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Editorial Note

Human Rights Law Journal was conceptualized to provide a contemporary and relevant discourse on human rights issues. The journal is part of an endeavour to facilitate contextualized debates on pressing and emerging issues in the human rights paradigm. In this context, the second issue of the journal has focused specifically on the rights of the marginalized and vulnerable sections of the society. The marginalized sections of the society require the protection of law more than any other and more often than not, are farthest from the reach of effective and meaningful justice. In a world which is evolving at a faster rate than at point of time in human history, the vulnerable sections of the society face a substantial challenge against majoritarian policies. Thus, this issue of the journal sought to highlight the peculiar challenges faced by the marginalized sections of the community in the context of human rights enforcement.

The article by Kanchi Kohli is built on a real life incident from 2016 and raises pertinent questions in relation of to forest rights of tribal communities. More importantly, it highlights important concerns in protecting the interests of the tribal communities in the face of unclear governmental policies.

The article by Yogesh Pratap Singh focuses on the constitutional prescription in recognizing Scheduled Tribes and their identity. The author argues for a realignment of the traditional approach towards securing tribal justice. The author emphasizes on the need to formulate policies concerning tribals only after a proper understanding of the actual needs of the community.

Nidhi Kulkarni analyses the issue of transgender rights from the perspective of the Rome Statute. The article is a solid research on the notion of gender in the realm of human rights and explains how it differs from sex. It delves into the position of the transgender individuals under domestic laws of USA, UK, Australia, Argentina and UK and provides a relevant critique of the definition of gender under the Rome Statute.

Malcolm Katrak and Aditya Manubarwala venture into the inadequately explored area of the lives of *Khandias* and the practice of descent based discrimination by the high priests and elitist Parsis. The article provides a fine explanation to

the dark practices through an analysis of the ancient scriptures of Zoroastrianism *inter alia* the *Gathas* and the *Vendidad.* It provides an alternative insight into the dimensions of Article 17.

Parmeet Singh deals with the position and status of transgender in India and highlights the problems faced by them. The reasons for the decline of the transgender community as a whole into the lower strata of the society are presented while outlining the steps taken by the judiciary to elevate the status of the community.

B. Muthu Kumar delineates on the alienation of the tribals of their rights and their lands. It provides the grim picture on how the legislations and government policies had yielded to the corporate lobbying. He concludes with series of suggestions on how harmonised development can be attained by the inclusion of tribal population's cooperation.

SonamDiki Dolma Bhutia addresses an important issue concerning the inheritance rights of the women in Sikkim. The author argues for the displacement of the dated customary laws with more egalitarian legislative prescriptions.

Kumari Nitu has highlighted the prevailing poverty in India and the impact of it on women. The author establishes a strong relation between poverty and the cause of gender justice and tries to highlight how difficult is it for a woman to strive towards gender justice in a poverty ridden society.

Sonal Vyas looks into the violations of the rights of the Indigenous people and the endangering of their status and identity due to the increased problem of migration, infrastructural development, urbanization, civil wars and local riots. The author has also framed suggestive policies by taking inspiration from United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Palla Trinadha Rao focuses on assessing the potential forest area in the states of Andhra Pradesh and Telangana over which rights can be recognized according to the The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. The author deals with identifying the key bottlenecks and problems in the implementation of the Act.

Yashdeep Chahal analyses the much contentious debate of Triple Talaq. The author provides a critique on the Triple Talaq from the perspective of Quran. Thereafter, the article has analyzed on the legal complications seen in the implementation of the Triple Talaq and justifies why a Uniform Civil Code is a necessity in India.

Nidhi Chauhan and Rajat Solanki present an interesting case comment on the role of the Supreme Court in addressing the issue of racial discrimination against

people from north-eastern region of India. The comment provides a comprehensive perspective on the issue along with suggestions for the way forward.

Zafar Mahfooz Nomani while reviewing the book, *Death Penalty India Report, Volumes I & II Along With Summary, [By Anup Surendranath, 2016]* aims to look at whether the book has succeeded in providing a different angle to a complex issue or not. The review identifies the role played by socio-economic factors in the Indian criminal justice system. According to the author, the book, instead of focusing on the moral and ethical aspect of death penalty, deals with the hopes and aspirations of the death penalty victims and attempts to raise the consciousness among criminal justice system.

In the review of the book, *A Life in Trans-Activism,[by A. Revathi],* Padminee Subhashree focuses on the author's life as an activist working towards welfare of people from the LGBTQ community and advocating on the issues of rights and welfare of individuals with transgender identities. The reviewer observes the similarity between the liberated livelihood of the protagonist and the author's work towards the welfare of the transgender community.

Dr. Rangin Pallav Tripathy
Editor in Chief

Contents

Articles

Case Comment

Book Reviews

An Unresolved Legal Question about Forest Rights

Kanchi Kohli*

Ghatbarra village, located in Sarguja district of the central Indian state of Chhattisgarh is home to Gondtribals, recognized under the Schedule V of the Constitution of India. Their home lies in HasdeoArand forest area, considered to be one of the last remaining contiguous patches of forests outside the legally recognized Protected Area (PAs) in Central India. The Gram Sabha (village assembly) of Ghatbarra and nineteen other villages has communicated their position to constitutionally oppose coal mining in the area back in 2015. Today, with a Supreme Court matter dealing with the validity of the 'forest clearance' affecting the village and the High Court case on the cancellation of forest rights pending decision, Ghatbarra is set to become a case in point in the near future.

In January 2016, the district level authorities revoked the Community Forest Rights (CFR) granted to this village as per due process of law. The reason cited was that the exercise of these rights was coming in the way of coal mining operations in the area. Even as the final decision on a petition challenging this revocation is pending in the Bilaspur High Court, this paper seeks to examine two legal questions that arise out of the case. First, is the cancellation of conferred forest rights legally permissible as per the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA, 2006)? Second, can the use of forestland for mining be approved under the Forest Conservation Act (FCA), 1980, without recognizing or compensating for the pre-existing rights of the tribal communities living in and dependent on the forests?

* The author is an environmental researcher

On 8th January 2016, the district level authorities revoked the Community Forest Rights (CFR)[1] of a tribal village in Sarguja district of the central Indian state of Chhatisgarh. The District Collector, Divisional Forest Officer (DFO) and district level representative of the Tribal Development Department, signed the order jointly. All these officials located in the headquarters at Ambikapur town would have also been members of a District Level Committee (DLC) that had recognized these rights in the first place. Ghatbarra had received its CFR titles in September 2013 (Das, 2016; Sethi, 2016).With the CFR in hand[2], the constitutionally protected Gond tribal residents of Ghatbarra village were entitled to use the forest for their livelihoods including for the collection and sale of non-timber forest produce (NTFP).[3]

The reason for cancellation cited in the order was that the villagers had caused disturbances to mining operations in the area. The move was further justified by stating that the titles for CFR were received only following the approval for forest diversion was given to the mine in 2012.

This decision brings to light two legal questions. First, was the cancellation of the title a legally permissible decision as per the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA, 2006)? Second, could the use of forest land for mining have been approved under the Forest Conservation Act (FCA), 1980, without recognizing or compensating for the pre-existing rights of the tribal communities living in and dependent on the forests?

The laws in question

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act was enacted in 2006 and is popularly known as the Forest Rights Act or the FRA. The law put in place a clear legal mechanism for recognition of rights both at an individual and community level. This is both for

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[1] Order from District Collector Office: No/Forest Rights/A.V/No. 42/2015-16/10669 *(letter number translated from Hindi)*

[2] The Ghatbarra CFR recognized three specific rights for the villages: Section 3 (1) b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zarnindari or such intermediary regimes; Section 3 (1) (c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries; and rights to grazing (both settled or transhumant) as per Section 3 (1) (d) of the FRA, 2006.

[3] According to Centre for International Forestry (CIFOR) "*Non-timber forest products (NTFPs) are any product or service other than timber that is produced in forests. They include fruits and nuts, vegetables, fish and game, medicinal plants, resins, essences and a range of barks and fibres such as bamboo, rattans, and a host of other palms and grasses.*" Accessed from http://www.cifor.org/publications/corporate/factSheet/NTFP.htm on 31.7.2017

tribal other other traditional forest dwelling communities, including forest workers who have been living a designated forest area for seventy five years or three generations. The FRA and its Rules (2008 and 2012) elaborate the manner in which the process of recognition of rights needs to be carried out.

In particular sub section 3 or Section 12 B (in the 2012 Rules) related to the Process of Recognition of Community Rights is of particular significance. It states that the District Level Committee[4] *"shall ensure that the forest rights…relating to protection, regeneration or conservation or management of any community forest resource, which forest dwellers might have traditionally been protecting and conserving for sustainable use, are recognized in all villages with forest dwellers and the titles are issued."*

The Ministry of Tribal Affairs (MoTA) has issued a series of guidelines and clarifications to address the ambiguities and multiple interpretations that have emerged during and as a result of the implementation of the FRA (Kohli, 2016).

The law also has special provisions for Particularly Vulnerable Tribal Communities (PVTGs)[5] who have been categorized such by the Ministry of Home Affairs. These include seventy-five such tribal groups residing in eighteen States and Andaman & Nicobar Islands.[6]

The Forest Conservation Act was enacted in 1980, with the stated objective of conservation of forests. Since then, non-forest use or purpose of forest area requires any potential user agency to seek prior approval from central government, i.e. the Ministry of Environment, Forests and Climate Change (MoEFCC). There is a detailed procedure prescribed under Section 2[7] of the Act. The lawalso clarifies what is 'non-forest purpose' and includes industrial activities, infrastructure expansion or de-reservation of the land to another administrative category. In order to use forests for an explicit non-forest purpose

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[4] Section 6 (5) of the FRA states that "State Government shall constitute a District Level Committee to consider and finally approve the record of forest rights prepared by the Sub-Divisional LevelCommittee."

[5] Section 12 B of the FRA Rules (as amended in 2012) states: "The District LevelCommittee shall, in view of the differential vulnerability of Particularly VulnerableTribal Groups as described in clause (e) of sub-section (i) of section 3 amongst theforest dwellers, ensure that all Particularly Vulnerable Tribal Groups receive habitatrights, in consultation with the concerned traditional institutions of Particularly Vulnerable Tribal Groups and their claims for habitat rights are filed before theconcerned Gram Sabhas, wherever necessary by recognizing floating nature of theirGram Sabhas.

[6] Important information and instructions relating to PVTGs in A&N Islands and Statewise list of PVTGs is available at http://www.tribal.nic.in/pvtg.aspx

[7] Section 2 of the FCA relates to the restriction on the dereservation of forests or use of forest land for non-forest purpose.

or dereserve it (from its Reserved Forest status), an approval needs to be sought from the environment ministry (Kohli et al, 2011).

With the enactment of the FRA, both these laws weremade applicable on the same forest area. The question of how would the non-forest use like mining of a forest be determined if people had rights under FRA pending or granted, as in the case of Ghatbarra above.

To address this issue, an advisory was issued by the MoEFCC on 3.8.2009 and sent to all state governments [F. No. 11-9/1998-FC (pt)]. It referred to the FRA process as "Settlement of rights" and clarified that while seeking diversion of forest land for non-forest use, the state governments are to provide evidence of having initiated and completed the process under the FRA.

The evidence provided by the state government also needs to include consent from the Gram Sabhas[8] or village assemblies that they are agreeable for forest diversion. In particular the advisory states, "*A letter from each of the concerned Gram Sabhas, indicating that formalities/processes under the FRA have been carried out and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion.*"

The Ministry of Tribal Affairs (MoTA) Guidelines on the implementation of FRA [No. 23011/32/2010-FRA [Vol.II (Pt.)] dated 12.7.2012, reiterates that the instructions under the 3.8.2009 circular should be followed.

In addition to the above laws, the Hasdeo Arand area also attracts the provisions of the Panchayat Extension to Scheduled Areas (PESA) Act, 1996. This law was enacted with the explicit purpose of extending provisions of 73rd constitutional amendment to Panchayati Raj Institutions (PRIs) in the Scheduled Areas as recognized in the 5th Schedule of the Constitution of India. This amendment had ushered in the era of devolution of powers to *Gram Panchayats (village councils)* so that they can exercise authority and function as institutions of self-government. It was a committee headed by Dileep Singh Bhuria that had suggested back in 1995 that the mandate of the 73rd Amendment be extended to Fifth Schedule Areas (GoI, 1995). Through this gram sabhas (village assemblies)[9]

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[8] Section 2 (g) of the FRA, 2006 states: "Gram Sabha" means a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women.

[9] Section 4(c) of the PESA Act, 1996, provides that every village shall have a 'Gram Sabha consisting of persons whose names are included in the electoral rolls for the Panchayat at the village level.

were be empowered to take decisions[10] related to the day-to-day life of tribal communities (Rao, undated).

Hasdeo Arand: Forests and a Coalfield

Ghatbarra village with its 300 Gond families (Das, 2016) is located in the Hasdeo Arand forest area with a 90% tribal population (Hasdeo Arand Bachao Sangarsh Samiti, 2014). It is considered to be one of the last remaining contiguous patches of forests outside the legally recognized Protected Area (Pas) in Central India, in particular between Palamu Tiger Reserve in Jharkhand and Kanha in Chhattisgarh. Most villages in the Hasdeo area including Ghatbarra are dependent on agriculture cultivation and forest produce for their livelihoods.The forest also the watershed of the Hasdeo Bango reservoir on theHasdeo river, which is a tributary of the Mahanadi River a lifeline of the adjoining states of Chhattisgarh and Odisha.

The Hasdeo region is considered to be the source of perennial water sources, rare flora and fauna, including elephants and leopards (Choudhury, 2015). According to a report by Greenpeace India (2012),*"around 450 sq. km.,with no human habitations within, was approved by the MoEFas the Lemru Elephant Reserve in 2007, acting on a resolution passed by the Chhattisgarh State Assembly in 2005."* The report also states that the inspection team for Lemru noted the area has *"dense cover, perennial water sources and moist riverine forest especially suitable for elephants.... There is an added advantage of having nearly 400-500 sq km free from human settlement."(ibid)*

But in mining records, Hasdeo Arand is a coalfield of 1878 sq. km out of which 1502 sq. km is forest. It has 30 coal blocks with estimated reserves of 5.179 billion tones of which 1.369 billion tones have been proven till date (Hasdeo Arand Bachao Sangharsh Samiti, 2014). The coalfields are considered to be under the 'ownership' of the Coal India Limited (CIL), and select coal blocks are presently being auctioned out to potential bidders through the procedure laid out under the Coal Mines (Special Provisions) Act, 2015 (Ministry of Coal, 2014).

The legal tangles of the operational mines of Hasdeo

There are two operational mines in the Hasdeo region, and several others at different stages of approval (Ministry of Environment and Forests, 2011). First, the Chotia coal block which is on the fringe of this fragile forest area. The

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[10] Section 4 (e) (i) of the PESA Act says every Gram Sabha shall *"approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level"*

PEKB coal block and forest diversion has been granted in the favour of M/s Rajasthan Rajya Vidyut Utpadan Nigam Ltd (RRVUNL), a state government undertaking. In order to develop, excavate, transport and sell the coal from this mine, the RVUNL formed a JV company Parsa Kante Collieires Ltd. (PKCL) along with Adani Mining Ltd. This mine has a peak production capacity of 15 MTPA. At the time the approval was granted the Adani group had 74 percent equity in PKCL.

This coal block was also granted "forest clearance" under the Forest Conservation Act, 1980 on noting that it was on the "fringe" of the Hasdeo forests.The official letter was issued in favour of the diversion on 15th March 2012. Following which, the Government of Chhattisgarh operationalized this diversion of 1898.238 hectares through its order dated 28th March 2012.

The then Minister of Environment, Jairam Ramesh, had to make an exception for three coal blocks PEKB, Parsa East and Tara and granted approval that they are "*actually not in the biodiversity-rich Hasdeo-Arand forest region (a "no-go area)"*, in order to grant approval for forest diversion. This is because; the entire Hasdeo Arand forest area in Sarguja, Surajpur and Korba districts of Chhatisgarh was recorded no-go[11] for coal mining by the same ministry (Ministry of Environment and Forests, 2011).

The decision to grant approval to PEKBwas unsettled both in courts and questioned by the tribal communities residing in the area. Even before the final approval was granted, the *Gram Sabha* of Ghatbarra passed a resolution on 2.10.2011, protesting against the coal mining in their village area. The Village Forest Committee (VFC), Forest Rights Committee (FRC) and the Joint Forest Management (JFM) committee of Ghatbarra village also sent a letter to the state forest minister, divisional and range level forest officers. They indicated that their claims under the FRA were yet to be recognized, and that there was no question of the *Gram Sabha* having approved the mining operations.

They added that the *Gram Sabha* meetingclaimed to been organized out to discuss this project was "fake", and that it had nothing to do with the forest rights process as per the law.[12] The entire issue was reiterated by the villagers through another letter on 5th March 2012 prior to the diversion approval and yet again in November 2012, after the forest diversion was approved by the MoEFCC.

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[11] The Hasdeo-Arand forests had been declared a "no-go" area back in 2010 when the ministries of coal and environment were finalizing the criteria to ascertain which forests could be opened up for coal mining and which others were to be saved as "critical energy reserves" for the future. Tree density was the primary basis on which the decision was taken. Given that Hasdeo Arand was a "no-go" area, none of the coal blocks there could have received approval at the time the ministry gave a go ahead.

[12] The letter also clearly indicates that a subsequent meeting of the Gram Sabha on October 2, 2011 officially declared the earlier mentioned meeting of 11th August 2009 as fake.

On 24th March 2014, the National Green Tribunal (NGT) set aside the approval for forest diversion granted to the PEKB coal block. The NGT's decision came in an appeal (Appeal No.73/2012) filed by Sudiep Srivastava, a Bilaspur based advocate and activist. It was argued before the principle bench and argued by senior advocate Raj Panjwani.

FRA was not part of the grounds of this appeal. However, one of the main arguments before the NGT was the manner in which the "go" and "no-go" criteria was interpreted in PEKB's case by the environment minister. It was argued that the joint study by the ministries of coal and environment was *"not merely an administrative exercise but a requirement in pursuance to the Forest (Conservation) Rules 2003".*[13] It was further argued that there is enough coal deposit available in areas classified "Go" areas to cater to the requirements of coal for the next 60 years. Therefore, there is no need to allow mining in dense forest areas like Hasdeo Arand.

The NGT in its judgment upheld the Minister's premise that the PEKB coal block was indeed on the fringe of the Hasdeo Arand forests, but did not agree to the minister's decision that this indeed meant that the area was not actually in the biodiversity rich region of the forest. This is especially because the ministry itself had rejected the diversion three times over on the grounds that the coal block was indeed in the "no-go" area.

The case of the "cancelled" CFRs

When Ghatbarra's Community Forest Rights were revoked stating that it was coming in the way of mining, what was being referred to was the PEKB mine and its proposed expansion. This action was taken by the District Level Committee when the validity of the mine'sforest clearance was itself under question. After the NGT set aside the abovementioned approval and"remanded to the MoEF with directions to seek fresh advice of the FAC"[14], the miners took the matter to the Supreme Court (SC). The SC in its order of 28.4.2014[15] allowed for the continuation of mining operations in the coal mine, but only*"till further orders are passed by the Ministry of Environment and Forests,"*

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[13] Judgment dated 24.3.2012 of the National Green Tribunal in Appeal No. 73 of 2012, Sudiep Shrivastava v/s Union of India

[14] The Forest Advisory Committee (FAC) is set up under the FCA, 1980 to review application of use of forestland for non forest if the diversion is above 40 hectares. If below 40 hectares, the applications are reviewed at the regional offices of the MoEFCC located in ten cities across India.

[15] Civil Appeal No. 4395 OF 2014 (RAJASTHAN RAJYA VIDYUT UTP.NIGAM LTD v/s SUDIEP SHRIVASTAVA & ORS)

From 2014 till date the Forest Advisory Committee (FAC) of the MoEFCC did not move on the issue citing reasons of the matter being subjudice.[16] Meanwhile, the action to revoke the CFR was taken. The Hasdeo Arand Bachao Sangharsh Samiti (Save Hasdeo Arand Struggle Group) immediately wrote to the State Level Management Committee constituted under the FRA, 2006 objecting to this decision. Their letter dated 26.2.2016 raised a multiple set of points:

a) The forest diversion was approved in violation of the FRA and the 30.7.2009 and 3.8.2009 advisory of the environment ministry.
b) The residents of Ghatbarra had written atleast three letters to stating that the forest diversion should not be approved, as the recognition of rights was pending.
c) The revocation of the CFR by the District Level Committee (DLC) is illegal and therefore should be reversed.

The SLMC is a body to be constituted by every state government; *"to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency such returns and reports as may be called for by that agency."* Not surprisingly, the function of this body is to monitor the processes upto the recognition and vesting of rights under the FRA. There is nothing in the law, which provides for the SLMC or any other institution to step in if rights are revoked. It is perhaps because such a scenario was never envisaged as part of the FRA's design or implementation. Ghatbarra is a unique case in point.

The Hasdeo Samiti also wrote to the Ministry of Tribal Affairs (MoTA) and the Chief Secretary, Government of Chhatisgarh. For MoTA too this was a first, primarily because such a scenario was never envisaged in the design of the FRA. The ministry of was implementing a law to undo historical injustice that occurred while denying forest access and rights to tribal and forest dwelling communities. The Preamble of the FRA clearly states*"the forest rights on ancestral lands and their habitat were not adequately recognised in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to the forest dwelling Scheduled Tribes and other traditional forest dwellers who are integral to the very survival and sustainability of the forest ecosystem."* When a law is designed to undo long-term damage, its makers did not consider a situation that rights once recognized and vested will get reversed or revoked.

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[16] Right to Information response (F. No. l6-l94/2015-FC) by Ministry of Environment and Forests to Alok Shukla dated 14.10.2015

The two legal questions

The Ghatbarra matter is being argued at the High Court of Chhattisgarh at Bilaspur. A decision in this case is likely to set precedence on of the two legal questions raised earlier in the paper.

First, is whether the District Collector and the District Level Committee[17] had the power to revoke the CFR as they did? Clearly, the FRA is silent on this, with no clause of the law allowing for it. The role of DLC ends with the vesting of rights.

This role of the DLC also needs to be read with Section 12 B (3) of the FRA Amendment Rules, 2012. This clause clearly lays down the responsibility of the District Level Committee to ensure that CFRs relating to traditional roles and forest access for protection, regeneration or conservation or management, are recognized in all villages with forest dwellers and the titles are issued. Section 12 B (4) the committee is required to record why no CFRs have been recognized, if such a situation arises.

Internal discussions within the MoTA in response to the Hasdeo Samiti's complaint point to some crucial aspects related to whether the committee could have sent a notice to Ghatbarra villagers as they did. The fifth paragraph of the official note sheet received by Alok Shukla, of Chhatisgarh Bachao Andolan[18] concludes on two crucial aspects:[19]

a) "*therefore the reason for cancellation of the community title as provided by the District Collector Sarguja by saying that the forest land was already diverted before the issue of community title to Ghatbarra is not a ground for cancellation of the title and cannot be accepted."*

b) "The Forest Rights Act does not provide for cancellation of any rights recognized under the Act. Therefore, cancelling of the community title is a violation ofthe law."

The *second* question is whether, the approval for PEKB itself is valid, given the questions raised on the recognition of rights being incomplete at the time the approval was given. If that maybe so, does the mine have the right to continue operating or seeking expansion (Koshy, 2017).

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[17] Section 6 (5) of the FRA states that "State Government shall constitute a District Level Committee to consider and finally approve the record of forest rights prepared by the Sub-Divisional LevelCommittee."

[18] Received in response to Right to Information (RTI) application filed by Alok Shukla of Chhatisgarh Bachao Andolan on 11th April 2016. The MoTA replied on 12th May 2016

[19] Ministry of Tribal Affairs Notesheet number F.No.23011/16/2015/FRA, signed by Roopak Chaudhari, Deputy Secretary on 3.3.2016

The MoTA notesheets have important observations to make even on this. On 4.3.2016, the Deputy Secretary writes, "*it may be pertinent to note here that the issue of FRA process in the area was notcompleted.*" A reference is made to the decision of the then environment minster Jairam Ramesh who had over-ruled the recommendations of the Forest Advisory Committee (FAC). The FAC had concluded against the diversion of the forest area in favour of PEKB, with one of the reasons being non-compliance with the FRA.

Based on both the above aspects, MoTA Joint Secretary Ashok Pai on 14.3.2016 concludes, "*Hence, both on facts and matter of law the said cancellation of CFR is arbitrary and violation of letter and spirit of the law ie FRA.*"

But the ministry did not take any final view on this matter and did not initiate any specific action. It instead noted on 5th April 2016, that a letter be written to the Chhattisgarh state government to clarify the matter. Soon after, in June 2016, Ghatbarra villagers approach the High Court.

With the Supreme Court matter dealing with the validity of the forest clearance and the High Court case on the CFR cancellation awaiting the formal response of the Ministry of Tribal Affairs (MoTA), Ghatbarra is set to become a case in point in the near future.

Even as the executive delays actions and the law is argued out between lawyers and judges, Ghatbarra and many other villages await justice. Justice that includes the legal and constitutional powers of *Gram Sabhas* to be consulted and say no to mining in Hasdeo as conferred under the FRA, 2006 and PESA, 1996. It also includes the freedom to exercise the CFRs that allow allows them to conserve, use and manage the forests as they have done so for generations. Afterall, they did all of it before the coal mine came in their way, and it not the other way round as the DLC has ordered.

Taking Tribal Rights Seriously: Appraisal and Alternatives

Yogesh Pratap Singh*

The State as the trustee of Constitutional justice to Scheduled Tribes can enforce the Constitutional positions concerning such Tribes only on the basis of an understanding concerning the undefined word Tribe. Hence, the first challenge in ensuring Constitutional justice to the Scheduled Tribes requires a complete change in the traditional justice approach of legislative and administrative justice. So far, generally, legislation is enacted without in-depth Holistic Studies of the subject matter to be legislated upon. However, Constitutional justice to the Scheduled Tribes especially in terms of Article 29 mandates that the State must first make a sincere effort to understand and document the particular sections of citizens, on whom it is conferring the Constitutional recognition or identity of a Scheduled Tribe. Identity is the foundation of Human Dignity and Laws enacted with the necessary data concerning such identity will not be able to do Constitutional justice to Tribes because what is to be protected, preserved and defended is the set of factors that constitute the identity of the section of citizens called a Tribe. Traditional administrative justice in the shape of schemes seeks to implement the schemes framed by a Government either directly under the Constitution or under a law enacted by the legislature. This implementation is done regardless of what constitutes the identity or the core elements of a Tribe. Tribal administrative justice becomes a nice statistic of outlay and expenditure instead of a living reality

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of the dignity guaranteed by the Constitution to Tribals. This paper is a modest attempt to analyse the status of tribal justice in the present Constitutional, legal and judicial regime and suggests appropriate measures and alternatives. In any event, such consideration cannot be done without data and knowledge of the diverse elements of the way of life of various Tribals, constitutional and legislative provisions, judicial discourse and actual impact of these on the life of tribals.

I. Introduction

Indigenous People are generally considered those, who inhabited a country or a geographic region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means. The Bushmen of Botswana, the Ainu of Japan, the Pygmies of Central Africa, the Inuits of the Arctic, the Yanomami of Brazil, the Maori of New Zealand and the Tribals of India may be as different as day and night in their cultures, customs and traditions. However, they consist of 300 million "Indigenous" individuals worldwide and face a common threat: being civilized to extinction. Their names are many viz. Aborigines, Indians, Autochthonous People, Natives, First People or Tribals. The contribution of these people to modern civilization is pervasive. They were the original cultivators of such staple foods as peppers, potatoes, peas, sugar cane, garlic and tomatoes.

State wise Percentage of ST Population

North Eastern States

State	ST %age of total State Population	# Scheduled Tribes
Mizoram	94.5	15
Nagaland	89.2	5
Meghalaya	86.0	17
Manipur	34.2	33
Tripura	31.1	19
Arunachal Pradesh	64.2	16
Assam	12.4	15
Total	**58.8**	**120**

Source:
Annual Report 2007-08
Ministry of Tribal Affair Government of India

States with Fifth Schedule Areas

State	ST %age of total State Population	# Scheduled Tribes
Chhattisgarh	31.8	42
Jharkhand	26.3	32
Orissa	22.1	62
Madhya Pradesh	20.3	46
Gujarat	14.8	32
Rajasthan	12.6	12
Maharashtra	8.9	47
Andhra Pradesh	6.6	35
Himachal Pradesh	4.0	10
Total	**16.4**	**318**

They were the first to develop and use most of the world's plant based pharmaceuticals, from aspirin to quinine, and have given the English language such words as canoe, barbecue and squash. Despite their great influence on the food we eat, the languages we speak, and the sciences and medicines we use to better our lives, Indigenous peoples have often, at best, been forgotten and, at worst, been driven from their lands, robbed of their cultures, excluded from political decision making, brutally socialized and economically exploited. India which is among few nations in the world with a sizeable tribal population is no exception to this trend. According to 2001 Census, the Scheduled Tribes population in the country was 8.4 crore. This constitutes about 8.2 percent of the total population.

The Indian saga of development is indelibly stained by the scourge of displacement. And though it is but obvious that people are the means and end of all conceptions of development as also with the dominant economic centered model – yet its application is an expose of the fact that development projects include people only as an awkward afterthought. Based on empirical findings, exclusively relative to the Indian situation we have found that tribal community is the major victim of this development paradigm.[1] Architecturally, this paper, after a brief introduction

[1] Tribals have been constantly losing their land holdings to powerful non-tribals and their alienation is still going on. The indigenous/ tribal peoples who constituted 8% of the total population of India at 2001 census make up over 50% of the total displaced people due to development projects. According to the Ministry of Tribal Affairs (MTA) nearly 85 lakh tribals were displaced until 1990 on account of large developmental projects. It has become more ominous in last two decades of the liberalization-cum-privatization and urbanization policies.

is divided into two parts. The first part deals with the constitutional, legal and judicial regime for tribal justice. The second part analyzes the problems embedded in the complex and dynamic legal frameworks and a possible way out.

[Part I: Existing Constitutional, Legal and Judicial Regime]

II. Background of Tribal Justice

On the eve of political Independence, two Indias were mentioned: one a territory under the direct "British administration" and other under the administration of Princely states known as "Indian India." There was a third India present in the midst, but perhaps not recognized, which we may designate as "Tribal India" living in forests, hills and even on the plains but isolated from the mainstream of life.[2] British policy towards tribals remained always unsatisfactory. It was a policy of neglect and a saga of exploitation. The British assumed that these tribals were primitive and backward in all respects.[3] This policy of isolation led to their exploitation by Zamindars, landlords, contractors, money-lenders and various other state and non-state agencies. Their land and forest were slowly and gradually grabbed by non-state agencies, turned them into bonded laborers and leading a life of poverty and misery. Thus, Independent India inherited from the British a complex tribal problem and framers of the Constitution, accordingly, faced a very complicated task in devising suitable safeguards to meet the needs and aspirations of this tribal population in India.[4]

III. Constituent Assembly

One of the first acts of the Constituent Assembly was to appoint the Excluded and Partially Excluded Areas (other than Assam) Sub-Committee, with A. V. Thakkar as its Chairman. The Sub-Committee emphasized the "great need of the aboriginal(tribes) for protection from exploitation of his agricultural land and virtual serfdom under the money lender. It stated: "The tribes themselves are for the most part extremely simple people who can be and are exploited with ease by plain folk, resulting from the passage of land formerly cultivated by them to moneylenders and erstwhile non-agriculturists. The tribes have their own customs and way of life with institutions like tribal and village panchayats

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[2] D.R. Meghe, 'Legal Protection to Tribals and Tribal Development: A New Deal for Tribals Through Law,' in S. G. Deogaonkar (ed.), *Problems of Development of Tribal Areas* (1980) 31.

[3] Earl Winterton remarked: "I do not think you want to turn areas into modern whipsnades where you have picturesque survivals and where Englishmen are able to go out and say. This is the most interesting anthropological race of people divided by 500 or 1000 years from the rest of India.

[4] P. L. Mehta, 'Constitutional Protection to Scheduled Tribes in India: In Retrospect and Prospects' (H. K. Publishers & Distributors Delhi 1991) 156.

or councils which are very effective in the smooth running of the village administration. The sudden disruption of tribal customs and ways by exposure to the impact of a more complicated and sophisticated manner of life is capable of doing great harm. Considering previous experience and the strong temptation to take advantage of tribal simplicity and weaknesses, it was essential to provide statutory safeguards for the protection of land which is the mainstay of the aboriginal's economic life and for his customs and institutions, which apart from being his own, contain elements of value.' There was a clear commitment in the Preamble[5] to this effect and the assurances given was translated into specific provisions. The assurances thus fundamental, something abiding and not to be lightly interfered with.[6]

In 1958, Late Prime Minister Jawaharlal Nehru laid down five principles for the administration of tribal areas: First; people should develop along the lines of their own genius and we shall avoid imposing anything on them. We should try to encourage in every way their own traditional arts and culture. Secondly, tribal rights in land and forests should be respected. Thirdly we should try to train and build up a team of their own people to do the work of administration and development. Some technical personnel from outside will no doubt be needed, especially at the beginning. But we should avoid introducing too many outsiders into tribal territory. Fourthly, we should not over-administer these areas or overwhelm them with a multiplicity of schemes. We should rather work through and not in rivalry to, their own social and cultural institutions. Lastly, we should judge results, not by statistics or the amount of money spent, but by the quality of human character that is evolved.

IV. Constitutional Justice to Tribal

Constitutional Justice to Tribal integrates the Indian State and society. The Constitution makes the State, the trustee to preserve, protect and defend the

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[5] WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all
FRATERNITY assuring the dignity of the individual and the [unity and integrity of the Nation];
IN OUR CONSTITUENT ASSEMBLY, this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

[6] M. P. Jain, 'Safeguards to Minorities: Constitutional Principles, Policies and Framework' in Mohammed Imam (ed.) Minorities and the Law (192) 1.

Tribal. Accordingly, it empowers under Article 342,[7] the President of India to specify the Tribes or Tribal communities, parts or groups thereof for the purposes of conferring Constitutional recognition as a Scheduled Tribe. On attaining such recognition, the Tribe deemed as Scheduled Tribe in relation to a State, become entitle to the benefit of a National Commission under Article 338-A[8] and a Commission to be appointed to report on the Administration of Scheduled Areas wherein the Tribes live as also the welfare of the Scheduled Tribes in the State.[9] In relation to such Tribes the Constitution empowers the Union Government to give directions to a State for the drawing up in execution of specific schemes for the welfare of the Scheduled Tribes in the State.[10]

The Constitution does not define the word Tribe and it does not also give any guidelines for the same. The National Commission for the Scheduled Tribes under Article 338-A[11] is not empowered to define as to what is a Tribe or to hold any investigation concerning this issue. Similarly, the Commission under Article 339 has no such power. Yet, under Article 47 it is a fundamental principle of the Governance of India that the State 'shall promote with such care' the educational and economic interest of the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. Under Article 29, such Tribes have the fundamental right to conserve their dignity, language and script of the culture. Once a tribe, a tribal community or parts or groups thereof, are deemed to be a Scheduled Tribe by the Presidential order, then this constitutional identity entitles them to the following provisions of the Fundamental Rights, constitutional rights and Directive Principles, in addition to the other constitutional justice rights available to all:

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[7] Article 342. Scheduled Tribes: (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be. (2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

[8] The 89th Constitutional Amendment 2004 established the National Commission for Scheduled Tribes by incorporating Article 338A in the constitution. This was done by splitting the erstwhile National Commission for Scheduled Castes and Scheduled Tribes primarily to supervise the implementation of various constitutional safeguards provided to Scheduled Tribes. For details See http://tribal.nic.in/Content/NationalCommissionforScheduledTribesOrganisations.aspx

[9] See Article 339

[10] See Article 339 (2)

[11] *n. 9*

[a]. Educational and Economic Interests

It is fundamental in the governance of India that economic and educational interests of tribals and other weaker sections shall be promoted by the State "with special care" and the State will protect them from social injustice and all forms of exploitation.[12] Regardless of the prohibition in Article 29(2),[13] regarding admission to educational institutions maintained by the State or receiving aid out of State funds, the State is empowered to make special provisions for their advancement.[14] Except for minority educational institutions, the State can provide by a law special provision for the admission of Scheduled Tribe candidates to public and aided or unaided private educational institutions.[15]

Since the word tribe has not been defined anywhere their condition is covered under 'backward class of citizens'. The State is empowered to reserve appointments or posts for the scheduled tribes if in the opinion of the State, they are not adequately represented in the service under the State.[16] Under Article 320(4) the Public Service Commissions do not have to be consulted to make reservation for the appointment of Scheduled Tribes. Similarly, reservation can be made for promotion of Scheduled Tribes.[17] While the reservations have to be made keeping in mind the maintenance of efficiency of administration, the State can relax qualifying marks in any examination or lower the standards of evaluation for the purpose of promotion of the Scheduled Tribes in any class or classes of services or posts in connection with the affairs of the Union or a State.[18] Under

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[12] Art 46

[13] Article 29(2): No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

[14] See Article 15 (4): Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

[15] See Article 15 (5): Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

[16] See Art. 16(4), (4-A), (4-B) and 335 Proviso.

[17] See Article 320(4): Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335.

[18] See 82nd Constitutional Amendment Act, 2000 which added a proviso in Article 335 of the Constitution. It permited relaxation of qualifying marks and other criteria in reservation in promotion for SC / ST candidates.

Article 320(4) the Public Service Commission does not have to be consulted to give effect to Article 335.[19]

[b]. Reservation in Legislatures

Reservation of seats for Scheduled Tribes in Lok Sabha and State legislatures for a certain period. The principle to quantify the reservations is the ratio of the population of a State to the total population of the State. For the Lok Sabha, this ratio as far as possible should be the same as that of the seats reserved for the total number of seats allotted to a State in the Lok Sabha. For the State legislatures, the ratio of the number of seats reserved for the total number of seats in the Assembly must bear the same proportion as that of Scheduled Tribes numbers in a State to the population of the State.[20]

The population for purposes of the above-mentioned quantification is frozen at that of the 2001 census. No change will occur till the publication of the relevant figures of the first census after 2026. Notwithstanding anything in the previous Articles, the reservation of seats in the Lok Sabha and the State Assemblies will cease to have effect only on the expiration of seventy years from the commencement of the Constitution, that is in 2020.[21] In addition, Constitution also provides that tribal populated States i.e. Chhattisgarh, Jharkhand, Madhya Pradesh, Odisha must have a Minister in charge of tribal welfare.[22]

[c]. Central Funds

For Scheduled Tribe development schemes undertaken by a State with the approval of the Government of India, a State is entitled to get money, the capital and recurring sums required for such schemes from the Consolidated Fund of

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[19] See Article 335: The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

[20] See Arts. 330,332,334

[21] See Art. 334

[22] See Art.164(1) Proviso: The chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor: ***Provided*** *that in the State of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and backward classes or any other work.*

India. These sums would be treated as grants in aid[23] of the revenues of a State. Such sums have to be approved by Parliament and once so approved these become charged on the Consolidated Fund of India. Till Parliament grants this approval, the President of India can grant the approval subject to any provision made by Parliament. Once a Finance Commission has been constituted then the President can pass such an order only after considering the recommendations of the Commission.[24]

Thus, the Constitution provides a complete scheme for the integration of the tribal population with the rest of the population by way of political representation in the directly elected Houses, in the Government of certain States, in the services of all the States, and provides funding for the development schemes under the Directive Principles and Fundamental Rights. This has led to the creation of a creamy layer, which no longer needs these constitutional crutches, for which there is yet no remedy. This has also led to the problem of assimilation of the tribes, especially through economic development and the loss of their lands (which are the sole source of livelihood and tribal identity) through moneylenders, displacement and the loss of their respective cultures despite their fundamental right under Article 29(1). The situation, therefore, is of a few modernized tribals and the rest struggling for a life of the barest dignity.

V. Judicial Quandary Over Tribal Rights

The Constitution of India seeks to achieve dignity of individual by guaranteeing equal fundamental rights to each citizen, so that she/he can enforce her minimal rights in courts of law if invaded by state or any of its instrumentalities. However,

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[23] Grants-in-aid are payments made by Central government to the federating units/governments, either according to the provisions of the Constitution or by legislative decision. Grants-in aid have been used as a balancing factor in all political systems, in one form or another, to correct the maladjustments arising from the Allocation of Important and relatively elastic sources of revenue to the Central Government and entrusting welfare functions to the Units. This mechanism of adjusting resources to functions is used after all other balancing factors have been commissioned. *See also* Article 282 of the Constitution.

[24] Article 275(1) of the Constitution of India empowers the Parliament to provide grants. The grant shall be charged on the consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States.

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State". See http://tribal.nic.in/Content/Grants%20under%20Article%20275%20of%20the%20Constitution%20of%20India.aspx

the drafters of the Constitution thought that this set of justifiable rights will not be enough for the maintaining the dignity of individuals, if he is not free from wants and misery. With this idea in mind, the framers further added a set of principles in part IV of the Constitution exhorting the state so as to shape its social and economic policies that *inter alia* 'all citizens men and women equally, have the right to adequate means of livelihood, just and humane condition of work and a decent standard of life and full enjoyment of leisure and social and cultural opportunities.

The Supreme Court of India has read the Preamble and Directives Principles of State Policy with Article 21 to conclude that right to dignity is the core element of both *"civil and political rights"* and *"Social and cultural rights"* and hence a fundamental right. Through several landmark judgments, the Supreme Court certified this norm. The Supreme Court elaborated this concept of individual dignity in famous ***Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors***[25] following manner:

> *the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constituting the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.*

The Supreme Court prolonged this above-mentioned concept of dignity and rightly so, in *Samatha v. State of Andhra Pradesh.*[26] The verdict declared all lands leased by the government or its agencies to private mining companies, null and void. However, it upheld the transfer of land to the government or its instrumentalities as entrustment of public property. The court observed:

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[25] 1981 SCR (2) 516

[26] *Samantha v. State of A. P. (1997)8 SCC 191*

> *"Agriculture is the only source of livelihood for scheduled tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and most valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality and permanent place of abode and work and living. It is a security and source of economic empowerment. Therefore, the tribes too have a great emotional attachment of their lands. The land, on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and is a potent weapon of economic empowerment in a social democracy."*

While explaining the symbiotic relationship of tribals with their land and environment Justice K. Ramaswami further observed:[27]

> *"The Fifth and Sixth schedules constitute an integral scheme of the constitution with direction, philosophy and anxiety to protect the tribals from exploitation and to preserve natural endowment of their land for their economic empowerment to cognate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat."*

The verdict of Supreme Court in Samatha case became an obstacle like PESA[28] "development plans" and therefore, powerful business houses and other vested political interests united to disavow the Apex Court's judgment. Several attempts were made by Central and State government to modify Samatha Order but, all

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[27] *ibid*

[28] The 73rd Amendment of the Constitution of India obliged the Government to enact the Panchayat (Extension to the Scheduled Areas) Act in 1996. It objectives to protect the tribal population from exploitation by making Gram Sabhas an axis of self-governance. PESA is perhaps the most progressive legislation for the administration of tribal regions. It recognizes the traditional rights of the indigenous communities over the natural resources. The Gram Sabha under PESA, will be involved in approval of development plans and programs, all decisions related to land acquisition as well as rehabilitation of affected persons, and in management of the minor forest produce. The Act specifically entrusts the Gram Sabha with the following functions: (1) Section 4.d: Gram Sabha shall safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution; (2) Section 4.e (i): Gram Sabha shall be responsible for approval of plans, programs and projects for social and economic development; (3) Section 4.e (ii): responsible for the identification or selection of persons as beneficiaries under the development programs; (4) Section 4.i: Consultation with Panchayat prior to land acquisition and Rehabilitation & Resettlement activities in the scheduled areas; (5) Section 4.m(ii): Endows ownership of minor forest produces (MFPs) to Panchayats; (6) Section 4.m (iii): endows power to prevent alienation of land in Scheduled areas and to take appropriate action to restore any unlawfully alienated land of STs. For details See https://socialissuesindia.wordpress.com

the petitions were dismissed by the Supreme Court (March 2000). The efforts to annul the Samatha judgment by amending Fifth Schedule of the Constitution continued in various government quarters even though the Supreme Court had not imposed a blanket ban on mining activity in the scheduled areas.

