to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid

[11] Magna Carta (Charter of Liberties) of 1215, art 61

[12] Ibid

[13] *Chambers v. Baltimore & Ohio R.R.,* 207 U.S. 142, 148 (1907).

[14] Ibid

1. Right against prosecution for petition

Challenging the rulers was never taken lightly and the kings used all their might to suppress dissent, questioning or demanding. Petitioning is also considered a crime. The essence of right does not lie in 'right to petition' itself, but in real terms, lies in immunity from being prosecuted for filing a petition. The English Bill of Rights of 1689 gave petitioning a special place by protecting petitioners from prosecution: *"That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal"*

While petitions continued to be addressed to the King, Parliament had in reality taken over both accepting and addressing petitions. The tradition developed that Parliament would respond to petitions with investigation and legislation.

The Right to petition is the first ever human right perhaps recognized by *Magna Carta*. It was won after bitter fights and bloody revolutions. The right to petition reaches back at least to the *Magna Carta* in 1215. The English Declaration of Rights in 1689 confirmed that subjects were entitled to petition the king without fear of prosecution.

2. Right to consideration of the petition

After removing criminal consequences, right to petition needs to have a positive consequence. Right to petition is fine, but what to do if the petition is not even considered? Over a period of time right to consideration of that petition has also emerged along with the right to petition. Colonial petitions addressed a wide range of public and private subjects including religion and the established church, slavery, relations with Great Britain, debt (public and private), taxes, government structure, divorce, appeals from judicial decisions, and naturalization. Petitions frequently set the legislative agenda in the colonies and resulted in laws being passed.

All persons did not have voting right for centuries. Women children and slaves were not given right to vote. Fortunately, the Right to Petition was not limited to voters. Petitions could be submitted by women, children and slaves also. The elected representatives and bodies of the colonies understood their duty was to entertain the petitions of all.

3. Right to rebel

The root of Petition Clause in Article 61 of the Magna Carta contains another significant right. Article 61 provided for the presentation of grievances to the

king, and required the king to redress grievances within 40 days or risk rebellion.[15] The Magna Carta's Right to Petition includes, if the right is abridged, the right to wage whatever war against government needed to get just redress. The Magna Carta's Petition Right included a Right to Rebel in the event that the Right to Petition were abridged.[16]

American Colonies witnessed petitioning as method of submitting grievances to local legislative assemblies. Americans submitted a wide range of petitions to the locally elected houses of assembly by end of eighteenth century. Petitioning the lower assembly for relief enhanced local authority, and local authorities took petitions seriously.[17]

Colonial assemblies entertained many types of grievances. Many colonial grievances could only be addressed by a response from the King and Parliament. The Declaration of Independence listed 27 grievances against King George and "others". The Declaration detailed the colonists' petitions and the King's response: *"In every stage of these Oppressions, we have petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury."*

The Magna Carta outlined the response when Petitions for Redress were ignored. This also includes about rebellion. The Right to Rebellion defined in 1215 was exercised in 1776 and explained in the Declaration.

4. Right to Response

This was the history in America as the First Amendment was drafted. The Right to Petition inherently includes the Right to a Response, and a government failure to respond triggers a Right to Rebellion. Till now, unfortunately the Right to Petition remained the least known and certainly least understood guarantee of the Bill of Rights. The right to petition government for redress of grievances is the right to make a complaint to, or seek the assistance of one's government, without fear of punishment or reprisals is also recognized in Europe.

As a constitutional right:

The First Amendment of the Bill of Rights (United States of America) addresses five rights. The limits on government interference with religion, speech and the press took shape of first amendment rights. The right to peaceable assembly was a needed protection to exercise these first three. The Right to Petition was central to constitutional law and politics in the early United States: *"Congress*

[15] Magna Carta (Charter of Liberties) of 1215, art 61

[16] Ibid

[17] Ibid

shall make no law abridging the right of the people to petition the Government for a redress of grievances."

This is how the First Amendment's Right to Petition the Government for Redress of Grievances grew from the history in US. This Petition Clause does not say Congress, the President or the Judiciary. This Clause includes all branches. The Petition Clause use of the term 'government' acknowledges an individual's right to invoke government's powers by way of a petition for redress of grievances. The clause thus affirms the right to invoke the government's judicial power by petition for redress. With the Petition Clause comes a right to petition the judicial branch for redress of grievances against the government. The Petition Clause created a constitutional right. Since less than one percent of Americans even know the Clause exists, it is not surprising that the right has been ignored by the government and largely trumped by the judicially adopted concept of "sovereign immunity".

The concept of sovereign immunity is that citizen cannot sue the Government in its own courts. This is an obsolete concept. Involving in so many public related activities and state is frequently interfering with public life as it has to answer questions of illegality and damage to the rights of citizen. "King can do no wrong" is an archaic idea to deny the rights of citizen against the state. It does not have any Constitutional basis. The Petition Clause gives a citizen a right to sue the government for redress of grievances, but Sovereign Immunity says the government has to consent to such a suit. The idea of such immunity is inconsistent with both a republic and the Constitution itself.

5. Right to sue the Government

Thus another auxiliary right that emerges out of right to petition: right to sue if petition is not answered. Whenever a citizen sued government for remedy or compensation, he was stonewalled with the argument of sovereign immunity or maxim of 'king can do no wrong'. Instead of this a right, "sovereign immunity" was the rule for a long time, as it was thought that the government can only be sued according to its consent. Such immunity abridges the right to redress grievances with government and freedom of citizen to question etc.

As the rights based approach progressed in emerging democracies, examples of waivers of sovereign immunity such as the Federal Tort Claims Act were visible and the courts have allowed other kinds of suits that are actually against the government by naming as defendants government officers in their official capacity. Several case law in India that developed with judicial activism, demonstrated that sovereign immunity is archaic, unconstitutional and irrational. The right to petition government for redress and governmental immunity from redress are direct contradictions. The former is the First Amendment in US,

fundamental right in India. The latter is the progressive result of Supreme Court decisions both in India and US.

The History of the Right to Sue Government dates to 1215 A.D. and the signing of the *Magna Carta*. Where petition rights would dispose of government of essentials, government has a right to condemn what it needs, *but it must pay a just compensation for it.* What they want to protect is government's "right" to take property *without just compensation*is considered theft.

6. Right to compensation

For a long time the controversy of *Petition Clause vs. Sovereign Immunity* continued leading to evolution of state liability. What sovereign immunity allows government to wrongfully injure its citizens, their liberty and property, *without just compensation?*

7. Right to an effective remedy

Article 8 of The Universal Declaration of Human Rights states the essence of Petition Clause, as to all governments:*"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or by law.*[18]*"*

Let us see the words "right to an effective remedy." What is an "effective remedy" for rights violations if it is not the right to sue government for just redress under law? That is a founding treaty of the United States with the United Nations forbidding our government from exercising immunity from its citizens for its violations of Constitutional Rights. It is clear that the right to an effective remedy is a substantive right.

The International Covenant Article II, sec. 2 and 3 declares:

Where not already provided for by existing legislative or other measures, each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[19]

Each State Party to the present Covenant undertakes:(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding the violation has been committed by persons acting in an official capacity.[20]

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[18] *Universal Declaration of Human Rights*, art 8

[19] International Covenant, art II, 2

[20] International Covenant, art II, 3

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy[21]*;*

Constitutional Right to Remedy: Constitution of India provided right to remedy as a fundamental right. A citizen, whose fundamental right is violated, can straight away go to state High Court[22] or Supreme Court[23] of India seeking remedy in the form of a writ, a direction or order to the public authority. However, *locus standi*[24] was an essential requirement for seeking remedy, i.e., only the victim of rights should seek remedy. If victim is poor or unreachable because of distance, or if dead, the wrongdoer's liability is automatically removed. If the state is wrongdoer, none could question it. From this situation emerged the 'judicial activism' and Public Interest Litigation. The constitutional courts, in fact, have effectively provided tortuous remedies which should have been ordinarily available in lower courts nearer to the people under law of torts.[25]

Effective Rights is the Hallmark of **Civilization:** The Right of Petition includes the right of use the compulsory process of law against government to redress grievances with it. It does not depend on any particular idea of the common law or of history. All this means that government is accountable under the law for the wrongs that it does to the people. That is a fundamental concept of civilization. This is later known as 'state liability'.

If rights are not enforceable or there is no mechanism to give effect the statutory provisions, the citizens will be frustrated, which might lead to serious consequences including 'violence'. If civilized methods do not work people might resort to barbarian methods using bombs and guns. An effective and compulsory process of law, judicial remedy and executive liability are needed.

8. Right to freedom of expression

Right to petition is important even today during these modern days of democratic rule of law. It is part of freedom of speech and expression guaranteed by First Amendment to US Constitution and under Article 19 of Indian Constitution. In the 'petition', a citizen freely expresses his views and criticises the policy as 'unconstitutional'. Right to petition emanates from this basic right and also reflect it when used.

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[21] *Lonergan v. United States,* 303 U.S. 33 (1938).

[22] Indian Constitution, art 226

[23] Indian Constitution, art 32

[24] *Locus standi* is a legal principle which insists only victim should approach the court for remedy

[25] Also called law of civil wrongs or law of compensation.

9. Right to dissent

The writ petitions or PILs before Judiciary or ordinary petition before Government bodies reflects the dissent, dissatisfaction or criticism of the policies or decisions taken up by the Government. Right to petition embraces the right to express dissent since it reflects the spirit of liberty. It cannot be denied and its denial will be considered as degradation.

10. Right to lobbying

In January 2007, the US Senate considered "ethics reform" bill, including a provision to establish federal regulation of certain efforts to encourage "grassroots lobbying". The bill said that "'grassroots lobbying' means the voluntary efforts of members of the general public to communicate their own views on an issue to Federal officials or to encourage other members of the general public to do the same". Civil Society of US criticized it.

In American society there are ongoing conflicts between organizations that wish to impose greater restrictions on citizen's attempts to influence or "lobby" policymakers, and groups that argue that such restrictions infringe on the constitutionally protected right to sue the government and the right of individuals, groups, and corporations (via corporate personhood), to lobby the government.

11. Right to transparency

Another controversial draft law is being considered. Proposed Executive Branch Reform Act, require over 8,000 Executive Branch officials to report into a public database nearly any "significant contact" from any "private party", a term that the bill defines to include almost all persons other than government officials. The bill defines "significant contact" to be any "oral or written communication in which the private party seeks to influence official action by any officer or employee of the executive branch of the United States."

This covers all forms of communication, one way or two ways, including letters, faxes, e-mails, phone messages, and petitions. The bill is supported by some organizations as an expansion of "government in the sunshine", but other groups oppose it as an infringing on the right to petition by making it impossible for citizens to communicate their views on controversial issues to government officials without those communications becoming a matter of public record.[26]

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[26] (1) Memorandum: "Congressman Waxman advances grave new threat to citizens' 'right to petition' government officials," by Douglas Johnson and Susan Muskett, J.D., National Right to Life Committee, February 20, 2007, (2) Letter from Richard D. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to the Honorable Henry

12. Right to services

What happened to such a crucial right to petition in these 800 years since? Right to petition to get redressal of grievances is yet to be granted in comprehensive manner. This became substantive right to good governance including 'development'.

The Citizen Charters – Duty to serve: The Citizens charters are supposed to be declarations of public authority to serve the taxpaying citizen. The governors owe a duty to serve them. Something like issuing caste certificate or certifying income or giving permission to build a house as per building bylaws, etc. Charter should declare time-bound delivery of services to the citizen. It should have been done without somebody making a law about it. But as not being done, the law is needed. Some of the states gave the citizens an entitlement to service as a right through 'service' right legislation. Some have limited it with mere charters. There are several legislative drafts before Centre and some states to guarantee the remedies for non-compliance of the 'charter' promised to citizen.

Though right to petition the government for redress of grievances is a significant right, but this right did not become statutory right as the Governments are still hesitating to provide. Right to Service legislation, which are supposed to reduce corruption among the government officials and increase transparency and public accountability. Madhya Pradesh enacted Right to Service Act on 18 August 2010 and Bihar was the second to enact this bill on 25 July 2011. Several other states Bihar, Delhi, Punjab, Rajasthan, Himachal Pradesh Kerala, Uttarakhand, Haryana, Uttar Pradesh, and Jharkhand have introduced similar legislation for effectuating the right to service to the citizen.

These laws commonly grant of "right to public services", which are to be provided to the public by the designated official within the stipulated time frame. Some of the common public services which are to be provided within the fixed time frame as a right under the Acts, includes issuing caste, birth, marriage and domicile certificates, electric connections, voter's card, ration cards, copies of land records, etc. Similar to RTI Act, this law also provide for aggrieved to approach first appeal authority and then Second Appellate Authority.

Origin of public service right is in right to petition as assured in Magna Carta 1215 within article 61 of the same.[27] The Article 44 of the Charter of

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Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, March 8, 2007, and (3) Letter from Richard D. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to the Honorable Henry Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, March 8, 2007.

[27] Magna Carta (Charter of Liberties) of 1215, art 61

Fundamental Rights of the European Union ensures the right to petition to the European Parliament.[28] The right can be traced back to the Basic Law for the Federal Republic of Germany[29] the Bill of Rights 1689 and the Petition of Right (1628).[30]

13. Right to redressal of grievance

Without any system of redressal of grievance either of employees or of the citizen, the state cannot boast of governance, let alone 'good governance'. The political leadership and the bureaucracy under the guidance of political governors have almost forgotten the obligation of offering governance to the people who are paying taxes and cast their vote to rule them.

In the days of no governance or bad governance, information is important tool for a citizen. Informed citizen alone could be a vibrant citizen, without whom there cannot be any purposeful democracy.

Grievance and Terrorism: Leaving serious issues of dissatisfaction unattended and unaddressed leads to serious violence and disturbance, including Terrorism, both international and domestic. All kinds of terrorism anywhere have two things in common. Whoever is behind it believes that he has unredressed grievances with the government at which the terrorism is directed. And he is able to convince others that his perception is correct.

Every civilized, so called, country should have open and fluid systems by which all grievances with government, real or imagined, can freely be addressed and justly redressed. Every government in all of its functions should be accountable to the governed in every way that it may create grievances with them, and that means that no government functionary can have immunity from just redress of grievances with it.

14. Right to seek compensation under RTI

Once it is recognized as 'right' it should have consequential remedies it includes remedy for seeking compensation. Right to service also should have a remedy for getting damages for not rendering that service. If the citizen charter mandates issuance of permission within 10 days (for example), the citizen is entitled to get either agreed amount or loss suffered by him for not getting the permission within due time. The citizen charter should also contain a clause that if the authority fails to render service it will pay a particular amount to citizen or would promise to compensate the loss established. It is a tortuous liability of authority falling

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[28] Charter of Fundamental Rights of the European Union (2000), art 44

[29] Basic Law for the Federal Republic of Germany, art 17

[30] Petition of Right (1628).

under the 'state liability' principle that was evolved over a period of time. Tort is a civil wrong. State has liability to compensate citizen for causing damage or committing civil wrong towards that citizen. In these cases of tortuous liability also the state immunity or sovereign immunity was pleaded for a long time, but ultimately the judiciary ruled out the archaic principle of immunity and rendered state liable for damage resulting to citizen from the actions and omissions including negligence of the state, its agencies and employees. Such an action, omission or negligence could be a crime also depending on circumstances and facts of each case.

15. Right to information

In addition to several auxiliary rights to right to petition as explained above, right to information is added as a significant necessity of civilized society. Right to information is basic to any democracy. A vibrant citizenry is a pre-requisite for survival of democratic society and good governance. It is not possible to have a rightful expression as a right without the right to information which is basis to freedom of speech. The quality of life in a civilized society depends upon the quality of exchange of information about governance and related aspects. The struggle between human rights and Government by secrecy should not go on forever. A citizen cannot afford to reconcile to the strong trend that government might run only on secrecy and human right is only a dream. It is not possible for any democratic Government to survive without accountability, which can be realized only when the people have information about the functioning of the Government. The whole effort must be to make democracy a really effective participatory democracy. The representative rulers should allow the real sovereigns, i.e., the people to decide, and the people have to decide or take part in every decision making process.

Freedom of Information: The United Nations General Assembly (UNGA), in its every first session in 1946, adopted Resolution 59(1), which states: Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations (UN) is consecrated.[31]

Fundamental Human Right: Article 19 of the "Universal Declaration of Human Rights" recognizes Freedom of Expression (FOE) including Freedom of Information and Free Press as a Fundamental Human Right.[32]

Article 19(2) of the ICCPR1966 states; *"Everyone shall have the right to Freedom of Expression; (which) shall include freedom to seek, receive and*

[31] United Nations General Assembly 1946, Resolution 59(1)

[32] Article 19 of the "Universal Declaration of Human Rights" 1948, an United Nations General Assembly resolution 217 (III) A of 1948

impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[33]

Article I of UNESCO declaration on "Fundamental Principles concerning Contribution of Mass Media to Strengthening Peace and International Understanding, to promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to war (1978) states; *"The strengthening of peace and international understanding, the promotion of human rights and the countering of racialism, apartheid and incitement to war demand a free flow and a wider and better balanced dissemination of information."*[34]

Article-II of the UNESCO Declaration states;

"The exercise of freedom of opinion, expression and information, recognized as integral part of human rights and fundamental freedoms, is a vital factor in the strengthening of peace and international understanding."[35]

Article 13 of the "UN Convention against Corruption" identifies[36]:

(i) effective access to information for public

(ii) undertaking public information activities contributing to non-tolerance of corruption (including conducting public education programmes) and

(iii) respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption…' as important measures to be taken by Government for ensuring the participation of society in governance.'[37]

Article 10 of the UN Convention against Corruption states:

"To combat corruption, each (member State) shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes and take measures (for adopting procedures/regulations, simplifying administrative procedures and publishing information."[38]

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[33] International Covenant on Civil and Political Rights, UNGA Resolution 2200 A(XXI) of 1966, art 19(2)

[34] UN Educational, Scientific and Cultural Organisation (UNESCO), art I

[35] UN Educational, Scientific and Cultural Organisation (UNESCO), art II

[36] UN Convention against Corruption" 'adoption by UNGA on 31 October 2003

[37] Ibid

[38] UN Convention against Corruption, art 10

Freedom of Expression and Information has been adopted as a 'Fundamental Human Right' by Regional Human Right Treaties from time to time *e.g.* the European Convention of Human Rights, 1950[39], the African Charter on Human and Peoples' Rights 1981[40], the Inter-American Declaration of Principles of Freedom of Expression, 2000[41] and Declaration of the Principle of Freedom of Expression in Africa 2002.[42] These conventions have reiterated Article 19 of the Universal Declaration of Human Rights.

African states: African Declaration of Principles of Freedom of Expression says:Public bodies hold information not for themselves, but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.[43]

Principle III of the Recommendations on Access to Official Documents adopted by the Committee of Ministers of the Council of Europe in October 2002 provides:Member states should guarantee the right to everyone to have access, on request, to official documents held by public authorities.[44] This principle should apply without discrimination on any ground, including that of national origin.[45]

Freedom of Information Laws: Realising the importance of the freedom of speech and expression including the freedom to receive and impart information, many countries around the world such as Sweden, the United States of America, Finland, the Netherlands, Australia, Canada, the United Kingdom, Japan, South Korea, Jamaica, Israel, South Africa, Thailand, India etc. have enacted Freedom of Right to Information Acts. The objective behind these enactments is to ensure that governmental activity is transparent, fair and open.

Most enactments are based on the paradigm that except in matters of defence, atomic energy and matters concerning the security of a country, there is no room for secrecy in the affairs of the Government. Whether it is a matter of taking a decision affecting the people or whether it is transaction involving purchase or sale of government property or whether the matter relates to entering into contracts in all these matters, the Government should act in a transparent manner. This means that every citizen who wishes to obtain any information with respect to any of those matters should be entitled to receive it.

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[39] European Convention of Human Rights, 1950

[40] African Charter on Human and Peoples' Rights 1981

[41] Inter-American Declaration of Principles of Freedom of Expression, 2000

[42] Declaration of the Principle of Freedom of Expression in Africa 2002

[43] Declaration of Principles of Freedom of Expression in African states, Principle IV

[44] Recommendations on Access to Official Documents 2002, Principle III

[45] Ibid

The impact of the Freedom of Information laws has varied across different countries but the trend towards an access regime is fostering greater Government accountability, and more dramatic headlines. The Right to information in the context of the voter's right to know the details of contesting candidates and the right of the media and others to enlighten the voter was recognized by the Supreme Court.

In *Union of India* v. *Association for Democratic Reforms' Case*[46], the petitioner challenged the constitutional validity of Amendments to Representation of Peoples Act invalidating the Supreme Court's May 2, 2002 judgment, the right to know about the candidate standing for election has been brought within the sweep of Article 19(1)(a). There can be no doubt that by doing so, a new dimension has been given to the right embodied in Article 19(1)(a) through a creative approach dictated by the need to improve and refine the political process of election. In carving out this right, the Supreme Court had not traversed a beaten track but took a fresh path. It must be noted that the right to information evolved by this Court in the said case is qualitatively different from the right to get information about public affairs or the right to receive information through the Press and electronic media, though to a certain extent, there may be overlapping. The right to information of the voter/citizen is sought to be enforced against an individual who intends to become a public figure and the information relates to his personal matters. Secondly, that right cannot materialize without State's intervention. The State or its instrumentality has to compel a subject to make the information available to public, by means of legislation or orders having the force of law.[47]

Objective of RTI

The objectives of the Right to Information Act, 2005[48], are as under:*"An Act to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority.*[49]

It is stated furthermore that: *Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed*

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[46] *Union of India* v. *Association for Democratic Reforms'*(2002) 5 SCC 294

[47] Judgment of Supreme Court on March 13, 2003 in voters' right to information case (2003) 3 Supreme 93.

[48] Right to Information Act, 2005, Preamble

[49] Ibid

The aim and purposes of the transparency law are:

(i) Greater Transparency in functioning of public authorities.

(ii) Improvement in accountability and performance of the Government.

(iii) Promotion of partnership between citizens and the Government in decision making process; and

(iv) Reduction in corruption in the Government departments.

Under RTI Act of 2005 the right to information includes following rights:

1. Right to inspect works, documents, records
2. Right to take notes, extracts or certified copies
3. Right to take samples of material
4. Right to obtain information in electronic form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through print outs where such information is stored in a computer or in any other device.
5. Right to information whose disclosure is in the public interest.

   Disclosure is the duty of any decision maker in a democratic society. It is reflected in fundamental rights such as right to know as part of right to life[50] and right to free speech and expression[51] wherein the administrative authorities are constitutionally obliged to inform the people. Right to notice is an essential component of principles of natural justice. Absence of bias and hearing the other side are the principles which constitute the underlying theme of procedural laws—codes of civil and criminal procedure. Open hearing is the mechanism through which the courts of law offer the information in a transparent manner.[52]

Accused has right to know the charges and evidence adduced against him. Similarly arrested has right to information about grounds of his arrest and right to inform his friend or relative about the arrest and place of detention etc. These rights were initially interpreted by the Supreme Court in several cases and finally they were incorporated through in 2008 amendments to Code of Criminal Procedure.

Section 4 of the Right to Information Act, 2005[53] mandates that every public authority shall maintain all its records duly catalogued and indexed in a manner

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[50] Indian Constitution, art 21

[51] Indian Constitution, art 19(1)(a)

[52] S.P. Sathe, Administrative Law, Lexis Nexis Butterworths, 2006, p. 233

[53] Right to Information Act, 2005, s 4

and in a form which facilitate the access to information granted as a right to all citizens.[54] It requires every authority to ensure that all records that may be computerised are within a reasonable time and subject to availability of resources are computerized and connected through network all over the country on electronic systems so that access to such record is facilitated.[55] All this is essential to facilitate the Right to Information.

The Public authority is also mandated to publish details within 120 days from the enactment of this Act about its functionaries and the procedure that the functionaries had to follow in order to discharge their public function.[56] It is also obligatory to publish facts affecting people while formulating important policies or announcing the decisions.[57] It also mandates every public authority to publish all relevant facts while formulating important policies or announcing the decision which affect people in general. Likewise, every public authority is obliged to provide reasons for its administrative or quasi-judicial decision to affected person[58].

Section 4(1)(b) lists 17 categories of information which have to declared *suo motu* by public authorities. However, most organisations only provide only sketchy details.[59] This is one of the very essential provisions of the Act which is of great help to the people in general. For example the CM's Relief Fund is available to individuals also but no information has been posted on the government website about how the citizen can go about applying for it. Those who know wield the influence and take their kith and kin to the legislators or officers who are close to CMO. Similarly, details of several social welfare and poverty alleviation schemes should be posted on government websites. The Adarsh housing society scam would not have been possible if the government had implemented Section 4 of the RTI Act.

The Act mandates that the routine information must be put in public domain *suo motu* to the public at regular intervals through various means of communications including Internet.[60] Experience shows that the more the information is put in public domain the lesser number of applications will be made by the citizens. However, Considering the fact that the information requested is unarguably must in the public domain and that its range and volume is such that it would attract

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[54] Ibid

[55] Right to Information Act, 2005, s 4(1)(a)

[56] Right to Information Act, 2005, s 4(1)(b)

[57] Right to Information Act 2005, s 4(1)(c)

[58] Right to Information Act 2005, s 4(1)(d)

[59] Ibid

[60] Right to Information Act 2005, s 4(2)

provisions of Section 7(9) of the Act,[61] it is not possible to authorize its disclosure in the form in which the appellant had requested as it would disproportionately divert the resources of the authority.[62]

The Act mandates that every information shall be disseminated widely and in such form and manner so that information is easily accessible to the public.[63] This can be done by publications of information of interest to the public through various modes such as newspapers, public announcements, media broadcasts, notice boards, the internet or any other means.

Principle of Maximum Disclosure. As per Section 4, disclosure should be exhaustive and illustrative. If the principle of maximum disclosure is properly followed, the need for seeking information under RTI would not arise. Put in public domain the maximum information. Once the information is brought into the public domain it is excluded from the purview of the RTI Act and, the right to access this category of information shall be on the basis of whether the public authority discloses it free, or at such cost of the medium or the print cost as may be prescribed. The public authorities are expected to disclose the directory of its officers and employees and their wave-and-emolument-related information. All citizens shall have the right to information, subject to the provisions of the Act.[64]

As result of increased Government's accountability in delivery of services, rural to urban migration has accelerated as widely reported in the media. This is also corroborated by the findings of a national level survey, jointly conducted by the Transparency International and the Centre for Media Studies. The survey has revealed that in the opinions of 40 per cent of respondent (all below the poverty line), corruption and malpractices in implementation of poverty alleviation programmes have declined due to RTI induced accountability of the Government and its functionaries at various levels.

The RTI Act provides a framework for promotion of citizen-government partnership in carrying out the programmes for welfare of the people is not only the ultimate beneficiaries of development, but also the agents of development.

Lack of transparency and accountability encourages the government officials to indulge in corrupt practices, which result in lower investments due to mis-use or diversion of funds for private purposes. As a result, the government's social spending yields no worthwhile benefits, because, for instance, the teachers do not teach, doctors and nurses do not attend health centres, ration card holders do

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[61] Right to Information Act 2005, s 7(9)

[62] Ibid

[63] Right to Information Act, 2005, s 4(3)

[64] Right to Information Act 2005, s 3

not receive subsidized food grains and the promised jobs are not provided to the people. In the process, it perpetuates poverty and harms the poor. It creates an environment of distrust between the people and the government, which impinge upon the development and jeopardize democratic governance. Section 20 of RTI Act provides for penalties for withholding information or denying it for illegal defences. The Information Commission also has an authority to summon records, grant compensation for any loss.

Though the RTI Act mandates that public interest should be driving force in seeking information, most of the RTI requests are for seeking remedies to their grievances. Substantive number of applications is asking for action taken reports on the petitions, memoranda, or representations given earlier or on complaints filed by himself or by someone else, or action on recommendations of a committee or judicial order etc. Right to petition is supported with legal guarantees and other consequences including the 'compensation' to be demanded for the delay or denial in delivery of information.

RTI an added value to right to petition

Right to petition is important even today during these modern days of democratic rule of law. Most appropriately the right to information is an added value to that eight hundred year old right to petition. A just born child cries to say something. It might contain a demand perhaps. Mother, father or doctor or somebody around have a duty and need to respond to that cry. Cry of the society of the day is right to information. Right to information is a human right. It means right to empower oneself.

In the days of no governance or bad governance, information is important tool for a citizen. Informed citizen alone could be a vibrant citizen, without whom there cannot be any purposeful democracy.

Administrative ethics

Administrative ethics and law demand accountability in administration. Accountability is possible only through transparency. Transparency is, for the first time provided by Section 4 of Right to Information Act 2005. It's in fact, revolution in governance. But the weakness of the law is that it remained a recommendation, not mandatory at all. The law does not even prescribe consequences for ignoring this 'recommendation' in suo moto disclosure clause. However there is an alternative. If a citizen seeks the information under Sections 3,6 and 7 as a matter of right, it should be delivered unless hit by any of exception under Sections 8 and 9. If information requested is that which the public authority has to disclose on its own, it becomes mandatory and denial shall lead to penal proceedings. Hence we cannot say that section 4 is not enforceable at all. The

information to be disclosed has to be shared when demanded, without even asking for identity of seeker, his address or the purpose.

The bureaucrats and administrators say the RTI should not be used for redressal of grievance. They even say its misuse. But the social activists rightly observe the usage of RTI for solving their complaints or seeking action on their representations is a creative use. The right to petition, recognized eight hundred years ago has a new enforceable additional force, the right to information. File a petition, give reasonable gap and ask for action taken report under RTI. The authorities are under obligation to inform the action taken or not taken within 30 days. Magna Carta's Right to petition is strengthened with RTI.

The Fundamental and Human Rights of Seafarers: Legal Issues in Perspective

Prof. Proshanto K. Mukherjee*

ABSTRACT

This article primarily is concerned with the deprivation of human and fundamental rights of seafarers within the sphere of seafarers' rights not only in antecedent times but also in the current milieu of modern and sophisticated shipping. This expressed purpose of the article begs the question as to what exactly is human rights and what is its significance in terms of seafarers and their rights. Although references to sociological and political concerns are unavoidable, the work attempts to focus on legal issues particularly from the perspective of international law embodied in conventions and other treaty instruments. In this process, the article first looks at the vulnerable position of the seafarer within the domain of shipping in macro terms and then at the legal framework which provides or fails to provide for even the bare essentials consistent with the needs of the seafaring vocation and profession. The notion of human rights is examined in terms of general international law and further by reference to various international treaty instruments. The discussion comprises a critical analysis of the extant law and practice pertaining to human rights of seafarers. In conclusion a summary is presented together with suggestions for improvement of the legal regime.

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Introduction

Seafaring has been around since time immemorial. Since the dawn of civilization, human kind has been constantly drawn to the sea. Our primitive ancestors although creatures of *terra firma* discovered the phenomenon of flotation and used hollow logs and rafts of wood as means of transportation on water before they invented the cart and the wheel. The early history of maritime adventures and middle ages is rife with chronicles of the legendary" iron men in wooden ships" But the sea and the elements have been relentless and uncompromising in challenging the undaunted spirit of seafarers; so have some unscrupulous shipowners treating their crew as slaves and objects of forced labour through centuries.

Maritime safety has always attracted the attention of the world community at large. In the modern era, concern for safety was brought to the forefront with the sinking of the *Titanic*, and in recent times it has been driven home time and again by disasters such as the capsizing of the roll on-roll off ferry *Herald of Free Enterprise* off Zeebrugge, the *Doña Paz in* The Philippines, and the *Estonia* in the Baltic Sea. Seafarer safety is central to maritime safety concerns relating to all ships. On cargo ships the totality of maritime safety involves the safety of ship, cargo and crew including the occupational safety of seafarers serving on board. But the extent to which safety concerns for the singular plight of seafarers has received at least commensurate attention remains a question mark.In the experience of this author, a former seafarer turned maritime lawyer, and others, seafaring remains a dangerous occupation as ever,[1] perhaps surpassed only by the related profession of maritime salvage.[2]

The seafarer is at the centre of shipping activities whether at sea or in port but has unfortunately not been accorded the rights, at least in practical terms that he deserves. As noted by one eminent commentator; "[s]eafarers are the least resilient in the maritime world and their marginalisation renders them even more vulnerable to economic exploitation than in the past". As such, they are often deprived of their basic human rights[3]. In *The Minerva*,[4]the eminent Lord Stowell, first judge of the English Admiralty Court, in apparent despair and out of empathy, referred to seamen as-

"a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill provided with the means of obtaining useful information, and

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[1] K.X. Li and Jim Mi Ng., 'International Maritime Conventions: Seafarers' Safety and Human Rights'(2002) 33(3) Journal of Maritime Law and Commerce381

[2] Proshanto K. Mukherjee, *Refuge and Salvage* (Aldo Chircop and Olof Linden (Eds.) Leiden, Boston: MartinusNijhoff, 2006) 271-297

[3] A.D. Couper et al., *Voyages of Abuse: Seafarers, Human Rights and International Shipping*(Pluto Press, 1999) 3

almost ready to sign any instrument that may be proposed to them; and on all accounts requiring protection even against themselves."

This article is basically concerned with the deprivation of human rights of seafarers within the sphere of seafarers' rights not only in antecedent times but also in the current milieu of modern and sophisticated shipping. This expressed purpose of the article begs the question as to what exactly is human rights and what is its significance in terms of seafarers and their rights. The focus of this work is somewhat less on political and sociological considerations and more on the legal issues particularly from the perspective of international law embodied in conventions and other treaty instruments. In this process, the article first looks at the vulnerable position of the seafarer within the domain of shipping in macro terms and then at the legal framework which provides or fails to provide for even the bare essentials consistent with the needs of the seafaring vocation and profession[5]. The notion of human rights is examined in terms of general international law and further by reference to various international treaty instruments. The discussion comprises a critical analysis of the extant law and practice pertaining to human rights of seafarers. In conclusion a summary is presented together with suggestions for improvement of the legal regime.

The Seafaring Workforce

Shipbuilding and seafaring flourished in the ancient civilizations of the eastern hemisphere and the Mediterranean basin,although during the Roman era of European history, "seafaring people were held in low estimation"[6] and "maritime ventures were viewed with horror."[7]

However, since those antiquated times, seaborne trade has remained the lifeline of land-based society to this day. The seafarer is an artisan of ancient vintage but ironically his lot has often been an unhappy one.

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[4] [1825] 1 Hag. 347 (Adm. Ct.)

[5] The term "vocation" pertains to seafarers at the level of ratings where qualifications are cast as "proficiency" requirements; in other words, the skills necessary for discharging duties associated with the deck, engine room and catering departments on a ship at the level of "ratings". In contrast, "profession" pertains to qualifications described as "competencies" required to be discharged at the professional and management levels on board a ship where decision-making, albeit within a prescribed hierarchy is an integral part of the duties and responsibilities of officers; See The International Convention on Standards of Training, Certification and Watchkeeping [1978] (STCW Convention) as amended in 1995 and 2010, 1361 U.N.T.S. 190

[6] James Reddie, *Historical View of the Law of Maritime Commerce*(William Blackwood & Sons, Edinburgh and London 1841) 79

[7] Proshanto K. Mukherjee, *Maritime Legislation*(Malmö: WMU Publications 2002) 14; see also W.P. Gormley, 'The Development and Subsequent Influence of the Roman Legal Norm of 'Freedom of the Seas'' (1963) 40 U. of Detroit L.J. 561

The awe of "iron men and wooden ships" glorified by the likes of Christopher Columbus and James Cook, and the romance and mystique of the sea immortalised in prose, poetry and painting has all but vanished. Until the early part of the last century unscrupulous ship owners operating overloaded ships had little regard for the lives and undaunted spirit of seafarers. They were only concerned with carrying as much cargo as could be loaded with the comfort of being able to collect insurance proceeds if the ship sank. It was through the relentless efforts of the British Parliamentarian Samuel Plimsoll that the so-called "coffin ships" were finally outlawed and the seeds of the Load Line Convention[8] were planted. In this new millennium, people whose lifestyles generate the pollution that is threatening the future of the planet loathe and ignore the very seafarers who bring them oil to fuel their gas guzzling vehicles and heat their homes. Without ships and seafarers, civilized life ashore could very quickly come to a standstill.[9]

Human Rights and Fundamental Rights Relating to Seafarers General Considerations

Given that there are considerable overlaps between fundamental rights and human rights, conceptually the two phenomena lie in a zone of confluence; yet there are functional differences between the two in terms of their characterization in law and custom. One view is that fundamental rights are broader in character consisting of rights that are intimately connected to the social and political fabric of a society and are invariably entrenched in the constitutional law of that society reinforced by decisions of the highest judicial body of the land. One definition in the American context is that they are a group of rights that the Supreme Court recognizes as being fair and legal, and are also rights that are listed within the Bill of Rights.[10] By contrast, human rights are inalienable rights relatively narrower in scope and character compared with the fundamental rights of a society. For example in certain jurisdictions in the United States, right to privacy, right to marry and right to bear arms are fundamental rights.[11] But they can hardly be considered as inalienable human rights.In this vein it must be further recognized that there are conflicting values in different social systems with regard to *inter alia*, such matters as gender equality, religious and political freedom. Such equality or freedom in a particular society may noteven be considered a fundamental right under the constitutional law of that society.

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[8] International Load Line Convention [1930] 135 U.N.T.S. 301

[9] Extracted from Proshanto K. Mukherjee, 'Criminalization of Seafarers: The Modern Maritime Malady' (Greenwich Maritime Institute, University of Greenwich 2005)

[10] See<http://study.com/academy/lesson/what-are-fundamental-rights-definition-types-features.html>accessed 20 March 2016

[11] Ibid

Under the Indian Constitution, there are six rights enumerated as fundamental rights in Part III. These are the rights to equality, freedom, right against exploitation, freedom of religion, cultural and educational rights and right to constitutional remedies.[12] Arguably, not all of these can be considered to qualify as universal human rights but the Constitution in its Preamble, and Part IV do contain provisions that constitute human rights at least within the arena of India's domestic law.The extent to which fundamental rights also qualify as inalienable human rights of universal purport is thus not definitive.

Among fundamental rights in general, human rights are paramount. They are rights inherent in all who belong to the human species irrespective of a variety of factors including race, religion, colour, creed, nationality, ethnic origin, social class, age, gender, sexual orientation, linguistic background,and political persuasion.

As one writer puts it -

"Human rights are generally, defined as those rights which are inherent in our nature without which we cannot live as human beings. All civilised countries must recognise them. It is the legal duty of the Nation to protect them and also respect them."[13]

Human rights must doubtless be of universal application[14] but unfortunately there are many who are victims of violations of those rights in society as well as the workplace. In the context of seafarers, such violations occur in multifarious ways including actions or omissions by their employers, agents, shipboard authorities and, last but not least, enforcement authorities ashore.

There are a host of international conventions and non-treaty instruments on human rights generated by various United Nations and regional bodies which are empowered to make administrative decisions regarding human rights[15]. There are also numerous judicial tribunals, both national and international which play a significant role in deciding cases of human rights violations.In many instances,

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[12] Durga Das Basu, *Introduction to the Constitution of India* (15th ed.,New Delhi: Prentice Hall of India 1993)79; A seventh right, namely, right to property was removed from Part III by a 1978 amendment to the Constitution

[13] JagatKonthoujam, 'Human Rights under Indian Constitution and AFSPA in NE', The sangai Express, webcast on January 14th, 2009<htpp://www.e-pao.netepSubPage Extractor.asp?stc=news_section.opnions.Opnion_on_Killing_of_Manorama.Human_rights_Constitution_and AFSPA_1>accessed 27 March 2016

[14] See D. Fitzpatrick & M. Anderson, *Seafarers' Rights* (Oxford: Oxford University Press 2005) 44

[15] Ibid at p. 45 for a list of the most important instruments adopted by or under the auspices of such bodies.

governments purporting to exercise the sovereign rights of their nations, commit acts or omissions contrary to the principles of human rights. Seafarers who are by the very nature of their calling, exposed to the vagaries of abuse indiscriminately inflicted on them by persons in authority in one form or another bear the brunt of human rights violations in helpless situations and often without recourse or remedy. The most significant international instrument in the field of human rights in general is the Universal Declaration of Human Rights[16] adopted by the United Nations in 1948 in the wake of the end of World War II. In this Declaration, the rights enumerated are those to which every working person is entitled. They are enshrined as follows:

- 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

Need less to say, seafarers as workers and human beings are covered by the above-mentioned rights.

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[16] hereinafter referred to as "Universal Declaration"

While the Universal Declaration is probably the most significant of the international instruments, it is not a convention. By contrast there are a number of treaty instruments on specific aspects of human rights that are binding on its state parties by virtue of being conventions. These are, *inter alia*-

- International Convention on the Elimination of All Forms of Racial Discrimination, 1965;
- International Convention on the Elimination of All Forms of Racial Discrimination, Against Women, 1979 and Protocol thereto;
- Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 and Protocol thereto.

It is notable that the rights relating to discrimination and torture, cruel, inhuman and degrading treatment and punishment in the Universal Declaration of Human Rights have been codified into convention rights. In this context attention must be drawn to the International Labour Organization (ILO) model of social justice which, despite its focus on the rights of workers including seafarers has also been a major source of inspiration for the development of economic and social rights within the framework of human rights instruments[17]. Attention must also be drawn to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 1966 which admittedly widens the conceptual scope of human rights by providing for complaints against violations of economic and social rights extending to the right to have decent work and is hailed as a holistic human rights approach as compared with the ILO model.[18] The universality engendered by the holistic approach of the Optional Protocol referred to above is indeed admirable. In combination with relevant ILO instruments it exemplifies a comprehensive regime despite some weaknesses, which some commentators have pointed out, are attributable to the ILO model.[19] Be that as it may, it must not go unnoticed that the Constitution of the ILO in its Preamble mentions "humane conditions of labour" in express terms in the context of universal peace based on social justice. Its mandate extends to "promoting social justice and internationally recognized human and labour rights" and refers to "labour peace" being essential to prosperity as a "founding mission" which it continues to pursue.[20] Another relevant instrument in this regard is the Vienna Declaration and Programme of Action, 1993, Article 5 of which declares that "[A]ll human rights are universal, indivisible, interdependent and interrelated" emphasizing that "[th]e international

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[17] D. Fitzpatrick & M. Anderson, *Seafarers' Rights* (Oxford: Oxford University Press 2005) 45

[18] See Gillian Mac Naughton and Diane F. Frey, 'Decent Work for All - A Holistic Human Rights Approach' (2011) 26 American University International Law Review 450

[19] Ibid at 466

community must treat human rights globally in a fair and equal manner..." and admonishes States to "protect all human rights and fundamental freedoms".[21]

All in all, the conglomerate of international instruments discussed above flowing from the Universal Declaration of Human Rights can be said to constitute a human rights code.[22] These instruments apply to their state parties whose conduct and behavioural standards are expected to adhere to the provisions of the instruments in question. The states are thus obliged to create and implement conditions for workers that protect human rights and to ensure proper compliance with such rights. Even if a state is not a party to an international instrument pertaining to human rights, it is bound by customary international law to observe and give effect to several of the basic human rights such as the right to life and liberty and freedom from forced labour.[23] Indeed it is submitted that the universality of customary international law governing human rights falls under the doctrine of *jus cogens*[24] so that they cannot be overruled, superseded, removed, curtailed or negated bydomestic legislation or private employment contracts. Arguably, even a waiver of human rights by individuals may be held to be invalid by a court.[25]

The Maritime Dimension

In the maritime context, it is to be noted that the Maritime Labour Convention, 2006 (MLC) of the ILO, often referred to as "seafarers' bill of rights" is set out within a legal framework of human rights. This is evident in the Preamble to the Convention as well as in Articles III and IV. Provisions relating to various requirements and obligations cast as seafarers' rights throughout the Convention

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[20] See Moira L. McConnell, Dominick Devlin and Cleopatra Doumbia-Henry, *The Maritime Labour Convention, 2006, A Legal Primer to an Emerging International Regime*(Leiden, Boston: MartinusNijhoff2011)13-14 in particular footnote 36

[21] World Congress on Human Rights, Vienna, 25 June, 1993

[22] D. Fitzpatrick & M. Anderson, *Seafarers' Rights*(Oxford: Oxford University Press 2005) 45

[23] Ibid at 46

[24] In Article 53 of the Vienna Convention on the Law of Treaties, 1969, "*jus cogens*" is defined as a "peremptory norm of international Law", meaning a norm from which no derogation is allowed. See Proshanto K. Mukherjee and Huiru Liu, 'Safety and Security in Shipping: International, Common Law and Chinese Law Perspectives'*Progress in Economics Research,* 33(Albert Tavldze (Ed.) New York: Nova Publishers 2015) at 56 and footnotes 62 and 63 at 72

[25] See D. Fitzpatrick & M. Anderson, *Seafarers' Rights* (Oxford: Oxford University Press 2005) 46 where mention is made of Article 19 of the European Human Rights Convention which expressly provides that the Court is not relieved of its duty by the sole fact of a waiver by an individual of rights guaranteed by the Convention.

text unmistakeably reflect human rights precepts.[26] Incidentally, the leading text book on the MLC points out that the United Nations Convention on the Law of the Sea, 1982 (UNCLOS),[27] given that it is frequently hailed as the "Constitution of the Oceans", fails to adequately consider the oceans including in particular, the high seas, as a "workplace or a site for human rights." While the contextual fairness and relevance of the comment may be called into question, notably, the authors of the book have expressly conceded that UNCLOS does address the human rights dimension in shipping through its provisions on slavery and piracy. Even in UNCLOS there is no consideration of human rights whether in the context of seafarers or otherwise, except that since 1995, it has been mentioned in the Annual UN Reports on the Law of the Sea.[28]

To advance the present discussion in the maritime context, and from a legal perspective, due cognisance must be given to the juxtaposition between fundamental rights and human rights in terms of legal theory. While this has been addressed at a preliminary level in the foregoing discussion, the issues need to be viewed from the vantage point of seafarers' rights. How they fit into the equation requires analytical examination. In this vein, account must be taken of their articulation through convention law such as the MLC, the relevant customary law and scholarly writings.

For starters, it is submitted that the underpinnings of the legal concepts of human rights and fundamental rights are primarily sociological in character extending to labour law considerations. As alluded to earlier, human rights in terms of legal theory arise out of the verity of natural law that society consists of human beings. These rights are thus inherent and inalienable belonging to all human beings *without exception* (emphasis added). This is the *grundprinzip*[29] governing human rights and providing its legal foundation. Needless to say, seafarers as human beings are natural beneficiaries of human rights laws. It is further submitted that the concept of fundamental rights in terms of legal theory is tangentially different from that of human rights even though both pertain to human beings and therefore share a common platform in terms of legal theory. Fundamental rights also have

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[26] Moira L. McConnell, Dominick Devlin and Cleopatra Doumbia-Henry, *The Maritime Labour Convention, 2006, A Legal Primer to an Emerging International Regime* (Leiden, Boston: MartinusNijhoff 2011) 13-14, in particular footnote 36 at 77

[27] [1833] U.N.T.S. 3; [1982] 21 I.L.M. 1261

[28] See respectively, Conference Resolution 1 in SOLAS/CONF.5/32, ANNEX, at 1-2, and paragraph 11 of the Preamble to the ISPS Code.

In the latter seafarers' shore leave rights pursuant to the 1965 Facilitation Convention is recognized 20-21; as per Report on Marie Jacobsson.

[29] Basic principle or ground rule

a sociological basis but under the constitutional law of many jurisdictions, extend, *inter alia*, to political and economic considerations, which in juxtaposition and *stricto sensu,* do not fall under the appellation of human rights. Fundamental rights are not in all cases absolute; in other words, there may be limitations imposed by law such as in the case of freedom of speech which are tempered by laws relating to defamatory statements, speech inciting violence, insurrection or hate. Similarly, rightof public assembly or demonstration is subject to the requirement that it must be peaceful. These fundamental rights illustrate their difference from human rights.

