

ITMU LAW REVIEW

VOL. 1, ISSUE 1 (JANUARY – JUNE 2015)

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Shubhojeet Kundu

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ITMU Law Review (ISSN 2321–9904) is a peer-reviewed biannual academic publication of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law, ITM University, Gurgaon. This publication is an endeavour to serve as a forum for the promotion and circulation of views on contemporary legal issues among members of the legal profession, academicians, and students. The Law Review targets legal research centres, policy makers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review, CPGLS or ITM University.

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EDITORIAL NOTE

It is a matter of immense pleasure for the Editorial Board to successfully introduce the inaugural volume of ITMU Law Review. The object of this Law Review has been to provide an academic platform for the members of the legal fraternity. Despite being the first volume, the response to the Law Review was extremely encouraging with contributors with diverse expertise. This edition analyses the legal developments that have taken place in various areas of law, both at national and international levels. The contributions circumscribe wide variety of legal topics – from climate change to human rights to taxation. The authors have done considerable justice with their respective topics and we are confident that the articles published in the Law Review would provide an interesting reading on contemporary legal issues.

In the article, *Utilization of Biological Resources and ABS: International and National Legal Regimes*, Dr. A. David Ambrose has repeatedly canvassed the issues with regard to biological diversity, genetic resources and its access and benefit sharing with the aid of various international conventions and protocols on the same. He has attempted to draw parallels between Indian and International regimes on the issue and has pointed out the reason for disparity between them.

Dr. Debasis Poddar, in *Discretion in the Law of Direct Taxation: A Source of Aberration for Rule of Law under the (Dis)guise of Tax Assessment*, exposes booby-traps within the taxation regime and thereby facilitates policymakers to address the same and attain better economic governance through reforms toward systemic transparency vis-à-vis computation and collection of taxes.

Dr. Uday Shankar, in his article, *Employment Laws in India and Their Impact on the Health of Workers*, has equated the importance of health care of workers with the progress of our nation. He has made a comprehensive analysis of the health care provisions under various labour and employment laws in India and the attitude of the State towards the issue.

Mohammad Rubaiyat Rahman, in his article *Climate Change Challenge in the Orb of Fragile and Post Conflict States*, has expressed concerns about the impact of climate change on the weak or failed States already ravaged by war or

disasters. Referring to various countries across the globe, the author has referred to various expert opinions and provisions under the International Environmental Law with a hope to overcome this extreme crisis situation.

An independent judiciary is necessary for a free society and a constitutional democracy. Dr. Azim B. Pathan in his article, *A Vanishing Jurisprudence of the Independence of Judiciary in India: An Analysis With Reference to Judicial Appointments Commission Act, 2014*, has analyzed the National Judicial Appointments Commission Act, 2014 and its implication on the independence of judiciary.

Dr. R. Srinivasan has segregated the time since 1950 into different phases and analyzed the role of the Apex Court in safeguarding the rights of the women in his article, *Journey of the Supreme Court in Interpreting International Human Rights of Women in Post-Constitutional Era*. Thus he has been able to bring forth the development of the women right's jurisprudence authored by the Indian judiciary.

Dr. Jyothi Vishwanath & Mr. Srinivas C. Palakonda, in their article, *Evolving Effective Legal Mechanism for Eradicating Child Labour in the Contemporary Times: An Assessment*, has examined the concept of child labour with reference to the municipal and internal law. They have discussed the causes and impact of child labour on the child and suggested certain measures required from the concerned quarters for complete eradication of child labour.

Ms. P. Lakshmi, in her article *Uniform Personal Law – If Not Now, When?*, has contested that India is a concoction of divisions of religions, castes, beliefs and principles which is further divided by different personal laws of each religion. She has attempted to trace the history of the concept of a uniform civil code and has dealt with its significance and effects on the citizens of India.

In *Reading Reason into Religion: A Legal Analysis on Animal Sacrifice in the Light of Gadhimai Festival*, Mr. Manjeri Subin Sunder Raj has explained as to how religion intersects with the dastardly practices of animal sacrifice. This article displays a detailed analysis on the recent findings about such practices, judicial precedents in that regard and reasons for the gradually changing shift towards an eco-centric approach.

Mr. Shubhojeet Kundu, in his article *Post Partition Laws on Displaced Persons – Charting the Legal History*, has demonstrated that despite the absence of any specific legislation relating to refugees or India not being a party to the UN Refugee Convention, the Government of India, through various legislation and orders, managed to deal with numerous problems regarding refugees which cropped up due to the migration following the partition.

We would like to place on record our sincere gratitude to Hon'ble Members of the Governing Body, ITMU; Prof. (Dr.) Prem Vrat, Hon'ble Pro-Chancellor, ITMU; Brig. S.K. Sharma (Retd.), Pro Vice Chancellor, ITMU; Col. (Retd.) Bikram Mohanty, Registrar, ITMU; for their invaluable guidance and

encouragement at every step of this journey. We are also thankful to many other important actors who made this issue possible including the reviewers, the dedicated staff of the University and ABC Printers, New Delhi. Last but not the least; the Editorial Board is indebted to the authors and other members of our fraternity and look forward to further academic endeavours.

It is indeed a pleasure to communicate to you seeking opportunities for in a hope to build a lasting relationship.

Editorial Board

ITMU LAW REVIEW

MESSAGE FROM THE PRO VICE-CHANCELLOR, ITMU

ITM University, nationally renowned for leadership in Engineering and Management Studies at the Under Graduate and Post Graduate level has established a law school to promote profound scholarship and enlightened research in law. To accomplish the said objective, the ITM University felt the need to establish the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law. In its short span of life, I am glad to acknowledge that various conferences and seminars have been successfully conducted under the aegis of the CPGLS. Now, the Centre has added yet another feather in its cap by coming up with the first academic journal of the University.

Hence, it's indeed a pleasure for me to present this inaugural volume of the ITMU Law Review. I would like to appreciate the role of every member of the efficient Editorial Board without whose dedication this publication would have remained a distant dream. I also express my sincere thanks to every actor, both inside and outside the University, involved in this arduous process for lending their expertise and support.

I am confident that the Law Review will flourish and attain greater heights in the days ahead. I would also like to congratulate the scholars whose articles have been published in this first issue. I sincerely hope that the readers would be immensely benefited in enhancing their knowledge from the well-researched and insightful articles covering wide range of legal issues. I wish the Law Review and the Editorial Board all success in their endeavour. I am sure that the Law Review proves to be yet another milestone in the achievements of ITM University, Gurgaon.

Brig. S.K. Sharma (Retd.),

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UTILIZATION OF BIOLOGICAL RESOURCES AND ABS: INTERNATIONAL AND NATIONAL LEGAL REGIMES

Dr. A. David Ambrose

I. INTRODUCTION

One of the three objectives of the Convention on Biological Diversity (CBD)¹ is fair and equitable sharing of the benefits arising out of the utilization of genetic resources. This objective is considered to be an important key element for the realization of the other two objectives namely (i) the conservation of biological diversity, and (ii) the sustainable use of the components of biological diversity. Thus, for permitted access, users of genetic resources are obliged to share benefits arising from the utilization of such resources with the providers; benefits, which help providers to develop their own sustainable uses and to preserve biodiversity. CBD under Art 15 acknowledges the sovereign rights of resource states to regulate access to genetic resources as well as their right to stipulate the sharing of benefits from the utilization of genetic resources. Thus the users of genetic resources are obliged to share benefits arising from the utilization of genetic resources with resource states. This position has been welcomed by many bio-rich countries as a panacea against rampant bio-piracy and seen as an opportunity to share benefits as a new way of earning quick and great wealth. Accordingly, many countries including India enacted legislations covering access and benefit sharing (ABS). Furthermore an international regime relating to ABS has been created by adopting the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD.² In this paper, an attempt has been made to discuss both the Indian and International regimes relating to ABS.

¹ See generally CBD, art. 1

² Nagoya Protocol on Access to Genetic Resources and Fair and equitable Sharing of Benefits from its Utilization (Nagoya Protocol), adopted on Oct. 29, 2010, in its objective under Art. 1, provides for the 'fair and equitable sharing of the benefits arising from the utilization of genetic resources thereby contributing to the conservation of

II. CBD AND ABS

From the ABS point of view, Articles 15 and 8(j) of CBD are very much pertinent. Art 15 recognizes the states' sovereign rights over the natural resources in the areas under their jurisdiction and states have authority to determine access to genetic resources in areas within their jurisdiction and while doing so the parties to the Convention have an obligation to take appropriate measures with the aim of sharing the benefits arising from the utilization of genetic resources in a fair and equitable manner.³ In addition, Art 15 provides that 'access to genetic resources, *where granted*, shall be (i) on mutually agreed terms and (ii) subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by the Party'.⁴

As traditional knowledge (TK) plays an important role in the utilization of genetic resources since it leads to genetic resources that are useful, protection of TK often includes ABS mechanism and accordingly, under Art 8(j), the Parties to the Convention have an obligation to share benefits from the utilization of traditional knowledge, innovations and practices of indigenous and local communities associated with genetic resources.⁵ Each contacting party shall, as far as possible and as appropriate, subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices. Thus a basic legal frame work for ABS under CBD- in general under Art 15 and with regard to TK under Art 8(j) - is established.

biological diversity and sustainable use of its components *available at* <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited Jan. 30, 2015)

³CBD, art 15 (7)

⁴ CBD, arts 15 (4) and (5); (*Emphasis supplied*)

⁵ CBD, art 8(j)

III. DEVELOPMENT OF INTERNATIONAL REGIME FOR ABS

Since the CBD recognized the States' sovereignty over the biological resources and authorized the Parties to enact national legislations regarding ABS, starting from the Philippines in 1995, several countries mostly (biological/genetic resources) provider countries enacted national legislations on ABS.⁶ These legislations envisaged stringent, restrictive and complex procedures for ABS.⁷ The biological resources are seen as 'Green Gold' source for earning great and quick wealth by these provider countries.⁸ Further certain cases of bio-piracy⁹ added fuel to the fire. Generally speaking, the fact that the developing countries own the majority of biological resources and the developed countries possess the technology for genetic engineering is the reason for the third world countries' apprehension that their biological resources could be used to develop genetically engineered bio-products/ organisms without them getting any financial benefits out of such inventions and subsequent patent protection leading to bio-piracy. As a result of this and triggered by the frustration of basic research and bio-prospecting projects, in order to ushering a more meaningful and less stringent ABS regime in 2000 at the Conference of Parties (COP) 5 the Parties to CBD, through the Decision V/26 established the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing (WG-ABS) with mandate to develop guidelines

⁶See generally Lyle Glowka, *A Guide to Designing Legal Framework to Determine Access to genetic Resources* (IUCN 1998); Country Reports in Evanson Chege Kamau and Gerd Winter eds., *Genetic Resources, Traditional Knowledge and the law: Solutions for Access & Benefit Sharing* (London: Earthscan, 2009); Loge Cabrera Medaglia, *A Comparative Analysis of the Implementation of Access and Benefit- Sharing Regulations in Selected Countries* (IUCN 2004).

⁷ Evanson Chege Kamu, Bevis Fedder and Gerd Winter, "The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: What is New and what are the Implications for Provider and User Countries and the Scientific Community?", vol 6/3(2010), LAW, ENVIRONMENT AND DEVELOPMENT JOURNAL, 246-262 at 249; available at [http:// www.lead-journal.org/content/10246.pdf](http://www.lead-journal.org/content/10246.pdf)., (last visited Jan 30, 2015)

⁸ *Id*

⁹ Bio-piracy could also mean "illegal or unauthorized access to and use of biodiversity components (mainly genetic and biological resources) and associated traditional knowledge, as part of development and research processes and application of biotechnology"; see www.biopirateria.org cf. (last visited Feb 3, 2015)

and other approaches and to work jointly with the Working Group on Article 8(j) and Related Provisions. Going by the mandate the WG-ABS prepared the Bonn Guidelines¹⁰ adopted by the COP 6 in 2002. In May 2008 at COP 9 in Bonn, the mandate of the Working Group on ABS was extended, and it was instructed to finalize the negotiation of the international regime before its Tenth Meeting in 2010.¹¹

The final text of the last three meeting of the WG-ABS before COP 10 was born in Cali, Colombia.¹² The negotiated text was adopted by the Plenary on 29 October 2010 at Aichi-Nagoya, Japan as ‘The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity’ (Nagoya Protocol)¹³ there by establishing the International Regime for ABS.

IV. INTERNATIONAL ABS REGIME

The Nagoya Protocol shall apply to the benefits arising from the utilization¹⁴ of both genetic resources and traditional knowledge associated with genetic

¹⁰ Bonn Guidelines on *Access to Genetic resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, in Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/6/20(2002), CONVENTION ON BIOLOGICAL DIVERSITY ORGANIZATION, available at <https://www.cbd.int/doc/meetings/cop/cop-06/official/cop-06-20-en.pdf> (last visited Feb. 3, 2015)

¹¹ Ninth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bonn, Ger., May 19-30,2008, Access and benefit-sharing, U.N. Doc. UNEP/CBD/COP/DEC/IX/12, CONVENTION ON BIOLOGICAL DIVERSITY ORGANIZATION., Oct. 9, 2008, available at <https://www.cbd.int/doc/decisions/cop-09/cop-09-dec-20-en.pdf>. (last visited Feb 3, 2015).

¹² Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, UNEP/CBD/COP/10/5/ADD5, CONVENTION ON BIOLOGICAL DIVERSITY ORGANIZATION., available at <http://www.cbd.int/cop/doc/> (last visited Dec. 30, 2014).

¹³ After six years of negotiation the Protocol was adopted on 29 October, 2010. *Supra note 2*. Nagoya Protocol has 27 Preambular paragraphs, 36 Articles and 1 Annex.

¹⁴ Under Nagoya Protocol, art. 2(c), “Utilization of genetic resources” means to conduct research and development on the genetic and/or biochemical composition of genetic

resources within the scope of CBD.¹⁵ Its objective, according to Art 1, is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, thereby contributing to the conservation of biological diversity and the sustainable use of its components. This is achieved by (a) appropriate access to genetic resources; (b) appropriate transfer of relevant technologies, (taking into account all rights over those resources and to technologies); and (c) appropriate funding. Art 5 of the Nagoya Protocol deals with benefit sharing and Art. 6 and 7 cover accesses to genetic resources and traditional knowledge associated with genetic resources (TKAGR) respectively.

A. BENEFIT SHARING

Art 5 provides that the benefits¹⁶ arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared, upon mutually agreed terms (MAT), in a fair and equitable way with the Party providing such resources, i.e., the country of origin of such resources or a Party that has acquired the genetic resources in accordance with CBD (Art 15 (1)). If the genetic resources are held by indigenous and local communities the benefits from their utilization must be shared in a fair and equitable way with the communities concerned again based on mutually agreed terms. Similarly the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Towards this, an obligation to take appropriate legislative, administrative or policy measures is envisaged. For the purpose of benefit sharing the Nagoya Protocol envisages extensive measures on capacity building and they include implementation of the Protocol, negotiation of MAT, development and enforcement of domestic legislation and endogenous research capabilities.¹⁷

resources, including through the application of biotechnology as defined in Article 2 of the Convention”.

¹⁵ Nagoya Protocol, art. 3

¹⁶ The benefits from utilization may include both monetary and non-monetary benefits listed in the Annex of Nagoya Protocol.

¹⁷ Nagoya Protocol, art 22

B. ACCESS

Access to genetic resources is in furtherance of States' sovereign rights over natural resources and is subject to domestic access and benefit-sharing legislation or regulatory requirements and the prior informed consent (PIC) of the Party providing such resources (country of origin of such resources) or a Party that has acquired the genetic resources in accordance with CBD¹⁸. For this purpose, the Nagoya Protocol imposes an obligation on the provider states that they shall through appropriate legislative, administrative or policy measures, provide for 'legal certainty, clarity, and transparency'. Further to this it also provides for, 'fair and non-arbitrary rules and procedures' on access to genetic resources, 'information on how to apply for prior informed consent', clear, cost-effective and timely decision-making, recognition of a permit or its equivalent as evidence of PIC, criteria and procedures for the involvement of indigenous and local communities, and clear rules and procedures for requiring and establishing (MAT).¹⁹ National focal points and competent national authorities are made responsible for advising on PIC and MAT and for granting access²⁰. One single entity may be designated to fulfill the functions of both focal point and competent national authority.

The Nagoya Protocol provides that the access to genetic materials shall be "Fair and non-arbitrary" (Art 6.3(b)) and 'benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources, i.e., the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms'.²¹ The Nagoya Protocol mandates legal certainty²² with respect to the following:

¹⁸Nagoya Protocol, art 6

¹⁹ Nagoya Protocol , art 6(3)

²⁰ Nagoya Protocol , art 13

²¹ Nagoya Protocol , art 5 (1)

²² Nagoya Protocol , art.6 (3)

-
- an authorization by the competent administrative body granting access and setting basic terms for access, utilization, and benefit sharing
 - a contract between the same body and the research institution which specifies the terms of access, utilization and benefit sharing
 - in relation to traditional knowledge, the consent of its holder
 - in relation to genetic resources, according to domestic legislation, the consent of private or communal landowners or owners of the genetic resources

The Protocol envisages one or more competent national authorities (designated by each party) on ABS with responsibility for granting access or, as applicable, issuing written evidence that access requirement has been met.²³ In turn such competent national authorities are to be notified to the Secretariat together with information on their respective responsibilities.²⁴ Art. 15²⁵ and 16²⁶ of Nagoya Protocol impose certain obligations on the user states with respect to ABS compliance that the provider state legislation must be respected. If ABS principles are not followed then the competent administrative authority should have powers to impose remedial measures or sanctions with the consultation of the provider states. Art 17 of Nagoya Protocol requires that the State Parties of the Protocol (the user states) must establish designated check points to collect information regarding genetic resources to ensure that they are accessed with the PIC of the State Party concerned i.e. the provider state.²⁷

The ABS issues relating to utilization of Traditional Knowledge Associated with Genetic Resources (TKAGR) is not adequately addressed in the Nagoya Protocol. Art 5 (5) of obliges all the parties to take legislative, administrative or policy measures benefits arising out of utilization of TKAGR are shared in a fair

²³ Nagoya Protocol , art.13(2)

²⁴ Nagoya Protocol , art. 13(4)

²⁵ Nagoya Protocol, art 15 provides for ABS compliance with respect to genetic resources.

²⁶ Nagoya Protocol , art 16 imposes more or less same obligations under art 15 but with respect to TKAGR.

²⁷ Nagoya Protocol, art 17 envisages certain appropriate measures to monitor and enhance transparency about utilization of genetic resources to support compliance of ABS principles.

and equitable way with indigenous and local communities(ILC) upon MAT. Art 7 mandates that TKAGR that is held by ILCs is accessed with the PIC or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

Art 16 obliges the parties to provide by appropriate effective measures – legislative, administrative and policy, - that the TKAGR utilized, is accessed with (1) PIC, (2) approval and involvement of ILC and (3) on mutually agreed terms according to the laws of the other party where the ILC is located. In spite of these few references, the Nagoya Protocol is silent with regard to many contentious issues like the definitions of TKAGR and ILC, utilization of TKAGR and monitoring mechanisms for the utilization of TKAGR.

V. INDIA AND ABS

After an extensive and intensive consultation process involving the stakeholders, the Central Government has brought Biological Diversity Act 2002.²⁸ The Act has been passed with the following salient features. (i) to regulate access to biological resources of the country with the purpose of securing equitable share in benefits arising out of the use of biological resources; and associated knowledge relating to biological resources; (ii) to conserve and sustainable use of biological diversity; (iii) to respect and protect knowledge of local communities related to biodiversity; (iv) to secure sharing of benefits with local people as conservers of biological resources and holders of knowledge and information relating to the use of biological resources; (v) conservation and development of areas of importance from the standpoint of biological diversity by declaring them as biological diversity heritage sites; (vi) protection and rehabilitation of threatened species (vii) involvement of institutions of state governments in the broad scheme of the implementation of the Biological Diversity Act through constitution of committees.

²⁸ Act no.18 of 2003.

Chapter - II of the Act dealing with Regulation of Access to Biological Diversity prohibits the following persons to undertake biodiversity related activity without the approval of National Biodiversity Authority (NBA).²⁹

- A person who is not a citizen of India.
- Non-resident Indian
- Corporate body not incorporated or registered in India; Indian corporate body having non-Indian participation in its share capital or management.

For ensuring equitable sharing of benefits (ABS) arising from the use of biological resources and associated knowledge, Section 19³⁰ and 21 stipulate prior approval of the NBA before their access. The NBA can impose benefit-sharing conditions.