The recent judgment of the Supreme Court in *UCO Bank v. Dipak Debbarma*[29] which allowed banks to sell mortgaged property of tribal to non-tribals which are prohibited by State Legislations is a serious impediment to the concept of Tribal Justice. It will impact the livelihoods of millions of tribals in the country. The decision came while construing the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, a legislation enacted by Parliament. The court observed that Union law will have overriding effect over the Tripura Land Revenue and Land Reforms Act, 1960, which restricts sale of mortgaged properties by the banks to non-tribal. The Supreme Court held that inclusion of the Tripura Land Act 1960 in the IX Schedule of the Constitution by itself would not confer any immunity to it from being overridden by the Parliament enactment.

Now the question that is disturbing tribal rights activists and civil society is that, whether this verdict of the Supreme Court would have any relevance to the existing constitutional laws prevailing in the Scheduled Areas of Andhra Pradesh and Telangana in relation to tribal land protections, which prohibit even banks to alienate the mortgaged property by either tribal or non-tribal to other non-tribal? The Land Transfer Regulations 1 of 70 prohibits transfer of lands not only between the tribals and non-tribals but also among the non-tribals in the Scheduled Areas of both Telangana and Andhra Pradesh. These Regulations emanates from the Constitution itself;[30] and hence cannot be diluted by any state or central laws.[31] However, this judgment may tile a way for non-tribals to permeate to the Scheduled Areas of other States and strengthen their commercial and business activity by gripping the resources. Unlike State of Andhra Pradesh, there is no such legislation in force in any other States having Scheduled Areas banning the land transfer in favor of non-tribals.

[Part II: Curative Action Plan]

VI. Representation in Public and Private Higher Education

A careful study of the All India Survey on Higher Education (AISHE) 2015-16, published by the Ministry of Human Resource and Development opens up the issue of representation of scheduled tribe students in public higher education in

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[29] Civil Appeal No. 11247 of 2016 (arising out of S.L.P. (C) No.36973 of 2012). Decided on 25 November 2016.

[30] Para 5(2) of the Fifth Schedule to Constitution of India.

[31] The Supreme Court has already declared in P Ramireddy v State of AP (1988) that the Andhra Pradesh Scheduled Area Land Transfer Regulations 1 of 70 (LTR) are constitutionally valid.

a chilling fashion. According to this survey, despite relatively undisputed reservation policy for STs in admission provided by Article 15(4) of the Constitution, the tribal representation in higher education is only about 2.01%.[32] The issue of representation of tribal staff (both academic & administrative) in public higher education suffered the same fate with disastrous consequences for the evolution of critical pedagogy which we consider to be second substantive issue of higher education.

By 2015-2016; the higher education system in India consists of 799 Universities out of this 277 Universities are privately managed. There are 39071 colleges out of this 78% Colleges are privately managed with 64% Private-unaided and only 14% Private-aided which caters to 67% of the total enrollment. There are 11923 Stand Alone Institution which is mainly run by Private sector (76%); Private unaided – 66% and Private aided – 10%. Only 24% Stand Alone Institutions are in the Government sector. According to one estimate by 2019, we will have more private universities than public universities. Even amongst the public universities, close to 79% would be private colleges affiliated to a public university. It would mean that about 85% to 90% students would be studying in a private college or a private university.[33]

In *P.A. Inamdar* v. *State of Maharashtra*,[34] the Supreme Court declared that the State could not impose its policy of reservations on the private managements, nor could they prescribe differential fee structure based on government and management quota. In short the whole idea of a compulsory Government quota, the product of the Supreme Court decision in *Unnikrishnan J.P.* v. *State of A.P.*[35] was conclusively declared impermissible.[36] To overcome this much-lamented verdict, Article 15(5) has been introduced in the Indian Constitution.[37]

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[32] This data has been obtained by taking into account census figures of 2011. For detailed methodology please see Debaditya, *Guest-Editorial: What 'Use' is the Liberal Ruse? Debating the 'Idea' of the University*, in 'The Idea of the University' (Issue 29) of Café Dissensus on September 15, 2016 Available @ https://cafedissensus.com/

[33] Maheshwar Peri, *Role of Private Players in Higher Education*, 17 August 2016 <https://www.saddahaq.com/role-of-private-players-in-higher-education>

[34] AIR 2005 SC 3226. Hereinafter referred to as *Inamdar*

[35] (1993) 1 SCC 645. Hereinafter referred to as *Unnikrishnan*

[36] This is considered a conclusive declaration as *TMA Pai* was a confusing decision in many respects. Though the *Unnikrishnan scheme* was overruled in *TMA Pai*, certain portions of this judgment was used to justify the permissibility of a Government quota in *Islamic Academy*. The Supreme Court gave its final verdict against Government quota in *Inamdar*, overruling *Islamic Academy* in this process.

[37] The text of Article 15(5) is as follows: "Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the state from making *any special provision*, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions, *including private educational institutions*, whether aided or unaided by the state, other than the minority educational institutions referred to in Clause (1) of Article 30."

While the constitutional validity of Article 15(5) was upheld by the Supreme Court[38], the judicial policy of postponement of social justice was at full play in private higher education as well. Firstly, Supreme Court through its judgment in *Inamdar* case ensured that the Bahujan do not get representation in private higher education in their formative stages. Evolution of private higher education with shared living experience of people representing all shades of social reality would have infused a certain element of radical potential in spaces of private higher education, something which public higher education always lacked. With the emergence of private as the prominent domain of higher education, public higher education is not likely to acquire any such capacity in near future. Supreme Court through *Inamdar* judgment denied this role to private space of higher education as well. In this sense, Inamdar judgment is to private higher education what Champakam[39] judgment was to public higher education.

Secondly, Article 15(5) is only an enabling provision which means that the issue of representation of tribals as students and staff (both academic & administrative) in private higher education is now dependent upon the sweet will of Legislature and the Executive of each State. The net effect of *Inamdar* judgment is that it postponed the question of representation of ST/SC/OBC in private higher education by a decade or two by making it contingent on the political conditions of different States. Even where the political will could be mustered to implement the mandate of Article 15(5) the judicial hurdles continue to surmount. For example the State Legislature of Uttar Pradesh passed the Admission to Educational Institutions (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 2006 in order to override the decision in *Inamdar* by making provision of reservation of seats for Scheduled Castes, Scheduled Tribes and other socially and economically backward classes, in admission to educational institutions, including private educational institutions.[40] But the Allahabad High Court prevented the enforcement of this Act on one pretext of the other and finally gave a fatal blow to it by declaring the key provisions of the Act unconstitutional in 2011.[41] Hence, the judicial policy of postponement of social justice continues deep into private higher education.

Thirdly, the exemption by Article 15 (5) to minority educational institutions referred to in Clause (1) of Article 30 has suppressed the question of representation of Scheduled Tribes. On this question, public and private higher education look like

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[38] *A. K. Thakur v. Union of India, (2008) 6 SCC 1*

[39] *n.18*

[40] U.P. Act No. 23 of 2006 <http://www.bareactslive.com/ALL/UP161.HTM> accessed 13 May 2017.

[41] Sudha Tiwari vs. Union of India and others, Allahabad High Court judgment delivered on 11.2.2011 available @ http://elegalix.allahabadhighcourt.in/elegalix/WebShowJudgment.do

a mirror image of each other. This is one of those classical examples where both the Parliament and the judiciary come together to pursue a policy of denial of representation to ST/SC at all spaces which can be termed as higher. Thus, if we are to take any lesson from the history of public higher education on this issue, it would be to prevent its repetition in private higher education by time bound implementation of Article 15 (5) across the country and broaden the horizons of social justice.

VII. De-Scheduling of Advanced Tribes

It may also be contended that socially and economically advanced STs be kept out the policy and referred to the Lokur Committee report[42] which had recommended that certain castes/tribes be excluded. The committee asserted that *"a lion's share"* of the most benefits and preferences were appropriated by the numerically larger and politically well-organized communities on the list.[43] It also cautioned about the deleterious effect of creating vested interests in the listing and recommended that the time has come when the question of de-scheduling of relatively advanced communities should receive serious and urgent considerations.[44]

It was contended in many cases before the Supreme Court that the creamy layer principle which was mandated for OBCs in the Mandal Commission Case must also be applicable to SCs and STs. However, the Court either declined to do that on the ground of policy decision or avoided the questions in its own fashion. In *E.V. Chinnaiah Vs. State of Andhra Pradesh*,[45] the apex court observed that the SCs and STs form a single class. The observations in Nagaraj's case[46] cannot be construed as requiring exclusion of creamy layer in SCs and STs. Creamy layer principle was applied for the identification of backward classes of citizens. And it was specifically held in Indra Sawhney's case[47] that this concept was confined to Other Backward Classes and has no relevance in the case of Scheduled Tribes and Scheduled Castes. The observations of the Supreme Court in Nagaraj's case should not be read as conflicting with the decision in

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[42] In 1965, an Advisory Committee was constituted for the revision of the Scheduled Castes and Scheduled Tribes list by the Government of India under the Chairmanship of Mr. B.N. Lokur, the then Law Secretary. See Lokur Committee (1965) The Advisory Committee on the Revision of the Lists of Scheduled Castes and Scheduled Tribes (Lokur Committee). New Delhi: India, Government of.

[43] Sanjay Paswan and Paramanshi Jaideva (Eds.), Encyclopedia of Dalits in India, Human Rights: Problem and Perspectives, Volume 12, Kalpaz Publications (2003) Delhi, p. 399.

[44] *ibid.*

[45] AIR 2005 SC 162

[46] AIR 2007 SC 71

[47] AIR 1993 SC 477

Indra Sawhney's case. The observations in Nagaraj's case as regards SCs and STs are *obiter*. Regarding SCs and STs, there can be no concept of creamy layer.[48] In a recent public interest litigation filed in the Supreme Court once again, it was contented that the benefits of reservation were not distributed equitably among STs in the last 64 years and only a small group had benefited from the policy.[49] The benefits were cornered by a handful of communities out of 586 Scheduled Tribes, leaving a vast population of the reserved class out of the social welfare measure.[50] A bench of Justices F. M. I. Kalifulla and V. Gopala Gowda, however, observed that it is not possible for the court to pass direction, but for the Parliament to decide. The approach of the Supreme Court seems to be ironical. When Supreme court has decided to exclude creamy layer from social and educationally backward classes in Mandal Commission Case, it cannot use *political thicket* excuse to run way in case of scheduled castes and scheduled tribes.

The first step, therefore, should be to identify the most backward communities amongst the tribes and implement special programmes to uplift them speedily. A radical approach, matched with adequate funds should be evolved so that they come to have a sound economic base which alone would enable them to cross the poverty line. Special attention must be paid in all programmes specially directed towards removal of poverty by earmarking a significant proportion of outlay exclusively for Scheduled Tribes which should not merely be proportionate to the proportion of the Scheduled Tribes in the target group but in view of their extreme backwardness it should have an added weightage so as to make up for the backlog.

VIII. Making Pro-Tribal Culture

To make tribal justice a reality, it may be suggested that tribal people themselves should be encouraged to play an important role in identifying region-specific problems, discussing alternative solutions available, planning specific programmes and providing a feedback to administrators, planners and the researchers. The driving force for the development process should emanate from within although sparks for its ignition may be provided by outsiders. An anthropological approach[51]

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[48] *Ashok Kumar (n 39)*

[49] For instance, *Meena caste* is one of such oldest *tribal* community found in Rajasthan, takes maximum benefits of the reservations in public employment. Due to this the tribes in Odisha, Jharkhand and Chhattisgarh for instance are still forced to keep away.

[50] PIL decided on 13th April 2015.

[51] An anthropological approach is the study of exploration of the complexity and distinctions of human interactivity and culture. As a research discipline, anthropology syndicates humanist and social science approaches. The method that sets anthropology apart from other disciplines is ethnography that studies qualitative process of discovering in depth the whys and hows of human culture, behaviour, and expression.

is needed to the entire gamut of tribal problems. The need to pay special attention towards the efficient administration of tribal areas had already been felt long back and hence, gram sabha must be vested with more powers to execute tribal plans and for that Constitutional amendment can be brought about on the lines of *Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA).*[52] The framers of the Indian Constitution were of a firm view that all constitutional benefits provided for the Scheduled Tribes could be executed into action only if strong constitutional machinery was evolved to this effect. With this object in view, they have been wise enough to carve out some provisions to this effect in our Constitution.

[52] The amendment provides the Gram Sabha, first to approve the plan, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the panchayat at the village level and secondly to be responsible for the identification or selection of persons as beneficiaries under the poverty alleviation and other programmes' and 'every panchayat at the village level shall be required to obtain from the gram sabha a certificate of utilization of funds by the panchayat for the plans, programmes and projects'.

The Precarious Position of the Transgender under the Rome Statute: An Urgent Need to Modify the Definition of Gender

Nidhi Kulkarni*

A large portion of the discourse surrounding gender in the past few decades has focussed mainly on women's rights. This has undoubtedly led to the crystallisation of a movement in both domestic and international law, which has resulted in the recognition and upliftment of women's rights in almost all spheres of life. However, the understanding of gender as a concept is still very skewed. The conflation of gender and sex has resulted in the denial of recognition to groups such as the transgenderwho do not necessarily fit into the binary of male or female. Although several international human rights instruments provide for equality and non-discrimination on the basis of birth, these groups have faced immense ostracism and violence at the hands of both state and non-state actors.The Rome Statute of the International Criminal Court included the first codification of gender-based persecution in international criminal law in 1998. This was hailed as a crucial step towards tackling crimes against humanity motivated by gender differences. Despite this, the definition of gender adopted by the Statute leaves transgender groups without any effective remedy and is not in consonance with the current recognition of gender identity under international law. Through this article, the author will first examine the concept of gender in the sphere of human rights and differentiate it from sex. Secondly, she will highlight the position of the transgender under the domestic

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law of countries along with analysis of relevant jurisprudence. This will be followed by a critique of the definition of gender under the Rome Statute and the insecure position of transgender individuals under this statute. Lastly, the article suggests modifications to this definition of gender with the aid of international instruments, which have recognised the rights of transgender individuals under international law.

Introduction

"We must all raise our voices against attacks on lesbian, gay, bisexual, transgender or intersex people. We must oppose the arrests, imprisonments and discriminatory restrictions they face."

– Ban Ki-moon[1]

The movement towards gender equality has been consistently dominated by feminist ideas. After decades of subjugation, it can be stated with certainty that women's issues have been incorporated into the framework of United Nations bodies and several other international organisations.[2] However, the skewed understanding of the concept of gender led to groups like the transgender being largely excluded during deliberations on gender at both national and international forums. While there has been a gradual shift from this position due to changes in international human rights law and soft law instruments,[3] the challenges faced by the transgender community have almost always been seen as part of the larger struggle of the LGBT group. The routine torture, threats of death and ostracism faced by transgender individuals consequently remain unaddressed.

The Rome Statute of the International Criminal Court (hereinafter "Rome Statute") included the first codification of gender-based crimes in international

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[1] Ban Ki-moon, 'Secretary-General's remarks at the 126th Session of the International Olympic Committee Session' (6 February 2014) www.un.org/sg/en/content/sg/statement/2014-02-06/secretary-generals-remarks-126th-session-interantional-olympic accessed 16 May 2017

[2] Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (1993); Report of the Fourth World Conference on Women, UN GAOR, Annex 1, UN Doc A/CONF.177/20/Rev.1 (1995); Economic and Social Council, Report of the Economic and Social Council for 1997, UN GAOR, 52nd Session Supp No 3 UN Doc A/52/3/Rev.1/Add.1 (1997); Gender Related Dimensions of Racial Discrimination, UN Doc A/55/18 (2000)

[3] UN High Commissioner for Refugees, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008); UNGA Res 67/168 (20 December 2012) UN Doc A/RES/67/168; UNHRC Res 32/2 (12 July 2016) A/HRC/RES/32/2; International Commission of Jurists, 'The Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007) http://www.yogyakartaprinciples.org/ accessed 16 May 2017

criminal law, which included rape, torture, sexual slavery and enforced prostitution.[4] Though this step was regarded as a major reform in international criminal law, the definition of gender provided in Clause 3 of Article 7 sought to preclude transgender and intersex individuals from the jurisdiction of the Court. Through this article, the author will first analyse the notion of gender in the realm of human rights and explain how it differs from sex. Secondly, the position of the transgender under domestic laws will be seen along with the relevant jurisprudence. This will be followed by a critique of the Article 7(3) definition of gender under the Rome Statute accompanied by modifications to the same.

I. The Binary Between Gender and Sex

The conceptualisation and understanding of gender and sex is the first thing that needs to be addressed before studying the position of the transgender under international human rights law.

Sex acquires its connotation from the Latin word "sexus" meaning either of two divisions of organic nature distinguished as male or female, respectively.[5] Alternatively, it has been defined as "the sum of those differences in the structure and function of the reproductive organs on the grounds of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned."[6] Gender, on the other hand, has been thought of as the behavioural, cultural, or psychological traits typically associated with one sex.[7] It is derived from the Latin word "genus" referring to kind or race.[8] Thus to put it simply, "sex" refers to the anatomical and physiological distinctions between men and women while "gender," by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions.[9] Mary Case, a professor of law at the University of Virginia, has explained this categorization with an interesting illustration by stating that while it is a sex distinction that men can grow beards and women typically cannot, it isa gender distinction that women wear dresses in this society and men typically do not.[10]

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[4] Rome Statute 1998, Ar. 7(1)

[5] *Oxford English Dictionary* (2nd edn, OUP 1989)

[6] ibid

[7] Britta N. Torgrimson, Christopher T. Minson, 'Sex and gender: what is the difference?' (2005) 99 Journal of Applied Physiology 3, 785-787

[8] *Oxford English Dictionary* (2nd edn, OUP 1989)

[9] Mary Anne C. Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105 Yale L.J.1, 11

[10] ibid

While the author does agree with the dichotomy that has been assigned to sex due to obvious biological and physiological markers, the same cannot and should not be assigned to gender. Though gender identity often does flow from sexual identity, the ordeals and experiences of transgender, intersex and other gender non-conforming individuals is evidence enough that this concept is complex and difficult to define.[11] Gender is fluid and changeable[12] and should not be pigeonholed into two categories for mere convenience.

The most important example of such an effort towards categorization of gender was the binary that emerged in The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).[13] The Convention includes the terms 'men' and 'women' but nowhere in the *traveaux preparatoires* of CEDAW has the definition and scope of the term 'women' be debated, possibly conveying the universalistic understanding of this term in international human rights law.[14] The Rome Statute of the International Criminal Court has also adopted this flawed definition of gender, restricting it to the male-female binary. This statute will be discussed in detail in the second half of this article with particular reference to the unstable and insecure position of the transgender under it.

The Yogyakarta Principles[15] drafted by the International Commission of Jurists in 2006 possibly contain the most inclusive definition of gender identity till date. Gender identity is defined as "each person's deeply felt internal and individual experience of gender" and is differentiated from sexual orientation, defined as "each person's capacity for profound emotional, affectional and sexual attraction to other individuals."[16] While this is definitely a welcome step towards a renewed understanding of gender, the rights of transgender individuals and their position in legal systems can only be secured when this understanding percolates to each and every domestic jurisdiction in the world.

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[11] Sonia Correa, Rosalind Petchesky and Richard Parker, *Sexuality, Heath and Human Rights* (1st edn, Routledge 2008) 205

[12] Tom Dreyfus, '*T*he 'Half-Invention' of Gender Identity in International Human Rights Law: from Cedaw to the Yogyakarta Principles' (2012) 37 Australian Feminist Law Journal 1, 3

[13] UNGA, 'Convention on the Elimination of All Forms of Discrimination Against Women' (18 December 1979) UN, Treaty Series, vol. 1249, 13

[14] Lars Adam Rehof, *Guide to the Travaux Preparatoires of the United Nations Convention on the Elimination of All Forms of Dianmination Against Women* (Martinus Nijhoff Publishers 1993)

[15] International Commission of Jurists, 'The Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007) http://www.yogyakartaprinciples.org/ accessed 16 May 2017

[16] ibid

II. The Position of the Transgender in Domestic Jurisdictions

Transgender individuals are not restricted to a particular geography and are found all across the world. Examples include the Hijras of India and Bangladesh, Fa'afafine of Polynesia and the sworn virgins of the Balkans.[17] Mythology abounds in references to transgender identity, the most well known being the Hindu God Shiva (also known as Ardhanarishvara or Half-Woman) and the Greek mythological figure, Ganymede.[18]

The meaning and ambit of the term transgender, however, has been the subject of much debate. The US case of *Oiler v. Winn-Dixie Louisiana, Inc.* first defined the term with the help of an expert as an umbrella expression to describe those who cross or do not adhere to culturally defined gender categories.[19] This included male-to-female and female-to-male transsexuals, transgenderists, bigender persons, drag queens and drag kings, and female and male impersonators. A later case of *Schroer v. Billington* involved a male to female transsexual who found her employment offer at the Library of Congress revoked after she declared her transgender status.[20] The judgment stated, "that a person's sex is a multi-faceted concept that incorporates a number of factors, including sex assigned at birth, hormonal sex, internal and external morphological sex, hypothalamic sex, and gender identity." *P v. S*, the first European case in the matter, broadened the understanding of the term by stating that, "biological sex and sexual identity fail to coincide."[21]

Over the years, the term has expanded to incorporate anyone who does not identify as either male or female in our society's binary view of gender, including those that identify as part of a gender continuum[22] and has also come to include transsexuals, transvestites, androgyne, polygender, genderqueer, agender or third gender persons and others who manifested their chosen gender or lack thereof through clothes, presentation or body modifications and multiple surgical procedures.[23] In medical terms, the American Psychological Association defines transgender as an "umbrella term for persons whose gender identity, gender

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[17] Antonia Young, *Women Who Become Men: Albanian Sworn Virgins* (1st edn, Berg Publishers 2000)

[18] Daniélou, Alain, *Gods of love and ecstasy: the traditions of Shiva and Dionysus* (Inner traditions/ Bear & Co 1992)

[19] Civ A 00-3114, ED La 2002

[20] (2007) 525 F Supp 2d 58, DDC 2007

[21] *P. v. S. and Cornwall County Council (*1995) Op. of Advocate Gen. Tesauro, ECR I-2148

[22] Navah C. Spero, 'Transgendered Plaintiffs in Title VII Suits: Why the Schroer v. Billington Approach Makes Sense' (2010) 9 Conn Pub Int LJ 387, 392-93

[23] Silvan Agius; Christa Tobler, *Trans & Intersex People: Discrimination On The Grounds Of Sex, Gender Identity And Gender Expression* (European Commission Report 2011)

expression, or behaviour does not conform to that typically associated with the sex to which they were assigned at birth."[24]

Non-discrimination is a principle, whichlies at the root of all the major human rights instruments including the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Article 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights".[25] The term "human beings" would include transgender individuals as well. Article 2 of the International Covenant on Civil and Political Rights, undertakes for each State party to the Covenant to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[26] Since the inclusion of "other status" indicates that the grounds under this statute are not exhaustive, gender identity and sexual orientation can easily be read into the article.[27] The Vienna Declaration and Programme of Action stresses on the obligation of states by stating that, "while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[28] Moreover, the general comments of several international committees and agencies such as the Committee on the Rights of the Child, the Committee against Torture and the Committee on the Elimination of Discrimination against Women have particularly included measures to tackle discrimination on the basis of gender identity and sexual orientation.[29]

Nevertheless, despite the prevalence of several international instruments recognizing the universality of fundamental human rights,transgender people have faced repeated ostracism; have been the victims of ghastly hate crimes and

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[24] American Psychiatric Association, 'Answers To Your Questions About Transgender People, Gender Identity, And Gender Expression 1' (2011) http://www.apa.org/topics/sexuality/transgender.pdf accessed 10 May 2017

[25] Universal Declaration of Human Rights 1948, Art 1

[26] International Covenant on Civil and Political Rights 1966, Art 2

[27] Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

[28] UN Doc A/CONF 157/23

[29] UNCRC, General Comment No. 4 CRC/GC/2003/4; Committee against Torture, General Comment No.2 CAT/C/GC/2; CEDAW General Comment No. 28 CEDAW/C/GC/28; CEDAW, concluding observations on South Africa CEDAW/C/ZAF/CO/4; Costa Rica CEDAW/C/CRI/CO/5-6

been repeatedly disenfranchised by both state and non-state agencies in matters of employment,[30] health care[31] and education.[32] The development of jurisprudence in this regard has been quite poor since courts have blatantly refused to recognise trans-individuals as a distinct entity.

The shocking judgment in *Ashlie v. Chester-Upland School District*[33], a 1979 United States case as well as its equally unnerving rationale is important to note. The Court denied the right to privacy to the plaintiff, a male to female trans schoolteacher opining that "this right does not cover transformation from man to a donkey" and thus displayed its repugnance to transgender individuals by comparing them to beasts and consequently denying them the protection of the law. An equally stunning and odious dictum was passed in *In re Petition of Richardson to Change Name*[34], where the Court after hearing a petition of the plaintiff to change his name stated unequivocally, "The point, however, as we see it is that we are being asked to lend the dignity of the court and the sanctity of the law to this freakish rechristening. To place a female name on a male is to combine incompatibles, and to do so legally is to pervert the judicial process, which is supposed to act in a rational manner."[35] In a later case of *Daly v. Daly*, the Court recognized the plaintiff's self-identified gender but stripped her off her custodial rights with respect to her daughter stating that by transforming into a woman, she had been divested of that particular role.[36]

Discrimination in the matters of employment first came up in *Ulane v. Eastern Airlines, Inc.*[37] where the Seventh Circuit overturned a district court's decision to rehabilitate a male-to-female transsexual as a flying officer accompanied by retention of seniority, back pay, and attorney fees. The Court scoffed at the idea of hormonal alteration and surgeries[38] and regarded discrimination against a transsexual

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[30] European Union Agency for Fundamental Rights, 'Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity: Part II – the Social Situation' (2009) 63-64

[32] Council of Europe Commissioner for Human Rights, 'Human Rights and Gender Identity' (2009) para 3.3; WHO, 'Prevention and treatment of HIV and other sexually transmitted infections among men who have sex with men and transgender people: recommendations for a public health approach' (2011), 30-31

[32] 'Human Rights Committee on Mexico' CCPR/C/MEX/CO/5, para. 21; UN Committee on Economic, Social and Cultural Rights, 'Comments by the Government of Poland on the concluding observations' E/C.12/POL/CO/5, 12-13; UN Committee on the Rights of the Child, 'General comment No. 3 (2003): HIV/AIDS and the Rights of the Child' CRC/GC/2003/3, 8

[33] (1979) Upland Sch Dist, No 78-4037 Lexis 12516

[34] (1982) 23 Pa D & C 3d 199

[35] ibid

[36] (Nev 1986) 715 P.2d 56, 59

[37] (1984)742 F.2d 1081

[38] Susan Etta Keller, Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity (1999) 34 HARV CR-CLL REV 329, 372

as legitimate since the law did not prohibit it. By adding, "what remains of this male is just a jumble of female hormones" the Court displayed a sense of continuing apathy towards this group that had been a staple in past cases of that decade.

Cases as recent as 2002 including *Mario v. P & C Food Markets, Inc.*[39] and *Oiler v. Winn-Dixie Louisiana, Inc.*[40] have denied the plaintiffs a discrimination claim on account of their transgender status.

European jurisprudence has been more progressive in this regard and has relied primarily on Article 8[41] of the Convention for the Protection of Human Rights and Fundamental Freedoms to deliver justice to victims. In *B v. France*[42], the European Court of Justice held that the law prohibiting a change in surname from the one assigned at birth violated the right to privacy enshrined under Article 8 of the Convention. In *Goodwin and I. v. The United Kingdom*[43], the denial of legal recognition of the postoperative gender was held to be violative of Article 8 and denying them the right to marry into their acquired gender was held to offend Article 12 of the Convention. The landmark 1996 decision of *P v. S and Cornwall County Council*[44] broadened the scope of gender and stated that the scope of discrimination should not be limited to only the two sexes in case of a gender reassignment surgery.

It would be wrong for one to say that the status of the transgender has not improved in the past decade. Governments have come to realise their duty towards this group in light of multiple developments at the international level. At this juncture, it is apposite to understand the position of the transgender under the domestic laws of countries. Five countries have been taken into consideration for this purpose.

A. The United States of America

The legal position of transgender persons varies considerably from state to state. There exists no federal law, which particularly addresses discrimination on the basis of gender identity though one might argue that the Equal Protection Clause does cover the above sort of discrimination, as well.[45] Oregon was the first state

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[39] 313 F3d 758, 766 (2d Cir 2002)

[40] No Civ A 00-3114, 2002 WL 31098541 (ED L. Sept. 16, 2002)

[41] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 8

[42] [1992] ECHR 40

[43] [1996] 22 EHRR 123

[44] [1996] IRLR 347

[45] Markowitz, Stephanie. 'Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy And Equal Protection' (2008) 14 Cardozo Journal of Law & Gender 705

to recognise the category of non-binary gender[46] in 2016, a move that has not been replicated as yet in other states. While over twenty one states have laws prohibiting discrimination based on gender identity in employment, housing and public accommodation, the others still have a long way to go.

The use of restrooms has been one of the most widely debated areas of concern for transgender people. The laws passed in this respect have been quite contradictory. Several states like Texas, Kentucky, Florida and Arizona have passed bills restricting the use of bathrooms to the biological sex assigned at birth.[47] The Public Facilities Privacy & Security Act passed by North Carolina over-ruled the previous act which provided for anti-discrimination policies in relation to restroom usage.[48] On the other hand, California was the first state to adopt a gender-neutral bathroom legislation.[49]

The United States is one of the few countries to have a hate crimes prevention act (The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act). Signed into force in 2009, it includes hate crimes motivated by the victim's gender identity and sexual orientation within its- ambit.[50]

Though progress in the area of transgender rights is being made, the recent move of the Donald Trump administration withdrawing a federal guidance policy, which allowed unbridled access to bathrooms, may just prove to be an obstacle.[51]

B. United Kingdom

The Gender Recognition Act, 2004, which came into force in 2005, allows transgender people to change their legal gender. It accords people who wish to transition, a new birth certificate after presenting their case before a Gender

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[46] O'Hara, Mary Emily, 'Nonbinary' is now a legal gender, Oregon court rules' (*The Daily Dot*, 10 June 2016) *https://www.dailydot.com/irl/oregon-court-rules-non-binary-gender-legal* accessed 14 May 2017

[47] '*Arizona Transgender Bathroom Bill Won't Move' (The Huffington Post*, June 2013) *http://www.huffingtonpost.com/2013/06/06/arizona-transgender-bathroom-bill-_n_3394164.html* accessed 14 May 2017

[48] Dave Phillips, 'North Carolina Bans Local Anti-Discrimination Policies' (*The New York Times*, 23 March, 2016) https://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html? accessed 13 May 2017

[49] Howard Blume, 'Gender-neutral bathrooms, high-quality ethnic studies class and other changes coming to California schools' (*Los Angeles Times*, 13 May 2017) http://www.latimes.com/local/education/la-me-edu-gender-neutral-school-bathrooms-plus-other-bills-20160930-snap-story.html accessed 13 May 2017

[50] Ryan Boetel, 'U.S. court upholds man's hate crime conviction' (2015) Albuquerque Journal

[51] 'Trump administration rescinds Obama-era protections for transgender students' (*The Guardian*, 23 February 2017) https://www.theguardian.com/us-news/2017/feb/22/transgender-students-bathroom-trump-obama accessed 13 May 2017

Recognition Panel. It, however, requires the passage of a two-year period after transition before issuance of a certificate.[52]

This legislation has faced immense criticism on several grounds. Firstly, since it applies only to people above eighteen, it leaves trans children out of its fold. Secondly, it applies exclusively to individuals who have changed their gender from male to female or vice-versa and thus excludes non-binary and genderqueer people who have to necessarily choose one of the two genders to be recognised. Lastly, the Gender Certificate issued can also be used as a tool to annul the existing marriage the person is part of and has thus been criticised for encouraging the breakdown of marriages in the UK in favour of civil partnerships.[53]

C. Australia

The Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 replaced the existing 1984 Act in the month of June 2013. It substitutes the term "marital status" with "sexual orientation, gender identity, intersex status, marital or relationship status". Gender identity has been defined under Section 6 to mean gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.[54] Discrimination on this ground has been dealt with in a neutral way covering all reasons for the aforementioned discrimination and applies to all areas of public life covering employment, education, housing and accommodation and membership and activities of licensed clubs.[55]

D. Argentina

The recognition and development of transgender rights in the South American nations has followed a faster and more certain path as compared to the rest of the world. This is probably what has led to Argentina having the most advanced transgender rights laws in the world.[56] The Gender Law passed in 2012 is the

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[52] Philip Cowley, Mark Stuart, 'Mapping Conservative Divisions Under Michael Howard' (19 November 2004) http://www.revolts.co.uk/Conservative%20splits.pdf accessed 13 May 2017

[53] Andrew N. Sharpe, 'A Critique of the Gender Recognition Act 2004' (2007) 4 Journal of Bioethical Inquiry 1, 33–42

[54] Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, Art 6

[55] Sexual orientation, gender identity & intersex status discrimination, Information Sheet, Australian Human Rights Commission

[56] Michael K Lavers, 'Argentina joins global LGBT rights initiative' (*Washington Blade*, 24 March 2016) http://www.washingtonblade.com/2016/03/24/argentina-joins-global-lgbt-rights-initiative/ accessed 14 May 2017

first such law which allows transgender people to change their identity or name without seeking judicial permission or without any requirement for a surgical procedure.[57] Subsequent to this gender change, trans people will be provided access to the country's socialised medical facilities for their future needs, free of cost. An additional unique feature of this legislation is that it provides for alteration of gender for persons below eighteen, as well. Article 5 of the Act provides for minors to avail of this procedure through their legal representatives in consonance with the best interests of the child as laid down under the Convention of the Rights of the Child.[58]

E. India

India has a considerable population of Hijras, better known as third genders. In 2014, the Indian Supreme Court in the landmark case of *National Legal Services Authority v. Union of India* (*NALSA* v. *UOI*), recognised the transgender people as a third gender and gave them the right to self-identification and to ascribe to the male, female or third gender.[59] The Court also granted them the position of a backward class and provided them reservations in admissions to educational institutions and jobs.

The Upper House of the Indian Parliament has recently passed the Transgender Persons (Protection of Rights) Bill, 2016.[60] It defines a transgender person as one who is partly female or male; or a combination of female and male; or neither female nor male. In addition, the person's gender must not match the gender assigned at birth, and includes trans-men, trans-women, persons with intersex variations and gender-queers.[61] The bill prohibits discrimination against such persons in fields of education, employment and healthcare. A transgender person must first however, obtain a certificate from the District Magistrate to avail benefits under the bill.

The definition of transgender includes intersex and trans-men and women but the bill has failed to define these terms. More importantly, the bill does not provide

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[57] Kamilia Lahrichi, Leo La Valle, 'Argentina's Field of Dreams for the LGBT' (*U.S. News & World Report*, 4 April 2016) https://en.wikipedia.org/wiki/U.S._News_%26_World_Report accessed 14 May 2017

[58] Gender Identity Law 2012, Art 5

[59] (2014) 5 SCC 438; 'India recognises transgender people as third gender' (*The Guardian*, 15 April 2014) https://www.theguardian.com/world/2014/apr/15/india-recognises-transgender-people-third-gender accessed 16 May 2017

[60] 'Cabinet approves Bill to empower transgenders' (*Indian Express*, July 2016) http://indianexpress.com/article/india/india-news-india/transgender-persons-bill-passed-approve-empowerment-2926551/ accessed 14 May 2017

[61] Transgender Persons (Protection of Rights) Bill 2016, s 2(i)

for enforcement of such a self-identified transgender right and has hence been criticized as standing in violation of the spirit of the NALSA judgment.[62]

III. The Definition of Gender under the Rome Statute

Unfortunately, the unfair treatment meted out to transgender people does not stop at discrimination on economic and political grounds. Transphobic violence has been documented in multiple countries across the world. It involves both physical and psychological violence and is motivated by punishing those who do not adhere to gender norms.[63] The National Coalition of Anti-Violence Programs in the United States of America reported 27 bias-motivated murders of LGBT persons in 2010, up from 22 in 2009.[64] In 2015 alone, Human Rights Watch tracked 21 deaths due to fatal transgender violence. The number has not gone down as 2016 saw 22 deaths in the United States alone.[65] The year 2017 has already seen 10 deaths of transgender individuals who were either shot or killed by other means[66] including rape, torture and forced impregnation. The International Criminal Court (hereinafter 'ICC') was set up in 2002 to address crimes of this very nature. It has been provided with jurisdiction to prosecute the crime of genocide, crimes against humanity and war crimes.[67] For years, international criminal law has served to protect groups from the mass violation of human rights. The tribunals set up in Rwanda and Yugoslavia, which were precursors to the ICC, have helped bring multiple perpetrators of the gravest of crimes to justice.

Consequently, the question arises: What is the status of the transgender under international criminal law? Can mass crimes against this community be prosecuted before the ICC?

The Rome Statute of the International Criminal Court contained the first codification of the term 'gender' in 1998. It was also the first statute to address

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[62] 'Activists in India are up in arms over the new transgender bill. Here's why' (*Hindustan Times*, August 2016) http://www.hindustantimes.com/india-news/activists-in-india-are-up-in-arms-over-the-new-transgender-bill-here-s-why/story-RMqjgjxZv1ElzJKuoDxEPN.html accessed 14 May 2017

[63] Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity (17 November 2011) A/HRC/19/41, 8

[64] ibid 10

[65] Violence Against the Transgender Community in 2016, Human Rights Watch, http://www.hrc.org/resources/violence-against-the-transgender-community-in-2016 accessed 14 May 2017

[66] Violence Against the Transgender Community in 2017, Human Rights Watch, http://www.hrc.org/resources/violence-against-the-transgender-community-in-2017 accessed 14 May 2017

[67] Rome Statute 1998, Art 5

gender-based crimes under the umbrella of crimes against humanity. Article 7 defines crimes against humanity as "any act when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[68] This category of crimeincludes murder, extermination, rape, enforced prostitution and persecution. Persecution has been defined under paragraph 2 of Article 7 as the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." A plain reading of these provisions would lead one to believe that persecution against transgender persons can be prosecuted under this article. While Article 7(h) explicitly mentions gender as a ground for persecution, the subsequent definition of gender under paragraph 3 would seem to place the transgender outside the purview of the article. Paragraph 3 of Article 7 states that "for the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

This present definition came into being after a series of negotiations during the drafting stages of the statute.[69] During the December 1997 negotiation session, a proposal stating that the ICC's general application of law and sources should be in consonance with non-discrimination on the basis of gender began to gain ground.[70] After a series of discussions, the parties were divided into two groups. The opposition contended that the term could imply rights, which were more expansive than currently contemplated and could also include a "sexual orientation" angle.[71] A second, although ancillary concern raised was that the term 'gender' could not be successfully translated into all the six official United Nations languages.[72] The main parties comprising the opposition bloc included the Holy See and certain Arab states. They did not wish for the term to include members of the LGBT community and hence, stressed on the introduction of "male and female" in the language of the provision. The final definition, which Theo Van Boven aptly describes as "the most puzzling and bizarre language

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[68] Rome Statute 1998, Art 7

[69] 'Report of the Preparatory Committee on the Establishment of the International Criminal Court, Vol. II (Compilation of Proposals)' UN GAOR 51st Session Supp No 22 UN Doc A/51/22 (1996)

[70] 'Decisions Taken by the Preparatory Committee at Its Session Held 1 to 12 December 1997' UN GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2, UN Doc A/AC.249/1997/L.9/Rev.1 (1997)

[71] Cate Steains, *Gender Issues, in the International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (Kluwer Law International 1999) 357, 377–80

[72] Valerie Oosterveld, 'Member of the Canadian Delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Notes From Working Group on Applicable Law' (July 11, 13, 1998)

ever included in an international treaty"[73], can thus be said to assuage the concerns of two distinct groups, women's groups and conservative elements like the Catholic Church and Islamic states.[74] "Within the context of society" addresses the anxieties of feminist groups while the addition of the phrase "does not indicate any meaning different from the above" was done to placate the conservative bloc, which understood the term to be grounded solely in "biological sexual identity".[75]

The most glaring criticism of this definition is that it attempts to conflate the concepts of sex and gender. As argued earlier in this article, apart from offering a highly scrambled understanding of the two concepts, this leads to the exclusion of transgender and other intersex individuals from the ambit of this provision. It has also been argued that it misrepresents gender as a biological rather than a social construction[76] and is a "stunningly narrow conception of gender".[77]

Secondly, the phrase "within the context of society" is an extremely ambiguous one. It can be interpreted both for and against the expansion of the term to include other categories of individuals. The Special Rapporteur on Violence Against Women has classified this definition as "preventing approaches that rely on the social construction of gender".[78] In the event the ICC has to use this definition, it should define certain parameters in accordance with Article 21(3) of the Statute, which states that "the application of the law under this statute must be consistent with internationally recognized human rights" which would aid it in interpreting the particular 'context'.[79]

While this definition would not affect transgender persons who have converted to one particular gender and can thus identify as male or female, it does not include agender persons who do not identify as either of the two. Neither does it

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[73] Theo Van Boven, *From Exclusion to Inclusion* (Volume 1 of Theo van Boven lecture series Intersentia, 2011)

[74] Brian Kritz , 'The Global Transgender Population and the International Criminal Court' (2014) 17 YHRDLJ 1, 36

[75] Doris E. Buss, 'The Vatican and the Beijing Conference on Women' (1988) 7 Social & Legal Studies 339, 348–49

[76] Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (1st edn, Manchester University Press 2000) 358

[77] Brenda Cossman, 'Gender Performance, Sexual Subjects and International Law' (2002) 15 Can JL & Juris., 283

[78] UN Commission on Human Rights, 'Report of the Special Rapporteur on Violence Against Women, Its Causes, and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2000/45' (31 January 2002) UN Doc E/CN.4/2002/83

[79] Rome Statute 1998, Art 21(3)

extend to "gender fluid" individuals who have indistinct gender identities and move between genders.[80]

Perpetrators of crimes against these groups might take the defense of the criminal law principle of *nullum crimen sine lege*incorporated under Article 22 of the statute. It states that the definition of every crime shall be construed strictly and shall not be extended by analogy.[81] While this is a legally sound argument, the Rome Statute itself contains provisions which allow for an expansion of this definition. Article 10 of the statute states that "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute." Several United Nations agencies have incorporated issues of gender identity into their daily working.[82] Global standards for the sexual and gender rights of the LGBT group were set out through the Yogyakarta Principles in 2007.[83] The United Nations General Assembly[84] and the United Nations Human Rights Commission[85] have on several occasions advocated for the prompt investigation of killings motivated by the victims' sexual orientation or gender identity. A narrow interpretation of gender resulting in the exclusion of transgender individuals would undoubtedly go against the developing rules of international law pertaining to gender identity. The aid of Article 21(3), which provides for "consistency of the interpretation of law with internationally recognised human rights", can also be taken to expand the definition to include transgender people.

Thus in the present scheme, a liberal reading of the statute is the only mechanism through which the position of the transgender can be cemented before the International Criminal Court.

IV. Conclusion: Need for a Modification in the Definition

Valerie Oosterveld, a member of the Canadian delegation to the 1998 U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of the

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[80] 'Decisions Taken by the Preparatory Committee at Its Session Held 1 to 12 December 1997' UN GAOR, Preparatory Comm. on the Establishment of an Int'l Crim. Court, Annex 2, UN Doc A/AC.249/1997/L.9/Rev.1 (1997) 36

[83] Rome Statute 1998, Art 22(2)

[82] OHCHR, WHO and UNAIDS, 'The United Nations Speaks Out: Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity' (April 2011) ; UNHCR, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008)

[83] International Commission of Jurists, 'The Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007) http://www.yogyakartaprinciples.org/ accessed 16 May 2017

[84] UNGA Res 67/168 (20 December 2012) UN Doc A/RES/67/168

[85] UNHRC Res 32/2 (12 July 2016) A/HRC/RES/32/2

International Criminal Court in her article "The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?" has defended the definition under Article 7(3). She has stated that critics have been overly harsh in opposing the definition and have failed to recognize the use of constructive ambiguity by the drafters of the Rome Statute.[86] By doing so, she added that the drafters have left openings for a positive and precedent-setting approach to the interpretation of gender.[87]

While this is an extremely optimistic view of an otherwise compartmentalized understanding of the term, it will not prove to be tenable in the future.