Again, needless to say, seafarers are entitled to all the fundamental rights provided in any given constitutional law as the supreme law of the land but they are not always in a position to exercise their rights because of the peculiarities of their professional or vocational calling. Notably, there are several seafarers' rights associated with the special circumstances of their working lives that go beyond the human rights and fundamental rights alluded to in the present discussion although there are close connections with or are modified versions or extensions of those rights. Those who live their daily lives on *terra firma* often fail to appreciate the perpetually mobile existence of seafarers who live, work and sometimes die on board a ship in the midst of a potentially hostile environment. It is therefore no surprise that people involved in shipping and seafarers are inclined to equate seafarers' rights with human rights as perceived by the public at large.[30]

Among the fourteen rights set out in the Universal Declaration of Human Rights, some are directly and undeniably relevant to employment at sea; others would ostensibly apply to seafarers in particular circumstances. The issues of right to life, liberty and security, freedom from degrading treatment, right to just and favourable remuneration, right to work, right to rest and leisure and right to health and well-being as articulated in the Universal Declaration apply to seafarers in one way or another whether or not they appear expressly in maritime conventions as they are deeply rooted in customary law and maritime practice. The issue of hours of work and rest at sea is addressed in MLC 2006 as well as in the STCW Convention. Other rights such as rights to a fair trial and to legal remedy would apply in particular circumstances such as where a shipmaster or crew member is detained or held in official custody without trial by shore authorities for inordinately long periods of time.[31]

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[30] D. Fitzpatrick & M. Anderson, *Seafarers' Rights* (Oxford: Oxford University Press 2005) 53-74; K.X. Li and Jim Mi Ng., 'International Maritime Conventions: Seafarers' Safety and Human Rights', (2002) 33(3) Journal of Maritime Law and Commerce385-393

[31] In relatively recent times, the infamous ship-source pollution episodes of the *Erika*, *Prestige*, *Tasman Spirit* and *Hebei Spirit* cases are striking examples which are briefly presented later in this article

Unfortunately, there is no singular authoritative legal instrument which provides a comprehensive and definitive enumeration of seafarers' rights. In some sound scholarly works,[32] rights of seafarers have indeed been admirably discussed but consistency among writers reflecting a systematic and unequivocal listing of rights is missing. Admittedly, different authors have presented the essence of a particular right in different forms of articulation, and have expressed the same sentiment from different perspectives. The downside from the viewpoint of a researcher is that rights mentioned by one author are absent in the works of another and *vice versa* which leads to uncertainty. There is also no clear indication of which seafarer rights can be said to be human rights, violations of which could and should lead to appropriate sanctions. It is submitted that this is a significant deficiency. A lacuna in this area of treaty law is thus perceived as a woeful inadequacy which should be addressed by the international maritime community.

In terms of scholarly works, undoubtedly the leading piece of literature is *Seafarers' Rights* authored by D. Fitzpatrick and M. Anderson. In their book[33] the authors have first mentioned in the order here stated, right to life, freedom from forced labour, torture, cruel, inhuman and degrading treatment. Needless to say, all of these constitute human rights in the global sense, but they do not routinely or as a matter of course relate to seafarers. Incidentally, all commentators on seafarers' rights refer to the right to life which shows the undeniable universality of this right without heed to any particular section of human society or any particular calling or profession.[34]

Fitzpatrick and Anderson then mention freedom from discrimination which is undoubtedly an important item of global human rights and is also a right pertaining to seafarers the violation of which could be of considerable importance in a given situation and in light of the discrimination suffered by a particular seafarer. Next is mentioned the issue of child labour in respect of which there are express prohibitory provisions in MLC and other ILO conventions and which are reflected in domestic legislation of states but there is no specific mention of it in the Universal Declaration of Human Rights. Arguably, children have the right not to be subjected to labour; child labour would therefore notionally qualify as a human right under

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[32] D. Fitzpatrick & M. Anderson, *Seafarers' Rights* (Oxford: Oxford University Press 2005) 44

[33] See D. Fitzpatrick & M. Anderson, *Seafarers' Rights* (Oxford: Oxford University Press 2005) 58-80

[34] K.X. Li and Jim Mi Ng., 'International Maritime Conventions: Seafarers' Safety and Human Rights', (2002) 33(3) Journal of Maritime Law and Commerce385-393; AzfarMustafar, 'An Inquiry into the Regimes of Piracy, Unlawful Acts, and Related Preventative Measures under International Maritime Law' World Maritime University, 2010, unpublished Ph.D. thesis are examples

the caption "cruel and degrading treatment". This is a phenomenon that has historically been an abominable practice in shipping and has now been outlawed through maritime convention provisions.[35] The right to legal remedy and access to justice falls very much within the scope of human rights listed in the Universal Declaration and is squarely also a seafarer right as mentioned above.

The rights pertaining to freedom of association, collective bargaining, strikesas mentioned by Fitzpatrick & Anderson are interrelated rights which are highly relevant to seafarers and closely associated with the right to work, free choice of employment, protection against unemployment and right to join trade unions, all recognized as human rights.The right to identity documents is highlighted as a seafarer right but is not a human right under the Universal Declaration. By contrast, shore leave is an extremely important seafarer right which is provided for in the IMO Facilitation Convention of 1965 and is frequently ignored by certain states. It is understandably not included in the Universal Declaration as it lacks a universal character. The right to fair wages as a seafarer right is synonymous with right to just and favourable remuneration in the Universal Declaration and is undoubtedly a human right. Another item in the Universal Declaration is the right to rest and leisure the maritime counterpart of which is "hours of work and rest" already discussed above. Fitzpatrick and Anderson refer to it as "reasonable work hours and holidays"; they also highlight health and medical care, social security and welfare as obvious seafarer rights. These rights are also human rights under the Universal Declaration. Among others, the right to repatriation is peculiarly maritime in character, and apart from being an established seafarer right should be regarded as a human right in respect of seafarers. It is not listed in the Universal Declaration because it is not of universal purport.

Fitzpatrick and Anderson also refer to safe and health working conditions. It is no doubt a seafarer right but can also be considered a human right under the notion of "right to a standard of living adequate for the health and well-being of the person". The concept of safe working conditions is characterized as "occupational safety". In relation to this, the Load Lines Convention, 1966 has already been mentioned. The core of occupational safety is "the correlation between a seafarer's welfare and his workplace which is tempered by the fact that he is constantly exposed to a potentially hostile environment and unsafe conditions at sea".[36] A related phenomenon peculiar to shipping is seaworthiness which is not expected to be mentioned in the Universal Declaration as a human

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[35] See Maritime Labour Convention, 2006, Title 1, Regulation 1.1 relating to minimum age of seafarers for on board service [2006] 45 I.L.M. 792

[36] See Proshanto K. Mukherjee and Huiru Liu, 'Safety and Security in Shipping: International, Common Law and Chinese Law Perspectives' (Albert Tavldze (Ed.) New York: Nova Publishers 2015) 56 and footnotes 62 and 63 at 72

right but in the maritime context, it surely is. The shipping legislation of several jurisdictions specifically provides for an implied warranty of seaworthiness in every seafarer employment contract.[37]

There are numerous other issues of seafarers' rights. K.X. Li and Jim Mi Ng have identified the right to participate in safety management and to on-scene decision-making, the right to sufficient manning, to acquisition of professional certificates and to safety training.[38] This author is sceptical about any of these rights qualifying even as seafarer rights let alone as human rights. Azfar Mustafar refers to "accommodation and storage facilities for personal belongings" connecting it to the enjoyment of time alone on board the ship as a right to privacy.[39] Right to privacy is not unique to seafaring but the unavoidable solitary confines of a ship which a seafarer has to endure is very much a unique situation. The author,[40] perhaps on a note of empathy, concludes by citing the eminent Lord Stowell once again who in reference to rights given under the employment contracts of seafarers of his time held that "[S]eafarers, who are favourites of the law, on account of their imbecility, and placed particularly under its protection, may be made the victims of their own ignorance and simplicity".[41] In this context one eminent author in empathizing with seafarers has referred to "the harshness of his working environment, the great power imbalance between him and the shipowners, the relentless drive of commerce as they practiced, and the general ignorance, injudiciousness and imprudence of the common mariner".[42]

Criminalization and Victimization of Seafarers

Criminalization as a Violation of Seafarers' Rights

At the outset of the following discussion, a brief exposition of the basic notions of criminality and criminalization is warranted[43]. In the domain of criminal law, "crime"

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[37] For example, the UK Merchant Shipping Act 1995, s 42; See K.X. Li and Jim Mi Ng., 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33(3) Journal of Maritime Law and Commerce388;Unni Ramachandran, a doctoral research scholar at World Maritime University is currently working on the theme of "Occupational Health and Safety" in the context of seafarers and the human rights approach to the notion of decent work

[38] See K.X. Li and Jim Mi Ng., 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33(3) Journal of Maritime Law and Commerce 385-393

[39] Azfar Mustafar, "An Inquiry into the Regimes of Piracy, Unlawful Acts, and Related Preventative Measures under International Maritime Law, World Maritime University, 2010, unpublished Ph.D. thesis are examples.

[40] Ibid

[41] *The Minerva*[1825] 1 Hag. 123, 125-127 (Adm. Ct.)

[42] D. R. Thomas, *Maritime Liens*(Steven & Sons, London, 1980)168

[43] See Proshanto K. Mukherjee, 'Criminalisation and Unfair Treatment: The Seafarer's Perspective'(2006) 12 (5) Journal of International Maritime Law (JIML)325-336; Extracted

is defined by the distinguished Professor Glanville Williams as "a legal wrong that can be followed by criminal proceedings which may result in punishment". The procedural (proceedings) and punitive (punishment) elements are clearly present in this definition.[44] Another explanatory definition of crime has been provided by Lord Atkin in the case of *Proprietary Articles Trade Association* v. *Attorney General for Canada* in the following words:

"The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declaredby the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished."[45]

In the above statement the oblique reference to penal sanction accompanying a particular act identified by the State as being criminal and the reference to "punishment" in the Glanville Williams definition is what in essence distinguishes a crime froma civil wrong characterized as a tort or delict. This distinction evolved historically from ancient European legal systems as offences[46] against the State or community, otherwise referred to as *crimina*, and offences against the individual, known as *delicta*.[47] The penal aspect of a crime is reinforced by Glanville Williams in the words; "[a] crime is an act that is condemned sufficiently strongly to have induced the authorities (legislature or judges) to declare it to be punishable before the ordinary courts."[48] Although "crime" and "offence" are often used interchangeably, they are distinguishable in that a criminal offence requires proof of *mens rea* whereas one that does not bear the hallmarks of criminality in the true sense does not. Such an offence is described as a regulatory or public welfare offence.[49] Typical *mens rea* offences are relatively serious where a mental element of wrongfulness must be proven. The principle is based on the maxim *actus non facit reum nisi mens sit rea* which means that only a guilty mind makes an act criminal.[50]

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from Proshanto K. Mukherjee, 'Criminalization of Seafarers: The Modern Maritime Malady'*Proceedings: Symposium on Seafarers' Rights: Reform*(Greenwich Maritime Institute, University of Greenwich 2005)

[44] Glanville Williams, *Textbook of Criminal Law*(2nd ed., London: Stevens & Sons, 1983)27-29

[45] [1931] A.C. 324 (P.C.)

[46] Defined as conduct or behaviour considered offensive by the law

[47] Sir Henry Maine, *Ancient Law* (London: Oxford University Press1931)307, 308-311where the Roman, Greek, Germanic, Teutonic and Anglo-Saxon legal systems are discussed

[48] Glanville Williams, *Textbook of Criminal Law* (2nd ed., London: Stevens & Sons 1983) 29

[49] Ibid at 322 and 936-937

[50] Ibid at 70 footnote 1

Criminality is the quality or fact of being criminal.[51] In contrast, "criminalization" denotes characterization of an act, activity, conduct or behaviour as constituting criminality. Thus, to criminalize is to turn an act into a criminal offence by making it illegal.[52] In reference to an individual, criminalization refers to characterizing that personas a criminal by making his act or activity unlawful.[53] In other words, criminalization is treating an act as a criminal act and also treating the person who carried it out as a criminal.

It is in the last-mentioned sense that seafarers have been criminalized by law enforcement and judicial authorities in several jurisdictions, mainly in relation to ship-source pollution incidents exemplified by the *Erika*, *Prestige*, *Tasman Spirit* and *Hebei Spirit* cases referred to earlier.[54] The master whose tanker runs aground in *force majeure* circumstances and spills oil is frequently prejudged as a criminal. Seafarers have been criminalized in this manner by the media and also by ill-informed land-based society at large.With the advent of modern piracy and various unlawful acts, there has been growing apprehension in certain quarters of so-called civilized land-based societies, of seafarers being potential criminals, in total disregard of their enormous contributions to the continuing well-being of those societies. A seafarer of suspect nationality and a strange name is denied leave to step ashore or communicate with his/her family after months of isolation at sea because such individuals are considered as security risks by enforcement authorities. Criminalization of seafarers is thus exemplified by gross violations of seafarers' fundamental and human rights, through undue harassment by state enforcement authorities, lack of respect and basic human dignity and deprivation of shore leave based on the pretext that seafarers are potential security threats. Whatever the law might be, the *de facto* state of affairs is that the common seafarer is often not even accorded basic fair treatment let alone equality before the law, due process, fundamental human rights or other mouthfuls of legal doctrines that are the hallmarks of civilized society discussed above.[55]

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[51] Bryan A. Garner, *A Dictionary of Modern Legal Usage*(New York: Oxford University Press 1987) 161

[52] Ibid

[53] Judy Pearsall (ed.), *The New Oxford Dictionary of English*(Oxford: Oxford University Press 1998) 2001

[54] In relatively recent times, the infamous ship-source pollution episodes of the *Erika*, *Prestige*, *Tasman Spirit* and *Hebei Spirit* cases are striking examples which are briefly presented later in this article

[55] See Proshanto K. Mukherjee, 'Criminalisation and Unfair Treatment: The Seafarer's Perspective' (2006) 12 (5) Journal of International Maritime Law (JIML) 325-336

Victimization of Seafarers

Seafarers are not only victims of reprehensible treatment by public authorities, but also of criminals at sea. Piracy attacks frequently end up with fatalities and inhuman treatment suffered by seafarers in the hands of pirates. Piracy is a high seas crime that is considered to have a *jus cogens* character.[56] The regime is covered in Articles 100 to 109 of UNCLOS which represents a codification of the customary international law of piracy. The definition of piracy is included and the rights conferred on states to combat piracy are universal in scope. Piracy-like "unlawful acts" are provided for in the SUA Convention of 1988 and its 2005 Protocol.[57] Current and updated information on incidents of piracy and unlawful acts committed against seafarers are regularly published by the International Maritime Bureau (IMB) based in Kuala Lumpur, Malaysia. The statistics show that numerous seafarers have been assaulted and injured and several have been killed in the relatively recent past. Many have been reported missing; presumably killed and dumped overboard. Between 1997 and 2004, some 200 seafarers were killed.[58] The reports of the casualties are quite horrifying but what is also disturbing is that not much is being done by the world community to better the situation. Criticisms are hurled at flag states, especially those of the so-called "open registry" variety, and at unscrupulous shipowners, much of which may be justified; but hardly any preventive and mitigative action is taken by the relevant authorities and the public who benefit immensely from trade and shipping and the services provided by seafarers. As one commentator has stated, human rights of seafarers should not simply be a matter for flag states regardless of the type of flag, open registry or otherwise. "These are indivisible rights regardless of race, nationality, culture, location or whatever".[59]

Granted, the international shipping fraternity under the auspices of the IMO has engaged in the law-making process with great enthusiasm; much still remains to be done in terms of implementation particularly to safeguard the position of the seafarer. One of the IMO legal instruments in question is the much talked about International Ship and Port Facility Security (ISPS) Code of the SOLAS

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[56] *M. Cherif Bassiouni,* International Criminal Law, Multilateral and Bilateral Enforcement Mechanisms *(3rd Ed. Martinus Nijhoff 2008)169*

[57] Convention for the *Suppression of Unlawful Acts* Against the Safety of Maritime Navigation [*1988*] 1678 U.N.T.S. 221, 27 I.L.M. 668

[58] Azfar Mustafar, "An Inquiry into the Regimes of Piracy, Unlawful Acts, and Related Preventative Measures under International Maritime Law, World Maritime University, 2010, unpublished Ph.D. thesis are examples

[59] A.D. Couper et al., *Voyages of Abuse: Seafarers, Human Rights and International Shipping* (Pluto Press 1999) 170-171

Convention.[60] Apart from numerous techno/legal deficiencies of the Code and its associated instruments, doubts have been expressed regarding its overall effectiveness.[61] Be that as it may, in the context of the theme of the present article, one view is that "it cuts both ways". In other words it is a double-edged sword. Marie Jacobsson states -

"On the one hand the regulation promotes protection against terrorism which also the people working on board benefit from. On the other hand basic rights as freedom of movement are restricted.... Today we can see bizarre pictures of seamen neatly sitting behind bars when in port. It's a deplorable development."[62]

Compliance with the ISPS Code has resulted in an increase in tasks and duties of seafarers on board at sea and in port. Yet they are the ones who suffer ill-treatment including violation of their shore leave rights and free movement in the hands of port officials and enforcement authorities who target them as suspected terrorists despite express mention in relevant IMO instruments of the need to reduce risk to and protection of crew in connection with prevention and suppression of terrorism and unlawful acts, and implementation of SOLAS Chapter XI-2 and the ISPS Code.[63] Clearly, there is an absence of proper balance between maritime security interests and the fundamental and human rights of seafarers.

Regrettably, cases of detention of seafarers without trial or grossly delayed trial are far too many. Mention has already been made in this article of the *Erika* and *Prestige* cases which gained enormous notoriety in the European media as both these oil spills took place in European waters.

In the *Erika* incident which occurred on 12 December 1999 off the coast of Brittany in France, the master Captain Karun S. Mathur, among other members of the ship's crew, was criminally charged and eventually held to be guilty pursuant to French law. He was arrested when he landed ashore from the ship, held in prison until 23 December 1999, and allowed to travel to his home country, India

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[60] For an overview and critique of the regime See Proshanto K. Mukherjee, 'The ISM Code and ISPS Code – A Critical Legal Analysis of Two SOLAS Regimes' (2007) 6 (2)*WMU Journal of Maritime Affairs* 147-166; International Convention for the Safety of Life at Sea [1974] (SOLAS) 1184 UNTS 2 / [1983] ATS No.22 / 14 ILM 959 / [1980] UKTS 46

[61] See Maximo Q. Mejia, *Law and Ergonomics in Maritime Security*, Ph.D. thesis(Lund University 2008)

[62] See Pierre Adolfsson, 'Fenced in Seafaring Report on Seafarer Rights' 20(Shipgaz, No. 7 2009) 20

[63] See respectively, Conference Resolution 1 in SOLAS/CONF.5/32, ANNEX, at 1-2, and paragraph 11 of the Preamble to the ISPS Code. In the latter seafarers' shore leave rights pursuant to the 1965 Facilitation Convention is recognized

only in February 2000. The charged crew members were released following four months' trial and the master was dismissed in January 2008 which was a good eight years since the occurrence of the oil spill.[64]

On 13 November 2002, the loaded Bahamian tanker *Prestige* broke up and sank off the Spanish coast of La Coruña causing significant pollution damage to the coastline. While all the crew members had managed to get ashore safely, the master, Captain Apostolos Mangouras remained on board in hugely hostile weather conditions in anattempt to stabilize the vessel with salvage assistance. Following several failed attempts, he, along with the salvors, asked the relevant Spanish authorities to provide refuge but was refused. When Captain Mangouras eventually came ashore, he was arrested, charged with pollution-related criminal offences among others and held in prison. Clearly, the actions taken by the Spanish authorities were contrary to Article 230 of UNCLOS which only allows for a non-monetary sanction in the event of a "willful and serious act of pollution" if the person charged is found guilty. Captain Mangouras remained incarcerated for 83 days before being released on bail for 3 million Euros. He was permitted to return to his home country Greece only in March 2005 subject to his undertaking to attend trial in Spain when required.[65] Captain Mangouras was given a two-year jail sentence by the Spanish Supreme Court on 14 January 2016 at which time he was 81 years of age. Needless to say, the sentence sparked an outcry within the world shipping community.[66]

Two other relatively recent cases are worthy of mention as illustrations of unfair treatment of seafarers.Two of them, the *Hebei Spirit* and the *Tasman Spirit* are oil spill incidents; one is not. The *m.v.Saiga* case is an episode involving a dispute relating to the nationality and flag of a ship and attendant responsibilities at international law.

In the *Hebei Spirit* oil spill incident in 2009, the master Captain Jasprit Chawla and Chief Officer Shyam Chetan were detained by the South Korean maritime authorities even after the Supreme Court issued a release order. Known as the "Hebei Two", they were initially arrested by the South Korean Coast Guard and

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[64] Olivia Murray, 'Fair Treatment of Seafarers – International Law and Practice'2012(18) *JIML* 150-164; written with contributions from the members of the CMI International Working Group on the Fair Treatment of Seafarers, namely: Giorgio Berlingieri, Italian Maritime Law Association; Michael Chalos, O'Connor & Duffy; - Prof. Edgar Gold, AM, CM, QC, PhD, FNI; David Hebden, Marine Casualty Surveyors; Kim Jefferies, Gard AS; Kiran Khosla, International Chamber of Shipping; Prof. Proshanto Mukherjee, The World Maritime University; Colin de la Rue, Ince& Co LLP; Mrs. Natalie Shaw, International Shipping Federation

[65] Ibid

[66] <http://uk.reuters.com/article/uk-spain-prestige-idUKKCN0V41PA> accessed 20 March 2016

held in custody for a lengthy period of time. In Marie Jacobsson's opinion, where the ship and its whole crew are treated as one unit for detention purposes, it would be contrary to the standards set by the European Convention on Human Rights and would be unthinkable in a land-based situation. She cites the example of a factory owner being charged with a pollution offence ashore; employees would be free to go home to their families at the end of the working day. In the case of a ship, seafarers are not only detained against their will, they would probably not even get paid.[67]

The Maltese tanker *Tasman Spirit* grounded at the entrance to Karachi Port in 2003 with a load of crude oil as cargo and heavy fuel oil in its bunkers. Attempts were made to refloat the vessel which failed. Greek salvors were then engaged by the owners to carry out transshipment of the cargo during which time the vessel broke up and spilled a huge amount of the crude oil cargo. There were allegations that the negligence of the Port Trust in failing to maintain a dredged channel was the cause of the grounding but the local authorities thought otherwise. As a result, six officers including the master and the helmsman all of whom were of Greek nationality, and also the Greek Salvage Master, were detained. They came to be known as the "Karachi Eight". After some nine months of detention they were eventually released as a result of pressure exerted from various quarters including the Government of Greece, the European Union and international organizations.[68]

In the *m.v.Saiga* case, the ship of that name was arrested by a Guinean Customs patrol boat when it entered the exclusive economic zone of Guinea in October 1997 and taken to the port of Conakry where, together with the crew it was detained. St Vincent and the Grenadines as the flag state of the ship brought "prompt release" proceedings under Article 292 of UNCLOS in the International Tribunal for the Law of the Sea (ITLOS) and received judgment in its favour for release of the crew without having to post a bond.[69] The decision of the Tribunal was indeed exemplary and it must be conceded that judicial attitude in such cases has generally been positive and sympathetic towards the crew on humanitarian grounds unlike the port or coastal state enforcement authorities as in the *Hebei Spirit* case.

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[67]See Pierre Adolfsson, 'Fenced in Seafaring Report on Seafarer Rights' 20 (Shipgaz, No. 7 2009) 22

[68]Olivia Murray, 'Fair Treatment of Seafarers – International Law and Practice' 2012 (18) *JIML* 150-164

[69]Pierre Adolfsson, 'Fenced in Seafaring Report on Seafarer Rights' 20 (Shipgaz, No. 7 2009) 20

Summary and Conclusion

In the context of seafarers' rights; or perhaps, conveniences and privileges, gone are the days when seafarers could travel in any part of the world to join a ship or return home by air or otherwise with simply a discharge book. Seafarers usually did not possess or carry passports, and visas were virtually unknown to them. This author as a former seafarer happens to be living proof of the practices of those times.

The issues discussed in this paper primarily involve legalities and practical measures; their inadequacies and failures. But there is another dimension to the problems which is the absence of political and administrative will on the part of certain states and their administrations as well as the negative attitude of the international community at large in addressing the question of human rights of seafarers. Many are ignorant of the plight of seafarers and their immense contribution to the global society, andview their human rights as alien to their shore-based daily lives and interests. This article has attempted to highlight the relevant issues and bring them to the forefront of consideration by the public at large beyond the maritime community.

It is submitted in the last analysis that the indispensable role and contributions of seafarers to human society as a whole must be acknowledged in a concrete manner beyond lip service, and legal as well as practical steps must be taken to recognize and rectify the deficiencies which point to the verity that seafarers are often miserably treated. Whether seafarers' rights are described as "fundamental" or "human" is more a matter of semantics than substance. What is important is how these rights must be upheld by states, international organizations and judiciaries around the world. Violations of these rights should not go unpunished. The MLC 2006 is undoubtedly a positive step forward even if there is room for improvement in that regime. The legal regimes in question, whether they comprise international treaty instruments or domestic laws, must be further strengthened and particularized in respect of their applications to the seafaring community everywhere. In concludingit is felt there is more than a ray of hope that the tide will change and the beneficiaries of shipping worldwide will exert sufficient influence to improve the seafarer's lot in a fair and positive way. Let optimism prevail.

State as Arbiter between Individual and the Market: Implications for Human Rights

Prof. Sheela Rai*

ABSTRACT

State has long been seen with suspicion and distrust by both the right wing and left wing scholars. With the growth in globalisation the very existence of the institution of State is being questioned. The State is ceding its sovereignty to internal as well as external forces. international institutions such as WTO and international financial institutions have succeeded in establishing market economy in most of the States. Recognition of individual rights and market economy are internal constraints on the powers of State. Growing respectability of International Law is putting external constrains on the sovereignty of State. Therefore the Westphalian concept of sovereignty which was given a legal shape by Austin and Bentham now possibly does not exist. The State, however, has been simultaneously burdened with positive obligations by internal as well as external forces which it has to discharge to justify its existence. How is the State able to reconcile the two conflicting scenarios? The observation made in the paper is that the State doing so by arbitrating between the market and the individual. It is trying to use and manipulate market forces in a way which enables it to discharge its positive obligations. The State especially with an underdeveloped economy needs the support of international law to protect social and economic rights of an individual in a globalised market economy system.

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Introduction

Globalization has redefined the position and role of the State. Internal and external constraints on the powers of State have prompted some writers to declare end of the Westphalian concept of sovereignty and some writers have renamed sovereignty as 'sovereignty modern'.[1] Human Rights are an important constraint on the power of State both internally in the form of constitutionally guaranteed rights and externally in the form of human rights. Problem with human rights is that one set of human rights constraint the powers of State, another set of human rights on the other hand impose positive obligations on the State. These positive obligations combined with other set of external and internal constrains like international trade and financial agreements and resultant liberal markets pose a big challenge to the State. Limitations on the power of State to regulate its economy are continuously increasing but at the same time the State is asked to guarantee to its citizens certain amenities of life like food, shelter, health and education. How are States especially developing countries adjusting to this dichotomy? Developed countries generate enough revenue from taxation. But developing countries do not generate sufficient revenue from direct taxes and their ability to levy indirect taxes is continuously decreasing due to treaties like the World Trade Organization. So what are the developing countries doing? My answer on the basis of observation of developments in India is that they are managing and manipulating the market to discharge their positive obligations towards their citizens. In other words, the State is arbitrating between the individual and market to ensure that some of its burdens are borne and discharged by the market. But human rights are guarantees against the State. This is true not only of civil and political rights but also of social, economic and cultural rights. For the purposes of this paper the latter category of rights are more relevant which are guaranteed by many international instruments both universal and regional. Important universal instruments are, the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, Convention on the Rights of Migrant Workers and their Families, Convention on the Elimination of all Forms of Racial Discrimination, Convention on the Elimination of all Forms of Discrimination against Women. Well known regional instruments are the American Convention on Human Rights; the Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights; the African Charter of Human and People's Rights

[1] John H. Jackson, 'Sovereignty: Outdated Concept or New Approaches' in Wenhua Shan et al (ed.) Redefining Sovereignty in International Economic Law, 3 (2008) Also see *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2006)

and the European Social Charter.[2] How can these rights be protected by the State that is losing the means to do so? My suggestion is that Multinational Corporations be recognized as entities on which international law applies including social and economic rights. Already international investment law is guaranteeing increasing number of rights to foreign corporations which is constraining the power of State to regulate them and their activities. It is time to recognize that if they have rights they have obligations as well. For this we need to conclude a Multilateral Agreement on Investment which recognizes and imposes obligations on foreign and multinational corporations.

Individual, Market and the State

Individual is the center of all associations and organizations. We form society because human beings are social animals and individuals are better protected in society. However, society alone was not able to protect individual so we form 'State' in order to ensure that different social groups are protected from internal disorder and external aggression and there is order in place of chaos so that individual has not to bother about her daily safety and general welfare. Some of the work can safely be entrusted to the political organizations and other individuals can be free to pursue and fulfill their life plans and ambitions. 'Man's dearest possession is life, and it is given to him to live but once. He must live so as to feel no torturing regrets for years without purpose'.[3]

However, social and political order places constraints on the rights and liberties of the individual. This is true of every society and State, whether democratic or despotic, liberal or totalitarian. Difference is only about the degree of interference and control. Therefore it is against these organizations that individual starts asserting, and claims independence from them. These social-political institutions created for the welfare of individual are decried as exploiters and looked at with suspicion by advocates of individual freedom and rights. Success of democracy depends on how far the individual is free from the shackles of the organizations and associations created by her. So much so that social and political organisations which individual created for giving her peace and tranquility so that she can pursue life's purpose; freedom from them, itself becomes her purpose and she wants to 'so live that, dying [s]he might say: all my life, all my strength were given to the finest cause in all the world- the fight for the Liberation of Mankind'[4]

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[2] See Asbjorn Eide, *Economic and Social Rights, Human Rights: Concept and Standards* (Janusz Symonides (ed.) UNESCO Publishing & Rawat Publications 2002)

[3] Nikolai Ostrovsky, *How the Steel was Tempered* 73 (Communist Party of Australia, Sydney Australia 2002)

[4] Ibid

What is the relation of the individual with the two institutions essential for her life and wellbeing-the Market and the State? Different theorists have portrayed different pictures. Some consider individual liberty and liberal market part of the same package and free market is considered to be a liberating force. Some find free market a myth and so called free market only an instrument of exploitation made and sharpened by the State and the dominant section of the society. For some, individual rights flow from the State which is a 'Leviathan'[5] and natural rights are 'nonsense upon stilts'[6]. For others, State has only those powers given by people and can regulate only those rights which individuals want to be regulated. Certain rights like Right to Life, Liberty and Property are inviolable and can never be ceded.[7] Individual can be forced to be free.[8]

Right to property is closely related to market economy. How does the market serve the individual and what is its relation with the State? Is market a friend of the individual and evil eye of the State wants to suppress the market to suppress the individual; or the State and market collaborate to cheat the individual?

In general terms market is the forum where buying and selling of goods and services take place. Should the market be left to function by itself regulated only by an invisible hand, because every individual decides in self interest in a rational manner, or should it be closely regulated because individuals can never act in self interested and in a rational manner at the same time? According to the liberal market economists 'Lassiez faire et laissez passer, le monde va de lui meme'[9] should be the moto[10]. Market theorists feel that market has a liberating effect and free market is the best way to free the individual. They want market to have free play which weeds out inefficient players. A perfectly competitive market according to them maximizes overall national welfare. This helps to ensure that a consumer gets best bargain for her money. They assert that maintaining inefficient players in the market is costly and results in overall national welfare loss. This is a utilitarian principle of greatest good of the greatest number. But as Hart and Dworkin point out utilitarianism does not protect individual rights.[11]

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[5] Thomas Hobbes, *Leviathan* (1651)

[6] Jeremy Bentham, 'Anarchical Fallacies, Being an Examination of the Declaration of Rights issued During the French Revolution available at <http://english.duke.edu/uploads/media_items/bentham-anarchical-fallacies.original.pdf> p. 5 accessed 20 March 2016

[7] John Locke, *Two Treatises On Government* (1680-1690)

[8] Jean-Jacques Rousseau, *The Social Contract* Book-1

[9] 'Let pass the world goes on by itself'

[10] The phrase is attributed to Vincent de Gournay. It was popularize by Rene de Voyer d'Argenson

[11] H.L.A. Hart, 'Between Utility and Rights' 79 Col. L. Rev. 828; Ronald Dworkin, "A Trump Over Utility" in MDA Freeman (ed.) *Lloyd's Jurisprudence* 434(Sweet & Maxwell, 1994) See Also Dworkin, *Taking Rights Seriously*

There also cannot be a perfectly competitive market because individuals acting in self interest want to oust competition and perpetuate their sway over the market.

The writers on the left also forget the individual in their socialist goals. Marxists have no faith in the fairness of free market at all. According to them, free market and contractual freedom is a myth created by the capitalist system whereby the State aids in the exploitation of the masses that is the labour class. They visualize a State-less and class-less society where each would contribute according to her ability and each would get the return according to her need. But as Ayn Rand points who would determine the need of a person and which need should be acknowledged and which need should be ignored?[12] How can we prevent corruption creeping into a system where individual is at the mercy of the community. Does it not result in exploitation of masses and domination by few? History has told us that it does happen so. The whole programme of redistribution of resources of the community, made the State more powerful in place of its withering away. The State however, failed to control and manage the market and economy and gave way to the neo classical economic theory. However the neo classical economic view is not accepted unchallenged. An important contention is raised by the Institutionalists. They argue that market is one of the many institutions therefore it cannot have priority over other institutions like the State.

"The real point is that the market is only one of the many institutions that make up what people call 'the market economy', or what we think is better called capitalism. The capitalist system is made up of a range of institutions, including markets as institutions of exchange, firms as institutions of production, and the state as the creator and regulator of the institutions governing their relationships."[13]

According to this view market is essentially a political construct and what is free market or controlled market can best be defined by taking into account the social, political, cultural, historical and economic conditions of that society into account. For example elimination of child labour might be a legitimate regulation in some states but an interference in the market for other states.[14]

The State has, however, always been looked upon with suspicion. Liberal political and economic theorists consider State as a necessary evil. They want to reduce the State to the role of night-watchman. Leftists want total annihilation of the State with the aim of achieving a State-less and class-less society. The problem

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[12] Ayn Rand, *Atlas Shrugged* (1957)

[13] Ha Joon Chang, *Globalisation Economic Development and the Role of the State* 89 (2003)

[14] Ibid

with the leftist theory has been that the plan for redistribution has resulted in strengthening of the institution of State rather than its phasing out. With the demise of the communist bloc and end of the cold war writers started predicting demise of the State.[15] The recession, however, has shown that the market needs not only regulation by the State but also help from the State to survive.[16] However, the nature and role of the State is changing. Globalisation has had two fold effects on the State. On the one hand it is decreasing the power of State on the other hand it is increasing the obligations of the State. There are internal as well as external constraints on the powers of State.[17] External constraints on the powers of State are put by international treaties and organizations like the WTO and IMF. WTO has to a large extent constrained the power of State in regulation of its trade which affects its economy. Similarly, the IMF and other international organizations also restrict the power of State in the regulation of its economy. Bilateral Investment Treaties have significantly constrained the power of State to regulate the corporations where foreign investment is made. International constraints have made foreign investors much more privileged than the nationals of the host State. Their rights are continuously increasing by decisions of tribunals. Many writers support these rights as part of customary international law.[18] United Nations and Human Rights treaties are also putting political constraints on the power of State to regulate its civil and political affairs and indirectly its economy also, as these become moral justification for non-interference in many property and economic matters. In the same way there are internal constraints on the powers of State. Many of the internal constraints are related to the external constraints. International trade, investment and economic agreements have established liberal market economy in most of the jurisdictions. Power to regulate the market is thereby constrained. Many internal constraints are imposed by the governance structure which a country has. In a democratic constitutional system

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[15] Francis Fukuyama, *End of History and The Last Man* (1992)

[16] "The main reason why the crisis of 2008 did not trigger a crash as serious as the Great Depression is that this time the governments and central banks of the wealthy countries did not allow the financial system to collapse and agreed to create the liquidity necessary to avoid the waves of bank failures that led the world to the brink of abyss in the 1930s. This pragmatic monetary and financial policy, poles apart from the "liquidationist" orthodoxy that reigned nearly everywhere after the 1929 crash, managed to avoid the worst. The pragmatic response to the crisis also reminded the world that central banks do not exist just to twiddle their thumbs and keep down inflation. In situations of total financial panic, they play an indispensible role as lender of last resort-indeed, they are the only public institution capable of averting a total collapse of the economy and society in an emergency." Thomas Piketty, *Capital in the Twenty-First Century* (Belknap Press of Harvard University Press 2014) 472-473

[17] See Sheela Rai, *Antidumping Measures: Policy Law and Practice in India* (Partridge 2014) for detailed discussion

like India, fundamental rights of citizens, Rule of Law and democracy are some of the important internal constraints on the powers of State.

Problem is that internal and external constraints are juxtaposed with positive obligations of the State toward its people imposed again both externally and internally. Internally the democratic set up of the governance structure itself requires an accountable government which is answerable for the welfare of its citizens. Even countries which are not democracy, recent revolts in countries like Libya and Syria show that government cannot remain in power only on the basis of force. It has to keep people happy. Since the time of great depression in early 1930s, capitalist countries have got transformed into welfare economies. Countries like India have constitutional provisions which require the State to take welfare measures into account at the time of making policies. Therefore natural rights are no longer limited to Right to Life, Liberty and Property. Modern natural lawyers expect the State to guarantee a comprehensive set of rights. John Finnis sets out a model of seven 'basic forms of human good' which people in most societies think important. These are Life including existence and capacity for development of potential and procreation; Knowledge which improves life quality; Play which provides for recreational experience and enjoyment; Aesthetic experience; Sociability or friendship; Practical reasonableness which includes capacity to shape one's conduct and attitudes according to some 'intelligent and reasonable' thought process and Religion which includes sense of responsibility of human beings to some greater order than that of their own individuality. From these basic human goods, Finnis derives natural rights which are Not to be deprived of life as a direct means to an end; Not to be deprived in the course of factual communication; Not to be condemned upon charges which are known to be false; Not to be denied procreative capacity; To be accorded 'respectful consideration' in any assessment of the common good.[19]

According to Amartya Sen freedom does not only mean absence of constraints but also ability to choose between alternatives. Unless the State or society is able to provide choice to an individual, freedom of individual is not guaranteed. Hence a society which is underdeveloped cannot be free in true sense as people in that society are condemned to accept what is offered or what they can get.[20] Martha Nussbaum develops the capabilities approach further and gives a list of

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[18] Rudolf Dolzer and Christoph Shreuer, *Principles of International Investment Law* (2012). Also see Thomas Waelde, 'International Law of Foreign Investment: Towards Regulation by Multilateral Treaties' (1999) Business Law Journal 50-70

[19] John Finnis, *Natural Law and Natural Rights* (Clarendon Law Series: Oxford University Press 2011)

[20] Amartya Sen, *Development as Freedom* (New York: Oxford University Press 1999)

10 goods which need to be provided by the State. These are life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other species, play, control over one's political and material environment.[21]

State today, therefore, is confronted with the problem of managing the dichotomy of reduced powers with increased obligations. Let us examine the outcome of the scenario.

The Crisis and Its Management by the State

Countries whether developed or developing are faced with a major political crisis-that is-rise of inequality. President Obama and Christine Lagrade, head of the international Monetary Fund, both have declared rising inequality to be a priority. In Global Attitudes Project of 2014, Pew Research Center asked the respondents about the "greatest danger of the world"[22]. It found that in United States and Europe "concerns about inequality trump all other dangers"[23]. Joseph Stiglitz,[24] Kate Pickett and Wilkinson Joseph[25] point out that rising inequality has bad consequences for today's society as it results in lack of social cohesion, increased crime, ill-health, teenage pregnancy, obesity and a whole range of social problems. Inequality not only poses social and political problems but may also result in economic problems. In the 2012 Annual meeting of the Word Bank and IMF, Christine Lagrade stated, 'recent IMF research tells us that less inequality is associated with greater macroeconomic stability and more sustainable growth.'[26] Dworkin feels, 'Equal concern is the sovereign virtue of political community-without it government is only tyranny-and when a nation's wealth is very unequally distributed, as the wealth of even very prosperous nations now is, then its equal concern is suspect'[27]

Writers have given various proposals to decrease inequality. Notable among them is given by Anthony B. Atkinson. He gives a set of 15 proposals which would

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[21] Martha C. Nussbaum, *Creating Capabilities: Human Development Approach* (Belknap Press 2011)

[22] Anthony B. Atkinson, *Inequality: What Can be Done?* 1 (Cambridge: Harvard University Press 2015)

[23] *Ibid*

[24] Joseph E. Stiglitz, *The Price of Inequality* (London: Allen Lane 2012)

[25] Kate Pikkett and Richard Wilkinson, *The Spirit Level* rev. ed. (London: Penguin 2010)

[26] Anthony B. Atkinson, *Inequality: What Can be Done?* 12 (Cambridge: Harvard University Press 2015)

[27] Ronald Dworkin, *Sovereign Virtue*:*The Theory and Practice of Equality* 1 (Harvard University Press 2000)

take care of the rising inequality.[28] Thomas Piketty suggests progressive global tax on capital which 'would provide a way to avoid an endless in egalitarian spiral and to control the worrisome dynamics of global capital concentration.'[29] All these proposals and suggestions are actually expectations from the State which is expected to discharge these obligations. Therefore while these suggestions may work well for developed countries, they may not necessarily do so for developing countries. Developed countries are able to raise sufficient revenue through taxation, major part of which is spent on social welfare. About 30 percent of the National Income of the United States, 40 percent of Britain and between 45 and 55 percent of the European Union is collected as tax.[30] The "regalian" functions of the government constitute less than one tenth of the national income in developed countries. 'The growing tax bite'[31] is allowing the governments of rich countries to 'take on ever broader social functions'[32]. A quarter and a third of national income of developed countries is spent on these social functions which can be broken 'into two roughly equal halves: one goes to health and education, the other to replacement incomes and transfer payments.'[33] Issue is how developing countries face the crisis whose ability to tax is limited due to limited income of the citizens and also due to increasing disability to levy indirect taxes. Indirect taxes are a major source of revenue for developing countries and international trade agreements are constraining that power of the State. In Sub-Saharan Africa and South Asia, governments generally took 10-15 percent of national income as tax. 'The most striking fact is that the gap between the rich and the not so rich countries rose (from 30-35 percent of national income in the 1970s to 35-40 percent in the 1980s) before stabilizing at today's levels, whereas tax levels in the poor and intermediate countries decreased significantly. In Sub-Saharan Africa and South Asia, the average tax bite was slightly below 15 percent in the 1970s and early 1980s but fell to a little over 10 percent in the 1990s.'[34] With tax of 10 to 15 percent a State cannot fulfill the social and economic responsibilities it is expected to perform.[35] After 'paying for a proper police force and judicial system, there is not much left to pay for education and health'.[36]

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[28] Kate Pikkett and Richard Wilkinson, *The Spirit Level* rev. ed. (London: Penguin 2010)

[29] Thomas Piketty, *Capital in the Twenty First Century* 515 (The Belknap Press, Harvard University Press 2015)

[30] Ibid at 476

[31] Ibid at 515

[32] Ibid at 477

[33] Ibid at 477

[34] Ibid at 491

[35] Ibid

[36] Ibid

Piketty considers rich countries and international organizations partly responsible for the crisis. The 'new ultraliberal wave emanating from the developed countries forced the poor countries to cut their public sectors and lower the priority of developing a tax system suitable to fostering economic development. Recent research has shown that the decline in government receipts in the poorest countries in 1980-1990 was due to a large extent to a decrease in customs duties, which had brought in revenues equivalent to about 5 percent of national income in the 1970s. —Today's developed countries reduced their tariffs over the course of the nineteenth and twentieth centuries at a pace they judged to be reasonable and with clear alternatives in mind. They were fortunate enough not to have anyone tell them what they ought to be doing instead.'[37] So how are the developing countries facing the challenge? We would examine this with reference to developments in India

Market, Individual and the democratic Socialist Republic of India

India is party to most of the important international economic and trade agreements which externally constraint the power of State and establish a liberal market system internally. Democracy, fundamental rights, Rule of Law and federalism are some of the other internal constraints on the power of State. But the Indian legal system does not visualize the State only as a political machinery. The State is required to discharge important positive obligations. Modern Republic of India has actually been established in accordance with Indian traditions. Except in certain cases India did not have strong rulers who could regulate life of citizens in totality. Caste and community bonds were stronger and justice was usually delivered in accordance with community norms. Individual was less in contact with the State and more with her community and village. Political organization did not have very strong presence in the Indian society ever.[38] Indian books of wisdom state: 'If the King does not give charity, if he insults, deceives and says

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[37] Ibid at 492

[38] Micheline R. Ishay in *The History of Human Rights: From Ancient Times to the Globalisation Era* (Orient Longman, 2004) opines that humanism was absent from India due to caste system. However, western humanism which is based on liberal political and economic thinking especially in the area of international trade is based on division of labour and comparative advantage. (See Douglas A. Irwin, *Against the Tide* (Princeton University Press 1996) Varna system which became caste system was based on division of labour and mutual interdependence which is the basis of modern international economic order. Each Indian11 village was an independent unit and the strong social cohesion kept the political power in check. Indian social philosophy was based on individualism where each individual had to seek his/her own salvation. It is this individualism which has ensured survival of Indian culture and traditions even though subject to centuries of aggression and defeat. The purpose is not to defend the atrocities of caste system but to counter the one sided view of western writers.

hard words or punishes mercilessly, his subjects leave him. A King who does not protect his subjects, a Brahmin who does not perform tapasya and a rich person who does not give charity goes to hell.'[39] Therefore State in ancient and medieval India was a form of social organization where the King was to discharge certain obligations towards its people.[40] In modern India, the Constitution of India, in accordance with Indian tradition, established a Republic of India which guarantees justice- social, political and economic. Constitution in this way reflects both the individualistic tendencies and the socialistic streams. That is why Liberty, Equality and Fraternity are the trinity of the Constitution as stated by Dr. Ambedkar

"What does social democracy mean? It means a way of life with monumental liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy."[41]

Nehru explained at the beginning in the Constituent Assembly:

"The first task of this Assembly is to free India through a new constitution, to feed the starving people, and to clothe the naked masses, and to give every Indian the fullest opportunity to develop himself according to his capacity."[42]

Therefore India adopted a Constitution which put India on the path of social and economic upliftment. The Constitution not only provided fundamental rights for individuals but also directive principles which allowed the fundamental rights to be limited for social and economic upliftment of the downtrodden. The Supreme Court of India through a series of decisions has widened the ambit of fundamental rights to include the directive principles of state policy also.[43]

Thus India embarked on the new journey with seemingly two contradictory ideas, democracy and Rule of Law on the one hand and social democratic planning on the other.[44] However, it was clear in the mind of Constitution makers that the

[39] Shukra Niti

[40] Shukra Niti also has provision for pension of retired employees, their families and financial allowance for sick employees and their family

[41] See B. Shiva Rao, 4 *The Framing of India's Constitution: Select Documents* 944-945

[42] Granville Austin, *The Cornerstone of a Nation* 27 (1996)

[43] Some of the important cases among others are *Francis Coralie v Union Territory of Delhi* [1981] AIR SC 746; *Chameli Singh v State of Uttar Pradesh* [1996] 2 SCC 549; *Olga Tellis v Bombay Municipal Corporation* [1985] 3 SCC 545; *HSEB v Suresh* [1999] 3 SCC 601; *D.S. Nakara v Union of India* [1983] 1 SCC 177; *Kirloskar Brothers Ltd. v Employees State Insurance Corpn.* [1996] (2) SCC 682; *Dalmia Cement Bharat Ltd. v Union of India* [1996] 10 SCC 104

[44] According to Hayek, law should only give general orders but no particular directions. He regards resort to such general formulas as fairness, equity, reasonableness as evidence of the decline of the rule of law. F.A. Hayek, *Road to Serfdom* (Routledge Classics 2001)

two are partners and one cannot survive without the other.[45] This aim however took the State to what is known as 'commanding heights' although India still remained a 'soft state'[46]. Since 1980s the State has started to recede from its commanding heights and due to entanglement with various international agreements has now moved from mixed economy to market economy. Like other countries, the Republic of India has also to manage the dichotomy of reduced power with increased obligations. The tension is reflected in the decisions of the Supreme Court also where the Court is trying to balance the new market ideology with the egalitarian goals of the Constitution. Together the judicial and political branch working within the international constraints are trying to find a solution to the dichotomy. Let us examine some of the important developments.[47]

In the *Peoples Union of Civil Liberties* v. *Union of India*[48] the Supreme Court through series of interim orders acknowledged right to food as a fundamental right. The Center after that enacted the Food Security Act. Unfortunately the Act is under scanner for violation of India's obligations under the WTO. Even though for the time being the problem is checked due to stiff stand taken by India, it is not over yet. Similarly, in the employment cases Supreme Court has completely changed its stand from the time of *Bandhua Mukti Morcha* v. *Union of India*[49] and *Central Inland Water Transport* v. *Brojo Nath Ganguly*[50] where the Court held right to work as an enforceable fundamental right under article 21 of the Constitution to *Steel Authority of India Ltd.* v. *Water front National Union Workers*[51] where the Supreme Court refused to acknowledge any right

[45] As Prof. Friedman states, 'No armory of legal devices can imaginably solve such basic antinomies of political life as the tension between social planning and individual freedom. The strength of public opinion and political wisdom is ultimately more important than the most elaborate legal safeguards. The lawyer can, however, assert with confidence that incompatibility of planning with the rule of law is a myth sustainable only by prejudice or ignorance. And once he has grasped and accepted the essentials of the social evolution of the last half century, the lawyer can make an important contribution to the problem of reconciling planning and freedom. Without its solution, democratic society cannot survive.' Friedman, *Law in a Changing Society* 279 (Stevens and Sons 1959)

[46] See Gunnar Myrdal, *Asian Drama: An inquiry into the Poverty of Nations* (Kalyani Publishers 1968)

[47] The author is indebted to S. Murlidhar 'India: Expectations and Challenges of judicial Enforcement of Social Rights' in Malcolm Langford (ed.) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge university press 2008) for references of cases mentioned below. For detailed discussion of cases on social and economic rights see Udai Raj Rai, *Fundamental Rights and their Enforcement* (Prentice Hall of India 2011)

[48] [2001] 5 SCALE 303

[49] [1984] 3 SCC 161

[50] [1986] 3 SCC 227

[51] [2001] 7 SCC 1

of contract workers to be reemployed by an establishment where employment of contract labour was abolished. In *National Textiles Union* v. *P.R. Ramakrishnan*[52] the Court relying on article 43A of the Constitution even recognized the right of workmen of a company to be heard at the stage of winding up but in *BALCO Employees Union* v. *Union of India*[53] the Supreme Court rejected the argument that workmen had any right to be consulted in the decision of the government to divest its shareholding in a public sector undertaking in favour of a private party. Similarly in case of right to shelter in *Shanti Builders* v. *Narayan K. Totame*[54] and in *Bandhua Mukti Morcha* v. *Union of India*[55] the Supreme Court showed inclination to recognize right to shelter as a fundamental right. However, in *Municipal Corporation of Delhi* v. *Gurnam Kaur*[56] and in *Sodan Singh* v. *NDMC*[57] the Court restrained itself and refused to recognize any right in pavement dwellers and squatters to continue their trade and business on pavements or for any right for rehabilitation. The Court however has been considerate in recognizing the right of health care[58] and right to education 'within the limits of State's economic capacity and development.'[59]

A cursory look at the above decisions shows that approach of the Supreme Court with regard to social and economic rights can be classified in two categories. On the hand are rights which impose obligations on the State-like right to food, right to education and right to health care. On the other hand are those rights which came in conflict with rights of affluent section of the society-businessmen or the middle and upper middle class of population. In the case of former the Court has taken more or less a clear stand. It recognized the rights of people and adjoined the State to take steps to enforce them. In the case of latter the Courts had a difficult task as they had to balance two private interests and the Court usually tilted in favour of the affluent section of the society. This is very clear from the decision of the Bombay High Court in *Bombay Environmental Action Group* v. *A.R. Bharati*[60] where the Court refused to recognize right to shelter of

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[52] [1983] 1 SCC 249

[53] [2002] 2 SCC 333

[54] [1990] 1 SCC 520

[55] [1991] 4 SCC 177

[56] [1989] 1 SCC 101

[57] [1989] 4 SCC 155

[58] *Paschim Banga Khet Majdoor Samity v State of West Bengal* [1996] 4 SCC 37; *Consumer Education and Research Centre v Union of India* [1995] 3 SCC 42; *Drug Action Forum v Union of India* [1997] 6 SCC 609; *Sheela Barse v Union of India* [1993] 4 SCC 204

[59] *UnniKrishnan J.P.v State of Andhra Pradesh* [1993] 1 SCC 645

[60] S. Murlidhar, *'India: Expectations and Challenges of judicial Enforcement of Social Rights' in Malcolm Langford (ed.) Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge university press 2008) 113

slum dweller who had created structures in the Sanjay Gandhi National Park. The decision has been criticized.