Section 21(1) provides that the NBA shall while granting approvals ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers. Further, the NBA shall determine the benefit sharing in all or any of the following among other manner:

- Grant of joint ownership of intellectual property rights to the National Biodiversity Authority or where benefit claimers are identified, to such benefit claimers. (Section 21(2)(a))
- Transfer of technology(Section 21(2)(b))
- Association of Indian scientists, benefits claimers and the local people with research and development in biological resources and bio-survey and bio-utilization. (Section 21(2)(d))

²⁹ *Id.* at sec. 3

³⁰ Sec 19 (2) deals with application of patent or any other intellectual property protection whether in India or outside India.

- Payment of monetary compensation and non monetary benefits to the benefit claimers as the National Biodiversity Authority may deem fit (Section 21(2)(f)).

The procedure for access to biological resources and associated TK is further provided in the Biodiversity Rules, 2004.³¹ Under Rule 14 the request for access to biological resources or TK has to be made to the NBA in prescribed Form appended to the said Rules and the approval to access shall be in the form of a written agreement³² between NBA and the applicant.³³ Such Agreement may include among others (1) conditions under which the applicant may seek intellectual property rights; (2) quantum of monetary and other incidental benefits; (3) restriction to transfer the accessed biological resources and the traditional knowledge to any third party without prior approval of Authority; (4) commitment to facilitate measures for conservation and sustainable use of biological resources accessed; (5) commitment to minimize environmental impacts of collecting activities

The NBA may restrict or prohibit the access request if the request for access is for any endangered taxa, any endemic and rare species, may likely to result in adverse effect on the livelihood of the local people, may result in adverse environmental impact which may be difficult to control and mitigate and may cause genetic erosion or affecting the ecosystem function.³⁴

The NBA shall formulate the guidelines on a case-by case basis and describe the benefit sharing formula providing monetary and other benefits such as royalty; joint ventures; technology transfer; product development; education and awareness raising activities; institutional capacity building and venture capital fund.³⁵ While granting approval to any person for access or for transfer of results of research or applying for patent and IPR or for third party transfer of the accessed biological resource and associated knowledge the NBA may impose

³¹ Biological Diversity Rules, 2004; came into force on Apr. 15, 2004.

³² For applications and agreements, *see*

<http://nbaindia.org/content/26/23/application.html>. (last visited Feb. 3, 2015)

³³ *Supra* note 31, Rule 14 (6)

³⁴ *See* Biological Diversity Rules, 2004, r. 16

³⁵ *See* Biological Diversity Rules, 2004, r. 20

terms and conditions for ensuring equitable sharing of the benefits arising out of the use of accessed biological material and associated knowledge.³⁶ With due regard to the defined parameters of access, the extent of use, the sustainability aspect, impact and expected outcome levels, including measures ensuring conservation and sustainable use of biological diversity the NBA in consultation with the local bodies and benefit claimers may decide upon the quantum of benefits on mutually agreed terms between the applicants and the NBA.³⁷ Certain obligations are also imposed on NBA. Depending upon each case, the time frame for assessing benefit sharing on short, medium, and long term benefits should be stipulated by the NBA in addition to stipulating that benefits shall ensure conservation and sustainable use of biological diversity. An obligation to monitor the flow of determined benefits in a manner so determined by the NBA is also envisaged.³⁸

VI. CONCLUSION- INDIAN AND INTERNATIONAL REGIMES ON ABS

It is of interest to note that the Indian ABS regime, considering from the date of Biological Diversity Rules, 2004, is at least six years older than the international ABS regime and therefore inevitably in some aspects they differ. For example with respect to scope, the Nagoya Protocol in Art 3 provides that it shall apply to genetic resources and to traditional knowledge associated with genetic resources within the scope of (Article 15 of) the Convention and to the benefits arising from the utilization of such resources; and the Indian Biodiversity Act and Rules go beyond the scope of the Nagoya Protocol and in Section 3(1) of the Act seeks to regulate access to biological resources and associated knowledge for the purposes of research or for commercial utilization or for bio-survey and bio-utilization. The apparent difference between the Protocol on one hand and the Act and Rules on the other is that the Protocol seeks to regulate ‘the utilization of biological resources’ whereas the Nagoya Protocol covers

³⁶ See Biological Diversity Rules, 2004, r. 20 (4)

³⁷ See Biological Diversity Rules, 2004, r. 20 (5)

³⁸ See Biological Diversity Rules, 2004, r. 20 (5)

only 'genetic resources'. Similarly, with respect to non-commercial research, the Indian ABS regime attempts to regulate all kinds of research including non-commercial research by non-Indian individuals and institutions and the Nagoya Protocol in the context of ABS aims at (i) promoting and encouraging non-commercial research which contributes to the conservation and sustainable use of biological diversity, (ii) paying due regard to cases of present or imminent emergencies that threaten or damage human, animal or plant health and (iii) considering the importance of genetic resources for food security³⁹. From the ABS point of view, Art. 6 and 7 of the Nagoya Protocol stipulates for PIC and MAT for accessing genetic materials and TKAGR respectively. In the Indian ABS regime PIC requirement is not adequately provided. Under Section 14(2) of the Biodiversity Act the rights over biological resources and associated traditional knowledge rests with Biodiversity Management Committees (BMCs) and the NBA has to necessarily consult them before taking any decision relating to the utilization of biological resources and associated traditional knowledge within the territorial jurisdiction of such BMCs. However, there is no provision in the Act envisaging a process of securing the PIC of BMCs for accessing biological resources and associated traditional knowledge from their territorial jurisdictions. Art. 15 and 16 of Nagoya Protocol⁴⁰ impose certain obligations on the user states with respect to ABS compliance that the provider state legislation must be respected. Art 17 of Nagoya Protocol requires the establishment of compliance mechanism in the user state by establishing appropriate check points. At the time of establishing the Indian ABS regime only an urge to protect our biological resources that too in the light of CBD was there and hence the regime was provider country oriented and the thought of India becoming a user country never occurred to our legislators. Accordingly, Indian ABS regime does not contain any user country compliance provisions, in other words it is user country blind and in this fashion differs from the international ABS regime.

³⁹ Nagoya Protocol, art.8

⁴⁰ *Supra* notes 25 and 26

With respect to access to genetic resources the international regime provides for fair and non-arbitrary rules and procedures on accessing genetic resources.⁴¹ On the contrary the Indian regime has different access procedures for Indians and non-Indians.⁴² India has already signed the Nagoya Protocol and also ratified the same⁴³ in spite of some cautioning against ratification.⁴⁴ As seen above there are some areas of disparity between the Indian and international ABS regimes and not only India, but also many developing countries do not have capacity for complying with the international ABS regime.⁴⁵ India now should concentrate in capacity building to protect and conserve its rich bio-diversity.

⁴¹ See Nagoya Protocol, art. 6(3) (b) which runs as follows: “(b) Provide for fair and non-arbitrary rules and procedures on accessing genetic resources”.

⁴² *Supra* note 28

⁴³ *Ratification of Nagoya Protocol on Access and Benefit Sharing by India*, THE PRESS INFORMATION BUREAU. IN., available at

<http://pib.nic.in/newsite/erelease.aspx?relid=88149> (last visited Feb. 11, 2015)

⁴⁴ The need for India to exercise caution in ratifying the protocol has been emphasized for various reasons; for such reasons see “*Go Slow on Ratifying Nagoya Protocol, say Experts*”, THE HINDU, Oct. 4, 2012, available at <http://www.thehindu.com/todays-paper/tp-national/tp-kerala/go-slow-on-ratifying-nagoya-protocol-say-experts/article3963721.ecet>. (last visited Feb. 4, 2015).

⁴⁵ The Ministers from ASEAN and India, met in New Delhi on 7th September 2012 and agreed “To call upon CBD CoP-11 to enhance capacity of the Parties to the CBD in ensuring preparedness for implementing the provisions of the Nagoya Protocol”; See Para 12 of the New Delhi ASEAN - India Ministerial Statement on Biodiversity, Sep. 7, 2012, UNEP/CBD/COP/11/INF/37;10, CONVENTION ON BIOLOGICAL DIVERSITY. ORG., available at <http://www.cbd.int/cop11/doc/> (last visited Feb. 4, 2015)

**DISCRETION IN THE LAW OF DIRECT TAXATION: A
SOURCE OF ABERRATION FOR RULE OF LAW UNDER THE
(DIS)GUISE OF TAX ASSESSMENT**

Dr. Debasis Poddar

I. INTRODUCTION

At the threshold of this effort, the author does endorse claims of an increasing trend toward transparency in tax administration which seems apparent on the face of record. By courtesy of the new economic policy to attain liberalization-privatization-globalization (LPG) since 1991, consequent reforms in the law of taxation- both direct and indirect- are due till date. Consecutive governments were at work to accomplish a herculean job to this end. A new taxing statute was on hold to gain consensus on the same and now, after two decades of weak governance, the strong central government is set to table the same along with permutation and combination to suit agenda of globalized India the way people in power wish to bring in. This effort, being stocktaking of experience from the past and present statutes on direct taxation, e.g. the Income Tax Acts of 1922 and 1961 respectively, offers preview of better tax management trajectory the State ought to follow through a statutory regime to be proposed soon.

To trace back the history of taxation from agrarian economy in ancient Indian antiquity, one-sixth share of the crops harvested, were due to the then ruler. In *Manusmriti*, taxonomy of taxation prescribed for citizens is apparent from *shlokas* thereby cited as virtual statute for the time and space it was meant for.¹ Taxation at times took ugly turn in medieval India due to atrocity of few Islamic rulers toward their Hindu subjects while the latter stood vulnerable in terms of taxation on the count of religious practice. Rather than econometrics, such tax management was rather driven by the then religious bigotry to encourage conversion to the Islam. Until British India,

¹ M. RAMA JOIS, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA: ANCIENT LEGAL, JUDICIAL AND CONSTITUTIONAL SYSTEM 618-623 (1984).

extraneous factors other than economics exerted greater impact on tax management for good reasons of the given time and space.

The present paradigm of direct taxation- both substantive law and practice therewith- was introduced by the colonial government in British India for reasoning of its own.² Till date, by and large, similar legacy still prevails over in terms of tax administration since jurisprudence behind the Income Tax Act of 1961 rests on its predecessor Act of 1922.³ Thus, the way Income Tax Department remembers *Kalidas in Raghuvansh*⁴ seems absent in the domain of direct taxation law and procedure for India in practice. What the author hereby contends is subsequently substantiated by post-1922 history of taxation posted by the Department in the same webpage as reform in tax structure sans radical change thereby stood apparent on the face of record.⁵ The same strategy was adhered to when Law Commission recommended reforms to the Income Tax Act of 1922 as asked for by the then Government in independent India.⁶ No wonder that the present Act followed predecessor Act and therefore remains very complicated both for administering authorities and tax-payers.⁷

² Jaison, *Brief History of Income Tax in India*, COMMERCE BLOGPOST, Nov. 21, 2011, available at <http://jaisoncommerce.blogspot.in/2011/11/brief-history-of-income-tax-in-india.html> (last visited May 9, 2015)

In India, this (direct tax) was introduced for the first time in 1860, by Sir James Wilson, in order to meet the losses sustained on account of the military mutiny of 1857. In 1886, first Income Tax Act was passed and the same remained in vogue with many amendments made from time to time. In 1918, a new Income Tax Act was passed and again it was replaced by another new act of 1922.

³ LAW COMMISSION OF INDIA, *Twelfth Report on Income Tax Act, 1922* (1958), available at <http://lawcommissionofindia.nic.in/1-50/Report12.pdf> (last visited May 10, 2015)

Government asked us to revise the Income-tax Act so as to make its provisions more intelligible without affecting its basic tax structure ... It is perhaps possible to make the provisions of the Act more logical and clearer without affecting the tax structure; but it is certainly not possible to make the Act simpler without encroaching upon at least the fringe and verge of the tax structure.

⁴“It was only for the good of his subjects that he (KING DALIP) collected taxes from them, just as the Sun draws moisture from the Earth to give it back a thousand fold.

Available at <http://www.incometaxindia.gov.in/Pages/about-us/history-of-direct-taxation.aspx> (last visited on May 9, 2015)

⁵ *Id.*

⁶ *Supra* note 3.

⁷ *Supra* note 2.

II. PROCEDURAL HURDLES IN DIRECT TAX ASSESSMENT

Due to want of radical transformation in archaic tax structure during British India, resort to critical analysis of the earlier Act serves the purpose of honest stocktaking. If not informed about scholarship of *M. C. Setalvad*- first Attorney General of India and Chairman of the then Law Commission- the readership may be confused whether the critique was scribbled by anarchist against the State; so cynical was his statement while he looked back on the Act of 1922 with despair.⁸ Since substantive law was such, not without reason, procedural law followed the similar state of affairs to make a mark of its own and thereby left tax administration at bay.

Since long back, lesser utility (if not futility) of direct taxation in terms of its revenue resource generation stands well established and the same seems more so in a country like India with unmanageable bulk of population to its (dis)credit.⁹ National income in postcolonial India, therefore, could never facilitate the State “wipe out every tear from every eye” as insisted by *Nehru* in his midnight speech on ‘Tryst with Destiny’.¹⁰ Carrying forward of

⁸ *Supra* note 3

(There is hardly any Act on the Indian Statute Book which is so complicated, so illogical in its arrangement, and in some respects so obscure as the Indian Income-tax Act, 1922. Courts and commentators have commented on the illogical arrangement of the provisions of the Act. It has been reportedly pointed out that the amendments made from time to time to the Act directed as they frequently are at stopping an exit through the net of taxation freshly disclosed, are too often framed without sufficient regard to the basic scheme upon which the Act originally rested. Provisions dealing with the same topic or subject-matter are scattered through the various Chapters of the Act and only a thorough knowledge of the whole would enable anyone to find out all the provisions bearing on a certain point. Added to the illogicality of the arrangement are two other defects, inaccuracy in the use of language and a degree of obscurity which make it difficult to have a glimpse on the real intention of the legislature.)

⁹ Mahfooz Ahmed, *Cost of Tax Collection in India*, 3(7) ECO. & POL. WEEKLY, 339 (Feb. 17, 1968)

(It is generally found that ... if the cost of collecting taxes (‘administrative feasibility’) is the sole criterion, for choosing from among different taxes, then customs duties are preferable to both excise duties and income tax, and excise duties are preferable to income tax. More generally, ‘direct taxes’ are costlier than ‘indirect taxes’).

¹⁰ *A Tryst with Destiny: Indian Prime Minister Jawaharlal Nehru’s Inaugural Address*, INTERNATIONAL RELATIONS AND SECURITY NETWORKS, Aug. 14, 1947, available at

http://mercury.ethz.ch/serviceengine/Files/ISN/125396/ipublicationdocument_singledocument/b5ba5c87-6993-42f8-9763-161aa70e17dc/en/1154_trystnehru.pdf (last visited on May 2, 2015)

colonial legacy vis-à-vis direct taxation law for the post-colony, in its consequence, could not allow optimism for third-world economy to take place.¹¹ Thus, despite jurisprudential reforms proposed by Law Commission and implemented by the Parliament through replacement of the Act of 1922 by another of 1961, basic tax structure with all its limitations remained as it was earlier. As per its own report, limited terms of reference for the Commission went apparent on the face of record.¹² Political (ill) will thereby stood on the way toward radical reform.

What the Commission reported is mentioned below issue-wise:

1. Logical rearrangement and regrouping of sections¹³
2. Simplification of the language; provisos removed¹⁴
(wherever possible)
3. Few minor changes in the substantive part of law¹⁵
4. Few major changes in the procedural part of law¹⁶
5. Best practice(s) elsewhere derived and adopted¹⁷
6. Other available taxing statutes enacted in India¹⁸

Thus, at its best, this may be appreciated for rationalization of existing tax structure rather than radical change which was neither claimed for anyway either by the State or by the Commission. With the passage of time, however, e-

¹¹ V. K. R. V. Rao, *National Income of India*, ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, INDIA SPEAKING 105 (1944)

(I believe I have said enough to indicate the dark and sombre background of the economy against which the population of India lives and has its being. Whether this poverty is the inevitable result of the niggardliness of Nature defying the most intelligent and organized application of human intelligence, or whether it is due to the failure of the human factor and can be remedied by a systematic and planned attempt at economic reconstruction administered by a government responsible to people, is a question outside the scope of this article. But I cannot help recording the belief that Indian poverty is not inevitable and that, given a national government and the adoption of a planned economy, substantial increase can be brought about in Indian income and considerable improvements effected in India's standard of life and conditions of real income.)

¹² *Supra* note 3, at ¶ 7, 9.

¹³ *Supra* note 3, at ¶ 5.

¹⁴ *Supra* note 3, at ¶ 6.

¹⁵ *Supra* note 3, at ¶ 8.

¹⁶ *Supra* note 3, at ¶ 8.

¹⁷ *Supra* note 3, at ¶ 10.

¹⁸ *Supra* note 3, at ¶ 11.

governance in taxation has brought in radical change in procedure. But this change too remains restricted by and large to e-submission of tax returns filing, etc. The core assessment procedure, discretionary part in particular, is yet to be brought into the realm of e-governance. And here lies an area which is susceptible to rent-seeking practice out of unholy nexus between unscrupulous interest in tax administration and profession as its counterpart in tax advocacy- altogether isolated domain well within legal profession- to squeeze taxpayer to gross detriment of the confidence the taxpayer otherwise would have had reposed on economic governance of the country. Thus, rather than tax avoidance, tax evasion seems on its rise, as a trend toward mutual detriment of both tax collector and taxpayer, to turn pandemic in its spread. Also, after (undue) benefit sharing between collector and evader, community at large is left to *de minimis*, if at all.

III. SOCIO-LEGAL HURDLES FOR TAXABLE INCOME GROUP

With such cynic historical setting behind, the Act remains opaque enough to layman even with formal education and thereby appears as a puzzle to taxpayer for whom the same is meant. Also, people engaged with heavy preoccupation possess no time to keep regular track with annual events of change in taxing statute through the Finance Act. Consequently, in the midst of otherwise occupied lifecycle, compliance to such rigid direct taxation structure appears odious to majority, if not all, stakeholders in tax net of the country. Herein lies another fallacy in morality vis-à-vis law of direct taxation. After Fuller, the fallacy of morality may be identified through two parallel streams- external morality and internal morality respectively.¹⁹ First, sans public endorsement in favour of taxing statutes as amended time-to-time, the same possess little- if at all- external morality. Next, due to their hyper-

¹⁹ Lon L. Fuller, *Positivism and Fidelity to Law, A Reply to Professor Hart*, 71(4) Harvard L. REV. 645 (1958) (The authority to make law must be supported by moral attitudes that accord to it the competency it claims. Here we are dealing with a morality external to law, which makes law possible. But this alone is not enough. We may stipulate that in monarchy that accepted “basic norm” designates the monarch himself as the only possible source of law. We still cannot have law until our monarch is ready to accept the internal morality of law itself.)

technical structure, taxing statutes suffers from want of internal morality on three counts to offend relevant principles, e.g. rules must be expressed in understandable terms, rules must not be changed so frequently that the subject cannot rely on him, rules must be administered in a manner consistent with their wording.²⁰ Taxing statutes in general and of direct taxation in particular, thereby fall severely short of endorsement from the domain of morality anyway. Thus, without optimizing major socio-legal hurdles for taxpayer in practice, hitherto mission of *sarkaari* sermons in ‘Citizen’s Charter’ ought to end in smoke.

If ‘Citizen’s Charter’ of Income Tax Department reflects on revenue governmentality, then divorce between the policy grandeur and tax assessment procedure in practice stands obvious. For the purpose of illustration, that constitutes fulcrum of this effort as well, discretionary space may be mapped in the Act. Satisfaction being expression of discretion, the same found space about hundred times in the Act of 1961.²¹ Of late, in the (proposed) Direct Taxes Code of 2013,²² the same old satisfaction finds space hundred times by count once again to indicate continuity of its archaic jurisprudence. Mission of the Charter, despite the same being issued in 2014, providing too much ado for the Department “to be accountable and transparent” creates confusion on intention of the Parliament to this end.²³

²⁰ *The Procedural Naturalism of Lon L. Fuller*, available at <http://lawmanblog.blogspot.in/2012/09/the-procedural-naturalism-of-lon-l.html> (last visited May 13, 2015)

²¹ Criteria for Satisfaction, in a way or other, appear about hundred times within the statute itself, e.g. Sections 10(21)(22B)(23)(23AAA)(23B)(23C)(23F)(23FA), 12A, 12AA, 13, 14A, 32A, 35, 35AC, 37, 40A, 43, 54ED, 64, 68, 69, 69A, 69B, 69C, 80C, 80G, 88, 93, 94, 115VQ, 115VZC, 115WH, 127, 132B, 139, 143, 145, 151, 153C, 158A, 158BB, 158BC, 158BD, 164, 172, 173, 178, 189A, 194C, 197, 201, 206C, 220, 221, 230, 237, 245H, 246, 249, 251, 253, 255, 260A, 260B, 264, 269B, 269F, 269G, 269H, 269J, 271, 273, 273A, 273AA, 278AB, 293A, if not more, of the Income Tax Act, 1961, as amended to date. In some provisions, satisfaction got repeated several times to count hundred (approximately) in the Act of 1961.