In the first place, a judge who restricts himself to a strict reading can whittle down any scope for constructive ambiguity and a liberal reading of the provision. The narrow interpretation of gender as sex would even be in keeping with the language of the clause, which very clearly aims to restrict gender to "the two sexes – male and female". Secondly and more importantly, the principle of *in dubio pro reo* enshrined in Article 22(2) of the Statute will stand in the way of such a liberal interpretation. The phrase when translated into English means "when in doubt, for the accused." It essentially requires that in the event of multiple interpretations, the one that favours the person being investigated, prosecuted or convicted shall apply.[88] This principle has been used by defendants and accepted as a rule of criminal law in several ICC and ICTY cases.[89] Perpetrators of mass crimes against transgender individuals can seek refuge under this article by arguing that the definition of gender should be read in a narrow manner to benefit them. A constructive reading through application of Articles 10 and 21(3) can thus, not be solely depended upon, as it is subject to the interpretation of the judge in a particular case.

Consequently, there exists a need to make an amendment to Article 7(3) and modify the definition of gender. Retaining any definition, which seeks to conflate the two terms of gender and sex and outlines a narrow denotation of gender identity is extremely dangerous for the future of both international human rights and international criminal law. In this regard, the definition of gender identity

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[86] Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 Harvard Human Rights Journal 55, 58

[87] ibid

[88] Rome Statute 1998, Art 22(2)

[89] *Prosecutor v. Stanislav Galic* (Appeal) [2006] ICTY IT-98-29-A; *Prosecutor v. Milomir Stakic* (Appeal Judgement) [2006] ICTY IT-97-24-A; *Prosecutor v. Dusko Tadic* (Appeal Judgement) [1999] ICTY IT-94-1-A; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* [2009] ICC-01/04-01/07 OA 8

enshrined in the Yogyakarta principles, in the author's view contains the most inclusive interpretation of the concept till date and reflects the current status of gender identity in international law.[90] Gender identity has been defined in the introduction to the principles as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."[91]

Through this, the drafters of the Principles have aimed to include all categories of trans-individuals (even those who have not been defined as yet) within the fold of the principles and have not restricted it to cases of simple female-to-male or male-to-female transformation. In light of increasing attacks against trans individuals propagated by both states and non-state agencies, there exists an exigent demand for international human rights law to accept a wider and more inclusive definition of gender. The first step in this regard should be taken by the State Parties to the International Criminal Court by proposing an amendment to Article 7(3) and modifying the definition of gender in light of the Yogyakarta Principles. The ICC will not be fulfilling its duty towards the enforcement of international justice[92] if it is not able to protect groups like the transgender who face regular threats of murder, torture and persecution. A modification in the definition is the only way through which the precarious position of this group under the Rome Statute can be secured. The delicate mosaic of common bonds and culture[93] referred to in the Preamble to the statute will definitely shatter if this is not done.

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[90] Conference of International Legal Scholars, 'Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007)

[91] ibid 7

[92] Rome Statute 1998, Preamble

[93] ibid

Descent Based Discrimination in the Parsi Community: Widening the Ambit of Article 17 of the Constitution

Malcolm Katrak & Aditya Manubarwala*

Zoroastrianism is considered to be the oldest monotheistic religion in the world. While mass persecutions occurred in Persia due to the advent of Islam, Zoroastrians migrated to India and have thereafter imbibed the Indian culture and tradition albeit still maintaining the uniqueness of the religion. The ethnic entity of Zoroastrianism which migrated to India is the Parsis. Parsis have been following the teachings of Prophet Zoroaster through the ancient scriptures of the Gathas and the Vendidad. However, the scriptures being ancient and enumerated in five different languages originally have resulted into varied interpretations by the traditional head priests of the community. The direct effect of such traditionalists' interpretations of the scriptures has resulted in severe orthodoxy which has had adverse consequences on the Khandias, a category of the Pall bearers. The Khandias have been accounted as the lowest strata of Parsis and are deemed to be perpetually polluted. This has resulted into the social ostracizing of the Khandias, including the regressive practice of untouchability. This article provides a glimpse of the lives of Khandias and the practice of descent based discrimination by the high priests and elitist Parsis. It is shown that the Khandias are essentially a sub-caste of Parsis and hence explores the relationship between descent based discrimination, which includes caste based discrimination and racial discrimination. The article further analyzes the

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constitutional and statutory norms protecting the civil rights of Khandias and provides for recommendations for the amendments to be carried in the laws. For the better understanding of the reasoning of the traditionalists' for such discrimination, the article analyzes the ancient scriptures of Zoroastrianism inter alia the Gathas and the Vendidad. The article concludes by providing an integral approach to be adopted by the Parsi Panchayat including changes in the Dokhma system and entailing interim measures for the safety of the Khandias.

I. Introduction

Parsis are an exemplary minority in India; an ethnic entity considered to be one of the castes of Zoroastrianism. They are the descendants of a body of Persians who were, 1200 years ago, compelled to leave their fatherland owing to persecutions at the hands of Mahomedans.The word Parsi derives its origin from Pars or Fars, a province in Persia, from which the original emigrants came to India.[1] This is a community which has expanded itself within the country while flourishing monetarily and becoming politically influential. The reasoning is based not only on the fact that Parsis had a rather cordial relationship with the Englishmen but also that they were forerunners in trading.[2] At the time when India was reeling under massive poverty *albeit* with the freedom struggle still ensuing, Parsis had often provided a shoulder for the countrymen, thus ensuring that the community became immortal in the pages of the Indian history, as one of the forerunners in the fight to attain freedom from oppression and a carrier of the torch of human rights.[3] They believe that the path to truth is happiness on Earth and upward progress in the realms of light thereafter, as indicated by the opening statement of the Ustavaiti Gatha, 'Happiness to him who gives happiness to whomsoever else.'[4] Throughout the time when Parsis first inhabited the Island of Bombay, they were strong proponents and champions of Human Rights. It is believed that the teachings enumerate that a true Zoroastrian does not have to go into seclusion in search of salvation. He does not have to relinquish life and become a wandering monk to subdue his senses and emotions. He does not have to withdraw into isolation; contemplating or meditating upon the knowledge

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[1] *Sir Dinshaw Manockji Petit v Sir Jamsetji Jeejeebhoy 2 Ind Cas 701*. See also, John Hinnells and Alan Williams, *Parsis in India and the Diaspora* (Routledge 2007)

[2] John R. Hinnells, *The Zoroastrian Diaspora: Religion and Migration* (OUP 2005)

[3] Jesse S. Palsetia, *The Parsis of India: Preservation of Identity in Bombay City* (BRILL 2001)

[4] *Tamam Khordeh Avesta* (Athornan Madressa) 508

that could gain freedom for his soul. He does not have to fast or perform penance or torture his body in order to conquer illusion and ignorance. On the contrary, he must put into practice, the philosophy of life that his beloved Zarathustra, the prophet of Zoroastrians has taught i.e. to fight evil, to fashion his character and to provide for the betterment of the world.[5] The teaching of Ahura Mazda, who is the regarded as the worthiest being on the planet is what Zoroastrians believe to be the all pervasive truth. By the same token, the purity of the religion has been marred by the orthodoxy of the caste system which has made a part of the community on their social classification as degradable. There is a stark difference in Zoroastrians and Parsis, although the words have interchangeably been used to define the religion. Zoroastrianism is the religion whereas Parsi is the community, often considered to be a caste of Zoroastrianism attached with the Zoroastrians of Indian ethnic origin.[6] Parsis have traditionally been the proponents of social mobility; however, the unfortunate rise of orthodoxy and stringency has led to a relative sub-caste system based on the proposition of social origin. The groups most affected by this orthodoxy have been the *Khandias* and the *Nasasalars*, the sub groups of pallbearers in Parsis. In Zoroastrianism, death is considered to be Angra Mainyu, the embodiment of all that is evil whereas the earth and its elements are considered as the pure work of God and hence, the corpse must be considered as a sacrilege.[7] However, conversely, the Zoroastrian Diaspora believes that purity is the epitome and hence has been interpreted to be equal to the trifold ethic of *Humata*, *Hukhata*, and *Harvasrstha* (good thoughts, good words and good deeds).[8] Even though the dead bodies are considered to be a sacrilege, the most polluted matter of all is the dead remains. The designation of handling the dead matter is on the pallbearers, and due to their profession, the *Khandias* are accounted as perpetually polluted.[9] They are often considered as 'second class Zoroastrians' and are subjected to mass ostracizing by the elite members of the community; some rather go to an extent of accounting them as untouchables. These *Khandias* have to maintain a separate accommodation from the community and at congregational functions, they are barred from entering the holy fire temple to pray or to give services to Ahura Mazda

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[5] Noshir H. Dadrawala, 'The Parsees, Their History, Religion, And Contribution To Indian Society' (*Zoroastrian Association of Western Australia*) <http://www.zawa.asn.au/history2.shtml#top>

[6] *Sir Dinshaw Manockji Petit* (n 1)

[7] Jenny Rose, *Zoroastrianism: A Guide for the Perplexed* (A&C Black 2011). See also, *Khordeh Avesta* (Union Press)

[8] AVW Jackson, 'The Ancient Persian Conception of Salvation according to the Avesta, or Bible of Zoroaster' [1913] The American Journal of Theology

[9] Rose (n 7)

(creator).[10] The article first lays down the concept of the process of disposing of the dead of the community by discussing the history and the traditionalist perspective through religious scriptures, thereby exploring the traditionalists' reasoning behind the discrimination. It then discusses the repercussions of such discrimination by analyzing the events accrued due to the macro social ostracizing of the *Khandias*. The third section includes the study of the violation of human rights and its relationship with racial discrimination by delving into the situation of the *Khandias* and their violation of fundamental freedoms. The fourth section of the article will guide the readers through the international and domestic legislations which provide for safeguards against these atrocities. It also enumerates the shortcomings of such laws and provides suggestions for amending the same. Lastly, the article concludes with the understanding of the situation of the *Khandias* by asserting the responsibility of the trusts governing the disposal of the bodies to make guidelines for their betterment and safeguarding of the rights of *Khandias*, taking the religious scriptures into account.

II. *Khandias*: The best kept secret of the Parsis

Zoroastrianism is an ancient religion and being ancient, its scriptures have gone through varied interpretations. Interestingly enough, the analysis of the scriptures has had its varied interpretations which have made two blocs within the Indian Parsi Zarathosti community viz. the traditionalist or the orthodox bloc and the modernist or the reformist bloc. Unfortunately, the former through time has its roots additionally imbibed within the elders of the community. Nevertheless, the traditionalists believe that at a particular point, every human being is unclean or polluted; the *Khandias*, however, are perpetually polluted due to their profession. An insight into the process of the disposal of the dead bodies provides a clearer understanding of the reasoning behind the traditionalist approach. According to the *Vendidad*, an ancient scripture of the Zoroastrians, after a human being dies, the evil spirit of putrefaction rushes on the dead body within three hours after death i.e. in the next division of time immediately.[11] Thereafter, no other human being must be allowed to touch the dead body except the special pallbearers. Spiritually and physically, the dead body is the most unclean at this

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[10] Nergish Sunavala, 'Spotlight's on Khandias, the Parsi "untouchables"' *The Times of India* (Mumbai, 1 June 2015) <http://timesofindia.indiatimes.com/india/Spotlights-on-khandias-the-Parsi-untouchables/articleshow/47858250.cms > accessed 13 May 2017. See also, Farrokh Jijina, 'A Protest by Pallbearers Opens Old Faultlines Among Parsis' (*The Wire*, 23 July 2015) <https://thewire.in/7026/a-protest-by-pallbearers-opens-old-faultlines-among-parsis/> accessed 13 May 2017

[11] 'The Zoroastrian Dakhma-nashini Mode of Disposal of the Dead' (*Parsi Zoroastrianism*) <http://tenets.parsizoroastrianism.com/dakhma33.html> accessed 14 May 2017. See also, Jivanji Jamshedji Modi, 'The Funeral Ceremonies of the Parsis: Their Origins and Explanations' [1892] Journal of the Anthropological Society of Bombay

moment. The body falls under the influence of the 'Drij-i-Nasu' i.e. the evil influence of decomposition of the body. It is considered to be unsafe to touch the body which now begins to be decomposed, lest the touch may spread contagion and diseases among the living. The people who are allowed to touch the body are the pallbearers.[12] After a few other rituals performed by the Dasturs, priests of the community, the body is then taken by the pallbearers on a special iron bier, from the prayer rooms. The body thereafter is placed by the bearers in a circular well-shaped stone structure, called the 'Dokhma' or the 'Tower of Silence'.[13] The same, thereafter, is exposed and left without clothes as to draw towards it the eye of the flesh-devouring birds and the body is then a prey to them. The sooner it is devoured, the lesser the chance of decomposition and pollution.[14] Normally, Parsis believe that vultures are the best scavengers and hence, during the yesteryears in Bombay, where the largest Parsi population is established, the sightings of vultures near the Dokhmanishini area was a common phenomenon. However, due to large scale urbanization and deforestation, there have been no sightings of the vultures in the past decade.[15]

Essentially, the sub group of pallbearers comprises of *Khandias* and the *Nasasalars*, the former had to carry the dead until the gates of the tower of silence and the latter disposed the dead by carrying the bodies inside the tower of silence and exposing it to the elements. The distinction though has now faded mainly due to the dearth of *Khandias*.[16] Cyrus Mistry, in his novel 'The Chronicle of the Corpse Bearers', based on a true story, narrates the life of Phiroze Elchidana, son of the high priest, falling in love with Sepideh, the daughter of a corpse bearer. In a rather contextual scenario, Phiroze leaves behind the prestige of priesthood for the love of his life and agrees to take on the demeaning work of the *Khandias*. The story portrays the life of Phiroze going through the turmoil and rigor of being considered as the lowest caste in the Parsi community.[17]

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[12] Modi (n 11)

[13] 'Zorastrian Funerals' (*BBC*, 2 October 2009) <http://www.bbc.co.uk/religion/religions/zoroastrian/ritesrituals/funerals.shtml> accessed 12 May 2017

[14] Modi (n 11)

[15] Bachi Karkaria, 'Death in the City: How a Lack of Vultures Threatens Mumbai's "Towers of Silence"' *The Guardian* (London, 26 January 2015) <https://www.theguardian.com/cities/2015/jan/26/death-city-lack-vultures-threatens-mumbai-towers-of-silence> accessed 11 May 2017.

[16] Lhendup G. Bhutia, 'Khandias: The Keepers of Doongerwadi' *Open* (Mumbai, 17 July 2015) <http://www.openthemagazine.com/article/living/khandias-the-keepers-of-doongerwadi> accessed 13 May 2017

[17] Cyrus Mistry, *Chronicle of a Corpse Bearer* (Aleph 2014). See Shanoor Seervai, 'Cyrus Mistry on Parsi Corpse Bearers', (*The Wall Street Journal*, 22 January 2014) <https://blogs.wsj.com/indiarealtime/2014/01/22/cyrus-mistry-on-mumbais-parsi-corpse-bearers/> accessed 13 May 2017; Waqar Ahmed, 'Book Notes: Chronicle of a Corpse Bearer', *Dhaka Tribune* (Dhaka, 6 April 2014)

Mistry articulates, "Naturally, I could not help being amused by the overblown logic or lack of it in some of these injunctions, which may have had a good reason for being enjoined upon primitive pastoral tribes some three thousand or five thousand years ago, but didn't need to be glorified into obsessive, all-embracing moral codes."

The traditionalists state that the foundation of societal functions with respect to sub castes has been throughout the years segregated and put in watertight compartments merely by interpreting the words laid down in the *Vendidad*. For instance, *Vendidad* 8.10 mentions that two powerful persons may carry the body and place it naked without any clothes on this earth, on clay, bricks, stone and mortar; *Vendidad* 3.19 provides that the Nasasalars, who come into contact with the dead body and carry it into the Tower, are generally provided with separate buildings to stay in. They cannot visit the Atash Behrams, i.e., the chief Fire-Temples until they purify themselves by a *barashnoom*, which requires several washings and segregation for nine days and nights.[18] Ironically, the interpretations of the Gathas, which are considered as the hymns that are sung to the creator, constitute basic teachings to the people. The first four Gathasare considered being recited by Prophet Zarathustra himself.[19] The basis of the argument for the traditionalists has been the religious law which must be upheld in all sense. However, the reformists argue that the foundational principal function of the *Vendidad* is to provide for a procedure which must be in consonance with the teachings of the *Gathas* and the *KhordehAvesta*.

III. Human Rights of *Khandias*: Social Ostracization and Hazardous work conditions

Human rights are not to be given, bought, earned, or inherited; they belong to humans simply because they are humans.[20] Before understanding the scope of violation of the rights, it is important to conceptually delineate the three basic categories of human rights, thereby adjudging the different dimensions of human rights violations of *Khandias*. Broadly, human rights may be divided into Civil and Political Rights, Economic and Social Rights and Solidarity Rights. Each of these includes within its ambit on a generic basis, the right to life and its facets, *inter alia* the right to clean environment, the right to health and well being.[21]

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[18] James Darmesteter (trs), *The Zend Avesta, Part I* (OUP 1880)

[19] Rohinton Fali Nariman, *The Inner Fire: Faith, Choice and Modern-day Living in Zoroastrianism* (Hay House, 2016) 19

[20] Action Professionals' Association for the People (APAP), 'Baseline survey report on APAP's Intervention in Areas of Human Rights' (Addis Ababa, 1999).

[21] Todd Landman, 'The Scope of Human Rights: From Background Concepts to Indicators' (AHRI-COST Action Meeting, Oslo, March 2005)

To conclude, through various methods for desegregation, the violation of rights of *Khandias* must be viewed through the prism of the above-mentioned categories of human rights.

In an attempt to fortify these rights against the attacks, the state must strive to aim at providing the basic rights to the lowest strata. Throughout the years, *Khandias* have been subjected to brutal treatment. However, in the context of the past decade, brutal treatment in itself would be an understatement. The reduction of vultures has resulted in piling of the dead in the tower of silence. As one Noshire Patrawala, a pallbearer in the Tower of Silence at Bombay, indicates, "the bodies tend to become soggy bread…. Whilst dragging the body, a hand or a leg comes off… that is the sorry state of affairs."[22] Besides, when the pallbearers have to lift the dead, they are barely provided with any safety material whatsoever, which makes the working conditions extremely hazardous, thereby threatening the life of the individuals. The dearth of vultures has created piles of the dead numbering to staggering 500 corpses, with 3-5 bodies on an average being dumped every day, which has resulted in clouds of mosquitoes. To further to add to their woes, the *Khandias* have also to clean the premises of the tower of silence with their bare hands without any cleaning tools or equipment. These *Khandias* are unable to procure insurance or basic health facilities from Parsi run hospitals, which in fact provide for free treatment to all Zoroastrians. Above all, the Parsi community as a whole have ostracized the *Khandias* and treated them as untouchables. Sam Vesuna, a 41 year old pallbearer, provides for a grim picture when asked about the behavior of higher caste Parsis with Khandias, "They call us Untouchables. When we would ask for money for our services, without touching the fellow Parsis, we had to have an outstretched hand with an open purse. It used to be worse before, we had to sit on floors, while other Parsis spoke to us from sofas or chairs. But even now rarely will anyone ever enter our houses, let alone drink or eat in our kitchens. Many don't like us living in the community baugs and hence many of my brother pall bearers live on the Tower of Silence premises."[23]

The Bombay Parsi Panchayat (BPP), the trust that governs the Tower of Silence premise and other Parsi properties in Bombay, has categorized *Khandias* as Class IV workers. Class IV workers are the lowest working strata and are considered on par with the gardeners, sweepers and hearse drivers.[24] In recent history, this classification by the BPP has resulted into mass protests all around Bombay by the *Khandias*, for the purposes of increasing the wages and for

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[22] Sunavala (n 10)

[23] Sunavala (n 10)

[24] Nergish Sunavala, 'Parsis Volunteer to Turn Corpse Bearers', *The Times of India* (3 July 2015).

providing them with basic rights and facilities. The protests took a turn for worse when the Mumbai Mazdoor Sabha's General Secretary, Mr. Dhunji Naterwalla, urged the *Khandias* to go on strike if the demands were not met.[25] The BPP plays a vital role in analyzing the structure and vital components of the community. It has its own set of bye-laws governing the 300 Crore corpus of the Parsi community which was created by the forefathers for the purposes of helping poor Zoroastrians.[26] Although the BPP has played an active role in largely maintaining the objects of the trust, it has however been a hindrance for raising the standard of living for the *Khandias*. A *Khandia* currently earns Rs. 20,000 a month, which, although a humongous sum compared to the general average income of the countries low strata communities, is scanty if compared to the advantages the other higher strata Parsis receive through BPP grants.[27]

Zoroastrians are considered to be fire worshippers; fire is the symbol of all truth in the religion, both the physical and the inner fire drives mankind. The inner fire is thus what ultimately gives mankind bliss.[28] Ustavaiti Gatha Yas 43.4 states, 'May I recognize You as holy and powerful, O Lord, who, with a mere wave of the hand, dost fulfill our longings. You give both the good and the evil their just desserts. Through Your blazing fire, mighty with the truth, will mental strength come to me.' Yas 43.9 thereafter continues further and states, "Henceforth, I will pay homage to Fire with all humility". Fire is considered to be the highest element there is, the all pervasive truth and the one which ponders upon judgment for all mankind.[29] An *Atash Bahram* and an *Agiyary* have an inner sanctum where the fire is maintained and the ceremonies are conducted. However, only ritually purified priests i.e. the Dasturs are allowed to enter the demarcated rectangular sanctuary called the *Pavi*.[30] Offering prayers to the almighty and the fire is every Zoroastrian's right which is not barred by any scriptural texts whatsoever. Throughout the past two centuries, the higher priests have interpreted the scriptures to bar the entry of *Khandias* in the fire temple. An Avestan Scholar Ervad Bajan puts it, "Social ostracization isn't condoned by the scriptures. However since the corpses are covered in bacteria, the *Khandias* are expected to keep their distance. But once they have a bath and follow the other rituals they can mingle with others. This separates the practice from untouchability."[31]

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[25] Sunavala (n 24)

[26] 'Bombay Parsi Panchayet (BPP) – New Website', (*Zoroastrians*, 28 July 2010) <https://zoroastrians.net/2010/07/28/bombay-parsi-punchayet-bpp-new-website/> accessed 13 May 2017.

[27] Sunavala (n 24)

[28] Nariman (n 19) 97

[29] n 4

[30] Monica M. Ringer, *Pious Citizens: Reforming Zoroastrianism in India and Iran* (Syracuse 2011)

[31] Sunavala (n 10)

This ritual entails staying in seclusion for nine days to purify oneself from all the evils which also entails drinking bull's urine (nirang) and bathing yourself with the same (nahn), before the *Khandias* are allowed to mingle with others or visit the fire temples.[32]

The Tower of Silence located at Malabar Hill with its 54 acre gigantic area where the truth of the *Khandias* is hidden away from the outside world: the best kept secret of the Parsis. With *Dokhmas* all around the country shutting down due to low Parsi population in areas apart from Bombay or due to the dearth of *Khandias* to dispose of the dead bodies, the Bombay Parsi population must protect these workers.

IV. Racial Discrimination: Whether Descent-based discrimination includes the caste system?

The caste system is considered to be the oldest form of racial discrimination; often,the caste system is considered to be synonymous with the Hindu religion or ethnicity. In the words of Ambedkar, in *The Annihilation of the Caste*, 'Caste has not the same social significance for non-Hindus as it has for Hindus… Among non-Hindus caste is only a practice, not a sacred institution… Hindus observe caste not because they are inhuman or wrong-headed but because they are deeply religious. People are not wrong in observing caste. In my view, what is wrong is the religion.'[33] Although caste in Hindus is described as the natural or the divine order, it cannot be only reserved exclusively for describing the Hindu system. The caste system of Hindus permeates through natural order. However, castes in other communities pertain to the socio-economic order, as has been the case in the Zoroastrian community.[34] The effects felt by the caste system including untouchability go to the fabric of the religion. Caste division and inequality absolve a person from rising through the social order. In Zoroastrians, the constitution of the caste system boils down to the socio-economic structure; there is a dearth of empirical evidence to prove that mobility cannot be achieved. However, defining the caste structure in Zoroastrians is extremely difficult. As Zinkin puts it, 'It is much easier to say what caste is not than what caste is.'[35] The author differentiates the same from the class system, as every caste may have its educated and illiterate sections.Through the differentiation between the

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[32] Philip G. Kreyenbroek, *Living Zoroastrianis: Urban Parsis Speak About Their Religion* (Routledge, 2013). See also Pheroza Godrej and Firoza Punthakey Mistree, *A Zoroastrian Tapestry: Art, Religion and Culture* (Mapin 2002)

[33] B. R. Ambedkar, *Annihilation of Caste: The Annotated Critical Edition* (Navayana 2014)

[34] Mistry (n 17)

[35] Taya Zinkin, *Caste Today* (OUP 1962)

Dasturs (Priests) and Behdins (non-Dasturs)[36], the former having designation of being the High Priest and the final authority on all religious matters ranking higher than the Mobeds, which is the lower category of Dasturs, whereas the latter cannot in any circumstances become a High Priest, as the profession is hereditary and familial based, it is understood that the Parsi Zoroastrian community has castes on the socio economic order albeit not watertight which differs from class.

According to Article 1(1) of the International Convention on the Elimination of All forms of Racial Discrimination, 1965 (ICERD), 'Racial Discrimination', means any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[37] Although caste based discrimination does not occur in the aforementioned definition nor any International Human Rights Treaty, the Committee on the Elimination of All Forms of Racial Discrimination (CERD), in a series of concluding observations beginning with India's State Report in 1996, stated that caste based discrimination is a form of descent-based discrimination and hence falls within the purview of the convention.[38] In August 2002, CERD issued General Recommendation XXIX on descent based discrimination.[39] The recommendation includes a number of measures of a general nature to be undertaken by the Parties, notably the identification of: '…those descent based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on various factors, including inability or restricted ability to alter inherited status socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces and places of worship, and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading and hazardous work; subjection to dehumanizing discourses of pollution or untouchability; and generalized lack of respect for their human dignity and equality.' Although equating caste into descent based discrimination would have

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[36] Palsetia (n 3)

[37] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD)

[38] Patrick Thornberry, 'The Convention on Elimination of Racial Discrimination, Indigenous Peoples, and Caste/ Descent-based Discrimination', in J. Castellino and N. Walsh (eds), *International Law and Indigenous People* (Leiden: Martinus Djhoff)

[39] UN Doc A/57/18. See also CERD/C/SR. 1531; Thornberry (n 38) 124

its own consequences, the same would entail an argument on a different tangent which lies outside the ambit of the paper.[40]

Based on this broad understanding of descent based discrimination under the Convention, it is submitted that the Parsi Zoroastrian Caste system is a form of racial discrimination.

V. Discrimination: International and Domestic norms

Before 1945, prohibition of discrimination was enumerated in minor treaties, with the advent of the United Nations swiftly followed a mass radical in the approach to view human rights and thereby the aspect of equality before the law without any discrimination. Article 7 of the Universal Declaration of Human Rights, accounted by several as a customary international law, states that, 'All are equal before the law and are entitled without any discrimination to equal protection of laws.' The same has been reiterated in several other covenants *inter alia* International Covenant on Civil and Political Rights (ICCPR) and International Covenant on the Economic, Social and Cultural Rights (ICESCR), emphasizing non-discrimination. During, the resolutions passed by the International sphere to unanimously prohibit discrimination, India had appointed Dr. Ambedkar as the Chairman of the Drafting Committee of the Constituent Assembly. The Constitution brought with it provisions relating to equality before laws and equal protection of laws and abolition of untouchability.

The Supreme Court in *Kailash Sonkar v. Smt. Maya Devi*[41] stated, "In view of the revelations made in Gita and the dream of the Father of the Nation Mahatma Gandhi that all distinctions based on castes and creed must be abolished and man must be known and recognized by his actions, irrespective of the caste to which he may on account of his birth belong, a positive step has been taken to achieve this in the Constitution and, in our view, the message conveyed thereby got engrafted in the form of Articles 14 to 17 and 21 of the Constitution of India, and paved way for the enactment of the Protection of Civil Rights Act, 1955."[41] The laws relating to the untouchability under Article 17 and the Protection of Civil Rights Act, 1955 (PCRA) have been provided a curious interpretation by the courts albeit the interpretation of the High Courts and the Supreme Court has been in the same paradigm.[42] The Bombay High Court in the case of *Laxman*

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[40] UN Doc A/57/18 111. See generally UN Doc. E/CN.4/SUB.2/RES/2000/4, 11 August 2000; UN Doc. E/CN.4/Sub.2/2001/16, 14 June 2001.

[41] 1984 AIR 600

[42] *Laxminarayan Reddy v Union of India* AIR 1987 SC 16. See also *Ajit Kumar v Ujayar Singh* AIR 1961 SC 1334 *State v. Puranchand* AIR 1958 MP 352 *Venkatraman Devaru v State of Mysore* AIR 1958 SC 255

Jayaram Shant v. *State of Maharashtra*[43] held that untouchability is referable to the caste and the sub caste. In different parts of the country, different castes have been considered untouchables. This shows the emphasis of the judiciary on limiting the definition of untouchability to certain cases, irrespective of other forms of untouchability practiced against groups, not on such basis. Technically, the definition of untouchability should imply activities in the broader sense of the term entailing people affected by contagious diseases or temporary untouchability, for instance, women barred from entering places of worship during the menstrual cycle.[44] However, the law does not prohibit such temporary untouchability as it would open floodgates which the judiciary would be unable to handle.The laws in India relating to untouchability typifies two things; first, that the term untouchability is not viewed in its grammatical sense, which begs the question about the intention of the legislature to draft Article 17. This can be answered through the Mysore High Court's analysis of the word untouchable in the case of *Devarajiah* v. *Padmanna*[45], wherein the court analyzed the intention enumerating that the subject matter of Article 17 is not untouchability in its literal sense or grammatical sense but the practice of it which has developed historically in the country.A literal interpretation of the term would lead to situations where temporary untouchability of the persons would also fall under the purview of the act. Second is, the scope of the PCRA which through interpretation has been applied to Scheduled Castes, owing to the traditional perception that historically untouchability is practiced against these castes albeit the statement of objects and reasons states that the Act is not confined to Hindus.[46]

Therefore, the true effectuation of preventing untouchability remains hollow. The inference which logically arises would be that there is no protection to the *Khandias* whatsoever even if the same legally comes under the bracket of discrimination under the Covenants aforementioned.

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[43] (1981) 83 BOMLR 15

[44] *Constitutional Assembly Debates, Book No. 2, Vol. No. VII, 4th November 1948 to 8th January 1948* (Lok Sabha Secretariat) 668

[45] AIR 1958 Mys 14.

[46] Centre for the Study of Casteism, Communalism and the Law, National Law School of India University, Bangalore, 'Evaluation of the Protection of Civil Rights Act, 1955 and its Impact on the Eradication of Untouchability'<https://www.nls.ac.in/csseip/Files/Material%20for%20uploading/PCRA_report_II_from_intro%5B1%5D.pdf> accessed 12 May 2017. See also The Protection of Civil Rights Act, 1955 (Act No. 22 of 155).

VI. Recommendations: understanding the scope of 'Untouchability'

Numerous laws and policies have been designed to abolish the practice of untouchability.[47] As can be clearly seen, the understanding of the word untouchability requires a radical change. Still, even the usage of the word caste in the Indian scenario has to be conceptually revamped to include the phenomenon of caste among diaspora communities and not only traditional Hindu Caste system.[48] Unfortunately, not much ink has been spilled to understand the workings of the *Khandias* and the deliberating effects of caste system amongst the community. One of the deliberating effects of the caste system is untouchability, which has been extensively dealt upon in the preceding section; however, what entails untouchability has not been defined under any law which is in force. The need for a revamp of laws is sought for the achievement of the goal of equality and this can be achieved through excessive deliberation on the interpretation of Article 17 and the PCRA. A *prima facie* reading of Article 17 provides that, 'abolition of untouchability and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.'[49] This provision is intended to remove the social stigma and the badge of inferiority, degradation, degeneration and halt the engine of oppression that results from the practice of untouchability. However, during the constitutional debates, specific emphasis was laid on Hinduism, ignoring the effects of the same in other communities. Dr. Ambedkar had suggested a broader based provision abolishing any privilege arising out of rank, birth, person, family, religion or religious usage and custom.[50] On the same parameter, Mr. Naziruddin Ahmad proposed the article be read as follows, "No one shall on account of his religion or caste be treated or regarded as an 'untouhcable'; its observance in any form may be punishable by law."[51] This would have necessarily provided a direction and reduced the broad base interpretation of Article 17 without the intervention of the Courts. Be that as it may, the courts have now interpreted that the necessary implication would be the necessity to demonstrate a historical sense of discrimination and untouchability. As has been mentioned above, the *Khandias* have been subjected to brutality and practice of untouchability, since times immemorial, the problem which lies therein is the closed doors of the Parsi community which vitiates the picture of discrimination.

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[47] Article 17, Constitution of India; The Protection of Civil Rights Act, 1955 (Act No. 22 of 155); The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

[48] Surinder S. Jodhka and Ghanshyam Singh, 'Comparative Contexts of Discrimination: Caste and Untouchability in South Asia' 45:48 [2010] Economic and Political Weekly 99

[49] Article 17, Constitution of India, 1950

[50] Centre for the Study of Casteism, Communalism and the Law, National Law School of India University, Bangalore (n 46)

[51] *Constitutional Assembly Debates, Book No. 2, Vol. No. VII, 4th November 1948 to 8th January 1948* (Lok Sabha Secretariat) 665

Moreover, the enactment of PCRA post the drafting of the Constitution has been unable to impose harder punishments in relation to offences constituting untouchability. In reality, its purpose may not have been served as it aimed for removing inequalities rather than punishing atrocities which led to the passing of the Prevention of Atrocities Act (POA).[52] This can be seen in the Preamble of the PCRA, 'prescribe punishment for the preaching and practice of "untouchability" for the enforcement of any disability arising therefrom for matters connected therewith.'[53] The focus, therefore, aims at punishing the practice rather than protection of civil rights. However the title *prima facie* belies the assumption. Admittedly, the title of the act was changed from "Untouchability offences act" to "Protection of Civil Rights Act". Although the Rajya Sabha debates aimed at consolidating both the punishment and protection by providing the title "The Civil Rights (Untouchables) Protection Act"[54]. However, the Joint Select Committee recommended that "By reason of abolition of untouchability certain rights are conferred on those who are subjected to the disability of untouchability and, therefore, the law should mainly concern itself to protect those rights. Hence, more emphasis should be laid in order to protect those rights rather than punishing the offenders who preach and practice untouchability in any form. Therefore the committee feels that the short title of the Principal Act should be changed to the Protection of Civil Rights Act."[55] The Rajya Sabha's title "The Civil Rights (Untouchables) Protection Act" would have been useful on both fronts, viz. 'Protection of Civil Rights' and 'Providing punishments'. Undoubtedly, the dual aspects can be viewed as two sides of the same coin.

Then arises the issue of the definition of the word 'untouchability' under the Act and the wordings of Article 17 of the Constitution. K. D. Gengade, in his treatise 'The Social Legislation in India' states that, 'The word untouchability has not been defined under the Act and there is no definition in the Constitution either. The assumption is that the word has a well-known connotation-it refers to any social practice, which looks down on certain depressed classes, solely on account of their birth and disables them from having any interaction with people from the

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[52] The penal policy underlying the PCRA is deficient in several contexts. From the quantum of punishment imposed, especially considering that this is a social welfare legislation, the aim seems to be rehabilitation, because of which the offender is not sentenced to a long term in prison. On the other hand, when compared to the POA Act, which has more stringent punishment, it appears that offences under the PCRA are being treated as minor offences, in comparison to the POA Act. The punishments under the latter seem to be following the just deserts and the deterrent theory. See Centre for the Study of Casteism, Communalism and the Law, National Law School of India University, Bangalore (n 46)

[53] Preamble, Constitution of India, 1950

[54] *Rajya Sabha Debates, Vol. VII, No. 16-29, on 16th September, 1954* (Kshirsagar) 109, 2431

[55] 'Report of the Joint Committee on the Untouchability (Offences) Amendment and Miscellaneous Provision Bill, 1972' [1974] (Kshirsagar) p. 110

so called higher castes or classes. The executive, legislature, and the Courts tend to define the term denotatively by pointing to well-known examples of practice rather than connotatively by demarcating specific boundaries, leaving it to the judge to decide whether the notion of untouchability was a part of the mental framework of the accused when he committed the act.'[56] The adverse consequence which arises from not defining the word untouchability is that apart from Scheduled Castes, no other religion or community practicing the heinous act comes under the ambit of the PCRA, thereby preventing the *Khandias* from having any facilitation through this legislation. It is hence recommended that the definition of untouchability must be laid down or at the very least, if the same is a tedious task, then the scope of PCRA must be defined. For this purpose, the definition of an untouchable under the Untouchability Offences Bill, which reads as follows, can be utilized:

'*Untouchable means a member of the Scheduled Castes as defined in Article 366(24) of the Constitution and includes any other person who by custom or usage is regarded as untouchable by any community or section thereof:*

Explanation I: A member of the Scheduled Castes shall not cease to be a member if he resides in any locality other than the locality specified in relation to him in any public notification issued or any law made by Parliament under Article 341 of the Constitution.

Explanation II: A member of the Scheduled Castes who has been converted from the Hindu religion to any other religion shall, notwithstanding such conversion, be deemed to be an untouchable for the purposes of this act.'[57]

These suggestions provided may facilitate the courts in analyzing the scope of Article 17 read with PCRA. The comprehensive definition provided above will eliminate the confusion of the applicability of the PCRA which may bring under its ambit other communities and religions which practice untouchability.[58] The *Khandias* may be facilitated through this in the following two ways; first, these changes may help the police to do a thorough investigation into the practices of other religions. This may entail the Parsi Community in to opening the doors which may facilitate the *Khandias* and prevent the traditionalists from discriminating under the false pretext of religious scriptures. Second, the BPP may realize the situation calls for drastic changes and thereby, it may provide for minimal measures for the protection of the civil rights of *Khandias*. These measures may range from providing safety equipment to raising the salary of

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[56] K D Gengade, *Social Legislation in India* (Concept 1978) 254

[57] Sec 2(f), Untouchability Offences Bill. See also, 'Argument of Home Minister G.B. Pant', Lok Sabha Debates, April 27, 1955 (Kshirsagar) 6545-6672.

[58] But see n 45

the *Khandias*. If the ambiguity is resolved by the legislature with respect to the terminology, it may help in realizing the object the Act sought to achieve and by providing a holistic view to Article 17 of the Constitution, it may result in abolition of the practice in its entirety.

VII. Interim Measures: A sigh of relief for the *Khandias*?

The commendable practice of laying the dead to rest in the Tower of Silence and feeding the body to the birds is considered as a final act of charity.[59] Commendable, because the method is ecologically sound and results in no pollution or occupation of fertile land. However, the need for vultures is felt after several years of deforestation; this has not only made the practice a redundancy in the modern era but also has led to piling of bodies which are left to rot.[60] The principal biological risks faced are the infections caused by *Mycobacterium Tuberculosis*, the blood-borne Hepatitis and HIV; all of these pathogens retain their infectivity after death.[61] This section provides for temporary interim measures to be made as compulsory guidelines by the BPP and other Parsi Panchayats for the handling of the dead by the *Khandias*. Schedule I of the Bio-medical Waste Management Rules, 2016, categorizes Human Anatomical Waste as a Bio-Medical Waste.[62] To handle these wastes, the BPP must aim at providing compulsory vaccination and personal protection equipment which must include a uniform, white gloves and a facial mask. The Panchayat must allow the use of equipment inside the tower of silence for cleaning purposes, which not only entails the cleaning of the structure but also the area where the bodies have piled up. These ancillary measures may help in at least increasing the standard working conditions of the *Khandias* as a temporary solution.[63]

The BPP must strive to provide health insurance to all the *Khandias* with all necessary benefits. It must provide timely treatment and vaccinations and must work with the Parsi General Hospital, which aims at providing free treatment to Parsis.[64] The interpretations of the religious scriptures such as *Vendidad* and the *Gathas* should be mutually interpreted to provide an inclusionary approach for the betterment of the *Khandias* and the same can be interpreted with the

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[59] Rose (n 7)

[60] Karkaria (n 15)

[61] D. S. Bhullar, 'Safety Measures in Dealing with Dead' 12:2 J Punjab Acad Forensic Med Toxicology [2012]. See also Infection Control Branch, Centre for Health Protection, Department of Health, 'Precautions for Handling and Disposal of Dead' (8th edn, 2010) (Hong Kong).

[62] Schedule 1, Bio-Medical Waste Management and Handling Rules, 2016

[63] Bhullar, (n 61)

[64] See, B. D. Petit Parsee General Hospital (*B. D. Petit Parsee General Hospital*), <http://www.bdpetitparseegeneralhospital.org/home.htm> accessed 13 May 2017.

help of Parsi Vada Dasturs (the religious heads of the community). Lastly, the Panchayat should research about incidental ways to dispose of the dead bodies piled up in the Tower of Silence which will not only facilitate the *Khandias* but also help the relatives of the dead to achieve peace. The usage of solar panels for the disposal of the dead after the dearth of vultures has proved ineffective.[65] One solution proposed by the Former Chairman of the BPP, Dinshaw Mehta, was the creation of aviaries to breed vultures in collaboration with the Government of India and the State Government. This, as Mehta proposed, will not only help in disposing the bodies at a faster pace but also help in revival of the age old practice. The cost of building the aviaries would boil to USD $15 million and the construction project may span up to 15 years; a viable investment which benefits all the stakeholders.[66]

VIII. Conclusion

Vahista Isti Gatha Yas 53.3 and 53.4 states 'Let all persons strive to be good with thought, word and deed, and worship God thus…The faith enjoins that each person does the task assigned to him, so that the radiant heritage of the pure mind may come to all who follow the faith.'[67] The moral voice that speaks from within is described as the greatest of all. This is so because it is only by hearing the inner voice that the path of truth can be followed in Zoroastrianism.[68] It will not take much time for the new generation to throw away such ancient practices in a community which prides itself on being one of the most literate and proponents of human rights. The state of *Khandias* currently is miserable and the BPP must strive as the leaders of the community to help with providing them with their basic rights. The Government as mentioned above must aim for bringing clarity in laws which help in facilitating the downtrodden castes in other communities. To conclude, in the words of Cyrus Mistry on what *Khandia* strike meant in 1942, "Blackmail is the last resort of Scoundrels and those who feed the vultures have become omnivores themselves!"[69]

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[65] Ashalata Samuel, 'How to Honour the Dead', *The Tribune* (Chandigarh, 14 January 2007)

[66] Garinder Harris, 'Giving New Life to Vultures to Restore a Human Retail of Death', *The New York Times* (29 November 2012)<http://www.nytimes.com/2012/11/30/world/asia/cultivating-vultures-to-restore-a-mumbai-ritual.html> accessed 11 May 2017. See also 'How the Lack of Vultures Gives Parsis an Opportunity to Adapt', *DNA* (19 August 2015) <http://www.dnaindia.com/analysis/editorial-how-the-lack-of-vultures-gives-parsis-an-opportunity-to-adapt-2115810> accessed 12 May 2017.

[67] (n 4) 549

[68] Nariman (n 19)

[69] Mistry (n 17)

Transgender and Law

Parmeet Singh*

In the words of Justice K.S. Radhakrishnan, the judge presiding over the NALSA case said "Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex."[1] The problem that plagues the transgender community in the Indian society is that there is not enough discourse in the public and amongst the people of the society so as to make any headway into tackling the problem that is faced by the transgender community as a whole. The lack of knowledge about the members of the transgender community is also because the members of the society do not accept the transgenders as a part of the society and see them as outlaws and not an integral part of the society. There exist historical reasons for this, such as the influence of the colonial powers and the subsequent de-legitimisation of the community as a whole. During the course of this article, the author will shed light on the issues of the transgender community and the problems that are faced by them and the historical influences that the community had in the echelons of powers and their gradual decline of them into the fringes of society. The author will then discuss the current laws and judgements that have been recently passed by both the Indian judiciary and the legislators with focus on the much heralded NALSA judgement and the severely criticised Transgender Bill, 2016. Following the discussion on these important landmarks in the legal

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[1] National Legal Services Authority v Union of India and another, AIR 2014 SC 1863.

recognition of the transgender community, the author will go on to elucidate in the conclusion, how laws can be used to improve the conditions of the transgender community.