"Preservation of the national park appears to have been prioritized over the bundle of survival rights-to shelter, health and education, to name a few-of the slum dwellers"[61]

This is however, one sided view. We cannot possibly fault with the decision of the Court because availability of clean and safe park for certain group of population is as much a necessity as shelter is for another group of population. Moreover, such amenities are necessary for the market based economy and the persons who are instrumental in the maintaining the system. It cannot be denied that India has economically developed in these 70 years and a section of the population requires something more than mere survival. Another reason for decision in the above mentioned employment cases is that the Court does not interfere in the economic policy of the government. Therefore the court has limited scope to enforce rights which have financial impact on the treasury. These rights have to be enforced by the executive and the legislature only. They require political action rather than a legal solution. Political action came in the form of various schemes like the Food Safety Act and Rural Employment Guarantee schemes.

But these schemes only ensure bare survival for a limited section of the population. How is a country like India then going to discharge its human rights obligations? The answer State has possibly found is that, it would use the market to discharge some of its positive obligations. This is not new. It has been happening in developed countries with market based system but India has started it now only as it is a new entrant in the market economy system.

Arbitrating Between the Individual and the Market: Indian Endeavors

Wide reading of the fundamental rights and the daily strengthening democracy in India is a challenge to the government for discharge of its social and economic obligations with constraints on its powers to raise revenue and manage the economy. The government has found the answer in utilization of the market. The State especially that of a developing country with such obligations in a market economy system has to arbitrate between the market and the individual. The Indian government has also adopted this mechanism. Let us see some examples.

One mechanism is the effective use of trade policy. International agreements like the WTO constraint the power of State to a large extent but they also have some exceptions, prudent utilization of which, helps the economy to have a

[61] Ibid

breathing space. India has now become a leading user of antidumping and safeguard measures.[62] These measures apart from providing some revenue to the government also ensure survival of domestic industry which in return secures the employment and investments of the domestic population. The State cannot provide employment to everyone. It has to create avenues in the market for the same. Maintenance of the domestic industry is one such avenue. This was made clear by the Report of the National Commission to Review the Working of the Constitution. It observes that the State 'should provide opportunity –to achieve steady economic social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual. The right to work does not mean that everybody is to be employed by the State. It only means that the State has to develop "employment opportunities" both in the public and private sector'[63]

Another mechanism recently adopted by the State which may have positive effect on the egalitarian functioning of the market are the provisions under the new Companies Act, 2013. [64] Two provisions under the new Companies Act would ensure that corporations work in the interest of the society at large. One is the provision for Corporate Social Responsibility (CSR). Section 135 of the Companies Act requires a company with a net worth of Rs. 500 crore or more or a turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year to constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director must be an independent director. Companies are encouraged to spend at least 2% of their average net profit in the last three years on CSR activities.[65] Other provision is regarding independent directors. Although the provision has been made for ensuring transparency, role of such directors in ensuring transparency would be limited as is evident from the Satyam Scam. The reason is that these directors are not well acquainted with the functioning of the company. Therefore there is a possibility that in future these directors can function as public interest directors and ensure that the company functions in social interest.[66]

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[62] See Sheela Rai, *Antidumping Measures: Policy Law and Practice in India* (Partridge 2014) for detailed analysis of Indian cases on antidumping. Also see Sheela Rai, *Recognition and Regulation of Safeguard Measures* (Routledge 2011) for discussion on safeguard measures under the WTO and employment issues

[63] Subhash C. Kashyap, *Constitution Making Since 1950* (2004)

[64] See Anil Kr. Rai and Sheela Rai, 'National Accountability of International Business' 36 (2) Business Law Review (Kluwer) 72-77

[65] An illustrative list of activities eligible for CSR is given in Schedule VII of the Companies Act, 2013

[66] See Anil Kr. Rai and Sheela Rai, 'National Accountability of International Business' 36 (2) Business Law Review (Kluwer) 72-77

Under the new Companies Act, 2013, Section 149 (4) requires one- third of the total directors on board to be independent.

For discharge of its social obligations in the age of privatization, State has mandated all private educational institutions to provide reservations to scheduled castes and tribes, and other backward classes of the society. The Supreme Court after some hesitation has finally upheld these provisions.[67]

But how far can these be effective? Esping Andersen on the basis of empirical evidence has identified three different systems of welfare capitalism and consequently three approaches to social and economic rights.[68] The first model developed laws for poor and provided them relief, but at extremely low levels. This was 'based on extreme reliance on the market and contractual relations'[69] and 'any type of action which could interfere with labour as a cheap commodity was ideologically resisted.'[70] Second model was social insurance model which was developed by conservative reformers like Bismark in Germany. The third model is the universalistic system. 'Under this, all citizens are endowed with similar rights, irrespective of class or market position. The system is meant to cultivate cross-class solidarity, a solidarity of nation. This is the democratic, flat-rate, general revenue financed model which was first formulated by Lord Beveridge, as Chairman of the Beveridge Commission in 1942. It has subsequently been developed to its fullest extent in the Nordic Countries.'[71] But what about developing countries with constrained powers of taxation? Experience of Vodafone case shows that when State wants to recover taxes due, the foreign investor takes up an international investment arbitration where the investor may be provided with remedy on the basis of obligations of the host state to provide 'fair and equitable treatment', 'full protection and security' and not to act in an arbitrary manner.

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[67] In *P.A. Inamdar v State of Mahrashtra* [2004] 8 SCC 139 the Supreme Court did not approve of the provisions for reservation in private educational institutions. But the Parliament amended the Constitution and added clause (5) to article 15. This clause extends the power of state to make provisions regarding reservations in private educational institutions also whether aided or unaided. The Supreme Court has now bowed before the power of democracy and did not doubt its validity in *Ashok Kumar Thakur v Union of India* [2007] 4 SCC 361

[68] Esping-Andersen Gosta, *The Three Worlds of Welfare Capitalism* (Cambridge Polity Press 1990)

[69] Asbjorn Eide, 'Economic and Social Rights' in Janusz Symonides (ed.) *Human Rights: Concepts and Standards* 114 (UNESCO publishing and Rawat Publishing 2002)

[70] Ibid

[71] Ibid

Foreign investments have become major part of the market today. Bilateral investment treaties and international investment tribunals are continuously providing them additional rights against the host state. To the extent State is ceding its power due to internal and external constraints, they are captured by private corporations especially where foreign investments are made, as foreign investments have protection of international law. But these corporations do not have corresponding obligations. Individually States, especially the developing ones, are hesitant to impose obligations on them and regulate them effectively due to need of foreign investments and pressure of international legal obligations. Some writers have effectively argued that private corporations be considered a 'State' for the purposes of fundamental rights.[72] Problem is that countries, especially those in dire need of foreign investments would never be able to provide for the same within their constitutional system. An example is the contrasting decisions of the Supreme Court of India in *Air India Statutory Authority* v. *United Labour Union*[73] on the one hand and *Steel Authority of India Ltd*. v. *National Union Water Front Workers*[74] on the other. In the former case the Court tried to expand the agency and instrumentality test to include private corporations also but through decision in the latter case the court abandoned the effort and bowed down to the market forces. Hence it is necessary that effort be made at the international level and through a Multilateral Agreement on Investment under the WTO, obligations be imposed on private corporations. Developing countries are resistant to signing any multilateral agreement on investment. However, they are losing more than they are gaining by this. Their policy options are any way getting curtailed by the Bilateral Investment Treaties and one sided development of international investment law. They would have better bargaining position as a group in the WTO where by formulation of the investment treaty certain social and economic obligations may be imposed on foreign corporation without hurting any country's investment opportunities. Because it would be a multilateral agreement, no country would be blacklisted as investment unfriendly.

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[72] Stephan Gardbaum, 'The horizontal Effects of Constitutional Rights' (2003) 102 Michigan Law Review 387; Mark Tushnet, 'The Issue of State Action/ Horizontal Effect in Comparative Constitutional Law' (2003) 1 (1) I. Con 79-98; Udai Raj Rai, 'Reach of Fundamental Rights' (1994) 36 Journal of the Indian Law Institute 292-301, Sudhir Krishnaswamy, 'Horizontal Application of Fundamental Rights and State Action in India in C. Raj Kumar and K.Chockalingam (ed.) Human Rights, Justice, & Constitutional Environment. See also Lillian BeVier and John Harrison, 'State Action Principle and Its Critics' (2010) 96 (8) Virginia Law Review 1767-1835

[73] [1997] 9 SCC 425

[74] [2001] 7 SCC 1

Conclusion

Power of State to regulate its economy is getting curtailed by multilateral and bilateral treaties. However, at the same time obligations of the State for social and economic upliftment of the individual is increasing. It is normally stated that there is never a power vacuum. To the extent State is ceding its power, the same is being captured by private corporations. Private corporations have almost become a parallel power with the State. International Law, however, still considers private corporations as vulnerable entities like a defenseless private person and is increasingly providing protection to them. As such these corporations do not have recognized obligations towards their host country. It is left to each country's law to regulate them which are again under the scanner of investment tribunals. How does a State protect the rights of individuals? To discharge its social and economic obligations, State in a developing country like India is manipulating the market. But individually countries are weak as they may lose investments or be subjected to investment arbitration. Therefore it is necessary that developing countries as a group should abandon their resistance to international investment agreement and rather work for it with strong and effective provisions for obligations on the foreign investors. This would on the one hand check one sided development of international investment law and on the other impose obligations on the corporations so that State may in a market economy system ensure that its obligations regarding social-economic rights of individuals are fulfilled. The Bhopal Gas leak tragedy shows that an individual is powerless against private parties and has better bargaining power with the State. Hence while individuals have to claim their rights from the State, the State has to ensure that private corporations who are now parallel powers also share its obligations towards individuals. This can be effectively done by combined effort of vulnerable countries in international forums. A Multilateral Agreement on Investment with effective provision for obligations of foreign corporations would ensure that legislative efforts made in countries like India are not defeated by counter pressure. In this way it can be ensured that State and market work not only for the welfare of majority and the powerful but for every individual.

Textual Stagnation and Contextual Adaptation: a Trajectory of the Definition of the Crime of Genocide in International Law

Dr. Srinivas Burra*

ABSTRACT

The experiences of the Second World War have influenced the drafting of the 1948 Genocide Convection. The definition of genocide, as provided under the Genocide Convention was adopted without any change in the Statutes of the adhoc tribunals established to deal with the situations of former Yugoslavia and Rwanda. The Statute of the permanent International Criminal Court also adopted the same definition as was provided in the 1948 Genocide Convention. This situation is different from other international crimes, mainly war crimes and crimes against humanity, which have been undergoing transformation with the adoption of almost every new international legal instrument. Thus, so far as the textual definition of the crime of genocide is concerned there has been no change at the international level in more than six decades. However, the jurisprudence of the ICTR and the ICTY on the crime of genocide clarified several issues. The important contribution of these tribunals is that they have dealt with the textually stagnant definition of the crime of genocide and interpreted creatively to the contextual requirements while recognizing the fundamental constituent elements. Arguably this

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jurisprudence would continue to guide future situations significantly.

Introduction

In the contemporary debates of international law discussions on prosecutions for international crimes occupy a significant place. This momentum started after the establishment of adhoc tribunals followed by the establishment of the permanent International Criminal Court. There is a relatively long history for international prosecutions, despite the fact that prior to the establishment of adhoc tribunals there were not many instances of such prosecutions. These prosecutions gained momentum after the end of the Second World War and with the establishment of the Nuremberg and Tokyo tribunals. These international tribunals and courts have jurisdiction on specific crimes. There has been a progressive momentum in the development of international law dealing with international prosecutions.

The crime of Genocide is one of the crimes enumerated in the Statute of the International Criminal Court along with three other crimes i.e., war crimes, crimes against humanity and the crime of aggression. The crime of genocide was for the first time defined in the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. The definition of genocide contains three main elements: the extent of destruction, intent, and protected groups. The intention to destroy a group in whole or in part differentiates genocide from homicide. The definition of genocide as provided under Article II of the Genocide Convention was later on adopted without any changes by the Statues of the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda. Similarly, the latest of important international criminal law instruments, the Statute of the International Criminal Court also defines the crime as it is in the Genocide Convention, without any modifications. According to this definition an act is considered as genocide if it falls into any of the acts mentioned and 'committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such'. Therefore, the identity of the victims is a fundamental element of the crime of genocide. Thus, systematic extermination of even large number of people on political grounds does not amount to genocide under the existing definition. However, extermination of fewer can amount to genocide if the intention of the perpetrators is to destroy one of the four groups in whole or in part.

The present article would attempt to map the history of the crime of genocide in international law from 1948 and its unmodified adoption into the Rome Statute. Part two of the article deals with the definition of the crime of genocide as it has been incorporated into various international law instruments. This section underlines the fact that the definition of the crime of genocide remains stagnant from its inception in international law texts. Part three analyses the jurisprudence of the adhoc tribunals which have interpreted and adopted the textually stagnant

genocide definition to the circumstances dealt with by them. Part four provides conclusions.

Definition of the Crime of Genocide

The International Criminal Court (ICC) has jurisdiction on four crimes i.e., genocide, war crimes, crimes against humanity and the crime of aggression[1]. These crimes are generally referred to as international crimes on which the ICC has jurisdiction. Though there are other crimes which may equally qualify as serious crimes, for various reasons they were not included in the Rome Statute. All the four crimes on which the ICC has jurisdiction have evolved in content mainly since the end of the Second World War. However, a careful analysis shows that there have been changes in respect of some crimes but in respect of others it is not the same.

Of the four crimes mentioned above genocide can be considered as the youngest of all based on its recognition as a crime under international law. The definition of the crime of genocide as it is understood today is largely influenced by the experiences of the Second World War. Despite the experiences of the Second World War influencing the definition of the crime of genocide, the crime did not find a place in the London Charter which established the Nuremberg Tribunal to deal with the individual criminal responsibility for violations of international law.

Post Second World War developments

The Nuremberg Tribunal was established by the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) which was formally adopted on 8 August 1945. The Charter of the International Military Tribunal was annexed to the Agreement. The agreement was signed by the four Allied powers. Later on nineteen other States expressed consent to the Agreement.[2]The Nuremberg tribunal did not have jurisdiction on the crime of genocide. The word

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[1] Statute of the International Criminal Court, Adopted on 17 July 1998 and came into force on 1 July 2002.

[2] The agreement and charter of London, as finally signed by representatives of the four conferring powers on August 8, 1945, was formally adhered to by 19 other States: Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, (Washington: US Government Printing Office, 1949), at p. VIII.

[3] Raphael Lemkin, Axis Rule in Occupied Europe: Laws of Occupation-Analysis of Government-Proposals for Redress (Washington D.C.: Carnegie Foundation for International Peace, 944), at p. 79.

genocide was first used by Raphael Lemkin, a Polish jurist in 1944. He coined this word from the ancient Greek word genos(race, tribe) and the Latin word cide(killing).[3] However, the crime the word genocide refers to did not take place only during the Second World War, though it influenced Lemkin to coin the term. As Lemkin himself stated it denotes 'an old practice in its modern development'.[4] A frequently referred to example of the crime of genocide prior to the second world war is atrocities committed on the Armenian people of Ottoman Empire. These atrocities were referred to later on as the crime of genocide.[5] Despite the grave crimes, similar to the later crime of genocide, took place, no prosecution and punishment for the crime of genocide did take place prior to the Second World War. Thus in the absence the word genocide and also the absence of legal definition for the crime of genocide, those crimes which could have qualified as genocide were prosecuted under the category of crimes against humanity by the Intentional Military Tribunal at Nuremberg.

Article 6(C)of the Nuremberg Charter defined crimes against humanity as

> namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

The Nuremberg Tribunal had jurisdiction on three crimes which included war crimes, and crime against peace, along with crime against humanity. The definition of the crime against humanity was intended to cover the atrocities committed against Jews and other civilian population in occupied territories as well as in Germany. The category of crimes against humanity[6] as defined in article 6(c) is significant in several respects. The first important aspect is that this provision emphatically criminalizes attacks on civilians.Historically the category of civilian

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[4] Ibid, p. 79

[5] See, RaffiSarkissian, The Armenian Genocide: A Contextual View of the Crime and Politics of Denial, in Ralph Henham and Paul Behrens ed., The Criminal Law of Genocide: International, Comparative and Contextual Aspects, (Ashgate, Aldershot, 2007), pp. 3-15. However, the successive Turkish governments continue to deny the occurrence of genocide of Armenians. For a latest controversial denial, see, Pope Boosts Armenia's Efforts to have Ottoman Killings Recognized as Genocide, The Guardian , 12 April 2015.

[6] It is said that it is not known as to how the phrase 'crimes against humanity' was chosen by the drafters of the London Charter. It is said that Robert H Jackson, the chief prosecutor of the US at the Nuremberg Tribunal framed the phrase in consultation with HerschLauterpacht. See, David Luban, A Theory of Crimes Against Humanity, Yale Journal of International Law, vol. 29, 2004, pp. 85-1167 ,at p. 86.

protection has not attained as much attention as the military necessity in situations of armed conflicts. As a result of this reluctance among States to grant any special protection to civilians there was no reference to the protection of the civilians in international law during armed conflicts before the First World War. Lieber Code and 1907 Hague Convention did not clearly provide for protection of civilians despite references to such protection.[7] For the first time the London Charter clearly criminalized the attacks on civilians under the category of crime against humanity.

The second important aspect is that article 6(c) criminalises attacks on civilians by their own government. The category of crimes against humanity for the first time entered into international legal framework through the Nuremberg Charter. Till then war time atrocities were largely understood within the framework of war crimes. However, crimes against humanity were 'distinguished from war crimes primarily by extending protection to civilian populations irrespective of nationality and the related requirement of a factor of scale or gravity that justified this unprecedented intrusion into state sovereignty'.[8] There was reluctance to cover the atrocities committed against civilians by their own government. The Nazi atrocities on Jews in Germany constituted how a government dealt with its own citizens. This was primarily seen as the concern of the relevant government without warranting international intervention. However, in the case of Nazis it was justified despite opposition.

Another important aspect of the crime against humanity as defined under the Nuremberg Charter is that the acts which are criminalized can be considered as crimes only if they took place in relation to the armed conflict.

Thus there has not been any reference to the crime of genocide in the Nuremberg Charter. However the indictments against the accused referred to the crime of genocide and the prosecutors also referred to it in their presentations before the Tribunal.[9] This reflects that within a short time after the term was coined by Lemkin it attracted the attention of the prosecutors. The final judgment of the Tribunal did not mention the word genocide.[10]

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[7] See, Amanda Alexander, The Genesis of the civilian, Leiden Journal of International Law, vol. 20, no. 2007, pp. 359-376.

[8] PayamAkhavan, Reconciling Crimes Against Humanity with Laws of War, Journal of International Criminal Justice, vol.6, no. 2008, pp. 21-37, at p. 23.

[9] William A. Schabas, Genocide in International Law: The Crime of Crimes, (Second Edition) (CUP, 2009), at p. 43

[10] Ibid, at p. 44.

Principles of International law recognized by the Charter and the Judgment of the Nuremberg Tribunal

Soon after the judgments were delivered by the Nuremberg Tribunal,[11] efforts were on towards making this experiment an important constituent of international law. Accordingly initiatives were undertaken at the newly established United Nations. The UN General Assembly adopted a resolution 95 (I) on 11 December 1946. In the resolution the General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.[12] Resolution 95 (I) merely affirmed the principles without elaborating on what constituted those principles. To fill this gap the General Assembly adopted another resolution 177 (II), on 21 November 1947, which directed the newly created International Law Commission (ILC) to formulate these principles and to prepare a draft Code of Offences against the Peace and Security of Mankind.[13]

At its first session, the ILC appointed a Sub-Committee which submitted to it a working paper containing a formulation of the principles. Following the submission of the text adopted by the ILC, the General Assembly did not formally adopt the Nuremberg principles in their elaborated form. It merely invited Member States to make observations. The Nuremberg principles were not developed any further. Thus the Nuremberg principles as elaborated by the ILC were not formally adopted or rejected by the General Assembly.There is no reference to the crime of

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[11] The Nuremberg judgment was delivered on 30 September–1 October 1946 which sentenced twelve Nazi defendants to death and seven to periods of imprisonment ranging from ten years to life.

[12] General Assembly resolution 95(I) of 11 December 1946 on 'Affirmation of the Principles of International law recognized by the Charter of the Nuremberg Tribunal' states as follows:

Affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly on 11 December 1946, to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.

[13] *General Assembly Resolution 177(II) adopted on 21 November 1947 on 'Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal'*

Directs the Commission to

(a) Formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and

(b) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above.

[14] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, Text adopted by the International Law Commission at its second

genocide in the principles though they specifically identify the three crimes, crimes against peace, war crimes and crimes against humanity in Principle VI.[14]

UN General Assembly Resolution 96(I) on 'the Crime of Genocide'

The crime of genocide did not go unnoticed before the General Assembly. The General Assembly, while extending a general approval to the Nuremberg principles through its resolution 95(I), also gave a special emphasis in a separate resolution to the crime of genocide. Accordingly the subject of genocide and its place in contemporary international law was taken up. On 11th December, 1946, it adopted the resolution 96(I)[15] in which it declared genocide a crime under the existing international law and recommended the drafting of a convention for its repression. The resolution is significant because despite the absence of the crime of genocide in the Charter and the judgment of the Nuremberg Tribunal it received the attention of the States at the international level. It can also be considered as the first authoritative acceptance of the crime of genocide under international law by States.

The resolution distinguishes the crime of genocide from normal murder by emphasizing on the denial of right to life to groups i.e., collective deprivation of life to people belonging to specific groups. it retrospectively recognizes the occurrence of genocides based on racial, religious, political and other grounds in which people were eliminated in full or in part. It underlines that the crime of genocide is the concern of the international community. As stated in the resolution the United Nations General Assembly, in Resolution 96(I), requested the Economic and Social Council to consider drafting a convention on the crime of genocide. This led to the drafting of the Convention.

Convention on the Prevention and Punishment of the Crime of Genocide

The General Assembly, at its 179th meeting on December 9, 1948, unanimously adopted Resolution 260(A)(III) and accordingly the International Convention on the Prevention and Punishment of the Crime of Genocide.[16]

The UN Genocide Convention defines the crime of genocide in Article II of the Convention. Article II states:

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session, in 1950and submitted to the General Assembly, *Yearbook of the International Law Commission, 1950*, vol. II,para. 97.

[15] *General Assembly Resolution 96(I) of 11 December 1946 on 'the Crime of Genocide"*.[16]Entered into force on 12 January 1951 and147 States are parties to it.

[16] Entered into force on 12 January 1951 and147 States are parties to it.

Genocide means any of the following acts committed with intent to destroy, inwhole or in part, a national, ethnical, racial, or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Salient Features

Delinked from Armed Conflicts

The Genocide Convention delinks the crime of genocide from the situations of armed conflict. As pointed out earlier, the Nuremberg Charter linked the crimes against humanity with the situations of armed conflict. However, the Convention clearly mentions in article I that the crime of genocide can take place in situations of war as well as in peace time.[17] This is a decisive change from the Nuremburg tribunal as it broadens the scope of the application of the convention to the situations of peace also.

Although the direct victims of the prohibited acts are individuals, the ultimate 'victim' is the group to which the individuals belong. It is against the group as such that the perpetrator directs his/her criminal activity, although to realize the intended objective it is necessary to target specific individuals, who are selected by the perpetrator on account of their membership in the group. The definition provided in the 1948 Convention had certain important elements. These are, inter alia, the intention, gravity of the crime and the protected groups.

To the general intent of the prohibited act, an additional specific mental element is required to prove the crime of genocide. The specific mental element, namely, 'the intent to destroy, in whole or in part' one of the groups mentioned in Article II of the Convention must be established. This is the specific intent of genocide, also known as genocidal intent. It is an aggravated form of intent that does not necessarily lead go realization but that is what is pursued by the perpetrator

[17]Article I of the Genocide Convention reads as follows:
The Contracting Parties confirm that genocide, whether committed in time of peace or war, is a crime under international law which they undertake to prevent and to punish.

through his/her acts. Another important element which is very much related to the above is the gravity of the crime. The definition requires that the intention of the perpetrator is to eliminate group in whole or in part. The purpose of committing acts enumerated is not merely to commit single murder but to eliminate the group in whole or in part. Though it is not necessary that it should result in elimination of the group in whole or in part but it should be established that there is an intention to commit the crime at such gravity.The third important element is 'protected groups'. Article 2 of the Genocide Convention provides that the protected groups are 'national, ethnical, racial or religious group. For an act to constitute a crime of genocide, the act must be committed against the protected groups mentioned above. 'The Convention's list of protected groups has probably provoked more debate since 1948 than any other aspect of the instrument. This is often reflected in frustration that the victims of a particular atrocity, that otherwise would respond to the terms of the Convention, do not neatly fit within the four categories'.[18]

Further Developments

After the adoption of the Genocide Convention in 1948 there have been several efforts at the international level in relation to the crime of genocide. There are four developments which are worth mentioning as they have a long lasting bearing on the legal implications of the prohibition of genocide. These developments led to the establishment of international adjudicatory institutional mechanisms and they interpreted the law on the crime of genocide. These are: the draft Code of Crimes Against the Peace and Security of Mankind, prepared by the International Law Commission; statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda, which were established by the United Nations Security Council and the Rome Statute of the International Criminal Court, adopted by the 1998 Diplomatic Conference. Framing of these instruments is of interest from the standpoint of interpretation of the texts as well as to understand the Genocide Convention itself.

Draft Code of Crimes against the Peace and Security of Mankind

The International Law Commission adopted the final version of the draft code in 1996. After working with the Convention definition for nearly half a century, the Commission eventually adopted the exact text of article II of the Convention with minor changes. The Commentary of the Commission on Draft Code says

[18] Schabas, note 9, at p. 117.

that 'The definition of genocide contained in article II of the Convention, which is widely accepted and generally recognized as the authoritative definition of this crime, is reproduced in article 17 of the present Code'.[19] However, the definition of genocide provided in the Draft Code has a few minor changes.[20]

Adhoc Criminal Tribunals

The two international adhoc tribunals were established by the UN Security Council.The Security Council adopted Resolution 827 on 25 May 1993 and established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY). It subsequently adopted another resolution 955, on 8 November 1994 establishing an International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January 1994 and 31 December 1994 (ICTR).The definitions of genocide and enumeration of punishable acts under Articles 2 and 4 of the ICTR and ICTY Statutes, respectively, constitute a *verbatim* reproduction of Articles II and III of the 1948 Genocide Convention.

International Criminal Court

The International Criminal Court (ICC) Statute was adopted on 17 July 1998. Unlike the two *ad hoc* Tribunals for Yugoslavia and Rwanda, the ICC is a permanent international criminal court established by its founding treaty. The ICC enjoys subject matter jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression. On the crime of genocide Article 6 of the Statute has been taken *verbatim* from Art II of the 1948 Genocide Convention. Thus there is no change in the definition of the crime of genocide from 1948 Genocide Convention definition.

Along with the definition of the crime of genocide in the Rome Statute the ICC also has Elements of Crimes. Article 9 of the Rome Statute says that 'Elements of Crimes shall assist the Court in the interpretation and application of Articles 6,

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[19] Draft Code of Crimes against the Peace and Security of Mankind with commentaries,1996, *Yearbook of the International Law Commission, 1996*, vol. II, Part Two.

[20] Instead of beginning the provision with 'Genocide means . . .', it says 'A crime of genocide means . . .', Similarly "the word "ethnical" used in the Convention has been replaced by the word "ethnic" in article 17 to reflect modern English usage without in any way affecting the substance of the provision". Commentary to article 17 of the draft Code.

7 and 8". Thus the Elements of Crimes constitute an important part of the ICC framework and make the definitions of crimesclearer. What is worth underlining is that despite the discussion around the definition of the crime of genocide in the cases before the adhoc tribunals which was happening during the same time when the Rome Statute was being drafted, there was no influence of those discussions on the drafting the crime of genocide in the Rome Statute. Thus the definition of genocide remains the same in the Rome Statute as it was in the 1948 Genocide Convention.This situation is different from other international crimes, war crimes and crimes against humanity. They have been undergoing transformation with the adoption of almost every new international legal instrument. Thus there has been a textual stagnation in the case of the definition of the crime of genocide. The next section would analyze the jurisprudence of the international courts and tribunals on the issue of determination of protected groups under the definition of genocide.

Jurisprudence of the Adhoc Tribunals

Protected Groups

According to the Convention definition "Genocide means...acts committed with intent to destroy, inwhole or in part, a national, ethnical, racial, or religious group, as such". In accordance with this definition acts as enumerated therein constitute genocide only when they are committed with a special intention to destroy in whole or in part people belonging to national, ethnical, racial and religious group. Going by the definition the list of protected groups under the definition is exhaustive. International Criminal Tribunal for Rwanda (ICTR) is the first international criminal tribunal to deal with the crime of genocide after the 1948 convention was adopted. The Tribunal was dealing the crime of genocide for the first time under international law and there was no support of precedents or any interpretive guidance from previous international examples. The tribunal had to apply the definition to the context of Rwanda. The task of the ICTR was to know whether the crime of genocide took place in Rwanda in the killings that took place between Hutus and Tutsis in which it was alleged that Tutsis were targeted and killed by Hutus.

The first case before the ICTR was the Prosecutor v. Jean-Paul Akayesu.[21]Akayesu was charged with genocide, crimes against humanity and violations of Article 3 common to the Geneva conventions. While dealing with the charge of genocide the Tribunal was confronted with the task of contexualising the definition of genocide to the Rwandan context. The Trial chamber looked at

[21] Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 2 September 1998.

the colonial past of Rwanda and attempted to understand the protected group under the genocide definition. The trial Chamber understood that the protected group under the genocide definition was a stable group.

The trial chamber held that,

> On reading through the *travauxpréparatoires*of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.[22]

However, in the context of Rwanda the factual situation in terms of groups was not accurately fitting into the above understanding. Group identity of Hutus and Tutsis was to be established to prove the crime of genocide. In this regard colonial past played a significant role in the formation of certain identities in Rwanda. Referring to the colonial past the Trial Chamber held that,

> Rwanda then, admittedly, had some eighteen clans defined primarily along lines of kinship. The terms Hutu and Tutsi were already in use but referred to individuals rather than to groups. In those days, the distinction between the Hutu and Tutsi was based on lineage rather than ethnicity. Indeed, the demarcation line was blurred: one could move from one status to another, as one became rich or poor, or even through marriage.[23]

This situation does not seem to fit into the understating of a group for the purpose of the genocide definition as provided under the ICTR Statute. It is so because there was no clear ethnical demarcation between Hutus and Tutsis which is a necessary element in deciding one group targeting the other, in the present case Hutus targeting Tutsis. Thus the Tribunal had to deal with the requirements of a group to bring the killing of Tutsis under the genocide framework. The Tribunal has relied on the stability of the group than the clearly demarcated group identity

[22] Akayesu, para. 511.

[23] Ibid, para. 81.

and established that the crime of genocide took place in the targeting of Tutsis in Rwanda.

> the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travauxpréparatoires*, was patently to ensure the protection of any stable and permanent group. [24]

The trial chamber was of the view that the definition of genocide was intended to protect those groups which are stable and membership of which cannot be changed merely by individual will. Thus it is pointed out that not so stable groups like political and economic groups were not considered as protected groups under the genocide definition. The initial proposals of the genocide definition like the General Assembly resolution included political groups.[25] There were contending opinions on its inclusion when the 1948 Convention was adopted and as a result in was not included in the definition. The Trial Chamber in *Akayesu case* was confronted with a situation where people belonging to particular group were targeted and killed, however, they did not seem to strictly fall under the four groups enumerated in the genocide definition. However the Tutsis were found to be stable group with specific demarcation though such demarcation was seemed to be part of the colonial policies. The fluidity of Hutu and Tutsi identities was transformed into demarcated identities through certain measures by colonisers.

Taking note of these factors the Trial Chamber favoured that any stable and permanent group would satisfy the definition of a protected group even if that group does not strictly fall under the four enumerated groups. Despite the fact that the list of four groups mentioned in the genocide definition are exhaustive, the Trial Chamber attempted to accommodate all stable and permanent groups even if they did not fall under the four groups. The Trial Chamber attempted to

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[24] Ibid, para. 516

[25] UNGA 96(I)of 1 December 946 on the Crime of Genocide.

accommodate the Rwandan situation within the definition of genocide by evolving a method of stability and permanency in determining the protected group. This view while deviating from the textual definition of the crime of genocide in terms of identifying the protected groups, attempts to understand the definition with certain objective criteria of relying on stability and permanency. However, it is argued[26] that the Tribunal also relied on subjective criteria also because the Trial Chamber said that 'all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity'.[27]

As the *Akayesu*was the first case dealt with by an international tribunal after the 1948 Genocide Convention was adopted, it can be said that for the first time the definition of crime of genocide was being tested in relation to a concrete incident. The experience of the tribunal in the case of *Akayesu* was a challenging one in terms of arriving at legal certainty so far as the determination of protected groups is concerned. Thus despite the ICTR's successful prosecution and conviction of the first accused for the crime of genocide, the judgment only initiated the judicial interpretive discussion to be taken up in the later cases on the determination of protected groups.

Determination of protected group continued to be an important legal issue in the later cases of the ICTR. The significance of this determination cannot be overemphasized. Along with the special intention the crime of genocide requires targeting of specific groups of people and those specific groups are only four and the list is exhaustive. The Trial Chamber in Kayeshema and Ruzindana case[28] had to deal with the question of group determination as was in the previous case of Akayesu. The Trial Chamber dealt with the question of Tutsi as ethnical group. The Chamber held that the determination of the ethnical group is dependent on perception of the victim or the perpetrator. The Chamber held that

> .An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).[29]

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[26] See, Rebecca Young, How Do We Know Them When We See Them? The Subjective Evolution in the Identification of Victim Groups for the Purpose of Genocide, *International Criminal Law Review*, vol. 10 (2010) 1-22 at p. 11.

[27] Akayesu, para. 702

[28] The Prosecutor v. Clement KayishemaAndObedRuzindana Case No. ICTR-95-1-T, 21 May 1999.

[29] Ibid, para. 98

This statement can be considered as a clear shift from the Akayesu opinion where the Trial Chamber concluded in favour of stable and permanent groups, which goes towards objective criteria. The above statement provides for three alternative criteria. The first alternative identifies a group based on sharing of common language and culture. The commonality of language and culture is an objectively identifiable criteria without any subjective perception. The other two criteria are essentially subjective as they are dependent on the perception of the victims or of the perpetrator of the crime. Therefore in the opinion of the Chamber an ethnical group can be identified either on objective criteria or based on subjective perceptions. This position is a significant change in the determination of the protected group because the earlier decision of the Chamber in Akayesu mostly relied on objective assessment of group existence. But the Chamber in Kayishema and Ruzindana limited this subjective test only to the determination of the ethnical group.

Thus, along with the above stated opinion what cannot be ignored is that the Trial Chamber, though not in clear terms, followed objective criteria while referring to racial and religious groups. It held that "[a] racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs".[30] This seems to be similar to *Akayesu* opinion as the criteria reflect some form of objectivity, stability and permanency. The significance of this judgment lies in the fact that it took the criteria of determination of a group towards subjectivity. However, no way can it be argued that it completely rejected the objective criteria of stability and permanency. It is so because the Trial Chamber also relied on other objective criteria in support of its conclusion that the Tutsis were an ethnical group. Thus it refers to the identification cards issued to the people of Rwanda which contained their ethnicity.[31] At the same time it also relied on the fact that the "the scores of survivors who testified before this Chamber stated that they were Tutsis and that those whom they saw massacred during the time in question were also Tutsis".[32] This again is reflection of subjective perception of the victims. Therefore it can be argued that move towards subjectivity in this case can be a consequence of the difficulty in identifying the group for the purpose of crime of genocide in a given situation.

The ICTR continued with this position further. It continued to rely on subjective criteria while at the same time not ignoring the objective criteria. In a more

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[30] Ibid

[31] Ibid, para. 523.

[32] Ibid, para. 525.

pronounced way the ICTR referred to the importance of both the criteria in the case of *The Prosecutor v. Georges Anderson NderubumweRutaganda*.[33]

.The Trial Chamber in this case underlined that there is absence of the definition of national, ethnical, racial and religious groups at the international level. This position of the Trial Chamber is a deviation from it previous position in the *Akayesu*case wherein it attempted to give general definition of the four protected groups.[34] The Trial Chamber in *Akayesu* attempted to define four groups as stable and permanent. However, in *Rutaganda*

> The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herse lf as belonging to the said group.[35]

Here the Chamber holds that there is no generally and internationally acceptable definition of the four groups exists now. In its view, it is thus necessary that they need to be evaluated in the political, social and cultural context. Any political, social and cultural context is essentially based on certain objective conditions which are beyond the confines of individual and subjective considerations. The

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[33] The Prosecutor v. Georges Anderson NderubumweRutaganda, Case No. ICTR-96-3-T, 6 December 1999.

[34] The ICTR Trial Chamber in the Akayesu case held that

-Based on the *Nottebohm*decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

-An ethnic group is generally defined as a group whose members share a common language or culture.

-The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.

-The religious group is one whose members share the same religion, denomination or mode of worship.

*Akayesu,*paras.512, 513, 514 and 515.

[35] Rutaganda, para. 56.

Chamber holds that there is a need for objective assessment of the protected groups taking into consideration certain circumstances. The Chamber however, considers the membership in a group as a subjective concept than an objective phenomenon. Here the Chamber seems to make a distinction between the existence of a group and the membership in that group and seems to favour the objective assessment of the former and subjective assessment of the latter. This understanding makes a conceptual distinction between group and the membership in a group. This formulation regarding a group is similar to the understanding of stability and permanency which has been held by the *Akayesu* decision. However, existence of a group as a stable and permanent entity does not necessarily facilitate determination of individuals who constitute that particular group. Therefore the Chamber leaves that determination to the individual perception. Such individual perception can be of the perpetrator or of the victim. However, the next paragraph of the decision does not seem to carry forward that distinction. The paragraph reads:

> Nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups, as provided for in the genocide Convention. It appears, from a reading of the *travauxpreparatoires* of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.[36]

The above paragraph does not seems to continue with the distinction between a group and membership in that group, as the previous paragraph seems to suggest. The Chamber here holds that subjective definition alone is not enough because the convention definition intends to exclude mobile groups from protection. Hence it is only stable and permanent groups that are afforded protection under the definition of genocide. Here the Chamber leans back on the objective criteria of the protected group without making any reference to membership in the group which it earlier says is dependent on the subjective criteria. Then,

> the Chamber holds that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both

[36] Rutaganda, para. 57.

> the relevant evidence proffered and the political and cultural context as indicated ...[37]

In the *Musema* case the ICTR Trial Chamber almost verbatim relied on the *Rutaganda* case while determining the status of the protected group.[38] Further the trial Chamber in *Bagilishemacase*[39]favoured the mixed approach that '[a]lthough membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension'.[40] Thus the Chamber says that even if there is a difference of perception between the perpetrator who considers the victim belongs to a particular group and the perception of the victims or the others, still the victims can be considered as belonging to that group. Thus it says 'the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society ... if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the group for the purposes of genocide'.[41]

The ICTR continued with its position of relying on both objective and subjective criteria. In *Semanza* Case the Chamber held

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[37]Rutaganda, para. 58.

[38] The Chamber holds in the Musema case as follows:

The Chamber notes that, as stated in the *Rutaganda*Judgement, the concepts of national, ethnical, racial an religious groups have been researched extensively and, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/ herself as a member of said group.

Nevertheless, the Chamber is of the view that a subjective definition alone is not enough sufficient to determine victim groups, as provided for in the Genocide Convention. It appears, from a reading of the *travauxpréparatoires*of the Genocide Convention66, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "non stable" or "mobile" groups which one joins through individual, voluntary commitment. That would seem to suggest *a contrario*that the Convention was presumably intended to cover relatively stable and permanent groups.

Therefore, the Chamber holds that in assessing whether a particular group may be considered protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place.

The Prosecutor v Alfred Musema, Case No.ICTR-96-13-A, 27 January 2000, Paras.161-163.

[39]The Prosecutor v. IgnaceBagilishema, Case no. ICTR-95-1A-T, Decision of: 7 June 2001.

[40]Ibid, para. 65.

[41] Ibid.

> The Statute of the Tribunal does not provide any insight into whether the group that is the target of an accused's genocidal intent is to be determined by objective or subjective criteria or by some hybrid formulation. The various Trial Chambers of this Tribunal have found that the determination of whether a group comes within a sphere of protection created by Article 2 of the Statute ought to be assessed on a case-by-case basis by reference to the *objective* particulars of a given social or historical context, and by the *subjective* perceptions of the perpetrators. The Chamber finds that the determination of a protected group is to be made on a case-by-case basis, consulting both objective and subjective criteria.[42]

The Chamber in this case referred to its own jurisprudence and held that it relied on both the criteria. It referred to all the important cases that dealt with the issue of identity of groups. It is to be underlined that the Chamber also referred to the *Akayesu*case to support its view that both the criteria were used for group determination. This position of the Chamber in a way contradicts the view that *Akayesu* favored the objective criteria by relying stable and permanent groups. To substantiate its view the Chamber refers to the relevant para of the *Akayesu* judgment.[43]

This paragraph clearly refers to the official policy of distinction between Hutus and Tutsis which is an objective criteria and also relies on the witness statements as to how they identified themselves with, reflecting the subjective criteria.

After the *Semanzacase*, the other cases followed the similar pattern of referring to previous cases of the ICTR and relying on both subjective and objective criteria. Accordingly in *Gacumbtsi case* the Trail Chamber of the ICTR held

> Membership of a group is a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide

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[42] The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, 15 May 2003, para. 317

[43] In the light of the facts brought to its attention during the trial, the Chamber is of the opinion that, in Rwanda in 1994, the Tutsi constituted a group referred to as "ethnic" in official classifications. Thus, the identity cards at the time included a reference to *"ubwoko"* in Kinyarwanda or *"ethnie"* (ethnic group) in French which, depending on the case, referred to the designation Hutu or Tutsi, for example. The Chamber further noted that all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity. Accordingly, the Chamber finds that, in any case, at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all. Akayesu, para. 702.

> as belonging to a group slated for destruction, but the determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria. Indeed, in a given situation, the perpetrator, just like the victim, may believe that there is an objective criterion for determining membership of an ethnic group on the basis of an administrative mechanism for the identification of an individual's ethnic group.[44]

In *Jelisiccase* the Trial Chamber of the ICTY recognized the difficulties involved in defining a national, ethnical or racial group objectively and was in favour of evaluating the status of a group from the perspective of those persons who wanted to single it out.

> Article 4 of the Statute protects victims belonging to a national, ethnical, racial or religious group and excludes members of political groups. The preparatory work of the Convention demonstrates that a wish was expressed to limit the field of application of the Convention to protecting "stable" groups objectively defined and to which individuals belong regardless of their own desires.[45]

It went on to say that

> Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators.[46]

The ICTY Trial Chamber makes a distinction here between religious groups and the other groups mentioned in the definition of the genocide, and states that while objective criteria can be applied to the identification of religious groups,

[44] The Prosecutor v. SylvestreGacumbitsi, Case No. ICTR-2001-64-T, 17 June 2004, para. 254.

[45] The Prosecutor V. GoranJelisic, Case No. IT-95-10-T, 14 December 1999, para. 69.

[46] Ibid, para 70.

same may not be possible for other groups. Therefore the Chamber holds that in the case of national, ethnical and racial group it is appropriate to decide the group based on subjective perceptions of the perpetrator. The Chamber believes that the identification of religious group can be possible with objective criteria but not in the case of other groups. Thus the trial Chamber, instead of adopting one or the other, favored different tests to different groups. This position varies from the jurisprudence of ICTR in similar cases.