²² The Direct Taxes Code, 2013, available at <http://www.incometaxindia.gov.in/Documents/direct-taxes-code-2013-31032014.pdf> (last visited May 13, 2015)

²³ Citizen’s Charter, 2014 <http://www.incometaxindia.gov.in/Documents/citizen-charter-declaration-english.pdf> (last visited on May 13, 2015)

Preponderance of satisfaction jurisprudence- a colonial remnant within tax structure and percolation of the same in revenue regime of globalized India- may and does hit hard on against national income generation? Points posed before the State stand as- whose satisfaction taxpayer is required to earn? Also, how much taxpayer is required to pay (as rent) and earn satisfaction? It is implied that 'satisfaction' is pregnant with potential to unleash floodgate of caprice for quasi judicial desks of high office in tax structure. At the same time, however, terrain of taxation is such that meeting between assessor and taxpayer stands part of the process and cannot be done away with in its entirety.²⁴ Resort to technology, e.g. videography of meeting between Assessor and Assessee, is a smart way to address the conundrum between taxation and transparency. Already Law Commission prescribed the way to bring in technology for investigation and trial of criminal cases.²⁵ The same may be followed to attain accountability, transparency, etc. to substantiate the relevant Mission of Income Tax Department in the Charter.²⁶ Indeed the remedy may not cure every sundry hurdle in tax administration. Smarter stakeholders, e.g. Assessor or Assessee or both may hoodwink videography as a tool of transparency in ways of their own. Still this ought to emerge as a bright beginning for revenue generation regime in time ahead.

Also, besides emphasis on taxpayer education toward tax awareness, Income Tax Department can also offer professional services for the benefit of taxpayer in exchange of reasonable cost to be charged on taxpayer as beneficiary of the service. Whether or how far service is required ought to be left to pure individual discretion of taxpayer concerned. The idea behind this suggestion lies in an attempt to rescue naive taxpayer from being squeezed out

²⁴ *Vide* the Income Tax Act of 1961, Chapter XIII- Income-tax Authorities, subchapters A-D, etc.

²⁵ LAW COMMISSION OF INDIA, *Two Hundred Thirty Ninth Report on Important Measures to Improve Criminal Justice Through Deployment of Technology at the Police Stations* (2012), available at <http://lawcommissionofindia.nic.in/reports/report239.pdf> (last visited Feb. 20, 2015) (Digital videography to be installed at police stations. At the time of receiving FIR/complaint, videography should be made compulsory. By this process, earliest version of informant will be evident. So also, at the time of inspection of the scene of offence and recovery of material object, videography should be insisted upon.)

²⁶ *Supra* note 23.

due to the alleged collusion vis-à-vis rent-seeking, if any, between tax administration and profession of tax advocacy. For tax evader, to expose collusion, internal intelligence services of the Department serve the purpose. Intelligence services run by ombudsman, not anyway annexed to the Department, are likely to perform better. By courtesy, the Income Tax Ombudsman Guidelines 2010,²⁷ his high office stands subject, if not subjugated, to covert control of the Department in a way or other.

IV. SATISFACTION JURISPRUDENCE OF ASSESSING OFFICER

The way 'satisfaction' of tax administration prevails over in direct taxation regime is a concern for reform in existing structure. At bottom, however, as expression of whim and fancy out of foreign domination, satisfaction stands rooted to tax law of the land as dominant discourse in tandem with the governmentality toward colonized subjects which the State is yet to get rid of even after independence; the way archaic doctrine of pleasure percolated into the constitutional governance. Regrettably, despite being arbitrary and thereby anathema to rule of law, these doctrines but continue unabated while piecemeal initiatives of the judiciary to reduce arbitrariness fall severely short to do away with aberration of a Democratic Republic pledged to the people of India whose satisfaction, if at all, the State is meant for.

In particular, 'satisfaction' of the Assessing Officer- at least in strategic provisions- does possess heavy potential to put Assessee in peril. If return file is in wrong hand, under Section 145²⁸- read with 271²⁹- of the Act, so called 'satisfaction' of the former may turn unruly horse to gross detriment of the latter. Discretion sans accountability thereby may and does unleash floodgate of caprice to defeat very object and purpose of the Act toward national revenue generation for economic development of the State. Indeed the impugned

²⁷ The Income Tax Ombudsman Guidelines, 2010, *available at* http://www.incometaxindia.gov.in/Documents/ombudsman_guidelines_2010.PDF (last visited Feb. 20, 2015)

²⁸ Income Tax Act, 1961, sec. 145

²⁹ Income Tax Act, 1961, sec. 271

satisfaction is cut to size by a series of judgments,³⁰⁻³¹⁻³² cases of abuse by strict interpretation of the term sometimes reduce such rationale to otiose. In common law system, a(ny) taxing statute being subject to strict interpretation, legislature ought to review such term in context of potential for its abuse at random at heavy cost of vulnerability for loot to be unleashed on taxpayer. The potential risk in turn bankrupts the confidence otherwise s(he) would have reposes on the system. After all, confidence of taxpayer constitutes building blocks of tax administration toward economic (good) governance.

Last but not least, one major drawback (if not only) of the Income Tax Acts of 1922 and 1961, lies in being too suspicious on diverse stakeholders in its existing tax net and beyond to miss sight on its own and the blind spot remained right under its nose. In its anxiety for loss of revenue, while the Department is engaged chasing taxpayer, vested interest within its administration- except sporadic instances of being exposed- by and large remained spared; whether and how unwittingly is a point apart. Besides, alleged collusion between tax administration and profession of tax advocacy remains underestimated despite being condemned by taxpayer community out of experience. Of late, in its literature, even an official institution has recognized corrupt practices inside its

³⁰ *Commissioner of Income-Tax v. Sarangpur Cotton Manufacturing Co.*, (1938) 40 BOM.L.R. 257

(It may well be said that, though the profit brought out in the accounts is not the true figure for income-tax purposes, the true figure can be accurately deduced there from. The simplest case would be where it appears on the face of the accounts that stated deduction has been made for the purpose of a reserve. But there may well be more complicated cases in which nevertheless it is possible to deduce the true profit from the accounts, and the judgment of the Income-tax Officer under the proviso must be properly exercised. It is misleading to describe the duty of the Income-tax Officer as a discretionary power.)

³¹ ARVIND P. DATAR, KANGA & PALKHIVALA, LAW AND PRACTICE OF INCOME TAX 2152 (2014)

(The Assessing Officer's power under this proviso to choose the basis and manner of computation of income is not an arbitrary power to assess the income; also, he must exercise his discretion and judgment judicially and reasonably.)

³² *Id.*, at 2157

(If the Assessing Officer has exercised his judgment reasonably upon the materials before him and has not acted arbitrarily or capriciously, his discretion under the first proviso to sub-section (1) or under sub-section (2) cannot be interfered with. But the court will interfere where the AO has failed to exercise his judgment reasonably, or there are no circumstances justifying recourse to the first proviso to sub-section (1) or to sub-section (2))

administration out of systemic fault-lines and recommended viable routes-minimizing interaction [sic.] between tax officials and taxpayers being one of them- to do away with the same.³³ Thus, the way in-house administrative fault-lines went out of sight earlier with sole focus on taxpayer is being balanced in course of time and there lies a remedy pending attention since long back.³⁴

The Department emerges cautious enough where even the judiciary stood confused.³⁵ So far as computation of the total income of defaulter to be held under Section 271 of the Act is concerned, in official clarification published on its own, the Department thereby cleared its stand on Amendment to Section 271 with citation of all conflicting judicial

³³ MIN. OF FINANCE, TAX ADMINISTRATION REFORM COMMISSION, *Tax Administration Reform in India: Spirit, Purpose and Empowerment* (Third Report) 827, Nov. 2014, available at http://finmin.nic.in/the_ministry/dept_revenue/TARC3rdReport.pdf (last visited Feb. 24, 2015)

(Development of sophisticated systems for risk analysis and selection of cases for audit and investigation is another tool to improve the enforcement capacity of the revenue administration. These systems, which have been implemented in Chile, Colombia and Hungary, use information from different sources to zero in on cases where the risk of fraud is high. These cases are then picked for detailed investigation and audit and physical inspection (in customs). Adopting a risk analysis based approach to curbing tax evasion and smuggling has many advantages. First, since the selected cases, prima facie, have some suspicious characteristics, it is more likely to find actual tax evasion in these cases, than if cases are picked up at random. Thus, the productivity of enforcement activities in terms of gathering additional revenue and penalizing evasion increases. Consequently, it also enhances the deterrent effect of such actions in the minds of the normal taxpayers. Second, risk analysis allows the revenue administration to be more selective in scrutinizing cases. The percentage of cases selected for examination is usually between 1 to 10 per cent of the total number of cases. This leads to more intense scrutiny and better use of investigation, inspection and audit skills, that are invariably in short supply in most revenue administrations. Third, reduction in the number of cases facing tax administration interventions implies that most of the other cases are accepted through an automatic review process. There, therefore, is no need for any interaction between tax officials and taxpayers. On the one hand, this reduces opportunities for corruption. On the other, it reduces the overall compliance costs to taxpayers.)

³⁴ *Supra* note 3, at 490-491

(As it is, the long-drawn proceedings of income tax assessment and the present features of taxing all round, amount to a great pressure on and hardship to small assesseees. But at the same time it leaves open wide gaps for escaping payment of the tax by sufficiently resourceful and rich parties. It is true that the assessee has got to be safeguarded against oppression and at the same time it should be seen that the tax is not evaded by rich parties. For this purpose, I am afraid, procedure in the present Income Tax Act is not adequate. The draft report attempts to make several efforts to remedy this defect. But I do not quite agree with its treatment to the question of evasion.)

³⁵ See MIN. OF FINANCE, Press Release, Mar. 14, 2008, available at <http://www.pib.nic.in/newsite/erelease.aspx?relid=36515> (last visited Feb. 24, 2015)

opinions on earlier position of law to this end. Perhaps, underlying rationale lies in a series of litigation experience to leave neither the Department nor taxpayer gainer anyway; as is the case in common law system. In particular, the extraordinary expense of litigation in general and tax litigation in particular deserves attention.³⁶ Not without reason that, if somehow caught by the Department for investigation, taxpayer and tax evader alike are left with no other option but to prefer compromise with those whose job is waging legal battle at the cost of public exchequer- whether for just cause is a point apart- and thereby leaving the rivals at real stake afterwards even if the latter win such unequal battle. Judicious contemplation stands imperative to address judicial aberration to this end.

V. CONCLUSION

To sum up findings on the basis of arguments advanced, and jurisprudential observation may be arrayed thus (i) in newly independent decolonized India, the State indulged in witch-hunting of the so called affluent under the (dis)guise of direct taxation and thereby encouraged tax evasion which would have otherwise contended to avoidance of taxation; (ii) in the name of offering justice to an otherwise well-to-do community, large segment of middle class crowd went scot-free from its tax net to gross detriment of revenue generation; (iii) out of populist policymaking, the State fell severely short of developing political culture to treat taxation as mark of contribution to the society; (iv) consequently taxation in general- and direct taxation in particular- is a menace, if not monster, in popular perception; (v) in

³⁶ See generally K. C. Sen, *The Law Commission Report*, 11(28, 29 & 30) ECO. & POL. WEEKLY 917 – 23 (Jul. 11, 1959)

(One matter that specially concerns the average litigant is the question of expense. The costs awarded by courts to the successful party are usually a small percentage of the costs actually incurred. The items of expenditure constituting the great bulk of the out-of-pocket expenses of a litigant are court fees and the lawyer's fees. A successful litigant often pays higher fees to his lawyer than he gets from his opponent on taxation. The costs awarded by courts do not include several items of expenditure incurred, e.g. notice charges, typing charges (except in West Bengal and Bihar), charges incurred in securing documentary evidence such as (except in West Bengal and Bihar) search fees and copying charges, coats of the party's own attendance.)

its larger-than-life anxiety for revenue, the Department concentrated its focus outward while inward world of administration well within the Department played no less through evil practice in unholy nexus with the profession concerned; (vi) erroneous policy analysis, along with judicial process, thereby vitiated taxation regime to governance failure.

Unlike this effort may appear to cynic mind, the author hereby reiterates appreciation in favour of the Department for excellent performance since independence in general and metamorphosis of given tax structure in particular; albeit within limits of its own, since new economic policy got introduced in 1991. Sole purpose of this effort is to set focus of oncoming tax reform in its context and thereby usher radical transformation in the hitherto trajectory of revenue generation for India. Subject to economic status and opportunity, timely payment of tax may be inserted as a provision for Part IVA of the Constitution. For the sake of concentration on focus, allied issues are left out, e.g. whether tax evasion by citizen may be construed to treason, whether hard-earned resource of citizenry may be (ab)used by the State to indulge in an(y) sundry economy to pervasive travesty of the economic agenda under Articles 38, read with 39(b)(c), of the Constitution, or the like, and wide open to socio-legal polemics in time ahead.

EMPLOYMENT LAWS IN INDIA AND THEIR IMPACT ON THE HEALTH OF WORKERS

Dr. Uday Shankar

I. INTRODUCTION

Industrial development is high on the agenda of the present government. The implementation of agenda requires support and suitable policy and legislative framework for working class. Health care of the working class is one such area to be focused for translating the agenda into action. Health is vital not only for individuals but also for the progress of a nation. It renders a significant contribution to industrial growth of a nation with a healthy working populace. Adequate health care to the working class plays valuable role in contribution to overall growth of a nation. Perhaps, this aspect made the makers of the Constitution to prescribe directives in the foundational document of the nation. The Constitution of India encompasses a wide range of issues relating to health of the working class in the chapter on Directive Principles of the State Policy. In order to realize the goals related to health enshrined in the Part IV, various employment laws have been enacted over a period of time to translate them into enforceable statutory framework.¹

The paper charts out various constitutional provisions on health of workers. It also analyses various labour laws which guarantee health benefits or security to workers and examines recent amendments made in these laws in relation to health benefit. In conclusion, the paper evaluates the impact of these provisions on the health scenario in India.

¹ Employment Laws signify collective labour laws which relate to the tripartite relationship between employee, employer and the union. Individual labour law deals with employees' rights at work through the contract for work.

II. THE CONSTITUTION AND HEALTH RELATED PROVISIONS

Colonial India witnessed lack of commitment from ruler to guarantee public health to masses that contributed in mobilizing of people during freedom struggle.² The importance of the issue of protection and promotion of public health in general and of workers in particular was exhibited in the form of various provisions in the Constitution. The narratives in the Constituent Assembly reflect the concern of the members regarding the arrangement of resources for creating adequate infrastructure for ‘public health’ and thus highlighted the need for concrete guarantees for the same. K Santhanam from Madras, pointed out that the provisions in the proposed constitution for funding public health were manifestly inadequate. He observed, “If you take Public Health, according to the Bhore Committee report, it requires 300 crores”, which was, at that time, the “total of the provincial and central taxation”.³ In a debate the following year, Renuka Ray of West Bengal invoked the Chinese constitution to argue for a constitutionally guaranteed minimum of funding for public health (and education). She suggested that between 15 and 30 per cent of overall expenditure could be devoted to funding for public health.⁴ For his part, Hirday Nath Kunzru expressed unease with the proposal to retain the current division of responsibility for health and welfare between the centre and the states; a division which had served India poorly in the past. In a post-colonial era, Kunzru argued: “Central government powers to give effect to international agreements – agreements, that is to say, specifying minimum standards for public health, nutrition and welfare – should be wider than it is at present”.⁵ These strong voices in favor of public health failed to muster the numerical support required to confer the status of fundamental right on it and hence, reduced it to ‘Directive Principles’.

² Sunil S. Amrith, *Health in India Since Independence*, Book World Poverty Institute, Manchester, Feb. 12, 2009 available at http://www.bwpi.manchester.ac.uk/medialibrary/publications/working_papers/bwpi-wp-7909.pdf (last visited Feb. 21, 2015)

³ 5 CONSTITUTIONAL ASSEMBLY DEBATES (CAD), Aug. 20, 1947.

⁴ 7 CAD, Nov. 9, 1948.

⁵ 5 CAD, Aug. 25, 1947.

There are various provisions in the Directive Principles of State Policy which refer to the right to health of an individual belonging to a specified class. Article 39 (e) provides:

...[T]he 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.

Article 39 (f) states:

...[C]hildren are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Article 42 states: “The State shall make provisions for securing human conditions of work and for maternity relief.”

These constitutional provisions refer to the significance of health of working class, children and mothers. The directives cast specific responsibility to ensure healthy environment at the work place. It also expresses the probability of prosperity of a nation as a manifest of contribution to health and rendering special attention to it.

Article 47 speaks about duty of the state with regard to maintaining public health by stating:

The State shall regard raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties, and in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health.

It is interesting to note the impetus that has been given to raising level of nutrition and standard of living along with health. Minimum level of health cannot be guaranteed in the absence of these essentials. A person cannot remain

healthy without nutritional staple food. Thus, Article 47 of the Constitution under the Directive Principles of State Policy defines health in both general terms as well as specifically in terms of health care. Conceptually, this is a great advantage, as healthy living is not only construed as an issue of medical care but also of good nutrition and living standards. Furthermore, the term ‘public health’ has a distinct collective dimension and has an inter-relationship with aspects such as the provision of a clean living environment, protections against hazardous working conditions, education about disease-prevention and social security measures in respect of disability, unemployment, sickness and injury. Special emphasis is laid on elements such as women’s reproductive health and the healthcare of children. As indicated earlier, some of these aspects of ‘public health’ have been enumerated individually as directives in the Constitution.

The second part of the article could be termed as illustrative in nature, describing the ways to improve public health situation in India. This part was included during the debate on the Draft Constitution. The factor behind introducing this clause was also to respect the ideology of Mahatma Gandhi.⁶

The National Commission to Review Working of the Constitution has recommended introduction of a new article in the fundamental rights which lays down the different components of maintaining good health. It recommends introduction of Article 30-D which *inter alia* refers to provisions for safe drinking water and prevention of pollution. Article 30-D states, “Every person shall have the right – (a) to safe drinking water; (b) to an environment that is not harmful to one’s health or well being;...”⁷

The Constitution of India has entrusted the responsibility to implement the directives relating to employment upon the central as well as state governments.⁸ Employment laws are broadly classified into four categories;

⁶ *Supra* note 4, at 563-564.

⁷ MIN. OF LAW, JUSTICE AND COMPANY AFFAIRS, GOV'T OF INDIA, 1 *Report of The National Commission To Review The Working Of The Constitution*, Mar. 2002 available at <http://lawmin.nic.in/ncrwc/ncrwcreport.htm> (last visited Feb. 21, 2015)

⁸ INDIA CONST. sch. VII list III entry 22, 23

firstly, the law made and enforced by the central government⁹. Secondly, the law made by the central government and enforced by both central and state governments¹⁰. Thirdly, the law made by the central government and enforced by the state governments¹¹ and lastly, the law made and enforced by the state governments¹². Amongst many objectives which employment laws intend to achieve, they also provide for modern medical care and for the protection of health of workers.

III. HEALTH AND EMPLOYMENT LAWS IN INDIA

Labour laws in India underline the importance of healthy working conditions at the place of employment and accordingly entrusts the responsibility upon employers and the State to undertake accountability for such conditions. Also, employees are entitled to claim compensation and necessary medical assistance in employment related injury. Provisions of different laws dwelling upon medical care and protection of health have been elaborated herein below.

A. EMPLOYEES' STATE INSURANCE ACT, 1948

The Employees' State Insurance Act provides need-based social security benefits to insured workers in an organized sector. The benefits enumerated under this Act are managed by the Employees' State Insurance Corporation (ESIC), a corporate body which has also taken up the daunting task of tailoring different benefit schemes for the needs of different groups. The Act applies to the factories and establishment viz. Road Motor Transport undertakings, Hotels, Restaurants, Cinemas, Newspaper establishments, Shops, Educational and

⁹ A list of laws which relates to health – Employees' State Insurance Act, 1948; The Dock Workers (Safety, Health and Welfare) Act, 1986.

¹⁰ A list of laws which relates to health - The Child Labour (Prohibition and Regulation) Act, 1986. The Industrial Employment (Standing Orders) Act, 1946; The Maternity Benefit Act, 1961; Unorganized Workers Social Security Act, 2008; Dangerous Machines (Regulation) Act, 1983.

¹¹ A list of laws which relates to health - The Employers' Liability Act, 1938; The Factories Act, 1948; The Personal Injuries (Compensation Insurance) Act, 1963; The Personal Injuries (Emergency Provisions) Act, 1962; The Workmen's Compensation Act, 1923.

¹² Various state laws are not enlisted here as the paper focuses only on laws enacted by the Centre.