Sex and Gender

The primary reason for the discrimination of the transgender community is the understanding of human sexuality in binaries where the sexuality of the person is dependent on the birth sex of the person rather than the persons own psychological understanding of his sexuality which might not conform to his/her birth sex. Sex relates to the biological differences that exist such as the chromosomal makeup, hormonal profiles, internal and external sex organs, whereas the gender of a person is more fluid as it describes the characteristics that a society or culture delineates as masculine or feminine.[2]

The binary understanding of the human sexuality was used for the landmark case of Corbett v Corbett[3], where justice Ormrod while deciding whether the respondent, a male transsexual who had undergone sex reassignment surgery, was a woman for the purpose of marriage laid down the biological criteria test to determine this issue of transsexual marriage after an SRS (sex reassignment surgery).

The criteria that were laid down by Justice Ormrod were:

a) The chromosomal makeup of the person i.e. the presence of the XY (male) chromosome or XX (female) chromosome
b) The presence or absence of testes or ovaries
c) The presence or absence of male or female external and internal sex organs.[4]

Justice Ormrod was against the contention that sex should be determined by a person's psychological sexual nature. As the respondent had his testicles and male external genitalia prior to the operation but that psychologically he was a transsexual, therefore, according to the biological criteria laid down by Justice Ormrod the respondent was declared a male. And according to the beliefs of the time, a person could not change his sexual constitution after his birth, therefore, the respondent was declared to be a male and the marriage was not held to be valid. The psychological gender of the person was of not important for the purpose of marriage as only the birth sex was to be utilized. During the judgment of this

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[2] 'Distinction between Sex and Gender' <http://vcampus.uom.ac.mu/soci1101/431_distinction_between_sex_and_gender.html>accessed 24 April 2017

[3] *Corbett v Corbett* [1970] All ER 33 (FD)

[4] Joseph M Thomson, 'Transsexualism: a legal perspective' [1980] Journal of medical ethics 92

case, Justice Ormrod clearly stated that this test was created only to determine the capacity of a person to enter marriage and that he was not attempting to formulate a test for determining a person's 'legal sex' at large.[5] But the test laid down in this case, was used as a precedence in cases relating to other transgenders and to determine their sex.[6]

However, the explanation for the differences between a male and a female solely by the biological criteria have been widely criticized. The more popular explanation is the determination of the sexuality of a person by the surrounding cultural circumstances. Therefore, the roles of both the sexes are said to be learned through socialization. It is therefore the culture that is the reason why men and women have different attitudes and behaviors.[7] And according to the widely-accepted definition of transgenders, they are "people whose gender identity, expression or behavior is different from those typically associated with their assigned sex at birth."[8] Thus restricting a person to the gender identity that is associated with his assigned sex is the problem that arises when the biological criteria are used to determine the sexuality of a person.

History of Transgenders

Even though during modern time the rights of the transgender community are severely curtailed, but during the ancient period right up to the medieval period before the advent of the colonial rule, the transgender community occupied an important place in the Indian society and were widely respected. Mentions of the presence and importance of the transgender community can be found in books such as the Manu Smriti and Hindu epics such as the Mahabharata and the Ramayana.

The oldest text of Hindu law the Manu Smriti clearly mention the presence of three distinct sexes with differing biological origins. Manu Smriti states that "A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if both are equal, a third-sex child or boy and girl twins are produced; if either is weak or deficient in quantity, a failure of conception results."[9] Both Ramayana and the Mahabharata mention the transgenders as important members of the community.

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[5] Ibid.

[6] R v. Tan [1983] All ER 1053 (QB).

[7] 'Distinction between Sex and Gender' <http://vcampus.uom.ac.mu/soci1101/431_distinction_between_sex_and_gender.html>accessed 24 April 2017

[8] 'Transgender Terminology' (15 January, 2014) <http://www.transequality.org/issues/resources/transgender-terminology>accessed 25 April 2017

[9] M. Michelraj, 'Historical Evolution of Transgender Community in India' [2015] Asian Review of Social Sciences 17

Hijras (people whose birth sex is male but identify themselves as females or as neither male or female)[10] played an important role in the royal courts of the Islamic world, such as the courts of the Ottoman empire and the even during the Mughal rule in India during the Medieval period. They occupied important positions such as political advisors, administrators, generals as well as guardians of the harems.[11] Due to the important positions that they occupied they were also able to influence state decisions.

But the position that was enjoyed by the transgender community was drastically changed due to the advent of the colonial rule. The European travelers could not understand how the transgender community could occupy such high positions in royal courts and other religious institutions. During the time of the British colonial administration, the Hijra community was sought to be criminalized and their civil rights were restricted. Legislations like the Criminal Tribes Act, 1871, included all hijras who were concerned with kidnapping and castrating children and dressed like women to dance in public places.[12] Even though the Criminal Tribes Act was repealed in 1952, the influences of the same can still be witnessed in present day legislature such as the Karnataka Police Act which after its amendment in 2012 stated that "provide for registration and surveillance of Hijras who indulged in kidnapping of children, unnatural offences and offences of this nature".[13]

Therefore, even though the transgender community was well respected in the Indian community till the time colonial powers invaded India, the colonial administration took away the power and the prestige that was accorded to the transgender community and replaced it with the brand of "criminal" due to legislatures such as the Criminal Tribes Act, 1871. This eventually led to the de-legitimisation of the transgender community in the Indian society.

Current Judgments and Laws Regarding the Transgenders

Whilst the Constitution of India allows interpretation of certain articles to accommodate the transgenders without explicitly naming them, two recent landmarks, namely the NALSA judgment of 2014 and the Transgender Bill of 2016 suddenly put the spotlight on this otherwise marginalized section of society. The discourse around the legal identity and rights of the community is very much in the public domain now.

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[10] Oxford Dictionary, <https://en.oxforddictionaries.com/definition/hijra> accessed 27 April 2017

[12] The Criminal Tribes Act, 1871 <http://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/Simhadri.pdf> accessed 27 April 2017

[13] Karnataka Police Act, 1963, Section 36A.

NALSA Judgement

The landmark judgment of National Legal Services Authority v. Union of India was delivered by the Supreme Court of India on 15th April 2014 by a Division Bench comprising Justices K. S. Radhakrishnan and Dr. A. K. Sikri. This historic judgment recognized the transgender community as the 'third gender' thereby granting them legitimacy in the eyes of the law.[14] As this verdict was given by the apex court of the country its decision regarding the legal recognition of the transgender community has to be upheld by all courts and tribunals as per Article 141 of the Indian Constitution which states that a law declared by the Supreme Court is to be binding on all courts within the territory of India.[15]

The Supreme Court in the NALSA judgment referred to various international conventions and reports to deliver a comprehensive judgment about the transgender community. The judges actively referred to the articles contained in the Universal Declaration of Human Rights (ICCPR), 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, the International Covenant on Civil and Political Rights (ICCPR), 1966 and also the Yogyakarta Principles. Articles such as article 6 of the UDHR and article 16 of the ICCPR state that every human being has the inherent right to live and that this right shall be protected by law and that no one shall be arbitrarily denied that right.[16] Furthermore, everyone shall have a right to recognition everywhere as a person before the law. These articles form the basis for the understanding of the human right issues regarding the transgenders for the judges as these articles are universally upheld as the most complete human rights. These articles form the foundation for the understanding of human right issues of transgenders since they are universally upheld.

Appreciation of the NALSA Judgement

Even though there might be some gaps in the NALSA judgment, it got most things right which is why it still the most comprehensive document on the rights of the Indian transgender community.

Justice K.S. Radhakrishnan states in his judgment that "Transgender is generally described as an umbrella term for persons whose gender identity, gender

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[14] Dhananjay Mahapatra, 'Supreme Court recognizes transgenders as 'third gender'', *The Times of India* (New Delhi, Apr 15 2014) <http://timesofindia.indiatimes.com/india/Supreme-Court-recognizes-transgenders-as-third-gender/articleshow/33767900.cms> accessed 28 April 2017.

[15] The Constitution of India, 1950, Article 141.

[16] Universal Declarations of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948).

expression or behavior does not conform to their biological sex."[17] During the course of the judgment, Justice Radhakrishnan goes on to talk about gender identity rather than using Justice Ormrod's biological criteria to determine the sexuality of the person. Gender identity according to him is "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms."[18]

This interpretation of gender identity by Justice Radhakrishnan includes the majority of the section of the transgenders thereby bringing them under the ambit of this historic judgment. Furthermore, it also does not restrict how a 'transgender' person identifies himself, but only states that transgenders are people whose mannerisms and identity do not correspond to their assigned/birth sex. This interpretation of the term transgender leaves it open-ended for the transgenders to decide for themselves how they want to identify themselves thus accepting the idea of gender self-determination for the members of the transgender community.[19]

The judgment is comprehensive because it incorporates internationally recognized principles while applying them to the Indian scenario. Principles such as the Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity which is considered to be the most complete text on the rights of the transgender community was used as a base for the formulation of this judgment. The principles such as the Yogyakarta Principles establish how the governments should treat the transgender communities by providing a basic standard.

The "Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity" were adopted in international law in Yogyakarta, Indonesia, in November 2006.[20] They can be understood as the Magna Carta for the modern LGBT community, providing a new wave of freedom by recognizing the various gender identities. Broadly, the Yogyakarta Principles seek to include the transgender community into mainstream society by according them the same dignity and rights as the rest. It grants them economic,

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[17] *National Legal Services Authority* v *Union of India* and another, AIR 2014 SC 1863.

[18] Ibid.

[19] Aniruddha Dutta, 'National Legal Services Authority v Union of India and another' AIR 2014 SC 1863 (note)

[20] 'Yogyakarta Principles a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights', (26 March, 2007) <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights> accessed 1 May 2017

social and cultural rights while upholding their right to expression and opinion. Such individuals enjoy the freedom of movement, right to participation in family life and the right to redress in case of violation and accountability of those responsible for such violation.

Criticism of the NALSA Judgement

Even though the NALSA judgement is a comprehensive document which is seen as an important step in the recognition of the transgender community it has its flaws. The broad definition used for the term transgenders in the NALSA leaves out various segments of the members within the transgender community. This leads to a multitude of interpretations by the lower courts thus diluting the judgement by affecting only a certain segment of the transgender community. In a case in the Madras high court the judges interpreted the NALSA judgement as only affecting the male-to-female transgender people and not the female-to-male transgender people, thus excluding a significant number of people form the effects of this judgement.[21] Therefore the NALSA judgment should have had a more comprehensive definition of the transgender community without alienating any segment of the community. The effects of the definition given is that, because of the lack of knowledge about the transgender community by the judges and the legislators the future decisions and the legislations might, while using the NALSA judgement as a template, leave out a lot of members of the transgender community from availing the benefits of the judgement or the legislation.

Even after recognizing the variety of members of the transgender community the judgment seems to undercut the particular variations and nuances that differentiate one segment of the transgenders from another. Thus, such segments of transgender people within the community suffer at the hand of generalizations of the definitions of the various members of the transgender community such as the transgender women by the judges.[22] This also goes against the very definition of self-determination as restrictions are placed on the identification of the person to conform to a specific transgender community. This judgment, therefore, reduces the variety of identities that can be assumed by the members of the transgender and so they restrict the right of self-determination and homogenize different segments of the transgender community. For example, the judgment creates a blanket category for all the Hijras which is the 'third gender' without taking into account those members of the hijra community that choose to identify as females.

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[21] *Jackuline Mary* v. *Superintendent of Police*, 2014 SCC OnLine Mad 987.

[22] *National Legal Services Authority* v *Union of India* and another, AIR 2014 SC 1863.

In the judgment, the implementation of the ideals stated is passed on to the central and the state legislatures without any directives on how to do the same.[23] Since the judgment states that the recognition of the legal identity will solely be done by the Central and State governments the transgender community is at a disadvantage as the centre and the states may use different interpretations of the terms relating to the transgender community and formulate laws that might negatively affect the community. For example, even though it is clearly stated in the NALSA judgment that the right of self-determination can be exercised without the requirement of a gender affirmation surgery, but a transgender man in the state of West Bengal was required to provide documents to prove whether he was a transgender or not by providing the documentation of the SRS (sex reassignment surgery) to establish his successful transition to male.[24]

The non-participation of the transgender community in the society is an important issue that need to be dealt with as even after the judgement unless the members of the community are not included into the society as active members they cannot be uplifted and the human rights violations will keep on happening. Furthermore, India being the largest democracy in the world cannot be regressive so as to not recognize the transgender community as an integral part of the Indian society. The National Legal Services Authority v. Union of India & Others, made India one of the first nations to legally identify and constructively work towards the betterment of the rights of the transgender community and accept them as the 'third gender'. Therefore, this judgement forms the litmus test for other legislations and judicial pronouncements anywhere in the world. And it is resounding statement about the need for the identification of the transgender community as a third gender, not only in India, but in the whole world. Even after the recognition of the community, for the full realization of the rights of the transgenders the supreme court needs to make sure that the implementation of this historic judgement is done correctly by the legislators.

The Transgender Persons (Protection of Rights) Bill, 2016

On December 2014, Tiruchi Siva, a Dravida Munnetra Kazhagam Rajya Sabha MP, introduced the Rights of Transgender Persons Bill, 2014 as a Private Member's Bill. On April 24, 2015, this private bill was unanimously passed by the Rajya Sabha, however, it was never made it to the Lok Sabha. Instead, the government introduced the Rights of Transgender Persons Bill, 2015 which was largely based on the 2014 Bill, with the exclusion of the provisions on Transgender

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[23] Ibid.

[24] 'Documentation of gender change for transpeople' <http://orinam.net/resources-for/lgbt/legal-resources/tg-documentation/> accessed 2 May 2017.

Rights Courts and the National and State Commissions.[25] When the bill was sent to the Law Ministry, the Cabinet approved it, but on its introduction to the Lok Sabha, it was drastically different from the original bill with many of the important features disregarded and also very little inputs from the NALSA judgment, the Expert Committee Report, and public comments.[26]

This rushed introduction of the bill into the Lok Sabha without due consideration of important issues highlighted by previous historic judgments and inputs of experts and public comments are the reason why the Transgender Bill, 2016 remains so wanting.

Criticism of the Transgender Persons (Protection of Rights) Bill, 2016

The Transgender Bill, 2016 defines a transgender person as someone who is (a) neither wholly female nor wholly male; or (b) a combination of female or male; or (c) neither female nor male; and whose sense of gender does not match the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and "gender-queers".[27] This definition is in complete contradiction to the more holistic definition that was given by the NALSA judgment which allowed a transgender person to decide whether their gender matched the gender assigned to them at birth and to then be at complete liberty to decide their sexuality. Furthermore, the previous versions of the Transgender Bills complied with the NALSA judgment and its definition of transgenders. The Transgender Bill, 2016 also over looks an important element of the definition of a transgender and their freedom of choice as the question of whether medical intervention is required is open to interpretation.[28] Lastly in the definition of the term transgenders terms like "wholly male" and "wholly female" are extremely regressive and run contrary to the inherent idea of gender identity.

The Transgender Bill, 2016 also aims to set up a Screening Committee to certify transgender persons.[29] This screening committee by its very notion is against the right of self-identification recognized in NALSA. The inclusion of a medical

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[25] Danish Sheikh, The New Transgender Bill Fails the Community, The Wire (New Delhi, 4 August, 2016) <https://thewire.in/56299/failures-of-the-new-transgender-bill/> accessed 2 May 2017.

[26] Shruti Ambast and Namrata Mukherjee,'A rights bill gone wrong' *The Hindu* (New Delhi, 10 January 2017) <http://www.thehindu.com/opinion/op-ed/A-rights-bill-gone-wrong/article17013991.ece> accessed 3 May 2107.

[27] The Transgender Persons (Protection of Rights) Bill, 2016, Section 2(i).

[28] ICJ Briefing Paper India: The Transgender Persons (Protection of Rights) Bill, 2016

[29] The Transgender Persons (Protection of Rights) Bill, 2016, Section 6.

officer de-sensitizes the issues of transgender by implying that it is a medical condition for which the officer is appointed. Such medical professionals may not possess the necessary skills and sensitivity to do justice to a process which is inherently fraught with a continuing history of harassment.

The requirement of a screening process is also in contradiction to progressive international jurisprudence. For example, Argentina's Gender Identity Law, 2012, which is considered by the international community as the model law, it recognizes the right to self-determination as an absolute right and states that there is no need for any screening process to determine the validity of the claim of a transgender.[30] The establishment of a screening committee will only act as an impediment to the full realization of the rights of transgenders as listed under Articles 14, 19, and 21 of the Constitution.

While the NALSA judgment by legitimizing the transgender community has included them into the fold of the fundamental rights such as Articles 14, 19 and 21 of the Constitution, the Transgender Bill 2016, leaves transgender persons vulnerable. As right from the determination of the transgender identity of the person to the inclusion of that person into mainstream society is dependent on the state. Furthermore, the Bill is also silent on how the rights granted to the transgender community will interact with the other laws currently in force such as the laws governing marriage, succession, and adoption. Criminal laws, too are founded on the principle of the binary understanding of gender especially the offences dealing with sexual crime.[31]

The fundamental rights under the Constitution of India can also be interpreted to have placed certain safeguards for the protection of the transgender community, but since these safeguards are not explicitly mentioned they can only be inferred by the judges. Hence the need for a legislation that tackles the problem of the community in its entirety and does not leave it up to the discretion of the judges deciding a particular case who might choose not to interpret the articles in a way that is beneficial to the members of the transgender community.

Some important articles that might be used to address transgender rights include for example Article 14 of the Indian Constitution which states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". The word 'person' in article 14 is not only

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[30] Comment on the Transgender Persons (Protection of Rights) Bill, 2016. <https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/58204319579fb3dc45130399/1478509429564/Submissions+on+the+Transgender+Bill+2016.pdf> accessed 10 May 2017

[31] Shruti Ambast and Namrata Mukherjee, 'A rights bill gone wrong' *The Hindu* (New Delhi, 10 January 2017) <http://www.thehindu.com/opinion/op-ed/A-rights-bill-gone-wrong/article17013991.ece> accessed 3 May 2017

applicable to males and females but also encompasses the transgender community. Even though the members of the transgender community are neither totally male or female but they still fall within the ambit of the word 'person', and thus are entitled to the legal protection given by the Constitution.[32] They are also entitled to other rights such as equal civil and citizenship rights, like any other citizen of the country. Therefore, any form of discrimination based on sexual orientation or gender identity, whether in public or private sphere is a violation of Article 14 of the Constitution of India."

Articles 15 and 16 prohibit the discrimination of people on the basis of sex, which is inclusive of both the gender and biological component of sex. Therefore, any form of discrimination on the basis of gender identity also comes under the ambit of both these articles. These articles were introduced so that there is no discrimination either directly or indirectly on the basis of both the biological sex and the gender identity of a person.[33]

Article 19(1)(a) of the Constitution of India declares that "all citizens shall have the right to freedom of speech and expression"[34] includes the right of a person to express one's self-identified gender. This right of self-determination of gender can be exercised through either words or actions or behavior. Therefore, the state cannot place any restrictions on any method that a person wants to use to express his gender identity unless it is prohibited under article 19(2) of the Constitution. The Supreme Court, therefore, held that the personal integrity of a person is an integral part of the right granted under 21 of the Indian Constitution.[35] Therefore, the nonrecognition of the identity of the transgender community, as a third gender, denies them the right to equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India.

Conclusion

During the universal periodic review (UPR) at the UN Human Rights Council (UNHRC), which is a peer-based scrutiny of a nation's human rights situation Attorney general of India Mukul Rohatgi stated: "India has been at the forefront of recognizing the equal rights of transgender persons".[36] This statement in the

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[32] Manjeet Kumar Sahu, 'Case Comment on National Legal Services Authority v Union of India and another: A Ray of hope for the LGBT community' [2016] BRICS Law Journal

[34] The Constitution of India, 1950, Article 19(1)(a).

[35] National Legal Services Authority v Union of India and another, AIR 2014 SC 1863.

[36] Devirupa Mitra, 'India Comes in the Line of Fire at UNHRC Over Rights Record, Racism' The Wire (5 May, 2017) <https://thewire.in/132165/india-unhrc-universal-periodic-review/> accessed 12 May 2017.

background of the heavily criticized transgender Bill 2016 raises concern about the attitude of legislators towards the transgender community. Not recognizing that more needs to be done in this field may not be the most fertile soil for further progress to support the rights of this community.

This article discusses in depth the two landmarks for the transgender community in India, the NALSA judgment of 2014 and the Transgender Bill, 2016. Even though the NALSA judgment was considered to be very progressive and was heralded as the savior of the transgender community, it still committed some fundamental errors in its understanding of this community and the problems faced by them. But the NALSA judgment, for all its faults, recognized the plight of the members of the community and even issued directives to the Central and State governments to make laws to help and uplift them. Even though the Transgender Bill, 2016 was a successor of the NALSA judgment, it was in its very makeup a legislation based on incomplete knowledge of the very fabric that defined this community as distinct from any other. This resulted in flaws in the legislation despite the fact that some of them had been discussed at length in the NALSA judgment such as the need for self-determination by the Trans genders themselves.

The need of the hour is that now that there is reasonable interest leading to a discourse on issues surrounding transgenders and given that transphobia in society has subsided, a fresh look be taken at legislation concerning the transgender community. This legislation needs to be empathetic, inclusive and should offer solutions that are peculiar to the issues of the transgenders. This can only be made possible by ensuring adequate representation by eminent members of the community and by taking the advice of experts that have a deep and complete knowledge of their problems. Laws thus formulated are likely to affect the lives of transgenders positively. Furthermore, there exist international standards such as the Yogyakarta principles which have been used by the Supreme Court in the NALSA judgement which provide internationally accepted standards for the humane treatment of the transgender community. The laws governing the transgenders in Argentina are perhaps the most comprehensive and such laws could be used as a template for formulating those for India.

Thus, even though India has recognized the transgender community as the 'third gender' there still exists the need for a comprehensive law that tackle the problems faced by the transgenders on a daily basis. The author hopes that this article has done justice to the efforts of judges who delivered the historic NALSA judgment while flagging the flaws in the transgender bill, 2016. There is an urgent need for revision of existing laws governing a largely neglected community.

Challenges of Indian Tribals in the Era of Development and Afforestation

B. Muthu Kumar*

The Tribal people across the globe are facing so many challenges and remain undeveloped. India is no exception to it. The NALSA (Protection and Enforcement of Tribal Right) Scheme, 2015 had formulated the problems faced by the Indian Tribals, in which land related issues formed a core part of it. The forest lands are the primary source of tribal welfare; the possession and occupation of the land are not a mere right but an identity for them. The acquisition and displacement lead to deprivation of their habitat, which in turn affects their livelihood, health, cultural values, education, etc. The Scheduled Tribe and Other Traditional Forest Dwellers (Recognition and Forest Rights) Act, 2006 is perceived as a milestone in the history of tribal social movements, and it has won for the trial people their long overdue rights over 'forest land'. Similarly, the Panchayats (Extension to the Scheduled Area) Act, 1996 and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 provides a certain mandatory process to alienate the land of Scheduled Tribe and also provides measures to restore any unlawfully alienated land of a Scheduled Tribe. However, there are several drawbacks in implementing the above-said Acts. Different laws exist in different States in respect of mining and industries create conflict in tribal areas. The recently passed Compensation Afforestation Fund Act, 2016 creates an apprehension that it will be detrimental to the interest of Tribals. At times, the Court

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also did not interpret laws beneficial to tribal people, for instance, UCO Bank v. Dipak Debbarma. Under these circumstances, this paper analyzes the forest of forestry laws and their importance in securing the land rights of tribals, balancing both the environment and the development.

I. Introduction

Tribal communities are the most marginalized and vulnerable section of the society. They live under the shadow of poverty, hunger, and disease. Their liberation requires sustained welfare measures, restoring their age-old rights over forest and forest produces. The concept of land as a commodity comes into conflict with traditional concepts of the common property of tribals. The land is the key to the effective protection of indigenous peoples' cultures. Being 'indigenous' means to live within one's roots.[1] A land is not only the most important productive resource base for the tribals but also occupies a prominent place in their psyche as the mainstay of their social and religious practices. Further, the tribal community happens to live in resource-rich regions that are highly attractive. As a result, both the Government and Private sector are having an interest in gaining access and control over their resources – land or mineral wealth.[2] With the onslaught of development in post-independent India, the resource base of the tribal communities has tended to get eroded not only through acquisition for public purposes but also through fraudulent transfers, forcible eviction, mortgages, leases, and encroachments.[3]

The development sectors like power, mining, heavy industry, irrigation and related infrastructural developments migrated nearly 40 to 50 percent of the tribals. According to estimates, not more than 25 percent of the displaced since the first five-year plan have been resettled.[4] The single largest community to bear the burden of the development paradigm in the 21st century is the tribal community irrespective of the place they habitat in the World. To ensure a minimum standard for the survival, dignity and the well-being of the indigenous peoples of the World, the United Nations adopted a declaration on Sep. 13, 2007. The United Nations

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[1] Etymologically, the latin word 'indigena' is composed of two words, 'indi', meaning 'within' and 'gen' or 'genere' meaning 'root'.

[2] Nishi K Dixit, *Tribes and Tribals – Struggle for Survival* (Vista International Publishing House 2006) 174.

[3] Nishi K Dixit, *Racial Identity, and Rights of Tribes and Tribals* (Vista International Publishing House 2006) 11.

[4] Lancy Lobo, 'Land Acquisition and Displacement among Tribals, 1947-2004' in Amita Shah and Jharna Pathak (eds)., *Tribal Development in Western India* (Routledge 2013) 285.

Declaration on the Rights of Indigenous Peoples protects the rights of Indigenous groups, which includes land rights. Before this declaration, the Constitution of India contains special provisions for the tribals. The provisions made under Art. 46,[5] Proviso of Art. 164(1),[6] 243(D),[7] 243(T),[8] 244,[9] 244A,[10] 275(1),[11] 330,[12] 332,[13] 335,[14] 338A,[15] 339[16] and 342[17] recommend positive discrimination and affirmative action on the regulatory and developmental fronts for tribal community. The Fifth[18] and Sixth[19] Schedules of the Constitution also have special provision which provide for administration and control of Scheduled Areas and Scheduled Tribes. Besides this, tribals are protected by other provisions such as Art. 14, 15, 16(4), 17, 23(1), 24, 25(2)(b), which apply to all. However, in spite of the above Constitutional safeguards, the tribals are being exploited, and their land resources are being plundered even by the governmental agencies. The long pending demand of the civil society particularly the tribal activists made the Parliament to pass the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition and Forest Rights) Act, 2006.[20] This Act is perceived as a milestone in the history of tribal social movements, and it has won for the tribal people their long overdue rights over 'forest land'. Similarly, the Panchayats (Extension to the Scheduled

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[5] Art. 46, Constitution of India: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes, and other weaker sections.

[6] Art. 164, Constitution of India: Other provisions as to Ministers.

[7] Art. 243-D, Constitution of India: Reservation of seats in the Panchayats.

[8] Art. 243-T, Constitution of India: Reservation of seats in the Municipalities.

[9] Art. 244, Constitution of India: Administration of Scheduled Areas and Tribal Areas

[10] Art. 244-A, Constitution of India: Formation of an autonomous State comprising certain tribal areas in Assam and creation of local Legislature or Council of Ministers or both therefor.

[11] Art. 275, Constitution of India: Grants from the Union to certain States.

[12] Art. 330, Constitution of India: Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.

[13] Art. 332, Constitution of India: Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

[14] Art. 335, Constitution of India: Claims of Scheduled Castes and Scheduled Tribes to services and posts.

[15] Art. 338-A, Constitution of India: National Commission for Scheduled Tribes.

[16] Art. 339, Constitution of India: Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes.

[17] Art. 342, Constitution of India: Scheduled Tribes.

[18] Fifth Schedule, Constitution of India: Provisions as to the administration and control of Scheduled Areas and Scheduled Tribes.

[19] Sixth Schedule, Constitution of India: Provisions as to the administration of Tribal areas in the States of Assam, Meghalaya, Tripura, and Mizoram.

[20] Act No. 2 of 2007. Hereinafter referred as 'FRA'

Area) Act, 1996[21] and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013[22] provides certain safeguards from alienating the tribal lands. However, there are several drawbacks in implementing the above-said Acts. This paper attempts to bring out the current scenario of the working of the above-said Acts and the challenges faced by the tribal community in India along with the recent observation made by the Supreme Court concerning Land laws and rights of the tribals.

II. Tribal Lands and Alienation

The land is a prime resource for tribals but it has become a source of the problem because of over dependence on land by all people including government and private agencies, and improper governmental planning in the usage of forest lands. Globally, the tribal people have been increasingly losing their land not only because of state's encroachment but also a lack of understanding between tribal mode of relationship and outsiders' interests. The fundamental violation of the right to own property, food security and employment are connected with land alienation.[23] Tribal people mode of land ownership is quite different from the rest. It can be classified under three kinds of cross-cultural research: (I) Community-based ownership, (ii) Clan based ownership, (iii) Family-based ownership.[24] From time immemorial, the rights of tribals over their land have frequently been denied due to several factors. Nevertheless, the tribal peoples' rights being a part of the broad human rights phenomena had acquired significance in the late 20th century. In contemporary society, the State, including international organizations and other NGOs comes to the rescue of tribal community rights all over the world. It is evident through many types of research that the indigenous people and their communities have a historical relationship with their lands and are descendants of the original inhabitants of such lands. They have developed over many generations a traditional holistic knowledge of their lands, natural resources, and environment. The International Labour Organisation Convention No. 169[25] recognizes the rights of indigenous peoples and led to a treaty in 2007, which has been ratified by all of the Latin American countries with significant

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[21] Act No. 40 of 1996. Hereinafter referred as 'PESA'

[22] Act No. 30 of 2013. Hereinafter referred as 'RR Act'

[23] Krishtopher Lakhra, 'Violation of Human Rights Against Tribals or Adivasis' in Hrangthan Chhungi (ed.), *Hearing the Voices of Tribals and Adivasis* (NCCI-COT, 2014) 46.

[24] Anuradha Manav, *Indian Tribes, and Culture* (Rishabh Books 2013) 162.

[25] International Labour Organization (ILO), Convention concerning Indigenous and Tribal Rights in Independent Countries (28 ILM 1989) 1382.

indigenous populations. According to Rio Declaration,[26] they shall enjoy the full measures of human rights and fundamental freedoms without hindrance and discrimination. The United Nations Declaration on the Rights of Indigenous Peoples 2007 (hereinafter 2007 Declaration) ensures indigenous peoples' control over their legal status, internal structures, and environment, and it guarantees indigenous peoples' rights to ownership and possession of the total environment they occupy or use.[27] Article 25 of the 2007 Declaration emphasizes their 'distinctive spiritual relationship' with their lands, and Article 26 States that indigenous peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied or otherwise used or acquired, and it directs states to give legal recognition to these territories.[28] The 2007 Declaration mandates that 'States shall give legal recognition and protection to these lands, territories, and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'. Although the 2007 Declaration was not binding on States, it gives importance to tribal welfare and rights by enacting Statutes.

In India, the traditional territories of the tribal people have been subjected to incursions since the beginning of 19th Century. Historically, two factors i.e. alienation and displacement are responsible for the dislocation of tribals from their land. The forests were exploited, and tribal lands were alienated more during the colonial period. The forest policy of the British Government was more inclined towards commercial considerations. The building of the railway network since 1853 enabled the timber contractors to wreck vast tracts of forest for fuel wood and railway sleepers. This brought increasing destitution and displacement of tribal people, and no effort was made to ameliorate their living conditions. The large-scale destruction of forest lands and more requirement of forest produce posed the question of forest conservancy. As Britain itself had no tradition of forest management, German experts were called in to start the

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[26] The Rio de Janerio Declaration on Environment and Development adopted on 14th June 1992 by the United Nations Conference proclaims that States should recognize and duly support indigenous peoples' identity, culture and interest and enable their participation in the achievement of sustainable development.

[27] Siegfried Wiessner, 'Indigenous self-determination, culture, and land: a reassessment in light of the 2007 UN Declaration on the Rights of Indigenous Peoples' in Elvira Pulitano (ed), *Indigenous Rights in the age of the UN Declaration* (Cambridge University Press 2012) 51.

[28] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is an international instrument adopted by the United Nations on Sep. 13, 2007. The declaration is the product of 25 years of deliberation by U.N. member states and indigenous groups. Nearly 144 countries adopted the UNDRIP with eleven abstentions and four countries voting against it. These four countries were Canada, the U.S.A., New Zealand, and Australia. Since 2009, Australia and New Zealand have reversed their positions and now support the Declaration, while the United States and Canada have announced that they will revise their positions.

Imperial Forest Department in 1864.[29] This department formulated the first forest policy, which made two major enunciations; first, the claims of cultivation are stronger than the claims of forest preservation; and secondly, the public (material) benefit was the sole object of forest administration.[30] This policy led to the enactment of the Indian Forest Act, 1878[31], a comprehensive piece of legislation that served as a model for other British colonies. The *sine qua non* of the 1878 Act was an absolute State Monopoly, with peasants and tribals allowed only limited access to forests and forest produce.[32] This led to non-tribals settling in the hill areas and alienation of the tribal land. The colonial government had encouraged the non-tribals by providing concessions for the non-tribal settlement. For example, no land rent was collected for establishing the coffee/tea plantations for the first five years, and in the rest of the period, also only a meagre amount was collected from the non-tribals. Further, a sizeable number of non-tribals settled in the tribal areas as the land price was low in the hills. The second was the displacement of tribals owing to various development projects and inability to rehabilitate them appropriately. There were not much development activities during the colonial period. In contrast, the post-colonial government had established several infrastructural facilities and development projects in different tribal areas of the country.[33] In India, the colonial government realized the importance of preserving forests for eco-diversity and enacted the Forest Act, 1927[34] which empowers the government to declare any areas to be a protective, reserved forest and village forests. After independence, there was some rethinking on the issue of forest policy. The new National Forest Policy was published as a Government of India Resolution in 1952. This was just an extension of the old policy followed during the colonial period. The regulations arrayed that the forest-dwellers were solely responsible for the destruction of forest and its resources and they were restrained from exploiting the forest resources even for their livelihood.

The National Commission on Agriculture in 1976 pointed that during the British period, the government was interested in the commercial plantation for revenue earning, which resulted in destruction and massive felling of trees causing the

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[29] Ramachandra Guha, 'Fighting for the Forest: State Forestry and Social Change in Tribal India' in Oliver Mendelsohn and Upendra Baxi (eds.) *The Rights of Subordinated People* (Oxford University Press, 1994) 23.

[30] Debnath Debashish, 'Tribal-Forest Relationship' in Vidyut Joshi, Tribal Situation in India – Issues in Development - With Special Reference to Western India (Rawat Publications, 1998) 115.

[31] Act No. 7 of 1878.

[32] (n 29).

[33] (n 2) 190.

[34] Act No. 16 of 1927.

depletion of forest resources. The Commission's new scheme of 'social forestry' imposed an almost complete ban on coupe cutting and tree cutting for commercial purposes. Thus, the Government has shifted its policy on forest conservation from forest exploitation not only to increase the forest cover in the country but also to preserve and protect the wild animals. There were numerous legislations cropped in connection to it. The Wild Life (Protection) Act, 1972[35] was enacted which empowers the government to permit any area to be constituted as a 'protected area', namely a national park, wildlife sanctuary, tiger reserve or community conservation area. The draconian Forest Conservation Act, 1980[36] penalizes tribals for accessing minor forest produce. Consequent to these Acts, almost one-third of the tribals lost their land and became landless labourers or were pushed into the interior forests as encroachers.[37] Besides the legislations mentioned above, there are other forms of land alienation reported. The report of the study team of the Union Home Ministry in May 1975 pointed out that large-scale transfers of ownership of the Adivasis lands are being made through Benami transactions and collusive civil proceedings, etc. The leasing or mortgaging of lands to raise loans by the tribals for their various needs and non-repayment of the same ultimately made them landless. Marital alliance and fictitious adoption are other forms which enable the non-tribals to grab the tribal lands at no cost.[38] The government enacted stringent laws to protect the interest of Tribals. The PESA, 1996; FRA, 2006 and RR Act, 2013 were enacted to address the historical injustice committed against tribals by denying their land and other resources. Moreover, many States particularly the North-Eastern States have passed Land Transfer Acts to prevent land alienation of the respective tribal populations.

III. Panchayat (Extension to the Scheduled Areas) Act, 1996 (PESA)

The Local Government or Village Administration comes under List – II (State) of the VIIth Schedule of the Constitution and the State Government is empowered to legislate on this subject, but unfortunately, it was kept unused by many States for nearly 40 years. This made the Parliament enact new parts i.e. Part IX (Panchayats) and Part IX-A (Municipalities) through 73rd and 74th Amendment to the Constitution in the year 1992. Further, the State Legislatures has been empowered by Statute or rulemaking power to determine the political, administrative and fiscal authority that such local bodies would exercise. The

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[35] Act No. 53 of 1972.

[36] Act No. 6 of 1980.

[37] (n 2) 189.

[38] (n 23) 168.

Part-IX was intended to create Local governments only in nontribal rural areas. After the enactment of PESA, the Parliament extended Part IX to the Fifth Schedule tribal areas. PESA has been enacted under Art. 243-M(4)(b).[39] Before PESA, the Fifth Schedule was entirely centralized system, and it permitted the Governor of each State to make regulations for the peace and good government of the Scheduled Area. The Governor was the sole legislator to legislate on all subjects in the three lists of the VIIth Schedule, and he could preclude the application of any Federal or State law in the Fifth Schedule Areas. This is subject to two conditions: (1) The Governor would consult a Tribes Advisory Council before making any regulation; and (2) All regulations would receive Presidential assent before taking effect. Conversely, the Sixth Schedule areas in the north-eastern States have been vested with considerable autonomy to have elected councils, which make laws on a variety of subjects, and even exercise judicial authority through traditional legal systems with certain features of the federal law. The Councils are also financially independent, but the exercise of power is subject to the approval of the provincial Governor. Thus, the PESA is a significant enactment which provides Gram Sabha for every village. The Gram Sabha is authorized to protect and preserve the traditions and customs of the people, community resources and the customary mode of dispute resolution. This legislation ensures the involvement of tribes in the decision making process through active participation and to safeguard the cultural identity of them. Nevertheless, it has been watered down in the process of adoption by the State concerned according to its suitability. In the process of ratification by the States, most of the powers of the Gram Sabha have been given to the district administration or the Zilla Parishad. Clause 4(e)(1) of the PESA provides that every Gram Sabha shall approve the plans, programmes, and projects for social and economic development before such schemes, programmes and projects are taken up for implementation. Further, it provides that the Gram Sabha or the Panchayat at the appropriate level shall be consulted before the acquisition of the land in the Scheduled Areas for development projects.

It also provides that before resettling or rehabilitating persons affected by such projects in the Scheduled Areas, the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level. There are no necessary measures to be taken up during any developmental project for taking the opinion and consent of the Gram Sabha except the above-said provision. Moreover, the recommendations of Gram Sabha have not been made compulsory

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[39] Art. 243-M(4)(b): Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and tribal areas referred to in clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

before granting prospective license or mining lease in many cases. For example, neither in Andhra Pradesh nor in the neighbouring districts the peoples' consent was obtained through Gram Sabha's in the case of Polavaram multipurpose project.[40] It is evident that PESA did not prevent large corporations from getting control over the natural resources which constitute the life support of the tribal communities. The deceit and connivance of the Government employees wreck the welfare of the tribal community. The corrupt government officials exercise their discretionary powers to favour non-tribals by transferring lands of tribal communities in which they may have a valid claim. In many States with a large tribal population, the issues such as access to natural resources, the definition, and rights of minor forest products remain unsettled. Thus, PESA is not achieving the object for which it had been enacted. The State is responsible for diluting the effectiveness of the act. To overcome this, an expert group on planning at the Grassroots level, which is an action programme for the Eleventh Five Year Plan suggested that the Union Government can issue specific directions by its powers[41] to issue directions to implement the provisions of PESA in letter and spirit. It also suggested to establish a forum at the Central level to monitor the deviations under the PESA and make necessary corrections. Further, it has recommended that the annual reports of the Governors should be given due importance and must be placed in the public domain.

IV. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA)

The FRA 2006, enacted in 2007 is a milestone in the history of tribal social movements. This Act replaced the Forest Act, 1927, wherein the forest land was divided into 'Reserved' and 'Protected' categories that significantly limited human occupation, which led to mass encroachment by traditional forest dwellers, who are subjected to legal action in the form of eviction, fines, and arrest.[42] This Act helped to restore the forest dwelling communities' rights to land and other forest resources during the continuance of colonial forest laws in post-colonial India.[43] The important provisions of this Act are: it recognizes the ownership rights of Tribes and other forest dwellers who are occupying a particular land

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[40] Krishna Halavath, 'Human Rights and Realities of Tribals' Lives in India: A Perfect Storm' (Vol.19, ed. 4 IOSR Journal of Humanities and Social Science 2014) 45.

[41] Under Proviso 3 of Part A of the Fifth Schedule.

[42] Medha Chaturvedi, 'Securing Land Rights for India's Tribes' (*Blog*, 8 July 2012) <http://blogs.wsj.com/indiarealtime/ 2012/07/08/securing-land-rights-for-indias-tribes/> accessed 23 Feb. 2017.

[43] V.S Simon, 'Land Laws, Livelihood and Human Security of Tribes in India' (Vol 5, ed 3 Journal of Politics and Governance 2016) 10.

for a considerable period. It recognizes both individuals[44] and community rights[45] over tribal land. They cannot be displaced without their consent. The permission of gram sabha is mandatory for mining and development projects on forest land used by the tribals. Besides providing a uniform system of proving ownership of tribal land, it also provides the due procedure for resettlement of forest dwellers in the case, and an animal sanctuary was designated in the tribal area. Furthermore, the Act clarifies that the areas that have been demarcated as core areas can be used only for wildlife in the future. Nonetheless, certain problems exist in the successful implementation of FRA, 2006. The key features of the FRA had been undermined, and in the current scenario, the rights of the tribals and other traditional forest dwellers are being denied, and the purpose of the legislation is being defeated. The instances are many: the major portion of tribal lands comes under the forest region, and the majority of tribal people are staying in the interior forest without having any legal title on those lands, and there is no such protection to those dwellers under FRA. The local administration had not maintained the land records. The Tribals do not have access to land records. This lends them to a higher probability of getting exploited by the non-tribals, and in some cases by the local officials. Wherever lands were provided, the pattas were not given yet, or lands were not shown in which patta was granted to it. There is a discrepancy in the demarcation of Scheduled Areas i.e. in some places, it is village wise, and in some localities, it is area wise. Thus, the non-availability or discrepancy of land records provide insufficient and unclear information regarding the actual ownership of land by the tribals, and this makes the tribals difficult in proving their title and ownership of their land. In addition to that, the implementation of this Act is being hit by the corrupt officials. The Government officials are colluding with non-tribals and creating records for them by manipulating the revenue documents which is due to the tribal community.

V. Role of the Government in Strengthening the Mechanism

The Government, both at the Centre and the State, has a significant role in successful implementation of the Acts meant for the tribal welfare. But, at times the Government yields to the pressure of corporate companies in the guise of development. The encroachers had the political backing irrespective of who comes to power both at the Centre and the State. Of late, there was an allegation against the Central government that they amended certain regulations meant for protection of tribal rights, forests, and the environment to ensure more than 130

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[44] There are claims made by individual tribal up to 4 hectares of land that they occupy and habitat since before 13th Dec. 2005.

[45] There are claims made by a community on which community facilities are built e.g. schools, playgrounds, health centers, etc.

mines to operate without getting fresh auctions. According to Section 10(2) of the amended law of Mines and Minerals Development and Regulation Act of 2015, anybody with a license to prospect or to carry out reconnaissance and had started operations would get a mining license. But the miners had to get permissions for mining within two years i.e. by Jan. 2017. Nevertheless, the records showed that the environment ministry had changed rules on April 2015 to facilitate miners from the threat of auction. On the side of the Ministry, it has been clarified that mining can begin only when the miners secured full-fledged forest clearance. Further, the tribal affairs ministry added that the consent of tribals was not required while assigning land but only mining begins.[46] Under the RR Act, the displaced tribals are compensated with meagre compensation by the Government. The loss due to displacement is not adequately compensated, and in turn, it affects food security for them. The government claims that activities like the relocation of tribals from protected forests and acquisition of their land for development projects are 'voluntary'. However, the consent is obtained through inducement. In the case of traditional knowledge, such inducements could be regarded as false promises of relevant schemes, favours to the village elites, in the name of national interests, creating jobs or bringing development.[47] However, in many cases, the employment opportunities for tribals are denied by industries which have been established in forest region by displacing the tribals. The development in the forest region not only displaces the tribal people but also leads to an influx of non-tribal people seeking employment in forest region forcing the tribal people to migrate.