Further the trial chamber said that

> A group may be stigmatised in this manner by way of positive or negative criteria. A "positive approach" would consist of the perpetrators of the crime distinguishing a group by the characteristics which they deem to be particular to a national, ethnical, racial or religious group. A "negative approach" would consist of identifying individuals as not being part of the group to which the perpetrators of the crime consider that they themselves belong and which to them displays specific national, ethnical, racial or religious characteristics. Thereby, all individuals thus rejected would, by exclusion, make up a distinct group.[47]

While resorting to subjective determination in the case of three groups the trial Chamber further classifies the determination process by way of positive and negative criteria. This takes place in the form of attributing others certain characteristics or self attributing certain characteristics by way of excluding others from those characteristics. This case was decided in 1999, which was prior to the important case law of the ICTR on the matter. This was just after the Akayesu decision. However, the later judgments of the ICTY differed with this view and took contrary position.[48]

The Appeals Chamber took the view contrary to the Trail Chamber's view in the *Jelisic case* and held that the jurisprudence of the Tribunals is not in favor of subjective criteria alone but they favored both subjective and objective criteria.

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[47] Ibid, para 71

[48] In the Stakic case the ICTY Appeals Chamber held: The Prosecution raises arguments regarding support in the jurisprudence for a subjective definition of the target group. The Appeals Chamber considers these arguments to be misguided for two reasons. First, contrary to what the Prosecution argues, the *Krstiæ*and *Rutaganda*Trial Judgements do not suggest that target groups may only be defined subjectively, by reference to the way the perpetrator stigmatises victims. The Trial Judgement in *Krstiæ*found only that "stigmatisation … by the perpetrators" can be used as "a criterion" when defining target groups – not that stigmatisation can be used as the sole criterion. Similarly, while the *Rutaganda*Trial Chamber found national, ethnical, racial, and religious identity

This judgment was delivered in 2006 and by then the jurisprudence coming especially from the ICTR was more or less settled towards adopting both the criteria.

Conclusion

The definition of genocide as was incorporated into the Statutes of these two adhoc tribunals is the same as Article II of the 1948 genocide Convention. The Rome Statute which established the permanent International Criminal Court also has jurisdiction over the crime of genocide. The Rome Statute also included the same definition as provided under article II of the Genocide Convention. Thus so far as the textual definition of the crime of genocide is concerned there has been no change at the international level in more than six decades. As said earlier there were also no trials for the crime of genocide at the international level for more than four decades. There was a stagnation in both textual and jurisprudential developments.

The jurisprudential stagnation on the crime of genocide finally broke when the adhoc tribunals became operational. Adhoc tribunals started indicting persons accused of committing crimes, inter alia, genocide. Thus the adhoc tribunals for the first time started dealing with the definition of the crime of genocide as was enshrined in the 1948 Genocide Convention and which continues to be the same in the later international instruments. The tribunals while dealing with cases of genocide had to deal with various aspects of the definition of genocide. As the crime of genocide was being dealt with by the international courts for the first time, they did not have much help from the precedence. As a result they had to deal with many of the complex issues involved in the definition. Akayesu case dealt with by the ICTR was the first case to be dealt with on the crime of genocide. As a result the judgment rendered by the Tribunal remains a central reference case for many of the future cases dealt with by the tribunals on genocide. ICTR is also the first international tribunal to punish a perpetrator for the crime of genocide at the international level.

A critical evaluation of the jurisprudence of the adhoc Tribunals on the issue of determination of protected groups reveals that the tribunals grappled with the textually stagnant definition of the genocide with the factual circumstances in

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to be largely subjective concepts, suggesting that acts may constitute genocide so long as the perpetrator perceives the victim as belonging to the targeted national, ethnical, racial, or religious group, it also held that "a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention." Other Trial Judgements from the ICTR have also concluded that target groups cannot be only subjectively defined. Prosecutor v. MilomirStakic, Case No.IT-97-24-A, 22 March 2006, para. 25.

which the crime has taken place. The tribunals, especially the ICTR, attempted initially to resort to the objective criteria of determining the protected four groups found themselves to be ill equipped to do so. However, they did not go in opposite direction and rely solely on subjective determination of the protected groups for the reason that would have led to reducing the crime of genocide to crimes based on discrimination. Thus the tribunals resorted to both the criteria. Any attempt to strictly adhere to objective criteria would have led to potential situations being left out of the crime of genocide because of narrow interpretation.

In the absence of the definitions of the four protected groups in international law and with the guidance of negotiations of the convention in certain respects favoring stable and permanent groups, the ICTR in *Akayesu* was confronted with a different reality where it could not make a clear distinction between Hutus and Tutsis as different ethnical identities. Thus it had to deal with the subjective perceptions. Similar situation was confronted by the ICTR and the ICTY in later cases. The central issue in the determination of the protected group status was how to determine a group of people as belonging to a particular ethnical community which is different from the perpetrators. As there are no clear objective criteria to determine it or when the objective criteria are insufficient to determine conclusively, both the tribunals vacillated between the objective and the subjective criteria. Thus the survey of the jurisprudence discussed in the reveals that the tribunals do not have any conclusive criteria to rely on, they seem to favor that both the objective and subjective criteria should be taken into consideration on a case by case basis. Thus it can be stated that the tribunals favour the intention of the drafters in understanding the four protected groups as exhaustive and stable and permanent. However, while endorsing such a position they seem to take into consideration the subjective feelings of the victims and perpetrators to know whether the victims fall into the category of any of the four protected groups.

Law and Justice: The Guantánamo Challenge

Renjith Thomas*& Devi Jagani**

ABSTRACT

This paper deals with the conflicting claims of law and justice in the context of detainee treatment at Guantánamo Bay and shows the tragedy attendant with justice being equated to mere law. Over a decade after the setting up of this detainee camp post the 9/11 attacks in Guantánamo Bay, which is located in a legal vacuum, there has been an extensive academic debate over the implications of the actions of the American executive officials. In this paper, the attempt is to reflect over the ideological and sociological underpinnings of the American system set up to combat the 'war on terrorism' and its response to the political influences from the Presidential power and from across the world, which rather than providing an effective solution raise deep unsettling and problematic questions relating to the theme of human rights, racial-discrimination, the use of language as a tool by those in power to subjugate and legitimize the sub-human position accorded to the 'enemy/unlawful combatants' and the structural deficiencies of a legal order based on manipulative value standards. This article is an attempt to raise fundamental questions relating to the rights of these detainees, majority of whom are not Al-Qaeda fighters, and to stir a public debate on the issue with a view to compel the American government to respond effectively to the demands of justice.

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Introduction

The 9/11 attacks on the World Trade Center in the Pentagon, one of the most guarded places on earth, left a deep scar on the public conscience. Terrorism was rightly identified by the President Bush administration as a threat to national security; however, even today with numerous detainees languishing without rights in the prisons of Guantánamo Bay, the US Naval Base in Cuba, a debate that contains at its heart the theme of justice in context of these military camps is very much alive. The detainees at Guantánamo represent one of the twenty-first centuries most crucial questions concerning human rights and dignity.

The Military Order dated November 13, 2001 issued by the President as the commander-in-chief of the American armed forces created an extra-legal sphere that authorized the use of prerogative executive power to combat the global "war on terrorism".[1] This project represents a contradictory value-standard, which has been and is used over time to justify their treatment of the detainees as legitimate and essential for strengthening the sense of safety and security.It poses powerful moral, ethical and politically charged questions regarding the perpetual presence of military commissions for conducting the trial and the detainment of innocent world-citizens due to their remote connection with the activities of the Al-Qaeda.

As human beings who are born with a natural instinct for justice, we ought to reflect upon the working and implications of this extra-legal system created to show the world the extent to which and the means that can be employed to combat the global war on terror. In this paper, as researchers, we have tried to raise several pertinent questions regarding the state of these detainees under the broad domain of issues relating to justice and have focused primarily on the conflict between human right violation and exercise of power by the executive authorities, the practice of racial discrimination and impact of social conditioning, the existence of interdepartmental conflicts and political influences as a source of arbitrary treatment in the operation of the system and finally the use of language

[1] *See* Military Order on Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism, 66 Fed. Reg. 57833. For a detailed analysis of the working of the military commissions established to combat the global war on terrorism and the exercise of prerogative executive power refer – Nancy Kassop, 'The War Power and Its Limits' (September 2003) 33(3) Presidential Studies Quarterly <http://www.uvm.edu/~dguber/POLS21/articles/kassop.htm> accessed 14 April 2016 and Anne English French, 'Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?' (2002) 63 Ohio State Law Journal <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/03/63.4.french.pdf> accessed 14 April 2016

and linguistics as a tool to validate the actions of the American government as legitimate and just.

Detainee Interrogations: Power, Human Rights and Security Issue

In this modern era most of us recognize and value the dignity of each human life as reflected from the jurisprudence underlying the principles of international human rights law,[2] which echo the perception of John Locke that as humans we are all born with certain inalienable rights such as the right to life, liberty, freedom against torture etc.[3] Human rights, which constitute a fundamental category of rights, may be defined as a relationship between individuals (citizens) and governments (states). ooted in natural law. As reflected in his Two Treatises of Government, published in 1690, the English philosopher John Locke believed that human rights, not governments, came first in the natural order of things.

Being inalienable, no political authority or any individual are in a capacity to legitimately abrogate these rights conferred by what is popularly known as the natural rights theory[4] in any given situation.

However, as Guantánamo prisons hit the headlines, innumerable stories regarding detainee abuse came to light.[5] Jess Bravin has correctly termed it as "*the dark*

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[2] Anonymous, 'Human Rights' (*Stanford Encyclopedia of Philosophy,* 8 November 2014) <http://plato.stanford.edu/entries/rights-human/> accessed 14 April 2016

[3] Human rights, which constitute a fundamental category of rights, may be defined as a relationship between individuals (citizens) and governments (states). The concept that legal systems should protect the rights of individuals from abuses by government is rooted in natural law. As reflected in his Two Treatises of Government, published in 1690, the English philosopher John Locke believed that human rights, not governments, came first in the natural order of things.

Civil and political rights are often referred to as fundamental or core human rights. Examples include the rights to life, liberty, security; freedom from enslavement, torture, and cruel, inhuman, or degrading punishment; freedom from arbitrary arrest, and presumption of innocence until found guilty by a competent and impartial tribunal –Anonymous 'Chapter – 16 Human Rights and Related Concepts' <http://www.disam.dsca.mil/documents/greenbook/v35_0/16_Chapter.pdf> accessed 14 April 2016. Also *See* George Clack, Executive Editor, 'Human Rights In Brief' <http://photos.state.gov/libraries/amgov/30145/publications-english/humanrights_brief.pdf> accessed 14 April 2016

[4] It is a common assumption that a natural rights theory of human rights underlies contemporary human rights doctrines. The term *human rights is* generally taken to mean what Locke and his successors meant by *natural rights:* namely, rights (entitlements) held simply by virtue of being a person (human being). Such rights are natural in the sense that their source is human nature. – *See* Jack Donnelly, 'Human Rights as Natural Rights' (1982) 4(3) Human Rights Quarterly 391

[5] *See* Anonymous, 'UN Rights Experts Urge US To Close Guantanamo Detention Centre And End Impunity For Abuses' *UN News* (11 Jan 2016) <http://www.un.org/apps/news/

age of investigation" where numerous dehumanizing, violent and brutal techniques were adopted by the interrogators including waterboarding, sense-deprivation, sexual abuse, disruption in food and sleep cycles, facial slaps, stress positions, providing threat of death or physical torture of loved ones etc. to extract information from the detainees, who according to them are members of the terrorist organization Al-Qaeda; in order to detect and stop its activities.[6] Although the motive seems commendable, the means adopted are unconscionable and seem to contradict not only the standards set by the internationa l norms, which are of persuasive value but also the American standards regarding fundamental rights. What then permitted use of these seemingly unlawful techniques?

The answer to this question seems to be provided in part by the choice of the location of these detainee cells in Guantánamo Bay – an area that Cuba has historically given in perpetual lease to the United States of America, who now exercises complete jurisdiction and control over this stretch of land that was initially used for the purpose of refilling of fuel into navy ships and for detection of trade in narcotics. Cuba still retains its sovereignty over Guantánamo, giving it a peculiar legal status where neither the American nor the Cuban courts exercise their influence.[7] Judith Butler in her book Precarious Life in the chapter titled

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story.asp?NewsID=52974#.Vw8_4zZ97R0>accessed 14 April 2016; Richard A Serrano, 'Human Rights Group Calls For Closing Guantanamo Bay Prison in Cuba' *Los Angeles Times* (10 November 2015)<http://www.latimes.com/nation/la-na-gitmo-detainee-rights-20151110-story.html>accessed 14 April 2016; Tara McKelvey, 'Guantanamo Bay: What Next For Cuba Prison Camp?' *BBC News* (14 January 2015) < http://www.bbc.com/news/world-us-canada-30820897>accessed 14 April 2016; Anonymous, 'USA: Close Guantanamo and Ends Human Rights Hypocrisy' *Amnesty International* (22 January 2014) <https://www.amnesty.org/en/latest/news/2014/01/usa-close-guant-namo-and-end-human-rights-hypocrisy/>accessed 14 April 2016; Tom Leonard, 'Inside Guantanamo Bay: Horrifying Pictures Show The Restraint Chairs, Feeding Tubes And Operating Theatre Used On Inmates In Terror Prison' *Daily Mail* (27 June 2013) <http://www.dailymail.co.uk/news/article-2349693/Inside-Guantanamo-Bay-Horrifying-pictures-restraint-chairs-feeding-tubes-operating-theatre-used-inmates-terror-prison.html>accessed 14 April 2016; Anonymous, 'Guantánamo: A Decade of Damage To Human Rights' *Amnesty International* (11 January 2012) < https://www.amnesty.org/en/latest/news/2012/01/guantanamo-decade-damage-human-rights/>accessed 14 April 2016; David Leigh, James Ball et al., 'Guantánamo Leaks Lift Lid On World's Most Controversial Prison' *The Guardian* (25 April 2011) <http://www.theguardian.com/world/2011/apr/25/guantanamo-files-lift-lid-prison>accessed 14 April 2016

[6] Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 83-111; Also *See* Jess Bravin and Greg Jaffe, 'Rumsfeld Approved Methods For Guantanamo Interrogations' *The Wall Street Journal* (10 June 2004) <http://www.wsj.com/articles/SB108682697155933408>accessed 14 April 2016; Jess Bravin and Gary Fields, 'How Do Interrogators Make A Captured Terrorist Talk?' *The Wall Street Journal* (4 March 2003) <http://www.wsj.com/articles/SB104673282554097688O>accessed 14 April 2016

[7] Michael J. Strauss, 'Cuba And State Responsibility For Human Rights At Guantanamo Bay' [2012-2013] 37 S. Ill. U. L.J. 533

'Indefinite Detention' explains this process as an act of the traditional state sovereignty, which is supreme, suspending the rule of law in this particular area in the name of national security, whereby the management of the people so detained is left to the executive branch of the government under the guidance of the President and as the act has no concrete ground or principle to justify itself, it becomes self-grounding and hence, creates a new expression of what the officials term as sovereign power (which can't be as the act is a product of the decisions of a sovereign and hence, this claim lacks legitimacy).[8] The use of this expression is a mere tool to ensure smooth functioning of the system whereby the detainees can be perceived as being below humans and so without any rights or entitlements by a person in authority who wields prerogative and lawless power to regulate subjects in the manner that it likes.

The system of military commissions set up by the Military Order issued by President George Bush was not bound by the Uniform Code of Military Justice, and hence even the most basic rights such as those guaranteed by the doctrine of presumption of evidence and the inadmissibility of evidence obtained by torture were denied to the detainees.[9] The order shed no light on important issues such as whether the prisoner will be able to consult civilian lawyers, or whether the right to appeal against the decisions of the military commissions lay with a military or civilian panel? These conditions stipulated are not in accordance with a spirit of justice, which regards that we need to address the pressing needs of each individual and do not deny as mandated by the natural law the basic rights to any human being. However, they were justified by a rhetoric of legality perpetuated by the executive officials who were acting in the name of the President, to further the cause of national security.[10]

Following this line of logic, a deeply problematic and unsettling moral question arises that was the modern terrorist who was associated with the Al-Qaeda a *"HOSTIS HUMANI GENERIS"*[11] forming a separate category not to be governed by the laws of humanity? Rumsfeld has publicly referred to the detainees as "pure killing machines" who can only be controlled by way of imprisonment, while another argument put forward says that these detainees were like the mentally ill as their actions departed from the well settled norms of Western

[8] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (first published 2004, Verso 2006 Reprint) 50-101

[9] Military Commissions Act 2006

[10] Fleur Johns, 'Guantánamo Bay And The Annihilation Of The Exception' (2005) 16(4) EJIL 613, 619-620

[11] *HostisHumani Generis* means enemy of all mankind; Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 22

standards of rationality and Western notions of the concept of civilization and who could only be controlled by way of involuntary incarnation, which was in effect equivalent to involuntary hospitalization.[12] In our view such an image of the detainees created by the public officials can be seen as an effort to secure endless power for themselves. Two important moral questions can be asked in this regard – firstly, were the laws of humanity not for all humans or were they only for those who the officials considered to be human? And secondly, do humans not have an independent existence that grants them certain basic rights that are inalienable irrespective of subjective standards of judgment?

The problem did not end here with the creation of a separate institution where the requirements of a just procedural standard were not adhered to but it granted the President power to recommend to these commissions the name of people who he had reason to believe were eligible for prosecution.[13] Is this not an example of arbitrary power vested in the President capable of being misused? Now, this also raises another important issue – was no *prima facie* guilt against those not chosen established even by putting to use the evidence obtained through torture? If no, was it not just to release them instead of holding them as captives to symbolically assure the public that safety measures were in place? If the officials answered this question in the negative, as indicated by their actions of allowing detention, they seem to be following the utilitarian logic which stresses upon the need to promote the greatest happiness of the greatest number, however, as Kant rightly criticized this system, it does not value human beings as an end in themselves but as having mere instrumental value and hence, fails to value them as rational beings having an intrinsic value irrespective of individual identity. Respect for humanity and human life for Kant is due to our capacity for rationality, which lies undifferentiated in each one of us and hence, we cannot torture the detainees whose guilt hasn't been established to promote the happiness of the other.[14]

Further, this power of the President that authorized detention of enemy combatants without a trial was not to be an exceptional circumstance, but a naturalized pattern that would be embedded in the usual way of life as it extended the term for an indefinite period, implying that the powers granted in the name of emergency

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[12] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (first published 2004, Verso 2006 Reprint) 72-74

[13] Anup Shah, 'US Military Commissions Act 2006 – Unchecked Powers?' (*Global Issues,* 30 September 2006) <http://www.globalissues.org/article/684/us-military-commissions-act-2006-unchecked-powers#Powertodetainindefinitelyandtorture> accessed 14 April 2016

[14] *See* Tore Nordenstam, 'Kant And The Utilitarians' (2001) 8(1) Ethical Perspectives 29; Norman Wilde, 'Kant's Relation To Utilitarianism' (May 1894) 3(3) The Philosophical Review 289;

were to have an endless presence. This indefinite detention also implied that the war against terrorism was perpetual.[15]

Now, taking into consideration the philosophy of Gandhi who believed that justice and harmony could exist in a society only by using the right means to attain the right goals, the torture used to extract confessions from the detainees whereby abrogating their basic human rights[16] will in the long-run produce a sense of revenge among members of groups such as the Al-Qaeda – an effect that questions the effectiveness of these techniques to promote peace and counter the terrorist acts.[17] Socrates also famously clarified that one form of injustice only leads to another[18] and hence, unjust treatment of the detainees only increases possible national security threats in the process. Here as we argue that violence is not justified as a means to secure the goal of justice we must recall the carnage associated with the American, the French and the Russian revolutions, led to the establishment of values like life, liberty, equality, justice, fraternity etc. Can it also be argued that the detainee would never confess if not for the torture? It can be argued by the officials that it is permissible to act immorally in order to punish a greater immoral act – but who is to be the judge of the extent of immorality? These and many more questions remained unanswered when judging the acceptability of the use of torture to extract confession.[19]

Harmin K, 'Utilitarianism vs. Kantian Ethics' (*Harmin K – Live and Love Life on Wordpress.com*, 6 February 2013) <https://catchharmin.wordpress.com/2013/02/06/utilitarianism-vs-kantian-ethics/> accessed 14 April 2016; Linda S. Neff, 'Utilitarianism versus Kant – Case Three: Confidentiality' <http://jan.ucc.nau.edu/lsn/research/papers/Kant_Utilitarianism.pdf> accessed 14 April 2016

[15] President Bush determined unilaterally that all prisoners captured in the "war on terror" were " unlawful enemy combatants" and could be held indefinitely. – *See* Human Rights Centre, University of California Berkeley, *Guantánamo And Its Aftermath – US Detention And Interrogation Practices And Their Impact On Former Detainees* (November 2008) Executive Summary 2; Alfred de Zayas, 'The Status of Guantanamo Bay And The Status Of The Detainees' (2004) 37 UBC Law Review 288; Alfred de Zayas, 'Human Rights and Indefinite Detention' (March 2005) 87(857) International Review of The Red Cross 15; Trevor Tim, 'Guantanámo Bay Is Only The Symptom Of A Sickness: Indefinite Detention' *Trevor Tim Column of The Guardian* (23 February 2016) <http://www.theguardian.com/commentisfree/2016/feb/23/guantanamo-bay-symptom-sickness-indefinite-detention> accessed 14 April 2016

[16] *See* Human Rights Watch, *Getting Away With Torture? Command Responsibility For The U.S. Abuse of Detainees* (April 2005) Vo1. 17, No. 1(G) Human Rights Watch; Physicians For Human Rights & Human Rights First, *Leave No Marks – Enhanced Interrogation Techniques And The Risk Of Criminality* (August 2007)

[17] Mark A. Costanzo & Ellen Gerrity, 'The Effects And Effectiveness Of Using Torture As An Interrogation Device: Using Research To Inform The Policy Debate' (2009) 3 (1) Social Issues and Policy Review 179, 202

[18] Desmond Lee, Editor and Translator, *The Republic By Plato (Book I)* (3rd ed., Penguin 2007)

[19] For a detailed discussion on this aspect, *See* Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical And Legal Aspects Of The "Ticking Bomb" Justification* (OUP Oxford 2008) 223

Not only the detainees but also the prosecuting attorneys suffer from the ill effects of torture as the reliability of the evidence on the basis of which they seek to establish the guilt of the detainee is itself questionable – and if the foundation is weak, the structure is bound to fall. In this context is it just to create separate prisons and courtrooms, engage special interrogators etc. by spending millions of dollars which can be put to address the more pressing needs of the hour which will directly benefit the American citizens such as the restructuring of the economy facing recession?

Do these arguments against the use of torture imply that we should acquit those detainees subjected to violence and barbarous means of investigation or should it be a circumstance to be considered for mitigating their sentence? In our opinion the risk of allowing all the detainees to go scot free as they were subjected to torture in a similar degree would go against the aim of enhancing national security and so it would be rather just to punish and reform those interrogators who committed the crime of torturing the detainees.

Overtime, through the aid of human rights activist lawyers, detainees approached the Federal Courts and in the landmark case of *Hamdan v Rumsfeld,*[20] where it was held that the detainees possess a right to challenge their detentions, and to be present in court to witness the person producing evidence against them, also they are to be accorded the rights guaranteed to Prisoners of War (POW) under the Geneva Convention until their status is otherwise determined by a competent tribunal.[21] Other remarkable decisions have entitled the detainees to engage in private and confidential interaction with their legal counsel (*Al Odah v. United States*[22]) and the right to subject the working of the military commissions to judicial review and to file complaints in the Federal Courts (*Rasul v. Bush*[23]).

One final interesting development in regard to the rights of detainees is reflected in the refusal of the authorities to permit Khalid Sheikh Mohammad,[24] the self-proclaimed architect of 9/11, to plead guilty for his crime, and hence, indirectly choose to die. Mohammad wanted to make this choice as he was tired of the system – and this indicates that the choice is probably based on emotional reasons

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[20] 548 U.S. 557 (2006)

[21] *Hamdan v Rumsfeld*[2006] 548 U.S. 557

[22] [2004] 346 F. Supp. 2d 1, 15 (D.D.C.)

[23] [2004] 542 U.S. 466

[24] William Glaberson, '5 Charged In 9/11 Attacks Seek To Plead Guilty' *The New York Times* (8 December 2008) <http://www.nytimes.com/2008/12/09/us/09gitmo.html?_r=0> accessed 14 April 2016; Anonymous, 'Top 9/11 Suspects To Plead Guilty' *BBC News* (8 December 2008) <http://news.bbc.co.uk/2/hi/americas/7770856.stm> accessed 14 April 2016

and in the heat of the hour if he be allowed to waive off his right to life it would be unjust not only because a wrong decision in such a case is irrevocable but also because the other 5 members who were tried with him may be carried away by his passions and may choose under the influence of his actions. The concern of the authorities is justified, however, one pertinent question that continues to linger in our mind is that all humans are entitled to lead a life of dignity, and hence, if life stops to be dignified can we choose to end it? This issue is similar to the one debated in the context of euthanasia, and continues to remain unanswered with certainty – however, we would like to bring in the view of Kant who believes that murder and suicide are both morally condemnable as they fail to value human life as an end – suicide because you chose to take your life while aiming to avoid pain and hence, act in accordance with an instrumental desire which is acting as per a law that is not self-chosen and hence, it is morally wrong.[25] Kant shows to us that the pursuit of advocating human rights for the detainees will be half fulfilled if they are allowed to plead guilt and opt for death in order to avoid physical pain associated with life.[26] Now we shall move on to reflect upon the peculiar social background of those detained in Guantánamo.

Identity, Racial Discrimination And Social Conditioning

Hundreds of people over the years have been detained at the Guantánamo Bay. However, it is astonishing to note that *all* of these detainees were *Muslims* and were aged between 13-89 years.[27] To move you even further – *92% of them were never Al-Qaeda fighters*.[28] The countries to which most of these detainees belonged are Yemen and Afghanistan – countries where social unrest is the norm and where most citizens are forced by underdevelopment and poverty to lead a Spartan life.[29] Most as Salim Ahmed Salim Hamdan, Osama Bin Laden's driver, are forced by their instinct of self-preservation to associate themselves with organizations such as the Al-Qaeda having no other source of livelihood.

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[25] Allen W. Wood, *Kantian Ethics* (Cambridge University Press 2008) 82, 99, 172-173

[26] Aderibigbe M.O., 'Kant's Categorical Imperative And The Dilemma Of Suicide In The Society' (June 2015) 3 (1) International Journal of Philosophy and Theology 150

[27] *See* Kim Hjelmgaard and David Jackson, 'Shaker Aamer, Last British Gitmo Detainee, Released' *USA Today* (30 October 2015) <http://www.usatoday.com/story/news/world/2015/10/30/shaker-aamer-guantanamo-bay-britain-release/74856850/> accessed 14 April 2016

[28] *See* M. Denbeaux, *Report On Guantanamo Detainees – A Profile Of 517 Detainees Through Analysis Of Department of Defense Data* (September 2005) Executive Summary; M. Denbeaux, *Profile Of Released Guantánamo Detainees: The Government's Story Then And Now* (June 2008) Executive Summary

[29] *See* Emanuel Deutschmann, 'Between Collaboration And Disobedience – The Behavior Of The Guantánamo Detainees And Its Consequences' (August 2014) Journal of Conflict Resolution, SAGE Journals

Once in the network of these groups, being at a sub-ordinate position, they often have no choice to retreat back to the form of life they desire.[30] In this context it is important to recall that one of the preconditions mentioned by Andrew Vincent needed to talk about justice is the moderate scarcity of resources.[31] In the lives of these helpless, starving people, who are compelled to join the Al-Qaeda because of reasons of economic vulnerability, and if they are illiterate like Hamdan who only studied up to the 4th grade, they have no other sources of earning their daily bread and hence, when there is a high level of scarcity of material resources essential for one to lead a comfortable life, the talk of justice seems to farfetched as under these conditions, people are only concerned about survival and justice, which demands showing concern towards the other seems a distant value they aspire to achieve in life. In this sense, one form of injustice leads to another as the wealthy and developed nations and people fail to lift up majority of the population.

All of us recognize that justice is one of the foundational values of human society but it is a term that is highly individualized in terms of semantics – i.e. this one word has several perceptions regarding its true meaning. In this context even though we just identified that the talk of justice seems impossible in case of majority of the detainees, the case of Omar Khadr,[32] one of the juvenile prisoners raises an important issue. Omar was brought up by his father who worked for the Al-Qaeda and given this he spent most of his childhood playing and associating himself with the kids of other Al-Qaeda members and was eventually given training by the organization in regard to using weapons. He was arrested by members of the American troops following a battle where all other Al-Qaeda members except Omar died and being the only one alive he was held accountable for throwing a granite bomb that killed a US soldier, however, this was untrue given that before shooting Omar on the leg, the said soldier had killed the man who threw the bomb.[33] The inference which one can reasonably derive from this story is that the mind of Omar was likely to be conditioned by the environment and not having developed sufficient understanding of the mind, nor exposed to education, his conception of morals – i.e. his sense of right and wrong permitted him to attack the American forces.

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[30] Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 4-6

[31] Andrew Vincent, *The Nature Of Political Theory* (first published 2004, Oxford University Press 2007) 109-113

[32] Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 287-288

[33] Ibid

From an independent standpoint, would it be just to hold Omar liable for his actions and subject him to torture as a detainee to extract confessions given that his choice of joining the group or performing the alleged acts for which he was imprisoned was not independent and free. Would it not be unjust to punish Omar for he had just acted in a manner which he thought was socially acceptable by imitating the conduct he observe in his surroundings? Just like the child of a butcher who would think it right to kill a cow for beef, when most Hindus (the dominant group) would condemn it – and when in the criminal jurisprudence of most countries *mens rea* or a guilty mind is needed to punish one for a criminal wrong,[34] it would seem unjust to punish Omar and others like him who although may know the consequences of their act did not understand its nature as being wrong.

Considering the fact that all detainees were Muslims, one of the justifications that permitted the American forces to treat them as sub-human was the idea of racial discrimination. In this light it is extremely fascinating to note that only 5% of the detainees at Guantánamo Bay were captured by the American troops whereas 86% of them had been turned in return of money – a sum of three thousand to five thousand US dollars per person was paid to the person who captured them and subsequently convinced the US authorities that they were genuine Al-Qaeda fighters.[35] Perves Musharraf, former President of Pakistan in his book boasted that they had captured 689 people who were fleeing from Afghanistan and had handed over 369 to USA in return of millions of dollars of prize money and hence, aided in combatting the global war on terrorism.[36] In the context of underdevelopment and poverty prevailing in these nations, the question arises that was it just to incentivize generals to arrest suspect terrorists by lure of money? Were the Americans directly exploiting the minds of the Afghans, the Pakistanis and the like indirectly to serve their own personal interests? Was it just to capture innocent people in this way to extract a higher level of personal safety for one self?

This idea of paying money in return for capturing a suspect terrorist just as identified by William Rowlandson provides a powerful similarity with the Atlantic

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[34] John S. Baker Jr. & William J. Haun, 'The "Mens Rea" Component Within The Issue Of The Over-Federalization of Crime' (2013) 14 (2)

[35] *See* Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 6; M. Denbeaux, *Report On Guantanamo Detainees – A Profile Of 517 Detainees Through Analysis Of Department of Defense Data* (September 2005) Executive Summary

[36] ShabanaFayyaz, 'Pakistan Response Towards Terrorism: A Case Study Of Musharraf Regime' (May 2010) *Doctoral Thesis Submitted To The University Of Birmingham* 1, 177-178

slave trade where slaves were auctioned and sold off to the highest bidder.[37] In this light it is not only wrong by Kantian standards of failing to respect human beings as end in themselves, but also this form of racial distinction was used by the officials who were in power to justify their brutal acts to prevent the detainees from savage and uncivilized countries from engaging in terrorist activities.This logic of the officials reflects that the state ended up judging the standards of abnormality in terms of cultural beliefs and practices associated with a particular group of people – and they used their powerful position to explain that these categories of people are not human as they do not fit in the description of normality which is based on Western perception and standards – and when this logic became a part of the public discourse, as identified by Judith Butler, it led to the creation of a public culture where not only the detainees but other Muslims were socially ostracized in America and their fundamental rights were abrogated when numerous people were arrested merely on grounds of holding a particular name in years following 9/11.[38]

The famous line from the Bollywood movie My Name is Khan delivered by Shah Rukh Khan is a point in illustration – "My name is Khan and I am not a terrorist" which implies on a deeper level that merely because I belong to a particular social group, I cannot be held responsible for the wrongs of the other as this would be both unfair and unjust because I am being punished for a reality of my life that I did not have freedom to choose in the first place. It was a popular line that was told to the detainees over and over again – "*America will embrace its enemies, if the enemy embraces America."* This statement in my mind is extremely problematic as it suggests that the only way to be proved innocent and be treated as a human was by accepting an American identity which was completely alien to most of them, and it implies at a deeper level that the American culture was the only one which could make a person harmless. This reflects the double value-standard the Americans proposed as they denied the humanity to others, which they thought was a characteristic that their culture nurtured. Further, unlike the slaves who helped in raising the economic productivity of the plantations they worked on, as most of the detainees were not Al-Qaeda fighters they had no knowledge about the finer details of the terrorist plans, and hence, most information extracted by subjecting them to torture was useless from the perspective of increasing the levels of national security – and this indicates that it was *prima facie* not just to spend millions of dollars on these detainees which

[37] William Rowlandson, 'Understanding Guantánamo Through Its Parallel With Slavery' (2010) 2 (3/4) International Journal Of Cuban Studies(Pluto Journals) 217

[38] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (first published 2004, Verso 2006 Reprint) 50-100

could be utilized to produce greater social benefit alongside enhancing the level of national security by providing funds for the development and education of the poverty-struck people in Afghanistan, who when aided in their personal growth by the Americans will be less likely to pick up arms against them.

Another extremely controversial aspect of the Military Order issued by the President was that the military commissions were not empowered to prosecute American citizens and this seems to be on the face of it an unreasonable and unjust classification because it presumed that on grounds of their nationality the Americans could not attack their own country, and here as discussed in the section below we ought to punish people for their acts and not their belonging to a particular social or political group as this would account as being an arbitrary procedure which denies you a fair opportunity to defend your actions.[39] As reflected in Plato's celebrated play *Crito,* in order to avoid chaotic conditions from prevailing in the society, law must be empowered to punish the transgressors and the question, which then remains for consideration is not whether the law punished you but whether a fair procedure was provided to you?[40]

Finally, attention must be drawn to the fact that most detainees against whom a specific charge could not be framed were accused of conspiracy, which later as decided in the case of *Hamdan-II,* was not a war crime – and the officials did not see to it whether the detainees were a part of the agreement or concrete plan of organizing a terrorist attack and under what conditions they were forced to join the Al-Qaeda or what was their degree of involvement.[41] Hence, it can be safely concluded that most detainees were imprisoned because of an identity they did not chose for themselves, a factor which questions the validity of the very foundations on which the system designed by the Americans to fight the war against terrorism was based. The next section provides in detail the deficits of the working of military commissions, which undermine its worth as a mechanism to deliver justice.

Structural Shortcomings

The problems with the detainee treatment practiced at Guantánamo Bay is not only at the ideological and social level as discussed above but also majorly reflected

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[39] David Cole, 'Military Commissions And The Paradigm Of Prevention' (2013) Georgetown Public Law And Legal Theory Research Paper No. 12, 1,2 <http://scholarship.law.georgetown.edu/facpub/1110> accessed 14 April 2016

[40] Benjamin Jowett (Translator), 'Crito by Plato'(*MIT Edu Internet Classics Archive*) <http://classics.mit.edu/Plato/crito.html> accessed 14 April 2016

[41] Jonathan Hafetz, 'Diminishing The Value Of War Crimes Prosecutions: A View Of The Guantánamo Military Commissions From The Perspective Of International Criminal Law' (2013)

at the institutional level especially under the political influence of the President and other leaders of the government. In our opinion the major structural deficiencies of the system can be divided into three distinct categories – firstly the impact of political pressure on the judiciary, secondly the strained relationships between the military commissions and the CIA and other prosecuting agencies including the intradepartmental power politics and thirdly the political influences responsible for release of high profile prisoners.

Coming to the first aspect of structural deficiency, i.e. the one relating to the working of the judiciary the most prominent incident in the history of Guantánamo Bay is the promotion of Justice Roberts to the Supreme Court of the United States four days after he delivered the decision in favor of the government in accordance with his conservative views in the first appeal made in the case of *Hamdan v. Rumsfeld.*[42] This incident highlights explicitly how the Executive arbitrarily used the powers associated with its office to infiltrate in the duties of the judiciary to rationally assess the issue and deliver a fair and just decision. Also, the selection of the jurors who were a part of the commissions panel seems irrational and influenced by political clout as one juror had been a part of the Guantánamo Bay and was well versed with its procedures and he was probably involved in the sending of the names of prisoners to be detained to his superior, another juror had a close associate who died in the 9/11 attacks and he was complimented for his work of tracking down the Taliban, while the third juror was directly involved in the planning of how to capture the prisoners and so on. Does not such a composition of the jury convince us that the panel was sufficiently biased as not to be able to assess the issue rationally particularly given their inexperience in the field of law?

Also, the detainees were to be represented by an American counsel with whom they could not connect easily because of cultural differences and pre-existing notions. All these factors denied the detainees of not only the chance of approaching the federal court system for a long time, but also an equal opportunity of a fair hearing. The fact that the decision of the court was influenced in a major way by the political bend of the minds of the judges, reflects that the outcome of the case was dependent on preconceived notions and not on a rational

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4(2) Cambridge Journal Of International and Comparative Law 800; Marco Sassóli, Antoine A. Bouvier& Anne Quintin, 'How Does Law Protect In War?' (*International Committee Of The Red Cross,* 15 February 2012) <https://www.icrc.org/casebook/doc/case-study/united-states-hamdan-rumsfeld-case-study.htm> accessed 14 April 2016

[42] Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 247-248. For a detailed analysis of this issue in light of the context of the doctrine of separation of powers, *See* Douglas W. Kmiec, 'The Separation Of Powers: Hamdan v. Rumsfeld-

assessment of the facts of the case at hand and hence, the influence exerted by power prevented the judges from freely adjudicating over a particular matter rendered the system unjust whereby the parties were not in an equal position to defend their cases.

Secondly, the hostile relations between the military commissions and the CIA meant that the information gathered by one wasn't shared with the other for confidentiality reasons, and hence, the prosecution of detainees became difficult as there was an internal impediment in the officers being able to access evidence across departments.[43] For instance, Stuart Couch was to prosecute in the case of Mohmmad-al-Qahtani, the 20th hijacker – i.e. a high-profile Al-Qaeda member, and in doing so through his senior at Guantánamo Bay he forwarded a request to his superior Swann to be able to access the interrogation findings and other relevant documents on the file of this detainee, and the superior used bureaucratic tricks such a drafting a reply to his mail denying the access and printing it but not actually sending the response to Couch.[44] Such events of inter and intra departmental politics that were abundant ate into the efficiency of the system, and the spread of corruption and procedural issues at all levels of functioning ensured that the structure provided little scope for officials to promote justice. Taking the famous example given by Socrates in Book – 1 of the Republic by Plato regarding the existence of justice between the members of a gang of dacoits, which was essential for them to fulfill their goal, provides an analogy to the situation of structural deficiencies in the Guantánamo prison system because here to the contrary of what is described by Socrates, there is an absence of understanding between the different actors, who for their personal benefits (getting favored treatment from superiors) behave in an unjust manner with their colleagues and this produces a lack of co-ordination among the members of the organization and hence, reduces the efficiency of the system as a whole to combat the terrorist forces, who seem to be united in the purpose and actions.[45]

The Anti-Roberts' (2007) 34 (5) Pepperdine Law Review 573; Helen Keller & Magdalena Forowicz, 'A New Era For The Supreme Court After Hamdan v. Rumsfeld?' (2007) 67 (1); Martin S. Flaherty, 'More Real Than Apparent: Separation Of Powers, The Rule Of Law, And Comparative Executive "Creativity" In Hamdan v. Rumsfeld' (2006) 9Clato Supreme Court Review 51

[43] Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 248-256

[44] Ibid at 257-259

[45] Desmond Lee, Editor and Translator, *The Republic By Plato (Book I)* (3rd ed., Penguin 2007); Nickolas Pappas, *Routledge Philosophy Guidebook To Plato And The Republic* (first published 1995, Routledge 2000) 46-47

Amongst the most controversial elements of the working of the system, in our opinion, is the release of high-profile Al-Qaeda members such as Moazzam Begg[46] and Habib,[47] because of the political pressure exerted by the countries to which they belonged – UK and Australia respectively and this was coupled by the need to foster the demands of an existing political alliance.[48] This raises important ethical and politically charged questions that we must all ask and try to answer. Could a detainee be treated differently for political reasons? Were they not being punished for their wrong act and not for belonging to a particular nation? Were all countries only concerned about the rights of their own citizens? Should we not exert political pressure to demand that all humans must be treated equally? Would the President consider such political pressure for release of detainees from the government of Iraq as legitimate when he did not perceive the nation to possess a genuine form of sovereignty? As discussed above, giving benefits or imposing burdens on a person merely because he/she belonged to a particular group by birth would be unfair as these were social and political situations which we as humans did not decide to be in. Next, if the high-profile criminals like Habib and Begg are released, then the deterrent effect sought to be achieved by the Guantánamo Bay prison system will have zero impact and in contrast the continued detention of the 94% of detainees who had no material connection with the Al-Qaeda[49] and hence, were seemingly innocent seems a blatant violation of their human rights of life and liberty to promote a sense of security among the American citizens, which has actually increased by releasing the people who were the masterminds behind the 9/11 attack.[50]

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[46]Lizette Alvarez, 'Marchers In London Denounce Bush Visit' *The New York Times* (21 November 2003); Anonymous, 'Family Reunions For Guantánamo Four' *Daily Mail UK* (27 January 2005) <http://www.dailymail.co.uk/news/article-335601/Family-reunions-Guantanamo-four.html> accessed 15 April 2016; Nicola Harley, 'Terror Charges Dropped Against Former Guantanamo Bay Detainee MoazzamBegg' *The Telegraph* (1 October 2014) <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11132838/Terror-charges-dropped-against-former-Guantanamo-Bay-detainee-Moazzam-Begg.html> accessed 15 April 2016; Ben Quinn, 'Before Shaker Aamer: Others Who Made It Back To Britain From Guantanamo Bay' *The Guardian* (30 October 2015) <http://www.theguardian.com/uk-news/2015/oct/30/before-shaker-aamer-others-who-made-it-back-to-britain-from-guantanamo-bay> accessed 15 April 2016

[47] Cynthia Banham, 'Welcome Home From Family Who Never Deserted Habib' *Sydney Morning Herald* (29 January 2005); Meriah Foley, 'Freed Australian Returns From Guantanamo' *Associated Press Newswires* (28 January 2005)

[48] Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 126-130, 237, 238

[49] Ibid at 240

[50] Refer the instances of releasing high-profile terrorists like Moazzam Beg and Habib discussed earlier in this context for understanding the interplay between political alliances/influences and the sense of security of the American nationals, which when seen in the larger picture display a sort of double standard in the war against terror

To conclude this section we must ask an important question that reflects the analogy of the city and the soul proposed by Socrates – did the existence of a fixed framework determine the attitude of the people or vice-versa? Before the decision was given by the Supreme Court in the case of *Hamdan v Rumsfeld,*[51]confessions obtained by way of torture were admissible as evidence in the courts, and so the officers handling the prisoners were not concerned about the treatment they meted out however, once the decision laid down the rule that the basic human rights of the detainees conferred by the Federal laws of America and the International agreements such as the Geneva Convention were to be protected, automatic restraints were imposed on the unfettered executive powers granted by Bush's military order.[52] In the first case we may say that an unfair structure provided officials the scope to act arbitrarily, but in the second scenario, the just minds of a few judges brought about drastic change in the entire system – and so we can say that both have an effect on each other and are inter-twined in such a manner that they can't exist independently.

Language as a Tool of Domination

As human beings we are all linguistic creatures and language is a powerful medium of expressing meaning and generating public consciousness. Mitchel Foucault who has in his work outlined clearly the relationship between power and language has famously recognized discourse as having the capacity and power to shape reality.[53] In politics particularly, language is employed by the leaders to get the public accept a particular perception with which to view reality and to experience certain events by creating certain concepts in our mind. The executive officials,

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[51] [2006] 548 U.S. 557

[52] *See* Sean Mulryne, 'A Tripartite Battle Royal: Hamdan v. Rumsfeld And The Assertion Of Separation-Of-Power Principles' (July 2008) 38 Seton Hall Law Review 279; William G. Hyland Jr., 'Law v. National Security: When Lawyers Make Terrorism Policy' (2008) 7 Rich. J. Global L. & Bus. 247; Daniel Silverberg, 'The President As Lawmaker: Moderating Executive Authority In Wartime' (2014) 5 (1) American University National Security Law Brief 37; Saby Ghoshray, 'False Consciousness And Presidential War Power: Examining The Shadowy Bends Of Constitutional Curvature' (2009) 49 (1) Santa Clara Law Review 167; Ashley S. Deeks, 'The Observer Effect: National Security Litigation, Executive Policy Changes, And Judicial Deference' (2013-2014) 82 Fordham L. Rev. 827; Stephen I. Vladeck, 'The Laws Of War As A Constitutional Limit On Military Jurisdiction' (2010) 4 Journal Of National Security Law & Policy 295; Dennis Phillips, ' Hamdan v. Rumsfeld: The Bush Administration And 'The Rule Of Law'' (2015) 1 Australian Journal Of American Studies 40

[53] *See* David Lodge and Nigel Wood, *Modern Criticism And Theory – A Reader* (first published by Pearson Education Limited in 1988, Routledge 2013); Michael Foucault, *The Archeology Of Knowledge And The Discourse On Language* (translated by A.M. Sheridan Smith, Pantheon Books 1972); Norman Fairclough, *Language and Power* (first published 1989, 10th Impression, Longman Inc. New York 1996)

including the President George W. Bush have employed language with tact to protect their skins and to justify their actions in relation to the detainees imprisoned at Guantánamo Bay in Cuba.[54]

The most important legal document, which set up the military commissions, the Military Order issued by the President on 13 November 2001 deliberately and cautiously omitted the use of the word "RIGHTS" with reference to the detainees and the phrase "*Procedures Accorded to the Accused"* was used instead.[55] Was the state totally absolved from any sort of duty to respect the human rights protecting the liberty, life and dignity of the detainees? Would it be just to camouflage and avoid your obligations towards another human being by manipulating the meaning of a document by the deliberate omission of words that cast on you an explicit responsibility? Was not John Locke correct in saying that certain rights are natural to individuals as human beings, having existed in the 'state of nature' before the development and emergence of the state?[56] Should the laws of the state (positive law) be considered superior to the natural law as they are certain and written?

Secondly, the American government has skillfully employed the phrase 'war against terrorism' to justify its actions. Here the word 'war' is not used to refer to a period of hostility between two rival groups (who may be individuals, nations, ethnic groups etc.) that is characterized by physical violence and bloodshed but it is seen as a fight against a perpetual problem such as that associated with the taking of drugs or consumption of alcohol. As the officials see the problem of terrorism as extending indefinitely in time, they are able to justify publicly in the name of national security the indefinite detention to the Guantánamo Bay prisoners without the provision of any trial or the framing of any particular charge.[57] Thirdly, the Americans have added a new term – "*unlawful/enemy combatants"* in the discourse of International Humanitarian Law. The use of this term to define the detainees in Guantánamo presupposes, as against the requirement of the Geneva Convention, that people merely by way of their membership to an organization (the Al-Qaeda or the Taliban) are enemies of America and this is a question that

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[54] Jennifer Bond, 'The Language Of War: A Battle Of Words At Guantanamo Bay' (2005) 10 Appeal Rev. Current L. & L. Reform 70

[55] Jill Lepore, 'The Dark Ages – Terrorism, Counterterrorism, And The Law Of Torment' (*The New Yorker,* 18 March 2013) <http://www.newyorker.com/magazine/2013/03/18/the-dark-ages> accessed 15 April 2016

[56] Emmanuel Q. Fernando, 'Natural Rights Legal Theory' (1999-2000) 74 Phil. L.J. 1, 21-24; James W. Byrne, 'The Basis Of The Natural Law In Locke's Philosophy' (1964) 10 Cath Law. 55

[57] Jennifer Bond, 'The Language Of War: A Battle Of Words At Guantanamo Bay' (2005) 10 Appeal Rev. Current L. & L. Reform 70, 75-76

is not left to be decided by a tribunal.[58] Providing the prisoners with this unique status that is nowhere defined either by the domestic or international laws, allows the authorities to treat them in any manner that they think is appropriate and thereby the human right violations described above are justified by them as being in accordance with the legal status of the detainees. The politicians in America have employed tools of rhetoric and persuasion to influence the public conception about the threat posed by the detainees, which is because of their inherent nature and that it can be handled only by way of brutal punishment and solitary confinement as they possess a savage instinct, and are of a status, which is below humans.