Medical Institutions wherein 10 or more persons are employed. The Act provides sickness, medical and maternity benefits along with other benefits.¹³

Benefits enlisted in the Act are available on the basis of self-financing insurance scheme wherein an insured employee contributes 1.75% of the monthly wages.¹⁴ In order to focus on the employees drawing low income, the law guarantees benefits only to employees whose monthly wage is Rs. 15000 or less. A phenomenal feature of the law is that the quantum of contribution does not determine the entitlement of medical benefits.

The Scheme provides for full and comprehensive medical treatment to the insured persons and their families including hospitalization, referral treatment and supply of artificial limbs, dentures etc. These benefits are available to insured persons from the date they enter insurable employment and are continued thereafter subject to the fulfillment of condition of contribution for 78 days in a contribution period of 6 months. The range of medical services provided covers promotive, preventive, curative and rehabilitative services which includes outpatient care/ inpatient care, specialized medical care and super specialty medical care as per the requirement of the patient. Medical facilities under AYUSH i.e. Ayurveda, Yoga, Unani, Siddha and Homeopathy are also provided. Corporates have also tied up with private hospitals to provide super-specialty services to the beneficiaries.¹⁵

The employees are entitled to avail medical benefits from the first day of entering insurable employment for oneself and dependents such as spouse, parents and children.¹⁶ Such an employee can, for himself and his spouse, subject to having completed five years in insurable employment on superannuation or in case of having suffered permanent physical disablement

¹³ The Act also provides for Disablement and Dependent Benefits.

¹⁴ An employee shall not be required to contribute for enjoying the benefits under the Act. Currently, an employee drawing wage less than Rs. 100 per day is covered under this category.

¹⁵ The Employees' State Insurance Act, 1948, sec. 57-58.

¹⁶ *Id*

during the course of insurable employment, avail the benefits.¹⁷ Amendment brought in the law in the year 2010 allowed the Corporation to extend the medical treatment and attendance from the underutilized Employees State Insurance Hospitals to persons registered under any scheme other than Employees State Insurance Scheme.¹⁸ This facility shall be available to other beneficiaries after payment of nominal user charges. This amendment has allowed the facilities of ESI to serve commoners also.¹⁹

The Corporation has been empowered to design measures for improvement of health and welfare of insured persons and for the rehabilitation and re-employment of insured persons beyond the provisions relating to benefits.²⁰

Maternity benefit is payable to insured women in case of confinement or miscarriage or sickness related thereto. For claiming this, an insured woman should have paid for at least 70 days in 2 consecutive contribution periods i.e. 1 year. The benefit is normally payable for 12 weeks, which can be further extended up to 16 weeks on medical grounds. The rate of payment of the benefit is equal to the wage or double the standard sickness benefit rate. The benefit is payable within 14 days of duly authenticated claim.

At present the scheme covers about 1.86 crore Insured Persons at 810 Centers in 30 States/UTs. The total number of beneficiaries availing medical care is about 7.21 crores including family members of insured persons.

B. FACTORIES ACT, 1948

The Factories Act aptly addresses the goals relating to health and strength of workers enshrined in the Constitution. The objective of the Act, *inter alia* is to ensure adequate safety measures and to promote the health and welfare of the

¹⁷ On payment of Rs.10/- p.m. in lump sum for one year in advance, Medical Benefits can be provided (See sec. 56 of the Act).

¹⁸ The Employees' State Insurance Act, 1948, sec. 73 B read with sec. 73 D.

¹⁹ MIN. OF LABOUR AND EMPLOYMENT, GOV'T. OF INDIA, Notification No. GSR 654 (E), (Aug. 4, 2010), available at <http://labour.gov.in/content/division/latest-notificationamendments.php> (last visited Apr. 25, 2015)

²⁰ The Employees' State Insurance Act, 1948, sec. 19.

workers employed in factories.²¹ The comprehensive and lengthy enactment covers a number of concerns of labour working in a factory in a separate chapter on health of workers. The various provisions relating to health mandate cleanliness, disposal of wastes and effluents, proper ventilation, exhaustion of dust and fume and artificial humidification.²² The Act demands an ambulance room to be maintained along with medical and nursing staff, in a factory employing more than 500 workers. Though causing financial burden on the owner or occupier of factories, the successful discharge of the burden would go a long way in minimizing the expenditure on medical care by the workers.

The Bhopal Gas Tragedy compelled the lawmakers to make necessary provisions to prevent occurrence of catastrophe of that magnitude by introduction of a special chapter on occupational health and safety to safeguard the workers employed in hazardous industries under the Act. Under this chapter, pre-employment, periodic medical examinations and monitoring of the work environment are mandatory for all industries defined as 'hazardous' under the Act.²³ The Directorate General of Factory Advice Service and Labour Institutes (DGFASLI) assists the Labour Ministry in formulating national policies on occupational safety and health in factories and docks, and enforcing them through inspectorates of factories and inspectorates of dock safety.

In the year 2009, the Government of India announced a comprehensive policy on Safety, Health and Environment at Workplace. The government acknowledged the significance of safety and health measures in attaining economic growth. The fundamental purpose of this National Policy on Safety, Health and Environment at workplace, is not only to eliminate the incidence of work related injuries, diseases, fatalities, disaster and loss of national assets and ensuring achievement of a high level of occupational safety, health and

²¹ The Government of India has moved an amendment bill to introduce many changes under the Act, *Inter alia*, night shift for women workers, entitlement for earned leave and hazardous substances. The Bill had been introduced in the Lok Sabha on August 7, 2014.

²² The Factories Act, 1948, sec. 11-15

²³ The Factories Act, 1948, chap. VIA.

environment performance through proactive approaches but also to enhance the well-being of employees and society, at large.²⁴

C. CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

The Child Labour (Prohibition & Regulation) Act, 1986 was enacted to prohibit the engagement of children below the age of fourteen years in factories, mines and hazardous employments and to regulate their conditions of work in certain other employments. Under this Act, the appropriate government may, by notification in the official Gazette, make rules for the health and safety of the children employed or permitted to work in any establishment or class of establishments.²⁵

D. CONTRACT LABOUR (REGULATION AND PROHIBITION) ACT, 1970

A law was framed to protect the interest and eliminate the practice of contract labour employed in industrial establishments. Chapter V of the Act deals with the welfare and health of contract labour. The Act imposes responsibility upon the principal employer on the occasion of failure of the contractor to provide amenities such as drinking waters, urinals and washing facilities which are essential for safeguarding the interest and health of workers.²⁶ However, the principal employer shall recover all the expense made for providing the abovementioned facilities from the latter.

E. THE MATERNITY BENEFIT ACT, 1961

The Act was passed with a view to reduce disparities under the existing Maternity Benefit Acts and bring uniformity with regard to rates, qualifying conditions and duration of maternity benefits.²⁷ The Act provides that the maternity benefit to which every woman shall be entitled to is a payment at the rate of average daily wages for the period of her actual absence immediately

²⁴*National Policy on Safety, Health and Environment at Workplace, 2009*, PRESS INFORMATION BUREAU, 2009 available at http://pib.nic.in/release/rel_print_page1.asp?reid=59378, (last visited Mar.15, 2015)

²⁵ The Factories Act, 1948, sec. 13

²⁶ The Contract Labour (Regulation And Prohibition) Act, 1986, sec. 16-20

²⁷ The Act does not apply to factory or establishment to which the provisions of Employee's State Insurance Act 1948 apply, except as otherwise provided under Section 5A and 5B of the Act.

preceding and including the day of her delivery and for six weeks immediately following that day. A woman shall be entitled to maternity benefit for a maximum period of twelve weeks of which not more than six weeks shall precede the date of her expected delivery.²⁸

The employer is liable to pay the amount of maternity benefit for the period preceding the date of expected delivery in advance to the woman employee on production of the proof of pregnancy. The Act imposes liability upon the employer to pay the benefit to workers, in contradiction with the Employees' State Insurance Act wherein the responsibility lies with the Corporation.

F. UNORGANISED WORKERS' SOCIAL SECURITY ACT, 2008

The Act was enacted to provide social security measures to workers engaged in unorganized sectors. Under the Act, the Central Government has been empowered to formulate suitable welfare schemes in the matter relating to health insurance, maternity benefit and pensions. As these schemes become successful, the trust and participation of workers build up and more funds pour in. A variety of different benefits can be included under this, such as children's education, housing, skill building etc.²⁹ Rashtriya Swasthya Bima Yojana for BPL families (a unit of five) has been extended to the unorganized sector. The scheme provides for smart card based cashless health insurance cover of Rs. 30,000/- per annum to every family on a family floater basis.³⁰

IV. CONCLUSION

The labour laws in India clearly display that the policy preference of the state is to not allow parties, employers and employees to regulate the matters of protection of health and availability of medical care between them. In recent times, the policy makers have been advocating for the engagement of private

²⁸ The Maternity Benefit Act, 1961, sec. 5

²⁹ The Unorganised Workers' Social Security Act, 2008, sec. 3

³⁰ *Social Security Schemes for Workers in Unorganized Sector*, PRESS INFORMATION BUREAU, Nov.23, 2011 available at <http://pib.nic.in/newsite/erelease.aspx?relid=77418>, (last visited Sep.15, 2014)

players in the matter of health care facilities to workers. There is a need to adopt cautious approach in such matters as the working class is usually unaware about private managed schemes and possible exploitation of the schemes in the name of workers by unscrupulous individuals is a threat.

In India currently only about 35 million out of a workforce of 400 million have access to formal social security in the form of old-age income protection. This includes private sector workers, civil servants, military personnel and employees of State Public Sector Undertakings.

The thrust of the present government towards the 'Make in India' campaign poses a challenge to extend adequate health care facilities to working class, regardless of affiliation to organised or unorganised sector. Medical care constitutes a very vital component of employability and productivity of individuals which is prerequisite for translating the idea of 'Make in India' into reality. The perusal of laws enacted during the time of independence up till now clearly scripts provisions relating to health indicating that a healthy workforce is indispensable for efficient productivity of goods and services in the country.

CLIMATE CHANGE CHALLENGE IN THE ORB OF FRAGILE AND POST CONFLICT STATES

Mohammad Rubaiyat Rahman

I. INTRODUCTION

Climate change is like unique environmental bulwark that humanity has ever confronted. Historically, the term ‘climate’ was referred as part of human environment. Alexander von Humboldt in 1845 in the book ‘*Cosmos: A Sketch of a Physical Description of the Universe*’ defined climate as the sum of physical influences, brought upon human through the atmosphere. Like astronomy, the issue of climate in much of 19th century discourse was subject to an anthropocentric view. At the turn of the 19th and 20th centuries, questions were formulated more in terms of climate as a physical system.¹ Nicholas Stern, who carried out the first comprehensive economic analysis of the climate change problem, stated that: “... Climate change is an externality like none other. The risks, scales and uncertainty are erroneous ... There is a big probability of devastating outcome.”²

However, relationship between climate and human society has been a topic of debate for ages. Theorists like Aristotle, Montesquieu related climate to the character or culture of a nation, Hippocrates related it to health while Hume related it to the cultivation of the land.³ From ancient times people was skeptical that over the course of centuries, human activity could change the climate of a territory. Meanwhile the discovery of ice ages in the distant past proves that climate could change all even by itself, perhaps even globally.⁴

¹ Hon Von Stroch et. al., *The Physical Sciences And Climate Politics, Vulnerability in THE OXFORD HANDBOOK OF CLIMATE CHANGE* 114 (J.S. Dryzek et. al. eds. 2011)

² W. Steffen, *A Truly Complex And Diabolical Policy Problem in THE OXFORD HANDBOOK OF CLIMATE CHANGE* 21 (J.S. Dryzek et. al. eds. 2011)

³ M Hajer & W Versteg, *Voices Of Vulnerability in THE OXFORD HANDBOOK OF CLIMATE CHANGE* 84 (J.S. Dryzek et. al. eds. 2011)

⁴ D. Jamieson, *The Nature Of The Problem in THE OXFORD HANDBOOK OF CLIMATE CHANGE* 67 (J.S. Dryzek et. al. eds. 2011)

Since the convoluted issues under the rubric of climate change encompass inclusive range of social, economic, developmental, political, environmental and legal features, the international law has pivotal role to play. Therefore, it is international environmental law, one of the arenas of international law, where climate change is dealt with.⁵

In 1968, the UN General Assembly first recognized the relationship between the quality of the human environment and the enjoyment of basic rights (UNGA Res. 2398 (XXII)).⁶ Climate change became matter of broad public concern in the early 1970s when savage drought affected the American Midwest, devastated the Russian wheat crop and brought starvation upon millions in Africa.⁷ Whereas climate change had previously been just one of several environmental concerns, the discourse structuralized in the second half of the 1980s and had become a central concept for the understanding of the world.⁸ The idea of climate change began to concern people in the 1990s.⁹ At the outset of 1990s, human driven climate change became absolutely dominant topic in climate sciences. Climate research confined its concern with human made climate and its impacts.¹⁰ The most authoritative and extensive forecasts on climate change underpinned from the Intergovernmental Panel on Climate Change (IPCC), a group of scientists from more than 120 countries.¹¹ The establishment of the IPCC is deemed as the response of the international environmental law to climate change issue. The IPCC 2007 report expressed much higher confidence in climate change forecasts than in previous reports. The IPCC approach recognizes that climate change consists of both natural and human elements. One major cause of climate change is global warming brought on by greenhouse gas emissions. There are other significant contributors,

⁵ Hossein Esmaeili, *International Law Responses To Climate Change* in ROUTLEDGE HANDBOOK OF CLIMATE CHANGE AND SOCIETY 442 (Constance Lever-Tracy ed. 2010)

⁶ PHILIPPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 777 (2012)

⁷ *Supra* note 4, at 70

⁸ *Supra* note 3, at 86

⁹ *Supra* note 4, at 68

¹⁰ *Supra* note 1, at 115

¹¹ JAMES R. LEE, *CLIMATE CHANGE AND ARMED CONFLICT: HOT AND COLD WARS* 67 (2009)

particularly habitat change brought on by tropical deforestation. Another cause is the increased atmospheric concentrations of aerosols.¹²

The UN Human Rights Council adopted a resolution (Resolution 7/23), in 2008, on human rights and climate change requesting the office of the UN High Commissioner for Human Rights to conduct a detailed analytical study of the nexus between climate change and human rights.¹³ Following this, on 2009, the council adopted resolution 10/4, noting that climate change related impacts have range of implications for the effective enjoyment of human rights.¹⁴

Climate change is posing as a threat multiplier which revs up existing trends, tensions and instability. The pivotal challenge is that climate change threatens to overburden states and regions which are already fragile and conflict prone. It is important to recognize that the risks are not just of a humanitarian nature; rather also include political and security risks that directly affect interests of the world politics. Moreover, in line with the concept of human security, it is clear that many issues related to the impact of climate change on international security are interlinked requiring comprehensive policy responses. The most likely effect of climate change on security is on individual or human security. It is evident that climate change will affect human well-being. This is particularly true for societies that are already vulnerable due to a high disease burden, poverty, and natural resource dependence.¹⁵ Over the preceding decades, the number and cost of natural disasters have been steadily rising. How much this is the result of human activities is unclear. Wars are as old as civilization; their numbers vary from year to year. But increasingly conflicts are occurring within countries, and are often fuelled by such environmental factors as desertification, deforestation and competition for resources.¹⁶

The features of climate change and the nature of the human influence on climate lead to profound challenges for governance.¹⁷ Climate change may significantly

¹² *Id*

¹³ MARM SALIH, CLIMATE CHANGE AND SUSTAINABLE DEVELOPMENT 84 (2009)

¹⁴ WORLD BANK, HUMAN RIGHTS AND CLIMATE CHANGE (2011)

¹⁵ C. WEBERSIK, CLIMATE CHANGE AND SECURITY 27 (2010)

¹⁶ A N SARKAR, GLOBAL CLIMATE CHANGE: BEYOND COPENHAGEN 77 (2010)

¹⁷ *Supra* note 2, at 26

increase instability in weak or failing states by over-stretching the already limited capacity of governments to respond effectively to the challenges they face. The inability of a government to meet the needs of its population as a whole or to provide protection in the face of climate change-induced hardship could trigger frustration, lead to tensions between different ethnic and religious groups within countries and to political radicalization. This could destabilize countries and even entire regions.

II. UNDERSTANDING THE LINKAGE BETWEEN CLIMATE CHANGE AND SECURITY

Security is a dynamic but old, contested and vague concept.¹⁸ The conventional notion of the term in international relations can be seen as something focusing on a state and its government, which is concerned with safeguarding territory, maintaining political independence and protecting, through military and other necessary means, the people and assets within its territory from intrusion by outside enemies.¹⁹ One of the broadest definitions of the term security is summed up succinctly by Arnold Wolfers: "...security, in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked."²⁰

Before dapppling with the relationship between climate change and security, it is pertinent to dapple with the concept of security. The expansion of the notion of security can be traced back to the late 1960s, when Robert McNamara suggested that security implied the freedom of a state to develop and improve its position in the future including people.²¹ The thaw of cold-war tension brought landslide changes in the international relations. The crumble of Soviet Union and the world's swivel towards uni-polar world, led to the rethinking of policy makers.

¹⁸ IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE (B. Buzan et. al., eds., 1993)

¹⁹ *Id*

²⁰ A. Wolfers, *National Security As An Ambiguous Signal* in DISCORD AND COLLABORATIONS 150 (Arnold Wolfers ed. 1962)

²¹ *Id.*

Fukuyama declared that it is the End of History.²² Liberals argued that the world will move towards peace and stability, there will be raise of international organizations and transnational capitalism. Realists were generally pessimistic about the prospects for eliminating conflict and war.²³ Decline of military concerns during post-cold war, however, led to emergence of other types of threats and challenges. Professor Barry Buzan argued that there occurred an ‘increasing securitization of two issues that had traditionally been thought of as low politics: the international economy and the environment’.²⁴

Richard Falk is deemed to be the first person to have systematically contended that environmental change is a security issue. His ‘First Law of Ecological Politics’ had stressed an ‘inverse relationship between the interval of time available for adaptive change and the likelihood and intensity of violent conflict’.²⁵ Scholars making these arguments accept the neorealist claim that ‘security’ is reducible to an objective referent and set of threats.²⁶ Some climate change impacts will have broader security implications, such as resource scarcity in resource-dependent communities in tandem with weak governance structure, low incomes, and potential history of conflict or large-scale cross-border migration.²⁷

Over the years, political leaders have channeled climate and security in order to elevate climate on international agenda; among such conveners, former UN Secretary General Kofi Annan and British Prime Minister Tony Blair are prominent.²⁸ Officials in Bill Clinton’s State Department used to dabble with climate change as a security issue in the entangled stage of 1990s global politics. In 2007, behemoths Washington think tanks, the established Center for Strategic

²² See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992)

²³ See generally COT Institute for Safety, Security and Crisis Management et. al., *Notions of Security: Shifting Concepts and Perspectives* (2007), available at http://www.academia.edu/9716396/Notions_of_Security (last visited May 12, 2015)

²⁴ BARRY BUZAN, *RETHINKING SECURITY AFTER THE COLD WAR, CO-OPERATION AND CONFLICTS* 7 (1997)

²⁵ R. A. FALK, *THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL* 35-39 (1971)

²⁶ NORMAN MYERS, *ULTIMATE SECURITY* 31 (1993)

²⁷ *Supra* note 15, at 127

²⁸ *Supra* note 16, at 65

and International Studies and the Center for a New American Security, published a report analyzing the worldwide security implications of three different global warming scenarios. The report considered three different scenarios, two over a roughly 30 year perspective and one covering the time up to year 2100. Its general result concluded that, ‘... flooding has the potential to challenge regional and even national identities. Armed conflict between nations over resources ... is likely’ and that ‘Perhaps the most worrisome problems associated with rising temperatures and sea levels are from large scale migrations of people- both inside nations and across existing national borders.’²⁹ Under the leadership of the United Kingdom, the UN Security Council held its first session on climate change and security in 2007.³⁰ The military advisory board, which is consisted of a panel of retired US generals and admirals, released a report under the rubric of ‘*National Security and the Threat of Climate Change*’. The report predicted that global warming would have security implications, in particular serving as a ‘threat multiplier’ in existing volatile rippled regions.³¹

However, one of the factors of securitization theory is to securitize climate change by ‘speech act’. Skimming through the speech of South Asian behemoth political leaders, it can be observed how climate change has been propounded as a menace of security by influential political actors from different countries of the South Asia region. The former President of Maldives, Mohamed Nasheed, while talking about climate change’s impact on the Maldives, opined: “It won’t be any good to have a democracy if we don’t have a country.”³²

Such comment of the Maldives President clearly inklings that climate change is a serious security menace to Maldives and it’s like countries. To make realize the seriousness of their security threat, the former President along with his

²⁹ *Id.* at 88

³⁰ *Supra* note 15, at 112

³¹ *Supra* note 16, at 88

³² Merritt, Harry, *Lessons from the Maldives on Climate Change*, available at <http://www.demos.org/blog/lessons-maldives-climate-change> (last visited May 12, 2015)

cabinet colleagues had an under-water meeting in 2009.³³ India’s defense minister A.K. Anthony, in his Presidential address in the ‘14th Asian Security Conference’ stated that:

Climate change too has an impact on security. It is causing floods and resulting in changes in crop yields and crop patterns. The per capita availability of water is decreasing sharply worldwide.³⁴

Bangladesh Prime Minister, Sheikh Hasina, in her inaugural address in International Meeting of Parliamentarians on Climate Change: Durban and Beyond’ stated:

Analysts in Bangladesh indicate that a mere rise by a meter in sea level would submerge a fifth of the land mass in the country displacing about 20 million people. It would lead to mass movement to the cities causing developmental and security problems.³⁵

These words and expressions of the important political actors, who in positions of authority, in Maldives, India and Bangladesh can convince their respective country people (as these leaders are democratically elected) that climate change is a security threat to their respective nations. Thence, it can be observed that the leaders through their ‘Speech Act’ have securitized climate change.