There is also an apprehension that the recently passed Compensation Afforestation Fund Act, 2016[48] (hereinafter referred as Act) will be detrimental to the interest of tribals. This Act was brought to comply the Order of the Hon'ble Supreme Court of India in *T.N. Godavarman Thirumulpad v. Union of India & Others*.[49] The Court observed that a Compensatory Afforestation Fund should be created in which all monies received from the user agencies towards compensatory afforestation, net present value of the diverted forest land including protected areas under the Wild Life (Protection) Act, 1972 or catchment area treatment plan shall be deposited. Besides artificial regeneration (Plantations), the Fund shall also be utilized for undertaking assisted natural regeneration,

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[46] Nitin Sethi, 'How the NDA diluted Tribal Rights to 'Save' Mining Companies from losing Mines to Fresh Auction' (*The Wire* 2017) <https://thewire.in/100722/nda-tribal-rights-forest-mining-environment-auction/> accessed 23 April 2017.

[47] Kumar Sambhav Srivastava, 'India, others get UN rules on tribal rights diluted' (*Hindustan Times*, 29 Dec. 2016) <http://www. hindustantimes.com/india-news/india-others-get-un-rules-on-tribal-rights-diluted/story-xtD82yGjIeEAo4jV8y 7QZI. html> accessed on April 24, 2017.

[48] Act No. 38 of 2016.

[49] (1997) 3 S.C.C. 312.

protection of forests, infrastructure development, wildlife protection and other related activities. The Court also directs to set up an independent monitoring and evaluation system to ensure effective and proper utilization of funds through the Compensatory Afforestation Fund. Thereon, the Supreme Court passed series of Orders in the years 2006[50] and 2009 in the above-said case. The Court observed in its judgment dated 26th September, 2005 that the fund generated for protecting the ecology and providing regeneration should not be treated as a Fund under Article 266[51] and Article 283[52] of the Constitution. In 5th May 2006, the Court directed to constitute an ad hoc authority till the Compensatory Afforestation Fund Management and Planning Authority become operational. The object of ad hoc authority is to recover and pool the money lying with the States. The Central Government on 2nd July 2009 framed guidelines for the utilization of funds lying with the ad hoc authority but they were not implemented. The Court on 10th July 2009, had directed the Central Government to notify and implement the said guidelines. To comply the directions of the Supreme Court, the Parliament enacted this Act by constituting an authority at national and at each of the State and Union Territory for the administration of the funds. Under this new Act, there is a possibility to displace the tribals from the forest region in the guise of afforestation. Thus, the tribal people are denied to reap the benefits of forest produce in the pretext of development and afforestation.

VI. The Role of Judiciary in Safeguarding the Land Rights of Tribes

The Courts particularly the Constitutional Courts play an inevitable role in protecting the rights of the Tribals. Two cases have been discussed here. The first judgment is about sustaining the rights of the tribals over their lands from exploitation in the name of development, and the second judgment gave authentication to transfer tribal land to non-tribal through an auction by a Bank for default of payment of a loan by a tribe. The former was against land alienation, but the latter favours it. The first case is *Orissa Mining Corporation v. Ministry of Environment of Forests and Others.*[53] It is a unique case, where after the grant of environment clearance to the project by Ministry of Environment and Forests (hereinafter MoEF), the local tribals and others including the Dongaria Kondhs challenged the project before the National Environment Appellate Authority. This was the first time that the local tribes have directly challenged the project in any Court of law. The MoEF had rejected the clearance for diversion

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[50] (2006) 5 S.C.C. 28.

[51] Art. 266 of the Constitution: Consolidated Funds and a Public account of India and the States.

[52] Art. 283 of the Constitution: Custody, etc., of Consolidated Funds, Contingency Funds and moneys credited to the public accounts.

[53] (2013) 6 S.C.C. 881.

of forest land for mining of bauxite ore in certain districts of Orissa (Now Odisha). The MoEF took this decision after considering the expert committee headed by Dr. Naresh Saxena. The Committee found that the impugned project will violate the rights of forest dwellers and the primitive tribal groups under the FRA and it will have an impact on wildlife and biodiversity in the surrounding areas. The Centre pointed out to the Supreme Court that the forest dwellers under the FRA are not just right holders, but have the authority to protect the Niyamgiri hills. Further, they relied on section 3(1)(e) of the FRA which recognizes the right to community tenures of habitat and habitation for Primitive Tribal Groups. They also contended that Dongaria Kondh have the right to grazing and the collection of the mineral forest of the hills, and they have the customary right to worship the mountains in the exercise of their traditional rights, which would be robbed if mining is permitted in Niyamgiri hills.[54] The Court recognized that FRA is a social welfare or remedial Statute and said 'it protects a broad range of rights of forest dwellers and STs including the customary rights to use forest land as a community forest resource and not restricted merely to property rights or areas of habitation.' Finally, the Court held that the tribals have the right to maintain a relationship with their land which is their most valuable asset and any industrial establishment cannot be established in tribal areas without the approval of their Gram Sabha. The Court held that the Scheduled Tribes and other Traditional Forest Dwellers residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands. The Court added that agriculture is the only source of livelihood for them apart from collection and sale of minor forest produce to supplement their income. Following this judgment, the Odisha Government selected twelve villages for holding gram sabha to decide the fate of Bauxite Mining Project. Nearly 985 forest dwellers participated and conveyed their views to the Government through Gram Sabhas. Finally, the project was rejected on 19th August 2013. The Judgment in this case and the outcome regarding gram sabha's rejection of the project was considered a mark of success of the FRA, and its effective implementation.[55]

Of late, in *UCO Bank v. Dipak Debbarma*,[56] the Supreme Court held that Section 187 of the Tripura Land Revenue and Land Reforms Act, 1960 to be invalid as it was inconsistent with the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002, which is a Union Legislation. The impugned section prohibited the bank from

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[54] V. Venkatesan, *Constitutional Conundrums – Challenges to India's Democratic Process* (Lexis Nexis 2014) 301.

[55] *ibid* 302.

[56] Civil Appeal No. 11247 of 2016.

transferring the land mortgaged by a scheduled tribe to a non-scheduled tribe person. The Tripura Act being placed in the ninth schedule could not enjoy the legal immunity provided under Art. 31-B of the Constitution. The Court finally held that the Bank can sell the mortgaged land to any person to recover its loan amount as per the SARFAESI because the Central Act is held to prevail over the State Act by invoking the principle of predominance of dominant legislation in the event of inconsistency of law made by the Parliament and the State Legislature. The recent Supreme Court ruling put the Sixth Schedule States in jeopardy in spite of Constitutional protection. Thus, the Supreme Court creates a situation wherein the land gets alienated by the application of Union Legislation without the consent of tribals.

VII. Conclusion

The rights of Tribals over forest region is an inalienable and irrefutable historical fact. The fundamental violation of the right to own property, food security and employment are connected with land alienation. The land alienation of tribals change their life-styles, and they lose their cultural identity. The land taken for development purpose is not illegal, but such policies ruined the livelihood means of tribals and did not take care of the ousted population regarding proper rehabilitation. Despite myriad Laws, policies, and Acts of the Government, the problems of land alienation and non-restoration or rehabilitation of tribals still exist. Various State agencies, particularly the revenue officials who deal with land records harass and deny them their basic human rights. It seems that the encroachment of the forest region is inevitable for the Government but in doing so, they should ensure effective rehabilitation for the tribals, and they should not be left in the lurch after displacement. The Government should take following steps for protecting the tribals in acquiring and displacing them from forest lands:

- There should be transparency and access to land records at the village level to the Tribals. A complete overhaul and systematic reorganization of existing land record should be adopted, and tribals should be allowed to participate in the process of the survey of the land.
- Tribal people have little or no experience in handling a large amount of cash. So, compensation paid in cash quickly slips through their fingers for festivities or ill-planned business enterprises. Thus, the best way for rehabilitation is the replacement of land similar to their habitat in surrounding forests.
- There is a need to harmonize the various legislations both centre and the State being implemented in tribal areas with the principles of Fifth and Sixth Schedules of the Constitution and the provisions of PESA. The role of the Court is indispensable in harmonizing the laws rather nullifying as unconstitutional.

- The respective Government should ensure that the laws brought by the Union and the State concerned are implemented in *strictu sensu* without any dilution for the sake of any bigwigs or corporate to plunder forest resources in the guise of development.
- Tribals should be made co-sharers/partners in all developmental projects/ activities carried out in forest areas such as mining, logging, tourism, forest produce, etc. besides providing employment.
- It is unreasonable to allege the poor tribals that they are responsible for degradation of the environment. In fact, non-tribals constitute more in degrading the environment, and it is the responsibility of everyone to safeguard the environment. Degraded forests should be given to Tribals for afforestation and allied activities.

Changing Dimensions of Inheritance Rights of Women in the State of Sikkim

Sonam Diki Dolma Bhutia*

The framers of the Indian Constitution noticed the inequitable position of women in Indian society and bestowed duty on the State to provide her equal status and work on gender equality. Articles 14, 15(2) and (3) and 16 of the Constitution of India is an attempt towards restraining discrimination against women. Article 17 of the International Declaration of Human Rights states that "everyone has the right to own property alone, as well as in the association of others and no one shall be arbitrarily deprived of his property". The Convention for the Elimination of all Forms of Discrimination against Women, an International Treaty legally binding on India, secures the right of all women to own land and property. An inheritance is an estate descended to the heir immediately on the death of the ancestor by virtue of his right as a descendant. Women's property inheritance rights vary according to her socio-cultural status. The Sikkimese society consists of tribal and general communities following the patriarchal system whereby the property belongs to head of the family, women inherit only movable belongings like ornaments and gifts received during their marriage; they do not have legal rights to their ancestral property.

This paper is an attempt to analyse the rights of Sikkimese women with regard to inheritance. It focuses on the customary laws which deprive a woman of their basic property rights, the need to replace unwritten customary laws according to new legislations and latest judgments, its impact on both parental and matrimonial families and to enforce the Sikkim Succession Act 2008, which gives equal inheritance rights to the woman.

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Introduction

'Inheritance' is an estate in real property which the law, immediately on the ancestor's decease, casts on the heir.[1] It is also those properties received from an ancestor under the laws of intestacy. Those properties an individual receives by bequest or devise.[2] Whatever one inherits and whatever is transmitted by descent or succession; an estate descending to the heir, which has descended to the heir and been cast upon him by the operation of law; or which may descend or be inherited is known as Inheritance.

The traditional Hindu Law of Succession was dissimilar in two main schools namely, Mitakshara and Dayabhaga Schools. The Dayabhaga School emphasises on one mode of succession where there is no right by birth or through survivorship, though a joint family and coparcenary property are recognised. In Mitakshara, the joint property will follow one and the property which is separate will follow another course of succession.[3] Dayabhaga School does not recognise the rule of survivorship even in the case of joint family property, a member of a Dayabhaga joint family holds his share in quasi-severalty, so that it passes on his death to his heirs, as if he was entirely seized thereof, and not to the surviving coparceners as under Mitakshara law[4]. In the case of a Hindu family residing in the particular State of India, it is presumed to be governed by the law of the place in which they reside.[5]

The population of Sikkim is predominantly Hindu 57.76%, followed by Buddhist consisting of quite a large community (27.39%) and the Christians only 9.91% of the total population, and among thepopulation of female 287,507 out of 6.11 lakhs population of Sikkim[6]. The Hindu Succession (Amendment) Act 2005 established the currently prevalent Hindu Personal laws on Inheritance or Marriage; which govern other religious communities like Sikh, Jain and Buddhists in India and it is not applicable to the people in Sikkim. The Hindu laws, except the Hindu Marriage Act of 1955, have not been extended or enforced in Sikkim, even after its merger with the Indian Union in 1975.

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[1] Pramanatha Aiyar, *Advanced Law Lexicon* (4th Ed., Vol.2, Lexis Nexis Butterworths Wadha, Nagpur 2013) 2418.

[2] Bryan A Garner, *Blacks Law Dictionary's* (9th ed., A Thomson Reuters Business 2009)853.

[3] Mayne's Hindu Law and Usage (16th Edition, Bharat Law House, New Delhi 2009) 959.

[4] S.A. Desai, Mulla Hindu Law (23rd Edition, Vol I , Lexis Nexis Butterworth Wadhwa, Nagpur) 99.

[5] ibid, 91.

[6] Sikkim Population Census Data 2011 <www.census2011.co.in>

An Analytical View of Inheritance Laws of Sikkim (A) Pre - Merger and (B) Post Merger Of Sikkim Into Union Of India 1975:

(A) Pre–Merger:

The laws of Sikkim were founded on messages spoken by Raja Me-long-dong which were in form of Proclamations. He lived in India before the times of Buddha (914BC)[7]; and later on laws proclaimed by him were rewritten by many other rulers. These laws were two sets, one contained 13 laws and the other 16, though they were mainly the same. The first dealt with offences in common and the second set dealt with the duties of Kings and Government servants.[8] Inheritance laws which were prevailing during the times of Kings, before the merger of Sikkim into the Union of India are uncodified and were mostly taken out of the Customs of a Community or Locality and were practised for an immemorial period of time, which gradually took the form of Customary Laws.

Earlier studies show that inheritance by a woman, as a rule, was denied in North Sikkim in the communities among Lachenpa's and Lachungpa's, both sub castes of Bhutia Communities. With regard to properties, women had no right in this society and they could not inherit properties. The possibilities of women inheriting properties arise only if there were no other male heirs in the family, various forms of inheritance are indicated by which even distant male relatives may inherit properties and further women are not entitled to sell, transfer, or mortgage the property of her late husband. The Hindu Laws of Succession and Inheritance are not applicable to the people of North Sikkim as they are still governed and guided by their old customary laws.[9]

Below are the examples of Inheritance practices in Bhutia and Lepcha communities in Sikkim which are taken from the society or region where it is practised for an immemorial period of time and are valid before the law.

The ways of Succession or Inheritance in Bhutia Community pre-merger according to customs are stated as follows:

(i) Son, a grandson through the male line, brother of the same father, father's sister's son.

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[7] S. K. Sharma, *Documents on North East India, An Exhaustive Survey* (Vol 10, A Mittal Publication 2000) 97

[8] H. H. Risley, Gazetteer of Sikhim (1972) 46.

[9] Ghatak S., *Empowerment of Women – A Case Study in North Sikkim Among the Lachenpa (*2004*)*, Anthropological Survey of India, 27 Jawaharlal Nehru Road, Kolkata - 700 016.Res: 12/1/G Chanditala Lane, P.O. Regent Park, Kolkata-700040 assessed on 12th Feb' 2016.

(ii) Father's brother's son, mother's brother's son and mother's sister's son, the one who performs the death rite preferably a person of the same clan or any Sikkimese Buddhist Bhutia or another clan.

(iii) The husband has no right to dispose of the landed properties given as pe-zong[10]. The husband succeeds to the property of the wife. A woman inherits property neither in the family of her father nor in the family of her husband except what is given as pe-zong by the father and as "jew-ni" by the husband. The son who performs death rites of the mother succeeds to the mother's property as per the list of successions.

(iv) If there are no male issues in the family, then son-in-law may be adopted as "Bhu-tsab[11]". In such a case the son-in-law adopts the phula[12] of the father-in-law. The devolution of properties follows accordingly. The "Bhu-tsab" cannot have the right of succession in the family of his birth. The unmarried or indigent[13] daughter does not enjoy any preferential rights over other heirs in succession to the father's property. Their whole welfare is the responsibility of the Gyab[14] families. However, they may be given some share by the parents out of love and affection and not as a rule for their well-beings.[15]

The ways of succession or inheritance of Lepcha Community according to customs - The Lepcha's are Mongoloid people living in the Himalayas on the southern and eastern slopes of Mount Kanchenjunga, they were originally the only inhabitants of this large territory of mountainous land, but during the last three centuries.[16] The practice to the Inheritance in Lepcha Community pre merger according to their followed customs is stated as follows:

Member of a family may have following properties:-(a) Primarily there are two types of properties, such as Athiu (shared) and Athyul (self-acquired). Ancestral properties are Athiu and self-acquired are Athyul properties. When necessary

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[10] Pe-zong means cash and gift given during marriage to the bride from her groom side.

[11] In Bhutia language it refers to a son in law who stays with his in laws, where the son in law permanently stays at his in-laws house after marriage. He will inherit the property of his father in law and cannot claim property from his own parental property.

[12] In Bhutia language phula is a process and practice, where in people of different community worship their fore father's souls and spirit (Ancestral Deity).

[13] A poor or destitute person/experiencing want or need, www.thefreedictionary.com, visited on 22nd April, 2015.

[14] In Bhutia language Gyab is referred to an elder brother.

[15] Law Commission of Sikkim, A Draft on Sikkim Customary Laws and Usages on Bhutia Community 2002, p 10.

[16] Geoffrey Gorer, *The Lepcha's of Sikkim (*Gyan Publishing House, New Delhi 1996) 35.

Athiu properties can be partitioned amongst the members of the family, but Athyul property shall be retained by member acquiring it.

(b) Sons and grandsons succeed to the ancestral properties, belonging to grandfather, grandmother, father and mother.

(c) In absence of a son or an adopted son, above-mentioned sons in (b) shall succeed to the properties belonging to the paternal grand uncle and the maternal grand uncle.

(d) In absence of a brother, brother's son, an adopted son of an unmarried woman her father or paternal uncle shall succeed to her properties provided they agree to repay her debts, if any, and meet the expenses of her funeral rites.

(e) A married daughter can possess and enjoy immovable property given by the father, but such property shall revert to the father, brother and brothers sons on her death. Unmarried daughter also benefits from the same rights.

(f) A widow can inherit the property in absence of her sons and daughter provided she does not marry with any new person; she has no right to alienate the property of her husband. On her death, the right of succession passes on the collateral heir of the deceased husband.

(g) In the case of a couple having no son and only daughter, they may take a Myok (son in law) to stay forever with the family as Kumok Myok i.e. Akup Myok or resident son in law. He will eventually inherit the property, provided Sunkyo Rumfaat[17] and other marriage rituals were performed during the marriage.

(h) An illegitimate son, if his father is revealed and proved, shall be given requirements by that father.

(i) When a man having no offspring and consanguineous kindred and no person belonging to his clan dies, the elders of the community shall recommend a person of that locality to succeed to the property and stand the expenditure for funeral rites and repay the debts, and fulfil the social obligations on behalf of the deceased person.[18]

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[17] Sunkyo means a wooden cup used by Lepcha's for special ceremonies such as wedding. As per the customs the cup is filled with fermented millet and water. On edge five spots are made with butter. Accordingly, one has to drink after the ceremony from the same spots. If the butter falls off during the ceremony which is Rumfaat, it is considered misfortune.

[18] Law Commission of Sikkim, A Draft on Sikkim Customary Laws and Usages on Lepcha Community (2002) 14.

So, during the times of kings in Sikkim customs were one of the sources of law and for the custom to be valid it had to be followed since ages with times immemorial. The law of succession under customary law governs inheritance in situations where a person dies without a will. The Customary Laws of Succession in Sikkim is based on the principle of primogeniture.[19]

As the Bhutia and Lepcha being tribal people of Sikkim follow the patriarchal family system, all the property either movable or immovable; belong to the father or head of the family. After the death of the father, the eldest of his sons becomes head of the family and takes charge of the property. The women except for their movable personal belongings, ornaments and utensils etc, have no locus-standi and legal rights in the hereditary property. They could take those gifts received during their marriage when they go away from their parental house. Though the woman has no legal rights in the property, the affluent and well to do family occasionally give a piece of cultivated land or a house to their daughters or sisters, which they give out of love and compassion and not as per law. If a Bhutia-Lepcha man dies leaving behind his widow and daughter only, with no sons, the widow shall inherit the property only for her life and on her death, the property shall revert back to male agnates of her late husband but not the daughter. Women are not entitled to sell, transfer or mortgage that property of her late husband, the Bhutia- Lepcha women may, however, acquire property by way of gift or under a will from her father or other relations.

The issue relating to the inheritance rights of women in Sikkim under customary law is not very apparent; it is presumed that the customary law relating to inheritance is based on the earlier Mitakshara School of thought, where women could never become a coparcener, a woman is not given a birth right in the family property like a son and sons acquire a right and interest in the family property and according to this school, a son, a grandson and a great grandson constitute a class of Coparceners and based on birth in the family, no female is a member of the coparcenaries in Mitakshara School.[20]

A notification issued as 'Sikkim State General Department no-2341- 4/G, on 17 June 1930[21], where "the word "Heirs" (as used in the opening paragraph of the Elakha lease) shall be deemed to mean one heir only, in the direct male lineal descent of a deceased lessee e.g. son, grandson, great-grandson and so forth. It

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[19] The status of being the first born child, among children of the same parents. A rule of inheritance at common law through which the oldest male child has the right to succeed to the estate of an ancestor to the exclusion of younger siblings, both male and female, as well as other relatives <legal-dictionary.thefreedictionary.com>accessed on 22nd April, 2016.

[20] Srinivasan's, Commentaries on Hindu Succession Act (6th Ed (Reprint), Law Publishers (India) Pvt. Ltd) xcviii.

[21] <http://www.sikkim.gov.in/MISC/GOVERNMENT/Old%20Laws/laws/sikkimcode_VOL2>.

shall not include collaterals, but an adopted heir may be deemed a valid heir, provided such adoption is made in writing with the express consent of the Darbar and the deed of adoption are registered according to law." The "Sikkim Married Women Property Regulations Act, 1962", gives us a concept that unmarried women were allowed to inherit but in case, she marries a man who does not hold a Sikkim Subject[22] then she either had to sell her property to someone who has Sikkim Subject as because this property of hers cannot be inherited neither by her husband nor her children.

It was an unexpected act of "Sikkim Durbar on 15th March 1969 initiated Proclamation[23] for cancelling the Sikkimese citizenship of women who marry an outsider (non-Sikkimese) not belonging to Sikkim". It was declared to the general public in Sikkim from that day on women marrying outside Sikkim had no rights over property inheritance legally, which was a setback to the women community and a hindrance in their path to gender equality.[24] This practice was basically adopted to check the transfer of property from Sikkim resident (subject holder) to non - Sikkim's and with the object of securing the ownership of land by Sikkimese people only.

Though it is said that in our state, women are given more respect and have a better status in comparison to other states, but it is seen that even the most educated females who are holding a high post in the Government Offices have not inherited anything from their hereditary property. It shows the real position of women and discrimination against them, which started from the place they called their home and family and of which they themselves are unaware of. Customary laws are tradition, that is a custom, opinion or belief handed down to posterity orally or by practice, the problem is that Customary Laws are in conflict with human rights. There is no gender equality; there is no equality between men and women.[25]

III. Post Merger

Property can be divided into two principal categories, one is ancestral property which has devolved upon an individual after the death of an ancestor, and the

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[22] Sikkim Subject Regulations 1961 <sikkimarchives.gov.in>upload 2012/09, (the ones who are born in Sikkim are issued a Sikkim Subject/ now presently a Certificate of identification, as their identity being a Sikkim Subject and a citizen of Sikkim)

[23] Proclamation Of Highness Sir Tashi Namgyal K.C.S.I, K.C.I.E Maharaja of Sikkim Dated 30th August 1956.

[24] Bitu Subbah, 'Women "Quest" for Empowerment in Sikkim's Society' (Volume 4, Issue 9, ISSN 2250-3153 September 2014) 3 <www.ijsrp.org>accessed on 21st October, 2016.

[25] Soli J. Sorabjee , *Law and Justice, An Anthology* (reprint, Universal Law Publishing Co Pvt. Ltd 2008) 874

other is self-acquired property which is the self-earned property of an individual. The recent ways of transferring property are the three modes of transfer of immovable property recognised in Sikkim, i.e, by sale, gift or acquisition in all communities.[26]

The Sikkim Code which is available in several volumes is totally based on Customs and Traditions of Sikkimese people. These Codes existed before the merger of Sikkim into India and much later after the merger, a draft on Sikkim Customary Laws and Usages on Lepcha, Bhutia and Nepali community were compiled in the year 2002, which also has its roots in Customs and Usages of Sikkim Society. The Supreme Court in the case of ***State of Sikkim v. Surendra Prasad***[27] held that Article 371F begins with a non-obstante clause which to the extent relevant and contextually permissible, applies to all the clauses which run contrary to the provision of the Constitution. The Article is a special provision relating to the State of Sikkim. All laws which were in force in Sikkim prior to the appointed day, i.e, 26-04-1975, were intended to continue to be in force until repealed or altered.[28]

In ***SonamTopgyal v. Gompu,***[29] it was held that there is no doubt that in Sikkim, there is, yet no statutory law authorising testamentary disposition. But in practice, Wills had been recognised, acted upon and given effect to in the Court of Sikkim as valid modes of post mortem disposition of properties. The Shastric Hindu Law did not recognise testamentary disposition and statutory provisions had to be made by and under the provisions of the Hindu Wills Act, 1870 empowering the Hindus to make Wills. Buddhism also favoured intestacy and as pointed out by the Privy Council in ***Dwe Maung v. Khoo Haung Shein***[30], according to "the Strict Buddhist view' intestacy is compulsory". As the personal laws of the Hindus and Buddhists did not recognise testamentary disposition, doubts have arisen as to whether the Hindus and Buddhists in Sikkim can validly make Wills in absence of legislative provisions.

The Courts further observed that[31], "If a legislation was necessary to authorize and validate testamentary disposition, then even the Indian Hindus, Buddhist or Christians settling or residing in Sikkim could make Wills in absence of such legislations." The Courts in Sikkim also accepted and recognised Wills made by

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[26] Ongyal Bhutia vs. Phumpi Bhutia & others RFA No. 20 of 2013, High Court of Sikkim.

[27] AIR 1994, SC 2342.

[28] Durga Das Basu, *Commentary on the Constitution of India* (8th Ed, Wadhwa Nagpur 2007) 1152

[29] AIR 1980 Sikkim at pp.41, 42.

[30] AIR 1925 PC 29 at p.31.

[31] Sonam Topgyal v. Gompu, 1980 Sikkim 33 at pp.42,43.

the Hindus, Buddhist and other people in Sikkim in numerous cases and has been exercised by the people of Sikkim as a valid mode of disposition of properties and has also been recognised by the legislative laws of the country.[32] The Courts in Sikkim presently are implementing the Indian Succession Act and properties left behind by a tribal father in the name of the daughter are also being registered in her name and further even the Succession Certificates are applied under this Act before the Lower Courts in Sikkim.

The Sikkim Succession Act, 2008 has great importance for women of Sikkim as after this Act daughters will get equal right to claim her share of the property from her parent. Section 3(d) of the Sikkim Succession Act, 2008 provides that, "heir" means any person male or female who is entitled to succeed to the property of an intestate under this Act.[33]

The Process For Devolution of Property In Sikkim according to the 2008 Act which is yet to be notified :- Section 2 of the Sikkim Succession Act, 2008 deals with applicability of the Act which clearly states that it's applied to persons who possess Sikkim Subject Certificate / Certificate of Identification (COI); descendants of the Sikkim Subject Certificate holder who has to be first identified through COI. It has also been stated that woman who marries a non-Sikkimese or if she acquires foreign citizenship shall not be eligible to enjoy the rights of descendants and heir held as a descendant.[34]

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[32] Dr. V.N.Tripathi, *The Indian Succession Act, 1925* (Reprint Edition, Premier Publishing Company 2010) 59.

[33] Sikkim Govt. Gazette, 2008, Volume II , p 57.

[34] The Sikkim Succession Act 2008, s 6(2). In case there is more than one surviving heir of an intestate then the property will be inherited in equal proportions.). s 6(3). The property of an intestate devolves upon the wife or the husband or upon those who are of the kindred of the deceased as per the Schedule under the Sikkim Succession Act 2008). s 6(4). In case the deceased husband is survived by a widow without any lineal descendants, the property will devolve to the next of the descendents of the brother of the deceased husband as per the schedule under The Sikkim Succession Act 2008). s 6(5). If the descendant or heir is a female and she marries to someone without the Certificate of Identification, then she cannot retain the interest in the property as she has to follow the personal law of her husband.). S 6(6). If the heir is a minor and parent are deceased intestate and no eligible heir claims responsibility to look after the property, then the appropriate authority will take care of the property on behalf of the minor heir.). s 6(7). The property will devolve to the daughter, if the deceased has no son, subject to above mentioned sub clause 5 and 6.). s 6 (8). In case of a divorced or abandoned woman who has no source of income, but has to take care of the children then the property will devolve to the woman in equal proportion along with other eligible heirs. This is only applicable if the woman has not deserted her husband and remarried. However, in such case the children of the deceased are eligible to equal share of the property. Lastly, the property of an intestate shall devolve in equal shares among all the heirs

Under section 6 sub-clause (1) of the Act:-if a Sikkimese male dies after the commencement of this Act, who had at the time of death, an interest in the property or had a self-acquired property, the property shall devolve among the surviving members of his family which includes his wife, sons and unmarried daughters in equal proportion. If the deceased has a surviving female relative who claims an interest in the property in such case the property will devolve to the extent she is entitled.[35]

According to Section 4 of the Sikkim Succession Act, 2008 the State Government has exempted the applicability of this Act to the members of the community or tribe or sect. The State of Sikkim comprises 50% of the population who are tribal and beneficiaries of this Act. Under the provision of Section 4 (2) if the State Government may by notification in the Official Gazette withdraws or revokes such exemption then they may get actual benefits from this Act.

Below are some interviews regarding the Inheritance rights of women in Sikkim taken for an opinion relating to Inheritance rights of women in Sikkim.

Case Study-1

Mr Topgay Bhutia (respondent) aged 72 years belongs to the tribal community. He lives in Chumbung Pelling West Sikkim, he was once a village Mandal[36] and has 2 sons and 2 daughters. When his two daughters were married within the Bhutia community, he gave his married daughters a portion of his land each as Phezong[37]. On being asked if he was aware of the new changes in inheritance law whereby daughters and sons inherited their father's ancestral property equally. He said he wasn't aware of such Law, rather he replied that the Bhutias and Lepcha's are governed by their own customary laws and he was, therefore, following these Customary Laws. After his death as per custom, his two sons would be inheriting his property as it has always been done since ages. He also mentioned that when he got married, his wife also did not get any property from her father as it was not practiced at all in their community and with passage of time those who are economically sound and hold large share of property they often give their married daughters a piece of land and further it is not compulsory to do so in their customs. He mentioned that only unmarried daughters are given a small plot of land for their future security and which can be of use during their old age when no one is there, to look after them.[38]

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[35] The Sikkim Succession Act, 2008, (yet to be notified in the official gazette).

[36] A Village Headman during the Kings time.

[37] Pezong means cash and gift given during marriage to the bride from her groom side.

[38] Interviewed on 12th Dec' 2016 in Pelling, Chumbung Village, West Sikkim at 10 am.

Case Study-2

Ms. Pema Bhutia (respondent) aged 52 years who belongs to the tribal community resides in a village near Amba Block, Pakyong, East Sikkim, when interviewed she revealed that her father Lt. Tshering Bhutia who before dying distributed his property among his 4 sons and 2 daughters equally as his two daughters were unmarried and in Bhutia community unmarried daughters are given a portion of their fathers property under their own Customary Laws. She further informed that, if the daughter is unmarried she retains the properties of the parents, but then she does not have the right to sell off the properties as and when she wishes and if she wishes to sell the property her brothers will have to be given the first offer for sale, and if she gets married she loses the right to her parental properties which she had when she was unmarried.[39] This system was practised for the safeguard of the unmarried daughter and also to see that the ancestral property stays within the family clan.

Case Study- 3

Mrs. Beba Maya Rai (respondent) aged about 72years, w/o Late Man Bahadur Rai, belonging to Nepali community, lives in Kabirthang, Yangtey, West Sikkim and she has 2 married daughters and 2 sons. When her mother in law passed away she had given the property to her and transferred the property in her name, which she said will give to her sons as she has a small portion of landed property. Her view on holding the property- she said it gave her more respect and security in the society after the death of her husband also; she was not discarded from the society. If women are given equal property rights along with the male, they will be more independent and equality issue will be solved.[40] So it can be seen that with due course of time the mindset of people is changing and people are taking a step towards women equality if the Customary Laws are not in the ways of benefitting the women, it should be replaced with the beneficial laws for women so they grow not in population but in their status too.

In the case of ***Krishan Chander Goyal v Bal Kumar Rasaily***[41] *and others, it was stated that the Hindu Succession 1956 is not extended to State of Sikkim and daughters do not inherit the property of their father under old Hindu Law. In many cases Indian Courts through Judicial Activism are letting the tribals take the benefit of the Hindu Law like in the case of* ***Doman Sahu v Buka and others, were***[42] it was held that though the Mundas and Mundari

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[39] Interviewed on 2nd November 2016 , in Amba Block East Sikkim at 1 pm.

[40] Interviewed on 10th dec 2016 in, West Sikkim at 11 am.

[41] AIR 1933 Sikkim 5 High Court.

[42] AIR 1931, Pat 198, Appeal No.33 of 1929.

women are aborigines of Ranchi District and are akin to other tribals, since they regard themselves as Hindus and as such they are bound by Hindu Law, the Patna High Court held that the Hindu Succession would apply to them.

The Hindu Succession Act of 2005 had made many revolutionary changes in India relating to succession particularly for Hindu female and now she could become an absolute owner of the property. According to Section 6 of the Hindu Succession Act, 2005 daughters could now inherit equally with a male counterpart and widows were also given more importance regarding succession of her husband's property as also to her father's property. The daughters of a coparcener in a joint Hindu family governed by Mitakshara Law, shall by birth become a coparcener in her own right in the same way as the sons having the same rights and liabilities in respect of the said property[43], the daughters are finally treated equally by the law giving them the long awaited rights to inherit. A woman's property rights vary depending on her religion, her marital status, the State she comes from and her tribal status.

The issue which has been raised in this batch of matters is whether Hindu Succession (Amendment) Act, 2005 ('the Amendment Act') will have retrospective effect. In the impugned judgment (reported in ***Phulavati*** vs. ***Prakash***[44]), a plea of retrospectively has been upheld in favour of the respondents by which the appellants are aggrieved. It is held that the Act has a retrospective effect. It is a well-known truth that women's ability to inherit land is often restricted. Women whether married, widowed or unmarried often possess momentary rights to land. Legal barriers to women's ability to inherit property often put women at a strong disadvantage and may be at the root of broader patterns of inequality. Indeed, stronger inheritance rights for women are likely to be a potent mechanism for improving a range of outcomes.[45] This paper is an attempt to estimate the impact of legislative changes in inheritance rights on women's lives in the State of Sikkim. It can be analysed that while more gender-equal inheritance rights did lead to encouraging effects for women; it did not fully remove the main gender inequality.

IV. Conclusion

In the year 1997, *Padma Kumari Ganesan's case was first of a kind, wherein, the issue was raised for the first time on the inheritance rights of a woman*

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[43] See Section 6 of Hindu Succession Act 2005.

[44] AIR 2011 Kar.78

[45] Klaus Deininger, Aparajita Goyal, and Hari Nagarajan. 2010. "*Inheritance Law Reform and Women's Access to Capital: Evidence from India's Hindu Succession Act.*" Policy Research Working Paper 5338, World Bank, Washington, DC.

marrying outside Sikkim before the High Court of Sikkim. Further, the Sikkim Succession Act passed in the year 2008 provides for the equal property rights for Sikkimese and Hindu Women, which also includes daughters and wives, divorced or abandoned wives who possess Sikkim Subject Certificate. They can claim the equal share from their father's and husband's property. Sikkimese Hindu women have an equal right to inheritance of property with their male counterparts irrespective of their marital status, though the Act is yet to be enforced.

This paper further states that, judicial decisions have reflected such views in their dictum, if tribals of a certain tribal area declare themselves to be Hindus, then they should be given a chance to get married, divorced and also acquire property equally with the male member as under the Hindu Law and not the Customary Laws of that particular area or State. The Indian Constitution has provided women equal status under Articles 14, Article 15(2), (3) and 16. These articles are of great effort towards preventing discrimination against women. The Judiciary in Sikkim should interpret the gender friendly rights of women and provide them with their much-awaited rights in the inheritance of their hereditary property. When a woman is given an equal share in her parental property, it is seen that violence against a married woman is less and also they are treated with respect in the society.

This paper reflects with regard to equal share of the property to a girl child, the parents felt that it was the custom to give the hereditary property to their son and it shall pass on to the coming generations within the same blood and title. These Customs are prevalent in the society which has now taken a position of customary practices regarding inheritance. It was further experienced that, if they give away the property to their daughter then fear of upsetting their sons was there, as they were looked after by them during their old age and were also the ones who would perform their last crematory rituals after their death. This further focuses on equal shouldering of responsibilities both by sons and daughters to their parents during their old age. There is a need for implementing a law which sets the accountability to both the genders in India when the responsibilities are shared equally, then their claim to their hereditary property can also be justified. There is a dire need for legal literacy for awareness among the women of their legal rights and strengthen statutory laws to make women access to land and property and also customary inheritance practices which are discriminating towards women should be abolished.

Strengthening Gender Justice in the Wake of Prevailing Poverty: An Analysis under Human Rights Regime

Kumari Nitu*

Poverty though is a global problem but its effect on the women has been more catastrophic. Men, whether poor or not are deprived of the opportunities of life. Women, on the other hand, are not only denied but also discriminated when it comes to their right to equal opportunities and other rights which are meant for complete development of a human being. Though there have been laws and policies assuring the rights of the women, the framers of the rights failed to consider the fact that women caught in the circle of poverty cannot have access to those rights. The need of the hour is not only to have just rights but also the means to have access to those rights and moreover, there is a need for enhancing the capabilities of women to claim their rights. All these cannot be accomplished unless and until the poverty of women is eliminated. The human rights of the women cannot be assured when half of the population is living under severe deprivations.

1. Introduction

The prevailing poverty is posing a great threat not only to the notion of gender justice but also to human rights of the women in particular. Despite the crucial issue at hand, the dilemma lies in the lack of any hard law to deal with it. For example, though we have certain provisions in the Constitution which assure gender justice, the problem lies in the enforcement of those provisions by the concerned parties i.e. the females. Gender in popular parlance constitutes both male and female but when we talk about gender justice, the attention is automatically drawn towards the female community because they have since

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long been deprived of every means of justice whether it is economic, social or political justice.[1]

2. Poverty: A Brief Description

Poverty is generally defined as a "condition characterized by severe deprivation of basic human needs including food, safe drinking water, sanitation, shelter, health care, education, and information."[2] And if the above-mentioned determinants of poverty are seen in context of women, then they constitute the disadvantaged community among the poor.

Earlier income was the sole determinant of poverty, however, with a change in time the traditional criterion for determining poverty has also undergone change.[3] Now, income is one of the factors. To give poverty a more human approach and to supplement the income factor to poverty, the Human Development Report (HDR) has come out with Human Poverty Index (HPI). There are three indicators of Human Poverty Index.[4] First is life expectancy, second is literacy and third is living standard which is again measured considering the three variables of health, safe water, and nourishment of children under five. The concerns towards the women community has also helped in the development of Gender Development Index (GDI).[5] The GDI measures gender gaps in human development achievements by accounting for disparities between women and men in three basic dimensions of human development—health, knowledge, and living standards.[6]

2.1. Indicators of poverty and the situation of women

The World Health Organization (WHO) released a report entitled "World Health Statistics 2016: monitoring health for the SDGs".[7] In its report the WHO mentions

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[1] Fatima Tanzeem, 'GENDER JUSTICE: A CONCEPTUAL ANALYSIS' (2013) 1(4) Excellence International Journal of Education and Research (Multi- subject journal) <http://www.ocwjournalonline.com/Adminpanel/product_images/39172f2f9c3cbcc06b31880d9e870966.pdf> accessed 8 May 2017

[2] United Nations, 'World Summit for Social Development: Chapter 2- Eradication of Poverty' (1995) <http://www.un.org/esa/socdev/wssd/text-version/agreements/poach2.htm> accessed on 28 April 2017

[3] James Gustav Speth, 'Poverty: A denial of human rights' (1998) 52(1) *Journal of International affairs* 277 <http://www.jstor.org/stable/24357823>accessed on 27 April 2017

[4] N. Krishnaji, 'Human Poverty Index' (1997) 32(35) *Economic and Political Weekly* 2202

[5] UNDP, 'Gender Development Index' *Human Development Reports*<http://hdr.undp.org/en/content/gender-development-index-gdi> accessed on 8 April 2017

[6] ibid.

[7] World Health Organization, 'Statistics 2016: Monitoring health for the SDGs' *News Release* (Geneva, 19 May 2016) <http://www.who.int/gho/publications/world_health_statistics/2016/en/>accessed on 17 April 2017

that women live more than men on an average but the life expectancy and the difference on the basis of gender are due to the gender norms, roles, and relations.[8] The increased life expectancy is not an achievement in favour of women rather it is the ill habits of men such as intoxication and tobacco which causes frequent deaths. Women, on the other hand, face great hurdles in health-related issues owing to lack of access to reproductive assistance in remote areas, sanitation, and nutrition related issues.

The report also points out that girl who gets married early misses out education and other socio economic opportunities. This, in turn, widens the gender gap and also aggravates the vicious circle of poverty.[9]

Women have never been allowed, due to gender discrimination, to perform the same level of work which men have been performing. They do not lack the ability rather they have never been given the opportunity to perform that work. The poverty of the family and the poor conditions also does not allow the family to think of investing on the needs of women. They consider investing on men as an asset but the women are never seen that way. The prevailing poverty hinders the progress of women not only at the family level but at the community level as well.

With regard to the third criterion of human development index, there are still a large number of indicators with reference to women which has been left out. These are the factors which the women have always been deprived of, such as, deprivation of gainful employment, deprivation in education, deprivation of basic human rights including equality before law and justice, gender disparities, political non-participation, non-information etc. All these in aggregate deprive the women of having a good standard of living.

Poverty entails not only the general population within its ambit but it has a more devastating effect on a more specific populace i.e. the women community. In scholarly terms, this has been termed as the feminization of poverty.[10] Till now the gravity of poverty has been measured on the per capita income scale and the overall growth of the nations which in popular parlance is called the gross domestic product (GDP). But now initiatives are made to measure it on the basis of capabilities approach. Capabilities approach means the availability of

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[8] ibid [24].

[8] ibid [68].

[10] Cagatay, Nilufer, 'Gender and Poverty", Working Paper Series 5'*(UNDP Social Development and Poverty Elimination Programme*,1995) <http://www.pnud.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf>accessed on 15 March 2017

the means of basic human developments.[11] With reference to poverty, it is something which cannot be confined to one dimension alone. It has its own manifestations and as long as all these manifestations are not dealt with, it is not possible to eradicate poverty completely. One such manifestation is poverty of the women. Since long poverty continued to be measured in context of the population as a whole but there are areas which needs special attention and poverty of the women is one that area which has been left unnoticed for long. This is one of the reasons that despite of so many efforts being made worldwide, poverty has still not been eliminated and the vicious circle of poverty continues to haunt the world.

The indexes of poverty measurement such as life expectancy, education, and availability of basic services are not available to women and this is where the feminization of poverty comes into light. Women who are availed of these facilities will be able to break the vicious circle of poverty and can act for the betterment of their family. This is so because when they are indulged in decision making then they will be in a position to stop extra expenses. A study done in Mexico and Honduras reveals the fact that men contribute only half of their income in family basic expenditures and the income which a woman earns is generally undervalued despite the fact that she gives all her income for the benefit of the family.[12]

The poverty of women operates at different levels and in almost every field.[13] They are discriminated at every level. The discrimination begins at household level when they are denied the opportunities in the distribution of assets, education, health, early marriages, child rearing and other constraints which limit their future opportunities of leading a good life and breaking this cycle of poverty. There has been a very wrong notion till date that prosperity can only be measured in terms of income which a family is earning or the availability of basic necessities available to the family as a whole. The horizons of poverty measurement with respect to women were widened when the scholars started considering the other manifestations of poverty also within the ambit of poverty such as poverty of social exclusion, lack of decision making or making their own economic and political stand.

Another factor is about the distribution of assets in the family.[14] Women, in general, are not considered to have a say in the resources of the family. This

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[11] ibid.

[12] ibid.