Finally, taking into consideration the extremely fascinating request of one of the detainees Bahlul to represent himself before the commissions, when the court denied the request saying that he does not have an adequate knowledge of the law, when the prisoner replied by saying that he had practiced law for a short time in Yemen, the linguist who was acting as a translator in coordination with the attorney change the meaning of the words and said that the detainee knew some people who were lawyers.[59] If the lawyers could not represent the views of the clients truthfully and took advantage of the language barrier to manipulate meaning to suit their interests, were they not committing a fundamental breach of the duty they owed to their clients as professionals? The use of language here by people in power brings in not only the issue of professional ethics but questions the very foundation of the fairness of the system that decided the guilt of the detainees.

Although the situation has drastically improved after the decision in the Hamdan case, which gave all the detainees a Prisoner of War status, so the basic rights enshrined in the Geneva Convention could protect them, even after election of Barack Obama and his promise to close down the commissions within a year has not seen the light of the day due to oppositions faced from within the system, we believe that public debate and consciousness over the existence of these fundamental issues relating to the question of justice in context of the detainees at Guantánamo Bay will compel the American government to make further improvements aiming to close down these prisons as soon as possible.[60]

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[58] Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, *Memorandum For Alberto R. Gonzales Counsel To The President, And William J. Haynes II General Counsel Of The Department Of Defense* (Re: Application Of Treaties And Laws To Al Qaeda And Taliban Detainees, January 22, 2002); Karl S. Chang, 'Enemy Status And Military Detention In The War Against Al Qaeda' (2011) 47 (1) Texas International Law Journal 1

[59] Jess Bravin, *The Terror Courts – Rough Justice At Guantanamo Bay* (Yale University Press 2013) 195-197

[60] Spencer Ackerman, 'Guantánamo Bay: Obama Reiterates Call To Close Prison In Final Plan To Congress' *The Guardian* (23 February 2016) <http://www.theguardian.com/us-news/2016/feb/

Conclusion

This article is an attempt to raise some of the many possible fundamental and seminal questions regarding the detainee treatment at Guantanamo Bay, which is an institutionalized practice that represents blatant human rights violations happening in a country which the world has hailed as being the epoch of democratic values and principles. The disregard of the universally recognized core principles of the administration of justice system, being the due process of law in order to ensure a fair trial to the "non-citizens" who are responsible for the 9/11 terror attacks, a threat presented as being the perpetual global war against terror, reflects how the law and legal machinery have been used, or rather manipulated, by the executive branch of the USA to legitimize an institution which is discriminatory in its treatment of the 'other' (the alleged member of the Al Qaeda) to secure a sense of security for the 'own' people of the nation who are presumed to be civilized by virtue of their belonging to a certain predetermined social category. This article highlights how legal language has been employed to legitimize the differential treatment accorded to the detainees, whose association with a particular social group is reason enough to perceive the associated threat of their actions to humanity at large. Starting from structural deficiencies in the system to questions relating to identity, racial discrimination and an overarching disregard for the basic value of human life without any evidence of guilty conduct is a deeply unsettling practice that needs to be debated upon and eliminated from the society as justice should not be equated with the mere letter of the law, but it should be done in a manner that it is felt to exist by each member of the system.

It is important for a nation like the United States of America that abides by and proclaims to be the guardian of Constitutional values, which guarantee a protection of fundamental human rights, that the actions of the state are so informed by these values in a non-discriminatory manner and not the act of the other and their actions, rather than words, should influence the people who do not believe in the same values to inculcate them for the good of humanity at large. The problem as identified in this article is not the pursuit of the war against terror, but

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23/obama-guantanamo-bay-closure-plan-congress> accessed 15 April 2016; Gregory Korte and Tom Vanden Brook, 'Obama Takes Last Chance To Close Guantanamo Bay' *USA Today* (23 February 2016) <http://www.usatoday.com/story/news/politics/2016/02/23/obama-releases-plan-close-guantanamo-bay/80792250/> accessed 15 April 2016; Charlie Savage and Julie H. Davis, 'Obama Sends Plan To Close Guantanamo To Congress' *The New York Times* (23 February 2016) <http://www.nytimes.com/2016/02/24/us/politics/obama-guantanamo-bay.html?_r=0> accessed 15 April 2016; Anonymous, 'The Case For Closing – And Keeping Open – Guantanamo' *NPR* (6 March 2016) <http://www.npr.org/2016/03/06/469370724/the-case-for-closing-and-keeping-open-guantanamo> accessed 15 April 2016

rather more importantly the means employed to secure that end – and the authors strongly feel that it is not justified in any sense to commit such atrocious human right violations in retaliation of a crime you aren't sure they committed. The state needs to refrain from indulging in such a practice as otherwise the line of human development that separates a democratic nation like the USA from the nonconformist groups such as the Taliban or Al Qaeda, and if the state fails to reform in this manner to secure human rights protection to all members of the world community at large, history will brand both as being guilty in their conduct.

The Guantanámo Bay challenge is not only questioning the actions of particular officials of a particular nation, rather it is a challenge for humanity at large and therefore, we must all engage ourselves and ponder deeply over some of the questions raised in this article and engage in public debate about the possibilities of reformation of the system of detainee treatment and to ensure that such a criminal wrong does not repeat itself in future.

Protection of Rights of Human Right Defenders: A Step Towards Strengthening the Bottom up Approach

Prof. P Ishwara Bhat*

ABSTRACT

The obligation of protecting human rights cannot be endowed exclusively to the state. The duty to respect, protect, and fulfil human rights under the first and second generation human rights which involve so many positive obligations from the side of State and non-State actors are to be supported by the third generation human rights which stand for social solidarity and community action. Defending of human rights through the actions of individual, groups, institutions and organizations gained significant attention in late 1990s. Human rights defence is not a path of rosy flowers. In 1999, UN has set a new pattern human rights protection by strengthening the hands of the human rights defenders by enacting a Declaration. In this article, the author traces the genesis, importance, working and output of the duty perspective in human rights jurisprudence in general, and the rights, privileges and duties of human rights defenders in particular. The role of HRNGOs in protection of human rights at the international and national level will be briefly surveyed. In view of the Millennium Development Goal to be achieved with optimum human rights protection, the potential contribution of this Declaration has been assessed by the author.

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Introduction

Human rights are extremely important values that deserve special strategy of strong social defence. The responsibility of defending human rights cannot be entrusted solely to the state as it requires multi-centric approach and widespread social participation. Traditionally, a duty approach to human rights protection had moral, philosophic and social justifications. Focus on performance of duties by ideal behaviour rather than looking for its fruits constituted the ancient Indian model of karma approach to human rights.[1]

Duty well performed became the basis for enjoyment of rights. Juristically, in the Hohfeldian system of relations amidst Right-Duty, Liberty-No right, Power-Subjection and Immunity-Disability, the best starting point for optimal result is Duty.[2] Making the rights dependent upon power is experienced to be risky.But a solemn wish that 'Let all perform their duties, and rights get protected on their own' is a too simple a proposition unless meticulous preparation for duty performance at the grass root level is satisfactorily built up at the people's level. This reflects 'bottom up' approach in contrast to 'top down' model. Because human rights values are intimate principles pre-requisite for human dignity, welfare and social harmony and are not at the mercy of hierarchical power relations, the 'bottom up' approach is natural and logical.

In international human rights discourse, the duty perspective had been born along with the rights approach, but has remained a neglected concept. With the proliferation of human rights through various Declarations, Conventions and their expansive interpretation at the international, regional and domestic level, the duty perspective had only a dormant life. In 1975, Andrei Sakharov had viewed that the defence of human rights is the only sure basis for genuine and lasting international cooperation.[3] The duty to respect, protect, and fulfil human rights under the first and second generation human rights which involve so many positive obligations from the side of State and non-State actors are to be supported by the third generation human rights which stand for social solidarity and community action. Defending human rights through the actions of individual, groups, institutions and organizations gained significant attention in late 1990s.

Human rights defence is not a path of rosy flowers. It is strewn with thorns and stones – obstructions, harassments, denials and discouragements.In horizontal relations with fellow human beings or non-State actors, the defenders of human

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[1] Bhagavadgita, II. 47; see P Ishwara Bhat, *Fundamental Rights* (Kolkata Eastern Law House 2004) ch.3

[2] RWM Dias, *Jurisprudence* (New Delhi Aditya books, Fifth Ed. 1994) 43

[3] Nobel Lecture, December 11, 1975

rights face hostilities when they claim human rights on behalf of the victims. In vertical relations with the State, often they face harassment, arrest, malicious prosecutions, false allegations, police atrocity, seizure of property and inhuman treatment. The deliberate killing of right to information activists, threatening and silencing of human rights activists and harassment of members of the NGOs are the shocking instances frequently reported in crime columns.

In order to overcome these haunting problems, the General Assembly of the UN set a new pattern for human rights protection by strengthening the hands of the human rights defenders by enacting a Declaration in 1999.[4] The present paper traces the genesis, importance, working and output of the duty perspective in human rights jurisprudence in general, and the rights, privileges and duties of human rights defenders in particular. The role of HRNGOs in protection of human rights at the international and national level will be briefly surveyed. In view of the Millennium Development Goal to be achieved with optimum human rights protection, the potential contribution of this Declaration will be assessed.

The Rationale Behind Defending the Human Right Defenders

The responsibility towards vigilance as the price of liberty is not shouldered by all, but by the valiant who dare even personal harms. Repressive states have the strategy of crushing the fighters for rights by multitude means as demonstrated from the beginning of the mankind. The stories of John Lilburne, Bal Gangadhar Tilak, Vallabhbhai Patel, Jawaharlal Nehru, Martin Luther King, Nelsen Mandela, Jaya Prakash Narayan and millions of freedom fighters in India and all over the globe, who got the wrath of authorities that wield repressive measures, speak about the justification behind protecting the human right defenders. The stories of Bhanwari Devi, a social activist of Rajasthan and crusader against child marriage who was victim of revengeful gang rape in 1992;[5] of Razzak of Bangladesh; a bare foot petition writer for human right protection who was hunted by police in 2011;[6] of Dr. Binayak Sen who drew world's attention to human rights violations in Salwa Judum operations and saved *adivasis* from starvation deaths but jailed for sedition;[7]and of Vinayak Baliga of Mangalore, an RTI activist who unearthed through RTI queries facts of misappropriation of temple fund to

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[4] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1999

[5] *Vishala v State of Rajasthan* AIR 1997 SC

[6] 'The problem of Human Right Defenders under Repressive state'
<http://www.humanrights.asia/resources/journals-magazines/article2/1002/the-problems-of-human-rights-defenders-under-repressive-states> accessed 2 April 2016

[7]' Who is Binayak Sen' <http://timesofindia.indiatimes.com/india/Who-is-Dr-Binayak-Sen/articleshow/7156373.cms>accessed 2 April 2016

the tune of Rs. 9 crores, but got murdered in 2016[8] speak about the need for protection of human rights activists as part of society's preparedness in the mission of human rights protection.[9]

Human rights defenders perform highly important and legitimate functions in democratic societies but are exposed to serious risks and targets of human right abuses. Since they are vulnerable against the mighty state or tyrant power holder of the locality in the hierarchic society, there is special need for their defence.[10]At the international, national and local levels, they face the challenges like false cases, unjustified arrests, confiscation of property and harassment of family members. Cruel treatment in the hands of private power holders, especially vested economic interests and fond saviours of old guard await in their path.

Many a time, championing for human rights is combating against traditional patriarchy and feudalism and forces that obstruct social transformation. The predicaments faced by Raja Ram Mohan Roy, Ishwara Chandra Vidyasagar, Jyotiba Phule, Pandit Ramabai, Kamaladevi Chattopadhyaya, Gandhiji and host of social reformers got repeated when they took up the cause of social reforms. Social organizations like All India Women Conference, SEVA, Partnership with Law for Development and Manushi, wrestle against harmful superstitions and for promotion of gender justice[11] in trying circumstances. Fearless expression of views and criticisms of governmental policies and undesirable social practices is a great force that carries the struggle against challenges. Infusing strength and courage for building psychological confidence is vital for radical approach of the social organizations.[12] Withholding of funding facility and initiation of legal action against Green Peace and Teesta Setalvad have raised new issues.[13] Detention and police case against Medha Patkar, Arundhati Roy and Narayan Reddy have exhibited intolerance against human rights defence.[14] Police firing, encounters

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[8] *The Indian Express,* 2 April, 2016

[9] 'Binayak Sen gets bail by supreme Court' <http://www.thehindu.com/news/national/binayak-sen-gets-bail-in-supreme-court/article1698939.ece> accessed 2 April 2016

[10] SRHR Defenders <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Challenges.aspx> accessed 2 April 2016

[11] P. Ishwara Bhat, *Law and Social Transformation in India* (Lucknow: Eastern Book Co., 2009) ch. 2

[12] Aparna Basu and Bharati Ray, *Women's Struggle* (New Delhi: Manohar, 2003); Daniel W Crowell, *The SEVA Movement and Rural Development* (New Delhi: SAGE Publications, 2003); Madu Purnima Koshwar, *Zealous Reformers, Deadly Laws: Battling Stereotypes* (New Delhi: SAGE Publications, 2008)

[13] 'SC asks Gujarat police to share details of documents with Teesta' <http://indianexpress.com/article/india/india-others/sc-asks-gujarat-police-to-share-details-of-documents-with-teesta/> accessed 2 April 2016

[14] Rajni Malhotra Dhingra, 'NGOs and Protection of Human Rights'(New Delhi: Deep and Deep Publications, 2011) 194-213; <http://www.thehindu.com/news/national/no-relief-from-court-appearence-for-arundhati-roy/article8139542.ece> accessed 2 April 2016

against agitators, stoppage of financial grants, blacklisting of NGOs, and restraints against associations have been barriers to human rights defenders.[15] Going beyond survival, helping through education, micro finance, health measures, food security and rural development is the path of human right defence. Ultimately, strong forts of human rights can be built only by emboldening the social mind.

Human right defenders have close contact with the society and are able to detect human right violations and identify the appropriate paths of remedies. P.N.Bhagwati, CJI observed,

"If we want to secure people's participation and involvement in the legal aid programme, we think the best way of securing it is to operate through voluntary organizations and social action groups. These organizations are working amidst the deprived and vulnerable sections of the community at the grass root level and they know the problems and difficulties encountered by these neglected sections of Indian humanity. They have their finger on peoples pulse and they know from their own experience as to what are the unmet legal needs"[16]

On the whole, there are multiple justifications defending the human rights defenders.

The Pre-1999 Position

The social efforts to build up the human rights system and activate it for the benefit of the people at large are chronicled in several narratives suggesting the strong bond between Human Rights NGOs and dynamism of human right movement. The footwork of large number of HRNGOs beneath the mass movements from time to time in various countries has carried the struggle ahead and also shows the path for the future.[17]

HRNGOs gain legitimacy from the Preamble to the Universal Declaration of Human Rights, 1948 which proclaims that 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive through teaching and education to promote respect for human rights and take the necessary measures to secure their universal and effective recognition and observance.' UDHR operates as a frame of reference to HRNGO activism.[18] Universal

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[15] Rajni Malhotra Dhingra, 'NGOs and Protection of Human Rights'(New Delhi: Deep and Deep Publications, 2011) 194-213; <http://www.thehindu.com/news/national/no-relief-from-court-appearence-for-arundhati-roy/article8139542.ece> accessed 2 April 2016

[16] P.N Bhagwati, CJI

[17] Upendra Baxi, *The Future of Human Rights*, (New Delhi: Oxford University Press, 2002) p.45

[18] Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009) 19

Periodic Review contemplates reporting about human rights compliance scenario in member countries of UN by involving the stakeholders, State and the NGOs.[19] The regional Human Right Conventions recognise the competence of NGOs also to complain to the respective Human Rights Commissions and Courts about violation of human rights and request for victim protection.[20] Recognition of freedom of association has boosted up their morale.[21] Because of the increased involvement of NGOs in human development activity in recent times, a new dimension of human rights is made dynamic.

The Declaration on the Right to Development, 1986 states, "The right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedom can be fully realized".[22]

The development model chosen is reflected in Art. 2.1, which states,

"The human person is the central subject of development and should be the active participant and beneficiary of the right to development."

The Preamble to the Declaration states that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and of all the individuals on the basis of their active, free and meaningful participation. Amartya Sen looks at development as a process of expanding freedoms that people enjoy. Sen observes; "Development requires the removal of major sources of freedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive state."[23] Caring actions of human rights defenders greatly facilitate development based human rights.[24]

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[19] Universal Periodic Review Process, UN A/ HRC/8 L. 1

[20] European Convention on Human Rights; African Charter on Human and People's Rights 1981,art 5[3]

[21] UDHR, art 20 ; ICCPR, art 22; CERD, art 7; CRC, art 15; CRPD, art 29; ICRMW, art 16

[22] The Declaration on the Right to Development, 1986, art 1.1

[23] Amartya Sen, *Development as Freedom(*New Delhi: Oxford University Press, 2000) 3 [24] K.S.Krishnasami opines that most NGOs, in reaching out to the dispossessed and needy, go by the values and policies of industrialized societies, and by sponsored projects keep certain kinds of dependency, which shall be avoided by greater participation by the concerned people. Krishnasami, K.S., 'Organizational Basis of Human Rights' in (Ed.) ChiranjiviJ.Nirmal, *Human Rights in India*, New Delhi: Oxford University Press, 2000 p. 207

Article I.13 of the Vienna Declaration and Programme of Actions, adopted by the World Conference on Human Rights in 1993 provides[25], *"There is a need for state and international organizations, in co-operation with Non-Governmental Organizations, to create favourable conditions at the national, regional and international level to ensure the full and effective enjoyment of human rights. States should eliminate all violations of human rights and their causes, as well as obstacles to the enjoyment of these rights.*[26]*"*

Article I. 38 contemplates contribution of NGOs through bringing public awareness of human rights issues, education, training and research, and involvement in standard setting in support of States with continued dialogue and cooperation. It also states, "Non-governmental organizations and their members genuinely involved in the field of human rights should enjoy the rights and freedoms recognised in the Universal Declaration of Human Rights, and the protection of the national laws. These rights and freedoms may not be exercised contrary to the purpose and principles of the United Nations. Non-governmental organizations should be free to carry their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights." In regional human rights guarantees, the role of HRNGOs is also contemplated.[27]

The Declaration of Rights of Human Rights Defenders, 1999

In 1999, a breakthrough development took place when the General assembly took note of the resolution of the Commission of Human Rights and ECOSOC resolution of 1998 and considering that for promotion and protection of all human rights and fundamental freedoms for all persons in all countries of the world, the rights and responsibility of individuals, groups and organs of society are crucial, formulated a Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1999 of which is popularly called as Declaration of Rights of Human Rights Defenders.[28]

According to Article 1 of the Declaration; "Everyone has the right, individually and in association with others, to promote and strive for the protection and

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[25] The Vienna Declaration and Programme of Actions, adopted by the World Conference on Human Rights in 1993, at I.13

[26] Ibid

[27] Anna Karnikova, 'Do They Really Matter? The Impact of NGOs on the European Instrument of Democracy and Human Rights' Vol. 20 Perspectives2012 pp. 83-109

[28] UN General Assembly, A/RES/53/144 8 March 1999

realization of human rights and fundamental freedoms at the national and international levels."[29]

The nature of activities and the role to be donned by the NPVOs has been hinted in Article 16 which states;*"Individuals, non-governmental organizations and relevant institutions have an important role to play in contributing to making the public more aware of questions relating to all human rights and fundamental freedoms through activities such as education, training and research in these areas to strengthen further, inter alia, understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities."*[30]

They also have the role and responsibility in safeguarding democracy, its institution and processes by promoting basic freedoms (Article 18 [2]).[31]

Each State has the prime responsibility and duty to create necessary social, economic, political and other conditions as required to ensure that all are able to enjoy human rights and adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed.[32] In view of the fact that repressive measures against the human rights activists by the States, which are intolerant of getting bad image, have snowballing adverse effect, positive and binding steps by the States are quite significant. Synchronization of domestic law with international law is another policy that adds to the capability for human rights protection.[33] In light of post-Bangalore Principles and Vishaka line of cases, this proposition becomes a reality.[34]

Specific rights of human rights defenders laid down in the Declaration can be catalogued as follows: firstly, application of freedom of assembly and association is tower of strength for human rights defence.

As per Article 5; "For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (*a*) To meet or assemble

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[29] The Declaration of Rights of Human Rights Defenders, 1999, art 1

[30] The Declaration of Rights of Human Rights Defenders, 1999, art 16

[31] Ibid, art 18(2)

[32] Ibid, art 2 (1),(2); see <www.osce.org/odihr>accessed 1 April 2016; also see <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Challenges.aspx> accessed 1 April, 2016

[33] The Declaration of Rights of Human Rights Defenders, 1999, art 3

[34] *Vishaka v State of Rajasthan*, AIR 1997 SC 3011

peacefully; (*b*) To form, join and participate in non-governmental organizations, associations or groups; (*c*) To communicate with non-governmental or intergovernmental organizations."

This right comprehends all the dimensions of right of peaceable assembling (including demonstrations, processions and expression of collective demands) and associational freedom including right to form, continue and participate including right not to associate and right against coerced union.[35] Like other rights enumerated in the Declaration, this right is also subject only to 'such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.'[36] The expression, 'just requirements' attracts the concept of reasonableness and proportionality. But the ground of 'morality' has potentiality of mischief by excluding associational right on vague and orthodox reasons.[37]

Secondly, it declares expressional freedom as a part of human right defence. According to Article 6 everyone has the right, individually and in association with others[38] (a) to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in legislative, judicial or administrative systems; (b) as provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; (c) to study, discuss, form and hold opinions on the observance, both in law and practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.[39] Article 7 refers to the right to develop and discuss new human rights ideas and principles and advocate their acceptance. Since growth of new human rights occurs through public discourse Article 7 has substantive significance. Under Article 14, as a corollary to the right under Article 7, the State has the responsibility of promoting the understanding of all human rights amidst all persons by various means such as[40]: (a) publication and widespread availability of national laws and regulations

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[35] See Gail L M Mosse, 'US Constitutional Freedom of Association: Its Potential for Human Rights NGOs at Home and Abroad' (1997) 19 'Human Rights Quarterly'738-812

[36] The Declaration of Rights of Human Rights Defenders, 1999, art 17

[37] *Ibid*

[38] The Declaration of Rights of Human Rights Defenders, 1999, art 6

[39] Ibid, art 6

[40]Ibid, art 7

and of applicable international human rights instruments; (b) full and equal access to international documents in the field of human rights, including the periodic reports and summary records of discussions and official reports; (c) creation and development of national institutions (like human rights commission or ombudsmen) for promotion and protection of human rights.[41]

The State also has the responsibility to promote and facilitate the teaching of human rights and freedoms at all levels of education and to ensure that training of lawyers, law enforcement officers, personnel of the armed forces and public officials includes appropriate elements of human rights (Article 15).[42] Thus, building a human rights conscious society with full understanding and insight of human rights is the objective of this international human rights instrument.

Thirdly, protection against discrimination and oppression is another important right of human rights defenders. Article 8 (1) states; *"Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs."*[43] As per Article 10; *"No one shall participate, by act or failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so."*[44] These are important measures against victimization of human right defenders.

Fourthly, pursuing of human right protection through various means is an essential right of human right defenders. As per Article 8 right to participate in the government of the country, and in the conduct of public affairs; right to submit to governmental bodies and public affairs organizations criticism and proposals for improving their functioning; and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms. Article 12 (1) says, *"Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.*[45]*"* States have responsibility to take all necessary measures to protect through competent authority against any violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of the exercise of rights under the Declaration. Protection of human right defenders

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[41] Ibid

[42] Ibid, art 15

[43] The Declaration of Rights of Human Rights Defenders, 1999, art 8(1)

[44] The Declaration of Rights of Human Rights Defenders, 1999, art 10

[45] Ibid, art 12(1)

against violence perpetrated by groups or individuals that affect the enjoyment of human rights is also contemplated.[46]

Fifthly, undisturbed enjoyment of lawful exercise of freedom of profession and occupation allows the defenders of human rights to be fearless in their pursuit for human rights. The declaration denies the scope for abuse of these rights which so that human dignity, human rights and fundamental freedoms are not put into jeopardy.[47]

Sixthly, the Declaration makes a significant provision that links charity to human rights. Article 13 states; "Everyone has the right, individually and in association with others, to solicit, receive and utilize resources for the express purpose of promoting and protecting human rights and fundamental freedoms, through peaceful means, in accordance with Article 3 of this Declaration." In fact, charitable institutions for food, health and education and supporting the disabled persons, orphan children, shelter-less women and the aged people render a great service in practical life. While the vocal and vibrant NGO role is appreciated, the silent and meaningful service of charitable institutions need to be greatly emphasized.

Finally, the Declaration provides for right to effective remedy and right to be protected in the event of violation of rights referred in the Declaration (Article 9[1]). For this purpose, everyone whose rights and freedoms are allegedly violated has the right, either in person or through legally authorised representation, to complain to and have the complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other legal authority and to obtain its decision without undue delay. [48]

The remedies include compensation and enforcement of rights. The incidental rights include right to attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments (Article 9 [3] b); to provide and offer professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms (Article 9 [3]c); and right to unhindered access to and communication with international bodies who have competence to receive and consider the communications (Article 9[4]).

The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation

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[46] Ibid, art 12(3)

[47] Ibid, art 12

[48] Ibid, art 9(1)

of human rights and fundamental freedoms has occurred in any territory under its jurisdiction (Article 9[5]).

The Declaration of Rights of Human Rights Defenders has a comprehensive policy of persuading for performance of duties. As per Article 18 (1);*"Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible."*[49] The individuals, groups, institutions, and NGOs have role and responsibility in contributing to promotion of a just social and international order contemplated in the UDHR.[50] Their acts shall also conform to the provisions of the Charter of the United Nations.[51]

After the Bangalore Principles 1988 and *Vishaka* series of cases, the international human rights instruments have binding character upon the court system undermining the specific adoption theory.[52] Hence, it becomes imperative upon courts to accommodate the claims of human rights defenders in human right litigations.

Experience About the Role of Human Rights NGOs

Human Rights NGOs watch and respond to human rights violations, depending upon extent of their concern or enthusiasm and gravity of violation. As human rights workers and public opinion creators, their activities range from norm creation to norm implementation in the human rights realm.[53] They devote considerable time and resources to activities designed to influence the human rights policies of various countries[54] NGOs constitute important public forum with emancipative potentialities in so far as human rights advocacy and awareness is concerned. The strength of unity flowing in human organizations, in fact, reflect collectivity

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[49] Ibid, art 18(1)

[50] Ibid

[51] Ibid, art 20

[52] *Vishaka v State of Rajasthan* AIR (1997) SC 3011; *NilabatiBeheravState of Orissa* AIR (1993) SC 1960

[53] Upendra Baxi lists their tasks as follows: (i) Future- inventing, i.e., innovating social consciousness towards new vision of human future. E.g., questioning racialism, colonialism, gender discrimination and environmental degradation. (ii) Agenda-setting, i.e., projecting the conception of alternate just as well as caring human future. E.g., feminist movement and environment protection movement. (iii) Norm-creative, i.e., acting as first draftspersons and co-authors of human rights enunciations. E.g., Red Cross' role in developing international humanitarian law with a catena of human rights. (iv) Implementational, which involves a variety of tasks such as investigating, exposing, lobbying, and litigating with the help of media and profession. (v) Solidarity i.e., sustaining and empowering national and local level rights activism against practices of cruelty.(Baxi, 2002, p.49)

[54] AshishChandra, *Human Rights Activism and Role of NGOs*(Delhi: Rajat Publications, 2000) 22

of individual rights and group rights, and comes to their rescue when challenged. The state or market or any private force might have posed such challenges. But civil society is able to negotiate with and neutralize the oppression through collective action.

Internationally, organizations like International Red Cross Society, Amnesty International, International Council for Voluntary Agencies (ICVA), American Refugee Committee, World Vision Inc, World Concern International, Save the Children Federation, Refugee international, and CARE have made immense contribution to the cause of human rights.

The Human Rights NGOs which use Public Interest Litigation as a method of redressing the human rights violations can be found in the following categories:

1. NGOs for human rights. E.g. All India Joint Women's Programme, Sahana, Manushi, Mahila Dakshita Samithi have litigated for stay against glorification of *Sati*, prosecution of dowry death inflictors, for remedies to rape victims and for release of kidnapped women.[55]

2. NGOs for workers' rights. E.g. BandhuaMuktiMorcha, People's Union for Democratic Rights, Labourers, Salal Hydro Electric project have fought litigations for emancipation of bonded labourers and child workers.[56]

3. NGOs for due process rights. E.g. People's Union for Civil Liberties, Common cause and others have litigated for better protection of rights of accused persons, prison reforms and protection against custodial cruelty.[57]

4. NGOs for health. E.g. Common cause, PB KhetMazdoorSangh, Consumer Education and Research Centre have pursued right to health through judicial remedy.[58]

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[55] *Joint Women's Programme v State of Rajasthan* AIR 1987 SC 2060, prevention of glorification of sati (*All India Democratic Women's Association v Union of India* AIR 1989 SC 1280), non-implementation of PNDT Act resulting in continuance of female foeticide (*CEHAT v Union of India*) unjustified acquittal in cases relating to rape (*Delhi Domestic Working Women's Forum v Union of India* (1995) 1 SCC 14*, State of Maharastra v C.K. Jain,* AIR 1990 SC 658), and brutal beating of women and children by police (*SAHELIvUnion of India* AIR 1990 SC 513)

[56] *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 583, 802; AIR 1997 SC 2218; *Labourers, Salal Hydro Project v State of Jammu and Kashmir*, AIR 1984 SC 177; *Peoples Union for Democratic rights v Union of India,* AIR 1982 SC 1473; *Consumer Education Research CentrevUnion of India*, AIR 1995 SC 922

[57] *People's Union for Civil Liberties v Union Of India* WP (Cr) 612 of 1992; *People's Union for Civil Liberties v State of U.P*. 1991 (2) SCALE 463, *People's Union for Civil LibertiesvPolice Commissioner* 1989 (1) Scale 114 (599)

[58] *P.B.Khet Mazdoor Samiti v State of West Bengal* AIR 1996 SC 2426; *Consumer Education Research Center v Union of India* AIR 1995 SC 922

5. NGOs for protection of indigenous people. E.g. Samatha, BanawasiSeva Ashram, Narmada BachaoAndolan have litigated for protection of tribals in case of eviction or against deforestation.[59]

6. NGOs for environmental protection are numerous. Rural Litigation and Entitlement Kendra, Vellore Citizens' Welfare Fund, Bhopal Gas Peedit Udyogi Mahila Sanghatan, Indian Enviro-Legal Education, Worldwide Wildlife Fund Narmada BachaoAndolan and others have litigated on a variety of issues relating to environment protection.[60]

The above constitutional developments indicate the means, modalities and strategies used by the human right NGOs in India.

Conclusion

There has been a growing realization that collective efforts for human rights defence are vital for human right protection.Conceptually, their linkage with human rights gives sound societal foundation for human rights. It reinforces the goals of social justice and multiculturalism hinged to human rights values. Individually and collectively, the human rights defenders have both rights and duties to make use of the resources and opportunities to face the challenges in a most radical way.

In view of harassment of human rights defenders and varieties of roadblocks on their efforts, empowering them morally, socially, and politically has attained tremendous significance. Both the international and national level NGOs have been involved in advocacy, grievance relief and developmental functions, which are essential for sound human rights jurisprudence and practice. Indian judiciary's activist role in human rights domain is matched and complemented by an activist role of NGOs. Recognition of legal space for their human rights advocacy and championing has reinforced their competence.

Like State, NGOs are also subject to human rights obligations, and obligation to conduct their affairs in a fair manner. The future of human rights depends upon their fair actions and wide, genuine and intensive commitment to the human rights values. The bottom up approach snowballing in this way has a potentiality of highly positive contribution. Supplementing the legal enforcement, the social support system goes a long way in effective protection of human rights.

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[59] *Banawasi Seva Ashram v State of U.P.* AIR 1992 SC 920; *SamatavState of A.P.* (1997) 2 SCJ 539; *Nagarahole Budakattu Hakku Sthapana Samiti v State of Karnataka*, AIR 1997 Kant. 288; *Narmada BachaoAndolanvUnion of India*, AIR 1999 SC 3345

[60] *Vellore Citizens Welfare Forum vUnion of India* AIR 1996 SC 2715; *Indian Council for Enviro-Legal Action* v*Union of India* AIR 1996 SCW 1069; *Rural Litigation and Entitlement Kendra* v. *State of Uttar Pradesh* AIR 1985 SC 652; *Tarun Bharat Sangh v Union of India* AIR 1992 SC 514

Gender Justice: Recent Developments in the Women's Right to Temple Entry- A Human Rights Perspective

Prof. (Dr.) B. Hydervali*

ABSTRACT

India is a multi-cultural, multi lingual, multi religious and multi superstitious country. The history of India is replete with instances of stories full of superstitious beliefs and customs that result in shocking and shameful violation of woman's human rights. They are more used and practised in our society since times immemorial, though we are living in a scientific era; practice like female foeticide, infanticide, honour killings, denial of entry to a temple are constant if not increasing incidence violence on women as well as consistent assaults on women's right to life and personal liberty have made them victims of patriarchal society. In this context this paper seeks to analyse the demands of woman's right to temple entry in the back drop of international and national legal frame work in through active social movement accompanied by legal reforms properly enforced with the help of law and a sympathetic judiciary to protect women from discrimination and neglect. Can women who could show competence in the Vedas and the temple rituals stake a claim to priestly roles in temples administered by the State Governments? The freedom ' to have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief ,including interalia a right to replace one's religion or belief with another or to adopt atheistic views ,as well as the right to one's region or belief. The long journey to universal respect of basic human rights will be advanced. Judges, lawyers

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and civil society have a duty to familiarise themselves with growing international jurisprudence of human rights. In this way the noble words of international instruments will be translated in to reality for the benefit of not only of the people we serve, but also of the people in every land.

Introduction

Human rights which are also sometimes referred to as natural rights or fundamental rights are those rights which are essentially basic in character for living a dignified human life. These are the rights that a human being possess right from birth irrespective of his or her nationality, race, religion, sex ,colour, simply and only because he or she is a human being.

Discrimination in the recognition and exercise of these rights on the basis of gender reveals to us an ugly face of the society. But the issue has been in discussion at local and global levels since ages and the society till today has not been able to rise above it. The truth of the matter is that gender discrimination is a form of travesty of social justice and equality, for women, who for work for two-third of the world's working hours and earn just one-tenth of the world's property and remain victim of inequality and injustice. As the human development becomes centre of discussion in this rapidly globalizing world, gender discrimination presents serious challenge in ensuring human dignity equality and gender equity which though amongst the most subtle, is one of the most all-pervading forms of institutional deprivation.

Indian mythology has always placed women on a rather higher pedestal. It tells us of the goddess of learning (*Saraswathi*), the goddess of power (*Parvathi*) and the goddess of wealth (*Laxmi*). Indian philosophical tradition too, has always laid much in store by its women philosophers, such as *Gargi*and *Maitri*, who were great authorities on the *Rigveda* and *Yajurveda* in the days of Yagnavalkya. Manu, one of the greatest Hindu sages, and the author of the *Manu Samhita* wrote, Where Women are honoured there the Gods feel delighted.

On the other hand, we have the same Manu displaying in his work, the *Manu Smriti*, contempt towards women, denigrating them as slaves. It was in those days when women were considered to be devoid of intellect, and at the same time, men, occupying a dominant position, had denied them any learning.

The Constitution of India adopted in 1950 not only grants equality to women, but also empowers the state to adopt measures of affirmative discrimination in favour of women. Our country has come a long way in narrowing this gap between men and women with Constitutional provisions such as Articles 14, 16, 39 and 51A,

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW). However, the recent, yet historical controversies that have arisen in the domains of temple entry and gender justice have left us thinking if achieving such a goal in possible or merely elusive.

Gender relations need to be measured in the context of participation and sharing of the important decision-making process that results in above inequalities. Such a measure would help to identify the differing degrees of inequality in terms of age, income levels and geographical location.

The United Nations and Women's Rights

The Division for the Advancement of Women (DAW), the office of the United Nations which develops policy advice for the promotion of women's rights and assists the Committee on the Elimination of Discrimination Against Women, as well as the Committee on the Status of Women, has done a remarkable work for elimination of all forms of gender discriminations. The Convention on Elimination of all forms of Discriminations Against Women (CEDAW) entitles individuals or groups, to submit claims of violations of the convention's terms to the committee on Elimination of Discrimination against women[1]. The committee for Elimination of Discrimination against women, under this Convention, has the power to enquire into the alleged violations of Convention. The total number of states to the present convention stands at 170, while 47 have ratified or acceded to the optional protocol (the optional protocol entered into force in December 2000). The United Nations Division for advancement of Women in 2004 organised a judicial colloquium on the application of the international Human rights law at the domestic level and to reiterate and discuss on the gender equality issue after 20 years of the Convention coming into force. The world leaders, in the Millennium declaration of this summit reiterated to promote gender equality and declared gender equality as one of the basic goal in the 21stcentury. The principles of gender equality and gender equity have been central to the Indian society which started around social issues in 19th century and later spread to the struggle for freedom itself.

The Ground Realities: Mirage of Gender Justice

Although these rights are guaranteed equally to men and women, there are several ways in which the structure of the family and existence of several inequitable customs and practices serve to deprive women of these rights. In particular,

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[1] *Air India v Nergesh Meerza* (1981) 4 SCC 355; *Vishaka v State of Rajasthan* (1999) 6 SCC 241; *Apparel Export Promotion Council v A.K. Chopra* (1991) 1 SCC 759

discrimination occurs within the family where norms regarding women's secondary status are reinforced in children from birth, for instance, preferential status to son is one of the key aspects underlying social values that views girls as a burden. Women are viewed as dependents within the family and face severe restrictions on their mobility, which further impede their ability to gain access to education, economic opportunities, to move freely and settle anywhere, to form unions or groups and soon which are all fundamental freedoms under the Indian constitution. Freedom of speech and expression is often denied to women within the family, and women are kept out of the decision making process within the community and state institutions. Cultural norms regarding appropriate behaviour for women and children often reinforce images of docility, passivity and subservience, severely curtailing women the exposure and require for participating on an equal footing with men in public life. Practice like female foeticide, infanticide, honour killings, denial of entry to a temple and constant if not increasing incidences of violence on women as well as consistent assaults on women's right to life and personal liberty.

Women's right to Temple entry- Social and Legal Issues

For centuries temples and shrines in India have used 'traditions' to keep women out, but women in India are increasingly fighting for their right to worship. M.S Desai, Bombay based social activist in feminism, who described herself as practising and believing in Hinduism says that it is her constitutional right to enter any temple and patriarchy is main culprit for keeping them out. She claimed that these are man-made traditions; because god does not differentiate man and woman. Dr. Ambedkar in 1934 said that if the Hindu religion is to be their religion, and one of social equality... the mere amendment of Hindu religious Code, by the mere inclusion in it of a provision to permit temple entry for all [women and untouchables] can't make it a religion of equality of social status. All that it can do so is to treat our people as nationals and not aliens. What is required is to purge it of doctrine of *chaturvarna* and the caste system as incompatible with self-respect of the depressed classes. The caste system is to be abandoned and expunged from the Hindu *shastras*. Do Indian political and legal system and reformers accept their goal and will they show courage to work for it? To accept temple entry and be content with it is to temporise with evil and barter away the sacredness of human personality that dwells in him. However he did not launch the temple entry movement because he wanted the depressed classes to become worshippers of or become worshippers of idols which they were prevented from worshipping or because he believed temple entry would make them equal members in an integral part of the Hindu society.

Echoing Dr. Ambedkar's views on temple entry by untouchables, it was held in the case of *The State of Bombay vs Shastri Yagna Purushadasji*, Satsangis or members belonging to the Swaminarayan Sampradaya have got the right to profess, practise and propagate their faith, and that right would be interfered with if non-Satsangi Hindus including the Harijans are allowed entry into the suit temples.[2] In S.R Bommai V Union of India[3] a nine –judge bench of the Supreme Court referred to the concept of secularism in Indian context. According to Sawant,J.

"... Religious tolerance and equal treatment of all religious groups and protection of their life and property and of places of their worship are essential part of secularism enshrined in our constitution..."

B. P. Jeevan Reddy, observed:

".... While the citizens of this country are free to profess, practice and propagate such religion, faith or belief as they choose. So far as the state is concerned, i.e., from the point of view of the state, the religion, faith or belief of a person is immaterial. To it all are equal and all are entitled to be treated equally".

The concept of secularism is not merely a passive attitude of religious tolerance. It is also a positive concept of equal treatment of all religions. Article 25[2] of the Constitution of India says that the state can throw open Hindu religious institutions of public character to all sections of the Hindus. Article 25[2] [b] enables the state to take steps to remove the scourge of untouchability from amongst the Hindus. It also protects the right to enter a temple for the purpose of worship. This however is not an unlimited right. Thus for instance, no Hindu can claim, as part of the right protected by Art 25[2][b], that a temple must be kept open for worship at all hours of the day and night or that he should personally perform those religious services in a temple which the *archakas* or *pujaris* alone are entitled to perform. The courts have recognised the need to place some limitations on the right conferred by Art 25[2] [b], particularly, with a view to harmonise this right with that protected by Art 26[b].[4] According to Bidu Bhusan Dash, human rights are fore closed for dalits, as they are still prevented from entering public places of worship in India. Though unconstitutional, this practice is prevalent. Dalits being harassed for trying to enter a temple in a coastal village of Odisha was widely covered by the media[5].

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[2] (1959) 61 BOM .LR 700

[3] AIR 1994 SC 1918

[4] *Sri Venkataramana Devaru V State of Mysore,* AIR 1958 SC 255.

The unconstitutional ban on women in temples had been challenged before the Supreme Court in 2012. In the hearing**,** Justice Dipak Misra questioned how women could be kept out of temples since 'God do not discriminate between men and women'. In other words what is the basis on which women have been denied entry into temples? The court observed that anyone can worship god, he is omnipresent.

'The three-judge bench of Justices Dipak Misra, Pinaki Chandra Ghose and NV Ramana observed. 'what right does temple have to forbid women from entering any part of temple, on bedrock of Constitution,' In the defence, Sabarimala priests say women are barred because the temple deity- Lord Ayyappa was a bachelor. Similarly Satara based lawyer and social activist V. Deshpande, who in 2013 led a group of 10 women into another temple for Hindu God Sani, says the temple authorities told them women are not allowed in because Lord Sani does not like women. As it is not just Hindus, Muslim women too are fighting for access to the popular 15th century *Haji Ali Mosque* in Mumbai. What is most striking is that Muslim women were allowed into the mosque's Mausoleums until 2011, when the trust decided that close female proximity to the tomb of a renowned saint was a 'grievous sin' in Islam. In justifying their decision, they stated that this practice is as such governed by Constitution law and particularly Article 26 of the Constitution which confers upon the Trust; a fundamental right to manage its own affairs of religion and as such interference is uncalled for by any third agency.[6] Therefore all religions are discriminatory towards them. It is to be noted in this context that religion is not meant for women. It is meant to exploit them. We, therefore, should reject all religions which are dominated by patriarchal ideas notions and who should have our own religion of women hood that strengthens women's empowerment by virtue of millennium development goals of United Nations in 2015.

In a big victory to the campaign for gender equality, the *Shani Shingnapur* temple in Maharashtra on 8th April 2016 lifted the 400 year old ban on entry of women at the sanctum sanctorum yielding to a crusade by activists and court directions. Soon after the temple trust announced the decision to facilitate unrestricted entry to all devotees to the core area of shrine, some women entered sacred spot and offered worship[7].

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[5] Bidu Bhusan Dash, Ethnographic study of Media Articulation, Jn of Asia pacific Media educator, June 2013 no 16 Pp.63-84.

[6]*See* 'Six places of worship in India that deny entry to women' (DNA India, 1 April 2016).

[7]*See*'400-year-old ban on woman at Shani Temple goes' (The Hindu, 9 April ,2016)

On April 1st 2016, the Bombay High Court held that it was the women's fundamental right to go to the places of worship and government was duty bound to protect it. It suggested that there needs to be a debate if entry of women is banned there merely due to blind faith or because of scientific reasons. A division bench headed by Chief Justice D.H. Waghela observed that women have the Fundamental Right to enter any place of worship where men too are allowed, and it was the Government's duty to ensure that this right was protected. The bench said "There is no law that prevents entry of women in any place. If you allow men, then you should allow women also. If a male can go and pray before the deity, why not women? It is the State government's duty to protect the rights of women".[8] The Bench said if temple authorities impose restrictions on someone's entry in a religious place, they could face six months' imprisonment as per the Maharashtra law. The Court had also ordered the State Government to ensure the strict implementation of the Maharashtra Hindu Places of Worship (Entry Authorization) Act, 1956. As per the Act, prohibiting any person from entering a temple would attract six months in jail. The directions were given hearing public interest litigation by senior advocate Nilima Vartak and social activist Vidya Bal challenging the prohibition of entry of women in temples like the *Shani Shingnapur* in Maharashtra. Terming the decision as wise decision feminist and social activist from Bombay Ms Desai told PTI: '*der se aye lelkindurusta aye'* [it was late but in the end correct decision]. The Bombay Chief Minister of Maharashtra Mr. Devendra Fadnavis said that discrimination was never part of Indian culture or *Sanatan dharma*. It is hoped that the trustees of *Trimbakeshwar* and *Mahalalakshmi* temples in Nasik and Kolhapur would make similar decisions. The government has pledged to the Bombay High Court that it will enforce a law that comes with six months in jail for preventing someone from offering prayers at a temple.[9] How long can these places of worship keep women outside? *Shani Shingnapur* victory shows that women have an upper hand and soon they may gain legitimate entry into these places.[10]

This is not just the case in Maharashtra. Kerala's Sabarimala temple too follows the practice of banning women of menstrual age from entering the temple premises. The State Government has been unsure about its stand on the ban of women's temple entry—in its latest affidavit, it had said that the prohibition of women is a matter of religion and it is duty-bound to protect the right to practice

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[8] *See* 'If Men Are Allowed in Place of Worship, Allow Women Also: Bombay HC' (The New Indian Express, 30 March 2016)

[9] *See* 'It is State's duty to protect fundamental rights of women: Bombay High Court' (The Indian Express, 2 April, 2016)

[10] *See* 'Women at the gate: Can Sabarimala continue to ban entry for women?' (IBNLive, 8 April 2016)

the religion of these devotees, but in its previous affidavit, it had supported a Public Interest Litigation seeking women's entry in Sabarimala.

The Supreme Court on 12th February 2016 had questioned this practice and deliberated if man-made customs can prescribe such prohibition when the God does not discriminate between men and women. The Supreme Court bench, which was led by Justice Dipak Misra said that the court would examine this issue on "constitutional parameters", and adjudge whether such a practice was "intricately fundamental" to religious customs and hence cannot be interfered with[11]. The bench had noted "The God does not discriminate between men and women, so why should there be gender discrimination in the premises of the temple? How can you stop the mother from entering the temple?" The Court made it clear that there is a difference between a temple meant for the public to worship and a mutt and unless they have a constitutional right that prohibits women entry, they cannot prevent them from worshipping at the shrine.[12] In a related development the Supreme Court on 12th April 2016 says that ban on women entering Sabarimala temple is considered grave. It observed that:

"God is everywhere but if a woman finds her faith in a temple idol, how can tradition stand in the way of her right to worship? This question was posed by the Supreme Court to the Sabarimala authorities on the "class grievance" of women denied entry at the Kerala temple, presided over by a celibate deity."

Justice Dipak Misra said that: "Any god or goddess can be worshipped anywhere by anyone. The power is all around us, omniscient. But you have structured god into an idol. Women want to come to your temple and worship him there ... Why you don't allow them".