Furthermore, making the viaduct between migration induced by climate change and security in terms of violent conflict is more problematic. However, evidence suggests that there is a relationship between civil conflict and refugee influx. For example, wars in Mozambique, Afghanistan, Israel/Palestine, and Iraq led to myriad of refugees. Such flows can veer labor markets and change the

³³ *Maldives Leader in Climate Change Stunt* BBC NEWS, Oct. 17, 2009 available at <http://news.bbc.co.uk/2/hi/8312320.stm> (last visited Jan. 6, 2015)

³⁴ *Anthony Inaugurates the 14th Asian security conference*, SIFY.COM, Feb. 13, 2012, available at <http://www.sify.com/news/antony-inaugurates-14th-asian-security-conference-news-defence-mcnpcjdahjsi.html> (last visited May. 6, 2015)

³⁵ *East African Legislative Assembly, International Parliamentary Meeting on Climate Change Commences in Dhaka*, Press Release, Mar. 14, 2012, available at <http://www.eala.org/media-centre/press-releases/325-international-parliamentary-meeting-on-climate-change-commences-in-dhaka.html> (last visited May 6, 2015)

composition of ethnic and religious groups in the receiving countries or regions.³⁶

III. IMPACT OF ARMED CONFLICT ON CLIMATE CHANGE

Armed conflict begets both direct and indirect environmental damage, which can jeopardize common people's health, livelihoods and security.³⁷ The Brundtland Commission Report, (UN 1987) was the first international report to refer explicitly to the nexus between environmental degradation and conflict and has since been reinforced several documents. The Rio Declaration of 1992 stated in Principle 24:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.³⁸

Agenda 21 in its Article 39(6) states:

... measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law.

As the ICJ proclaimed in 1996 in its Advisory Opinion (paragraph 29) on the *Legality of the Threat or Use of Nuclear Weapons*: ‘... environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generation unborn.’

Climate change increasingly being identified as a risk to security. Intergovernmental and international organizations such as the European Union

³⁶ NILS PETTER GLEDITSCH ET AL., CLIMATE CHANGE AND CONFLICT: THE MIGRATION LINK: COPING WITH CRISIS (2007)

³⁷ M. Both et. al., *International Law Protecting The Environment During Armed Conflict: Gaps and Opportunities*, 92 INT'L REV. OF RED CROSS 571 (2010)

³⁸ *Id.*

and the World Bank have identified climate change as a security issue.³⁹ The path from climate change to conflict may not be a direct one. For that matter, most roads to conflict are indirect and lie in structural and behavioral patterns that make the path easier to travel. There are three structural thoroughfares from climate change to armed conflict: sustained trends, intervening variables, and the need for conflict triggers. First, conflict only emerges after a sustained period of divergent climate patterns.⁴⁰ Second, climate change alone will not cause conflict, but along with other factors, will contribute to it and shape it. Third, climate change can create structural conditions for conflict, but a trigger is required to set off strife.⁴¹ However, climate change and conflict situations are consisted of short- and long-term processes. Short-term conflict may occur as the gap between resource demand and supply reaches a critical point, similar to how earthquakes occur when tectonic plates move.⁴²

IV. CLIMATE CHANGE SITUATION IN CONFLICT SCOURGED FRAGILE STATES

Fragile states are posed as menace unlike any other state, endangering international security, while ruining the lives of hundreds of millions across the globe.⁴³ According to World Bank report the number of fragile countries that could provide a breeding ground for terrorism jumped from seventeen in 2003 to twenty-six in 2006.⁴⁴ Earlier, the Bank referred them as ‘Low-Income Countries under Stress’ (LICUS). Fragile states are the main bulwark impeding international efforts to meet the United Nations’ Millennium Development Goals, which include eradicating hunger, reducing child mortality, and achieving universal primary education by 2015. In fragile and failed states, weak

³⁹ J. Barnett, *Human Security* in THE OXFORD HANDBOOK OF CLIMATE CHANGE 267 (J.S. Dryzek et. al. eds. 2011)

⁴⁰ *Supra* note 11, at 3

⁴¹ *Supra* note 11, at 4

⁴² *Supra* note 11, at 23

⁴³ S.D KAPLAN, *FIXING FRAGILE STATES* 1 (2008)

⁴⁴ Karen De Young, *World Bank Lists Failing Nations That Can Breed Global Terrorism*, WASHINGTON POST, Sep. 15, 2006 at A13

governance is recognized as a contributor to conflict and civil war.⁴⁵ They are fifteen times more vulnerable to civil war than developed countries, and they are the starting point of most of the world's refugees.⁴⁶ Fragile states are widely recognized as a danger both to international security and to the security of their neighbor states, as well as to the well-being of their own people. Such states' lawless environment spread instability across borders; provide havens for terrorists, drug dealers, and weapons smugglers; threaten access to natural resources; and consign millions to poverty. Fragile states have marched from the fringe to the very center of Western security concerns. Whereas once U.S. defense analysts worried only about competing powers during cold war era, now even the weakest of countries is considered a potential threat. 'The events of September 11, 2001 taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states' the 2002 U.S. National Security Strategy declared.⁴⁷ Scholars and practitioners use terms such as 'fragile states', 'failed states', and 'weak states' to describe fumbling countries unable to administer their territories effectively. However, such lopsided management of governance may also rev up climate change vulnerability.

As per 2001 report of IPCC, as a result of low adaptive capacity of its population Africa is the most vulnerable region to climate change. For almost two decades, Somalia has been experiencing human sufferings and scourge of warfare. Armed tussles between Ethiopian-supported government troops and militias of the Islamic Courts Union in Mogadishu have once again destroyed the hope of a prosperous and politically stable Somalia. The Somali pirates are good examples of Somalia's power vacuum. No authority exists that could patrol the Somali coasts to protect the country's rich fisheries while preventing pirates from entering and capturing foreign vessels. Because Somalia is largely an arid country, highly susceptible to natural disasters, especially droughts and floods, and because its people have been victims of severe famine in recent

⁴⁵ D W Brinkerhoff, *Governance Challenges In Fragile States* in GOVERNANCE IN POST-CONFLICT SOCIETIES: REBUILDING FRAGILE STATES 2 (D W Brinkerhoff ed., 2007)

⁴⁶ Stewart Patrick, *Weak States And Global Threats: Fact Or Fiction?*, 29 WASHINGTON QUARTERLY 31 (2006)

⁴⁷ *Supra* note 43, at 2

decades, it seems evident that annual changes in rainfall have a socioeconomic impact with consequences for the country's political stability and human security. Somalia is part of the East African savannah, which is part of the Sahel stretching from Senegal in the West to Djibouti in the Far East. Somalia is a country that is more prone to droughts and erratic rainfall. The fragility of the relationship between the Somalis and their environment, together with population growth, led to the assumption that the Somali conflict relates to changes in rainfall patterns.⁴⁸ However, the Somali case is more complicated than reducing the conflict to explanations of resource scarcity and population pressures. Alexander de Waal argued that the famine from 1991 to 1992 in southern Somalia was highly selective: people most affected by the famine were farming communities and internally displaced persons.⁴⁹ Once again, this is a good example of how climate change impacts will affect people depending on their vulnerability. In sum, climate change impacts are only one of the many factors that shape conflict and human insecurity, making it more difficult to build a prosperous and peaceful future.

Sudan, both North Sudan and South Sudan, is facing several environmental issues. All but one has to do with water. Inadequate supplies of potable water, soil erosion, desertification, and periodic drought all plague Africa's largest country and fifth largest population (deeming North and South together). Recently in Sudan, natural resource wealth, mainly from oil, offers large resource rents to elites.⁵⁰ The dependence on natural resource production weakens the state structures that redistribute wealth, and are less reliable and competent to provide public welfare. Hence, weak states, in turn, are at higher risk of civil war because they rely on natural resources for revenue rather than on taxation, have weaker state structures, and are thus less⁵¹ able to contain violence. In addition, they tend to be less democratic; they need not to be accountable to the public because natural resources provide large rents that

⁴⁸ Sarah Cechvala, *Rainfall & Migration: Somali-Kenyan Conflict (2011)* available at <http://www1.american.edu/ted/ICE/somalia-rainfall.html> (last visited Mar. 22, 2015)

⁴⁹ *Supra* note 15, at 38

⁵⁰ *Supra* note 15, at 41

⁵¹ *Supra* note 46, at 41

preclude the need for taxation.⁵² It is evident that the causes that trigger, sustain, and prolong recurring conflicts are multidimensional and cannot be reduced to a single variable.

V. CLIMATE CHANGE MANAGEMENT IN POST CONFLICT STATES

Conflict and post-conflict are relative terms and subject to nuance. In practice, most of the post-conflict reconstruction efforts take place in such a place where conflict has subsided to a greater or lesser degree, but is ongoing or recurring in some parts of the country.⁵³ The inability of fragile and post-conflict states to provide fundamental public goods and services has impacts on both the 'immediate prospects' for tending to citizens' basic needs and restarting economic activity, and 'long-term prospects' for assuring welfare, reducing poverty, and facilitating socioeconomic growth.⁵⁴

Conflict and wars empirically devastate basic infrastructure, disrupt the delivery of core services (e.g. health, education, electricity, water, sanitation) and impede the day-to-day routines associated with making a living. In the worst-case scenario, they lead to pervasive suffering, massive population dislocation, humanitarian crises and epidemics, which overwhelm the already inadequate effectiveness of failed-state governments. The inability of post-conflict states to provide fundamental public goods and services has impacts on both the immediate prospects for tending to citizens' basic needs and restarting economic activity, and long-term prospects for assuring welfare, reducing poverty, and facilitating socio-economic growth. Restoring or creating service delivery capacity and initiating economic recovery are central to governance reconstruction agenda.⁵⁵

Post-conflict public policies are particularly vulnerable to distortion by sectarian behavior towards particular groups, sectors or communities overriding national

⁵² RI Rotberg, *Failed States, Collapsed States, Weak States: Causes And Indicators in STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 1* (RI Rotberg ed., 2003)

⁵³ *Supra* note 45 at 3

⁵⁴ *Supra* note 45 at 5

⁵⁵ UNDP, *Human Development Report* (2000)

interests. The loss of human and social capital, dearth of social cohesion, continued exclusion of targeted groups in society, and absent participatory mechanisms in public policy formulation, all perpetuates a lack of trust in government and challenge the revival of legitimate local and national governance structures. Internally displaced people (IDPs), returning refugees, and unsupported youth and (former) child soldiers or ex-combatants and others are particularly vulnerable to being co-opted into unproductive or illicit activities that are counterproductive to the effective functioning of the state.⁵⁶ The environment, and even climate change, could offer peace-building opportunities in conflict-affected areas.

The Environmental Law of Afghanistan, a post conflict state in the based on 13 fundamental principles.⁵⁷ It consists of nine chapters and seventy eight articles entwining all the main environmental concerns.⁵⁸ It reflexes that environmental policies of Afghanistan are steadily improving. Afghanistan, with its rich natural resources, should gain substantially from mainstreaming environmental protection into the reconstruction agenda and the national budget. If the current environmental crisis in Afghanistan is not fully highlighted, they will consequently have dramatic impacts on the people and the economy and would evidently expose Afghanistan to the threat of violence.

One important case study that highlights the nexus between climate change and conflict is the relationship among the conflicts in Afghanistan, the drying of the vital Helmand River, and the booming of opium trade within the Helmand Province. This Province remains a flashpoint area for several reasons. The Taliban and its allies have a strong presence here, and it has been home to some of the most frequent and violent clashes between the insurgents and coalition forces in recent years. It is also the single largest opium-producing province in

⁵⁶ GPAB/REGOPA, *Governance Strategies for Post Conflict Reconstruction, Sustainable Peace and Development* 5 (2007), available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028332.pdf> (last visited Apr. 27, 2015)

⁵⁷ ISLAMIC REPUBLIC OF AFGHANISTAN, ENVIRONMENTAL LAW, Off. Gazette No. 912, Jan. 27, 2007, available at http://www.afghan-web.com/environment/afghan_environment_law.html (last visited Apr. 27, 2015)

⁵⁸ UNEP, *Afghanistan's Environment: Annual Report* 9 (2008)

the world.⁵⁹ The vibe of civil conflict and a weak and ruffled central government have led to years of environmental degradation and ramshackle mechanisms for water management. Under the froth of such negligence, the amount of water flowing into Helmand Province from the Helmand River has decreased. Hence, as the drought has continued ceaselessly, the farmers in Helmand have found it increasingly difficult to grow traditional staples and such snowball's chance in hell situation for farming traditional staples has forced many of them to turn to the cultivation of drought-resistant opium crop.

However, earlier to such abseiling situation, Helmand province had been an agricultural hub to Afghanistan for centuries due to the presence of the Helmand River. It is because of this river that the area was once known as the 'bread basket of Western Asia'.⁶⁰ A number of staple crops had been grown here over the years, including wheat and other cereals, sugar beets, vegetables, orchards, cotton, and seeds. An historic drought began in 1998; it had been the worst drought in the 175 years of recorded history in the region. This has escalated with decades of conflict to cause a precipitous drop in the level of the Helmand River. In 2001, the Helmand river flow declined to 98% below compared to its average annual flow. In 2001, the first year the Helmand River did not reach the Sistan Basin. All of the standing water disappeared, replaced by vast salt flats. Consequently, the entire Sistan Basin ecosystem has collapsed.⁶¹

If a functioning government, in tandem with gilt edged good governance and rule of law mechanism existed in Afghanistan, it may have been able to take some effort to mitigate the effects of this drought. However, none exists, as it has been destroyed by internal strife. The hydrologic infrastructure of the area, much of which was poorly designed in the first place, is in desperate need of repair and upkeep. The Kajaki Dam, which was funded by USAID, has not been spared. The ongoing civil conflict between the Afghan Central Government and the insurgency is a significant factor in this declivity as well. The high level of

⁵⁹ Tim Kovach, *ICE Case Studies: Helmand Province, Afghanistan, Conflict and Climate Change* (Dec. 2011) available at <http://www1.american.edu/ted/ICE/helmand.html> (last visited Apr. 27, 2015)

⁶⁰ *Id.*

⁶¹ *Supra* note 61

insecurity in the Province is a contributing factor in the growth of the opium market and the level of support for the insurgency.⁶² The people of Helmand have not been able to rely on the central government to protect them from the constant threat of bodily harm, let alone to provide them with the necessary tools for economic and human development. The Taliban, in contrast, share a common religious and cultural identity with the people and have taken great effort to build rapport. They provide swift justice for the people through their *ad hoc* Shariah court systems. They also effectively encourage opium farming and trafficking as an economic development tool. They protect farmers from eradication efforts and provide access to the networks the farmers need to get their opium harvest from the farm into the black market. This relationship is readily apparent when one studies the correlation between opium production and number of security incidents. In 2010, the UNODC found that where security conditions were ruffled or not in existence, opium was produced in 66% and 79% of these villages, respectively.⁶³

VI. CONCLUSION

Climate change poses as a unique and empirically novel security threat.⁶⁴ Matt Yglesias, a famous blogger, depicts the standing of climate change in world politics by opining: ‘...climate change means honest to God major problems and not just somewhat warmer weather is useful.’⁶⁵

Climate change that induces conflict in the twenty-first century may turn out to be quite dangerous or quite benign.⁶⁶ The present Secretary-General of the United Nations, Ban Ki-moon, has aptly termed climate change as ‘defining

⁶² UN: *Afghan opium production increases*, NEW STRAITS TIMES, Apr. 15, 2013, available at <http://www2.nst.com.my/latest/un-afghan-opium-production-increases-1.255913> (last visited May 12, 2015)

⁶³ See generally United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2010* (2010), available at http://www.unodc.org/documents/crop-monitoring/Afghanistan/Afg_opium_survey_2010_exsum_web.pdf (last visited May 10, 2015)

⁶⁴ N. Gilman, *Climate Change And Security* in THE OXFORD HANDBOOK OF CLIMATE CHANGE 251 (J.S. Dryzek et. al. eds. 2011)

⁶⁵ *Supra* note 16, at 65

⁶⁶ *Supra* note 11, at 117

issue of our era'.⁶⁷ Thence, it is evident that it is a challenging issue to convey. The deficit of direct experience, which is exposing in fragile and post conflict states, makes climate change fundamentally a problem that requires illustrating and explaining by those who have expert knowledge to those who don't.⁶⁸ For this reason, scholars of international relations along with international environmental law have delved their attention to this topic. Their variegated conceptual, theoretical, and methodological approaches to the problems in international cooperation raised by global climate change contribute to a better understanding of the achievements accomplished to date as well as the challenges ahead.⁶⁹

Hence, from the aforementioned discussion it is evident that, the existential threat, menace and consequences as to climate change is much more than an attack by external forces, because due to climate change the territories of the states may not exist at all. The prime factors of modern state i.e., territory may be submerged and population may be displaced or may migrate to other countries as refugees. This reiterates that climate change threatens the core features of modern state and security.

⁶⁷ UN, *Climate change 'defining issue of our era', says Ban Ki-moon, hailing G8 action*, UN NEWS CENTRE, Jun. 8, 2007, available at <http://www.un.org/apps/news/story.asp?NewsID=22836&Cr=climate&Cr1=change#.VVHqJ46qqkp> (last visited May 10, 2015)

⁶⁸ SC Moser & L Dilling, *Communicating Climate Change: Closing The Science-Action Gap* in THE OXFORD HANDBOOK OF CLIMATE CHANGE 163 (J.S. Dryzek et. al. eds. 2011)

⁶⁹ INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE vii (Urs Luterbacher & Detlef F. Sprinz eds., 2001)

A VANISHING JURISPRUDENCE OF THE INDEPENDENCE OF JUDICIARY IN INDIA: AN ANALYSIS WITH REFERENCE TO THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014

Dr. Azim B. Pathan

I. BACKGROUND

At the outset it is significant to note that the Doctrine of Separation of Powers was adopted at the time of framing of Indian Constitution, which limits the functioning of the three organs in their respective spheres and provides for checks and balances. The framers of the Indian Constitution had ‘independence of the judiciary’ as their prime concern which can be inferred by Dr. B.R. Ambedkar’s words, “.... *there can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself and the question is how these two objects could be secured*”.¹ Independence is a key to the judiciary’s effective functioning. An independent judiciary is necessary for a free society and a constitutional democracy. It ensures the rule of law and realization of human rights and also the prosperity and stability of a society.² The independence of the judiciary does not mean just the creation of an autonomous institution free from the executive and legislative control and influence. Its underlying purpose is that judges must be able to decide a dispute before them, according to law, uninfluenced by any other factor.³ A suitable environment and a constant guard against the changes in society, economy and politics is required to achieve and propagate the independence of judiciary as it is too fragile to be left unguarded. In the recent past, the controversy generated by former Supreme Court (SC) Justice Markandey Katju’s allegation that a corrupt Madras High Court judge was allowed to continue in office due to political pressure from the government, became the last straw in putting an end to the two-decade old collegium system.

¹ 11 CONSTITUTIONAL ASSEMBLY DEBATES (CAD), 1949 at 17

² Philip S. Anderson, Foreword, 61 LAW & CONTEMP. PROBS. 1-2 (Summer 1998)

³ *Id*

Following a consensus reached at a consultation organized by the National Democratic Alliance government with eminent jurists, the Law Ministry began work on a Constitutional Amendment Bill to replace the collegium system with a Judicial Appointments Commission (JAC) in which the executive would also have some say in appointment of judges of the SC and High Courts (HCs) and this led to the framing of the twin Acts- the National Judicial Appointments Commission Act, 2014 and the Constitution (121st Amendment) Act, 2014.

II. INDEPENDENCE OF JUDICIARY: MEANING AND NEED

Independence of judiciary is the *sine qua non* for the existence of a democracy. Our Constitution in its provisions just talks of independence of the judiciary but does not define it. The question thus arises, what is its meaning? Since independence of judiciary stems from the doctrine of separation of powers therefore principally it means the independence from the other two organs of the government namely executive and legislature, whereas essentially, it also means that every judge is absolutely free to adjudicate matters before him with his own understanding of the facts and knowledge of the law without any influence, enticement, pressure, directly or indirectly from any angle. Thus the independence is not only limited to freedom from control by the executive and legislature on the judiciary as an institution, but it also extends to judges who shall have independence in deciding disputes before them according to law and uninfluenced by any other factor.