[13] Alison Dundes Renteln, 'The Concept of Human Rights' (1998), 4(6) *Anthropos Bd.* 343-364 <http://www.jstor.org/stable/40463371>accessed on 16 March 2017

[14] Cagatay, Nilufer, 'Gender and Poverty Working Paper Series 5'*(UNDP Social Development and Poverty Elimination Programme*,1995) <http://www.pnud.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf>accessed on 15 March 2017

limits their economic opportunities. Men on another hand owe the property owing to the inheritance and are in a position to run a business of their own. Women on the other hand, neither have an investment to start a venture of their own nor do they get easy loans from the financial institutions. All these compel a woman to take a job in the informal sector where the wages are usually low and therefore they are unable to become economically independent.[15] Moreover, whatever income they earn is not valued much at the family level despite the fact that they are earning these amounts along with the unpaid family responsibilities which they are carrying on. Also, their responsibilities in the household are so institutionalized that they are not seen as such apart from being a mother and a wife. Women belonging to a poor community are not even given proper education or proper health facilities. There are other factors such as early child marriage, lack of education, maternal mortality owing to early reproduction etc. which limits their every chance of leading a quality life.

Several studies have been conducted in different parts of the world which reveal the fact that women are the poorer amongst the poor.[16] The study done in Nicaragua states that 68 percent of the population lives in poverty and amongst it, the condition of women is even worse because of the low payment which they get from the unorganized sector and their dependency on the men which obstructs them from making any independent decision.[17] This is not only a violation of their human rights of equal pay for equal work but a great insult to their labour as well.

In Kenya, 85% of the daily calorie intake of women is burnt due to fetching of water.[18] It is because the natural water resources of Kenya are not equitably distributed and people there suffer due to scarcity of water.[19] The government is also not competent enough to take any adequate remedy to solve the problem

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[15] USAID, 'Gender and Extreme Poverty' (2015) *USAID Discussion Series*<https://www.usaid.gov/sites/default/files/documents/1870/Gender_Extreme_Poverty_Discussion_Paper.pdf>accessed on 15 March 2017

[16] Cagatay Nilufer, 'Gender and Poverty", Working Paper Series 5'*(UNDP Social Development and Poverty Elimination Programme*,1995) <http://www.pnud.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf>accessed on 15 March 2017

[17] Sarah Bradshaw, 'Poverty: An Analysis from The Gender Perspective'(2002) *Catholic Institute for International Relations*<https://www.globalpolicy.org/component/content/article/218/46391.html>accessed on 20 March 2017

[18] UNDP, 'Gender and Poverty Reduction' <http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_gender_and_poverty.html>accessed on 20 March 2017

[19] Shannyn Snyder, 'Water in Crisis – Kenya' *The Water Project* <https://thewaterproject.org/water-crisis/water-in-crisis-kenya>accessed on 23 March 2017

and hence a large chunk of the population is involved in fetching water from far away sources of fresh water and most of their time and energy is consumed in that only.[20] This restricts their opportunity of doing anything creative and also for the children to engage in education hence aggravating the already prevailing poverty.

The percentage of women being employed in gainful work is also low in developing countries.[21] Some reports also state that gender inequality is directly proportional to human poverty index. For example, countries such as Sierra Leone, Niger, Burkina Faso and Mali who rank lowest in the Gender Development Index also rank low in the HPI whereas the countries such as Costa Rica, Singapore, Trinidad and Tobago have a good ranking both in the HPI and GDI.[22] The above-mentioned statistics though few in number show that poverty needs a holistic approach to overcome the overall prevailing poverty and poverty of women is indeed a part of it.

3. A Human Right Approach to Poverty of Women

The Universal Declaration of Human Rights (UDHR) is one such document which though is not legally binding but has been so impactful that any violation of the UDHR principles attracts severe criticism around the world. In this section, we will discuss some of the rights of women under the UDHR which are violated due to extreme poverty. It can be further sub divided into two categories stated below:

3.1. Poverty of Women and Consequent Violation of UDHR Principles

There are some important principles of the UDHR which are discussed below. The issue of poverty has also been discussed along with to show how poverty is causing their violation.

a) Universality and Inalienability[23]

The principle of universality is manifest in the title of the declaration itself which says, "Universal Declaration of Human Rights" and affirms the universal nature

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[20] ibid.

[21] UNDP, 'Genderand Poverty Reduction<http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_gender_and_poverty.html >accessed on 20 March 2017

[22] Cagatay Nilufer, 'Gender and Poverty", Working Paper Series 5'*(UNDP Social Development and Poverty Elimination Programme*,1995) <http://www.pnud.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf> accessed on 15 March 2017

[23] Stephen P. Marks and Ajay Mahal, 'Economics and Human Right Perspectives On Poverty'(2010) in Bård A. Andreassen, Stephen P. Marks and Arjun K. Sengupta (eds.) *Freedom from Poverty as a Human Right: Economic Perspectives* 25<//unesdoc.unesco.org/images/0018/001876/187610e.pdf>accessed on 23 April 2017

of the declaration. The principle of universality means that the declaration has an application throughout the world and to all the people.[24] The declaration in the first article states that all men are born free and are equal in rights and dignity.[25] But the women have neither been treated equal nor with dignity.

The principle of inalienability finds its place in the opening paragraph of the UDHR. The preamble recognises that equal and inalienable rights of all members of the human family are the foundation of freedom, justice, and peace in the world.[26] But if seen in context poverty, despite UDHR being universal in nature, poor women are still not being assured of their rights to have an adequate standard of living.

b) Indivisibility[27]

The principle of indivisibility states that human rights whether they are in the form of civil, economic, cultural, political or social rights constitute the human rights as a whole and all the rights mentioned above are important for the well-being of the people.[28] No right has an upper hand in comparison to other. If this principle is seen in the context of poverty of women, then it is the denial of all the five rights viz. civil, political, cultural, economic and social, which as a whole constitutes the human right.[29] The other possible interpretation of the principle of indivisibility in the context of poverty is that the State should try for the advancement of the human rights as a composite whole and not infractions. But again, this interpretation of indivisibility in the context of advancement of human right of women is highly misunderstood.[30] This is so because if some right has been ignored for long, then it is nothing wrong in promoting and making efforts

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[24] ibid.

[25] Universal Declaration of Human Rights <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

[26] Universal Declaration of Human Rights <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

[27] Stephen P. Marks and Ajay Mahal, 'Economics and Human Right Perspectives On Poverty' (2010) in Bård A. Andreassen, Stephen P. Marks and Arjun K. Sengupta (eds.) *Freedom from Poverty as a Human Right: Economic Perspectives* 25 <//unesdoc.unesco.org/images/0018/001876/187610e.pdf>accessed on 23 April 2017

[28] ibid [26].

[29] Bard A. Andreassen, Stephen P. Marks and Arjun Sengupta(eds.) 'Introduction: Freedom from Poverty as a Human Right' (2010) 3 <http://unesdoc.unesco.org/images/0018/001876/187610e.pdf> accessed on 23 March 2017

[30] Siddiqur R. Osmani, 'The Human Rights Approach to Poverty Reduction' (2010) in Bård A. Andreassen, Stephen P. Marks and Arjun K. Sengupta (eds.) *Freedom from Poverty as a Human Right: Economic Perspectives* 101 http://unesdoc.unesco.org/images/0018/001876/187610e.pdf accessed on 23 March 2017

for the advancement of that right.[31] For example, if reservations are made for the upliftment of women, then it neither hampers the indivisibility of rights nor is a denial of gender justice.

c) Equality and non-discrimination[32]

The principle of equality is highlighted under Article I of the UDHR which states that all human being are born free and are equal in right and dignity.[33] Article II, on the other hand, embodies the principle of non-discrimination wherein it states that everyone is entitled to rights and freedom set forth in the declaration without any distinction of any kind.[34] Despite the principle of equality and non-discrimination reflected in the UDHR, we see that there is inequality in the society owing to poverty. Men are still placed in a privileged position when it comes to giving of opportunities in education or employment sector. Poverty carries with it the baggage of many deprivations to women such as lack of education, access to government services, resources, lack of having any say in the decision making and many other deprivations.

3.2. Poverty of Women and Consequent Violation of UDHR Provisions

Stated below is the study of certain provisions of UDHR which are violated due to the poverty of women:

i) The Preamble

The declaration in its preamble mentions the phrases such as inherent dignity and equal and inalienable rights on which the whole edifice of UDHR is built. There is neither equality nor dignity when half of the population is living under the aegis of poverty despite the advancement made by the countries of the world in all sectors. 'Dignity' also does not find its due in the lives of poor women. Women are generally voiceless whether rich or poor but to talk of poor women the situation is even worse when it comes to attributing dignified life to

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[31] Ibid.

[32] Stephen P. Marks and Ajay Mahal, 'Economics and Human Right Perspectives On Poverty'(2010) in Bård A. Andreassen, Stephen P. Marks and Arjun K. Sengupta (eds.) *Freedom from Poverty as a Human Right: Economic Perspectives* 25<//unesdoc.unesco.org/images/0018/001876/187610e.pdf>accessed on 23 April 2017

[33] Universal Declaration of Human Rights <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

[34] Universal Declaration of Human Rights <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

them.[35] They are considered nowhere on the scale of dignity. They are hence denied the right to dignity.[36] It is also not true to say that women do not have any knowledge of their right. It has been stated by UNESCO that people very well know about their rights and remedies available to them in the case of violation.[37] The problem in the present era is not of awareness but of having access to the means through which they can get their rights implemented and exercised. So, they are not ignorant people rather are the victims whose rights are blatantly violated.[38]

ii) Article 23(2) of UDHR

Article 23(2)of the declaration states that there should be equal pay for equal work.[39] But studies reveal that men are generally preferred when it comes to paying hike or promotions in the job owing to career breaks of the women due to marriage, pregnancy, and motherhood.[40] Employment of the women is one factor which can reduce poverty of the women but employment alone will not suffice unless and until there is adequate and equal payment for the work done.[41]

iii) Article 25 of UDHR

The article in its first clause asserts the right of every person to have an adequate standard of living.[42] The ambit of an adequate standard of living enlists the right

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[35] Bard A. Andreassen, Stephen P. Marks and Arjun Sengupta(eds.) 'Introduction: Freedom from Poverty as a Human Right' (2010) 3 <http://unesdoc.unesco.org/images/0018/001876/187610e.pdf> accessed on 23 March 2017

[36] ibid.

[37] ibid.

[38] Bard A. Andreassen, Stephen P. Marks and Arjun Sengupta(eds.) 'Introduction: Freedom from Poverty as a Human Right' (2010) 3 <http://unesdoc.unesco.org/images/0018/001876/187610e.pdf> accessed on 23 March 2017

[39] Universal Declaration of Human Rights, 'Article 23(2): Everyone, without any discrimination, has the right to equal pay for equal work' <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

[40] PTI, 'India suffers from huge gender pay gap, says report' The Hindu (New Delhi, 18 May 2016) <http://www.thehindu.com/business/Economy/India-suffers-from-huge-gender-pay-gap-says-report/article14324693.ece#> accessed on 20 April 2016.

[41] UNDP, 'Gender Inequality: Gender Trends in Livelihood' <http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Inclusive%20development/Humanity%20Divided/HumanityDivided_Ch5_low.pdf> accessed on 25 April 2017

[42] Universal Declaration of Human Rights, 'Article 25(1):Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control' <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

to food, clothing, housing, medical care, social services, and security.[43] It has been argued by some of the scholars that right to an adequate standard of living fulfils the criterion of right not to be poor.[44] The statement is made keeping in view all the rights associated with the right to an adequate standard of living. If a person has all the necessities required for a living and that also which is prescribed under Article 25(1), then a person is no poor. It is also argued that since the poverty itself implies that a person who is poor has been denied a range of human rights which were essential for his/her complete development, so a fight against poverty of women becomes directly proportional to the achievement of human rights of the women.[45] The article in its second clause states that motherhood and childhood are entitled to special care and assistance.[46] The assertion is again evident of the fact that women rights need special enactments.

iv) Article 27 of UDHR

Article 27 of the declaration mentions that everyone has the right to education. The declaration is built on the principle of non-discrimination but it is generally observed that the girl child is often deprived of right to education due to household works or early marriage.[47] The reason for such deprivation ranges from lack of means to afford the education to the social norms of the society which debar the girl child from getting any education. Even though in many States the primary education is free and is made accessible to all, it is a matter of great concern that girl child is still kept away from recourse to education. Though the number of countries who had gender disparities in education has reduced considerably stills the poor girls in the sub-Saharan Africa have almost no access to education.[48]

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[43] Universal Declaration of Human Rights <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

[44] Bard A. Andreassen, Stephen P. Marks and Arjun Sengupta(eds.) 'Introduction: Freedom from Poverty as a Human Right' (2010) 3 <http://unesdoc.unesco.org/images/0018/001876/187610e.pdf> accessed on 23 March 2017

[45] ibid [6].

[46] Universal Declaration of Human Rights, 'Article 25(2):Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection' <www.un.org/en/universal-declaration-human-rights> accessed on 27 April 2017

[47] Rachel Williams, 'Why girls in India are still missing out on the education they need' *The Guardian* (India, 11 March 2013) <https://www.theguardian.com/education/2013/mar/11/indian-children-education-opportunities> accessed on 30 April 2017

[48] UNESCO, 'EDUCATION FOR ALL 2000-2015: achievements and challenges' (2015) *EFA Global Monitoring Report* <http://unesdoc.unesco.org/images/0023/002322/232205e.pdf> accessed on 15 April 2017

4. International Law to Curb the Menace

There is indeed certain conventions and laws at the international level for the protection of women but a woman with an empty stomach and her needs unfulfilled cannot go for the enforcement of her rights. It is very much necessary that legislation should be made to pull her out from the vicious circle of poverty. One such piece of law is the Convention for Elimination of Discrimination Against Women (CEDAW). It was enacted on the edifice of equal rights of men and women as provided in both the Charter of the United Nations and the Human Rights Declaration.[49] The aim of the convention is to end all sorts of discrimination against women.[50] The United Nations had been instrumental in campaigning the cause of women empowerment and gender justice through agencies such as Commission on the status of Women and the UN Development Fund for Women.[51]

But all efforts made have been in the direction of assuring gender justice and not towards eliminating poverty of women. As stated, a woman even though has rights on the paper but do not have the implementation machinery at hand for the enforcement of those rights. The need of the hour is to have targeted efforts for eradication of poverty of women. Educated, informed and a woman with no more empty stomach can only be in a position to have complete access to the rights meant solely for her advancement such as rights in the form of CEDAW, voting rights, education rights and also rights to equal share in the property.

5. The Role of International Institutions in Eliminating Gender Based Poverty

There have been some efforts made by the national as well as the international institutions to deal with the poverty of women as a strategy to deal with the all-pervasive poverty. In this context, we, will in particular, see the works of UNDP and World Bank:

5.1. United Nations Development Programme (UNDP)

The work of UNDP in this regard has been quite instrumental. UNDP has launched several programs which empower the women by facilitating training

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[49] United Nations General Assembly Resolution 34/180, 'Convention on the Elimination of All Forms of Discrimination against Women' (1979) <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/34/180> accessed on 8 May 2017

[50] ibid.

[51] Fatima Tanzeem, 'GENDER JUSTICE: A CONCEPTUAL ANALYSIS (2013) 1(4) *Excellence International Journal of Education and Research (Multi- subject journal)* <http://www.ocwjournalonline.com/Adminpanel/product_images/39172f2f9c3cbcc06b31880d9e870966.pdf> accessed 8 May 2017

programs, financial contributions made to promote women, supporting the generation of employment for women, helping them start business ventures,[52]. Efforts have also been made to educate the girl child by several programs carried on by UNDP.[53] The activities and aid programs of UNDP in Cambodia, Kenya, Burkina Faso, China and Mongolia have been very useful in empowering women.[54] Apart from international aids which come from established institutions, national governments should also work for the advancement and empowerment of the women residing within their territory. Such efforts should include measures such as, providing them equal share in the household resources,[55] equal access to education,[56] providing them higher education to avail them of good job opportunities,[57] the works of UNDP should be followed by the State governments also.[58] The available data regarding poverty of women should be used to plan the national policies to target specific problem area.[59] Other possible remedies can include ensuring equal opportunities for women at par with men in key sectors such as agriculture, education, and domestic responsibilities etc.[60] the eradication of poverty is placed on top of the sustainable development goal list,

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[52] Cagatay Nilufer, 'Gender and Poverty", Working Paper Series 5'*(UNDP Social Development and Poverty Elimination Programme*,1995) <http://www.pnud.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf>accessed on 15 March 2017

[53] USAID, 'Gender and Extreme Poverty' (2015) *USAID Discussion Series*<https://www.usaid.gov/sites/default/files/documents/1870/Gender_Extreme_Poverty_Discussion_Paper.pdf>accessed on 15 March 2017

[54] Cagatay Nilufer, 'Gender and Poverty", Working Paper Series 5'*(UNDP Social Development and Poverty Elimination Programme*,1995) <http://www.pnud.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf>accessed on 15 March 2017

[55] ibid.

[56] UNDP, 'Our Work: Gender and Poverty Reduction' <http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_gender_and_poverty.html> accessed on 21 April 2017

[57] USAID, 'Gender and Extreme Poverty' (2015) *USAID Discussion Series*<https://www.usaid.gov/sites/default/files/documents/1870/Gender_Extreme_Poverty_Discussion_Paper.pdf>accessed on 15 March 2017

[58] UNDP, 'Our Work: Gender and Poverty Reduction' <http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_gender_and_poverty.html> accessed on 21 April 2017

[59] Cagatay Nilufer, 'Gender and Poverty", Working Paper Series 5'*(UNDP Social Development and Poverty Elimination Programme*,1995) <http://www.pnud.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf> accessed on 15 March 2017

[60] USAID, 'Gender and Extreme Poverty' (2015) *USAID Discussion Series*<https://www.usaid.gov/sites/default/files/documents/1870/Gender_Extreme_Poverty_Discussion_Paper.pdf>accessed on 15 March 2017

the aim of sustainability cannot be achieved if half the population comprising of women is left unnoticed.

5.2. World Bank

The World Bank in the year 2017 released its Atlas on Sustainable Development Goals (SDGs). The report mentions the problem area and the possible solution for every goal under the SDGs. Similarly, under the Gender Equality, it states the State practices with relation to the difference between laws relating to men and women which hinder the progress of the women.[61] It also states that the early marriage of the girl obstructs the gainful education which they could have received. This in turn, forces them towards the informal sector of employment which is low paid and hence aggravates the poverty.[62] Despite the Declaration of the Human Rights on equal pay for equal work, women since long have been denied this right.[63] The bank states it emphatically that no country can progress sustainably if the choices, opportunities, and resources are not distributed equally among male and female.[64] The equal distribution is important for eradication of poverty in general and that of poverty of women in particular.

The International Development Assistance (IDA) which is part of the World Bank has been instrumental in providing loans and grants to programs that work in the direction of reducing gender inequalities.[65] An IDA-supported project is currently disbursing roughly $2 million in loans to growth-oriented women entrepreneurs every month.[66] Apart from it, 17 million pregnant women received prenatal care during a visit to a health provider from FY 13-15, with help from IDA.[67]

The report of the World Bank helps in decision making and also in initiating human rights movements towards the State lacking in the implementation of the rights of the women.

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[61] World Bank, 'Atlas of Sustainable Development Goals 2017: World Development Indicators' (2017) <https://openknowledge.worldbank.org/handle/10986/26306> accessed on 8 April 2017

[62] Ibid

[63] Universal Declaration of Human Rights, 'Article 23(2): Everyone, without any discrimination, has the right to equal pay for equal work' <www.un.org/en/universal-declaration-human-rights>accessed on 27 April 2017

[64] World Bank Group, 'Gender Equality, Poverty Reduction and Inclusive Growth' (2015) *World Bank Group Gender Strategy (FY16-23)*<https://openknowledge.worldbank.org/handle/10986/23425> accessed on 19 April 2017

[65] IDA, 'The world bank fund for the poorest: gender' <http://ida.worldbank.org/theme/gender> accessed on 19 April 2017

[66] ibid.

[67] IDA, 'The world bank fund for the poorest: gender' <http://ida.worldbank.org/theme/gender> accessed on 19 April 2017

6. Indian Perspective

The Constitution of India incorporates provisions which ensures rights of the women at par with men. The rights under Constitution are bestowed upon every person whether male or female and without any distinction on any ground, but there are some specific rights which have been attributed for the advancement of women in particular. Article 15(1) states the principle of non-discrimination on the ground of religion, race, caste, sex, place of birth or any of them.[68] Article 15(3) states that State is empowered to make special provisions for women and children.[69] Article 16 (2) states that there shall be no discrimination on the ground of religion, race, caste, sex, descent, place of birth, residence or any of them in matters of employment.[70] Article 21A inserted by the 86th Amendment Act in the year 2002 incorporates the right to education and is bestowed on all without any distinction.[71] All these rights are enforceable in the court of law. But there are still certain provisions in the Constitution which, though are not enforceable but are important in the context of asserting gender justice. For example, Article 39(a) says that the citizens of India, irrespective of their gender will have the right to an adequate means of livelihood.[72] Article 39(d) states that, men and women both will have an equal pay for equal work.[73] Article 39(e) states that the health and strength of workers whether male or female shall not be abused.[74]

To further strengthen the position of women, Article 243 D of the Constitution was inserted by 73rd Amendment Act in the year 1992. It lays down special provisions for reservation of one-third of seats for women in the Panchayat.[75]

Apart from the Constitutional provisions, there have been plans and policies at the Central level for the upliftment and empowerment of women. *Beti Bacaho*

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[68] M.P.Jain, *Indian Constitutional Law* (first published 1962, Lexis Nexis 2010)

[69] Ibid; Article 15(3): Nothing in this article shall prevent the State from making any special provision for women and children.

[70] ibid; Article 16(2):No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

[71] ibid; Article 21 A: The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

[72] M.P.Jain, *Indian Constitutional Law* (first published 1962, Lexis Nexis 2010); Article 39(a): that the citizens, men and women equally, have the right to an adequate means of livelihood.

[73] ibid at Article 39(d): that there is equal pay for equal work for both men and women.

[74] ibid at Article 39(e): that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength

[75] ibid at Article 243 D (2): Not less than one third of the total number of seats reserved under clause (1) shall be reserved for women belonging, to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

Beti Padhao scheme, *Women Hostel*, *Swadhar Greh, Support to Training and Employment Programme for Women*etc. are amongst the many schemes carried out by the Government of India.[76]

A perusal of all the above provisions shows that though there have been plans, policies and some of the Constitutional provisions there has been no concrete and enforceable law to deal with the poverty of women. A woman who cannot have a good education or a standard of living is not in a position to have access to any of the plans, policies or Constitutional rights mentioned above. For example, there have been reservations in the name of women in the Panchayat, it is generally seen that the male member of their family exercise the power bestowed on the women.[77]

So, the need of the hour is to pull the women out of the vicious circle of poverty. A woman who is caught in the clutches of poverty cannot avail the rights meant to her.

7. Conclusion

Gender justice and human rights of women cannot be assured unless and until the women are lifted from the clutches of poverty. There is need for a claim based approach to eradicate poverty of women and to make them available all the rights to which they are worthy of. The policies at the national level though are directed towards empowerment of women but fail to consider the fact that many of those women who are living under the aegis of poverty are not in a position to avail of the rights and policies meant for them. The rights mentioned on paper do not serve their purpose to a person with an empty stomach. The need of the hour is to have a targeted effort towards elimination of poverty of the women, and then only their human rights can be assured.

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[76] Ministry of Women and Child Development, 'Women Empowerment Schemes' <http://wcd.nic.in/schemes-listing/2405> accessed on 30 April 2017.

[77] Jagran Post Editorial, 'Jairam Ramesh attacks "mukhiya pati" rule in villages' *Jagran* (26 August 2012) <http://post.jagran.com/search/mukhiya-pati-in-bihar> accessed on 29 April 2017.

Plight of Indigenous People – Battling for Survival and Identity

Sonal Vyas*

The crisis continue, rights are snatched and the vulnerable go on getting exploited. The indigenous masses of any society are a heart of its origin and the source of its culture. Recently, their status and identity have been endangered due to the increased problem of migration, infrastructural development, urbanization, civil wars and local riots. The important areas that are dealt in the paper are the Central-Eastern belt of the country plagued by the Naxalites (with a close study of situation in Chhattisgarh), where the tribal villages are scorched and the young tribe members are forced into a life of struggle, then the plight of Jarawa tribes inhibiting the Andaman and Nicobar Islands is studied to help the government find better solutions for safeguarding their identity and originality, and also discussed in the paper is the poor state of natives of North-Eastern regions, especially Assam which are suffering from the curse of cross-border migration. Also, discussed in this paper is the plight of Van Gujjar – the Himalayan tribal community and the denial of accessibility in the forest areas and unavailability of enough economic subsistence necessary for the preservation of their identity. An attempt has been made through the paper to highlight and find out the possible ways to deal with this sensitive issue using constitutional safeguards available for the vulnerable groups, who are continuously being pushed in the inner circles of their birthplace. The role of National Register of Citizens (NRC) is also looked upon to help find solutions to the survival struggle in the North-East region. Efforts have been made to frame suggestive policies

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taking inspiration from United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) for helping better the situation of the natives who are none less than babe in the woods, often exploited and used.

"In every Indigenous community I've been in, they absolutely do want community infrastructure and they do want development, but they want it on their own terms. They want to be able to use their national resources and their assets in a way that protects and sustains them. Our territories are our wealth, the major assets we have. And Indigenous people use and steward this property so that they can achieve and maintain a livelihood, and achieve and maintain that same livelihood for future generations."[1]

Natives take birth, form the society and contribute towards its development, and then… the sudden flow of the modern people from the distant lands overpowers them and makes them the forgotten beings. The indigenous people are the most important part of every society and are the main source of their existence. According to the World Bank (WB) policy on Indigenous Peoples, the term "Indigenous Peoples" is used in a generic sense to refer to a distinct, vulnerable, social, and cultural group possessing the following characteristics in varying degrees: (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others, (ii) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories, (iii) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture, and (iv) an indigenous language, often different from the official language of the country or region.

In all the countries and regions, indigenous groups are found in vast numbers. They are indeed the representatives of the different and pure culture of the place they inhabit. The traditions they carry, the ceremonies they follow, the customs they observe and the behavior they practice make the land rich in value and ethics. With them, the society is born. Every region has a story which starts with the coming of aboriginals. Their way of living and their stories of survival inspire the historians and the sociologists. The autochthonous peoples are often attached to their lands and live for and within biodiversity. The close interaction of the aboriginals with the environment and the nature around them is awe inspiring. Their love for nature – the flora and fauna is the essence of their existence. The way they coordinate with the nature to survive and grow is a distinct mark of excellence which is way beyond the modern crusaders. According

[1] Rebecca Adamson (American Businesswoman and Advocate)

to the United Nations Environment Program, "Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of such lands."

In every part of the world, the globalization, industrialization and urbanization have adversely contributed towards the pitiful condition of the native folks. The uncontrolled migration has further aggravated the situation. European migration to the Americas had few, if any, positive effects on the native populations. The Indians' contact with settlers led to their displacement, subjugation, and death from disease and warfare. These negative consequences far outweighed the Europeans' good intentions, which included efforts to Christianize and educate America's original inhabitants. Researchers' estimate that the native population in America declined by nearly 50 percent due to disease alone, beginning with the natives' first contact with European explorers in the 16th century.[2] This is just one instance of how the lives of the natives are put at stake by the outsiders.

In India, the aboriginals form the majority of the population in the remote areas. India is a land of diverse cultures. Every region in the country hosts differently unique tribes. As per International Work Group for Indigenous Affairs, 461 autochthonous peoples or ethnic groups inhabit the Indian mainland and amount to 8.2% of the total population. They have attributed the status of Scheduled Tribes (STs) in the Constitution of India. India being a welfarist country holds significant responsibilities towards the aboriginals of the Indian mainland. Several policies, programs, and legislations have been introduced by the Indian Government and Legislature to help the vulnerable indigenous groups of the country.

Plight of Jarawa Tribe in Andaman Islands in India

The Jarawas are the migrants from the African mainland, having been settled in the Andaman Islands long ago. Their distinct nature and way of living in the remote islands are remarkable. They have a special identity and strangely very broad-minded customs related to marriage, which allows the widow to remarry. Their style of architecture of huts is inspiring and is designed to survive floods and tsunamis. This indigenous group of the Andaman Islands is very sensitive to their culture and tries to resist contact with the modern men of the Islands. They prefer isolation to interaction. Their main means of livelihood includes hunting especially of pigs and collection of honey by both men and women.

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[2] Laura Leddy Turner, 'How Did European Migration Affect Native Populations?', *Classroom* <http://classroom.synonym.com/did-european-migration-affect-native-populations-7034.html>accessed on 26 December, 2016

But their existence and attempts of preserving their culture are prejudiced due to fast infrastructural development in the region of their habitats. The construction of the Andaman Grand Trunk has been the major cause of subjection of the Jarawas to disadvantage. Due to this construction, they are sidelined and were forced to relocate themselves into the more remote regions of the Islands. Further, increased tourism in the area due to attractions like Limestone Caves and Mud Volcano have exposed the aboriginals to the modern ways of living and have acted as temptations for the tribe to forget their original cultural ethics and to adopt the urban lifestyle. The Constitution of India accords the status of Scheduled Tribe to the Jarawa Tribe and has taken several active steps to preserve the culture of this distinct group of aboriginals.

To protect the interests of the Jarawa people, a notification in October 2007 was issued by the Tribal welfare department of the Andaman and Nicobar. This notification demarcated an area of up to 5 km radius around the Jarawa Tribal Reserve as a buffer zone and prohibited entry into the buffer zone of anyone other than a member of the aboriginal tribe. This notification was quashed by the Calcutta High Court. The matter was then brought to the Supreme Court as a special leave petition[3]. The Supreme Court in its judgment dated 2nd July 2012 stayed the High Court's order and held that no commercial and tourism related activities shall be carried out by the administration or any private individual in violation of the prohibition contained in the October 2007 notification. The Court asked the Andaman and Nicobar administration to strictly enforce the notification till it was considered by the court.[4] Further, in the same case[5], the Supreme Court banned the despicable 'human safaris', which were voyeuristic trips organized through various Jarawa settlements to ensure that their culture is preserved and they are not influenced by the outer world.

Exploitation of Vulnerability of Indigenous Tribes of Chattisgarh

The dense forests of Bastar region of Chattisgarh inhabit distinct tribes. Their unique way of living, dressing and operating their livelihoods, their rituals and superstitions are the queer mark of their groups. The Gonds, Abhuj Maria, Muria, Halbaa, and Dhurvaa are some of the tribes that occupy the remote areas of Chattisgarh. Chattisgarh is the central state of the country and is extremely rich in minerals and resources. This results in the intense fight for the resources among various groups. Civil wars and the Naxalite movements in the region make the life of the natives tough and challenging.

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[3] L.G Andaman & Nicobar Islands v M/s Bare Foot Inns and Leisure Pvt. Ltd (2012) 11 SCC 709

[4] *The Road Not Taken*, I Pleaders (September 6, 2013), https://blog.ipleaders.in/the-andaman-trunk-road-not-taken/

[5] *Andaman* (n 3)

Most of the resources, particularly the iron-ore, are on Adivasi land, so inevitably the tribal people are being displaced. They live primarily in the dense forests that cover nearly half of the state, and the trees too are very valuable. Private corporations such as Jindal Steel, BALCO Aluminium, TATA, and ESSAR are already based in Chhattisgarh and are keen to expand. They are backed by the central government, which is also involved directly through state-owned companies such as Bilhai Steel Plant, the National Thermal Power Corporation (NTPC) and the National Mineral Development Corporation (NMDC). The Adivasi are meant to be protected under the Constitution, so that they keep their land and are free to follow their own customs etc., but in practice they are constantly charged by the forest guards for petty misdemeanours, such as cutting wood for fires or plucking leaves, or exploited by corrupt government officials and police. The Naxalites have provided the Adivasis some protection, but ultimately the suffering of the tribal people has only increased. The Maoist policy was to forcibly recruit one cadre from each Adivasi family, and there were indiscriminate executions of 'petty bourgeois' among the villagers. In 2005 an organization called 'Salwa Judum' was formed under the leadership of Mr Mahendra Karma, the Leader of Opposition in the Chhattisgarh State Legislative Assembly, to counter the episodic attacks of the Maoists. Salwa Judum means 'Peace Initiative', but in reality it is a vigilante organisation that goes around burning villages and killing people. Mahendra Karma is himself from the Adavasi community, but has exploited his own people by, for example, buying up a lot of Adivasi land at cheap rates (theoretically, only Adivasis are able to buy Adivasi land), and then selling the valuable trees. Hundreds of Adivasis, often as young as 16, have been given state-supported military training as Special Police Officers (SPOs), and since many of the Maoist soldiers are also minors, there are now armed teenagers fighting and killing one another. The SPOs are often recruited from the same families as the Naxalite cadres, so it has created a civil war where one is either with the Maoists or with the Salwa Judum. Meanwhile, the government continues to forcibly acquire Adivasi land all over Chhattisgarh (and indeed all over India, in particular, Jharkand, Bihar, Orissa and the north-east), to be used for industrial development.[6]

All the reckless acts by the Naxalite and the government have contributed towards the pitiful condition of the adivasis in the region. The forced displacement, the contrived recruitment of the adivasi teenage boys and contemptuous compensation to the tribal victims of collective oppression by the government and the Naxalite groups makes the tribes vulnerable and stakes the livelihood and existence of the regional aboriginals of the State.

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[6] Lucy Calder, 'The Suffering of the Adivasis (tribal people) in Chhattisgarh', Lucy Calder (April 2011) <https://lucycalder.com/india/the-adivasis-of-chhattisgarh/>

Crisis in Assam: Illegal Immigrants Snatching the Rights of the Aboriginals

Assam in India witnesses the most cases of illegal migration due to its geographic features. Assam- sharing passable borders with three countries – Myanmar, Bhutan and Bangladesh suffers the most in economic, political, emotional, social and religious sense. With the formation of Bangladesh the problem has reached new heights. There is no official statistics on the number of illegal Bangladeshis in India in general, although some unofficial estimates put the number at 20 million. Similarly, there is no concrete data on the number of Bangladeshi migrants in Assam specifically, although in 2005, former Assam Governor, Lt. Gen. Ajai Singh reported that close to 6,000 Bangladeshis enter Assam every day. The large scale migration from Bangladesh has significantly altered demographics in India's northeastern states, leading to social, economic, and political tensions between tribal and Bangladeshi Muslim settlers. For instance, in Assam, Muslims make up approximately 33% of Assam's population, and 11 out of 27 districts in the state now contain Muslim majorities. Bodo leaders in Assam assert that Bangladeshi Muslims are using their growing power to impose their culture and religion in the area. Illegal Bangladeshi migrants have systematically appropriated farming, grazing, and forest lands traditionally used by the Bodos and other indigenous tribes in Assam for their livelihood, leading to fear and resentment amongst the tribal population. Along with illegal migrants, drug smugglers and other criminal elements frequently cross the Indo- Bangladesh border into Assam. Additionally, according to Indian officials, many Bangladeshi Muslim settlers in Assam are now engaged in the illegal cultivation and distribution of narcotics in the state. The mass influx of Bangladeshi Muslims has been a destabilizing force in Assam and has resulted in a number of political and security challenges in the state.[7] The fear of Muslim dominance and aversion for Muslim immigrants have caused a considerable hardship to the Muslim citizens of Assam, as often they are mistaken for immigrants and are discriminated against. Ric Keller, an American politician has rightly said, "*The economic impact of illegal immigration on taxpayers is catastrophic*". In 2012 ethnic-communal clashes broke out between indigenous Bodos and Bengali-speaking Muslim immigrants. There was a numbing familiarity to the riots that struck the eastern Indian state of Assam, leaving 48 dead and 400,000 people homeless.[8] The extent of increase in illegal population movement across the borders has resulted in considerably influencing all the major policy decisions, have inevitably altered

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[7] The Indian State of Assam: Origins and Conflicts, *Hafsite* <http://www.hafsite.org/media/pr/indian-state-assam-origins-and-causes-conflict>accessed on 15 Jan. 2016, at 00:33

[8] Gardinar Harris, 'As Tensions in India Turn Deadly, Some Says Officials Ignored Warning Signs', *The New York Times* (28 July 2012)

the region's demographic profile with a considerable disappearance of the erstwhile majority Hindu population. The consistent influxes of disturbing elements in the State have resulted in various instances of insurgency and violence and have altered the local language and culture. The rise in ethnic differences has undoubtedly made the life of the indigenous population nightmarish. For them, justice has lost its meaning. *What was theirs was now of others…their land now shared…their comforts now tantalized…and fears reinforced!*

Van Gujjars – the Forgotten People

Van Gujjars known for their temporary settlements is the main tribe of Uttrakhand. It exhibits a unique way of living and portrays varied means of livelihood, main being the selling of milk. They mainly occupy the lands in Rajaji National Park and Corbett National Park. These park being the major center of attraction among the tourists, the tribes are often forced to relocate themselves to a remote area of the region. The tribes face extreme difficulty in the hilly areas of Uttrakhand and constantly struggle to live amid the few usable resources and difficult terrain with little infrastructure. Their rehabilitation is very poorly dealt with by the State government authorities due to their redundant data of the population of the Van Gujjar tribe.

However, the long-standing issue of settlement of Van Gujjars was dealt by the High Court of Uttarakhand at Nainital. On June 20, the court upheld a petition by Van Gujjars in terms of The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, and directed the state forest department to "include the names of the left out Van Gujjars in the list prepared for rehabilitation of the Van Gujjars residing in the Rajaji National Park, Dehradun".[9] But still, the government has to go a long way in handling the tribes and uplifting their standard of living. The need is to provide for the development of the region inclusive of the efforts and the participation of the tribes. The joint efforts of the locals and the government will bring positive results inclusive of more satisfaction and more regional and environmental preservation.

The Gift of the Constitution of India

The Constitution of India is the supreme and the absolute law which governs the lives of the citizen of India. India being a welfarist country holds certain responsibilities towards the deprived, isolated and vulnerable groups of the country.

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[9] Archi Rastogi, 'Court Ruling on Forest Rights Cheers Van Gujjars', *Down to Earth* (31 August 2007) <http://www.downtoearth.org.in/news/court-ruling-on-forest-rights-cheers-van-gujjars-6462>

For the tribal communities, the State often adopts the role of the guardian and pledges to protect it. The Constitution of India confers the status of '*Scheduled Tribes*' to the natives and the Adivasis. Further, it imposes various obligations on the State to ensure that the culture and distinctness of the STs are preserved and their amicable survival is ensured.

The positive and farsighted outlook of the framers of the Constitution has yielded several provisions which aims to protect the rights of the tribes in India and ensure their betterment.

Article 46 epitomizing the policy calls upon the State (Central & State government) to promote with special care the educational and economic interests of Scheduled Castes and Scheduled Tribes and protect them from social injustice and all forms of exploitation. It is a comprehensive article comprising both the development & regulatory functions. The question is always that if this Article really works on the tribal people. It is very clear when we look at the Jarwas in Andaman. Their economic and the educational status of these people is not at all cared. Provisions relating to fundamental rights have been qualified with 'reasonable restrictions' in favor of Scheduled tribes.

Article 15 prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth: but clause (4) thereof enables a State government to make special provisions for advancement of members of Scheduled castes and Scheduled tribes. This Article also is not very effective on tribes in India. Even though there are few provisions which are for the advancement of the Tribes in India they are not very effective.

Article 16 provides for opportunities for all citizens in matters relating to employment or appointment or post in favor of Scheduled Castes and Schedules Tribes. This Article is not at all effective. Where and what type of employment do these tribal people get. Even if they get, they don't get low salary and they are discriminated among others.

Article 19 grants the rights to freedom of speech, Assembly, Association, union, movement and residence throughout the country practice of any profession, occupation, trade or business. But for the protection of the interests of Schedules Tribes clause (5) permits reasonable restrictions on the exercise of rights of free movement, residence, and settlement in any part of the territory of India. Article 23 prohibits traffic-in human beings. Where is freedom of speech and expression for these people? Why aren't these people given this right, there are special provisions for them to stay in certain areas but these areas are also not protected. Many people enter their territory and disturb their privacy.

The Constitution provides for special staff for the protection of the interest of Scheduled Tribes (Article 338) and also for a commission to look into the social

educational conditions of these groups and to report to the Parliament on measures needed to improve these conditions. The Constitution 65th Amendments Act 1999 provides for the establishment of National Commission for Scheduled Caste and Scheduled Tribes. Article 339(2) empowers the Centre to give directions to a State asking them to draw up and execute schemes for the welfare of Scheduled tribes. The fifth schedule [Clause (I) Article 244] contains provisions regarding administration and control of the Scheduled areas and Schedules tribes.Even though there are these many provisions and even more for the welfare of the tribes in India only a few are effective. To look at the Andaman tribes these provisions never work.[10]

International Perspective of Dealing with the Rights of Aboriginals

Apart from the Constitution, what the legal system of country inspires from before enacting laws protecting the rights of indigenous people are the international laws advocating the importance the rights of aboriginals. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizing the contribution of the indigenous people in the diversity and common heritage of humankind, it seeks to empower the group with various rights like the right to equality, the right to self-determination, the right to nationality, right to liberty and much more. It further requests the countries to promote and apply these provisions for the betterment of this vulnerable group. Further, the ILO Convention No. 169 on Indigenous and Tribal Peoples, 1989, the UN Working Group on Indigenous Populations, 1981, and many similar initiatives succeeded in increasing awareness about rights of the indigenous people.

These new international norms are grounds upon which indigenous peoples may appeal to decision makers in international forums, although international procedures for the enforcement of human rights law are limited. Relevant procedures within the UN, the OAS, and specialized international agencies (such as the ILO) rest mostly on the threat of placing a human rights violator in a shameful light in the eyes of world public opinion, rather than on formal sanctioning mechanisms. Nonetheless, the mobilization of shame can wield significant influence.[11]

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[10] Hariharan Kumar, 'The Struggle for Dignified Livelihood by Tribes Of India: A Study on Jarwa Tribe in Andaman and Nicobar', *Lawctopus* (16 November 2014) <http://www.lawctopus.com/academike/the-struggle-for-dignified-livelihood-by-tribes-of-india-a-study-on-jarwa-tribe-in-andaman-and-nicobar/>

[11] International Law And Indigenous Peoples: Historical Stands and Contemporary Developments, *Cultural Survival* (March 1994) <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/international-law-and-indigenous-peoples-historical-stands>

Conclusion

The vulnerable folks of the remote areas – forgotten and often exploited are always considered weak and undesirable by the society. They are treated as scraps of the society. Their distinct way of living and dressing is often made fun of and are ridiculed. The Constitution through the government tries hard to protect the lives and the culture of the aboriginals, but the need is to recognize that this struggle is not only of the government but of us. The measure and the medicine of this act of isolation, reduced development and sideling are include them in the development of the region. It is often observed that the decentralization of power and distribution of the same in the hands of the natives and the locals have yielded magnificent results. The development should be made inclusive of the efforts of the locals.

The Apex Court of the country has time and again fought for the rights of the tribal groups. The judiciary has always held the rights and interests of the tribal communities on a high pedestal, and that their rights and concerns trumped even the developmental needs (Niyamgiri), security concerns (Nandini Sunder), and the right of leisure and entertainment for the general public (ban on trips in Jarawa settlement).[12] The Supreme Court in *Kailas v. State of Maharashtra*[13] has very well observed that "It is the duty of all people who love our country to see that no harm is done to the Scheduled Tribes and that they are given all help to bring them up in economic and social status since they have been victimized for thousands of years by terrible..." Thus, the spirit of collective and cooperative existence should be adopted to ensure development and upliftment of all. To ensure these efforts have been made to frame suggestive policies taking inspiration from United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) for helping better the situation of the natives who are none less than the babe in the woods often exploited and used. In the words of Rebecca Adamson, "We are all indigenous people on this planet, and we have to reorganize to get along."

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[12] Manu Sebastian, 'Prem Mardi vs Union of India :- Did the Court Fail the Tribes and Adivasis?', *LiveLaw.in* <http://www.livelaw.in/prem-mardi-vs-union-of-india-did-the-court-fail-the-tribes-and-adivasis/> accessed on 24 September 2015

[13] (2011) 1 SCC 793

Forest land rights to Tribals Denied in Andhra and Telangana States

Palla Trinadha Rao*

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA for short) recognises and vests diverse pre-existing rights over forest land. These include rights over occupied forest land, rights to ownership of minor forest produce (MFP); Community Forest Resource (CFR) Rights; rights over produce of water bodies; grazing rights (both for settled and nomadic communities); rights over 'habitat' for PVTGs and other customary rights. The most critical right which has a bearing on forest governance and the welfare of tribals and other traditional forest dwellers is that over Community Forest Resources which provides Gram Sabhas the rights to conserve, protect and management forests. The paper examines whether the well intentioned the FRA has recognised these ensured rights over forest landscape in favour of tribals.The paper makes a preliminary assessment of the potential forest area over which rights can be recognised in AP and Telangana under the FRA and compares it with the actual performance. The paper identifies the key bottlenecks and problems in implementation of the FRA and provides recommendations to address the issues. The paper assesses the status of implementation of FRA based on the secondary data.