The Bench, also comprising Justices V. Gopala Gowda and Kurian Joseph, is hearing a petition filed by the Indian Young Lawyers Association and five women lawyers seeking a direction to allow the entry of women in the Sabarimala Ayyappa temple without age restriction. Women in the age group of 10-50 are not allowed entry.

The ban, as Justice Misra observed, is considered "grave" as it endangers gender justice. "There is this tradition, we understand, of not allowing women of a certain age. But what we will decide is whether this tradition, this source of the ban,

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[11] *See*' Supreme Court to examine ban on women's entry at Sabarimala' (The Indian Express, 13 February, 2016).

[12] *See* Krishna das Rajagopal, 'Do you have a constitutional right to prevent women's entry at Sabarimala? SC to Devaswom' (The Hindu, 12 January, 2016)

overrides constitutional provisions... What right do you (temple authorities) have to forbid women from entering any part of the temple? This is a class grievance for women denied their right to worship". At one point, Justice Misra asked senior advocate K. Parasaran, who is assisting the court, about the "protocol" of greeting the elders where "your mother, father, Kul guru and Kulpurohit" are sitting in the same room? He himself responded "The protocol is to greet the mother first". The ban was enforced under Rule 3 (b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 (women at such time during which they are not by custom and usage allowed to enter a place of public worship).

It is really shocking to read the reports describing the ban on the entry women of menstrual age at Ayyappa Temple in Sabarimala. The authorities concerned (Travancore Devaswom Board) claimed this stricture is sanctioned by custom. In 1991 the Kerala High Court upheld the ban and directed the Devaswom Board to implement it. The petition contended that discrimination in matters of entry into temples was neither a ritual nor ceremony associated with the Hindu religion. Such discrimination was totally anti-Hindu. The religious denomination could only restrict entry into the sanctum sanctorum and could not ban entry into the temple, discriminating on the basis of sex. But are all these prohibitions justified in 21st century? Menstruation is a biological process, and it is a health concern. Why smear it with notions of purity and pollution? These strictures are also directly proportional to socially constructed hierarchies, most notably caste. They also vary from religion to religion but these are only matters of degree. Physical, cultural, psychological and/or verbal taboo pertaining to menstruation and menstruating women, in fact, transcend cultures.[13]

Conclusion

The battle for human rights in general and for protection of women's rights, in particular, already facing invisible but steady decline and fall needs immediate struggle for vitalising the United Nations efforts for Women Empowerment, and vicariously, its auxiliary institutions. The lawmakers, lawyers, judges and members of NGOs must take steps vibrant with human values, not to be scared of consequences and status quo order. Women rights challenges today need mobilisation of revolutionary consciousness sans which civilised system ceases to exist[14]. Ensuring women's rights obviously creates a strong launching pad for emergence of a more humane justice, equal human society equality and probity.

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[13] *See* Letters to the Editor ,EPW jan 23, 2016 p 2

[14] Dr. Justice JitendranathN.Bhatt, 'Gender Justice-Victor or Vanished' [2006] 4 SCC 12

I cannot resist the temptation of mentioning the most striking and relevant verse of *Poem of the Ute Indians* at this stage:

"I am the woman who holds up the sky.

The rainbow must run through my eyes,

The sun makes a path to my womb,

My thoughts are in the shape of clouds,

But my words are yet to be measured."[15]

[15] *See* www.trusimplicity.tumblr.com

Women as Victims of Domestic Violence and their Quest for Justice in India: Gender- Centric Reflections on the Inalienable Right to Access Justice

Ms. Suman Dash Bhattamishra*

ABSTRACT

The current article seeks to explore the relationship of victims of domestic violence with the Indian Legal System. While the legal system in India is known to suffer from inherent deficiencies, it is particularly insensitive in the context of women. Of late, victims of domestic violence have acquired a distinct status as there are allegations that most of these cases are either frivolous or mala-fide. Research has shown that all over the world, courts tend to have bias or prejudice against such victims. Not only that, victims of domestic violence also find it difficult to battle custody rights for children, particularly when their partner has been acquitted in a case of violence filed by them. The 243rd Law Commission Report in India explored the possibility of bringing changes to section 498 A of the Indian Penal Code, a provision which has lately become infamous. The purpose of bringing such changes seems to be stopping the "abuse of the law". Mandatory arrests, which were introduced in order to ensure prompt action on the part of law enforcement agencies are also under the scanner. The question that the author tries to answer at this juncture is: Have we really reached a stage where we can claim that domestic violence has ceased to be a problem? If we have not, can we claim to dilute the acidity of existing provisions against domestic violence?

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Victims of Domestic Violence: A Curious Case

Equality of status, among other forms of equality is a non-negotiable component of all human rights. Article 1 of the Universal Declaration of Human Rights (UDHR) asserts the significance of the right to equality and declares that all human beings are equal in *dignity* and rights.[1] While there are many forms of inequality, the most common and universal form of discrimination practised all over the world is based on gender and the most disturbing form of gender-based discrimination is Domestic Violence. Victimisation of women in the context of Domestic Violence is highly controversial, particularly in India.

Internationally, several efforts have been made to protect women from gender – based discrimination. A major effort in this direction has been the adoption of the Convention on the Elimination of Discrimination Against Women (CEDAW) in 1979 by the UN General Assembly. India has ratified the Convention and has mandatory obligations to discharge for the protection of rights of women. Although special laws have been passed for protection of women from domestic violence, there have been several loopholes in their actual interpretation.

While the problem of Domestic Violence has been phenomenal in Indian families, the social acceptance and recognition of it has never been unequivocal. While on the one hand, records of NCRB reveal that a significant chunk of deaths in India is the consequence of some form of Domestic Violence, on the other hand, the 243rd Report of the Law Commission has been very verbose about the 'misuse' of laws relating to matrimonial cruelty (the content of which can be easily covered within the ambit of domestic violence), more specifically, section 498 A[2] of the Indian Penal Code. Likewise, while India is witnessing a massive social uproar against laws relating to protection of women from domestic violence, significant research in this area reveals that majority of incidents relating to domestic violence are never reported. In this context, it will be pertinent to assess the problems, complications and difficulties of women in accessing justice if they are victims of domestic violence.

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[1] Universal Declaration of Human Rights 1948, a 1; "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

[2] Indian Penal Code 1860, s 498 A; "Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be pun-ished with imprisonment for a term which may extend to three years and shall also be liable to fine."

The truth remains that domestic violence has not ceased to exist in Indian families, is constantly acquiring new shapes and forms and the enforcement of the law has been noticeably dismal. In spite of that, victims of domestic violence lack credibility as the problem is often said to be fake. Several arguments have been advanced in support of this contention and courts have consolidated the position of these arguments by acquitting the accused in most of the cases of domestic violence.

Domestic Violence is not a singular problem. A victim of domestic violence may be fighting many legal battles at the same time. Sometimes, she may be battling a potentially emotional custody suit and on other occasions she may be looking for legal remedies to meet her economic or social needs. That is exactly why such victims need to be handled sensitively. However, the complexity of court procedures, incompetence of lawyers and loopholes in our legislations add to the problems of such victims, thereby discouraging them to access the criminal justice mechanism for enforcement of legitimate rights and entitlements.

The current article will make a genuine effort to highlight the difficulties of women while interacting with various layers of the Criminal Justice Mechanism and will try to look for possible remedies to the ultimate riddle of re-victimisation by the legal system. The million dollar question that the author seeks to answer is whether or not the truth in the story of domestic violence will be respected by the legal system as the consequences of disbelieving a genuine victim can only lead to a failure of judicial process.

Feudal, Feminist and Flawed Perceptions of Domestic Violence

In the domains of Criminology and Victimology, the concept of Intimate Partner Violence is a familiar and widely discussed theme and the problem of Domestic Violence is intricately linked with the former. Although Domestic Violence includes within its scope a wide variety of abuse with victims ranging from children to adults in various family-based or quasi-family based relationships, the most common context of understanding Domestic Violence is in connection with intimate partner relationships.[3] It is in the context of intimate relationships that

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"Explanation.—For the purpose of this section, "cruelty" means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

[3] Sarah Lorraine Salon, 'Criminal Law: Domestic Violence' 2009 (10) Geo. J. Gen & L. 370

Domestic Violence becomes a nuisance for female partners. As per a study conducted in the United States of America, incidents of domestic violence range from a million to three million every year and in every six minutes, a woman is recorded to be either battered or raped.[4] Likewise, in India domestic violence against women has become a matter of serious concern despite several laws being in place to counter the same. In the years of its inception, Domestic Violence was hardly treated as an offence in any part of the world. In the US, for instance, condonation of domestic violence was commonly practised by courts.[5] In India, likewise, the earliest law that dealt with a very specific aspect of domestic violence came into existence only in 1986.[6]

The idea of domestic violence was initially confined to physical assault. However, with time, the connotation of the term has changed drastically to include within its ambit physical, mental, emotional, verbal, psychological and even economic abuse.[7] While reasons behind the occurrence of domestic violence are many, the current research does not concern itself with those factors. However, the effects of Domestic Violence call for essential concern and deliberation. The problem of Domestic Violence poses several legal complications, particularly in connection with women. It is on account of these complications that an attempt is being made to assess the various obstacles that are obstructing the course of justice in matters pertaining to domestic violence.

The problem with legal battles concerning domestic violence is that unlike regular civil suits or criminal proceedings, they do not stop at addressing the issue of violence alone. Allied with every case of domestic violence are several other cases that have either branched out from it or are likely to emerge in the near future. For instance, centred upon a case of domestic violence could be a case of custody of children, division of property, maintenance rights, a battle for divorce, so on and so forth and a verdict in all or any of these cases is more often than not impacted by the end-result of the case of domestic violence.[8]

The primary disadvantage of all cases of Domestic Violence is that any discourse on this theme lacks a fine balance of principles that would enable a gestalt-like

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[4] Ibid

[5] Katherine E. Volovski, 'Domestic Violence' 5 (2004) Geo. J. Gender & L. 175

[6] In India, section 498A was inserted in the Indian Penal Code by an amendment in 1986. The said section penalised matrimonial cruelty but the scope of the concept is much narrower than the ambit of Domestic Violence.

[7] See generally, Definition of Domestic Violence under the Protection of Women from Domestic Violence Act, 2005 as well as VAWA.

[8] Amy Levin and Linda G Mills, 'Fighting for Domestic Violence when Child Custody is at Issue: Survey of State Laws', (2004) 48 (4) Social Work 464

perception, thus eliminating bias, prejudice and damage stemming from stereotypes. Probably this explains the meandering and arduous battle of Kiranjit Ahluwalia for a partial defence based on Battered Woman Syndrome, after having put her abusive husband on fire in a fit of rage, fear and distorted emotional outpour resulting from several years of domestic violence in all possible forms. Starting from the point where a woman musters the courage to file an FIR at the police station to the point where she struggles to find legal representation in courts to the ultimate point of gaining a favourable verdict, a victim of domestic violence confronts confusing versions of what her approach towards the problem is supposed to mean. This is where one begins to question the neutrality of the law on questions of gender. In the recent past, researchers have indicated the existence of bias in various strata of the justice system. This is reflected for instance, when a victim of domestic violence is questioned as to why she is lodging a complaint after tolerating her abusive husband for several years, a question often aimed at impeaching the reliability or integrity of the victim.[9]

Reflections on the Barriers in Accessing Justice:

A lot has been said and written on the theme of access to justice. Traditionally, access to justice has been linked with an aggrieved individual's formal right to litigate or defend a claim. However, over a period of time, the concept has undergone a radical change. In the last few decades, many experiments have been conducted in the domain of access to justice in different parts of the world and a wave of change has been noticed in the direction of making courts and the justice delivery mechanisms more sensitive to the needs of people. Probably, this is the contribution of the growth and recognition of a welfare state model which obstruct women at the entry level but also those which hinder their access to a justifiable end-result.

In India, the access to justice mechanism is known to suffer from various drawbacks like complex court procedures, delays in the disposal of cases, high costs of litigation, lack of quality legal aid, etc. Such issues become even more critical when we deal with weaker sections of the society like women, children, old or poor people. So far as women are concerned, they experience many more difficulties in accessing the legal system due to lack of female representation and participation in court processes, existing stereotypes, biases and prejudices and many other factors.

As mentioned in the above paragraphs, Access to Justice issues need to be addressed to create a fuller and more forceful impact on issues of Domestic

[9] Kumaralingam Amirthalingam, 'Women's Rights, International Norms and Domestic Violence: Asian Perspectives' (2005) 27 (2) Human Rights Quarterly 684

Violence. Although historically the term has been used to indicate preliminary stages in the justice delivery mechanism, the same is not true in the current context. The phrase Access to Justice involves within its scope all actors in the justice delivery mechanism, the highest among them being the Judges.

Social Handicaps in the filing of an FIR:

Like sexual offences, domestic violence also poses serious problems for women when they are asked to report the matter. There are various social pressures on a victim of domestic violence to refrain from filing an FIR as that might damage the possibility of reconciliation in future. 'Mediation' by family and friends is mostly the chosen alternative, regardless of the gravity of abuse by the husband or his relatives. The reasons behind a victim of domestic violence not resorting to the police station are many. But what is more pertinent to be noted is the rate at which victims of domestic violence are choosing to avoid an interaction with the police. According to a study conducted by a Delhi-based crisis intervention centre named Dilaasa[10], 47% of women registered had sought the help of police before approaching the centre but surprisingly only 2% of such women had filed an FIR. According to the study, 53% of women had never approached the police and one-third of these women had experienced violence for three to five years while 64% of them had experienced violence during pregnancy.[11]

Cases of Domestic Violence and the Court Room scenario:

The 243rd Law Commission Report has stressed on the number of acquittals in cases pertaining to domestic violence and in all dialogues against the retention of domestic violence laws, the number of acquittals is a matter of serious concern. However, it is important to note that the reasons behind an acquittal could be many. According to a research conducted by Oxfam India in collaboration with an organisation named CLAP, in the last fifteen years, more than ninety percent of the cases of domestic violence have resulted in acquittals on the ground of lack of evidence.[12] Conducting a prosecution in a case of domestic violence requires professional expertise and considering that domestic violence occurs within four walls of the house, it is possible that the prosecution is unable to produce necessary evidence. A lack of evidence does not necessarily indicate that the abuser is innocent nor does it indicate that the victim made up a frivolous or fraudulent case.

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[10] Indira Jaising, 'Concern for the Dead, Condemnation for the Living',<http://www.lawyerscollective.org/wp-content/uploads/2014/07/Concern-for-the-Dead-Condemnation-for-the-Living.pdf> accessed 11 December 2015

[11] Ibid

[12] Ibid

Barriers posed by Legislations:

A very important reason behind women not opting for remedies under the law in cases relating to domestic violence is because of certain conflicting provisions of related laws. A victim may file a case of section 498 A against her abuser but if it is proven to be frivolous on the ground of lack of evidence, her husband acquires a right to divorce her under Personal Laws. In several cases, filing a false case of section 498 A has been construed to be matrimonial cruelty by Indian Courts.[13] So, to prevent further damage to her matrimonial relationship and to avoid greater damage to her existing state of physical and mental state, a victim may not be motivated to resort to remedies under the law.

Lack of Protection Officers and Consequent Failure of the Domestic Violence Act:

Another major problem associated with some domestic violence legislations in India like the Domestic Violence Act is that the effectiveness of remedies available under them depends on the institutional mechanisms set up. For instance, the implementation of all orders under the Protection of Women from Domestic Violence Act, 2005 depends on the availability of Protection Officers who are appointed by the State under the Act. In most of the states of India, the Domestic Violence Act has failed simply because of non-appointment of Protection Officers. One can only imagine the frustration of a victim who gets the appropriate remedy under the PWDVA but still doesn't witness the dawn of justice because of the absence of a Protection Officer to execute the court's order.

Lack of Counselling and Legal Aid:

In India, legal aid services are at a rudimentary stage. The extension of these services in not as far-reaching and widespread as it should be considering the diverse composition of India's population both in terms of culture and economics. Lack of door-to-door campaigns and legal aid services has ensured that women remain ignorant of their rights and entitlements under the law. In marginalised sections across India, the words bigamy, divorce, maintenance may be neither comprehended nor accepted. Many women fail to get justice through existing mechanisms just because they do not know the exact contours of their rights and remedies under the law.

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[13] For example, section 13 of the Hindu Marriage Act, 1955 mentions matrimonial cruelty to be a ground for divorce. In several cases, the High Courts and Supreme Court of India have held that if it is proved that a certain case under section 498 A is false or frivolous, it amounts to matrimonial cruelty against the husband.

Re-victimisation by the Justice Delivery Mechanism

A regretful consequence of the deficiencies of the legal system in India is that justice fails to reach those who need it the most. While it is one thing to be a victim of domestic violence, it is another thing to be a victim but be treated as a culprit. After long and arduous struggles, when abusers are proven to be innocent, it reflects very badly on the victims. Processes and procedures of law are as such complicated and denial of appropriate relief in genuine cases aggravates the problem further. Courts must be careful and sensitive while dealing with cases of domestic violence because otherwise, we will end up having a society where domestic violence becomes the order of the day. The legal system needs to earn credibility from victims so as to ensure greater efficiency.

The Corporate Responsibility to Respect Human Rights

Ms. Nidhi Chauhan*& Mr. Rajat Solanki#

ABSTRACT

In present scenario of liberalisation and globalisation, international business enterprises have become more financially dominant in comparison to other countries of the world. A good amount of transnational corporations have a powerful and significant existence in budding countries like India, as these Transnational Corporations are time and again considered to be very essential for financial growth and development of the countries. So there is much possibility of gross human rights violations by these transnational corporations, for example, right to health of the workers is infringed, carelessness in preserving the survival of the individuals in the nearby places of industrial units which are generating hazardous materials and causing injury to the environment. This paper would look at the practicality of relating human rights responsibilities to the transnational corporations with respect to international law.

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Introduction

Multinational corporations have appeared as a strong financially viable force in this period of economic process. Multinational corporations have emerged as a business unit which are functioning in more than one country with the help of their subsidiaries and they also have power over the assets of not only their home state but also of the country of operation. With the emerging tendency of liberalization and globalisation, the Multinational corporations can easily pervade their state boundaries and can establish them in more than one country.[1]

In present scenario, the corporations are performing large varieties of activities which were performed by the state which indirectly has given them considerable authority over World's financial system. With the rising authority of business entities all over the world and the astonishing financial power of multinational corporations, the supporters of human rights have started claiming accountability from authority holders.

This is an efficient move towards guarding human rights as there is large impact of the behaviour of business entities on rights.[2]

The efforts to guard basic human rights have usually centred upon the association between the state and the individual. The half-century agreement on suitable state action concerning the concept of human rights as defined in the Universal Declaration of Human Rights is not valued in uniform manner. Acknowledged the complexness of the forces deciding as to how individuals are dealt in different environment around the globe, it is the right time to scrutinize the duties and roles of other pertinent players, including corporations, labour, the media, and the common people, adding to the progress and the growth of human rights.[3]

While international human right is a vast and complicated notion to describe, many global agreements identify precise designed criteria.[4] In particular, the United Nations formats the most conspicuous instance of present human rights values, the Universal Declaration of Human Rights ("Universal Declaration"). A variety of human rights problems are provided in the Universal Declaration

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[1] D Nandy and N Singh, 'Making Transnational Corporations Accountable for Human Rights Violations' (2009) 2 NUJS Law Review 75.

[2] S Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 2 Australian Journal of Human Rights 16.

[3] B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

[4] B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

including security of person,[5] assembly and association,[6] the right to life, liberty, freedom of movement,[7] and the right to vote or taking part in formation of government.[8] The Universal Declaration of Human Rights also supports freedom from cruel and inhuman punishment,[9] freedom from torture, unjust labour practices,[10] arbitrary arrest [11]and slavery.[12] These rights are worldwide and also limit business entities and individuals from encroaching on human rights.[13]

The other pronouncements of United Nations have regarded environmental protection as an indispensable human right. It has also scrutinized the participation of corporations in protecting human rights and confidently declared that "multinational corporations should/shall respect the social and cultural objectives, values and traditions of the countries in which they operate" and "shall respect human rights and fundamental freedoms in the countries in which they operate."[14]

As far as this Article is concerned, an important distinction exists between respecting and promoting human rights. Business entities already have a virtuous obligation to encourage human rights. Therefore, in the context of encouraging human rights, such activities have regarded as corporate philanthropy and humanitarianism. Today, promoting human rights is good business,[15] and corporations are fortunate to be in a unique position to be able to do so.[16]

As global commerce continues to nurture, the genuine control of transnational continues to widen, at the same time the genuine control of some State governments continues to reduce.[17] With this level of control, transnational have

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[5] Universal Declaration of Human Rights, A 3.

[6] Universal Declaration of Human Rights, A 20.

[7] Universal Declaration of Human Rights, A 13.

[8] Universal Declaration of Human Rights, A 21.

[9] Universal Declaration of Human Rights, A 5.

[10] Universal Declaration of Human Rights, As 23 & 24.

[11] Universal Declaration of Human Rights, A 9.

[12] Universal Declaration of Human Rights, A 4.

[13] Universal Declaration of Human Rights, A 30.

[14] J C Anderson, 'Respecting Human Rights: Multinational Corporations Strike Out' (1999-2000) 2 University of Pennsylvania Journal of Labour and Employment Law 463.

[15] D Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?' (1995) 19 Fordham International Law Journal 1963, 1977.

[16] D F Orentlicher and T AGelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China Symposium: Doing Business in China'(1993-94) 14 Northwestern Journal of International Law & Business 66.

[17] D Cassel, 'Corporate Initiatives: A Second Human Rights Revolution?' (1995) 19 Fordham International Law Journal 1963, 1977.

enormous chance to make better circumstances around the globe. The matter of fact remains, however, that a virtuous responsibility cannot be compelled upon a business entity. In comparison, it is the legal responsibility of business entities or corporations to value human rights. Specifically, they are not permitted to make profit from the ill-uses of human rights but in present scenario there is no apparent positive legal liability exists. Whereas the Universal Declaration of Human Rights restrict all persons from getting themselves involved in the practices which are likely to violate human rights.[18]

It is in state of the essential enforcement mechanisms to efficiently obligate such duty. In addition, the viability of using the Universal Declaration by itself to compel business entities or corporations to value human rights is strictly limited. If the corporations or business entities are allowed to take benefits out of the provisions of existing law as recognised legal personality then it is suitable and sensible to anticipate that the corporations should manage them accordingly.[19]

Profit and social responsibility are sometimes viewed as opposite ends of the spectrum. Milton Friedman calls social/corporate responsibility a "fundamentally subversive doctrine" in a free society.[20] He accepts that shielding human rights is an obligation of the State, not of industry.[21] The duty of a business entity is to "make as much money as possible," and anything which is less is "pure and unadulterated socialism".[22] The only social responsibility of business entities is to increase its profits without any deception or fraud."[23]

Despite Friedman's stance against multinational corporations' social responsibility, Friedman serves his observations by calling for businesses to look for returns while adhering "to the basic rules of the society."[24]

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[18] Universal Declaration of Human Rights, A 30.

[19] M M Blair, A Contractarian Defense of Corporate Philanthropy' (1998) 28 Stetson Law Review 27, 28.

[20] M Friedman, 'The Social Responsibility of Business is to increase its Profit'*New York Times Magazine*(13 September 1970) 32.

[21] M Friedman, 'The Social Responsibility of Business is to increase its Profit' *New York Times Magazine* (13 September 1970) 32.

[22] M Friedman, 'The Social Responsibility of Business is to increase its Profit' *New York Times Magazine* (13 September 1970) 32.

[23] M Friedman, 'The Social Responsibility of Business is to increase its Profit' *New York Times Magazine* (13 September 1970) 32.

[24] M Friedman, 'The Social Responsibility of Business is to increase its Profit' *New York Times Magazine* (13 September 1970) 32.

Need for Corporate Responsibility

Shielding individual rights exclusively through responsibilities on States appears rather undisputed if host countries signified the only risk to self-respect of human, or if countries could be counted on to control behaviour within their boundaries efficiently. Nevertheless, an arrangement where the state is the only end of worldwide law responsibilities might not be adequate to guard human rights. Business entities or corporations are potent worldwide players that some countries are wanting for the resources or will to deal. Other countries may plead for business entities or corporations to work together in imposing human rights. These actualities build confidence on state responsibilities unsatisfactory. Further than the reality of corporate authority, human rights theory discards endeavours to limit duty holders to States or to those carrying out state policy. Corporate law offers direction to worldwide law on the necessity to look business entities or corporations, and not merely those functioning for them, as responsibility holders.[25]

There are mainly two sets of players in the field worldwide human law who might held liable for ill-uses of human rights. These are states (through the notion of state liability) and the individuals (through the notion of individual liability). Countries are fully responsible for wide ranging human rights, whether found in the customary law or incorporated in treaties.

Individual liabilities are concerned with a small variety of ill-uses, mainly considered by the seriousness of their corporal or religious attack on the individual.[26]

The requirement for corporate liability comparable with the development of the present law is beyond the liability of state of covering liability of individuals, in which individual is criminally liable for remarkably grave human rights ill-uses.[27] Liability of individual comes out principally from the fact that holding states responsible established insufficient to deal with those acts.[28] Accountability for individual violators may offer victims of inhumane activities with justice, distinct from the liability of the state. It may aid in deterring ill-uses in future more efficiently, send an influential meaning of ethical disapproval of atrocious crimes, and assist

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[25] S R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 461.

[26] S R Ratner and J S Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd edn, OUP 2001) 13.

[27] S R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 461.

[28] Trial of the Major War Criminals before The International Military Tribunal,(1947) 466. Available at: <https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-IV.pdf> accessed 17 March 2016.

a humanity shocked by violations of human rights to recognize perpetrators and thereby encourage nationwide reestablishment of cordial relations.[29] Liability of individual is an option along with enforcement machinery for humanitarian law and human rights in advancement of aforesaid goals.[30]

There is requirement of standard which can establish that the state is responsible for the actions of business entities as well as corporations although it is considered that the country will only be responsible for the conduct of business in its territory because of its ability to manage private actions. The courts dealing with human rights mostly hold countries liable for not preventing the activities of business entities which are in violation of the human rights. However, in holding states responsible, there is requirement of a theory of understanding as to when violation of human rights by a corporation increases to the point that the state is liable for obstructing or controlling the same.[31]

Countries have published a chain of worldwide labour conventions, advices, recommendations and many different standards to encourage the well being of the employees. In queue with the conventional concept, the State authorities and the International Labour Organization (ILO) observe the standards as creating responsibilities on countries, and hence the focal point of International Labour Organization and political concentration is on the responsibilities of the countries to employ them.[32] However, both the ideas of the conventions and their language make very definite that they do recognize responsibilities on business enterprises or corporations concerning their workers.

Beyond labour la w, decision makers are holding the private enterprises or corporations for harming global environmental. The State authorities and the people who work to protect the environment know that state liability even under a strict liability regime may not work to offer suitable compensation for the damage done. Consequently, the "polluter pays" principle has applied a tough blow on governmental strategies toward avoidance and reactions to pollution, touching global environmental law beyond sole dependence on state responsibility.[33]

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[29]J M-Goti, 'Transitional Governments in the Breach: Why Punish State Criminals?'(1990) 12 Human Rights Quarterly 12.

[30]S R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 461.

[31]S R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 461.

[32]Constitution of the International Labour Organisation, "The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries".

[33]S R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 461.

Accountability of Corporations for Violating Human Rights

Firstly, worldwide law is shifting, and non-state players are presently concerned as both creators and subject matter of international law[34]. In certain regions, worldwide law liability and responsibilities have already been exerted to non-state players. There are also multipartite agreements such as the "*United Nations Convention against Transnational Organized Crime and the Protocols thereto*"[35] that are supported on the assumption that business entities or corporations can commit global crimes, which provide for nationwide enforcement mechanisms.[36]

Secondly, at the same time the human rights law has evolved in the global domain, the huge number of human rights violation takes place in the national domain. In furtherance of fulfilling the responsibilities forced under a range of human rights agreements, countries are time and again obligated to bring out national legislation banning conduct that impinges sheltered rights. Countries have global liability 'to guard people against interfering with their rights by nonstate players. The excellent means to perform this duty is to impose straight liability on nonstate players including business entities or corporations for some certain human rights.

Thirdly, the legal framework is somewhat held liable for providing much power to the business entities or corporations in which they operate. In exchange of that the law can claim liability and answerability in the use of that power.

Limited legal liability permits the holders of the business entities or corporations, who yield from its actions and, through the selection of its executives, manage its activities to refrain legal liability for the activities of the business entity or corporation.[37] The other reason which is very specific to corporations or business entities which permits them to impinge human rights is the status of separate legal entity, the assumption of primacy of shareholders and division of ownership from management.[38]

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[34]M Dixon and R McCorquodale,*Cases and Materials on International Law* (2nd edn, Blackstone Press 1991).

[35]Convention against Transnational Organized Crime, 15 November 2000, GA Res 55/25, UNDoc A/45/49 (I) (2001).

[36]S Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 2 Australian Journal of Human Rights 16.

[37]P Redmond, *Companies and Securities Law Commentary and Materials* (2nd edn, The Law Book Co 1992) 107.

[38]S Bottomley, 'Corporations and human rights' in S Bottomley and D Kinley (eds),*Commercial Law and Human Rights*(Ashgate/Dartmouth 2002) 50.

Incorporation brings a business entity or company into existence as a separate 'legal entity or person'. But it is very difficult to manage them as they neither have the sense of right and wrong, nor soul, nor a corpse to be incarcerated. The gift of limited liability which is available to the companies assists in entrepreneur activities and risk taking which indirectly benefits the broader community.

The gift, however, implies a variety of legal liabilities and the legal fiction which is available with company is now and again disregarded when these liabilities are not satisfied. Disregarding the fiction has been known as '*piercing the corporate veil'*[39] and it time and again engages holding those who direct the corporation liable for its activities.[40] The courts have disregarded the concept of separate legal entity of corporations in cases where companies are engaged in fraud, inappropriate behaviour and agency.[41]Perhaps in future, a failure to observe human rights liabilities will be an instance for piercing the corporate veil.

Role of Multinational Corporations in Promoting Human Rights

Historically, Multinational Corporations have not performed as moral agents in the countries in which they carry on their commercial activities.[42] Previously, there were no significant harmful outcomes when multinational corporations abstained from acting in response to a host authority's encroachment of the basic human rights of the corporation's employees, or other prevalent human rights ill-uses.[43]

The United Nations and its member countries face rising pressure to control the conduct of non-state players in regard to human rights.[44] Some of the most important non-state players presently are private companies, especially multinational corporations. From 1970s, the United Nations and other intergovernmental organisations have promoted the formation of transnational codes of conduct for transnational corporations. The primary objectives of these codes were to regulate transnational corporations from interfering with the internal

[39] P Redmond, *Companies and Securities Law Commentary and Materials* (2nd edn, The Law Book Co 1992) 107.

[40] S Bottomley, 'Corporations and human rights' in S Bottomley and D Kinley (eds), *Commercial Law and Human Rights* (Ashgate/Dartmouth 2002) 51.

[41] P Redmond, *Companies and Securities Law Commentary and Materials* (2ndedn, The Law Book Co 1992) 173.

[42] D F Orentlicher and T A Gelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China Symposium: Doing Business in China' (1993-94) 14 Northwestern Journal of International Law & Business 66.

[43] B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

[44] Report of the Fourth World Conference on Women, Beijing Declaration, 1995.

politics of host country and also restraining the unfavourable effects of transnational corporation actions on domestic financial objectives.[45]

The proper relationship between human rights and TNCs is a topic drawing increasing attention from citizens, governments and corporations. No international code or standards have yet been adopted specifying the responsibilities of TNCs to protect and respect international human rights, but governments and corporations themselves have begun to suggest the appropriate framework of responsibility for addressing human rights abuses in host countries. Nongovernmental Organizations (NGOs) are also taking steps to encourage Transnational Corporations to make use of their power to encourage and guard human rights in countries in which they are doing business.[46]

An additional and very important factor is the push by consumers, shareholders, and labour unions for corporate management awareness of human rights ill-uses in the states in which the transnational corporations do their business. Increasing the perceptibility of human rights problems with patrons may be an efficient instrument for altering the behaviour and strategies of Transnational Corporations.[47]

TNC Obligations to Respect and Protect Human Rights

Although the Universal Declaration provides a general guide for a government's responsibility to its citizens, it is not clear whether Multinational Corporations are forced to respect these rights. The United Nations human rights agreements are binding on the ratifying governments and not the non-state players such as transnational corporations.[48] However, corporations have a responsibility under the International Bill of Human Rights to value human rights of others.

Articles 29 and 30[49] of the Universal Declaration of Human Rights (UDHR) and corresponding Articles 5(1) of both the International Covenant on Economic,

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[45]B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

[46]B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

[47]S W Pruitt and M Friedmen, 'Determining the Effectiveness of Consumer Boycotts: A Stock Price Analysis of Their Impact on Corporate Targets'(1986) Journal of Consumer Policy 375, 382.

[48]F C Newman and D Weissbrodt, *International Human Rights: Law, Policy and Process* (2ndedn, Anderson Publishing 1996) 5-16.

[49]Universal Declaration of Human Rights, A 30, "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) lays down the restrictions on individual or corporate activities in furtherance of the basic rights defined in these instruments: no person or any business entity may involve in an activity which trample upon any other person's rights and liberties.[50] However, these agreements do not expressly hold individuals or corporations liable for affirmatively protecting. The Governments are assigned to regulate corporations as private players. Therefore, with regard to global legal responsibility, the transnational corporations risk very little if they are obeying with the national laws of the states in which they are carrying their business. In the absence of the legal responsibility, the transnational corporations have an ethical and moral liability to value the basic human rights which are included in the Universal Declaration of Human Rights

Respecting Human Rights Through Codes of Conduct

Government and world organizations looking for addressing human rights ill-uses are calling for transnational to accept codes of corporate conduct, of which two basic types exist. First, "external" codes are those drafted by entities such as international labour organizations and environmental and human rights groups in the hope that they will be adopted by corporations. Second, corporations may draft and adopt their own "internal" codes.[51]

Since 1977, the United Nations began formulating the United Nations Code of Conduct on Transnational Companies ("Draft U.N. Code"). After several drafts, the most recent of which was completed in 1990.[52] Its provisions addressed various problems regarding the conduct of transnational, including good faith negotiation of contracts and respect for tradition, fundamental freedoms, and global principles of human rights.[53] The Draft U.N. Code balanced regulating multinationals' activities against standardizing the host government's behaviour toward multinationals.[54]

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[50] "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

[51] J C Anderson, 'Respecting Human Rights: Multinational Corporations Strike Out' (1999-2000) 2 University of Pennsylvania Journal of Labour and Employment Law 463.

[52] J C Anderson, 'Respecting Human Rights: Multinational Corporations Strike Out' (1999-2000) 2 University of Pennsylvania Journal of Labour and Employment Law 463.

[53] J C Anderson, 'Respecting Human Rights: Multinational Corporations Strike Out' (1999-2000) 2 University of Pennsylvania Journal of Labour and Employment Law 463.

[54] B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

According to the "United Nations Code of Conduct on Transnational Companies" preamble, one of its principal ends was to reduce the damaging effects of multinationals' activities.[55] The draft U.N. Code made explicit reference to human rights, requiring that "transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, language, social, national and ethnic origin or political or other opinion."[56] Unfortunately, because the Draft U.N. Code was never officially adopted by the U.N. General Assembly, it exists today as little more than a model for other codes.

Also in 1977, the International Labour Organization (ILO)[57] adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[58] The ILO intended the Tripartite Declaration to "encourage the positive contribution which multinational enterprises can make to economic and social progress...."[59] The Tripartite Declaration gives direction to state authorities, corporations, and employee organizations in such areas as equal opportunity and treatment, functioning conditions, security, safety and health, and freedom of association.[60] Effectiveness is limited, however, because the primary method of enforcing the Tripartite Declaration is through "discrete persuasion by OECD or ILO officials" and "public embarrassment through the media."[61]

In 1998, the International Labour Organisation recognized the Tripartite Declaration's defects and introduced a new initiative called the "International Labour Organisation Declaration on Fundamental Principles and Rights at Work".[62] This declaration targets to make sure that national efforts to foster financial growth go hand in hand with social progress by calling for:

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[55] Preamble of the Draft UN Code. The Draft U.N. Code also demanded that "transnational corporations shall refrain, in their transactions, from the offering, promising or giving of any payment, gift or other advantage to or for the benefit of a public official as consideration for performing or refraining from the performance of his duties in connection with those transactions."

[56] The Draft UN Code, para 13-14

[57] The International Labour Organization (ILO) has 186 member countries and seeks to set labour standards by furthering social and economic stability through promotion of democracy, human rights, job creation, and worker protection.

[58] International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006).

[59] International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006).

[60] International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006).

[61] L Compa & T Hinchliffe -Darricarrere, 'Enforcing International Labour Rights Through Corporate Codes of Conduct' (1995)33 Columbia Journal of Transnational Law 671.

a) freedom of association and the effective recognition of the right to collective bargaining;

b) the elimination of all forms of forced or compulsory labour;

c) the effective abolition of child labour;

d) the elimination of discrimination in respect of employment and occupation.[63]

A Transnational Corporations are not likely to take proactive human rights strategies without pressure of some kind. Presently, that stress is constructing both externally and internally. The internal stress arises from company stakeholders and from the difficult situations in which corporations find themselves in global business. The internal pressures have been added by the United Nations, the United Nations authorities, labour and community groups by formulating laws and corporate strategies that either need or persuade Transnational Corporations not only to value human rights, but indeed to guard them in active manner.[64]

Corporate Liability for Human Rights Abuses

The first liability of the corporate is in the form of employment. The most important relation most people have with corporations is through their service. There are various human rights acknowledged at global level that arise in the perspective of this connection. The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, incorporates the right to work,[65] the right to enjoy just and propitious working conditions[66] and the right to form and join trade unions.[67] Article 2 (2) necessitates that the rights mentioned in the covenants will be exercised without any discrimination. Different employment rights are also contained in the International Covenant on Civil and Political Rights (ICCPR), 1966, a variety of International Labour Organisation (ILO) conventions, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1966, and the Convention on the Elimination of All Forms of

[62]International Labour Organization, Declaration on Fundamental Principles and Rights at Work (1998).

[63]International Labour Organization, Declaration on Fundamental Principles and Rights at Work (1998).

[64]B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

[65] The International Covenant on Economic, Social and Cultural Rights 1966, A 6.

[66]The International Covenant on Economic, Social and Cultural Rights 1966, A 7.

[67]The International Covenant on Economic, Social and Cultural Rights 1966, A 8.

Discrimination Against Women (CEDAW), 1979, as well as the Universal Declaration of Human Rights (UDHR), 1948.[68]

Secondly, corporations have lofty profile as offenders in the areas of health, security, safety and environment laws. In comparison to other human rights problems, corporations are provided with significant number of directions about their environmental liabilities.[69] At the same time human rights agreements cover rights to health[70] and the right to live in a healthy working environment.[71] Generally, environmental rights are not acknowledged as basic human rights.[72] However, the right to health and sufficient standard of living[73] may require reduction of pollution.[74]

Thirdly, the right of privacy is infringed by the corporations in the form of electronic storage and distribution of information. Corporations hold huge quantity of personal information about individuals and if this information is misused by the corporations then it causes serious breach of human rights specially the right to privacy. The corporations which are involved in collecting highly sensitive information it is very important that safeguards are forced on them to make sure that the right to privacy is guarded.

Conclusion

With regard to media attention and public protest over ill-uses of human rights, various organizations and corporations have formulated and accepted codes of conduct. But these codes are uncoerced and have negligible enforcement machinery. The laws have failed to efficiently impose any responsibility on corporations with respect to valuing of human rights. Large multinationals may have more economic power than that of small countries. One-half of the world's largest economies belong not to nations but to corporations. Their power have made them quasi-governmental in nature and made them powerful as some nation-

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[68]R Norris,'Human rights and employment: An exploration of some issues'(2000) 6 Australian Journal of Human Rights 128.

[69]P Schwartz and B Gibb, *When Good Companies Do Bad Things: Responsibility and Risk in an Age of Globalization*' (John Wiley 1999) 120.

[70] The International Covenant on Economic, Social and Cultural Rights1966, A 12.

[71]The International Covenant on Economic, Social and Cultural Rights 1966, A 7.

[72]M Anderson, 'Human rights approaches to environmental protection: an overview' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996) 5.

[73]The International Covenant on Economic, Social and Cultural Rights 1966, A 11.

[74]R Churchill, 'Environmental rights in existing human rights treaties' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1996) 108.

states. At the same time, however, multinationals are sometimes considered the largest violators of environmental and labour statutes.[75]

The ability of multinationals to profit from human rights abuses can be significantly limited by federal initiative and by states revisiting corporate privileges. Multinationals must be expected to value human rights, and government should intervene to demand for the same.

These privately created and controlled efforts to monitor corporate involvement in countries with serious human rights problems have had an important blow on the consciousness and conduct of Transnational Corporations in those countries.

Public pressure and corporate concerns about operating in a stable business environment have resulted in rudimentary policies regarding corporate responsibility in the face of human rights ill-uses. These policies are bound to be refined as international business decision-makers confront more and different situations of government violations of fundamental human rights. A proactive approach by Transnational Corporations will result in a more coherent, and more humane, response to human rights abuses in their operating states.[76]

Individuals are allowed to take their own action to guard their rights. But if the legal system is not accessible then it can be a big obstruction in attaining human rights. For assisting action against infringement of human right, there is requirement of funding for legal aid. Rise in litigation itself likely to make sure larger fulfilment by corporations.[77]

The other probable answer to the commission of human rights infringement by corporation is the additional growth of global standards with regard to corporate liability, which would put a stop to 'the race to the bottom'.

Global Compact, a principle based framework and learning forum, of the UN is promoting corporations to value human rights and take liability for the same.

The United Nation has come up with thorough standards for the liability of multinational corporations for human rights in its "*Norms on Responsibilities of*

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[75]J C Anderson, 'Respecting Human Rights: Multinational Corporations Strike Out' (1999-2000) 2 University of Pennsylvania Journal of Labour and Employment Law 463.

[76]B A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' (1997) 6 Minnesota Journal of Global Trade 153, 160.

[77]S Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 2 Australian Journal of Human Rights 16.

[78]S Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 2 Australian Journal of Human Rights 16.

Transnational Corporations and Other Business Enterprises". These standards state that the main liability is on the countries to encourage and guard human rights. While at the same time the multinational enterprises have the responsibility of encouraging and protecting compliance of human rights which is limited to their area of operation and authority.

This is an instance which proves that the companies have an influence on individual's life in various spheres as states do.[78]

There is an urgent requirement of formulation of a legally binding instrument from the UN norms, standards and other instruments which are non-binding in nature. The laws should be changed and made stringent so as to make the Transnational Corporations duty bound to respect and value human rights. There is also requirement of establishment of a dispute resolution body to deal with cases relating to infringement of human right and impose sanctions. Such body should provide remedy and relief to all the individuals and states along with the primary goal of grievance redress.

No Country for Rohingyas

Ms. Zara Fathima Kaiser*

ABSTRACT

The Rohingyas, an ethnic minority in Myanmar, were rendered stateless within their own state following sectarian violence. Over two million Rohingyas became Internally Displaced Persons (IDPs,) lost their homes and were forced to live in Refugee camps in various parts of Myanmar. They are subjected to strict rules of movement, employment and even policies preventing them from marrying or having more than two children. In such desperation many Rohingyas have tried to flee Myanmar and seek refuge in neighbouring states. But these asylum seekers are turned away and forced to return. The Rohingyas have no where to go. While the International community has successfully assisted the needy during crises of Sudan, Sri Lanka, Germany etc., this essay attempts to understand the cause for a seemingly apathetic reaction towards the Rohingyas. This article aims to assess the failures of the present refugee law regime, in addressing the concerns of developing countries. Followed by possible steps that can be taken by the international community to prevent further inhumanity and tackle this crisis.

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Introduction

The act of providing 'sanctuary' usually practiced in history by Churches, temples and mosques; has been engrained in moral ethos of every culture. All major religions across the world advocate protecting those who cannot protect themselves. It was considered a part of Natural law, a divine obligation or natural order of things deriving legitimacy from the authority of God, religious texts or human reason.[1]

Although the present international refugee Law has grown leaps and bounds from theological assertions to binding conventions and laws, it nonetheless relies heavily on the goodwill of the states. In 1921, When Gustav Ador addressed the League of Nations regarding the protection of thousands of homeless Russians; his concerns then were to 'assist refugees in need'.[2] Nine decades later, the concern still is one of 'assisting' refugees but the modalities around it have changed. The way refugee crises are looked at handled now is based on economic and political gain rather than goodwill to assist. One example of lack of such enthusiasm is that of the Myanmar refugees. In this essay the author shall attempt to understand the Myanmar conflict in light of the international actions taken or lack thereof in handling it, and new factors which are forcing one to change his outlook on refugee law.

Myanmar: The Country

Myanmar is a small country snuggled between India, Thailand and Bangladesh. It has a majority Buddhist population with a minority of different ethical groups. Scarred by its British-rule, since its inception Myanmar has tried vehemently to protect its ethnic identity. This has been reflected in the agendas of every passing political regime and for a country as small as Myanmar it has had to face numerous political problems.[3] From the hands of the British it received independence along with India but was marred with military rule from 1960's for almost four decades. This era saw an absolute lack of human rights, where military tyranny had emerged within the polity.[4]

In the year 2008 a multiparty democracy was attempted to be established. A referendum adopted the new Myanmar constitution in 2010 and the citizens were

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[1] KatlinSiska, 'Historical and legal perspectives of Right to asylum and extradition until the 19th century', Miskolc International Journal of Law, Vol. 1.(2004) No. 2. pp. 188-197

[2] Jakob Kellenberger, *Foreword by the President of the International Committee of the Red Cross* (International Review of the Red Cross, No 843, 2001)

[3] BBC, 'Myanmar Profile',<http://www.bbc.co.uk/news/world-asia-pacific-12990563> accessed February 2016

[4] International Coalition for the Responsibility to Protect 'The crisis in Burma', <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-burma> accessed April 2016

finally given their due share.[5] In 2010, an army drafted-constitution came to force based on a referendum which was accepted by an overwhelming majority.[6] In 2012, by-elections were held and President U Thein from National Democratic League was elected. The world community looked on to hope for a well-established democracy. The western countries soon talked about pulling down sanctions against Myanmar and helping develop economy and accepting the new political regime with open arms. It seemed finally that Myanmar was headed in the right direction. Unfortunately, the end of military atrocities was followed by grave sectarian violence against the Muslim-minority community; Rohingyas.[7]

Understanding the Crisis

In the 18th century, Arakhan (presently the Rohingya majority province in Myanmar) was not a part of Burma or Bangladesh. It was a separate region ruled by an independent king. It can be seen that the independent state was highly influenced by the Muslim culture. Hence the population was majority Muslim. The coins of that age show the Kalima (proclamation of allegiance to the religion of Islam) inscribed on it.[8] In 1784, the Burmese king Bowdawpya invaded and conquered this region.[9] The Rohingyas then got incorporated into the Burma Empire as we know it. The colonial census records of the British in 1825 A.D show that Rohingyas were a third of the Buddhist population in Arakhan. But as Burma fell into the hands of the British, the empire began using a large portion of the population for manual labour. It began harvesting the potential for rice and cotton industries along with the fisheries. Therefore labourers were brought in from Bengal (which is the present Bangladesh and West Bengal in India) overtime these workers settled in India and parts of Burma.

In 1948 post the Burmese Independence, there were elections held and Rohingyas being one of the ethnic groups were represented and allowed to vote. This can be seen as the triumph of a multicultural Burmese state.[10] In 1960's, with the fall of democracy and the establishment of military rule, the persecution began. The military rule gave rise to extremist and radical groups. A Zionist-like idea crept into its ideology, the Rohingyas were removed from government posts and were

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[5] Ibid

[6] '92% approval for new constitution', *Reuters*, <http://in.reuters.com/article/2008/05/15/idINIndia-33587120080515> accessed 30 January 2016

[7] Oxford Burma Alliance 'Ethnic minorities of Burma- Rakhine&Rohinga', <http://www.oxfordburmaalliance.org/ethnic-groups.html> accessed on Aril 2016

[8] MA Chowdhury, *The Advent Of Islam In Arakan And The Rohingyas*, Annual MagazineArakan Historical Society (Vol 24, pub 1995) 1-48

[9] KhinMaung Saw*, 'KhinMaung Saw On Rohingya'*, (International conference Berlin, 1993) <http://asiapacific.anu.edu.au/newmandala/wp-content/uploads/2009/02/khin-mg-saw-on-rohingya.pdf>, 90 Accessed 19 March 2016

[10] Ibid at 93

no longer allowed to represent. Calls such as "Burma for Burmese" and "Rohingyas are Bengalis"[11] began to grow.