Shetreet takes into account these considerations.⁴ Explaining the expression independence and judiciary separately, he says that the judiciary is “the organ of government not forming part of the executive or the legislative, which is not subject to personal, substantive and collective controls, and which performs the primary function of adjudication.”⁵ Dealing with independence, after citing a

⁴ JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE (Shimon Shetreet & J. Deschenes eds., 1985)

⁵ *Id.* at 597-98.

few definitions with which he does not fully agree,⁶ he differentiates between the independence of the individual judges and the collective independence of the judiciary as a body which together constitutes independence. To Shetreet, independence of the individual judge consists of the judge's substantive and personal independence. The former means subjection of the judge to no authority other than the law in the making of judicial decisions and exercising other official duties, while the latter means adequate security of the judicial terms of office and tenure.⁷ The independence of individual judges also includes independence from their judicial superiors and colleagues.⁸ Thus it can be concluded from Shetreet's treatment that independence of the judiciary is twofold, as it means and includes independence as a collective body from other two organs of the government as well as independence of judges as members of judiciary in performance of their roles. These two aspects go hand in hand for achieving an independent judiciary. The need for an independent judiciary can be attributed to its role as a guardian and interpreter of the Constitution and as a watchdog to regulate the functions of the executive and legislature, also while resolving disputes it is expected of the judiciary to deliver judicial justice and refrain from any bias.

III. INDEPENDENCE OF JUDICIARY: CONSTITUTIONAL OVERVIEW

The judges of the Supreme Court and the High Courts have been given security of tenure. Once appointed, they continue to remain in office till they reach the age of retirement which is 65 years in the case of judges of the Supreme Court⁹ and 62 years for judges of the High Courts.¹⁰ They cannot be removed from office except by an order of the President and that too solely on the grounds of proven misbehavior and incapacity. A resolution has to be accepted to that effect by a majority of total membership of each House of the Parliament and also by a

⁶ *Supra* note 4, at 594-95.

⁷ See *Supra* note 4, at 598.

⁸ See *Supra* note 4, at 599.

⁹ INDIA CONST. art. 124 cl. 2

¹⁰ INDIA CONST. art. 217 cl. 1.

majority of not less than two-thirds of the members of the house, present and voting.¹¹ The salaries and allowances of the judges is also a factor which makes the judges independent as their salaries and allowances are fixed and are not subject to a vote of the legislature. Their emoluments cannot be altered to their disadvantage¹² except in the event of grave financial emergency. The Parliament can only add to the powers and jurisdiction of the Supreme Court but cannot curtail or take away any power of Supreme Court.

Article 211 of the Constitution of India, states that there shall be no discussion in the legislature of the state with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties. A similar provision is made in Article 121 of the Constitution which states that no discussion shall take place in the Parliament with respect to the conduct of the judges of the Supreme Court or High Courts in the discharge of their duties except upon a motion for presenting an address to the President praying for the removal of the judge. Both the Supreme Court and the High Court have the power to punish any person for their contempt under Article 129 and Article 215 of the Constitution of India. Article 50¹³ of the Constitution of India, states that the state shall take steps to separate the judiciary from the executive in the public services of the state. The object behind this Directive Principle of State Policy is to secure the independence of the judiciary from the executive.

IV. BACKGROUND OF APPOINTMENT OF JUDGES

In 1945 the Sapru Committee recommended in its constitutional proposals that the “Justices of the SC and the HCs should be appointed by the head of State in consultation with the Chief Justice of the SC and, in the case of High Court judges, in consultation additionally with the High Court Chief Justice and the head of the unit concerned”.¹⁴

¹¹ INDIA CONST. art. 124 cl. 4 and 5.

¹² INDIA CONST. art. 125 cl. 2.

¹³ INDIA CONST. Directive Principles of State Policy.

¹⁴ GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 176

In his memorandum on the Union Constitution, submitted later, Sir B. N. Rau, the Constitutional Advisor, agreeing in principle, suggested that the appointment of judges should be made by the President with the approval of at least two-thirds of the Council of States which was proposed to advise the President in the exercise of the President's discretionary powers and of which the Chief Justice of the SC was an ex-officio member.¹⁵

The Union Constitution Committee recommended that "a judge of the SC shall be appointed by the President after consulting the Chief Justice and such other judges of the SC, as also such judges of the HCs as may be necessary for the purpose."¹⁶

With incidental changes, these recommendations on the appointment of the Supreme Court and the High Court judges were incorporated in the Draft Constitution prepared by the Constitutional Advisor.¹⁷ The recommendations were adopted as such in the Draft Constitution prepared by the Drafting Committee of the Assembly.¹⁸ The first reaction to these provisions came from Justice Kania who was the then Chief Justice. He limited his comments to laying emphasis on independence of the judiciary from the executive as he thought that the exclusion of politics in the selection of judges was necessary for independence of the judiciary.

Thus justifying the decision of the Constituent Assembly for adopting select recommendations, Dr. B.R. Ambedkar concluded by saying that, "it would be dangerous to leave the appointments to be made by the President, without any kind of limitation merely on the advice of the executive of the day. Similarly, to make every appointment which the executive wishes to make, subject to the concurrence of the Legislature is also not suitable. Apart from being

(1999). For The Text of the Committee Report, *see generally* T. B. SAPRU ET. AL., CONSTITUTIONAL PROPOSALS OF THE SAPRU COMMITTEE (1946)

¹⁵ See B. N. RAU, INDIA'S CONSTITUTION IN THE MAKING 72-86 (1960).

¹⁶ SHIVA RAO ET AL., THE FRAMING OF INDIA'S CONSTITUTION 600 (1968).

¹⁷ The Draft was prepared on the instructions of the Constituent Assembly and was based on the recommendations of various committees appointed by the Assembly and accepted by it. This Draft became the basis of the Draft Constitution prepared by the Drafting Committee of the Constituent Assembly that was chaired by Dr. B. R. Ambedkar.

¹⁸ *Supra* note 16, at 554

cumbersome, it also involves the possibility of the appointment being influenced by political pressure and considerations. The draft article steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature.”¹⁹

V. TRACING THE COLLEGIUM COINED BY APEX COURT

In the *S.P. Gupta* case (known as First Judges case),²⁰ the Hon’ble Supreme Court literally interpreted the word consultation appearing in Articles 124²¹ and 217²² of the Constitution of India. The Court held that the opinion of the Chief Justice of India (CJI) is merely consultative and the final decision in the matter of appointment of judges is left in the hands of the Executive. This decision was criticized and challenged.

The dissatisfaction with the Judges Case led to the Second Judges Case.²³ The Court laid emphasis on an “integrated participatory consultative process” for selecting the most suitable persons available for appointment in which all the constitutional functionaries must perform this duty collectively with a view to reach a consensus, serving the constitutional purpose, so that the occasion of primacy does not arise in the matter of appointment of judges to the Supreme Court or the High Courts.²⁴ The proposal for the appointment of judges to Courts²⁵ must be initiated by the Chief Justices of the respective courts. Such proposals have to be submitted by the CJI to the President. The President must consider these proposals within a set time frame. In case of a difference of opinion between different constitutional functionaries, the opinion of the CJI has primacy. In making recommendation, the CJI represents the judiciary and does not act individually. So his opinion is the judiciary’s opinion. The CJI must

¹⁹ *Supra* note 1, at 18.

²⁰ *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

²¹ INDIA CONST. art. 124

²² INDIA CONST. art. 217

²³ *SC Advocates on Record Association v. Union of India*, AIR 1994 SC 268.

²⁴ *Id.*

²⁵ Both Supreme Court and High Court.

consult the two senior-most Judges of the SC to avoid arbitrariness which was later increased to four in Presidential Reference²⁶ where the SC coined the term collegium. In the wake of the recent controversies this collegium system has been highly criticized for being opaque and an alternative of a National Judicial Appointments Commission to take its place was proposed.

VI. INFUSION OF THE JUDICIAL OPINION IN THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION ACT, 2014

The National Judicial Appointments Commission Act, 2014 and the Constitution (121st Amendment) Act, 2014 are two significant acts to provide and facilitate the opinion of the Apex Court given on the collegium system. It is paramount to note here that the National Judicial Appointments Commission Act (NJAC), 2014 was introduced in conjunction with the Constitutional (121st Amendment) Act, 2014. It provides for the procedure to be followed by the NJAC for recommending persons for appointment as CJI and other Judges of the Supreme Court, and Chief Justice and other Judges of High Courts.²⁷

A. THE CONSTITUTION (121ST AMENDMENT) ACT, 2014

It is important to note here that the above said Act amends Articles 124 (2), 217 (1), 222 (1) and 231 (2) of the Constitution related to appointment of SC judges and appointment and transfer of High Court judges. It replaces the current collegium system with a JAC. It empowers Parliament to pass a legislation to determine the composition, appointments, functions of the JAC, and the manner of selection of Supreme Court and High Court judges.

B. COMMISSION (COMPOSITION) UNDER NEW ACT

It states that the JAC shall comprise of the CJI, two other senior most judges of the Supreme Court, the Union Minister for Law and Justice, and two eminent persons to be nominated by the Prime Minister, the CJI and the Leader of

²⁶ AIR 1999 SC 1.

²⁷ *The National Judicial Appointments Commission Bill, 2014*, PRS LEGISLATIVE RESEARCH, Oct. 7, 2014 available at <http://www.prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014-3359/> (last visited May 3, 2015)

Opposition of the Lok Sabha. The composition of the JAC has not been included in the Constitution, but has been left for Parliament to decide by law. This implies that modifying the composition of the JAC would not require a constitutional amendment, but may be altered by a simple majority in Parliament.²⁸

VII. HOW DOES THE ACT HAMPER THE INDEPENDENCE OF JUDICIARY?

While there is a broad consensus on the need to reform the manner in which judicial appointments are made and render the process more transparent than it has been under the Collegium system, the NJAC suffers from a fatal flaw. It gives the government a direct role in making judicial appointments and even the ability to block individual judges under certain circumstances. The Constitution prescribes a fine balance between the executive and the judiciary, and judicial independence is the key to its maintenance.²⁹ The two Acts destroy the separation of powers and undermine the independence of the judiciary by giving power in the hands of the executive to determine the composition of the judiciary, given that laws implemented by the executive can be challenged in front of the judiciary, it is imperative that judges are not dependent on the executive for their appointment.³⁰

Insulating the judiciary from political processes is indispensable for ensuring independence of judiciary. The problems with the collegium system must be addressed first rather than scrapping it. Judiciary's independence is too sacrosanct to be traded off in a country governed by the supremacy of the rule of

²⁸ *The Constitution (120th Amendment) Bill, 2013 and Judicial Appointments Commission Bill, 2013*, PRS LEGISLATIVE RESEARCH, Oct 7, 2014, available at <http://www.prsindia.org/uploads/media/Judicial%20Appointments/Legislative%20Brief%20Constitution%20120th%20Amendment%20and%20JAC%20Bill,%202013.pdf> (last visited May 3, 2015)

²⁹ Siddharth Varadarajan, *A Fatal Flaw in the Bill on Judges*, NDTV, Aug. 14, 2014.

³⁰ Indira Jaisingh, *National Judicial Appointments Commission: A Critique*, XAAM, Oct 7, 2014, available at <http://www.xaam.in/2014/09/national-judicial-appointments.html>. (last visited May 3, 2015)

law.³¹

Although the National Judicial Appointments Commission Act seeks to remove the flaws of the collegium system, it has not managed to do so in its present form. The major failing of the collegium has been its opaque mode of functioning which is being further propagated by the new law. The manner in which non-judicial members in the NJAC can veto a candidate irrespective of the views of the three judicial members, including the CJI, exhibits a major encroachment into the powers of the judiciary. Justice A.P. Shah contends, this veto power is likely to perpetuate the culture of trade-offs and sycophancy already claimed to be present in the collegium system of appointment and makes it even more malicious, since this will not remain internal to the members of the collegium, but will exist between the judiciary and the executive.³²

The NJAC, as currently envisaged, is dangerous because it breaches the separation of the executive and the judiciary by giving the Law Minister a formal role and worsens the situation by opening a door for the government to filter out individual nominees whose reputation for independence might make it uneasy.³³

There is a serious conceptual flaw with the present legislative design. An uncomfortable dichotomy between the constitutional provision and statutory scheme emerges through the new move. While the 121st Constitution Amendment Act would empower the NJAC, its composition and voting pattern are to be determined by a statute i.e. the National Judicial Appointments Commission Act, not by the amended Constitution. Thus, even without a

³¹ Suhas Chakma, *India: Undermining independence of judiciary National Judicial Appointments Commission Bill: The cure is worse than the disease*, WORLD KASHMIR AWARENESS FORUM, Oct 7, 2014, available at <http://www.kashmirawareness.org/Article/View/46665/india-undermining-independence-judiciary-nati> onal-judicial-appointments-commission-bill-cure-worse-than-disease (last visited May 5, 2015)

³² *Judicial Commission Should Not Have Veto Power: Justice Shah*, THE INDIAN EXPRESS, Oct. 5, 2014, available at <http://www.newindianexpress.com/nation/Judicial-Commission-Should-Not-Have-Veto-Power-Justice-Shah/2014/10/05/article2463201.ece> (last visited May 1, 2015)

³³ See *supra* note 29

constitutional amendment, the limited virtues of the NJAC can be taken away through a statutory amendment by a simple majority in the Parliament.³⁴

Federalism is a basic feature of our Constitution as held by the SC.³⁵ In the new system, the NJAC or the President of India is not bound by the recommendation of the Chief Justices of the HC or the Governors. Those at the Centre, through the commission will select the HC Judges, despite lacking familiarity with the institutions of Courts and absence of mechanism for the assessment of individual merit. This completely nullifies the constitutionally guaranteed federal traits in the realm of judicial appointments.³⁶

The selection of the eminent persons in the NJAC itself does not meet the test of objectivity on various grounds. The Constitution (121st Amendment) Act, 2014 fails to specify the criteria including educational qualification of the eminent persons except that one of them shall be a person “belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities or Women”. That alone cannot be the only criterion for selection of the eminent persons.³⁷

While Article 124(3) of the Constitution prescribes the minimum requirement of a person to be eligible to be appointed as a SC judge, Clause 5(2) of the National Judicial Appointments Commission Act, 2014 can now prescribe “any other criteria of suitability as may be prescribed by the regulations.” Similarly, additional criteria can be added for HC judges. The eligibility of Supreme Court and High Court judges will be determined not just by the Constitution but by “regulations” of the Commission creating a situation where judges are directly dependent for their appointment on the Commission.³⁸

Kapil Sibal pointed out that the Act allows two members of the NJAC to scuttle the appointment of an individual. Such a provision can be misused, especially, when the appointment of the two eminent persons is open to executive control.

³⁴ Kaleeswaram Raj, *Federalism in Judicial Appointments*, THE HINDU, Sep. 17, 2014, available at <http://www.thehindu.com/opinion/op-ed/federalism-in-judicial-appointments/article6416552.ece> (last visited May 1, 2015)

³⁵ *S.R. Bommai v. Union of India*, (1994) 3 SCC 1.

³⁶ *Supra* note 34

³⁷ See *supra* note 31

³⁸ Arvind P. Datar, *A fatally flawed Commission*, The Hindu, August 17, 2014.

If political bias of those two come into play at the time of appointing a candidate, this can be detrimental to the composition of the judiciary. Fali S. Nariman criticized the composition of the NJAC as it would have only three judges out of six members, withholding primacy of the judiciary which it is entitled to. Another issue of concern is the matter of unanimous reiteration if the President refers the names back for recommendation. Just one member can, through his veto, block any appointment and this can give the Executive the power to reject names till it gets an appointment of its choice.³⁹

The veto power conferred on the members of the commission allowing any two persons to block the consideration of any candidate gives rise to another problem. It effectively gives to the executive a veto over the nomination made by the judiciary, as the law minister and one of the eminent persons can stop the appointment of a judge.

The actual problem is the lack of transparency in the selection process. Instituting a JAC doesn't address this problem. On the contrary, it transfers the opacity of the process to selection of judges to the process of selection of members of the Commission. If people having no faith in the Constitution's values of liberal democracy and secularism, get appointed to the Commission, they will end up appointing to the highest echelon of the judiciary. This would do serious damage to the separation of powers as envisaged in the Constitution.⁴⁰

The Act amending the Constitution and introducing Section 124B which states that one of the criteria for being recommended as a judge is that a person must be of ability and integrity. There is no system created by the Act for judging ability and it does not define it either.

³⁹ Apoorva Mandhani, *Judicial Appointments Commission Bill: Kapil Sibal and Fali Nariman Decide to Challenge Constitutional Validity of the Two Bills*, LIVE LAW, Oct. 7, 2014 available at <http://www.livelaw.in/judicial-appointments-commission-bill-kapil-sibal-fali-nariman-decide-challenge-constitutional-validity-two-bills/> (last visited Jan, 23, 2015)

⁴⁰ T.K. Arun, *Judicial Appointment Bill may skew independence of judges*, THE ECONOMIC TIMES, Aug. 14, 2014.

VIII. CONCLUSION AND SUGGESTIONS

After analysis of the history of the Judges Appointments in India so far, one can see that collegium system was provided as the most suitable solution by the judiciary for appointing judges keeping in mind the sacredness of the Constitution and Independence of the Judiciary. Just because of a few aberrations it should not be totally repealed rather the problem of it being opaque shall be considered and it should be made more transparent, accountable and known to the public.

Whereas if the National Judicial Appointments Commission is looked at as an alternative, it cannot succeed unless certain changes are incorporated, such as:

1. The Law Minister must not have the power to block a nominee in tandem with another member.⁴¹ To prevent this, the provision that gives veto power allowing any two members to block the nomination of a candidate needs to be altered. Otherwise the executive can misuse this provision and filter out those nominees whose reputation for independence makes it uneasy. There must be absolute clarity about the manner in which the two eminent persons are to be selected for the JAC and the unanimity principle must be enshrined in the statute.⁴²
2. It will make far more sense to have the NJAC consisting of the three senior-most Supreme Court judges, two retired Supreme Court judges and two retired Chief Justices of High Courts.⁴³ If not, at least the majority members should be representing the judiciary to ensure primacy of the judiciary while ensuring independence of the judiciary.
3. The Act should be clear as to what comprises ability and integrity or at least set up a system that will help determine it objectively.

It is most important to reiterate that Independence of the Judiciary cannot be compromised with as the Judiciary is the protector of the Constitution. The independence is not restricted to the formation of an institution free from executive and legislative intervention and control but also includes the

⁴¹ See *supra* note 29

⁴² See *supra* note 29

Independence of the judges in carrying out their role as members of the judiciary. Thus the idea of such an independent judiciary depends on the appointment of Judges which has to be free from the dominant control of the executive. The new Act in its current form does not ensure such independence rather it threatens it. Therefore a need is felt to either revive the collegium system or to make the new Act pro-judicial independence.

JOURNEY OF THE SUPREME COURT IN INTERPRETING INTERNATIONAL HUMAN RIGHTS OF WOMEN IN POST- CONSTITUTIONAL ERA

Dr. R. Srinivasan

I. INTRODUCTION

The women in India faced a paradoxical situation. They were highly venerated like mother like earth and on the other subjected to hardship both physical and mental, due to innumerable social practices. The Constitution of India guarantees 'equality' and 'non-discrimination', even before the ratification of 'International Bill of Rights' at the global level. Therefore corresponding to the development of human rights at the global level, India attempts to internalize such laws into the domestic system either by amending the Constitution or through legislative enactments. In spite of that there is a persisting gap between the evolving global laws and the existing laws. Global laws are far head of national laws. In this context the paper is attempt to analyze the role of the Supreme Court of Indian in interpreting the international human rights in the domestic law.

This paper attempts to analyse the role of the Supreme Court cases from 1950 to 2014 on the rights of women. In the back drop of the development under International Law the cases are arranged chronologically and classified into four phase, which constitute four phases namely, the first phase from 1950 to 1966 i.e. from the commencement of the Constitution to the year of enactment of International Covenants, the second phase from 1966 to 1979, i.e. after the enactment of ICCPR and ICESCR to the year of ratification of these two instruments by India, the third phase commences from 1979 i.e. after the ratification of the two covenants till the enactment of Protection of Human Rights Act in 1993. The fourth phase commences from the enactment of Protection of Human Rights Act, 1993 to 2014.