Introduction

Andhra Pradesh (AP) had 23 districts till its bifurcation into Telangana and Andhra Pradesh in 2014. There are now nine districts in coastal Andhra and four districts in Rayalaseema while the rest 10 districts comprise the Telangana state. Recently

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the Government of Telangana created additional 21 districts, under the Telangana District Formation Act, 1974 and District Formation Rules, 2016, taking the total number to 31.

The AP State has 36,914.77 sq. km. of notified forest cover which is 22.73 percent of its total geographical area. While Telangana has 26,904 sq. km. of forest land which is 24% of the total geographical area of the state. Most of the forest areas of AP are located in 4 pre dominantly tribal districts in the northern part of the state. Most of the forest areas of Telangana are located in erstwhile districts of Khammam, Warangal, Adilabad and Mahaboobnagar. Historically, tribal communities have depended on forests for their livelihoods- both for cultivation and forest product collection. Many tribal people engage in a form of shifting cultivation in upland forests, called *podu*[1].

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA henceforth) recognises and vests diverse pre-existing rights over forest land. These include rights over occupied forest land, rights to ownership of Minor Forest Produce (MFP), Community Forest Resource (CFR) rights, rights over produce of water bodies, grazing rights (both for settled and trans human communities), rights over habitat for Particularly Vulnerable Tribal Groups (PVTGs) and other customary rights. The most critical right which has a bearing on forest governance and on the welfare of tribal communities and other traditional forest dwellers is over Community Forest Resources which provides Gram Sabhas the right to conserve, protect and manage forests.

There has been no effort to estimate the actual potential of the FRA's implementation in Andhra and Telangana states and to compare it with the achievements. Specifically, there is no analysis of how much forest area will come under the jurisdiction and management of Gram Sabhas under the community forest resource rights provision of the law.

This research paper makes a preliminary assessment of the potential forest area over which rights can be recognised in AP and Telangana under the FRA and compares it with the actual performance. The study identifies the key bottlenecks and problems in the implementation of the FRA and provides recommendations for the way forward.

Methodology

The major sources of data included secondary data available with the ITDAs, the Director of Tribal Welfare Department and the Forest Department. The

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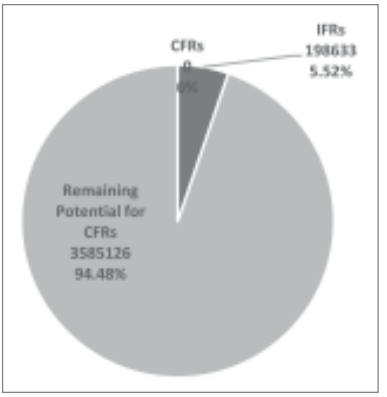
[1] Reddy et al (2010) Reddy Gopinath, Anil Kumar K. Trinadharao Palla and Oliver SpringateBaginski, Obstructed Access to Forest Justice, The implementation of Institutional Reform (FRA-2006) in AP Forest Landscapes, CESS, Hyderabad

study also reviewed relevant AP High Court orders and published literature on the subject.

1. Scope (in terms of potential forest area) for implementation of the FRA

The undivided AP started implementation of the FRA in 2008. The main focus was on the recognition of individual forest rights under section 3(1) (a). The state governments data also show large areas of land being recognized under CFR rights under section 3(1)(i). In practice, however, there has been no recognition of Community Forest Resource Rights till date in AP.

Promise vs. Performance of FRA in AP (Acres)



1.1 Andhra Pradesh:

Approximately, 24.56 Lakh acres of forest land is situated within the cadastral boundaries of 2,982 Revenue Villages in AP (Census of India, 2011). Additionally, there are 66.60 lakh acres of forests outside the village boundaries in the state. Following Forest Survey of India (1999) and Rights and Resources Initiative *et al(2015), it is estimated that at least all the forest land within village boundaries would come under GramSabha jurisdiction as CFRs and as forest land recognized under individual occupancy.*

Large numbers of individually occupied lands as well as large areas of customary CFR claims are located in forests outside village cadastral boundaries in AP. It is impossible to get a good estimate of the area eligible to be recognised without actual mapping of these lands. To get a tentative estimate of the potential forest area for the implementation of the FRA, we very conservatively assume that at least 20% of these forest lands located outside village boundaries will come under the jurisdiction of GramSabhas through the Act, which is calculated to be13.19 lakh acres[2].

Thus the total potential forest land coming under the jurisdiction of Gram Sabha through the FRA is estimated to be at least 37.75 lakh acres. However, since Individual Forest Rights are located in the same forest lands, we subtract

[2] Trinadha rao Palla, Policy and Performance of FRA 2006 in Andhra Pradesh –CFR-Learning & Advocacy 2017,

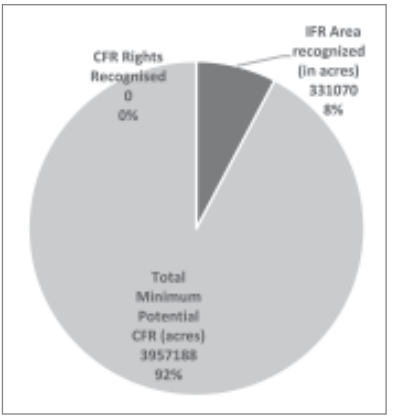
the area already recognized as IFRs (1.98 lakh acres) to calculate the minimum potential for CFRs. The minimum potential for CFRs in AP is estimated to be 35.77 lakh acres. The above estimate is validated by the fact that 4,695 Vana Samrakshna Samithis (VSSs)/Joint Forest Management Committees (JFMCs) in the State covered an area of 30 lakh acres at the time of enactment of the FRA.

Promise and Performance of FRA in AP: A comparison

As compared to the approximate potential of 35.77 lakh acres of forest land over which rights need to be recognized under the FRA, only individual forest rights have been recognized over 1.98 lakh acres, i.e. only 5.52% of the estimated forest area for both individual and community forest rights. No CFR right has been recognized in the state of AP as the CFR rights granted to VSSs are illegal and cannot be included as the FRA's performance. At least another 35.77 lakhs acres of forests can be recognized as CFRs and brought under the jurisdiction of Gram Sabhas.

1.2. Telangana State:

In Telangana State approximately, 37.04 lakh acres of forest land is situated within the cadastral boundaries of 2,641 revenue villages in Telangana (Census of India, 2011). Additionally, there are 29.40 lakh acres of forests outside village boundaries in Telangana. Following Forest Survey of India (1999) and Rights and Resources Initiative (2015), it is estimated that all the forest areas within village boundaries would come under Gram Sabha jurisdiction as CFRs and as forest land recognized under individual occupancy.



Large numbers of individually occupied lands, as well as large areas, claimed as customary CFRs are located in forests outside village cadastral boundaries. It is impossible to get a good estimate of the amount of these areas without actual mapping of these lands. To get a tentative estimate of the potential forest area for the implementation of the FRA, we assume that at least 20% of these forest lands will come under the jurisdiction of Gram Sabhas through the FRA, which is calculated to be 5.88 lakh acres.

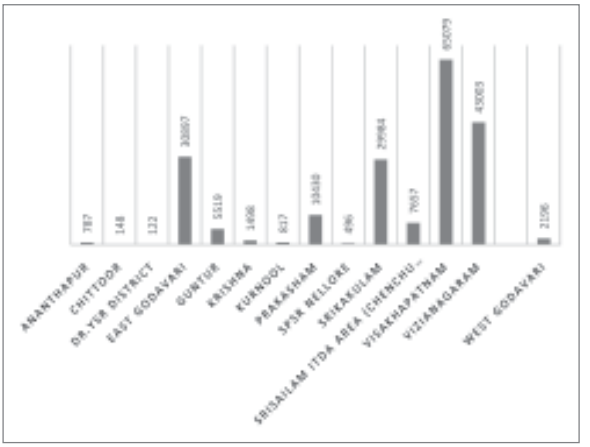
Thus the total potential forest land coming under the jurisdiction of Gram Sabha through the FRA is estimated to be at least 42.92 lakh acres. However, since

Individual Forest Rights (IFR) are located in the same forest lands, we subtract the area already recognized as IFRs, under the jurisdiction of individual rights holders, to calculate the minimum potential for CFRs. The minimum potential for CFRs in Telangana is estimated to be 39.57 lakhs acres. The above estimate is validated by the fact that 3,804 Vana Samrakshna Samithi (VSSs) / Joint Forest Management Committees (JFMCs) in the State covered an area of 30.35 lakh acres at the time of the enactment of the FRA. The area under the Joint Forest Management (JFM) should be treated as the absolute minimum area which should come under Gram Sabhas jurisdiction under the FRA[3].

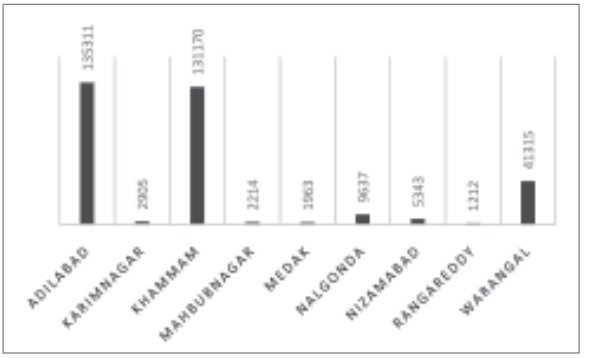
Telangana: Minimum Potential CFR

The undivided Andhra Pradesh started implementation of the FRA in 2008.The main focus was on the recognition of Individual Forest Rights (IFRs) under section 3(1)(a). The Government of AP data shows large areas of land being recognized for CFR rights under sections section 3(1)(i).In practice, however, there has been no recognition of CFR rights till date in the undivided AP (including what is now the state of Telangana).

IFRS CLAIMS RECOGNISED DISTRICTWISE IN AP (ACRES)



IFR AREA RECOGNIZED(IN ACRES)



2. Community Forest Resource Rights and Community Rights

2.1 Andhra Pradesh:

The United Government of Andhra Pradesh issued operational guidelines (G.O.Ms. No. 102) in 2008 to implement the FRA. The Government Order (GO) allows the members of VSSs to claim rights

[3] Trinadha Rao Palla, Policy and Performance of FRA 2006 in Telangana-CFR. Learning & Advocacy Process 2017

within the operational area of VSSs. The GO was further amended through another G.O. Ms. No. 168 in the same year giving eligibility to VSSs to claim community rights. This was in violation of the provisions of the FRA. Based on this GO, by the end of May 2010, more than 1,669 VSSs were granted community forest rights over 3.82 lakh hectares of forest land in undivided Andhra Pradesh. The Ministry of Tribal Affairs (MoTA), Government of India, held that the grant of CFR Rights titles to VSSs is illegal and directed the Government of AP to immediately withdraw these titles[4]. However, the MoTA order has not been complied with and the CFR Rights titles to VSSs have not been withdrawn yet.

According to the Report of Tribal Welfare Department, Govt. of AP, out of 4,493 claims submitted for the grant of community rights over 5.73 lakhs acres, only 1319 were recognised over an area of 4.34 lakh acres which is around 66.53 percent of the claimed area. The forest area over which community rights have been recognised is around 10 per cent of the estimated potential forest area for implementation of the FRA.

2.2 Telangana:

Even after formation of the new state the Government of Telangana has completely avoided recognition of the most crucial and empowering CFR rights under the FRA. While 3,769 claims for community rights either by the people or by VSSs for recognition over 2.18 lakh hectare were submitted, 761 were allowed covering an extent of 2.07 lakh hectares which is around 95 percent of the total land claimed for community rights. This outcome was due to the intervention of Forest Department in securing titles largely in the name of VSSs. **As per law, all these titles are illegal.**

3. Individual Forest Rights Performance

3.1 Andhra Pradesh

In the initial years, the major focus of the Government of undivided AP was to recognize individual forest rights. This was taken up in a campaign mode, and as discussed later, there are major problems with the rights recognition process followed. A total of 1.98 lakh acres of IFRs have been recognized, with four districts of Visakhapatnam, Vizianagaram, East Godavari and Srikakulam accounting for more than 90% of the recognition. There is a wide variation in the extent of implementation in different districts.

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[4] MoTA, GoI Circular No 23011/11/2013/FRA

3.2 Telangana State:

In Telangana State, approximately 331,070 acres of Individual Forest Rights have been recognised for 99,486 right holders. The majority of the IFR rights recognised are in the three districts of Adilabad, Khammam and Warangal.

4. Recognition of Habitat and Habitation Rights of PVTGs in Andhra and Telangana:

Chenchu, Kondareddy, Kondh, Porja, Gadaba, Savara in A.P and Chenchu, Thoti, Kolam in Telangana State are specially categorised as Particularly Vulnerable Tribal Groups (PVTGs) in the state. The habitat and habitation rights of the Particularly Vulnerable Tribal Groups(PVTGs), rights of the pastoralist communities and rights of the displaced communities have still not been recognized as per the FRA. Instead, there have been reports that forest officials are evicting tribals, including PVTGs from their habitat in gross violation of the FRA[5]. There is evidence that Forest Department officials are evicting tribals from their habitats in the protected areas. The current moves of Telangana government to relocate the adivasis from Kawal and Amrabad Tiger Reserves are not only a violation of the law but also a breach of trust since the Telangana Rashtra Samithi came to power with the promise that it would stand by the aspirations of the adivasis. The GO 214 (April 2015) is intended to relocate the tribals from the Kawal Tiger Reserve and Amrabad Tiger Reserves in Telangana. The government should take steps for withdrawal of the GO and look for other alternatives which will not cause disturbances in the Adivasi hinterland[6].

Conversion of forest / unsurveyed villages into revenue villages is yet to be done. And in every such case, the authorities are of the opinion that there is no clear guideline to recognize these rights[7]. There are 290 Chenchu settlements with a population of 49,232 (2001 census) spread over 3568 sq. km. in the undivided A.P. There are several forest settlements of Gothikoyas in Khammam and Warangal districts. Dealing with a case of Forest Department officials evicting Gothikoyas, the High Court of AP held that the authorities should follow the provisions of the FRA and give a reasonable opportunity to the claimants before evicting them from their lands[8].

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[5] Trinadha Rao Palla, Defying law to uproot tribals from their habitat, The Hans India, Jun 26, 2016

[6] Trinadharao Palla Move to remove tribals from natural habitats, The Hans India, Dec, 05, 2015

[7] Minutes of Telangana State Consultation on the Status of implementation of the FRA with regard to CR and CFR, Hyderabd, 27th March.2015. It needs to be noted that MoTA has issued detailed guidelines for the conversion of forest/unsurveyed villages into revenue villages in 2014.

[8] Podium Devaiah& others Vs. Govt. of India & others (WPNO 2133 of 2009, dated 18-04-2011)

5. Key Issues

- **Community forest resource rights granted illegally to VSS instead of Gram Sabhas:**

- **GCC monopoly over NTFPs a violation of community ownership Rights over Minor Forest products:** Section 3.1.c of the FRA recognizes community rights of ownership and disposal of Non-Timber Forest Product (NTFP). However, the AP policy of continuing monopoly rights of Girijan Cooperative Corporation (GCC) over NTFPs fundamentally violates these provisions of the FRA.

- **High Rates of Rejection: In Andhra Pradesh,** 1,50,345 individual forest rights claims were filed for forest land amounting to 1.35 lakh hectares. Of these, 83,874 claims for an area of 80 thousand hectares were recognized constituting 59 percent of the total claimed land. While in Telangana 2,11,973 individual forest rights claims were filed for area amounting to 7.61 lakh acres. 99,486 claims over area amounting to 3.31 lakh acres were recognized which constitutes only 43.50 percent of the total claimed land.

  Claims are often rejected at sub-divisional or district levels without hearing the claimant and this is in violation of the FRA Rules. Officials also often seek documentary evidence, rejecting other evidences which are admissible by the law. The hearing of any appeal should be held at the village level where the claimed land is situated, and after following the proclamation procedure. But this procedure is not being followed for hearings. Even the claimants are not communicated about the rejection of their claims which would have enabled them to take further legal recourse.

  "In fact, the term 'self-cultivation' under section 12A (8) of the FRA Rules includes not only cultivation but also a host of other ancillary or allied activities of agriculture. The irony is that the failure on the part of officials has become a ground for rejection of forest land claims of Adivasis in the agency areas. For instance, about 1,020 forest land claims of tribals covering 3,726 acres were rejected on the ridiculous ground that no verification report of field staff was available[9]*"*

- **Evictions from Podu Lands:** The Forest Department officials in the Agency area of East Godavari District reportedly ransacked a settlement of Kondareddy tribe, a PVTG, at Ukkurluru, around 18 km away from Maredmilli mandal headquarter, and burnt down their huts in gross violation of both human

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[9] Trinadharao Palla, *AP, TS govts depriving girijans of their just rights*. The Hans India, April 15, 2016

rights as well as rights under the FRA[10]. The Government of Telangana has launched an ambitious afforestation program named Harita Haram which has become a major reason for evictions. The recently reported decision of the government not to entertain any further claims under the Forest Rights Act has emboldened Forest Department staffs to suppress the rights of Adivasis. *"The decision was taken on January 17, 2015 by the Chief Minister K. Chandrasekhar Rao during an interactive session with forest department officials at the Forest Academy, Dulapally, and is aimed at protecting the forests in the state"[11]*.

In spite of several orders issued by the High Court against the eviction of Adivasis from forest lands, forest officials are evicting Koyas and others from the occupation of over 1,200 acres of land in Enkur, Julurpadu and Dummugudemmandals. Further, the officials are threatening to evict Adivasis from 1,300 acres of land in Pinapaka and Chandrugonda mandals too. All this happening despite the FRA provision of not evicting claimants from forest areas until the determination of forest land rights inquiry is complete[12].

- **Problems with IFR titles, location, extent and recording in the Record of Rights:** In many villages, the survey teams have struggled to use the equipment, and so they complained about the 'instrument problems'. Firstly, the technical skills of the surveying teams, to effectively use the GPS devices, have been lacking, probably due to inadequate training. The result has been that a large numbers of readings are completely inaccurate. This has led to invalid or wrong data for the claims[13].

- **Constitution and functioning of Gram Sabhas and FRCs:** Clause 6(1) of the Act authorizes the Gram Sabhas to initiate the process for determining the nature and extent of individual/community forest rights. But in the scheduled areas, Gram Sabhas must be constituted at habitation level as envisaged under the PESA Act. The Government of Andhra Pradesh has failed to operationalize hamlet level Gram Sabhas for implementation of either PESA Act or FRA in the Scheduled Areas.

- **Indifferent Role of the Forest Department:** The Department has been a major perpetrator and beneficiary of the 'historical injustice' because it gained

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[10] Trinadha Rao Palla, *Defying law to uproot tribals from their habitat*, The Hans India, Jun 26, 2016

[11] http://www.thehindu.com/todays-paper/tp-national/tp-telangana/ts-not-to-entertain-fresh-pleas-under-fra/article6854834.ece

[12] Trinadharao Palla, 'Illegal and Arbitrary Eviction of Adivasis from Forests in AP' *The New Indian Express*, (Telangana, 25th March 2015)

[13] CESS, Assessment of Implementation of FRA in Andhra Pradesh, Hyderabad, 2010.

control over ancestral tribal lands as 'state forests'. It is an interested party in the reform process as it stands to lose control. It has been a serious obstructer in the way of following the proper legal process and thereby illustrating its autonomy from the democratic processes[14]. During verification of the claims the Forest Department officials have been rejecting the claims on untenable grounds and often, refusing to sign the title deeds. Gothikoyas, internally displaced persons from Bastar in Chhattisgarh filed a Writ Petition in the High Court of Andhra Pradesh seeking the recognition of their forest rights and protection from dispossession. The High Court directed the forest officials not to evict them till the procedure for recognition of their rights was completed under FRA[15].

The whimsical functioning of the forest bureaucracy is best illustrated by its role in the implementation of the FRA in Khammam district. The District Level Committee had approved 456 eligible claims for 1,499 acres in Khammam district. However, the Divisional Forest Officer, Palvoncha, and the DFO, Wildlife Management refused to sign 191 of the approved title deeds, saying that they had instructions from their higher-upsnot to do so. An attempt by tribal welfare officials in Khammam district to transfer 102 CFR claims which were granted in the names of VSSs to Gram Sabhas was also foiled by the Forest Department officials. The later cited instructions of the Principal Chief Conservator of Forests (File No 27554/TG/ October 2015) which ordered not to entertain fresh claims under the FRA[16].

An even greater problem is that the Forest Department field staffs are grossly interfering in the land mapping process. They either obstruct or misdirect surveys. They treat the forest as 'their' forest land and act as judges in the process without any legal mandate. Many claims were obstructed or arbitrarily 'rejected' by forest guards during field verification surveys, sometimes directly and sometimes through FRC members[17].

- **Violation of the FRA in the diversion of forest land:** Diversion of forest land without recognising the forest land rights of tribals for State induced development projects in States is another dimension of problem. For instance

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[14] Gopinathreddy, M. Anil Kumar, Palla.Trinadha Rao and Oliver Springate-Baginski, 'Issues Related to Implementation of the Forest Rights Act in Andhra Pradesh (2011) 46 EPW <http://www.epw.in/journal/2011/18/special-articles/issues-related-implementation-forest-rights-act-andhra-pradesh.html>.

[15] *Podium Devaiah&others v Government of India& others.* [2009] WP 2133.

[16] Trinadharao Palla, 'AP, TS Government depriving girijans of their just rights'*The Hans India*, (Hyderabad, 15 April 2016) <http://www.thehansindia.com/posts/index/News-Analysis/2016-04-15/AP-TS-govts-depriving-girijans-of-their-just-rights/221647>.

[17] CESS, Assessment of Implementation of FRA in Andhra Pradesh, Hyderabad.

in 2010 the Ministry of Environment and Forest (MoE&F), Govt of India, gave final clearance for diversion of 3,731 hectares of forest lands for the Polavaram Project without recognition of forest rights under FRA. The community forest rights and resources rights are yet to be recognised in the submergence villages. The state government seems to be denying community rights of the claimants to facilitate construction of dams, mining, and other infrastructure projects. The consent of GramSabha as well as the Mandal Praja Parishad under the State Amendment PESA Act is essential to go ahead with the project proposals in the Schedule V areas of the state[18].

Recommendations: The way forward

Operational guidelines and directions from the Government to recognise the CFR rights and habitat rights of PVTGS should be issued without any further delay. All the titles granted for CFRs to VSSs should be withdrawn in view of their illegality and recognised in favour of Gram Sabha /community. There is a need to revisit all the rejected claims since no proper Gram Sabhas were held earlier during the process. The reasons for rejections should be communicated to the claimants and reasonable opportunity must be given to them for making appeals against rejections. FRCs should be reconstituted at habitation level and in accordance with the amended FRA Rules, 2012 for effective implementation of the PESA and the FRA in the Fifth Schedule areas. The GCC monopoly powers should be revoked and Gram Sabhas should be strengthened the disposal and marketing of NTFPs.

Sensitization of the officials and other stakeholders on the Mo.TA circulars/ guidelines, the FRA and the Rules is critical for effective implementation of the Act. No development projects should be allowed execution without recognition of the individual, community and community forest resources rights under the FRA.

[18] Trinadha Rao Palla, 'Monumental tragedy in the making' *The Hans India* (Hyderabad, 07 November 2015) <http://www.thehansindia.com/posts/index/Hans/2015-11-07/Monumental-tragedy-in-the-making/185129> accessed 24 May 2017.

Triple Talaq: Questioning the Undisputed Portrayal of Gender Inequality in Personal Laws and the Constitution

Yashdeep Chahal*

Triple Talaq falls in the category of 'talaq-e-biddat' or improper talaq of the Islamic law. It has been a contentious issue since the time of it's inception and incorporation under the Indian law of marriage and divorce for Muslims. This paper analyses the issues revolving around this practice, their impact on the society and eventually goes on to analyze the impact of these practices on the concepts of women empowerment and gender equality.

The paper further explores the possible solutions that can be inculcated into the legal domain of he subject so as to curb the practice. The topic has been approached by the author from various angles including social, political and religious. The author has further touched upon the subject in the light of Article 25 of the Constitution which grants immunity to religious practices. The paper also enters the domain of the historical demand for a Uniform Civil Code in the country which has been provided in Article 44 in part IV of the Constitution of India.

The paper has also examined the importance of this practice vis-à-vis other countries having a substantial Islamic population. Parallels have also been drawn with countries like Pakistan and Iraq to understand the importance of this practice as well as it's integrity with the religion of Islam.

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Introduction

The continuous evolution of law is one of the core principles of jurisprudence. Law is never static and in all parts of the progressive world, it shapes or reshapes itself to suit the needs of the society. However, certain laws, customs or practices have permanently refrained themselves from any kind of evolvement. One such law that has been a victim of stagnation in India is the Muslim Personal Law. Outstanding issues of the society as a whole like Triple Talaq, polygamy etc. derive their existence from the Muslim personal law prevalent in India. In this paper, our focus is to deliberate upon the issue of Triple Talaq, both in theory and practice on two crucial parameters: Gender Equality in the Muslim Personal Law vis-a-vis Indian position in the present world scenario. The focus has also been established on the probable solutions to the existing issues and their feasibility, as has been deliberated upon by various jurists through multiple means.

Divorce in Muslim Personal Law

Before the enactment of Hindu Marriage Act, 1955 - Hindu Marriages were regarded as a sacrament and an indissoluble tie, whereas Islam does not reckon the institution of marriage as indissoluble. It regards marriage as a very sacred contract. Muslim law gives sanction to both out of court as well as in court divorce. Both codified and un-codified Muslim Personal Law mandates out of court divorce. Divorce at the instance of the wife is governed by the Dissolution of Muslim Marriage Act, 1939. The Shariah Law as well as the Muslim Personal law, as applicable in India, both recognize the following 8 forms of divorce: 1) Talaq, 2) Talaq-e-Tafwiz, 3) Khula, 4) Mubaraat, 5) Fuskh, 6) Ilah, 7) Ziar, 8) Lian

In this paper, our major point of contention is on the 'Talaq' mode of divorce with a special focus on the prevalent practice of Triple Talaq in India.

Talaq: In theory and Practice

Under Islamic jurisprudence and all other relevant Muslim law, a Muslim husband can effectuate an out of court divorce by his own declaration. This is called Talaq. The word 'Talaq' is an Arabic word which literally means 'undoing of or release from knot'. The general belief, both among the Muslims and non-Muslims, is that the Muslim law permits male unlimited power to effectuate divorce by the pronouncement of Talaq. However, it is not true in accordance with the Sharia law. In the true sense of the Shariat, Talaq must be for a reasonable cause, should be treated as a last resort and must be preceded by efforts for reconciliation. Theoretically, a Muslim husband does have neither unbridled nor absolute power to seek a divorce. But in practice, it seems to be absolute.

A Talaq strictly following the procedure is called Talaq-e-Sunnat, a proper talaq. A talaq in violation of the prescribed procedure is Talaq-e-Biddat or an improper talaq. Triple talaq, widely prevalent in India, is a form of improper talaq or talaq-e-biddat. The Quran does not mention triple divorce in one sitting. It only sanctions the divorce to be effective over three consecutive periods of cleanliness, giving the couple the chance to reconcile during those three phases. However, the Muslim law as is prevalent in India has taken a bad course and has given the Muslim male a free hand to break the marital tie at will.

Talaq: Myth & Truth

In India, *talaq* has been a contentious issue for decades. In fact, the law relating to *talaq* in Muslim law has been gravely misunderstood. No other aspect of Muslim personal law has suffered so much misconception and distortion as *talaq*. It is widely believed that Muslim law allows a Muslim husband unlimited discretion to divorce his wife instantly, as he pleases, and without having to give any ground. Freak *talaqs* and the helpless bondage of women to wedlock cannot be blamed on the *Quranic* injunction.[1] The general belief, both among Muslims and non-Muslims, that under Muslim Law a male enjoys an arbitrary and unlimited power to inflict divorce by the pronouncement of *talaq* does not at all accord with true *Shariah* law. A closer scrutiny of *Shariah* law would show that Islam has prescribed an easier, simpler, and expeditious approach to the idea of the dissolution of marriage without the intervention of courts and authorities. If the marriage breaks irreparably, Muslim law permits extra-judicial divorce both to men and women. But the actual fact remains that this simple, humanistic, and non-cumbersome divorce law has been grossly misused by unprincipled individuals, who pay only lip service to their faith in Islam, with the tacit support of *ulema* and clerics.

Muslim law allows talaq subject to several conditions that are of dissuasive nature; their purpose is to discourage the husband from exercising his right without a careful and cool consideration. The Quran prescribes four steps before the pronouncement of the first talaq. The procedures to be adopted in the first step are given in the Quran as:

As to those women for whose part you fear disloyalty and ill conduct, admonish them (first), (next), refuse them cohabitation and last, turn away from them; but if they behave with you, then do not seek a device with them[2].

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[1] V.R Krishna Iyer, 'Reform of the Muslim Personal Law' in Tahir Mahmood (ed.), *Islamic Law in Modern India* (Indian Law Institute, New Delhi 1972) 24

[2] Quran IV: 34, IV:35

As a first step, when there is marital discord, the Quran advice the husband to reason with his wife through discussion. If differences persist, then, the parties are asked to sexually distance themselves (*wahjuru hunna*) from each other in the hope that temporary physical separation may encourage them to unite. If even this fails, the husband is instructed, as a third step, to once again explain (*wazirabu hunna*) to his wife the seriousness of the situation and try to bring about a reconciliation. In pursuance of *wazirabu hunna* the husband must explain to his wife that if they do not resolve their difference soon enough, their dispute may go beyond the confines of their house and become common knowledge. If the dispute still remains unresolved, as the fourth step, the Quran requires the matter to be placed before two arbiters, one from the family of each spouse, for resolution. The Quran in this regard says:

If you fear a breach between them again, appoint (two) arbiters one from his family, and other from hers; if they wish for these Allah will cause their reconciliation, for Allah has full knowledge, and is acquainted with all things.

Such compulsory reconciliation procedure has now also been incorporated in the Hindu Marriage Act,[3] the Special Marriage Act,[4] and the Family Courts Act.[5] These enactments make it obligatory for the court in the first instance to make every endeavour to bring about reconciliation between the parties.

Thus it can be summarized that after four serious attempts at reconciliation a Muslim husband is permitted to divorce his wife once or twice within the period of *iddat* to resume conjugal relations without having to undergo the procedure of marriage. After the expiry of *iddat*, he can either re-contract the marriage on fresh and mutually agreeable terms or irrevocably divorce her by pronouncing the third and final talaq. However, to emphasize the sanctity of marriage and the enormity of breaking it for frivolous reasons, the Quran warns that once the parties choose to separate after the expiry of *iddat*, they cannot entertain hopes of marrying again, unless the wife takes another husband and he divorces her.[6] And a divorce may result only if the new husband has serious differences with his wife. He is required to follow the Quranic procedure for divorce. This is called the doctrine of *halala*.

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[3] The Hindu Marriage Act 1955, S 23(2)

[4] The Special Marriage Act 1954, S 34(2)

[5] The Family Courts Act 1954, S 9

[6] Quran II: 230

Validity of Triple Talaq

Most Muslim men, as well as women, are not aware of the fact that there is no provision for such triple talaq in the Holy Quran. It was a pre-Islamic practice which was rejected by the Prophet. However, it was reinstated during the second Caliph as the situation at that time was extraordinary and hence, an extraordinary measure was taken. In the contemporary world today, no such situation exists.

The Prophet strictly forbids this form of divorce and described divorce in general as *abghad-al-mubahhat* (a most condemnable form of permitted practices).[7] When marriage is treated as a contract under the Muslim law, the practice of unilateral triple talaq defies all norms attached to a contract. It permits a marriage contract entered into by the free consent of the parties to be broken by the unilateral will of the husband. No other contracts, including commercial contracts, can be broken in this manner.[8] Instances of Triple talaq in one sitting in disregard of the law, like over the phone, SMS, on Internet etc. have been on the rise. Pertaining to this issue, Justice SA Khader comments,

"No other principle of Muslim law is so violently violated as triple talaq and no other system of law has conferred on the husband such a despotic power which has been rightly characterized by Prof. Asif AA Fazer as 'one sided engine of oppression in the hands of the husband' and by Justice Khalid as 'Monstrosity'.[9]

It is astonishing that despite the clarity of the Quran on the issue of divorce, Muslim patriarchy has stubbornly refused to adopt the Quranic procedure. Because of this, courts in India are forced to uphold the validity of triple talaq on the principle of *stare decisis*, declaring the practice to be 'good in law, though bad in theology'.[10]

The Question of necessity of 'Reason' for Divorce

Great divergence also exists among various schools and jurists about whether or not any reason has to be shown in order to pronounce *talaq*. While one section holds the view that divorce by talaq can be arbitrarily given by the husband who may repudiate his wife with or without reason, another body of jurists regards *talaq* emanating from the husband as being prohibited except for necessity. They consider that any cause which may satisfy separation should be tested by an unbiased judge.

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[7] Asghar Ali Engineer, 'Rights of Muslim Women and Reform of Personal law' (Mainstream 1992) 29.

[8] Priya Dharshini Narayanan, 'Triple Talaq: Effect and Law' (Lawyers Collective 2004) 4

[9] Dr. Kauser Edappagath , *Divorce and Gender Equity in Muslim Personal Law of India.*

[10] A Faizur Rehna, 'The Continuing Tyranny of the Triple Talaq', *The Hindu* (4 April 2012)

Mulla, widely accepted author and authority on Muslim law, says in Principles on Mohammedan Law that:

Any Muhammedan of sound mind who has attained puberty may divorce his wife whenever he so desires without assigning any cause.[11]

McNaughton declares that:

There is no occasion or any particular cause for divorce, mere whim is sufficient.[12]

The view was taken by Paras Diwan also resonates with the previous authors and he says:

Wedded as it is to the notion of wife's subordination to the husband, Muslim jurisprudence confers on the husband almost absolute power of divorcing his wife, and consequently, the wife can obtain relief only when the husband agrees to her proposal, and she either forgoes her dower or gives him something in return for his consent, to release her from the marital bond.[13]

Plight of divorced Muslim Women

Triple talaq, sinful but lawful in the eyes of Muslim Personal Law now in force in India, has become the fashion of the day. Discriminating law on divorce adversely affects the socio-economic well-being of the women concerned. Triple talaq clashes head on with the very idea of human rights and with the concept of modernity.

Ameena, a young telephone operator in Delhi, came home one evening to find her husband in the clinic with another woman. Even before she could collect her senses, he turned on her and pronounced Talaq.

Saba Khali, a Muslim wife from Moradabad, found herself on the receiving end of modern technology when her husband sent her an SMS pronouncing talaq. Saba went on to file a complaint against her husband Suhail under sections 498A, 323 and 406 of IPC pertaining to mental and physical abuse. Interestingly, local moulvis in Moradabad gave their sanction to the high tech split[14]*.*

And the list goes on. . .

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[11] DF Mulla, *Principles of Mahomedan Law* (Lexis Nexis 2013) 389.

[12] WH McNaughten, *Principles and Precedents of Mohamadan Law* (Calcutta 1985) 59.

[13] Paras Diwan, *Muslim Law in Modern India* (Allahabad Law Agency, Faridabad 2005) 45

[14] Dr. Kauser (n 9)

Some Interesting Findings

It is generally believed that the only legal process of dissolving a Muslim marriage is to say the word 'Talaq' thrice. How to make the so-called triple pronouncement of Talaq in a single breath and the jurisprudential controversy regarding the validity and effect of the triple diverse formula remains a fact that a predominant majority of Muslims in the country are not well aware of. In a study conducted by Sabita Hussain in Darbhanga town in Northern Bihar, it was found that the majority of the women respondents (62 percent) were not aware of the true Quran provisions relating to talaq and the common form of divorce prevalent among the community was talaq-e-biddat.[15] In yet another study conducted by Alka Singh among 300 Muslim women, 150 from Delhi and Lucknow, none of the respondents had knowledge about the true practice in Shariah for talaq. Call Billy that the divorce is final and irrevocable by the pronouncement of the word 'Talaq' thrice in one breath.[16]

Judicial Trends in India

The courts in India have approved of this unilateral and discriminatory provision of divorce from time to time. Long ago Privy Council observed that 'matrimonial laws of Mohammedan favour the stronger sex where the husband can dissolve the tie at his will'. In the celebrated decision of Shah Bano case, the SC observed that 'undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reason good, bad or indifferent, indeed for no reason at all'.[17]

In the case of *Mohammed Ibrahim v. Mehrunisa Begum*[18], the Karnataka HC took the view that talaq must be for a reasonable cause and preceded by attempts for reconciliation, one by the wife's family and the other from the husband's family.

In spite of these judgments, triple talaq in practice remains a menace to the society.

The Way Out

The All India Fiqh Conference and Organization of Muslim theologians and experts of Muslim jurisprudence adopted a resolution a few years ago that the

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[15] Sabiha Hussain, 'Male Privilege: Female Anguish, Divorce and Remarriage Among Muslims in Bihar' in Imtiaz Ahmed(ed.), *Divorce and Remarriage Among Muslims in India* (Manohar Publications, New Delhi 2003) 269

[16] Alka Singh, *Women In Muslim Personal Law* (Rawat Publications, Jaipur 1992) 48

[17] Moonshee Buzloor v. Shamsoonisa (1867) 11 MIA 551

[18] AIR 2004 Kant 261

practice of triple divorce had not received sanction from the Quran, and therefore could be abrogated. Even the leaders of the recognized body of Muslim clerics Jamiat-ul-Ulema-i-Hind have come forward to concede that the practice of triple divorce, though legal in terms of the law, amounts to a sin.[19]

The All India Muslim Personal Law Board, in September 2004, took a decision to review the practice of triple talaq at one go. Asghar Ali Engineer, an expert on Muslim Law and Jurisprudence, feels that it is high time that the Muslim Personal Law Board recommended a bill to the government to abolish triple talaq in one sitting and enforced the Quranic form of divorce.[20] Guzre denounces such talaq as 'absurd and unjust' and suggests that the proper remedy is to do away with it by statute. Ameer Ali suggests that Shafi law, which doesn't permit triple talaq, be made applicable to Muslims in India. A division bench of the Kerala High Court, in Saidali v. Saleena,[21] observed that 'A legislation for setting up bodies at central and regional levels to regulate, control and supervise the sanctity of marriage and divorce is the need of the hour'.

Reforms in the Muslim World

Around 20 countries amended laws to change 'matrimonial law, within the broad framework of Islam itself. Many Islamic countries have a national civil code. In Algeria, Tunisia, etc, the practice of extra judicial, unilateral divorce has been abolished. In Egypt, Jordan, Morocco, Iraq, Pakistan and Bangladesh, unilateral divorce is allowed but it must be duly registered. In Afghanistan, Somalia, South Yemen and Sri Lanka, a talaq can be effected by a husband only with prior permission of the court, preceded by a court trial for reconciliation, direct or through arbitrators, failing which it can allow a talaq.

More importantly, in Egypt, Iraq, Jordan, Kuwait, Lebanon, Sudan and Syria, a talaq is no more effective or necessarily enforceable if pronounced by a person who is drunk, insane, imbecile, provoked, depressed, and ill in sleep or undue duress, under threat or is implied in an ambiguous or metaphorical expression.

Notably, in 1961, Nehru's cabinet received suggestions for reforming Muslim Personal law. He himself was enthusiastic about it and cited the examples of the above-mentioned countries but a mere hint of it led to public outcry.

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[19] Imtiaz Ahmed, 'Should the Muslim Practice of divorce be banned: Pros and Cons' in Asghar Ali Engineer (ed), *Islam, Women and Gender Justice* (Gyan Publishing House, New Delhi 2001) 57

[20] Asghar Ali Engineer, 'Islam and Woman', *Indian Express* (New Delhi, 5 August 1993)

[21] 2008 (4) KLT 885

Gender Neutral Provisions of Divorce and the Way Ahead

It is inevitable to say that the provision of Triple Talaq as approved by the Muslim Personal Law, is a huge violation of the Constitution as it directly amounts to discrimination on the basis of sex and thus violates articles 14, 15 of the Constitution and Universal Declaration of Human Rights.

The immediate need of the hour, apart from the reforms in talaq mode of divorce, is to educate the Muslim women about other or more gender neutral provisions of divorce available in the Muslim personal law of India. Talaq-e-Tafwiz is one such mode of divorce which provides precautionary powers to a woman and allows her to set conditions of marital conduct before the marriage.

In Hamidoola v. Feizunnissa[22], it was that under Muslim law, a husband may give to his wife the power to divorce herself from him according to the form prescribed by that law for divorce by the husband. It is one of the most ignored provisions in India and most of the Muslim women are unaware of its existence.

Khula or divorce at the instance of the wife is yet another provision which is recognized by Indian law. This mode of divorce has been specifically mentioned in the Muslim Personal Law (Shariat) Application Act, 1937. But unfortunately, Muslim personal law, as it operates in India, does not allow a woman the right of khula without her husband's consent. In the case of Saidali vs. Saleela, as also mentioned above, the court observed that "legislation for setting up bodies at Centre and Regional Levels to regulate, control and supervise the sanctity of marriage and divorce is the need of the hour". Sections of Women Groups including All India Democratic Women's' Association, Muslim Women's' Personal Law Board have been actively involved in bringing various reforms to ensure various legal rights of Muslim women in marriage. The demand of united Muslim Matrimonial Act has been raised time and again. However, the Ulemas and conservative factions of Muslim in the country are the hurdles to reforms.

Personal Laws versus the Constitution

A Public Interest Litigation was filed in the form of the writ petition before the Supreme Court in 1997 by the Ahmadabad Women Action Group. The reliefs prayed for in that case were: (a) to declare the Muslim personal law which allows polygamy as void, as offending Article 14 and 15 of the Constitution, (b) to declare the Muslim personal law which enables a Muslim male to give unilateral talaq to his wife without her consent and without resorting to the Judicial process as void, offending Articles 13, 14 and 15 of the Constitution, (c) to declare that

[22] I.L.R. 8 Cal. 328 (1888)

the mere fact that a Muslim husband takes more than one wife is an act of cruelty within the meaning of clause (viii) of section 2 of the Dissolution of Marriage Marriage Act, 1939, (d) to declare that Musalman Wakf Validity Act, 1930 is void as it infringes Articles 14 and 15, and (e) to further declare that the provisions of Sunni and Shia laws of inheritance are discriminatory against females in their share as compared to the share of males of the same status and that these are void as they discriminate against females only on the ground of sex. The Supreme Court denied all the above said reliefs to the petitioners vide its judgment.[23] The Supreme Court observed that the issues raised before it wholly involved issues of state policy which the Court will not, ordinarily, interfere in. *Their lordships held that remedy lies somewhere, but not with the Court.* The Supreme Court declined to entertain the writ petition and, accordingly, dismissed the same. The court while deciding the above case mainly relied on its own decision in Krishna Singh v. Mathura Ahir[24] and the decision of Bombay High Court in Narasu Appa Mali.[25] The Supreme Court obviously felt that these previous decisions were of such nature that it would have been impossible for it to grant the reliefs claimed by the petitioners. Both the previous cases urged courts to show utmost caution and, wherever possible lend judicial restraint in dealing with the matters pertaining to personal law. The High Court of Delhi, in Harvinder Kaur v. Harmandar Singh Choudary,[26] holding that section 9 of the Hindu Marriage Act was intra vires Articles 21 and 14 of the Constitution, observed that 'the introduction of Constitutional law in the home is most inappropriate', 'it is like bull in a China Shop', and 'it will prove to be a ruthless destroyer of the marriage institution and all that it stands for'. *The learned Judge further observed that in 'in the privacy of the home and the marriage life, neither article 21 nor article 14 has any place', and that 'in a sensitive sphere which is at once intimate and delicate, the introduction of the cold principles of Constitutional law will have the effect of weakening the marriage bond'*. Later, the Supreme Court, again relying on the decisions in Krishna Singh, Narasu Appa Mali and Ahmedabad Women Action Group, held in Mathew v. The Union of India,[27] that personal laws do not fall within the ambit of Article 13(1) of the Constitution and that they are not 'laws' as defined in Article 13(1). The underlining policy that one can gather from these decisions is that the reformative process of personal laws of various communities in India needs to be explicitly dealt with by the legislature and that the court should be extremely reluctant to interfere.