In 1982, a new Burmese citizenship act was passed. It stated under Article 7 stated that a person would be a citizen if born to Burmese parents or had acquired citizenship as a citizen. Article 3, lays down that any person who is a part of Burma anterior to 1823 A.D and had permanently settled are recognized Burmese ethnic group.[12] Over 130 ethnic groups have been recognized in the schedule of this Act. The list does not include Rohingyas as one of the ethnic groups, taking their citizenship away. The Rohingyas were not issued new citizenship cards while the rest of the population could avail such cards. They were given identity cards specially recognizing them as Rohingyas and not citizens. These cards are used to their movement and make it difficult for them to obtain jobs or other benefits.[13]

In June 2012, there was fresh violence against the Rohingyas incited by the Buddhist monks[14] and almost 90,000 Rohingyas were displaced by the attacks.[15] By October 2012, it moved to full-fledged sectarian violence.[16] A state of emergency was declared. The number of deaths and displaced persons increased. Ban Ki Moon the UN secretary General said that "the vigilante attacks, targeted threats and extremist rhetoric must be stopped. If this is not done ... the reform and opening up process being currently pursued by the government is likely to be jeopardized".[17] A call to halt violence and allow humanitarian groups access was called from various countries across the world. The sectarian violence continues till date. As of 25 August 2013, over 2 million Rohingyas have to be displaced and lack protection and the violence still continues.[18] As per the statistical snapshot

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[11]Ateekh Durrani, 'The 'Burma for Burmese campaign'-Genocide, torture of Myanmar rohingyas' (Bangladesh Corruption, 2012) <http://bangladeshcorruption.wordpress.com/2012/07/27/genocide-torture-of-myanmar-on-rohingyas/> Accessed on 27 February 2016

[12]Burma Citizenship Law 1982, PyithuHluttaw Law No 4 of 1982, § 3, "nationals such as the Kachin, Kayak, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories...from a period anterior to 1185 BE 1823 AD".

[13]Special Rapporteur Of The Commission On Human Rights, *Interim Report on the situation of human rights in Myanmar*,(UN Doc A/52/484, 16 October 1997) Para. 140

[14]Alan Strathern, Why are Buddhist monks attacking muslims? BBC NEWS,2 May 2013, <http://www.bbc.com/news/magazine-22356306> accessed 8 April 2016

[15]Munir Uz Zaman,'Burma's ethnic clashes leave 90,000 in need of food, says UN', Toronto Star (Myanmar, 19 June 2012)

[16]'Burma: Ethnic cleansing of Rohingyamuslims', HRW, April 22, 2013, <https:/www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims> accessed April 2016

[17]Secretary General United Nations,'Secretary-General Urges Swift Action by Myanmar Government to Stop Vigilante Attacks in Northern Rakhine', (UN press release SG/SM/14605, 25 October 2012)

[18]*Violence against Rohingyas*, Jakarta Post, (Jakarta, 25 August 2013) <http://www.thejakartapost.com/news/2013/08/25/buddhists-myanmar-torch-muslim-homes-and-shops.html> accessed January 2016

by the UNHCR, there are 1.44 million Internally Displaced Persons (IDP) within Myanmar and; 415 thousand refugees and 28 thousand asylum seekers originating from it.[19] The approximate numbers of IDPs and Asylum seekers adds upto 2 million homeless and displaced.[20]

In 2016 Aung San SuuKyi and her party, National League for Democracy, won the Myanmar elections in a sweep finally ending military rule in the country. The world hoped that the Nobel peace laureate would take strong actions to prevent human rights violations in Myanmar. But her silence has been cold comfort to the Rohingyas. As put rightly by one writer it would be a remarkable sight to see a Nobel peace prize winner presiding over 21st century concentration camps.[21] This article hopes to discuss and understand issues of the Rohingya crisis; and the possible solutions that might help in solving the problem.

Persecution

Myanmar is not a party to the Refugee Convention or Protocol; it has been a standard to assess a 'Refugee' as per Article 1 of the 1951, Refugee Convention. For a person to be considered a 'refugee' under the convention, he must be *outside the protection* of the state, having a *well-founded fear* of *persecution* due to his *membership* in a particular race, religion, nationality or particular social group or political opinion. The World Report 2013 of Myanmar by the Human rights Watch[22] reveals shocking figures of murders, rape and ethnic violence. Thousands were killed and most Muslim villages were burnt to the ground. The Report also reveals that grave violations of human rights are still being continued not only by the Buddhist extremists but also the Myanmar military and security forces. Mass arrests without due process of law and fair trial are the order of the day. Most women are subjected to Gender crimes or forced into prostitution. Since the Rohingyas are stripped off their citizenship, they are effectively stateless and are not guaranteed any state protection. Although they are entitled to basic human rights under the UDHR, the Myanmar government does not guarantee any positive protection to these people.

The latest attempt by the government to 'regulate' the Rohingya community in Burma is the 2-child policy. As per this policy a Rohingya couple is not permitted

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[19] UNHCR,'2014 Country Operations Profile- Myanmar', (UNHCR, 2015) <http://www.unhcr.org/pages/49e4877d6.html> accessed 11 March 2016

[20] BBC, 'Why is there communal violence in Burma' <http://www.bbc.com/news/world-asia-18395788> accessed April 2016

[21] *Myanmar's peace prize winner and crimes against humanity,* Nicholas Kristof, NEW YORK TIMES, (Sittwe, 9 January 2016,)

[22] HUMAN RIGHTS WATCH,'World Report 2013: Burma', (HRW 2013) < http://www.hrw.org/world-report/2013/country-chapters/burma?page=2,1-3,2> accessed 14 February 2016

to have more than 2 children.[23] The law is clear that no family is allowed to have more than two children. The reason cited for it is that the Rohingyas are no longer citizens and are effectively non-citizens living off the states resources in the Jew-like World War II concentration camps. The state cannot afford to look after them. Further it stated that this move has been taken to protect the health of a woman and act as a means for family planning and reducing the population levels to ease communal tension.[24] But the Burmese Penal Code bans abortion unless it poses a risk to the mother. But in cases of the third child are the parents allowed to go for an abortion (which is clearly illegal as per the BPC) or they can give birth to the child?

Since the mid 2002, when the local rakhine authorities passed several regulations against Rohingya the situation has deteriorated. All Rohingya households are obliged to report any changes to the family list to the authorities for the registration of births and deaths in families. Rohingyas are forced to pay fees to the local authorities and are required to seek written permission before marrying.[25] The authorities give limited permissions and corrupt practices are rampant. There are no written laws governing these regulations. They are usually verbal orders but they are to be followed without question. Non-compliance results in punishments and arrests with no legal recourse.[26]

It has to be noted that the above policies do not extend to any other ethnic group and apply exclusively to the Rohingyas. Further, there is no redressal mechanism. The Rohingyas do not have the right to be heard or the right to revision. Therefore the policies at the very least can be named 'discriminatory' and 'arbitrary' going clearly against the principles of natural justice.

The Rohingyas are being targeted specifically for belonging to a particular race and religion. They are being discriminated against due to their religion Islam and their distinct racial features. The 'fear' as mentioned in the convention, is to be determined on an objective and subjective basis. The subjective basis would be determined case-wise, whereas the objective criteria can be easily ascertained with the help of reports from the UNHCR and various other NGOs can be of ample assistance.

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[23] 'Myanmar minister backs two-child policy for Rohingya minority', Reuters,(London, 11 June 2013)<http://in.reuters.com/article/us-myanmar-rohingya-idUSBRE95A04B20130611> accessed 11 March 2016

[24] Myanmar imposes 2 child limit for Rakhiner, Reuters(27 May 2013) <http://www.ibtimes.com/myanmar-imposes-2-child-limit-rohingya-muslims-rakhine-1279617> accessed 1 April 2016

[25] Human Rights Watch, 'Burma: revoke two child policy for Rohingyas' <https://www.hrw.org/news/2013/05/28/burma-revoke-two-child-policy-rohingya> accessed 1 April 2016

[26] The statelessness 'Rohingya Persecuted persons', <http://www.thestateless.com/p/rohingya.html> accessed 20 February 2016

The Rohingyas are clearly not under the protection of the Burmese government as they are not considered citizens and consequently have no claim for state services. Even if a blanket application is not possible, it can be noted that the requirements of lack of protection, well-founded fear, persecution and membership are fulfilled in the case of Rohingyas. All requirements of being a refugee are fulfilled or can be easily assessed by agencies. If Rohingyas clearly fit the bill for 'persons in need of protection', why are countries refusing to provide protection to Rohingyas when they have a clear obligation under UNHRC and customary international law? Why are these people unable to receive protection from other states?

Why Such Plight in Myanmar?

Admitting an asylum seeker into one's territory invariably puts financial and social burden on the government admitting. All governments indulge in a cost-benefit analysis before stepping forward in providing support. In the past, international organizations have been successful in addressing refugee situations in WWII, Russia etc. However the recent failure in addressing the Myanmar refugee crisis is a cause of concern. There are several unique factors contributing to the plight to these refugees

Firstly, the Rohingyas are kept in small refugee camps. They have no means to access any local administrative bodies, even to attain basic travel documents. Driven away from their homes and houses, they have very little economic resources to sustain existence within the camp. The prohibition on employing the rohingyas worsens their economic situation. Amidst a government vehemently controlling their movement through local authorities, it is extremely difficult for the Rohingyas to even leave the refugee camps let alone make it to another country. Making their way out of the persecuting country is one of their major challenges.

Secondly, the unfortunate geographic placement of Myanmar is a major impediment. Myanmar is snuggled between India, Bangladesh, China and Thailand. These countries are exhibiting 'host fatigue'. During the post partition period, India has absorbed millions of refugees from East Pakistan and later from Bangladesh when it was created. Each country has already taken in thousands of refugees from Burma during the Military regime. Then, the local Burmese had fled the state fearing atrocities committed by the military regime. After taking in thousands of refugees during the military era, these countries are now reluctant to accept more people.[27] Generosity too has its limits. The Rohingyas though in

[27]Refugee And Neighbours: Rohingyas And
Bangladesh, Sumitganguly and Brandon miliate, The Diplomat, (14 October 2015) < http://thediplomat.com/2015/10/refugees-and-neighbors-rohingya-in-bangladesh/> accessed on 1 April 2016

desperate situations, the disinclination of states in accepting more refugees and shari ng the already limited resources is an obstacle.

Thirdly, barring China; India, Bangladesh and Thailand are developing economies. There is an intense pressure on the state resources. These governments are striving to guarantee basic rights and resources to their own citizens. With such constraints in resources both economic and social (such as health care, water, sanitation) resources, these countries refuse to shoulder further responsibility. The issue extends beyond just lack of monetary resources, Bangladesh has refused foreign aid[28] from UN and other international agencies, on the pretext that such aid would encourage Rohingyas and rehabilitate them within Bangladesh.[29] The concurring social costs extend well beyond just economic and monetary deficiency. Bangladesh fears it would become the permanent abode to Rohingya instead of a temporary protector, increasing the populations and pressure on local resources. At the same time Bangladesh refuses to see that the aid embargo would be detrimental to its local population as well, which could benefit infinitely from the aid.

Fourthly, Most of these countries have closed their borders to the Burmese refugees. China has strong borders which are difficult to penetrate, in an unlikely event of entering the territory asylum seekers are forced to leave and are sent back.[30] This is an invariable breach of the principle of Non-refoulement, but is nonetheless flaunted by the states. Bangladesh and Thailand too follow a similar strategy of refouling asylum-seekers. Sometimes the Rohingyas are put in detention centers, tortured or smuggled or trafficked into prostitution.[31]

Fifthly, neither Myanmar nor its neighbours are a party to the Refugee Convention of 1951. Consequently, the role of the UNHRC is limited. The threshold of rights and obligations for a contracting party is higher than that of a non-contracting party. They are nevertheless bound by the customary principle of non-refoulement, which is binding on even non-contracting parties to the convention.[32] Non-

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[28] Bangladesh orders charities to stop aid to Rohingyas, *BBC News*(London 2 August 2012) <http://www.bbc.co.uk/news/world-asia-19092131> Accessed 14 February 2016

[29] Joseph Achillin, 'Bangladesh rejects UN help for Rohingyas',DVB news,Dhaka (2 May 2011) <http://www.dvb.no/news/bangladesh-rejects-un-help-for-rohingya/15474 >accessed20 February 2016

[30] Human Rights Watch, 'HRWreport: Isolated in Yunan',< http://www.hrw.org/node/108102/section/6> Accessed on January 2016

[31] Amy sawitta, 'Thai police rescue hundreds of Rohingyas in raid on suspected trafficker's camp' *Reuters*, (Bangkok 27 January 2014) <http://www.reuters.com/article/2014/01/27/us-thailand-rohingya-idUSBREA0Q0IU20140127> accessed January 2016

[32] UN High Commissioner ForRefugees,'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases', (UN2 BvR 1938/93, 31 January 1994)

refoulement includes non-rejection at borders if it means that the individual would be sent back to the country he is facing persecution in. Although there is no excuse for breaching customary international law, lack of a binding treaty lets these countries off the hook easily. A recent study by Harvard[33] showed that even countries such as Canada which is applauded for its refugee measures under the 1961 Convention regularly flaunts the principle of Non-refoulement. It states that there is a clear gap between the promise of refugee protection and its enforcement in border policy today. Canada has made sweeping changes in its refugee system and has limited recourse for appeal and safety protections.[34]

The Sixth reason for the plight of Myanmar refugees is the growing islamophobia across the world. The world population in general has begun looking at Muslim refugees as major suspects of terrorism.[35] Rohingyas being Muslim minority from Myanmar are looked at as a threat. A recent survey showed that an overwhelming 85% of Myanmar citizens that were questioned showed a sense of hostility against the Muslim Rohingyas, fueled by rumours that they would turn the country into an Islamic State.[36] Their religious identity has been an eye sore for Myanmar and other neighboring countries.

Majority of these refugees are not skilled labourers and survive out of manual labour. Most of the time these refugees are not absorbed within the work force of the Host country. Unemployment and poverty escalate the chances of indulging in anti-social or anti-national activities. India has been a victim of cross-border terrorism from foreign insurgents. As it is difficult to ascertain the difference between a genuine refugee and an insurgent in the grab of refuge-seeker, countries would rather be safe than sorry.

Apart from the terrorism aspect of Islamophobia, there is a political aspect as well. Absorbing refugees of a particular religion would inevitably affect the political scenario of the country. Especially those countries which are heavily based on Religion-oriented vote bank politics such as India; as seen in Assam in India, concerns were raised before the Supreme Court at the unprecedented growth of members of a particular community.[37] Although the court came down heavily against illegal migration, it nevertheless highlighted that action based on religious

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[33] ErfatArbel&Alleta Brennan, 'Bordering on failure: U.S- Canada Border policy and the politics of refugee exclusion', Harvard Immigration and Refugee law clinical Program, Harvard Law school, November 2013, 1-115

[34] Ibid at 114

[35] Susan Omitson, 'Rejecting Muslim refugeesencourages ISIS', UN refugee head saysCBC NEWS (23 November 2015) <http://www.cbc.ca/news/world/un-syrian-refugees-paris-attacks-1.3331292> accessed 1 April 2016

[36] Jasmine Cha, 'The truth about Rohingya crisis', The Diplomat(March 5, 2016) <http://thediplomat.com/2016/03/the-truth-about-myanmars-rohingya-issue/> accessed 8 March 2016

[37] *SarbadanandSonowal v Union of India*, W.P (civil): 117 of 2006

or linguistic profiling was illegal. Therefore it can be safely concluded that fears of dilution of vote banks with non-citizens and vote-colouring in favour of a particular party are damaging to the democratic threads of the society.

Legal Basis for the Refugee Protections

All refugee protections are based on cost-benefit analysis. Foreign policy of all states is governed by how much the country providing assistance would benefit in return. While countries like Sudan which went through similar sectarian violence have received immense international assistance, in the view of the author, the apathetic response to the Rohingya crisis can be chalked upto lack of economic incentives in Myanmar. Unlike Sudan, it is neither floating with oil nor is of political or strategic importance like Sri Lanka. Furthermore most of these Rohingyas are uneducated and unskilled labour, adding no value economically. The costs of helping the Rohingya refugees outweigh any benefit.

A recent trend amongst refugee-providing countries is to claim an 'adulteration' within the flood of asylum seeking Rohingyas. Countries like Thailand, Australia, Indonesia etc. claim that the persons under-taking treacherous journeys are not the persecuted Rohingyas; rather they are Bangladeshi immigrants seeking better economic opportunities. What now becomes a task is to filter those who are actually 'asylum-seekers' and 'illegal economic immigrants'. These countries have now started the policy of detaining these asylum seekers into immigrant detention camps or IDCs till official determination.[38] This determination being a lengthy process means that these 'asylum seekers' or 'illegal immigrants' are sentenced to indefinite detention in deplorable human rights conditions. Even after escaping treacherous circumstances in Myanmar, the Rohingyas' woes only amplify with strict determination processes in other countries. More often than not, lack of documentation and effective communication skills makes status determination an uphill task.

Lastly the present refugee law is west-oriented. The woes of third world countries and developing countries are left unaddressed. The 1961 convention and even the customary International law rule of non-refoulement places an unusually high economic burden, which these countries cannot manage. Even the system of examining and determining refugee status of individuals requires resources, time and labour. The developed countries such as US have been able to control the entering and the movement of asylum seekers within their territory. It is difficult for countries such as India or Thailand to keep a tab on the asylum seekers with their porous borders. Racial and linguistic similarities make it easier

[38] Human Rights Watch, 'Mayalasia's treatment of undocumented Rohingya' <https://www.hrw.org/reports/2000/malaysia/maybr008-02.htm> accessed 1 April 2016

for refugees to assimilate within the local population further aggravating the identification process. Especially in countries like Bangladesh and India, where a large chunk of the population in the sub-continent have similar features and no identity certification of any kind, it is difficult to differentiate between citizens and asylum seekers.

Concluding Recommendations

The situation of Rohingyas in Myanmar is deplorable. They are unwanted in their own country and the rest of the world, It is imperative for the international community to focus its attention and prevent such violation of human rights. The researcher understands that there can be no immediate solutions. There is need for slow long-term perseverance to achieve lasting results. One of the ways to ensure that international law is abided by is through international pressure. This international pressure can be built with the help of international NGOs such as Human rights watch and Amnesty international. Reports from these NGOs would help garner attention for the issue. The Human Rights Watch report on Myanmar[39] has been instrumental in highlighting the ground reality of the Rohingya situation. More reports by different NGOs assessing ground realities are the need of the hour.

Another method could be through the Human Rights Council which works under the auspices of the General Assembly. The Human rights council was introduced in 2006 and every six years it comes out with a Universal Periodic review. In this review, the countries make a report on how they have implemented different human rights obligations. Then, the UNHRC reviews the report and concerns from other states about human rights violations are answered. Post-review, a representative from the country is given an opportunity to respond to concerns of stakeholders and other countries. This would be a useful mechanism to highlight the issue before the general assembly which can pass a resolution for protection of human rights.

It is would be difficult but yet not impossible to seek help from the Security Council. The UN Charter, a binding treaty ratified by all member states of the UN, gives the Security Council the authority to act. Under its Chapter VII powers, the Security Council shall make recommendations or decide what measures to take to maintain or restore international peace and security.The Security Council can take action on 'Breach of peace or acts of aggression'; this is not restricted to mere acts of war but also 'systematic' or 'grave' violations of human rights. The Security Council can pass a resolution taking active action to stop human

[39] BBC, 'Why is there communal violence in Burma' <http://www.bbc.com/news/world-asia-18395788> accessed April 2016

rights violation through diplomatic or more coercive channels such as troop deployment, embargo etc.

Another such strategy could be the SC referring the matter to the International Criminal Court. The Rome Statute empowers the SC to make referrals to the ICC. This does not mean that the Security Council is obliged or should refer every situation involving a humanitarian crisis or violations of human rights to the ICC. However, in the situation of Myanmar, where grave crimes have been verified as "ongoing and intransigent" by no less than the UNHRC, Amnesty International and the Human rights watch.[40] The Security Council can refer the matter for investigation. This would be helpful in legitimizing the authority of the ICC and the SC.

The UN can also pass a resolution under Responsibility to protect, R2P. ICISS Report tables the idea of Responsibility to protect (R2P),[41] where a sovereign state is unable to protect its citizens, it is the duty of the community of states to shoulder it. R2P endorses use of force if needed. Although the concept just has the status of an international norm, it has nonetheless gained international consensus. The report also enunciates that the most critical point of peace building is restoration and rebuilding.[42] In relation to the recent conflict in Libya, a resolution passed by SC to protect civilians and provide humanitarian assistance can be cited as an example of R2P.[43] Although R2P is currently restricted to Security Council, the possibilities of individual state R2P have not been written off.

A change is required in policy of the Myanmar government. The main bone of contention against the Rohingyas seems to be that they are 'original ethnic minorities' that is to say that their ancestors migrated to Myanmar centuries ago and were not indigenous to Myanmar. This argument seems to be the basis of not accepting Rohingyas; it is usually peddled by politicians and common people alike. Such xenophobic ideas have no place in 21st century, if one starts to assert nationality only by ancestral descent, it is highly doubtful that any person can claim citizenship from any country. The previous century was marred by trader movements, colonial expansion and mass exodus from land to another, essentially making the world a melting pot. Perpetuating such regressive ideas of nationality

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[40] Amnesty International, 'Myanmar: Abuses against Rohingya Erode Human Rights Progress' (19 July 2012); Human Rights Watch, 'The Government Could Have Stopped This'(Naypyidaw, 1 August 2012)

[41] International Commission on Intervention And State Sovereignty (Iciss), *The Report On Responsibility To Protect, 2001*, <responsibilitytoprotect.org/ICISS%20Report.pdf > Accessed 31 January 2015

[42] International Coalition On Responsibility To Protect*About responsibility to protect,*<http://responsibilitytoprotect.org/index.php/about-rtop> accessed 9 February 2015

[43] UN Security Council Resolution 1970 (2011), S/RES/1970 (2011), 26 February 2011

as basis of citizenship has not place in the present world. A clear consensus within public international law needs to be developed to in this regard. Community strengthening programmes should also be conducted and encouraged to dispel hate and foster harmony.

The above recommendations are problem-specific and aim directly at handling the Myanmar refugee issue. But the Myanmar refugee problem is a mere symptom of a growing disease of refoulement and rejection. It is a disease which present International Refugee law is unable to treat. In order to treat this disease we need to make International refugee law more powerful. It needs to leave behind its western-oriented developed country outlook and attempt to incorporate the concerns of the developing countries. This is the need of the hour as developing countries together constitute the most-refugee producing and accepting countries in the world. By addressing concerns of developing countries, refugee law in turn will address concerns of millions of refugees in these areas. In conclusion the author hopes to see a more inclusive refugee law accepted by developing and developed countries alike.

Right to Information Constricted: A Commentary on Girish Ramchandra Deshpande v Central Information Commissioner & Ors

Mr. Shailesh Gandhi*

ABSTRACT

This write up is a focused analysis of the implications of the decision of the Supreme Court in the case of Girish Ramchandra Deshpande v Central Information Commissioner. & Others on the right to information regime in India. It first of all establishes the significance of the Right to Information Act 2005 in furthering and safeguarding the fundamental rights of the people. It then provides a factual background of the case of Girish Ramchandra Deshpande and the decision therein. It explains the reasoning adopted by the court in upholding the decision of the subordinate courts and in applying the exemption under section 8 (1(j) of the Right to Information Act. The author then tests the validity of the conclusion reached by the court in light of the statutory provisions in Section 8 (1) (j) including the proviso contained therein. The author discussed the concept of privacy and the notion of personal date and argues that the decision reached by the court is not justified. According to the author, the decision of the court results in a constricted interpretation of extent of information available to the citizens by expanding the scope of the exemption under Section 8 (1) (j) beyond its obvious statutory boundaries. The author contends that the decision overlooks the significance of the applicable proviso which results in an obvious curtailment of the right to information available to the citizens. The author characterises the decision of the court as a virtual amendment of the statutory provisions and hold is against the spirit of the Right to Information Act 2005.

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RTI usage and propagation is moving at a fast pace because of citizen enthusiasm and desire for accountable governance. The biggest gain has been in empowering individual citizens to translate the promise of 'democracy of the people, by the people, for the people' into a living reality. The law as framed by Parliament has outstandingly codified this fundamental right of citizens. When framing the law cognizance had been taken of various landmark decisions of the Supreme Court on this subject. One of the objectives of this law mentioned in its preamble is to contain corruption. It is a simple, easy to understand statute, which common people can comprehend. However, there are some decisions of information commissions and courts which are constricting this fundamental right of citizens which is neither sanctioned by the constitution or the law. This paper is an effort to highlight one such instance, which is resulting in an effective amendment of the law without Parliamentary sanction.

The RTI Act mandates that all citizens have the right to information subject to the provisions of the Act. The law defines who has to give information and fixes a period of thirty days for this. It mandates the position of Public Information Officers (PIO), and a process for filing a first appeal and a second appeal before information commissions. No reason needs to be provided for seeking information and if a PIO denies information without reasonable cause, he is liable to be penalized personally. Section 7 (1) clearly states that information can only be refused for the reasons specified in Section 8 and 9. Section 22 of the Act ensures that no prior laws or rules can be used to deny information by stating;

"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

If there is no inconsistency with an existing law, information under RTI would have to be provided. If there is any inconsistency with any law and the applicant seeks information under the RTI Act, this law supersedes the earlier law and denial of information would have to justified only by Section 8 or 9. The reasonable restrictions which may be placed on the freedom of expression have been mentioned in Article 19 (2) in the constitution as affecting "*the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.*"

At this stage it would be worthwhile to look at Sections 8[1] and 9.[2]

[1] Right to Information Act 2005, s 8;
"(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,-
(a) information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;
(b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court;
(c) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
(d) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;
(f) information received in confidence from foreign government;
(g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
(h) information which would impede the process of investigation or apprehension or prosecution of offenders;
(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers:
Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over:
Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;
(i) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:
Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.
(2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interests in disclosure outweighs the harm to the protected interests.
(3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:
Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act."

[2] Right to Information Act 2005, s 9; "Without prejudice to the provisions of section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be, may reject a request for information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State."

In Rajiv Singh Dalal (Dr.) Vs. Chaudhari Devilal University, Sirsa and another (2008)[3], the Supreme Court, after referring to its earlier decisions, has observed as follows;

"The decision of a Court is a precedent, if it lays down some principle of law supported by reasons. Mere casual observations or directions without laying down any principle of law and without giving reasons does not amount to a precedent."

The Supreme Court's judgment in the Girish Ramchandra Deshpande[4] is being treated as the law throughout the country and I will argue that this has the effect of amending Section 8 (1) (j) without legitimacy. This paper will seek to show that the impugned judgment does not lay down the law and is being wrongly used to constrict the citizen's fundamental right to information.

Girish Ramchandra Deshpande had sought various information about Mr. Shri Anant Baliram Lute, Enforcement Officer, with Regional Provident Fund Commissioner by his RTI application. The appellant had sought for copies of all memos, show cause notices and censure/punishment awarded to Shri Lute. He had also requested for a copy of the assets & liabilities submitted by Shri Lute at the time of his appointment in the service and details of investment, lending and borrowing from Banks and other financial institutions by Shri Lute. He had also requested for a copy of the details of gifts accepted by Shri Lute and his family and friends and relatives at the marriage of his son. Apart from these he wanted a copy of the immovable and moveable property returns submitted by Shri Lute to the competent authority. This was denied by the Public Information Officer, First appellate authority and the Central Information Commission primarily on the ground that it was exempted under Section 8 (1(j) of the RTI Act. He approached the High court which also rejected his writ. He then approached the Supreme Court.

The main part of the judgment states:

"12. The petitioner herein sought for copies of all memos, show cause notices and censure/punishment awarded to the third respondent from his employer and also details viz. movable and immovable properties and also the details of his investments, lending and borrowing from Banks and other financial institutions. Further, he has also sought for the details of gifts stated to have accepted by the third respondent, his family members and friends and relatives at the marriage of his son. The information mostly sought for finds

[3] (2008) 9 SCC 284

[4] Special Leave Petition (Civil) No. 27734 of 2012; Girish Ramchandra Deshpande v Cen. Information Commr. & Ors; KS Radhakrishnan & Dipak Misra; 3 October 2012; (2013) 1 SCC 212

a place in the income tax returns of the third respondent. The question that has come up for consideration is whether the above-mentioned information sought for qualifies to be 'personal information' as defined in clause (j) of Section 8(1) of the RTI Act."

"13. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show cause notices and orders of censure/punishment etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organization is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer of the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed but the petitioner cannot claim those details as a matter of right."

"14. The details disclosed by a person in his income tax returns are 'personal information' which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information."

A careful reading of the law shows that personal Information held by a public authority may be denied under section 8(1)(j), under the following two circumstances;

"(a) Where the information requested, is personal information and the nature of the information requested is such that, it has apparently no relationship to any public activity or interest;"

or

"(b) Where the information requested, is personal information, and the disclosure of the said information would cause unwarranted invasion of the privacy of the individual."

If the information is personal information, it must be seen whether the information came to the public authority as a consequence of a public activity. Generally

most of the information in public records arises from a public activity. Applying for a job, or ration card are examples of public activity. However there may be some personal information which may be with public authorities which is not a consequence of a public activity, eg. Medical records, or transactions with a public sector bank. Similarly a public authority may come into possession of some information during a raid or seizure which may have no relationship to any public activity.

Even if the information has arisen by a public activity it could still be exempt if disclosing it would be an unwarranted invasion on the privacy of an individual. Privacy is to do with matters within a home, a person's body, sexual preferences etc. This is in line with Article 19 (2) which mentions placing restrictions on Article 19 (1) (a) in the interest of 'decency or morality'. If however it is felt that the information is not the result of any public activity, or disclosing it would be an unwarranted invasion on the privacy of an individual, it must be subjected to the acid test of the proviso;

"*Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."*

The proviso is meant as a test which must be applied before denying information claiming exemption under Section 8 (1) (j). Public servants have been used to answering questions raised in Parliament and the Legislature. It is difficult for them to develop the attitude of answering demands for information from citizens. Hence before denying the information the law has given an acid test: Would they would give this information to the elected representatives. If they come to the conclusion that they would provide the information to MPs and MLAs they will have to provide it to citizens, since the MPs and MLAs derive legitimacy from the citizens.

Another perspective is that information is to be denied to citizens based on the presumption that disclosure would cause harm to some interest of an individual. If however the information can be given to legislature it means the likely harm is not much of a threat since what is given to legislature will be in public domain. Hence it is necessary that when information is denied based on the provision of Section 8 (1) (j), the person denying the information must give his subjective assessment whether it would be denied to Parliament or State legislature if sought.

It is worth noting that in the Privacy bill 2014 it was proposed that Sensitive personal data should be defined as Personal data relating to;

"(a) physical and mental health including medical history, (b) biometric, bodily or genetic information, (c) criminal convictions (d) password, (e) banking credit

and financial data (f) narco analysis or polygraph test data, (g) sexual orientation. Provided that any information that is freely available or accessible in public domain or to be furnished under the Right to Information Act 2005 or any other law for time being in force shall not be regarded as sensitive personal data for the purposes of this Act."

Only if a reasoned conclusion is reached that the information has no relationship to any public activity or that disclosure would be an unwarranted invasion on the privacy of an individual a subjective assessment has to be made whether it would be given to Parliament or State legislature. If it is felt that it would not be given, then an assessment has to be made as Section 8 (2) whether there is a larger public interest in disclosure than the harm to the protected interest. If no exemption applies there is no requirement of showing a larger public interest.

In the impugned judgment a RTI request for copies of all memos, show cause notices, orders of censure/punishment, assets, income tax returns, details of gifts received etc. of a public servant was denied. The court has ruled without giving any legal arguments merely by saying that this is personal information as defined in clause (j) of Section 8(1) of the RTI Act and hence exempted. The only reason ascribed in this is that the court agrees with the Central Information Commission's decision. Such a decision does not form a precedent which must be followed. It cannot be justified by Article 19 (2) of the constitution. As per the RTI act denial of information can only be on the basis of the exemptions in the law. The court has denied information by reading Section 8 (1) (j) as exempting;

"information which relates to personal information ~~the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual~~ unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:

~~*Provided that the information, which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."*~~

There are no words in the judgment,- or the CIC decision which it has accepted,- discussing whether the disclosure has any relationship to a public activity, or if disclosure would be an unwarranted invasion on the privacy. The words which have been struck above have not been considered at all and information was denied merely on the basis that it was personal information. Worse still the proviso 'Provided that the information…..' (underlined above) has not even been mentioned and while quoting the entire Section 8 (1) the proviso has been missed

. Effectively only 40 of the 87 words in this section were considered. This proviso is very important and the court should have addressed it.

I would also like to quote the ratio of *R Rajagopal and Anr. v state of Tamil Nadu* (1994),[5]

The ratio of this judgement was as following;

"28. We may now summarise the broad principles flowing from the above discussion:

(1) the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone." A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages Position may, however be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy." unwarranted invasion on the privacy of an individual. At point 3 it categorically emphasizes that for public officials the right to privacy cannot be claimed with respect to their acts and conduct relevant to the discharge of their official duties. The Girish Deshpande judgment is clearly contrary to the earlier judgment, since it accepts the claim of privacy for Public servants for matters relating to public activity which are on Public records.

The Supreme Court judgement in the ADR/PUCL Civil Appeal 7178 of 2001 has clearly laid down that citizens have a right to know about the assets of those who want to be Public servants (stand for elections). It should be obvious that if citizens have a right to know about the assets of those who want to become Public servants, their right to get information about those who are Public servants cannot be lesser. This would be tantamount to arguing that a prospective groom must declare certain matters to his wife-to-be, but after marriage the same information need not be disclosed.

The Girish Ramchandra Deshpande judgment should not be treated as a precedent which must be followed for the following reasons:

1. It is devoid of any detailed reasoning and does not lay down a ratio.

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[5] *R Rajagopal andAnr. v state of Tamil Nadu* 1994 SCC (6) 632

2. It does not analyse whether a public servant's work and assets is information which is a public activity or not. The judgment when stating that certain matters are between the employee and the employer misses the fact that the employer is the 'people of India'.

3. It has completely forgotten the proviso to Section 8 (1) (j) which requires subjecting a proposed denial to this acid test.

4. It has not considered the clear ratio of the Rajagopal judgment or the ADR/PUCL judgment.

A major provision of the RTI Act has been amended by a judicial pronouncement which appears to be flawed. A major tool of citizens to bring the shenanigans, arbitrary and corrupt acts of public servants has been affected adversely without a proper reasoning. Citizens and the legal profession should discuss this and it must be recognized that Girish Ramchandra Deshpande does not lay down the law on Section 8 (1) (j) of the RTI Act.

Case Comment on National Campaign Committee for Central Legislation for Construction Labour

Dr. A. Aruna Sri Lakshmi*

Ms. Kuntirani Padhan*

ABSTRACT

Labour rights is the quintessential perception while seen from a human rights perspective. Labour and labourer both are the most neglected areas in the social as well as in the 21st Century. When it comes to issues relating the same, many laws have been mandated though not being carried on fairly well. The present case comment encapsulates the summarisation of the petition entertained for the upliftment of the building and construction workers in India after the introduction of the concept of cess in the nomenclature of labour law. The Building and Construction Workers Act as well as allied acts related to construction workers, the work taken up by the government authorities as well as the in progress judgement has been stated herein this case comment. The verdict given by the Social Justice Bench comprising of Justice Madan B. Lokur and Justice Uday Umesh Lalit for implementation of the cess fund for the benefit of the labourers has been dealt here.

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Background

The concept of social change in the field of unorganised workforce as envisioned by Justice V.R. Krishnaiyer who constituted the National Campaign Committee for Central Legislation for Construction Labour in 1985 led to the passing of the Building and Construction Workers Act as well as BOCW Welfare Cess Act 1996. The present case comment is an encapsulation of the summarisation of the petition entertained for the upliftment of the building and construction workers in India after the introduction of the concept of cess in the nomenclature of labour law. The Building and Construction Workers Act as well as BOCW Welfare Cess Act 1996 related to construction workers, the implementation of the same by the government authorities is nominal. The verdict given by the Social Justice Bench comprising of Justice Madan B. Lokur and Justice Uday Umesh Lalit for implementation of the cess fund for the benefit of the labourers has been dealt here.

The present case comment hovers around the judgement given by the social justice bench comprising of Justice Lokur and Justice Lalit which dealt on the issue of proper allocation of the cess amount that is being collected by the states. The construction site workers face myriad challenges both in the destination as well as in their present work place. Despite abundant provisions in the Building and Construction Workers'(Regulation of Employment and Conditions of Service) Act of 1996, the implementation of the same is done on a very insignificant scale.

The most important provision in the act is every employer who undertakes construction business by engaging 10 or more workers has to mandatorily register that worker. This pre-requisite is not taken into consideration in most of the construction sites. While on bare reading of the Building and other Construction Workers Act, it is revealed that there is no mandatory strictures given for the employers to register the workers who join the construction business. Due to lack of awareness and illiteracy, the lower strata who join as workforce are not vigilant over their rights but the lacuna lies in the act itself which do not provide for initiation from the employer side also which act as a triggered lacuna. This lacuna makes the employers complacent and in this process they can misappropriate the cess fund that is collected and which has to be used only for the beneficiaries i.e. the construction workers. Section 22 of the Act[1] mandates for provision of immediate assistance and other allied assistance like, making payment of pension to the beneficiaries who have completed the age of sixty

[1] The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act 1996

years, sanctioning of loans and advances and other financial assistance. There have been eight court orders issued in CWP 318/2008 wherein at different times during 2015, the Court sought a detailed affidavit and the utilisation of funds collected in the form of cess under the Building and Other Construction Workers Welfare Cess Act 1996.

The Building and other Construction Workers' Welfare Cess Rule provides for levy and collection of cess on the cost of construction incurred by employers and the amount would be deposited with the Building and Other Constructions Workers Welfare Boards. The government collects thousands of crores through construction cess, ultimately paid by people who booked flats, but less than 10% of the amount has been spent for the benefit of daily wage earners in the construction sector for whose welfare the tax is levied, a fact which has shocked the Supreme Court. The social justice bench of Justice Lokur and Justice Lalit have expressed serious concerns over the miniscule amount that has been spent on the welfare of the construction workers taking into account that only about Rs. 361 crores has been used for their welfare out of the Rs. 4179 crores construction cess that was collected in last three years by eight states. [2] It is observed that there is a failure on the part of the States to comply with the same.

The pension scheme is one of the most important measures that had to utilise the corpus of Rs.21000 crores collected under the Building and other Construction workers Cess Act of 1996.[3] But the corruption in the system is so pertinent that the right of the old aged construction workers are being trampled by the Labour officials all over the country. While responding to the query put by the social justice bench of Justice Lokur and Justice Lalit, Labour secretaries all over the country covered their faults by stating that the workers do not have a proper identity card and they are providing them with portable Unique Access Number(UAN) which would channelize the process and all monetary benefits would be directly going to the workers. The NLUO team again taking into account the move taken by the Labour officials tried to ascertain the actuality of the same. On survey, it was found that except for in some cases , only marriage assistance is given by the board. But on questioning on provision of UAN only 2% of the surveyed population affirmed in positivity. The 2% who were having the UAN was not an act by the Building and other Construction Workers Welfare Board but the intervention of certain NGOs those who are working in the field of migrant construction workers.

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[2]Amit Choudhary, "Minimal use of building cess for workers 'shocks' Supreme Court**"(February 2015) <**http://timesofindia.indiatimes.com/india/Minimal-use-of-building-cess-for-workers-shocks-Supreme-Court/articleshow/46248891.cms **>** accessed 01 May 2016

[3] < http://www.newkerala.com/news/2015/fullnews-118294.html> accessed 1 May 2016

Directions of the Hon'ble Supreme Court on Core Issues of Construction Workers

Taking into account the writ petition filed before the Hon'ble Supreme Court by the NCC-CL against the respondents which includes representations from 25 States and three Union Territories, the social justice bench consisting of Justice Madan. B. Lokur and Justice Uday Umesh Lalit opined the case[4] in 2015 dated 16th October 2015 and enumerated five key areas that were to be looked into by the Central Government. They are :

i. To ensure maximum coverage of the building and other construction workers;

ii. To ensure distribution of benefits and implementation of the Schemes that are in existence for the benefits of the building and construction workers;

iii. To lay greater emphasis on education and provide educational facilities to the children of the building and construction workers;

iv. To provide health benefits and insurance of the building and construction workers and their families;

v. To activate the State Advisory Boards which, as per the affidavit, have not met in the last several years.

The Bench further directed the States that they do not need any permission to carry out their Schemes which they have mandated regarding the Building and Construction Workers. It also mandated to file the status report before 15th January 2016.

Status of Implementation of Supreme Court Directives in the State of Odisha

Commenting on all these five points, it is seen that in the State of Odisha, all of these benefits still lay down in paper and the beneficiaries are yet to be benefited by the same. Apart from all these, the condition of women having small children was appalling. They were either carrying their children on their back tying them with a piece of cloth or the infants would be very carelessly laid down beside the drains. Health and hygiene is a reverie for the workers working in the construction sites and also for the women. Education as a fundamental right has

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[4] National Campaign Commtt CL Labour v Union of India & Ors [318/2006] SC, Writ Petition(s) (Civil) No(s). 318/2006

been included in the Constitution vide the 86th Amendment and was though implemented from 1st April 2010 for provision of free and compulsory education to all the children in the age group of 6-14 years, it has not in strict sense being executed by the BOCW board.

But it is a notable mention that during the survey done at various places related to building and construction workers as well as migrant construction workers, the initiative taken by *Aide-et-Action,* a French based charity is applaudable. The organisation basically works for the upliftment for the migrant construction workers and basically is dedicated in the brick kiln areas. They have set up day-care centres for the children of the workers working in brick kilns. Instructors are appointed for teaching as well as taking care of the toddlers upto the age of five years. After the children complete the age of five years, the organisation links them up with the Primary Schools of the nearest area where the children would get free and compulsory education. Aide-et-Action has also linked up with the concerned *Anganwadis* and *Asha karmis (* lady health care workers) for provision of food to the children reading at the day care centres and provision of emergency health care services with the help of *Asha karmis*. These health care workers take care of the people residing in the brick kilns and whenever they need any emergent hospitalisation needs, they call up the ambulance services and render assistance.

Another impediment for the construction workers as well as the migration workers is the non availability of proper identity cards with them which is rendering them nothing in form of entitlements. The Act[5] lays down provisions for the workers migrating from different states but has no provisions for the labourers who get displaced only within the State in search of livelihood. *Aide-et-action* is working on introduction of a new act that will cover specifically the intra-state migrant workers. The Labour rights team from NLUO has also shared supportive hands to the French charity and the initiatives are being taken by both the ends for implementation of an intra-state workmen Act that will give the workers migrating inside the State an obligatory right to receive entitlements.

Apart from the above initiatives, it would be apt if the Centre could send proper audit wings for internal inspections as to the collection of cess and proper channelization of the same.

National Campaign of Construction Workers to ensure proper implementation of Building and Other Construction Workers Act 1996 as well as Building and Other Construction Welfare Cess Act, 1996 is the need of the hour to protect the human rights of the unorganised workforce particularly the construction workers.

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[5] The Inter State Migrant Workmen Act 1979

Barbulescu v. Romania – Employer Aware, Employee Beware?

Mr. Abhishek Sarkar & Mr. Anand Vardhan Narayan*

ABSTRACT

The European Court of Human Rights, in a path breaking pronouncement recently, held that surveillance by an employer of his employee's work messaging account – that was to be solely used for professional purposes, was legally valid as long as the said is limited and proportionate. The Court, while delivering its maiden judgement on legal surveillance by an employer on his employee, touched upon the issues of the extent of privacy rights granted under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the difference posed by the factual premise of the said case in comparison with erstwhile judicial precedents and the significance of striking a balance between both the employer and employee's rights. Further, a dissenting opinion by Judge Paulo Pinto de Albuquerque mandated the creation of a detailed internet usage policy that would reasonably restrict the rights of the employer to access the employee's personal communications, with the same also being made available to the employee and his consent taken before subjecting him to it. In the light of the aforementioned aspects, the present case commentary critically analyzes the decision of the Court on the right to privacy of employees. The commentary begins with the appreciation of the facts of the case, the issues involved therein and the judgment passed by the Court. The authors then move on to a critical and multi-dimensional analysis of the said decision, taking into account the hits and misses of the Court while delivering the same. In conclusion, the authors deal with the implications of the decision on the legal scenario pertaining to the burgeoning issue of the extent of privacy available at a workplace.

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Introduction

The European Court of Human Rights ('**ECHR**') delivered a landmark decision on January 12, 2016 in the case of Barbulescu v. Romania,[1] wherein it rejected by 6 votes to 1 an appeal by a Romanian citizen against his erstwhile employer who terminated his work contract since he used his professional instant messaging account for sending personal messages to his brother and fiancé. Mr. Barbulescu ('**the Applicant**') stated that his employer had acted in contravention to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2] ('**the Convention**') which granted him the right to respect for private and family life. Further, he claimed that domestic Courts had been unable to preserve the said right. However, the ECHR dismissed the contentions regarding such violation on account of the monitoring by the employer being limited and proportionate.

The said judgment has ignited several important discussions with respect to the new guidelines to be used for determination of an equitable balance between the employees' right of respect for his/her private life, coupled with communicating at work; and the employers' interests. The present case comment critically analyses this verdict, taking into account all the major issues contained therein and also its implications on an employer's conduct vis-a-vis his actions related to employee monitoring.

Facts of the Case

A. Background

The case revolves around Mr. Barbulescu, a Romanian engineer who at the request of his employer created a Yahoo Messenger account for responding to the enquiries of clients. The employer claims to have informed Mr. Barbulescu that these communications will be monitored. As per the records, it was seen that Mr. Barbulescu had used the Internet for sending personal messages, contrary to the employer's internal regulations. The internal regulations of the company specified that company resources including computers and internet access cannot be used for personal purposes.

As per the employer, the Yahoo Messenger account was accessed by him with the belief that it contained professional messages. The Applicant stated that he

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[1] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016)

[2] Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 November 1950, entered into force 3 September 1953) CETS No. 005 (The Convention)

had used the Yahoo Messenger account for professional activities. A transcript of the Applicant's communications on Yahoo Messenger was produced by the employer. There was no dispute between the employer-employee that certain messages contained sensitive personal data. The Applicant alleged that his employer had violated his correspondence and therefore should be held accountable under the criminal code. The employment of the Applicant was terminated for breaching internal regulations of the company which specified that computers should not be used for personal purposes. In search of a remedy, the Applicant took the dispute to the Bucharest County Court ('**County Court**') and raised the contention that the termination was illegal as the employer intruded his right to privacy by going through his communications.

B. Decision of the domestic courts

The County Court dismissed the complaint filed by the Applicant stating that the employer had duly complied with the dismissal proceedings as laid down in the labour code. Further, it stated that the employer had notified the employee about the regulation that prohibited the use of company resources for personal use. Accordingly the Applicant appealed against this decision to the Bucharest Court of Appeal ('**Court of Appeal**') and alleged that his communications are protected under Article 8 of the Convention, which mentions that '*everyone has the right to respect for his **private** and family life, his home and his **correspondence.***'[3] The Court of Appeal ruled in favour of the employer and observed that the conduct of the employer has been reasonable. It stated that it was necessary to keep surveillance on the Applicant's communications in order to establish any disciplinary breach by the employee. Subsequent to this, an application was filed by the Applicant to the ECHR under Article 34 of the Convention.

Key Submissions by Both the Parties

A. Key submission from the side of the applicant

The Applicant asserted that the nature of his communications on Yahoo Messenger had a private character and therefore it should be protected under Article 8 of the Convention. In light of the same, it was contended that the Romanian Government had a positive obligation to protect the Applicant's right to privacy. The Applicant argued that on account of failure of the Romanian State to protect his privacy from his employer, the said Article 8 will be applicable. The Applicant relied on the decision of *Niemietz v. Germany*[4] and argued that the protection

[3] The Convention, art 8

[4] *Niemietz v Germany* (1993) 16 EHRR 97

under Article 8 cannot be denied to him on the ground that the measure deployed by the employer related only to professional activities. Furthermore, the Applicant contended that the said breach of privacy was in contravention with paragraph two of Article 8. He stated that the same was outside the purview of the applicable law as the country's labour code did not specify procedural safeguards with respect to the surveillance of conversations in the electronic media by an employee.