II. RECOGNITION OF GENDER EQUALITY UNDER INTERNATIONAL LAW

Life, Liberty, Equality and Dignity are the basic tenets of human rights. These concepts evolved at the global level and are internalized by the legislature and harmonized by the judiciary at the domestic level. The genesis and growth of modern human rights law can be traced from the wake of twentieth century. The flagrant violation of equality and non-discrimination of women were the reason for the development of human rights instruments. The preamble of the United Nations (herein referred to as UN) Charter is the first instrument which declares the 'equality of men and women' in the international sphere. Article 1(3) and 55 of the Charter prohibits the discrimination on the basis of sex and Article 76(c) encourages and respects the human rights and fundamental freedom without any distinction of sex. After the UN Charter, the formal list of international legal instruments on women is very impressive in the international arena. It started from the inauguration of the Universal Declaration of Human Rights (herein referred to as 'UDHR'), 1948, which guarantees the right of every individual not to be discriminated against on the basis of sex among other things. From 1948 when UDHR came into being to 1966 when International Covenants on Civil Political Rights and Economic, Social and Cultural Rights were drafted, there were numerous women related international instruments sponsored by the UN.

The first exclusive human rights instrument concerning women was the Convention on Trafficking in Women, 1949 sponsored by UN, followed by Supplementary Convention on Abolition of Slavery, the Slave trade and Institutions and Practices similar to slavery, 1956, Convention on the Political Rights of Women, Mar. 31, 1953, the Convention on the Nationality of Married Women, Feb. 20, 1957; and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 10, 1962. In 1966, the International Covenants on Civil and Political Rights (hereinafter 'ICCPR')¹ and International Covenant on Economic, Social and Cultural Rights (hereinafter

¹ ICCPR art. 2

‘ICESCR’)² prohibit the discrimination of women and subsequently Convention on the Elimination of All forms of Discrimination against Women (hereinafter ‘CEDAW’) emerged in 1979 which elaborated about gender equality in numerous spheres of human life. International Labour Organization (herein referred to as ‘ILO’) Conventions have also referred to the gender equality and the need for special action to provide justice to women. It also urged national constitutions and laws to be made to adopt the international human rights language on women towards entrenchment of implementation.³

The *Mexico Plan for Action* (1975), and the Nairobi Forward Looking Strategies (1985) also add up to such international documents safeguarding woman’s rights. It has come to be recognized as International Bill of Rights for Women. CEDAW prohibits all restrictions on women and work towards empowering of women, her right and freedom – civil, political, economic, social and cultural. The Preamble of CEDAW convinced: ‘the full and complete development of a country, the welfare of the women and the cause of peace require the maximum participation of women on equal terms with men in all fields’.

The equality of women was reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 (Vienna Human Rights Declaration), Cairo Programme of Action, the Millennium development goals and World Summit and in the Fourth World Conference on Women held in Beijing (Beijing Declaration) in 1995 as well as “Beijing +5” follow-up in June, 2000. These developments together represent significant progress in the struggle by women rights activists, who have been working at local, regional, national and international levels to recognize women’s rights under human rights in international law. Indeed, this recognition is a tribute to the great success of the Beijing Conference. But it is regrettable to note that after decades of omission the subject of the worldwide occurrence of violence against women was seriously recognized by the UN.

² ICESCR art. 2(1)

³ Upendra Baxi, *From Human Rights to the Right to be a Woman* in ENGENDERING LAWS: ESSAYS IN HONOUR OF PROFESSOR LOTIKA SARKAR 13 (Amitha Dhanda & Archana Parashar eds., 1999).

III. GENDER EQUALITY IN DOMESTIC LEGAL REGIME

The Constitution of India guarantees the concept of 'equality' and 'non-discrimination'. Part III, dealing with Fundamental Rights ensures different rights for women's equality under Article 14; special protection under Article 15(4); and the right against exploitation under Article 23 & 24 which includes the rights of girl children. Besides, Directive Principles of State Policies provide for adequate means of livelihood and equal pay for equal work for both sexes. Under Article 39(a), the State has to make just and humane conditions of work and maternity relief and Articles 42. Article 51A (e) imposes a Fundamental Duty which requires every citizen to renounce practices derogatory to the dignity of women. Articles 243 (D) (3) and 243 (T) (3) ensures reservation of seats in every Panchayat and Municipality for women and hence advocates for equality in political sphere. Since 1950, the Parliament of India has enacted a sizeable number of legislations for protecting the rights of women.⁴ The Indian Penal Code has also provided provisions for dealing with offences against women. Apart from these legislative protections, the Government of India constituted two commissions in the 1990s: the National Commission on Women (NCW) in 1992 and the National Human Rights Commission (NHRC) in 1993. The Indian Government was committed to bring parity between sexes in all walks of life and to eradicate discrimination in all its manifestation. The Commissions task is to study human rights violations against women and forward the report periodically to the Government of India.

⁴ Dowry Prohibition Act, 1961, Immoral Traffic (Prevention) Act, 1956, Indecent Representation of Women (Prohibition) Act, 1986, Commission of Sati (Prevention) Act, 1987, Child Marriage Restrain Act, 1929 as amended by 1956, National Commission for Women Act, 1990, Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Maternity Benefit Act, 1961, Protection of Women from Domestic Violence Act, 2005, Equal Remuneration Act, 1976, the Hindu Marriage Act, 1955 amended Act in 1976, The Marriage Amendment Act, 2001, the Immoral Traffic (Prevention) Act, 1956 as amended and renamed in 1986, Dowry Prohibition Act, 1961 and amended Act, 1984, Child Marriage Restrain Act, 1976, Medical Termination Pregnancy Act, 1971, the Indecent Representation of Women (Prohibition) Act, 1986, Commission of Sati (Prevention) Act, 1987, the protection of Women from Domestic Violence Act, 2005.

IV. OVERVIEW OF THE SUPREME COURT CASES FROM 1950 TILL 2014

The role played by the Supreme Court in harmonizing the International Human Rights Law with the Domestic Law relating to women is analyzed under the following four phases.

A. FROM 1950-66:

This phase was the Nehruvian period, the Supreme Court predominantly struck on the British tradition of ‘Black law tradition’. In this period the Supreme Court consistently adopted self-restraint approach. It is relevant to point out the work of S.P.Sathe regarding ‘the style of functioning of the Supreme Court during the 1950’s and 1960’s, he observed that judiciary did not question the legislative enactments. Hence the Court did not interpret the international human rights instruments directly, it observed:

Sex is a sound classification and although there can be no discrimination in general in that ground the Constitution itself provides for special provisions in the case of women and children by clause (3) of Article 15. Article 14 and 15 thus read together validate the last sentence of Section 497 IPC which prohibits women from being punished as an abettor of the offence of adultery.⁵

The provisions of UN Charter and UDHR instruments on equality and non-discrimination did not play a significant role in the domestic law, but it is found that the Court started to apply the ‘human rights’ angle in the domestic law relating to women’s equality. Therefore in this phase the Court analyzed the concepts of equality and non-discrimination relating to women in a limited scope as the sexually weak and vulnerable group of the society.

Hence there was no assimilation and harmonization of international laws on women’s rights into the domestic sphere during this phase.

⁵ *Yusuf Abdul Aziz v. State of Maharashtra*, AIR 1954 SC 321.

B. FROM 1966-79:

This is a significant phase for the development of women empowerment in the international sphere. The Fifth Five Year Plan (1974-78) in India saw a marked shift in the approach of women's issue from welfare to development. During this period India signed the ICCPR, CEDAW, and ratified the *Mexico Plan of Action*. Despite all the positive developments in the international arena, there was no respite in the brutality and violence against women. The declaration of Emergency changed the outlook of the Supreme Court from a docile and adjusting third organ of the State to a highly activist Court pulling up the other organ for their failure. This phase is noted for many women centric laws, but cases relating to women's rights and other issues did not come to the Supreme Court.

C. FROM 1979-93:

This phase saw a gender sensitized judiciary swinging into action to provide equality for women. In *Shah Bano Begum case*, the Supreme Court playing an active role to bring uniform personal laws for women, irrespective of religion to attain gender equality as guaranteed by Uniform Civil Code in Article 44 of the Constitution.⁶ In this the Court awarded maintenance under Section 125 of Criminal Procedure Code, which apply to all irrespective of religion, race, caste etc. The judgement led the nation into turmoil. The Islamic fundamentalist protested against the judgement. Finally the Parliament of India enacted Muslim Women (Protection of Rights on Divorce) Act, 1986 with retrospective effect to dilute the contribution of the Court. This incident made the judiciary concerned and cautious therefore, became bit hesitant to interfere in the internal affair of Islam and Christian religions.

In this period though the Court attempted to view the cases on women in the human right dimension, there is no evidence of harmonization of civil and political rights from the international instruments into the domestic law except in *Sheela Barse v. State of Maharashtra*.⁷ This period is etched in the minds of all human rights activists for yet another interesting reason. It saw the

⁶ *Mohammed Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

⁷ *Id*

emergence of a highly activist justice, V.R. Krishna Iyer former Judge, Supreme Court of India as the champion of human rights. In this case he observed:

. . . [T]he women are continuing to suffer from womb to tomb. Still, women are subjected to sexual offences like rape, sexual slavery, enforced prostitution and forced pregnancy besides being subject to gender bias in almost every walk of life.

Also, the phase is significant because the National Commission for Women was constituted by the Government of India in 1992 to periodically appraise it about the position of women and their needs.

D. FROM 1993-2014:

In this period India ratified the *Beijing Declaration* and unreservedly endorsed the *Platform for Action (1995)* and Outcome Document adopted by the UN General Assembly Session on Gender Equality, Development & Peace for the 21st Century. This document was titled “*Further actions and initiatives to implement the Beijing Declaration and the Platform for Action*”. The Indian Parliament enacted the *Protection of Human Rights Act, 1993* to give effect to the international obligations. In this period the Court discussed the personal laws related to women.

The nature of gender equality of women was examined under Hindu personal laws by the Supreme Court in this phase. In *Gita Hariharan and Another v. Reserve Bank of India*, the Court had to construe Section 6(a) of *Hindu Minority and Guardianship Act, 1956*⁸ and Section 19(b) of the *Guardian and Wards Act, 1890*.⁹ This Section were challenged as violative of equality clause of the Constitution, in as much as the mother of the minor is relegated to an inferior position on the ground of sex alone since her right, as a natural guardian of the

⁸ Section 6(a) of Hindu Minority and Guardianship Act, 1956, stated that the natural guardian of a Hindu minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property) are in the case of a boy or unmarried girl- the father, and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

⁹ Section 19(b) of the Guardianship and Wards Act, 1890, describes that ‘Nothing in this Chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose father is living and is not in the opinion of the Court, unfit to be guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor.

minor, is made cognizable only 'after' the father. The Court relied upon the CEDAW and the *Beijing Declaration*, which directs all State parties to appropriate measures to prevent discrimination of all forms against women. It was held by the Court that the domestic courts are under an obligation to give due regard to international convention and norms for construing domestic law when there is no inconsistency between them. It is the first time the Supreme Court of India took a case on inter-personal conflict of law, which is a by-product of lack of Uniform Civil Code in India.¹⁰

The impact of the instruments influenced further in *Sarla Mudgal v. Union of India*¹¹, the Court held the second marriage would be void in terms of provisions of Section 494 of the Indian Penal Code and the apostate husband would be guilty of the offence of bigamy under the above section.¹² In *Lily Thomas v. Union of India*¹³, the Supreme Court ruled that the Uniform Civil Code is not desirable, but it is a counterproductive for resolving the conflicts and reforming the personal law like abolition of polygamy and unilateral power of the Muslim husband to divorce his wife. This may not hurt Muslim sentiment as this type of reform had already taken place in Islamic countries like Syria, Morocco, Pakistan and Tunisia etc.¹⁴ This case also decided by the Supreme Court on human rights perspective.

For the first time in Indian legal history the Supreme Court referred the international instruments like UDHR and CEDAW in personal laws in *C. Masilamani case*.¹⁵ Again in *Valasamma Paul*¹⁶, the Court pointed out the definition of Section 2(d) of the *Protection of Human Rights Act, 1993* and held that the principles embodied in CEDAW and the concomitant 'right to development' have become an integral part of the Constitution and the Human Rights Act and so enforceable. In *Madhu Kishwar and Gita Hariharan case*,¹⁷ the Supreme Court invoked CEDAW and harmonized into the Hindu personal

¹⁰ *Gita Hariharan v. Reserve Bank of India*, AIR 1999 SC 1149.

¹¹ (1995) 3 SCC 635

¹² AIR 1995 SC 1531.

¹³ (2013) 7 SCC 653

¹⁴ AIR 2000 SC 1650.

¹⁵ *C. Masilamani v. Idol of Sri Swaminathaswamy*, AIR 1996 SC 1697.

¹⁶ *Valasamma Paul v. Cochin University and Others*, AIR 1996 SC 1011.

¹⁷ *Madhu Kishwar v. State of Bihar*, (1996) 5 SCC 125.

laws to ensure the equal share of women in the ancestral property, even against the existing statutory provisions in the previous case and remove the discrimination of women for guardianship.

It was the first time in India, the Supreme Court comprehensively dealt with the right of working women against sexual harassment in *Vishaka v. State of Rajasthan*.¹⁸ In this case the Court referred Article 11 and 24 of CEDAW¹⁹ and states that “In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of international conventions and norms are taken for the purpose of interpretation of the guarantee of gender equality and right to work with human dignity.” Further the Court observed that “any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions of the Constitution and enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.” On the basis of the international instruments, the Court issued guidelines obliging employers in work places as well as other responsible persons and institutions to observe the recommendations of CEDAW. Further the Court supported the decision on the basis of ‘doctrine of legitimate expectation’ and by referring to the objectives of the judiciary mentioned in the Beijing Statement of 1995.²⁰

This stand was continued in *Apparel Export Promotion Council v. A.K.Chopra*²¹ and in *Medha Kotwal* case in 2012.²² Similarly, in *Gaurav Jain case*,²³ the Court discussed the pushing of young girls of fallen women into prostitution in

¹⁸ AIR 1997 SC 3011

¹⁹ CEDAW, art. 11

¹⁹ According to the Court, the objectives of the judiciary mentioned in the Beijing Statement are:

- a. To ensure that all persons are able to live securely under the Rule of Law;
- b. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- c. To administer the law impartially among persons and between persons and the State.
- d. To ensure that all persons are able to live securely under the Rule of Law;
- e. To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- f. To administer the law impartially among persons and between persons and the State.

²¹ 1999(1) SCALE 57 at 68.

²² *Medha Kotwal Lele v. Union of India*, AIR 2013 SC 93

²³ *Gaurav Jain v. Union of India*, MANU/SC/0789/1997.

the light of *UN Declaration on the Rights of Child*, the *UN Standard Minimum Rules for the Administration of Juvenile Justice*, along with the UDHR and CEDAW in support of its decision.

In *Chairman, Railway Board v. Chandrima Das*²⁴ the Court considered the relevance of the provisions in UDHR and *UN Declaration on the Elimination of Violence against Women*, 1993 and declared that the International Covenants and declarations as adopted by the UN have to be respected by all signatory states and the meaning given to the above words in those declarations and covenants have to be such as would help in effective implementation of those rights. The applicability of the UDHR and the principles thereof may have to be read, if need be, into the domestic jurisprudence. The Court gave relief awarding compensation of Rs.10 Lakh to a Bangladeshi national who gang raped at Howrah Railway Station in West Bengal.

‘Gender equality’ in the employment opportunities was considered by the Supreme Court in several cases in the light of international instruments. In *Anuj Garg & Ors v. Hotel Association*, the Constitutional validity of Section 30 of the Punjab Excise Act, 1914, which prohibits employment of a man under the age of 25 or any women in any part of such premises in which liquor or intoxicating drug is consumed by the public was raised before the Court. It was a classical counter of Individual rights v. Community orientation of rights. In this instant case, the provision of UDHR was invoked before the Supreme Court for ‘gender equality’ and to throw the doors open for women also.

The employment of the women for dancing in the bar was decided as exploitation in *Indian Hotel and Restaurant Assn* case. In this case the Court read the provisions of CEDAW in the domestic law.²⁵

V. ANALYSIS OF THE SUPREME COURT CASES

The basic tenets of human rights, liberty, equality and dignity have found a niche for themselves both in the preamble and in Part III of the Constitution. The preamble aims to secure to all its citizen justice, liberty, equality and

²⁴ AIR 2000 SC 988.

²⁵ *State of Maharashtra and Anr v. Indian Hotel Restaurant and Association*, AIR 2013 SC 2582.

fraternity. Corresponding to the preamble, Article 14 of the Constitution provides equality to all-both citizens and non-citizens. Article 21 provides protection of life and personal liberty to all persons irrespective of nationality. The doctrine 'rule of law' is inseparably woven like a golden thread throughout the Constitution. It prohibits discrimination and thereby secures human dignity. Besides that, secularism, a basic structure of the Constitution facilitates the realization of human dignity of all persons, irrespective of religion and nationality. Thus the Indian Constitution has a basic framework for the protection of human rights.

The Indian Parliament is empowered by the Constitution to enact appropriate legislations to protect human rights. In accordance with it and also in accordance with various international conventions and treaties, the Parliament keeps expanding the scope and ambit of human rights through legislations. The human rights picture in India looks pretty rosy. Despite the constitutional protections and legislative enactments, human rights violations continue to exist. In the highly segregated Indian society, equality is anathema, liberty has a limited meaning and human dignity is available only to equals based on caste and gender hierarchy. The divergence between the empirical and legal reality of human rights results in cropping up of cases before the judiciary.

The Indian judicial system is structured on the common law tradition. Accordingly, in the process of adjudication, the Court can derive sources from the Constitution, or from the statutes, or from judicial precedents or even from customs. Such an approach is considered as the "*Wednesbury's approach*". It is pertinent to note here that the Indian Constitution empowers the Supreme Court to render complete justice under Article 142. In furtherance of this task, the Court, many a times deliberately drifted far away from the *Wednesbury's approach* to invoke various international conventions, treaties, declarations, reports etc. At times, the judgments of foreign courts have also been quoted in its judgments.

In *Sheela Barse*, the Supreme Court laid down guidelines for protecting women prisoner's human rights in prison. In *Vishaka*, the court laid down detailed guidelines preventing sexual harassment of women in working place- It was

further expanded in *Apparel Export* case and followed in *Medha Kotwal Lele* case. In *Gaurau Jain's* case, certain directions were issued in protecting the interest of the children of prostitutes in order to rehabilitate them. All the human rights available to women was extended to a foreign women in the *Chandrima Das* case.

Further, India enacted the Protection of Human Rights Act, 1993 to give effect to the international obligations and also signed Beijing Declaration and Platform for Action in 1995. Hence, women in India are accorded equality and non-discrimination on the basis of sex. However, the secular dimension of the Constitution permits the continuation of personal laws which are dealt in Article 25 to 28 of the Constitution. In this matter the government of India openly accepted in its periodic report submitted before the *UN Committee on the Elimination of Discrimination Against Women* and stated:

. . . [T]he personal laws of the major religious communities had traditionally governed marital and family relations, with the government maintaining a policy of non-interference in such laws in the absence of a demand for change from individual religious communities.²⁶

By viewing the report, CEDAW Committee noted: ‘[S]teps have not been taken to reform the personal laws of different religious and ethnic groups, in consultation with them, so as to conform to the Convention’, and cautioned that “the government’s policy of non-intervention and urged the government to withdraw its declaration to Article 16, paragraph 1 of the Convention and to work with and support women’s groups as members of the community in reviewing and reforming these personal laws and expected the government to follow the Directive Principles of State Policy in the Constitution and Supreme Court decisions. It also urged the Government to enact a Uniform Civil Code (UCC) which different ethnic and religious groups may adopt.²⁷

²⁶ UNITED NATIONS, *Report of the Committee on the Elimination of Discrimination Against Women*, Supp. No.38, A/55/38, 22nd Session, Jan. 17 – Feb. 4, 2000 and 23rd Session, June 12 – 30, 2000, GENERAL ASSEMBLY OFFICIAL RECORDS 8 (2000).

²⁷India’s declaration with regard to Article 5(a) and 16(1) of the CEDAW is as follows: “the government of the republic of India declares that it shall abide by and ensure these

The Human Rights Committee (HRC) of the *International Covenant on Civil and Political Rights, 1966* at its meeting held on 30th July 1997, after considering the Third Periodic Report of India observed that “women in India have not been freed from discrimination” and expressed serious concern that they “are subjected to personal laws which are based on religious norms and which do not accord equality in respect of marriage, divorce and inheritance rights”. It further stressed that the enforcement of personal laws based on religion violates the rights of women to equality before the law and non-discrimination. In fact, India signed CEDAW in 1980 and ratified it in 1993. Hence, India is legally bound under the International law to implement CEDAW. This paves the way for harmonization of global human rights by the judiciary as an organ of the State to implement the global human rights instruments at the domestic level.

It was witnessed in *Masilamani* case, that the Court took all appropriate measures to modify or abolish gender discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women. It held that the State should create conditions and facilities conducive for women to realize the right to development. In *Madhu Kishwar* case, the Court interfered in the personal laws of Hindus by harmonizing CEDAW principles and thus supporting equal share for women in the ancestral property rights. This move was against the existing statutory provisions.