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[23] Ahmedabad Women Action Group and others v. Union of India, JT 1997 3 SC 171

[24] AIR 1980 SC 707 (712)

[25] AIR 1952 Bom 84

[26] AIR 1984 Del 66

[27] 1999 2 KLT 248

Challenges and Immutability of Shariah

While the Shariat Application Act 1937 says that, notwithstanding any customs or usage to the contrary every Muslim is to be invariably governed by Muslim personal law, the reality is that the said law has not been codified in a comprehensive statute and is spread over many disparate commentaries, texts, judicial pronouncements, etc. making it well night impossible for any judge to effectively rule on any contentious issue of personal law and leaving the field open for fatwas and misinterpretation by opportunist prelates, pontiffs and reactionaries. The question of rationalization and codification of the personal law of Muslims with due justice to the woman is beset with immense difficulties. Eminent judges, scholars and thinkers like Syed Amir Ali, former Chief Justice Hidayathulla, Justice V. Khalid, AG Noorani and Badrudinn Taybji have pleaded for a reform of the Muslim personal law as administered in this country. Several other scholars and a large section of Muslim intelligentsia recognize the need for the reform but are not prepared to speak out their minds. Justice Khalid in Mohammed Haneefa v. Pathummal Beebi[28] lamented:

Should Muslim wife suffer this tyranny for all times? Should their Personal Law remain so cruel towards the unfortunate wife? Can't it be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity.

The Islamic law of crimes, evidence and the contractual property has been supplanted in India by the Indian Penal Code, the Code of Criminal Procedure, the Indian Evidence Act, the Indian Contract Act, the Code of Civil Procedure, the Transfer of Property Act, except as to gifts etc. The Islamic law of inheritance has also suffered mutability nearly a century and a half ago by the Caste Disabilities Removal Act, 1850 which abrogated the Islamic law of deprivation of apostates from Islam, of the right of inheritance. The Government Servants' Conduct Rules prohibiting bigamy have made applicable to all sections irrespective of religious faith. The Prohibition of Child Marriage Act 2006 has made it an offence to marry a male below 21 years of age and a female below the age of 18, while under the Islamic law puberty is the age of competency for the marriage. The Dissolution of Muslim Marriage Act, 1939 has made serious inroads into Shariah and conferred on Muslim Women the right to sue for divorce on specific 'grounds'. The concept of Immutability of the Shariah in secular matters is unsound and untenable.

The Plea for Uniform Civil Code and the Way Ahead

It is strongly argued from some quarters that the best option to curb male domination and Gender bias in the matter of divorce in Muslim Personal Law of

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[28] 1972 KLT 512

India is the formation of a Uniform Civil Code. The founding fathers of the Indian Constitution enacted Article 44 which states that the state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. In India, there is Uniform Civil Code of law covering almost every aspect of the human relationship. There is a complete criminal code operating throughout the country. The only province which is not covered by any uniform civil code is marriage, divorce and succession.

The Supreme Court of India has successively held and reiterated the necessity of a Uniform Civil Code for the protection of the oppressed and the promotion of the national unity and solidarity. The Supreme Court has repeatedly pointed out the need for framing of a Uniform Civil Code in accordance with the mandatory provision of the Constitution.

It is true that the Uniform Civil Code is one of the main socio-economic goals enshrined in the Constitution. It would indeed be fascinating to watch such a code emerging on the legal horizon of the country. There is great danger in enforcing a compulsory code in a sudden fashion as it might result in the alienation of the minorities which is not wise from the point of view of national integration. In Pannalal Bansilal case (Pannalal Bansilal Pitti v. State of Andhra Pradesh),[29] even the Supreme Court observed:

A Uniform law though highly desirable, enactment thereof in one go may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law gradual progressive change and order should be brought about.

Eminent jurist HM Seervai also opined:

It is unfortunate that those supporting or opposing uniform civil code should do so without reference to our Constitution and the law governing the two very large communities in our country, Hindus and Muslims. Those who have studied Hindu law and Mohammedan Law will realize that a common civil code for Hindus and Muslims alike is an impossibility.[30]

Eminent scholars like Justice VR Krishna Iyer, Prof A A Fyszee and Justice SA Kader advocated facultative legislation rather than an obligatory code. Justice VR Krishna Iyer in his article published in the 'The Hindu, has pleaded for:

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[29] AIR 1996 SC 1024

[30] HM Seervai, 'Uniform Civil Code', *The Times of India* (5 July 1995)

The formulation of a comprehensive statute taking the basis of various family laws, improve upon them and make a model for a pluralist society, keeping as close as possible the genius and traditions of Indian family values. . . . Indeed as an experimental measure, a facultative code may immediately be drawn up comprehensive enough to cover Matrimonial relations, succession, and inheritance, guardianship and other allied provisions which may also contain flexibility enough to accommodate some changes if the parties so desire. This special code may be enacted as an optional legislation. Any citizen of India may take advantage of it by a formal act of this.[31]

[31] VR Krishna Iyer, 'Uniform Civil Code II', *The Hindu* (23 August 1995)

Racial Discrimination faced by people of North-Eastern States of India: A Comment on *Karma Dorjee v. The Union of India*

Nidhi Chauhan* & Rajat Solanki#

In Karma Dorjee v Union of India,[1] the Supreme Court directed the Central Government to constitute a Monitoring Committee to take proactive and regular steps to redress issues pertaining to racial discrimination faced by people of North-Eastern States. The Court gave the direction to enhance a sense of security and inclusion for the people from the North-Eastern States. It also questioned the obligation of the Government. The Committee is expected to monitor, oversee and review the implementation of the Bezbaruah Committee report. In this comment, the authors have highlighted the important recommendation of Bezbaruah Committee report and analyzed the judgment. They have argued for the requirement of strict law and enforcement machinery against racial discrimination and hate crimes.

Introduction

India is a country with diversity and what is remarkable is that the people of different faiths and beliefs are living together in proximity. However, racial discrimination is not something new to India. In particular the people of North-Eastern states have to face continuous harassment on account of their racial features. The nature of harassment varies from passing derogatory comments to violent attacks. It may be in the form of gender insensitive remarks and actions of harassment. They are sexually harassed, molested, ridiculed and patronised in interaction. However, the issue of racial discrimination is brought to the public discourse only when offences of rape and murder are committed.

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[1] Karma Dorjee v. Union of India, AIR 2017 SC 113

Discrimination against people from the northeast has a deeper root than religion or physical appearance. This prejudice also stems from a lack of information, awareness and knowledge of the conditions both political and historical of the northeast, and a feeling of alienation arising from their perceived geographical distance and racial phenotypes.

In society, discrimination is prevalent against citizens of the nation coming from the North-Eastern States. Under the Constitution, it is the fundamental duty of every citizen of India "to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women."[2] Such discrimination violates this fundamental duty. The people of North-Eastern States face various problems relating to employment, education, social security and right to live in dignity.[3]

International Convention on the Elimination of All Forms of Racial Discrimination

On 21st December 1965, the United Nations General Assembly adopted the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The Convention was ratified by India in 1968. The Convention came into force on 4th January 1969. The Convention has imposed the following obligations on the States Parties under Article 2:

1. "to condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.
2. to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
3. not to sponsor, defend or support racial discrimination by any persons or organizations;
4. to take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and Regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
5. to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
6. to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."

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[2] Article 51A(e)

[3] Karma Dorjee v. Union of India, AIR 2017 SC 113

According to Article 5 of the Convention, "all states parties have undertaken to prohibit and eliminate racial discrimination in all its forms notably, in the enjoyment of the following rights (amongst others): (a) Equal treatment in the administration of justice; (b) Right to security of person; (c) Political rights including participation in elections; (d) Civil rights; (e) Right to freedom of movement and residence; (f) Right to freedom of thought, conscience and religion and to express one's opinion; (g) Economic, social and cultural rights; (h) Right to work and to free choice of employment; and (i) Right of housing, public health, medical care, social security, education and training and access to any public place."[4]

Bezbaruah Committee

The Ministry of Home Affairs set up a committee under the Chairmanship of M.P. Bezbaruah, I.A.S. (Retd.), Member North Eastern Council to look into the various kinds of concerns of the people hailing from the North Eastern States of India who are living in different parts of the country especially the Metropolitan cities and to suggest remedial measures which could be taken up by the Government in light of the unfortunate death of a student from Arunachal Pradesh.[5] The report provides a comprehensive list of long-term, short-term and immediate measures that must be taken by the government to eradicate racial discrimination.

The report quoted judgment[6] of Delhi High Court and made a recommendation that the directives of the court on conducting an immediate study to determine whether such crimes are for the reason of the victims thereof being from North-Eastern states and the reasons therefor should be implemented. The committee recommended that immediate and serious examination should be taken up. The Committee recommended amendment of Section 153 of the Indian Penal Code. The Committee recommended facilities for legal assistance and strengthening of Law Enforcement Agencies. The committee suggested some more routine actions that police should take. The bonding power of sports should be utilized by the State. Committee found it necessary to educate the people about the North East and also that focus of information and broadcasting and media should be in North East as well. The Government should respond to the problems of accommodation and rents. An effective monitoring mechanism should be built into the system. As part of short term measures, Committee recommended sensitization of the law enforcing agencies about the people and culture of the North East for creating a suitable atmosphere. The committee suggested strengthening law enforcement agencies by a process of comprehensive, computerized database for keeping track of the people from North East. The

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[4] Karma Dorjee v. Union of India, AIR 2017 SC 113

[5] Report of the Committee under the Chairmanship of Shri M.P. Bezbaruah to look into the concerns of the people of the North East living in other parts of the country

[6] Court on its own motion v Union of India, 208 (2014) DLT 172

Committee recommends creating awareness and promoting understanding. The committee suggested cultural exchange programme for students in school and colleges and sensitization of armed forces personnel. The Committee observed that the rich culture of the North East can act as a means of integration and that promoting tourism can act as a means of creating awareness and understanding. As part of long term measures, the Committee recommended that within the broad framework of Indian Constitution the legal, strategic and philosophical aspects of the demand for an anti-racial law should be debated and a suitable decision should be taken. The committee recommended the establishment of North East Centre in Delhi as there is a need for sustained, systematic and continuous exposure of the North East to the rest of India and the world.

On the recommendations made by Bezbaruah Committee, the Union Government has decided to amend the Indian Penal Code to strengthen the legal framework against racial discrimination. The Government has also responded favourably towards the recommendations for providing legal assistance, educating people about the North-Eastern States and relief fund for victims of racial discrimination and hate crimes.

The Judgment

In the public interest, petitioners filed proceedings under Article 32 of the Constitution for guidelines to be set down to curb acts of discrimination against persons from the North-Eastern States. The petitioners gave the factual details of instances reported in print media since 2009 regarding hate crimes and sought the intervention of the court for addressing the problem by the issuance of guidelines for bringing a systematic approach. The petitioners sought issuance of writ of mandamus: "directing the government to formulate a mechanism to deal with racial atrocities; to constitute special investigation team to investigate into atrocities committed in specific instances; to frame a proper mechanism to deal with cases of racial intolerance and discrimination; and direct all authorities to undertake programmes for inculcating awareness and to sensitise both the public and the law enforcing machinery."[7]

The Constitution under Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. India being a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination is duty bound to enforce its obligations under the law. In construing the nature and ambit of the constitutional guarantee under Article 15 of the Constitution, the provisions of International Convention on the Elimination of All Forms of Racial Discrimination play a significant role.

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[7] Karma Dorjee v. Union of India, AIR 2017 SC 113, para 3

The Supreme Court, after referring to the International Convention on the Elimination of All Forms of Racial Discrimination, observed that "India's obligations under an international convention designed to protect fundamental human rights must be read into the constitutional guarantee against racial discrimination". A consensus in the international community of nations, in which India is a vibrant participant, must infuse the content of our own constitutional guarantees.[8] The provisions of the Protection of Human Rights Act, 1993 in India in fact buttress and support the obligations which have been assumed by the country under International Convention on the Elimination of All Forms of Racial Discrimination.

The Court referred to the recommendations made in Bezbaruah Committee Report and found[9] that the Union Government has accepted the recommendations made by the Committee with regard to immediate measures and has taken action to implement the recommendations. The Court observed that the Bezbaruah Committee has suggested an effective monitoring mechanism and said that "the court as a protector of human rights is within jurisdiction in ensuring that this assurance translates into reality". The Court, further, observed that the Government is proposing to amend the Indian Penal Code to insert provisions dealing with offences involving racial matters. The Court pointed out that the provisions relating to promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony,[10] offence committed in place of worship, etc.,[11] imputations, assertions prejudicial to national integration,[12] **s**tatements creating or promoting enmity, hatred or ill-will between classes,[13] already exist as a part of the Indian Penal Code.

The Court stated that it is for the Government to decide whether the law should be amended after assessing the situation, the nature of the problem and the efficacy of existing provisions. The Court said that it cannot issue a mandamus to legislate. The Court was apprised by the Union Government that advisories relating to various aspects dealing with discrimination and racial profiling faced by Indian citizens hailing from north-eastern states have been issued to the state governments. The Court was of the view that the Union Government may monitor the steps being taken, particularly by the Delhi Police so that the model can be replicated in other parts of the country. The Union Government apprised the

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[8] Vishaka v. State of Rajasthan, (1997) 6 SCC 241

[9] Reference to Counter Affidavit dated 15 October, 2015 filed by Union Government.

[10] The Indian Penal Code 1860, s 153 A

[11]The Indian Penal Code 1860, s 153A(2)

[12] The Indian Penal Code 1860, s 153B

[13] The Indian Penal Code 1860, s 505(2)

Court of the fact that steps have been taken for sensitizing the police force, a special helpline has been introduced for people from the North-Eastern States, the Facebook page has been launched for them, data bank on crimes against them has been unveiled during 2014.

The Court observed that the monitoring of instances of racial discrimination involves issues pertaining to law enforcement, but it is not sufficient to resolve the problem. The mind set of people has to be changed in the society. There is a need of fostering sensitivity and inclusion and this can be achieved by the inculcation of greater awareness of the history and the rich cultural traditions of the North-Eastern States.

The Court was of the view that it is a "non-negotiable obligation of the Government to take positive steps to give effect to India's commitment to racial equality which is embodied in constitutional rights, fundamental duties, statutory provisions and in the international obligations which have been assumed by India. In order to enhance a sense of security and inclusion, the Government should take proactive steps to monitor the redressal of issues pertaining to racial discrimination faced by citizens of the nation drawn from the north-east. The Court held that a regular exercise of monitoring and redressal should be carried out by a Committee consisting of the following members: Joint Secretary (Northeast), Ministry of Home Affairs; and two other members to be nominated by the Union Government (one of whom should be a public figure). The Committee should be widely publicized in the media and it should be accessible to grievances, suggestions and complaints. It should meet periodically to monitor the redressal of all such grievances including the implementation of the recommendations of the Bezbaruah Committee, to the extent to which they have been accepted by the Union Government."[14]

The Court directed that the Committee shall carry out the following functions:

"a) to monitor, oversee, pursue and review the implementation of the MP Bezbaruah Committee Report dated 11.07.2014;

b) to monitor the initiatives taken by the Government to curb and deal with the incidents of racial discrimination/racial atrocities/racial violence;

c) to monitor action in respect of incidents of racial discrimination/racial atrocities/ racial violence, suggest measures and ensure strict action;

d) to receive, consider and entertain complaints from individuals and groups of individuals who claim to be victims of racial abuse/racial atrocities/racial violence/

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[14] Karma Dorjee v. Union of India, AIR 2017 SC 113, paras 14, 15

racial discrimination and forward the same to the National Human Rights Commission and/or the State Human Rights Commissions and/or to the jurisdictional Police Station as the case may be for enquiry and necessary action;

e) to issue necessary directions including calling for reports on incidents of racial discrimination/racial atrocities/racial violence from the State Governments/Union Territories."[15]

Conclusion

In this case, the Supreme Court gave certain directions so as to enhance a sense of security and inclusion for people from the North-Eastern States who face racial discrimination and hate crimes. In order to curb racial discrimination, the Court directed the formation of a Committee and also asked the Government to implement the recommendations of Bezbaruah Committee. The Court, however, refrained from giving directions on the proposal of the amendment to the Indian Penal Code.

Although the Supreme Court has directed the Union Government to take proactive steps to monitor the redressal of issues pertaining to racial discrimination faced by citizens from the North-Eastern States, the instances of racial discrimination against them is still continuing.

The Union Government should focus on infrastructure and economic development of the North-Eastern States and the problems of people of North-Eastern States must be addressed. The need of the day is to bring reformation in the education system so that emphasis is given to tolerance and respect for ethnic and individual diversity. Apart from this, the law enforcement machinery should be strict when it comes to racial discrimination and hate crimes.

The Human Rights advocates are of the opinion that the Government should take immediate steps to frame a strong anti-racism law that will cover all kinds of racial discrimination and hate crimes committed against racial minorities living away from home. Apart from this, there is a need of improving educational system and economy of North-Eastern States and of creating opportunities for employment in order to reduce the migration from the region. As the results of this judgment are yet to be seen, it will not be wrong to say that the lack of strong anti-racism law along with effective law enforcement machinery continues to remain a major concern.

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[15] Karma Dorjee v. Union of India, AIR 2017 SC 113, para 9

Death Penalty India Report, Volumes I & II along with summary, (2016)

Zafar Mahfooz Nomani*

THE BOOK UNDER REVIEW *Death Penalty India Report* by Anup Surendranath in two volumes along with a summary published by National Law University Delhi (NLUD)[1] delves deep in to the hopes and human aspirations of death sentence victims in a surge to raise consciousness among criminal justice system and its paraphernalia and to the conscience of nations which expectedly and penultimately will end our collective silence one day or the other. The foreword by Ranbir Singh mentions that '*the robust research agenda is full of rigours, perseverance and patience*' gives the impression that the Report has been dexterously framed and meticulously crafted.[2] On the other hand, the author in his preface narrates broad agenda of the project culled out in Report by stating that:

> The discussions on the death penalty in India rarely have the space for issues beyond the heinousness of the crime and judicial arbitrariness. for an issue as grave as this, there have been far too few attempts in India to understand thequestion about who gets the death penalty, how they get and what its like to live under the sentence of death in prison.[3]

According to theauthor, '*these are undoubtedly complex issues and this report seeks to make a contribution towards grappling with that complexity.*'[4] The Report under this synoptic framework thrashes out in three parts consisting of summary, volume one and volume two. Running across 318 pages, it consists of ten chapters along with a detailed account of 'Death Sentences in India 2000-2015' along with an appendix. The Report is methodologically tested, theoretically

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[1] Anup Surendranath, *Death Penalty India Report*, Volumes I& II, (1st edn, National Law University, New Delhi publication, 2016)

[2] ibid at 7

[3] ibid at 8

[4] ibid

sound, statistically analyzed and lucidly presented and coherently arranged to prick readers for serious browsing.

In the Indian context, politics surrounding the prisoners' ethnic origin or linguistic affinity isoften the basis of or pleas for clemency observed in *Hindu Editorial* of May 9, 2016. The editorial also claims that '*Death Penalty India Report* by NLUD on the working of the death penalty provides 'validation of proof for something that those familiar with in the administration of justice knew all along.'[5] The comparative jurisprudential insights suggest that 'an offender's economic background, educational level, social status or religious identity working against his interests in legal proceedingsin America as well.'[6] Now the seminal question is as to whether *Death Penalty India Report* by AnupSurendranath in two volumes published by National Law University Delhi (NLUD) *Death Penalty India Report* reveals something obvious or it is portrayed heuristically obvious phenomena in an innovative way. Before we get into it is appropriate to be conversant with the late President, A.P.J. Abdul Kalam opinion on theissue of clemency and pardoning of death sentence victims.

> The late President, A.P.J. Abdul Kalam had once said on the basis of a study by his Presidential office into the background of convicts seeking mercy has surprisingly revealed "a socio-economic continuum" on its preliminary findings.[7]

The late President digressed from his prepared text during a public lecture to ask further:

> "Why are so many poor people on death row?" He exhorted the link between socio-economic standing and access to competent legal counsel and effective representation indicate systemic bias or institutionalised prejudice. It is not uncommon that legal grounds unavailable to the vulnerable are invoked in favour of the inûuential.[8]

Under this backdrop, it is pleasant to note that Death *Penalty India Report* in two volumes along with an executive summary published by NLUD intersperse death sentences in India during the period of 2000-2015 in empirical fashion.[9] The Report is an attempt to answer questions concerning the socio-economic

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[5] Editorial, "Poverty and The Death Row" *The Hindu* (May 9, 2016)

[6] Thomas F. Geraghty, 'Trying To Understand America's Death Penalty System And Why We Still Have It', (Autumn 2003) The Journal of Criminal Law and Criminology, 209-238

[7] Editorial, 'Poverty and The Death Row', *The Hindu* (May 9, 2016)

[8] ibid

[9] Anup Surendranath, *Death Penalty India Report*, Summary, 7 (2016) *op. cit.*: Chapter: Introduction: Methodology, Vol.I Pp 16-19

profile of prisoners sentenced to death in India along with enquiring into the matter in which they are sentenced to death.[10] The empirical study is of seminal significance through personal interviews with prisoners and their families.The aim was to focus on aspects of the death penalty that have received very little attention in India and as it explore new fronts for discourse beyond analysis of Supreme Court judgments. This Report in its right earnest believes that the death penalty is a unique punishment but does not wade into the debate of abolition of the death penalty.[11] The academic purview in two volumes of the Report brings to the fore structural and institutional concerns that through significant light on the administration of the death penalty:

> The study encompasses the institution, legal provisions and practices point towards a crisis in the criminal justice system that cannot be ignored. The findings of Report seems to be narratives from prisoners sentenced to death which documented multiple facets of criminal justice system like police custody, investigation, trials, legal representation, treatment in prisons, clemency proceedings, the Report beset with deep structural flaws while evaluating and reflecting on these criminal justice system of death penalty.[12]

The dynamics of criminal justice and capabilities raise significant questions about differential impact of the death penalty. While the Report certainly does not suggest a casual connection between various socio-economic factors and death penalty amply demonstrates the disparate impact of the harshest punishment in our legal system. This is violent and alienating dynamics of India's criminal justice system often ensure that people with a certain socio-economic profile are disproportionately affected by the brunt of administration of justice. This is corroborated by a recent instance of that of four prisoners from a political party who were sentenced to death for burning a bus during a protest and killing three women students. The court, while commuting their sentence, invoked the '*doctrine of diminished responsibility*' and reasoned that those gripped by mob frenzy were not fully cognisant of the situation around them. It is submitted that 'while invoking any ground to commute death sentence to life is welcome, the impression is inescapable that such relief often comes at a very late stage and only to those with the means to pursue legal remedies till the very end.[13]

The Report consists of study of 373 prisoners (361 men and 12 women) across 20 states and one union territory fewer than 59 sections across 18 central legislations dealing with death sentences provisions. It remarkably finds:

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[10] ibid at 7 *op. cit.*.: op. cit.: Chapter: Introduction, Vol.I Pp. 1-12

[11] ibid *op. cit.*: Chapter: Legal Context, Vol.I Pp. 20-25

[12] ibid at 8 *op. cit.*: Chapter 1: Coverage of the Project Vol.I, Pp. 26-47

[13] *Supra* note 5 at Editorial

> The Report delves deep into aphenological state of most of those sentenced to death in the country are poor and uneducated, and many belong to religious minorities.[14]

In addition, a revealing number is that as many as 241 out of 385 death row convicts were ûrst-time offenders.[15] Some may have been juveniles when they committed capital offences but lacked the documentation to prove their age. Against the salutary principle that those too young and too old be spared the death sentence, 54 death row convicts whose age was available were between 18 and 21 at the time of the offence, and seven had crossed 60 years of age. An average prisoner awaiting execution is likely to be a religious minority, a Dalit caste, backward class, or from an economically vulnerable family, and is unlikely to have finished secondary schooling. The penologicalcategories of prisoners under the Report surround four major variants. According to the stages in death sentence cases, the prisoners forming part of our study have been categorised as follows:

- Prisoners sentenced to death by the trial court with the confirmation of the sentence pending before the High Court
- Prisoner whose death sentence was confirmed by the High Court but the appeal was pending before the Supreme Court
- Prisoners whose mercy petition was under consideration by the Governor of a state or the President (includes those prisoners whose death sentence has been confirmed by the Supreme Court but who have not filed a mercy petition for various reasons)
- Prisoners whose mercy petition has been rejected.[16]

The trauma and tribulation related to duration of death row has succinctly narrated that given the harsh conditions of confinement and the unbearable uncertainty associated with the death sentence, it becomes essential to consider the time spent by these prisoners under the death sentence. Out of 373 prisoners in our study, the trials of 127 prisoners lasted for more than five years with the trials of 54 such prisoners continuing for more than 10 years.[17]

The extent and magnitude and nature of death penalty covering 18 central legislations encompass murder, sexual offences, terror offences,kidnapping with murder,dacoity with murder, national security offences. The geographical mapping

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[14] ibid Summary at 10 *op. cit.*:Coverage of the project, Vol.I Pp. 26-47

[15] ibid Summary at 9 *op. cit.*: Coverage of the project Vol.I Pp. 26-47

[16] ibid Summary at 9 *op. cit.*: Coverage of the project Vol.I Pp. 26-47

[17] ibid Summary at 12 *op. cit.*:Duration On Death Row, Vol.I Pp. 48-67

reveals that UP and Bihar had highest number of prisoners sentenced to death.[18] The Report highlights large variation which was observed in the median duration of legal proceedings at different stages across different crimes. Among crimes for which statistically significant numbers were sentenced to death, the median durations in cases involving sexual offences were the shortest in the trial court and High Court stages. On the other hand, the longest median durations for proceedings at the trial courts and High Courts were observed in cases involving terror offences. Interestingly, the trend of short duration in cases involving sexual offences was not replicated at the Supreme Court, where the highest median duration of confirmation was for such cases.[19] The socio economic profiling of prisoners sentenced to death in this country were almost always poor and belonged to the marginalised sections of society. The report however takes readers beyond the realm of intuition, and confirms the long held hypothesis that the death penalty is dis proportionately imposed on vulnerable persons along the axes of economic and social parameters[20] such as age, juvenility, previous criminal record, economic vulnerability, educational background, religious and caste affiliations and multiple socio economic factors leading to marginalisation.[21] There are parallel and distinct features in India and America on this count as This is happening in American criminal justice systemas Thomas F. Geraghty in his paper 'Trying To Understand America's Death Penalty System And Why We Still Have It's published in *Journal of Criminal Law and Criminology*, observes:

> [The] Opponents of the death penalty have a lot of ammunition in their arsenals. This country's history of the administration of the death penalty is fraught with evidence of racism. Only in rare instances has anyone other than a poor person been executed.[22]

The hallmark of criminal justice system is free and fair trial and legal assistance to indigent litigants. But in the given socio economic profiling of prisoners sentenced to death,lawyers are required to play an important role to counter the alienation experienced by prisoners from the criminal justice system. The estimated finding is as under:

> Over 60% of the prisoners in the project report engaged private legal representation at the trial court and high court. The trend regarding the engagement of private lawyers was not replicated at

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[18] ibid Summary at 14 *op. cit.*: Nature Of Crime, Vol.I Pp. 68-89

[19] ibid Summary at 16 *op. cit.*: Socio Economic Profiling, Vol.I Pp. 90-127

[20] ibid Summary at 18 *op. cit.*: Socio Economic Profiling Vol.I Pp.90-127

[21] ibid Summary at 20-21 *op. cit.*: Socio Economic Profiling Vol.I Pp.90-127

[22] (n 6)

> the Supreme Court where over 70% of the prisoners sentenced to death relied on legal aid lawyer.[23]

It narrates that fact at level of apex court constitutional duty to provide free legal to the accused runs quite high than that of trial and high courts.[24] The Report also highlights horrors and vagaries based on victim's experiences in custody despite the constitution and criminal statute contains essential safeguards against police atrocities such as right to be produced before magistrate in 24 hours, confession before police officer, legal representation at pre trial stage.

> An examination of experience of prisoners sentenced to death paints a shocking picture of rampant custodial violence and violation of constitutional and statutory safeguards that seeks to uphold the rule of law and protect the rights of an accused.[25]

It further precipices as:

> The increased police power and condoning the brutality of the investigating agencies is detrimental to foundational liberties and freedom of all people.[26]

The cardinal part of the report metaphorically termed as 'Living on Death Row'. The prisoner sentenced to death are treated differently from the moment the trial court imposes the death sentence, despite the law being abundantly clear that all death sentences imposed by the trial court require confirmation by the high court. The Report is very candid on the issues as he asserts:

> This difference in treatment has very real consequences in prison including the prohibition on work, lack of interaction with general prison population, prohibition from participating in prison activities. Amongstthe mostegregious violations inflicted on prisoners sentenced to death was solitary confinement in naked derogation of Supreme Court's directives. The harsh physical conditions of incarceration (such as extremely cramped spaces, cell with very little light and air, unacceptable standards of hygiene, abysmal quality of food in flagrant violation of prison manuals, poor standards of medical services almost non-existent mental health services) almost act as a separate sentence, making living under the sentence of death all the more difficult.[27]

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[23] ibid Summary at 28 *op. cit.*: Legal Assistance, Vol.I Pp. 128-141

[24] ibid Summary at 29 *op. cit.*: Legal Assistance Vol.I Pp.128-141

[25] ibid Summary at 30 *op. cit.*: Experience In Custody,Vol.II Pp. 9-30

[26] ibid Summary at 32 *op. cit.*: Experience In Custody, Vol.II Pp. 9-30

[27] ibid Summary at 36 *op. cit.*: Chapter 8 Living On Death Row, Vol.II Pp. 71-108

Thus living on death row is an experience of living under the sentence of death with limited opportunities for meaningful human interaction. The conscious awareness of their sentence makes the prisoners worry about the precariousness of their existence, constantly oscillating between life and death.[28] The presence of gallows was a cruel and constant reminder to the prisoners about their possible end of life. Even some prisoners had death barrack designed in such a manner so as to ensure that prisoners sentenced to death had a constant view of the gallows.[29] The alienation from the legal system that a prisoners experienced in the trial and appellate stages, applied with just as much intensity during the phase of seeking mercy as well. The practices developed in filling mercy petitions on behalf of prisoners sentenced to death rarely involve the prisoners themselves.[30] The trials and tribulations depicted ultimately conclude:

> The accounts of the prisoners seeking mercy allow us to understand their fears and despair which are aggravated by the opacity of the process. The grave procedural irregularities high lighted in the chapter reinforce the fact that the system has failed in ensuring the meaningful realisation of the right to life and established canons of law and justice.[31]

Thus, an overview of the death sentences in Indiaduring 2000-2015 under the shape of Report honestly confesses that there existed a dearth of information about prisoners sentenced to death in India:

> During the course of study the Report makes startling revelations that of the 1486 death sentences imposed by the trial courts for which outcome across the appellate stages could be traced, only 4.9% (73 prisoners) remained on death row after the appeal in the Supreme Court was decided. Of the total death sentences, 65.3% (970 prisoners) were commuted, and another 29.8% (443 prisoners) of the prisoners sentenced to death at the trial court stage were acquitted by the end of the judicial ladder.[32]

Thus, it is evident that we have too little information about the manner in which the harshest punishment in India's criminal justice system is administered. The philosophical debate over the death penalty must be situated in the context of

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[28] ibid Summary at 37 *op. cit.*: Living On Death Row, Vol.II Pp.71-108

[29] ibid Summary at 38 *op. cit.* : Living On Death Row, Vol.II Pp.71-108

[30] ibid Summary at 39 *op. cit.* : Chapter 9:Seeking Mercy, Vol.II Pp. 109-124

[31] ibid Summary at 40-41 *op. cit.*: Chapter 9: Seeking Mercy, Vol.II Pp. 109-124

[32] ibid Summary at 42 *op. cit.*: Chapter on Death Sentences in India 2000-2015, Vol.II Pp. 147-200

the structural realities of the criminal justice system and due attention to the experience of living on death row. This Report identified thewide gap between the provisions of law and the realities of its enforcement, flagrant violations basic protections like those against torture and self-incrimination, effective sentencing procedures.The Report uniquely locates the problematic by much of the discussion of the death penalty is focussed on the nature of the crime without reference to systematic factors that are the core of the issue. In the context it is crucial to examine on whom the burden of the death penalty falls:

> The socio-economic profile of prisoners documented in this Report begins to demonstrate that these burdens have a disparate impact on vulnerable and marginalised sections of society along the lines of economic status, caste, religion, and levels of educational attainment.We need to make much more an effort to understand the nature of the death penalty as a punishment. It would be grossly inadequate to understand the punishment as the only the fact 'taking of life'. The conversation with prisoners sentenced to death led to the realisation that the suffering of the death penalty is not only about the fear of death or not wanting to die. The dimension of every day uncertainty between life and death often does not get necessary attention it deserves. We need to acknowledge the systematic realities that of harshest punishment in our legal system and rule of law but humanity as a whole.[33]

When a judicial system that is seen as favouring the inuuential resorts to capital punishment, it will be vulnerable to the charge of socio-economic bias. Law and society, therefore, will be better served if the death penalty itself is abolished. These statistics must reinforce the larger moral argument against the state taking the life of a human being - any human being – as punishment.[34]

The aim of the Report is to draw a meaningful engagement to jurisprudence of death penalty in doctrinal holism. A rigorous and frank evaluation of the criminal justice system death penalty and recognition of the stark structural realities that operate within it collapse Supreme Court's jurisprudence of '*rarest of rare'* and tilts towards '*doctrine of diminished responsibility'*. The Report is remarkable contribution to criminal justice system and human right jurisprudence in India. It is laced with erudite explanations, often giving an aura of celebrated work done on the subject in American jurisprudence. To suffice we are reminded of singular

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[33] ibid

[34] Editorial, 'Poverty And The Death Row', *The Hindu* (May 9, 2016)

contribution of Thomas F. Geraghty[35], Franklin E. Zimring[36], Stephen P. Garvey,[37] Joan Jacobs Brumberg & Kansas Charley,[38] ILL's Governor's Commentary On Capital Punishment.[39] The horrendous portrayal in the Report ends with the fact where 'silence settles with a sound of its own' and makes a clarion call to collective conscience of the nation. TheReport is unputdownable as a page turning thriller for readers of criminal law and human rights. The report findings givewings for systemic reform in criminal justice system. The subversive tales from dark hovel in the Report makes creative space of constant and thoughtful engagement for overhauling of pathological state of criminal justice system. Thus it is time to revisit the painstaking details of this researcher documents as to how our criminal justice system reacts to victims by creative oeuvre of authors and publishers. The pragmatism in which an intimate portrayal of death sentence has been madein the *Death Penalty India Report* by Anup Surendranath in two volumes published by National Law University Delhi (NLUD) will definitely go long way in demystify criminology, penology and victimology of death sentence prisoners in India.

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[35] Thomas F. Geraghty, 'Trying To Understand America's Death Penalty System And Why We Still Have It', (Autumn, 2003) 94(1) The Journal of Criminal Law and Criminology, 209-238

[36] Franklin E. Zimring, *The Contradictions Of American Capital Punishment* (New York: Oxford University Press 2003). Pp 258

[37] Stephen P. Garvey, *Beyond Repair? America's Death Penalty* (Stephen P. Garvey Ed., London: Duke University Press 2003). Pp 244

[38] Joan Jacobs Brumberg & Kansas Charley, *The Story Of A 19th Century Boy Murderer* (New York: Viking 2003). Pp 273

[39] ILL Governor's Comm'n on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* (April 2002).

Revathi: A Life in Trans-Activism

(1st edn, Zubaan Publishers Pvt Ltd 2016)

Padmini Subhashree*

A rigid nomenclature of binary sexual identity is the pith of an onerous life that is synonymous with transsexual life in the country. There are unperceptive notions prevalent in the Indian society which place gender identities of individuals into one out of two categories, thus conferring a strict male/female personality to the exclusion of all else who identify with the complex sexual character borne to them or acquired upon later in life by choice as part of exercising their indistinguishable right to life and liberty in a free democratic establishment.

The above constructive synthesis is one of the often-repeated points of discourse in the book "A Life in Trans-Activism", reiterated by the author at varying junctures to establish the incongruity in social perception as well as legal framework as commensurate with the liberated gender identity regime in the modern world. Upon the publication of her first book, a memoir, "The Truth about Me" in 2011, she began to be widely acclaimed on account of her fearless spirit and firm resolve to narrate the oppressive realities of her life as part of gaining transgender identity in a society that cultivated minimal empathy for her.[1] In this second book "A Life in Trans-Activism", she opens up about her life as an activist working towards the welfare of people from the LGBTQ community and advocating on the issues of rights and welfare of individuals with transgender identities. She is particularly augmenting about the rights of female-to-male transgender individuals, who seek behavioral acceptance as male in site of being born physiologically as females. Her support towards this small yet significant community of people is reinforced from her effort to include specific chapters in the book from the individuals' point of view, with an aim to sensitize the reader about the plight of this community to a personal degree. The book is an acknowledgment of Revathi's journey through the life, primarily after she chronicled her experiences of leaving her home to attain her transgender identity

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[1] University of Chicago, 'A Life in Trans-Activism' (The University of Chicago Press, 07-12-2016) <http://press.uchicago.edu/ucp/books/book/distributed/A/bo23681819.html> accessed 10 June 2017.

in the first book. It focuses on her induced awareness into the progressive developmental platforms working towards betterment of people like her and thereafter it traces the nature of her own substantive work done towards achieving the same.

The degree of emotional conjunction in the book is displayed right at the beginning wherein the author decidedly dedicates it to two dearly departed individuals, Famila and Deepu, whom she supposes to be her children. The author gradually narrates the story of Famila through different episodic encounters and conversations she has had with her at various points. The character construct of Famila appears to be very impressive especially in light of the empowering narrative presented to us by the author with an attempt to debunk the idea that individuals with transgender identity can have an equally eventful life with harrowing experiences to share by via the inalienable nature that they associate themselves with, which is different from the gender identities that they were born with. What is particularly discerning here is the fact however that the reader finds no similar narrative with regard to Deepu throughout the text of the book although he has merited equally worthy mention in the author's dedication. This cannot be adjudged as a literary sight considering that a major inspirational archetype to the author's cognition almost always warrants due acknowledgment in the text of her writing. This prognosis is further propped by the knowledge that the exhibition of remarkable boldness by the author in her last book through the depiction of some unearthing facts such as she was raped and brutalized by her own family, only goes on to show the spirit of her fearless account. Therefore, the conspicuous absence of Deepu's tale in the book only hints at either the need to maintain confidentiality or the conscious decision of the author to not unravel the circumstances of his bereaved memory.

Capturing insight into the reader's perception has been wonderfully achieved by the author by recounting her numerous experiences as a demonstration of the kind of life that transgendered individuals are faced with in the society. As members of a heterosexual community, being hounded by in railway compartments or getting amused at their performance in community events such as weddings or baby showers are the flashing impressions we have of transgendered people in general. Moreover, the general awareness in the area is only restricted to the male-to-female type of transgendered identity, otherwise known as 'hijra', 'aravani', 'jagappa', 'thirunangai', etc. The book however brings into light the issues related to an overtly overlooked category of transgendered identity in the form of female-to-male transgendered individuals. This group is seemingly more stigmatized and relented owing to the hackneyed patriarchal construct of our societies. They also face increased problems in acquiescing to the physical adaptations mandated by their biological identity but incongruent with their masculine frame of mind. The author has pertinently raised such issues and asserted the need for increased attention towards them. The problems faced by trans-men are unique and rightly so requires an independent context which has been appropriately done justice to in the course of the book.

The life of an activist is often scoped through the nature of his/her work in the respective fields through increased sensitization, mobilization and progressive developments aiding towards objective realization. However, empowering it may seem at the end, the travails of making a life-changing transition from a sex worker to being an office-staff at an NGO is one tale that merits outstanding illustration. Her rise up the ranks inside Sangama has been wonderfully articulated with momentous punctuations of struggle against the establishment, the police and the law-enforcing agencies with a view to bring about basic sensitization among people towards the real transgender identity almost two decades ago at a time when the instruments of social media and digital equipment were not available for fueling such a crusading initiative. What is particularly welcoming about reading these pages is the autobiographical nature of the text which gives an author-synonymous construct to it through the personal narrative. She is critical of many issues that have been plaguing the dynamic enterprise of social movement in India on account of petty politics and vested agendas. Such fearless exposition by the author of an establishment of which she was once part of is highly praiseworthy.

The issues concerned with denying transgendered identity is to be rightly associated as one of rights-violation under the Constitution of India. The right to life and liberty and the right to equality of transgendered people under Article 21 and 14 respectively are unequivocally breached when the state is deficit in its obligation with regard to providing them with essential entitlements such as ID, ration, etc. owing to the absence of their exclusive categorization as a class of citizens barring male or female. This blatant human rights violation is in addition to the social ostracisation that haunts such groups of people throughout their lives. Therefore, what they essentially need is state-sponsored legal and material incentivisation of their livelihoods via legislations and social remedies including jobs, housing, etc. Hence, the author has attempted relentlessly to catapult this idea into the minds of the reader by offering refined examples of gender brutalities affected upon them by the society with much critical aplomb. It is commendable as to how meticulously she has examined some of the landmark court judgments and parliamentary legislations pertaining to LGBTQ rights and offered her own perspective upon them in spite of her limited educational outlook. She is a true activist in act as well as spirit, one who has risen mercurially in terms of her societal awareness and fraternizing prowess to be able to tell her story as a representative of a community that has been at the receiving end of all forms of social subjugation for far too long. By employing an inclusive analysis of the NALSA judgment on transgender rights[2] and the Delhi High Court as well as Supreme Court judgments on interpretation of Article 377 of the Constitution[3], she has expressed acknowledgement as well as discontent, wherever deemed fit, to showcase the ultimate efficacy and influence of these rulings over the life

[2] National Legal Services Authority v. Union of India, WP (Civil) No 604 of 2013.

[3] Nag Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277.

of an ordinary transgendered individual. The author has also attempted to highlight the deficiencies in the legal set up which have repeatedly led to the institutional handicap of the state instrumentalities that are supposedly assigned the task of materializing the law into action.

The true credit for the expression and language in the book, however, goes to Nandini Murali who, through her personal recounts with Revathi has been instrumental in bringing shape to the English text of the book. Attributing a sense of personal accord with her, the author expresses the exemplar ease and understanding she struck with her, thus, idolizing examples of friendship and association with the people of transgender community in the country, which is unnervingly uncommon. Mrs. Murali has also done an incredible job of translating Revathi's words in her native language to a synonymously corresponding level of comprehension in the vernacular. Making no efforts at literally brandishing, she has appropriately articulated the narration to the similar level of enunciation which corresponds with that of a person of same linguistic prowess as Revathi. There is however a noticeable departure of this modicum of expression in three chapters, Criminalized by Law(Chapter 8), The Supreme Court Judgment(Chapter 20) and A Ray of Hope(Chapter 21), wherein the expression takes an academic form and doesn't quite remain in tandem as the rest of the book. Although there are a few critical junctures where Revathi's alignment of reasons do not quite fall at places, the bigger picture of re-establishing gender identities takes larger precedence and can be conveniently overlooked. One such instance is when she describes Famila as an independent and liberated woman who according to Revathi was wrongfully dismissed from her service at Sangama because she refused to abandon sex work. Although the author throws in her weight behind this decision by Famila, she is later observed blaming herself for Famila's death to a certain extent. This is a fine line of morality and objective hypothesis where it appears to me as a reader that identifying oneself as a social worker and advocating for the uplift of one's own community while simultaneously engaging in the same acts which one is advocating against, which is sex work in this scenario, seems particularly incongruent from a moralistic viewpoint. Nevertheless, it was the spirit of a liberated livelihood and freedom of survival that were the propellants of Famila's life, as described by the author and it is in this spirit that her work towards the welfare of transgender community will be well remembered.

A book is only the sum of its parts. The social landscape traversed by this book is one of the most harrowing and emboldening ones that we face today. It is yet another addendum to social change in the manner of literary art form which makes it relevant and worthwhile. By way of addressing the personal challenges of Revathi and a few other people of her community, it spells out the necessary perceptive outlook that is of utmost requirement to be borne within the minds of the reader today, towards reforming the transgender identity in one of the most populous democratic society in the world.

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