B. Key submission from the side of the romanian government

On the other hand, the Government of Romania submitted that Article 8 of the Convention will not be applicable in the present case. It was contended that the Applicant cannot claim for expectation of privacy while at the same time denying private use from the Yahoo Messenger account. It was argued that Article 8 will be attracted only if the party asserts private nature of the communication. The Government stated that when the Applicant was given an opportunity to claim that the communication was private in nature, he had clearly mentioned that the same was for professional purposes. Further, it was put forward that the Applicant had been duly notified by the employer that they can monitor the communications of their employee. The Government distinguished the present case from the decided cases of *Halford v. the United Kingdom*[5] ('**the Halford case**') and *Copland v. the United Kingdom*[6] ('**the Copland case**'). In *the Halford case*, it was held that the employer by monitoring a personal telephone line at the place of work had infringed Article 8 of the Convention. In order to distinguish it from the present case, the Government argued that the Applicant there was provided one of the landlines of the office for personal purposes, whereas in the present case the employees were clearly prohibited from using company resources for personal purposes. Furthermore, it can be inferred from the ruling in *the Copland cas*e that in the absence of any warning regarding monitoring of communications, one can have a reasonable expectation that his/her communications will remain private. The Government in order to distinguish between *the Copland case* and the present one, argued that personal use of company resources were allowed in the former, while in the latter the usage was limited strictly to professional purposes.

Issues Decided

The present case involved three pertinent issues which were determined by the ECHR:

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[5] *Halford v the United Kingdom* (1998) 24 EHRR 523

- Whether the employer's access of the Applicant's Yahoo Messenger account was lawful due to the assumption that the information was to be confined to professional activities?
- Whether the employer acted in a reasonable manner by verifying that his employees were busy in professional activities during work hours?
- Whether the scope of monitoring of the employee was limited and proportionate?

Judgment of the ECHR

A. Notion of private life

Citing its previous holdings,[7] the ECHR observed that the concept of private life has a wide ambit. Telephone calls and e-mails sent from business premises are *prima facie* covered within the notions of 'private life' and 'correspondence' under Article 8 of the Convention.[8]

B. Scope of the complaint

With regards to the violation of Article 8 of the Convention, the ECHR observed that the complaint was being raised pertaining to labour law proceedings in order to establish that the decision of the employer was null. Therefore, the Court found that the scope of the complaint was limited to monitoring within the disciplinary proceedings framework. The decision of the employer to terminate the employment contract of the Applicant was not based on either the actual content of his communications or on the disclosure of communications.

C. Expectation of privacy

The ECHR carefully deliberated on the issue of the reasonable expectation of privacy by an employee while communicating through the internet from an account that was registered by the employer. In this regard, it first distinguished *the Halford* and *Copland cases* on the ground that in those cases the personal use of the telephone/computer was allowed. The Court observed that it is disputed whether prior notice was provided or not. However, it agreed that if no prior warning was provided then the Applicant had a reasonable expectation of privacy.

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[6] *Copland v United Kingdom* App no 62617/00 (ECHR, 3 April 2007)

[7] *E.B. v France* (2008) 47 EHRR 21 [43]; *Bohlen v Germany* App no 53495/09 (ECHR, 19 February 2015) [45]

[8] *Halford v the United Kingdom* (1998) 24 EHRR 523 [44]; *Amann v Switzerland* (2000) 30 EHRR 843 [43]

D. Striking a fair balance between the interests of the parties

In an attempt to balance the conflicting interests of either party, the ECHR discussed the duty of the State with respect to the maintenance of its positive obligations imposed by Article 8 of the Convention. Since the complaint was made pertaining to disciplinary proceedings, the ECHR opined that the employer had taken his actions within the purview of disciplinary powers vested on him by virtue of the State's own labour code. It was noted that the employer perused the Applicant's conversations due to his assumption that the same was professional in nature.

The ECHR decided in not attaching much significance to the said communications, as the same was not considered important as per the verdict of the domestic Courts.[9] It further stated that it could not be considered unreasonable on the part of an employer to check if his employees were working while being in office. Owing to the fact that merely the Yahoo Messenger account was perused and nothing else, the monitoring by the employer was decided to be limited in both scope and proportion.

In sum, the ECHR held that there has been no violation of Article 8 of the Convention since the monitoring by the employer was proportionate and limited in scope.

E. Dissenting opinion–emphasis on employee rights, not employer interests

The dissenting Judge Paulo Pinto de Albuquerque disagreed with the majority opinion that there had been no violation of Article 8 of the Convention. He opined that internet surveillance is not at the discretion of the employer and such monitoring is not unrestricted. After relying on past decisions,[10] he held that the protection afforded to a communication cannot be lowered just because (a) the communication occurred during working hours,(b) it occurred in the employment relationship context, (c) it had an impact on the business activity of the employer, or (d) it affected the performance of the employee. The Judge stated that the need of the hour is to put in place a comprehensive internet usage policy at workplaces, which specify rules on the usage of email, social networks and the likes. Relying on Article 29 of the Working document on the surveillance of

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[9] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [58]

[10] *Niemietz v Germany* (1993) 16 EHRR 97 [28]; *Halford v the United Kingdom* (1998) 24 EHRR 523 [44]; *Amann v Switzerland* (2000) 30 EHRR 843 [4]

electronic communications in the workplace,[11] it was stated that a general prohibition on personal use of internet by the employee is not feasible. He stated that the employee should be made aware of the said internet usage policy and be notified personally. Further, the consent of the employee regarding this policy should be taken explicitly.

A Critical and Multidimensional Analysis of the Judgment – More Pitfalls Than Promise?

The present deliberation has undertaken a critical analysis of the ECHR's judgment under five sub-headings. To begin with, the authors have addressed the issue of this decision's contradiction with *the Copland case*. Then they have moved on to the inherent inconsistency in reasoning that is present in the judgment and discussed the inefficacy of the adjudicatory body in not being able to sufficiently protect the identities of other people. Further, it has been highlighted that Article 8(2) of the Convention – with respect to breach of privacy, has been improperly applied. The final heading contains a discourse on how the laws pertaining to the European Union could have been applied here and resulted in a different verdict.

A. Contradiction with *the Copland case*[12] – How critical is informing the employee about surveillance?

The present judgment aims to differentiate itself with the verdict given in *the Copland case*,[13] but in essence it is in contravention to it. The majority judges considered it to be a case in which the employee's use of the office telephone was 'tolerated'.[14] The same is a valid but incomplete hypothesis. The crux of the judgment was that she received no warning about her calls being monitored.[15] It is a critical difference as it has not been clarified if the Applicant had knowledge about the surveillance in the present case. Further, this unaddressed issue may have far-fetching repercussions given that other employers may provide a complete ban on an employee's use of the internet, but not inform them about any surveillance. Such would spark a debate on whether the failure to inform about surveillance is crucial (as per *the Copland case*) or not (as per the present case); or only limited to when private use of the employer's equipment is not at all banned.

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[11] Article 29 – Data Protection Working Party, 'Working document on the surveillance of electronic communications in the work place (adopted on 29 May, 2002)'<http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2002/wp55_en.pdf> accessed 17 March 2016

[12] *Copland v United Kingdom* App no 62617/00 (ECHR, 3 April 2007)

[13] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [39]

B. Inconsistency in reasoning – Surveillance placed in general or for a specific purpose?

The judgment by the ECHR has a significant inherent contradiction in it. Emphasis has been provided on the employer subjecting the employee to surveillance only after his contention that he had limited the use of the messaging service to work purposes. Thus, the employer could not have anticipated finding personal messages while confirming the veracity of the Applicant's statement.[16] The same is justified, but, in the factual scenario it has been mentioned that the initial allegation on the Applicant that he was using his work equipment for personal purposes was premised on putting him under surveillance first.[17] Therefore, the Applicant has been subject to surveillance before any action was brought against him. The same is not a minor discrepancy as it raises a pertinent question as to whether the employers who ban the private use of any work equipment are allowed to put their employees under surveillance or whether there needs to be a specific purpose (like to check the veracity of an employee's denial of an allegation with respect to that) for the same.

C. Protection of other people's identities – A half-baked attempt

It has been mentioned in the judgment that the identities of the people the Applicant communicated with were not disclosed.[18] However, the ECHR makes numerous references to these people (the Applicant's brother and fiancé).[19] In this digital age where information about everyone is available on social media, it is very much possible for someone who knows the Applicant to find out who his brother and fiancé are, thereby disclosing their identities and defeating the underlying objective of the ECHR.

D. Improper application of Article 8(2) of the Convention – Was the breach of privacy truly legal?

The ECHR recognizes that Article 8 of the Convention[20] has been affected, but, as has been rightly pointed out in the dissenting opinion, it fails to adequately apply Article 8(2).[21] It does not point out the interests that justify the said breach

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[14] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [39]

[15] *Copland v United Kingdom* App no 62617/00 (ECHR, 3 April 2007) [42]

[16] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [57]

[17] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [7]

[18] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [58]

[19] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [7], [30], [44]

[20] The Convention, art 8

[21] The Directive, art 8(2)

of privacy, or if the breach had been made in accordance with law, or if such breach was necessary and proportionate. Although the employer's interest to enforce his policy with regards to using work equipment can fall under 'rights and freedoms of others,'[22] it is still subject to deliberation if the acts of the employer were 'in accordance with law'[23] or proportionate.

E. Application of European Union law – Key legislation missed

Considering that Romania follows the European Union Directive[24] ('**the Directive**'), the ECHR could have discussed the issues raised as per the laws of the European Union. As has been mentioned hereinabove, any interference with a person's right to privacy needs to be in accordance with the law.[25] Therefore, an overview of the national law and the local Court's interpretation regarding the same should have been taken into account – to check if such was in consonance with the European Union's law. It was surprising for the ECHR to not undertake the same and completely do away with the in accordance with law test.

(i) Collecting personal data under the Directive

It would have been very difficult for the employer to justify his actions under the Directive. The Applicant had not given consent for the said data collection; therefore, the employer could either have taken the defense that such was vital to the performance of the contract or was for some legitimate interests.[26] However, the legitimate interests could have been outweighed by the Applicant's rights. It is debatable whether the Court of Justice of the European Union ('**CJEU**') would have decided the case in a similar manner after interpreting the Directive; since it is highly debatable whether the monitoring of an employee's private communications was essential for enforcing the policy against use of work equipment for private purposes, or whether the points considered by the ECHR were sufficient to put the employer's rights on a higher pedestal than the employee's rights. Taking into account the most recent CJEU decisions on data protection that have upheld the privacy of people,[27] it can be safely presumed

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[22] The Directive, art 8(2)

[23] The Directive, art 8(2)

[24] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (The Directive)

[25] The Convention, art 8(2)

[26] The Directive, art 7

[27] Case C - 362/14 *Maximillian Schrems v Data Protection Commissioner* (ECJ, 6 October 2015); Case C-212/13 *Ryneš v Úøad pro ochranuosobníchúdajù* (ECJ, 11 December 2014); Cases C - 293/12 & C - 594/12 *Digital Rights Ireland and Seitlinger & Ors. v Minister for Communications,*

that it would probably mandate a notification of surveillance before any such surveillance was imposed.

(ii) Prohibition of access to sensitive data under the Directive

A major point of contention of the Applicant was that the data accessed by the employer had contents of his health and sex life.[28] While the European Union law does not permit the processing of such information along with other sensitive data,[29] such prohibition is nothing more than a legal fiction as there are several grounds when such data may be processed.[30] However, it remains difficult to justify such processing of data. As per the Directive, the data in the present case could only have been processed if it was vital to the carrying of the employer's duties and rights, was permitted by the national law and had proper safeguards.[31] It is difficult to imagine that the aforementioned criteria would have been fulfilled in the present case.

Impact of the Judgment on the Existing Legal Framework

The ECHR has certainly not reversed the existing judicial precedents on this matter – it differentiates *the Halford case* and *the Copland case*, instead of overturning them. While various media outlets have gone on a frenzy and stated that this judgment has allowed employers access to their employees' personal messages,[32] such is not the case and this decision certainly does not give the employer power to put his employees under constant surveillance. However, there continues to be scenarios where such surveillance is permissible and instances when such is prohibited. The significance of this case lies in it creating a dividing line between these two classifications.

The said line comes into existence after considering the extent a reasonable expectation of privacy exists with the employee at his place of work. There will be a different level of expectation when the employer explicitly permits the use

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Marine and Natural Resources & Ors. (ECJ, 8 April 2014); Case C 131/12 *Google Spain SL & Anr. v Agencia Española de Protección de Datos (AEPD) & Anr.* (ECJ, 13 May 2014)

[28] *Barbulescu v Romania* App no 61496/08 (ECHR, 12 January 2016) [30]

[29] The Directive, art 8(1)

[30] The Directive, art 8(2)

[31] The Directive, art 8(2)(b)

[32] Dave Snelling, 'WhatsApp warning: Your boss can now legally read every message you send at work' (*Daily Star*, 15 January 2016) <http://www.dailystar.co.uk/tech/news/487320/WhatsApp-ruling-EU-messages-read-employers> accessed 17 March 2016; Siobhan Fenton, 'European Court

of phone/computer for private communication,[33] or when he tolerates it.[34] In the present factual premise, the critical difference lies in the fact that the employer banned the use of work equipment for private purposes.

Furthermore, the ECHR took into account other factors such as there was a limited use of the transcripts of communication, other documents present in the computer was not accessed and there was a lack of a solid reason for the employee to use his work equipment for private communications. It was noted that the Applicant had initiated a claim as per employment law and not criminal or data protection law. These factors were also critical and were considered along with the employer's ban on use of work equipment for private purposes.

In any case, the decision should not be regarded as a concrete source of authority. It is highly probable that the Grand Chamber of the ECHR will revisit and revise the judgment, on account of it having numerous fallacies in reasoning. Further, when the higher standards of the European Union law come into the picture, changes are bound to be made upon the said verdict.

Conclusion – The way Forward

The decision in this case should not be regarded as one that gives unrestricted power to the employers to check employees' personal communications at their workplace. Employers need to keep in mind that the monitoring measure here not breaching Article 8 of the Convention is not to be taken as an indication that the same is permitted. More limitations under various national laws will be applicable, that differ from one jurisdiction to the other. The judgment was not an unanimous one (with the presence of a dissenting opinion), it was premised on a very particular factual circumstance and it is not binding on domestic Courts and national privacy regulators.

The pivotal point of this issue rests in the balance that needs to be maintained between monitoring employees and not breaching their right to privacy, which can be achieved by undertaking adequate risk assessments prior to the initiation of monitoring schemes – with special emphasis on determining whether the objective of monitoring is legally valid. A proper notice should also be provided

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rules bosses can monitor employees' private messages on WhatsApp and other messaging services' (*The Independent*, 13 January 2016) <http://www.independent.co.uk/news/business/european-court-rules-bosses-to-monitor-employees-private-messages-on-whatsapp-and-other-messaging-a6808691.html.> accessed 17 March 2016

[33] *Halford v the United Kingdom* (1998) 24 EHRR 523

[34] *Copland v United Kingdom* App no 62617/00 (ECHR, 3 April 2007)

by the employer to his employee, that details the nature and extent of monitoring that is going to take place. Further, the monitoring scheme has to be kept limited to the purpose for which it was sanctioned. A regular overall assessment of the said scheme needs to be done.

Human Rights of Manual Scavengers in India: Judicial Insensitivities and Policy Paralysis in the *Delhi Jal Board* Case

Mr. Devarshi Mukhopadhyay*

ABSTRACT

There has been long standing argumentative discourse surrounding the multiple and cross-cutting dimensions of law vis. caste realities in India. While one the one hand, we may have made significant strides in ensuring an acceptable level of formal equality, structural shortcomings both in the market and in the public sphere continue to challenge our constitutional promise of social justice. Much seems to be lost in translation in between phases of policy-making and achieving our constitutional objectives, a concern which threatens to invalidate the existence of a stunning majority of social welfare legislations in the country. Naturally therefore, the need to re-examine basic yet existential policy questions of caste welfare assumed significance in the public fora. Before the advent of British Colonialism, one wouldn't have imagined the structured and institutionalized model of societal segmentation that exists amongst castes today, especially in the public realm. The inherent contradictions that were present in the societal interaction between members of different castes, was defined in terms of significant flexibility.

It is the endeavor of the author to trace the role of the judiciary in ensuring such substantive equality with respect to the manual scavenging community in India, by commenting on the landmark 2011 decision of the Supreme Court of India in the Delhi Jal Board case. The author shall demonstrate how by distancing itself from the lived realities of the manual scavenging community

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in India, we continue to observe a poor policy performance and consequently, an apparent policy paralysis. The larger objective of this case comment therefore, is to highlight the need for the Indian judiciary to formulate a 'rights-based' non-legal analysis model, in ensuring substantive equality.

Factual Matrix

In the year 2007, Human Rights Law Network filed a Public Interest Litigation in Delhi High Court for "*National Campaign for Dignity and Rights of Sewerage and Allied Wor*kers" representing the millions of manual scavengers in and around Delhi who are employed by the municipal agencies like Delhi Jal Board (the agency which is responsible for water supply and liquid waste management), Municipal Corporation of Delhi, New Delhi Municipal Council, Delhi State Industrial Development Corporation, Central Public Works Department and other civic bodies challenging their professional terms and conditions under the Indian constitutional scheme.

The case was filed at the backdrop of reports coming in regard of the deaths of the scavengers because of poisonous gases and fumes in several cleaning areas. These scavengers and sewage workers were forced to go into the drains without any safety equipment and gas cylinders. After their death, the civic agencies also refused to pay any compensation and financial benefits to their families. In the PIL, these instances were highlighted and the Hon'ble Delhi High Court found the situation very grim and pathetic. The court therefore directed the civic bodies by its order dated 05.04.2008 to forthwith ensure, inter alia, providing free medical care facilities to the sewage workers, payment of compensation to the sewage workers, who are suffering from occupational diseases, payment of compensation and statutory dues like provident funds, gratuity etc. to the dependents of such sewage workers, providing protective gears and equipment to the workers going down the drain, etc. The Court also directed to pay a compensation of Rs. 1 Lakh (Rupees one hundred thousand) to every sewage worker who lost his/her life while performing their duties.

When the hearing progressed, the Court found that there was very low level of implementation of orders and directions of the order dated 05.04.2008 by these civic bodies. Hence after considering the affidavits filed by different agencies and the reports submitted by the Committee constituted by the Court to see the implementation of its orders, the Court finally took a tough stand and passed the order on 21.04.2008 directing the civic bodies to ensure immediate payment of compensation to the families of the victims through Delhi Legal Aid Services Authority. The Court also enhanced the compensation to some victims to tune of

Rs. 1.71 lakhs (Rupees 171 thousand). The Court also issued show cause notices to these civic bodies for initiating contempt of court proceedings.

Challenging the order dated 21.04.2008 passed by the High Court of Delhi, the Jal Board filed the appeal in the Supreme Court of India. In this appeal the civic body contended that the High Court overreached its powers while awarding compensation and directing them to ensure safety and security of the sewage workers.

The Supreme Court dismissed their plea and directed, by its order dated 12.07.2011, the civic bodies to ensure the immediate implementation of the orders passed by the Delhi High Court on 05.04.2008, preferably within two months and file a compliance report in the Delhi High Court. The Court also enhanced the compensation to be paid to each of the victims to Rs. 5 Lakh (Rupees Five hundred thousand). The Court remanded the matter back to the Delhi High Court for further hearing and passing appropriate orders.

Legal and Constitutional Issues

Several constitutional legal issues arise in the present factual matrix, given the terms and conditions of the present State enforced oppression apparatus. The author contends that multiple legal/constitutional issues, including (a) the involvement of local authorities in the perpetration of caste atrocities, (b)the move towards complete intolerance of manual scavenging, (c) the coverage afforded under the Prevention of Atrocities Act 1989[1] and the Untouchability Offences Act 1955[2], and (d) the omnipresent Indian problem of the sexual division of labor should have been examined by the Court to enhance this role of the State in formulating and implementing a broader welfare framework which remained unaddressed. The author further argues that this inadequate engagement with the labor question further perpetrates labor hegemonies viz. manual scavenging and significantly limits the counter-hegemonic discourse. In proving the abovementioned points, the author has followed a mix of the doctrinal and non-doctrinal methodologies of legal research in order to showcase the usual *"conversion handicap"* faced by the manual scavenging labor community.

Furthermore the detailed examination by the Court of the *locus standi* question may have provided a broader activist base, but consequently resulted in an inadequate examination of several legal and structural issues that should have been addressed by the Court, in order to shape a more responsive and well

[1]The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act), 1989.

[2]The Untouchability (Offences) Act, 1955.

defined territory of future debate.[3] It is also submitted that although the judicial response of the Court, speaking through Ganguly J. and Singhvi J., was fairly meticulous, looking into several individual cases of death due to inhuman working conditions, it failed to outline the scope of labor law as a tool to control social power through an operational normative framework, by simply ordering the appellants to follow the interim instructions of the Delhi High Court.

Asking the *"Why"* Question: Exploring the Judicial Disengagement with Manual Scavenging Labor

Setting the tone and outlining the territory for a contemporary narrative in the context of the dehumanizing experiences of the manual scavenging labor force in India necessarily requires a double-fold examination into the State's policy failures as well the societal handicap of deep structures within the Indian social fabric. While the *"legal"* reasoning of the judiciary, often couched in the language of a strong *"non-legal/welfare*" approach, continues to enlist a variety of the States' *"constitutional obligations*", the fact that such reasoning is often divorced from the lived experiences of caste in this country provides only a superficial solution/examination to the cross-cutting issues of labor law, caste and the counter-reactive State machinery.[4] Although the transition of this examination, (from the assumption that only egalitarian structures were capable of curbing deep structures to a more interventionist and non-tolerant model which envisages a more sensitive human rights dialogue), has paved the way for a better perceived policy debate,.It was seen in the case of *Safai Karamchari Andolan vs. Union of India*[5] and we continue to notice the lack of a well directed and pragmatic policy engagement with the *"why"* question of the State's intervention in manual scavenging, especially in terms of the judicial engagement with the labor question.[6]

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[3] The question of *locus standi* has been dealt with in great detail by the Court, listing close to 20 cases in order to decide the maintainability of the writ petition. It is submitted that this detailed examination may have provided for a broader base for litigation, but possibly compromised on looking into more necessary sub-issues.

[4] The author contends that the judiciary, through its reference to State guaranteed rights, make a fairly *"legal"* point, but couches its disengagement in welfarist language. Consequently, this lack of adequate engagement results in a significant curtailment of the counter-hegemonic discourse essential to achieve a situation of zero tolerance to manual scavenging practices.

[5] Writ Petition (Civil) No. 583 of 2003.

[6] The author stresses on the need for the current judicial model to undertake a finer examination into the *"why"* question of State intervention and policy in order to move beyond an *"employment relations law"* discourse.

Although the Supreme Court of India, in the 2011 matter between the *Delhi Jal Board and the National Campaign for Dignity and Rights of Sewage and Allied Workers* (hereafter "*National Campaign*[7]") as well as in *Safai Karmachari Andolan*, provided for a more sensitive judicial dialogue with the power inequilibrium surrounding manual scavenging than before, one cannot help but notice its inadequate engagement with locating/identifying subaltern structures, which the author argues is a result of the problem of *"distance"*. The author shall primarily focus on the landmark 2011 decision of the Supreme Court of India in the *Delhi Jal Board case*, in order to demonstrate certain policy areas for labor welfare.

Interpreting Subaltern Structures through the Judicial Eye: Examining the Problem of *"Distance"*

In her essay *"Can the Subaltern speak?"* Gayatri Chakraborty Spivak raises questions about who speaks for whom when the subaltern of history becomes the subject of literary or any other kind of representation[8]. Spivak and Mahasweta Devi both question what gets lost when the object of representation (i.e., the subaltern subject) is spoken of or translated by someone whose socio-cultural and economic location is in a relationship of privilege to the object of representation. The politics of caste-based discrimination in India and the use of traditional methods of the rule of labor law to combat the dehumanizing effects of manual scavenging represents this same relationship of privilege and have been able to do very little to alleviate levels of social poverty in the country. It is submitted that the examination of the judiciary in the present case demonstrates precisely this problem of *"distance"* from the subaltern subject (the labor force involved in manual scavenging), and consequently leads to its failure in addressing the caste centric labor question through a broader normative model which could potentially change the face of the current judicial discourse.[9]

Judicial Disengagement with Normative Questions: The Underlying PROBLEMS OF the *"Conversion Handicap"*

If one undertakes a detailed examination of the structure of the judgment, one sees that the Court delves into a mechanical examination of (a) the question of compliance with the orders of the Delhi High Court dated 20.08.2008 and 21.04.2009, and (b) the question of the maintainability of the writ petition. In deciding these two issues, the Court goes on to examine the contents of the Delhi

[7] Civil Appeal Number 5322 of 2011.

[8] *See generally* Gayatri C. Spivak, *Can the Subaltern speak?* Marxism and the Interpretation of Culture, 271 (Lawrence Grossberg and Cary Nelson eds. 1988).

[9] Ibid.

High Court's order of August 2008, whereby it had relied on the committee headed by Muralidhar, J. as well as the affidavits and documents filed by the appellant to pass a detailed interim order around certain interim beneficial measures for sewage workers. Although the initial engagement with the plight of the unorganized sector is evident by virtue of the Court making a distinct reference to the inadequacy of laws controlling the informal sector in relation to air or railway workers, its activist position is fairly diluted through the mode of its subsequent examination. The Supreme Court, having satisfied itself about the *"contemptuous apathy shown by the public authorities and contractors"* in providing safety equipment to the workers who toiled in *"odd conditions",* undertakes a meticulous scrutiny of several individual cases, cited in 2007 by Navbharat Times and the Times of India in order to highlight the plight of these workers. Having traced the cause of death of such workers, relying on the report of the Centre for Education and Communication, the court then goes on to look further into individual cases of gross negligence of the State/private contractors to ultimately order the immediate implementation of the orders of the Delhi High Court with an enhanced amount of compensation, vide. its order dated 12.07.2011.

Local Authorities and the Perpetration of Deep Structures: Judicial Disengagement with the Prevention of Atrocities Act 1989

The author argues that by failing to acknowledge the inherently complex relationship shared between the State apparatus (an allegedly neutral party in a quest to restore societal balance beyond the domain of contract or tort law) and the manual scavenging labor force, caste-labor hegemonies are further perpetrated by the mode of judicial examination itself. For instance, as a detailed field study conducted by Human Rights Watch in 2014[10] and a 2012 National Round Table discussion initiated by the UNDP and the UNSE (GCP)[11] observe, one of the greatest hindrances to the issue of forced manual scavenging, especially in rural settings, is the detrimental involvement of local authorities. Now, the State, by outsourcing the task of sewage cleaning, often leaves the duty of selecting and controlling sewage workers to private contractors, who at a rural level, are often supervised by the local authorities in complying with State schemes and statutory prohibitions (the rehabilitation scheme under the 2013 Act is an example of this).

Evidently, as the lived experiences of Lalibai from Madhya Pradesh's Mandsaur district and Rekhabai from Indore indicate, the involvement of the local *"Sarpanch"* and allied authorities inevitably is to further distance the manual

[10] Human Rights Watch, *Cleaning Human Waste*, (2014).

[11] UNDP and UNSE (GCP), *A Report of National Round Table Discussion*, (December, 2012).

scavenging laborers from access to social justice initiatives and compliances, thereby furthering the already deep caste structures.

By examining the disposal and conviction rates of alleged offenders under the Prevention of Atrocities Act, one clearly sees how on an average, 81.7% (data for 2013-14)of the cases continue to be pending before the concerned authorities, while out of the ones decided, only 24% end in conviction. Further, Rule 3 (setting up vigilance committees and giving arms licenses to Dalits), Rule 14 (Special Courts) and Rule 16/17 (Monitoring Committees at State and District level) of the 1995 Rules[12] framed under the 1989 Prevention of Atrocities Act, are evidence of the fact that even where the State does develop protective machinery, it ultimately results in several cases either not reaching the point of dispute resolution, or being closed after investigation or ending with a forced compromise.[13]

As a 2002 report of the National Human Rights Commission also observes, the police themselves are often guilty either of deterring complainants under the Act or committing atrocities themselves. In fact, if one were to look beyond the rural-urban divide, one can clearly see the superimposition of caste hierarchies in urban areas even when a non-Dalit member engages in the act of sewage cleaning or manual scavenging and is naturally, also deemed to be *"impure"*. [14]

Defining the Territory of Future *"Rights"* Litigation: The Need for Wide Judicial Scrutiny in Combating Structural Inequalities

Now, the existence of modern avatars of manual scavenging, the status of which remain unaltered either due to (a) a lack of accountability of local authorities, or (b) from a lack of alternate avenues of gradual social mainstreaming, or (c) from the State's inability to implement adequate sanitation schemes, calls for greater judicial intervention in identifying and engaging with deeper structural issues adequately and then passing an order, instead of pronouncing judicial decisions with very little normative potential.

The author further argues that such judicial pronouncements often have significant impact in deciding the territory of future litigation. Now, if one notices the judicial trend in India, it becomes fairly evident that the problem with the judicial line of examination is its focus on the enforcement of currently operative legislative enactments, without an adequate examination into finer sub-issues. Given the importance of shaping labor law discourse in a manner that opens avenues of interpretation and examination for future *"rights"* litigation, the territory of welfare

[12] The SC/ST (Prevention of Atrocities) Rules, 1995.

[13] Punnaiah Commission Report.

[14] Report of the National Human Rights Commission, 2002.

legislation has generally been restricted by the Indian judicial examination. By virtue of the fact that the raging problem of the sexual division and consequent imposition of manual scavenging on women workers specifically is not dealt with by the court in either of the two cases mentioned, the need for a more comprehensive mechanism for the rehabilitation of women and children remains completely unaddressed in most judicial pronouncements.

Further, at the backdrop of the Courts in this country being the supreme interpreters of the constitutional obligations of the State under the paradigms of both Fundamental Rights, the Directive Principles of State Policy as well as India's international obligations (specifically under Article 23(3)[15] of the U.D.H.R and Article 5(a)[16] of the CEDAW), a more sensitive inquiry is possibly the only real deliberation window, for constructive change in the State apparatus.

Legal Overlaps and the Structural Concern: Moving towards Zero Tolerance

While a structuralist would typically question the *"real"* exploitative operation of the law as a result of shifting the burden of securing rights (generically interpreted) to the State which has demonstrated its inability on numerous occasions, the author contends that it is only the State machinery (this includes judicial examination) that can run through and correct social structures, especially within the Indian context. Now, having said that, the aim of policy in the present context is not just to secure labor rights, but to also move towards a model of absolute non-tolerance. The legal overlap however, between prohibitory provisions of the 1989 Act, and the States refusal to implement an absolute ban mechanism significantly curtails the possibilities of changing the current discourse. An excellent example of this is the provision for *"compulsory service for public purpose imposed by the Government"* contained as an exception to an atrocity under Section 3(vi)[17] of the abovementioned Act, which may very well fit in the scheme of the current outsourcing of the Government's sanitation activities to private contractors who in the garb of such "*compulsory service",* may further (a) seek the Government link shield and (b) prevent the successful eradication of manual scavenging practices.

Concluding Remarks

The author respectfully submits that although the Supreme Court in the present instance successfully reflects upon the general plight of sewage workers viz.

[15] Article 23(3) of the Universal Declaration of Human Rights, 1948.

[16] Article 5(A), Convention to Eliminate All Forms of Discrimination Against Women, 1979.

[17] Section 3(vi) of the SC'ST Act, 1989.

manual scavenging, its failure to adequately engage with the finer sub-issues of the deep structure question ultimately results in the *"permissible operation"* of such labor practices, but within the domain of law. The *Delhi Jal Board case* is an excellent instance of institutions of justice completely marred by a structural lack of experience, which leads to the inevitable misperception of social realities. The constant lack of focus on the historical construction and lived reality of caste in this country, has continuously failed to highlight caste as a true human rights issue, especially at the pan-India level. Thus the author focused to highlight where the judiciary may fall short of realizing true justice.

The platform for labor law as a tool to control the sources of social power and provide for a broader normative framework seeks to ultimately wipe out such practice in its quest for minimum human dignity. It is therefore respectfully submitted that the lack of a more sensitive labor analysis, only furthers the currently present deep structures and restricts the territory for future *"rights "*litigation.

'Princess' by Jean Sasson

Ms. Manisha Mishra*

INTRODUCTION

"Anyone with the slightest interest in human rights will find this book heart-wrenching", remarks acclaimed author Betty Mahmoody about *Princess.*[1] Most of us are interested to take a peek into the lives of the rich and the famous and nothing beats it, if it is the household of a royal family of Saudi Arabia. However the book is not simply a page 3 one that takes you to their parties, beauties and luxuries. It does in a way but the crux of it is in the deception behind the beauty- the secret behind the veils. It shocks you beyond possible repair! Reading one chapter after another, you will find there is no shock absorber- you will be led into the world of Princess Sultana that seems like 'the other world', nothing that most of us can relate to.

The atrocities against women discussed in the book are shocking not simply because they are treacherous, but because they are astonishingly unconventional. For instance: Sultana who is exposed to violence right from her childhood is slapped across her face merely because she imitates her father in his prayers. The discrimination between a male and female child in her home was there as in many Indian families even today but what is alarming is the orientation drilled into these young male minds to grow up and be arrogant and cruel towards all the females in their lives. Narrates Sultana: "The authority of a Saudi male is unlimited; his wife and children survive only if he desires. In our homes, he is the state."[2] Additionally, what makes the book more compelling is the first person vivid narrative of a woman whose lot has to bear unthinkable cruelties in the twentieth century. The motive behind the book is also interesting. Princess Sultana tells us that more than the patriarchal oppressions and injustice, the fact that

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[1] Acclaimed writer Betty Mahmoody says this when asked to comment on the book *Princess* that dealt with many sensitive issues as her own bestseller *Not Without My Daughter*

[2] Jean Sasson, *Princess* (Transworld Publishers 2004) 29

female births and deaths were going unrecorded in the land was something people in other countries needed to hear about: "The history of our women is buried behind the black veil of secrecy. Neither our birth nor our death is made official in any public record. Although births of male children are documented in family or tribal records, none is maintained anywhere for females"[3] It is this lack of acknowledgment of the existence of women altogether that provoked Sultana to tell her story; though it was risky and potentially life-threatening to expose the hidden truths of the royal family. This very fact glues us to the story, as the reader automatically wonders what was so unbearable for her.

Human Right Violations Depicted

The book exposes us to the amount of pain and anguish that begins in a Saudi girl's life since the time she veils. A case in point is Sara, the elder sister of Sultana. The moment she started veiling, she was treated as a 'non-person', as if her reaching puberty was something despicable. An extremely bright 16-year-old Sara is pressurised to stop dreaming about becoming a world-famous artist and is forced to marry a sixty-two year old man. Sultana says; "In our land, brilliance in a woman assures her future misery, for there is nowhere to focus her genius."[4] Despite the timidity of Sara, she protested in many ways to break off the marriage but her efforts were futile; her father made sure that a tranquiliser be given to her on her wedding day so that she could not protest. But the repercussion of such a forced, cruel marriage (because of sexual brutalities) was even more alarming: Sara tried to kill herself by pushing her head into a gas oven! Even then, the father believed it must have been Sara who had 'provoked' her husband into criminal behaviour because most men believe women themselves are responsible for all atrocities against them. What gives the book an interesting dimension is that it breaks the stereotypical notion of all Saudi girls being docile and tame- examples being Sultana and Sara. What proves shocking is, despite the potential danger of losing his daughter, Sultana's father was worried only about upholding the laws of the land.

Sasson is brilliant when she is able to capture the note of amusement in describing the hypocrisy of veiling. She talks at length about different kinds of *abaayas* (loose, long garment covering the whole body from neck to feet, usually black in colour). Moments of laughter in the book come when Sasson states: "The method of tying the *abaaya* to show the exact amount of foot that is allowed without being considered risqué is discussed in great detail."[5] She explains how there are

[3] Sasson (n 2) 30

[4] Ibid at 54

[5] Sasson (n 2) 88

different kinds of fabrics, which is more practical, and how women use their own sense of fashion to look smart, despite donning the black *abaayas*! What is ironic is that the women still want to 'look' appealing, when no one can look at them any longer! And the paradox is that veiled women become more visible: "A child enters the shop, but a woman emerges, veiled and, on that day, of a marriageable age. Her life changes in that split second. Arab men barely glance at the child as she enters the shop but once she dons her veil and *abaaya* discreet glances come her way. Men now attempt to catch a glimpse of a forbidden, suddenly erotic ankle. With the veil, we Arab women become overwhelmingly tantalizing and desirable to Arab men." [6]

Other Human Right Violations Depicted

Sasson portrays the hypocrisy of Saudi males quite successfully on different occasions in the book. In one instance when Ali, his friend Hadi, Sultana and Sara had gone to Cairo, Ali and Hadi start restricting the girls on various grounds like not veiling and going to night clubs. However, they themselves rape minor girls in Egypt (which they don't feel will lead to 'deterioration' of family values) by luring their mothers with money. This again shows how these men were brought up with the wrong orientation that everything in the world can be brought by material opulence. The most shocking part of this story was when Hadi and Ali were 'caught in the act', they were not scared at all and when Sultana warned them of the consequences of relating the incident to their father, Ali sarcastically replies it was his father who had given the contact number of the man who could provide such 'service'. Moreover, he adds that his father also availed of such 'services'. Sasson also exhibits the sheer lack of sanctity towards the institution of marriage by the males of the Saudi household by the depiction of Sultana's father marrying a fifteen-year-old girl Randa within a month after the demise of Sultana's mother Fadeela.

What is considerably shocking about the book is the idea that not just Saudi men, but even certain Saudi women prove to be potentially threatening for other younger Saudi women to live a life of dignity, with considerable freedom of thought and expression. Writes Sasson: "Many Saudi men leave the final decision on the marriage of their daughters to their wives, knowing they will make the best match possible for the family. Still, often the mother, too, will insist upon an unwanted marriage, even as her daughter protests". [7]

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[6] Ibid at 89

[7] Sasson (n 2) 71

The opulence and exuberance of wealth and luxuries described in the book stands in sharp contrast to the lack of awareness of human rights in the land of Saudi Arabia. Though materially rich, they are humanely poor. Circumstances leading to Nadia's execution, the case of Wafa, the ruthless divorce of Randa, the plight of foreign women in Saudi, regulations of the self-proclaimed Public Morality Committees and Religious Council, the painful tradition of forced female circumcision are instances of extreme violations of human rights. Anyone who reads the book will be compelled to wonder if these things can still be a part of the so-called 'civilised' royal Saudi Arab society!

Princess is bound to remind the readers of Betty Mahmoody's famous book *Not Without My Daughter*.[8] The unsurpassable spirit of Sultana in rescuing herself, her sisters and other women she knew from the perilous Saudi environment resonates the tireless attitude of Betty in saving herself and her daughter from the 'uncivilised' laws of Iran.[9] The laws that require Betty and her daughter Mahtob to keep their head covered, the laws that make it mandatory for the kids to go to Koran school, the laws that do not allow females to drive around, or go out of the country without the permission of a male guardian and many other atrocities including treating Betty as a perpetual outsider, no matter how much she tried to pretend to 'fit in' into the Iranian society, in many ways echoes the life and society of Princess Sultana. The absolute forced dependence of women on men seems to be the commonality in both the books.[10]

Princess has been ranked as 'one of the best 500 books written by women since 1300'. It is now a mandatory reading in many educational institutions. One of the reasons for the immense popularity of the book is its honest depiction of the plight of women. It is not a lop-sided picture by simply trying to depict Middle-Eastern women as the oppressed class; it has also wonderfully illustrated instances of women trying to brave the oppression with their indomitable courage and conviction to change their unjust, heavily-biased society.

[8] Mahmoody Betty, Not Without my Daughter (Bantham Books, 1987)

[9] Betty (n 8)

[10] Ibid

Legalised Persecution of Girl Child A book review of 'Child Marriage in India: Socio-legal and Human Rights Dimensions' - Jaya Sagade

Ms. Priyanka Anand*

Marriages throughout the world are a reason for incredible celebration. Unfortunately, so is a Child marriage which is a paradox as the two words are totally inconsistent with each other. Marriage means a legally or formally recognized union of two individuals as partners in a relationship which has profound physical, psychological, intellectual, and emotional consequences. Thus, it is but natural to think that it must be between two consenting adults. Jaya Sagade, Vice-Principal of ILS Law College, Pune, India, in her book, *Child Marriage in India: Socio-legal and Human Rights Dimensions*, examines the all important and ever so prevalent issue of child marriage among India's various cultures and its impact on the human rights of young girls. Dr. Sagade's book is an ardent reflection of her research in the area of gender and law, family law, human rights, and reproductive health. Though, the entire book is written from a feminine perspective and completely ignores the role of the boy child in such marriages, it is significant for those studying and working in the area of child marriage and women's rights. This book is successful in exploring the social, religious, cultural and legal barriers in prohibiting the harmful practice of child marriage in India through the feminist lens and is no doubt a very well referenced book, but Dr, Sagade has adopted a fairly narrow approach in the suggestions that she has proposed to address this social issue. As per the author, the reason for the continued existence of this social evil is not only due to lack of government's initiative towards acknowledging the issue but also dealing the issue without the requisite vigour. Moreover, as per her opinion, the Judiciary has adopted a minimalist approach, whenever it has dealt with cases on this subject. Further, the author's generalisation, while dealing with the socio-legal and human rights violations in Child marriage to include the issue of all the marriages of individuals below the

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age of 18 years (females) and 21 years (males) on the same footing, concerns the readers. Dr. Sagade has missed the appreciation of this issue in the contemporary milieu as it completely overlooks some new reasons for early marriages that have emerged in the recent past as a result of the increasing inclination towards western culture, like the youngsters engaging themselves in unmarried sexual activity.

The author in her opening chapter, has highlighted the gravity of the issue by documenting the incidence of child marriages in India with the help of demographic data which gives the backdrop for the readers to understand how different circumstances, settings and variables influence the pattern of human behaviour. Dr. Sagade, in her second chapter highlights the legal discourse prevalent in the Indian law on the valid age for marriage. Here, the historical reasons that led to the enactment of the specific law, Child Marriage Restraint Act, 1929 (CMRA) for tackling the issue of early marriage is traced by examining the earlier laws ranging from Constitution to penal laws coupled with the analysis of some judicial rulings on the same. The suggestions advocated by the author for an effective remedy to eliminate this practice are very well spelled out; like making the legal age for marriage same for both bride and bridegroom; making registration of marriages compulsory; and ensuring free consent of the parties. But Dr. Sagade's suggestions ask to amend the personal laws of the communities for achieving these changes, which evidently is a very sensitive issue in Indian society and there are chances that it may lead to creating a social outrage rather than serving as a means to bring a social change.

The third chapter of the book is focussed on the various religion based personal laws on marriage and highlights the political unwillingness of the legislature to bring a law on the minimum age for marriage. Dr. Sagade's quintessential approach towards the issue, where she generalises Child marriage to include all marriage of individuals below the legal age in the same palate is somewhat unappealing. As for the matter, there should have been a distinction made, to fragmentise and study separately, the social and economic problems and human rights violation towards the issue of marriages of infants, children of age group 14-16 and adolescents above the age group of 16 but below the legal age of 18. The reasons for existence of all these practices are very different than the other and have varied bearing on the physical, mental and social well being of the child party to this marriage.

Dr. Sagade strongly feels that the patriarchal Indian society, which puts men on a superior pedestal to define what social customs are to be practiced and continued, is the basic cause for the survival of the practice of child marriage, despite the several attempts to eliminate it. With this patriarchal foundation, Dr. Sagade has

traced the discourse encompassing child marriage in India, from deficient legislative efforts to eliminate the practice to judiciary's conflicting and unusually technical way to deal with the issue. She advocates that all social practices should be dynamic and adapt with the changing time, particularly when they are posed with challenges of being discriminatory and against human rights. This is paradoxical as on one hand, she herself points out the age long legislative apathy and disregard on the issue and on the other, as a remedial measure, urges that the laws should be so made that it meets the international standards and obligations of the country through various treaties. Further, she overlooks the fact that the failure on the part of the government to be dynamic and the judiciary's endeavours in the past is because our society is buried very deeply in culture and religion and is more concerned to preserve the age-old customs than to bring in an ideologically correct administration. This strife becomes more obvious as the legislature's effort to legislate on and the judiciary's endeavor to mediate, all have been confronted with public outrage and disregard in the past. Thus, one is pressed to observe that in view of such resistance, Dr. Sagade is banking too much on the need for a perfect legislation for preventing Child Marriage, for the reason that till the time the society does not prepare itself to adapt to the changing outlook, even laws that on paper completely prevent Child Marriage are expected to have only modest outcome.

Dr. Sagade has been unfair while reading into the judicial contribution towards dealing with cases on this issue where she blames the Judiciary to have adopted a minimalist approach. It must be stated here that the author has missed on some of the landmark rulings laid down post 1997, where courts have adopted a much more gender sensitive approach. Judiciary, in certain cases, has cast aside its minimalist approach and given unconventional rulings, like upholding the validity of a Child Marriage with a view to prevent the husbands from escaping liability of the child brides.

The next three chapters are focussed on the international angle with a human rights approach as Dr. Sagade discusses how various existing UN standards and international human rights conventions, like the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962 followed by Recommendations on the Convention of 1965, (which appear to be largely ignored) would have had a preventive effect if they were duly respected and implemented. Here, she lists out the measures India would have to adopt so as to conform to the various international treaties that India has entered into. In the fifth and sixth chapter, Dr. Sagade discusses various problems faced by adolescent girls when put through the practice of child marriage and the analysis of the extent to which India has complied with its international obligations. She states that the reason for lagging behind in compliance of international obligations is not because of

ignorance of the Indian Government, but because it does not wholly embraces the women question. While Dr. Sagade acknowledges the fact that over time child marriages have become less common, she fails to appreciate the reason for the change in outlook of the society towards this issue. Her suggestion of amending and adapting the domestic laws blindly on the international standards overlooks the importance of local socio-economic discourse. The task of delivering a more reasonable examination of this problem remains unfulfilled.

The last chapter deals with the different recommendations Dr. Sagade accepts could be taken to address this social issue. She recommends that the members of the judiciary and legal field, law enforcement agencies, academicians, politicians etc. ought to realise their social duty and take upon the obligation of educating and publicising about the evils that this practice ensues, the ways in which it breaches the international human rights law and so forth, so that the state can acknowledge and be held accountable for its apparent nonchalance in safeguarding and respecting the basic rights of young girls. In spite of the fact that this recommendation appears to be proper and viable, Dr. Sagade fails to notice the fact that she is entrusting the responsibility on the same persons whom she had accused of being incompetent to uphold, enact, and adjudicate against patronising child marriage. She again approaches the judiciary and the government, both of whom she had in the earlier chapters scrutinized for neglecting to act adequately before, to actualize an arrangement for changing social standards and points of view.

In this book, Dr. Sagade has successfully explored the reasons why such a practice, which denies children of their adolescence, devastatingly affecting the well being and general advancement, specifically of the young girls, is persisting over the years. She has ardently critiqued the domestic law, its lacunae and inconsistencies and lack of gender neutral provisions, in light of international human rights law. The author has been successful in highlighting how the customs are in violation of the basic human right to which a child is entitled, including the other fundamental rights enshrined in our Constitution and also brought to light the role of civil society in challenging the status quo. However, she has not been successful in suggesting any proper remedy that could be adopted to help in effectively eradicating the social evil and help the civil society appreciate and embrace a change in the outlook on the role of girls in the Indian society.

Human Rights Law Journal

Human Rights Law Journal is a peer-reviewed journal published annually by National Law University Odisha, Cuttack. The journal is the part of an integrated effort by the University to contribute more meaningfully to the human rights discourse. The journal aims to highlight critical challenges and also explore practical and essential solutions for a more effective realisation of the human rights ideals. We are committed to expand the dialogue on human rights so as to include within its fold many issues which get sidelined in the clamour for space in media coverage and state priorities. Our goal is not only to highlight challenges to existing theoretical constructs but also to facilitate contextualised research which addresses tangible problems in the society. Through this journal, we hope to provide a platform for critical thinking and effective analysis in the area of human rights.

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