In *Gita Hariharan* case, the Hindu women’s right of guardianship over the minor child was accorded even during the life time of the father. Here too there was expansion of human right. Thus it is obvious that harmonization was made by the Supreme Court in the rights of women whenever they are deprived of their rights on grounds of gender. This was especially true in the case of Hindu women. Therefore, it is obvious that the Supreme Court’s role in harmonizing the international human rights of the women is substantial and very progressive.

provisions in conformity with its policy of non-interference in the personal affairs of any Community without the initiative and consent.”

VI. CONCLUSION

It is evident from the above discussion that in the first two phases from 1950 to 1966 and 1966 to 1979, it is found that, there is no assimilation or harmonization of civil and political rights from international human rights instruments. But in the third phase the Supreme Court median attempt to promote the international human rights principles against gender inequality and gender discrimination. Especially in *Shella Barse case* the Supreme Court laid down guidelines in consonance with the UDHR, 1948. But mere mentioning of the international human rights instrument in these cases did not play any role in arriving at the decision. Later in the third phase from 1979 to 1993 and in the Fourth and last phase from 1993 to 2009, it is found that the Supreme Court not only referred, but recognized and consolidated the international human rights in the domestic legal set up.

Interestingly, the Supreme Court of India in its all-encompassing activism interprets almost all the components of civil, political, economic, social and cultural rights as essential components of Article 21 in relation to the protection of women in India.

**EVOLVING EFFECTIVE LEGAL MECHANISMS FOR
ERADICATING CHILD LABOUR IN THE CONTEMPORARY
TIMES: AN ASSESSMENT**

Dr. Jyothi Vishwanath & Srinivas C. Palakonda

I. INTRODUCTION

Millions of children are forcibly languishing in the harsh realities of life and while working for their living they are vulnerable to the worst forms of exploitation at the hands of employers, following the path shown by their helpless parents, with no foresight of a fruitful future. A child's participation in work denies him the basic human rights including the right to childhood, right to education, access to vocational or professional skill development opportunities, right to lead a carefree and happy life and the right to self-development, forcing them to lead a prematurely adult life.

There has been an exorbitant increase in the global statistics of child labour despite the adoption of innumerable International treaties, conventions and recommendations by prominent world bodies and despite the growing national legal concern and awareness regarding this complex socio-legal issue. It is in this context that this paper addresses different aspects of child labour in India. It attempts to examine the concept of child labour participation and focuses its attention towards the sectors involving child labour participation. It delineates the causes and impact of child labour on the child, society and nation and analyses the existing relevant International and Municipal legal documents, thereby reflecting on the reasons for the failure of these legal texts and mechanisms. It also proposes the measures and the policy options for a complete eradication of child labour and for maximizing the protection of children.

II. CONCEPTUAL CLARIFICATIONS

A Child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.¹ Child is a person who, due to his young age, is considered being of immature intellect and imperfect discretion and is unable to comprehend the consequences of his own act²

Thus age is the factor that differentiates child labour from an adult worker. Child labour refers to any work interfering with the completion of a child's education or is mentally, physically, socially or morally dangerous and harmful to children by its nature or circumstances.³ Usually, the child takes up work as a means of survival for the child and his family and not for realizing its true potential and honing its natural abilities. Such work arrests the development of the child's personality. The earnings of the child and its participation in the support of the family directly conflicts with the growth and education of the child and thereby what results is known as child labour.⁴

Thus, any work leading to exploitation of the child and depriving it of the opportunities for growth though adding to the family's income is called child labour.⁵

III. SECTORS INVOLVING CHILD LABOUR PARTICIPATION

The International Labour Organization (ILO) estimates that around 246 million children between the age of 5 and 17⁶ are engaged in child labour and work under exploitative conditions.⁷ 120 million of them are engaged in child labour

¹ REKHA SHRIVASTAVA, INTERNATIONAL ENCYCLOPAEDIA OF WOMEN RIGHTS AND CHILDREN RIGHTS 302 (2009)

² PARAS DIWAN & PEEYUSHI DIWAN, CHILDREN AND LEGAL PROTECTION 3 (1994)

³ GLOBAL MARCH AGAINST CHILD LABOUR, *From Exploitation To Education: Global March Position on Child Labour and Education*, available at <http://www.globalmarch.org/images/GM-Position-Paper-on-Child-Labour-and-Education.pdf> (last visited May 1, 2015)

⁴ B.K. PATIL, WORKING CHILDREN IN URBAN INDIA 1-2 (1988)

⁵ Statement made by Former President of India, Shri.V.V.Giri.

⁶ *Supra* note 3

⁷ H.O AGARWAL, HUMAN RIGHTS 123 (2008)

on full time basis while the remaining combine work with their schooling or other non-economic activities.⁸

Innumerable sectors and industries, whether hazardous or non-hazardous, involve child labour participation in India. These sectors can be categorized on the basis of their legal categorization as follows:

A. LEGAL ACTIVITIES

Fishing, agriculture, mining and quarrying, manufacturing (carpets, footwear, glass and bricks, fireworks, garments), domestic work hotel and retail industry; tea plantations, cashew processing units, beedi and matchstick industries are the prominent sectors where child labour exists. Workshops and fuelling stations; food processing, packing and labeling; vehicle repair garages; basket making; sale of newspapers, milk and lotteries; fruit and vegetable vending; traditional occupations like carpentry, tailoring, pottery, hair dressing industry, laundry, load carrying⁹ also have large numbers of child labourers.

B. ILLEGAL ACTIVITIES

Drug trade, child prostitution, forced and bonded labour, armed conflict involvements, pornography and illicit activities¹⁰ involve child labour.

IV. CAUSES AND IMPACT OF CHILD LABOUR

Shockingly 60% of the world's child labourers exist in India.¹¹ The causes behind such shocking magnitude of child labour in the country and its impact is specified in Table 1.

⁸ ILO, *Facts And Figures On Child Labour*, available at <http://info.worldbank.org/etools/docs/library/237384/toolkitfr/pdf/facts.pdf> (last visited May 1, 2015)

⁹ *Supra* note 4 at 5

¹⁰ *Supra* note 3

¹¹ *Supra* note 3

TABLE 1. CLOSER PERSPECTIVE OF THE PROBLEM

| CAUSES | IMPACT |
|---|---|
| <p>*Extreme and widespread poverty *Limited access to education</p> <p>*Repression of workers' right</p> <p>*Limited prohibitions on child labour</p> <p>*Violations of the existing laws</p> <p>*Willingness on the part of the employers to hire child labourers to reduce labour costs</p> <p>*Broken & neglected homes</p> <p>*Migration of a family from rural to urban area resulting into financial instability & insecurity of the family</p> <p>* Demise of the bread earner</p> <p>* Cultural beliefs and pressure among people which forces the parents to emphasize job more than education of their children¹² especially girl child's</p> <p>*Inaccessible & expensive schools</p> | <p>*Child labour adversely affects the physical, mental, emotional well-being of the children</p> <p>*Due to young age, long hours of strenuous work pose more risks to children.</p> <p>*Inadequate food intake, makes them vulnerable to malnutrition, suffer fatigue more quickly / are prone to diseases.</p> <p>*Lifting of heavy materials may lead to skeletal damage, impaired growth, severe injuries.</p> <p>*Chemical exposure adversely affects the developing brain.</p> <p>*They face great risks of hearing impairment.</p> <p>*Due to lowering heat tolerance because of developing sweat glands, they face the risk of heat stress;</p> <p>*Due to poor ability to assess the risks factors, they have the risk of greater injury</p> <p>*Children working at farms face greater risks like dermatitis, fatigue, headaches, sleep disturbances, anxiety, memory problems, cancers, birth defects, reproductive problems, neurotoxicity & blood, liver & kidney disorders due to exposure to pesticides.</p> <p>*Child labour leads to child slavery, child trafficking, and forced labour.</p> <p>*Prevents them from going to schools.</p> <p>*Leads to child marriages.</p> <p>*The nation & society is deprived of the valuable services that a child can render as an properly educated & trained adult.</p> |

For effective reduction of the child labour ratios in the country, the causes operating behind child labour have to be removed.

¹² The parents consider that employment of their children before they reach the age of majority is more meaningful & preferable.

V. LEGAL SCENARIO RELATING TO CHILD LABOUR

The international legal regime relating to child labour can be analyzed from the point of view of the general and specified international approach.

A. GENERAL INTERNATIONAL APPROACH

Children all over the globe are entitled to the most basic human rights such as, right to associate with their biological parents, right to food, right to free education, right to care and nurturing, and numerous other rights. They ought to enjoy a certain level of freedom in their activities for their complete physical, mental and emotional development. Table 2 depicts the general international approach towards protecting the basic rights of the children.

| TABLE 2. INTERNATIONAL APPROACH -DOCUMENTS |
|--|
| 1. Geneva Declaration of the Rights of the Child, 1924 ¹³ |
| 2. Universal Declaration of Human Rights, 1948 ¹⁴ |
| 3. Supplementary Convention on the Abolition of Slavery and Practices Similar to Slavery, 1956 ¹⁵ |
| 4. Declaration of the Rights of the Child, 1959 ¹⁶ |
| 5. International Covenant on Civil and Political Rights, 1966 ¹⁷ |
| 6. International Convention on Economic, Social and Cultural Rights, 1966 ¹⁸ |
| 7. Declaration on the Right to Development, 1986 ¹⁹ |
| 8. Convention on the Rights of the Child, 1989 ²⁰ (CRC) |

¹³ This Declaration was adopted on Sep. 26, 1924 by the Fifth Assembly of the League of Nations & is the first International instrument dealing with the children's rights.

¹⁴ UDHR, art. 22

¹⁵ Supplementary Convention on the Abolition of Slavery and Practices Similar to Slavery, 1956, art. 1

¹⁶ Declaration of the Rights of the Child, 1959 Principle 9

¹⁷ ICCPR art. 24

¹⁸ ICESCR art. 10

¹⁹ Adopted by the General Assembly on Dec. 4, 1986. art. 1, 2

²⁰ art. 32

B. SPECIFIED ILO APPROACH

Totally aware and conscious of the magnitude of the child labour problem, the ILO²¹ with its own International Labour Code,²² strongly supports the rights of the children against this evil. This is depicted in the rules adopted by the ILO in various conferences. Right from its establishment, the ILO's strategy has been to specify a minimum working age for children. As specified in Table 3, innumerable Recommendations and Conventions²³ relating to employment of children below 18 years has been adopted in this direction.

| CONVENTION /RECOMMENDATION | SUBSTANCE | EXEMPTION | INDIA'S POSITION |
|--|---|--|--|
| Conventions No.5- Minimum Age (Industry), 1919 | *Children below 14 years shall not be employed/ engaged in public/private industrial undertaking. ²⁵ | *Exempts an undertaking where only family members work; work done by children in technical schools if it is approved & supervised by public authority ²⁶ | *Minimum age is 12. ²⁷ *Ratified by India. ²⁸ |

²¹ Established on Apr. 11, 1919

²² (i) All the Conventions & the Recommendations of the ILO form the International Labour Code.

²³ Though increasing number of countries are ratifying the ILO standards concerning child labour, one third of the child labourers live in the countries which have not ratified Convention No.182 & 138.

²⁴ Apart from the Conventions mentioned in Table 3, the ILO has also adopted Convention No.13 -White Lead (Painting) Convention, 1921 which has been ratified by India. This convention prohibits employment of male children below 18 & all female children in painting work of industrial character involving the use of white lead or sulphate lead. It has also adopted Convention No.115 -Radiation Protection Convention, 1960 which prohibits employment of persons below 16 years involving ionizing radiations & India is a party to it as well.

²⁵ Conventions No.5, art. 1

²⁶ *Id.*, art. 2 & 3

²⁷ *Id.*, art. 6

²⁸ Subsequent to India's ratification on September 9,1955, Factories Act, 1948, Mines Act, 1952, Employment of Children Act, 1938, Beedi and Cigar Workers (Conditions of

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| | | | |
|--|---|--|---|
| <p>Convention No.7 - Minimum Age (Sea) Convention, 1920²⁹</p> | <p>*Prohibits employment of children below 14 years on vessels.³⁰</p> | <p>*Exempts those vessels where family members are employed, school ships or training ships.³¹</p> | <p>*Not ratified by India.</p> |
| <p>Convention No.10- Age for Admission of Children to Employment in Agriculture, 1921³²</p> | <p>*Prohibits employment of children below 14 years in any public or private agricultural undertaking.³³</p> | <p>*Such children can be employed after the hours fixed for school attendance. *If employed, attendance in school should not be affected & should not reduce the school attendance to less than 8 months.³⁴ *Exempts work done in technical schools. *Only Light agricultural work can be allotted.</p> | <p>*Not ratified by India.</p> |
| <p>Convention No.15 - Minimum Age (Trimmers and Stockers) Convention, 1921³⁵</p> | <p>*Prohibits employment of children below 18 years on vessels as trimmers/stockers.³⁶</p> | <p>*Can be employed if only persons below 18 years are available but two persons must be employed in place of one trimmer or stoker.³⁷</p> | <p>*Ratified by India.³⁸</p> |

Employment) Act, 1966; Motor Transport Workers Act, 1961 were enacted in the country

²⁹ This Convention has been modified by Convention No.58 -Minimum Age (Sea) Convention (revised), 1937 which has increased the minimum age of children from 14 to 15. Even the latter Convention has not been ratified by India.

³⁰ Convention No.7, art. 2

³¹ *Id.*, art. 2 & 3

³² This Convention has been revised in 1973 by Convention No.138.

³³ *Id.*, art. 1

³⁴ *Id.*, art. 2

³⁵ This Convention has been shelved.

³⁶ *Id.*, art. 2

³⁷ *Id.*, art. 4

³⁸ Subsequently Merchant Shipping Act, 1958 was passed.

| | | | |
|---|--|---|-------------------------|
| Convention No. 33- Minimum Age (Non-Industrial Employment), 1932 ³⁹ | *Covers employment not covered in the aforementioned conventions. *Children below 14 required to attend primary school shall not be employed. ⁴⁰ | *Exempts work exempted in earlier Conventions. *Does not apply to employment in sea-fishing & technical & professional schools & if members of employers family are employed. ⁴¹ *Children above 12 may be employed on light work if not harmful for their health or normal development. ⁴² | *Not Ratified by India. |
| Convention No.59 – Minimum Age for Admission of Children to Industrial Employment, 1937 ⁴³ | *Children below 15 years not to be employed in any private or public industrial undertaking. ⁴⁴ | *Exempts if the employment is not dangerous to life or if family members are employed or if work is done by children in technical schools. ⁴⁵ | *Not Ratified by India. |
| Convention No.60 – Age for Admission of Children to Non-industrial employment, 1937 ⁴⁶ | * Prohibits employment of Children below 13 years of age in all non-industrial occupations in India. Occupations like shops, offices, hotels, restaurants, places of public entertainment are covered. ⁴⁷ | | *Not Ratified by India. |

³⁹ This Convention has been twice revised in 1937 & 1973 by Conventions No.60 & 138 respectively.

⁴⁰ *Id.*, art. 2

⁴¹ *Id.*, art. 1

⁴² *Id.*, art. 3

⁴³ This Convention has been revised by Convention No.138 in 1973.

⁴⁴ Convention No.123, art. 2

⁴⁵ *Id.*, art. 2, 3

⁴⁶ This Convention has been revised in 1973 & the 1937 Convention has been shelved.

⁴⁷ Convention No.123, art. 9

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| | | | |
|--|--|---|--|
| Convention No.123 – Minimum Age (Underground Work), 1965 | *Minimum age will not be less than 16 under any circumstances. ⁴⁸ | | *Ratified by India. ⁴⁹ |
| Recommendation No.124 – Minimum Age (Underground Work), 1965 ⁵⁰ | *Minimum age for admission to employment or work underground in mines & quarries should be progressively raised with a view to attaining a minimum age of 18 years. ⁵¹ | | |
| Recommendation No.136 - Special Youth Schemes Recommendation, 1970 | *It speaks about the special schemes designed to enable young persons to take part in activities directed to the economic & social development of their country & to acquire education, skills & experience facilitating their subsequent economic activity on a lasting basis & promoting their participation in society. ⁵² | | |
| Convention No.138 - Minimum Age for Admission to Employment, 1973 | *Each Member State has to pursue a national policy for effective abolition of child labour & for increasing progressively the minimum age for admission to employment or work to a level consistent with the fullest physical & mental development of young persons. ⁵³ *Minimum age for admission to any employment/ work | *National Laws may permit employment of children (13 to 15 years) on light work if it does not harm their health or development or does not prejudice their attendance in school. ⁵⁵ | *Not ratified by India since the Convention covers all forms of employments. |

⁴⁸ *Id.*, art. 2

⁴⁹ Ratification on Mar. 20, 1975.

⁵⁰ This Recommendation has relevance to Minimum Age (Underground work) Convention, 1965.

⁵¹ Recommendation No.124, art. 3

⁵² Recommendation No.136, art. 1

⁵³ Convention No.138, art. 1

| | | | |
|---|---|--|--|
| | likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years. ⁵⁴ | | |
| Recommendation No.146 – Minimum Age for Admission to Employment, 1973 ⁵⁶ | *Provides that minimum age should be fixed at the same level for all sectors of economic activity. ⁵⁷ | | |

Table 4 describes the ILO approach towards night work by children and young persons.

| TABLE 4. ILO STANDARDS RELATING TO NIGHT WORK BY CHILDREN & YOUNG PERSONS | | | |
|--|---|--|-------------------------|
| CONVENTION /RECOMMENDATION | SUBSTANCE | EXEMPTION | INDIA'S POSITION |
| Convention No.6 – Night Work of Young Persons (Industry), 1919 | *Young persons below 18 years shall not be employed during the night in any public or private industrial undertaking ⁵⁸ or in any branch thereof. ⁵⁹ * Article 2 shall not apply to male young persons above 14 years. ⁶⁰ | *Young persons above 16 years may be employed at night in industrial undertakings which by reason of the nature of the process is required to be carried on continuously | *Ratified by India |

⁵⁵ *Id.*, art. 7

⁵⁴ *Id.*, art. 3

⁵⁶ This Recommendation has relevance to Convention No. 138.

⁵⁷ *Id.*, art. 6

⁵⁸ As defined in the Indian Factories Act, 1948

⁵⁹ Convention No.6, art. 2

⁶⁰ *Id.*, art. 6

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| | | | |
|--|---|--|-------------------------|
| | | day & night *Prohibition of night work may be suspended by Government for young persons between 16-18 during serious emergency & for public interest. ⁶¹ | |
| Recommendation No.14 - Night Work of Children and Young Persons in Agriculture, 1921 | *Regulates employment of children below 14 years in agricultural undertakings during the night ⁶² *Regulates employment of young persons between 14-18 years in the agricultural undertakings ⁶³ | | |
| Convention No.79- Night Work of Children and Young Persons in Non-industrial Occupations, 1946 | *Children below 14 years who are admissible for full-time or part-time employment & children above 14 years ⁶⁴ shall not be employed at night during the interval between 8 p.m. -8 a.m. ⁶⁵ *Children above 14 (not subject to compulsory attendance) & below 18 shall not be employed between 10 p.m. -6 a.m. ⁶⁶ | *National laws can grant licenses for night work by children below 18 as performers in public entertainment. ⁶⁷ | *Not Ratified by India. |
| Recommendation No.80 - Restriction of Night Work of Children and Young Persons | *Regulates employment in public entertainment, methods of supervision. *Extends 1946 Convention to all services such as commercial establishments, Post & Telegraph communication services, administration services, newspaper undertakings, hotels, boarding houses, | | |

⁶¹ *Id.*, art.7

⁶² *Id.*, art.1

⁶³ *Id.*, art.2

⁶⁴ Subject to full-time compulsory school attendance

⁶⁵ Convention No.79, art. 2

⁶⁶ *Id.*, art. 3

⁶⁷ *Id.*, art. 5

| | | |
|---|---|---------------------|
| in Non-Industrial Occupations, 1946 ⁶⁸ | restaurants, clubs. *Employer & parents should be held legally responsible for violations of laws & regulations. ⁶⁹ | |
| Convention No. 90 - Night Work of Young Persons (Non-Industrial Occupation), 1948 ⁷⁰ | *Provides for a period of uninterrupted rest of 12 hours for young workers under the age of 18 years. ⁷¹ | *Ratified by India. |

Apart from the above initiatives in this direction, the ILO has also established International Programme on the Elimination of Child Labour in the year 1992.⁷² In 1997, the ILO paved the way for the global consensus on action against child labour through the Amsterdam and Oslo International Conferences. In 1998, the ILO has adopted the ILO Declaration on Fundamental Principles and Rights at Work focusing on effective abolition of child labour.

The Worst Forms of Child Labour Convention, 1999⁷³ was also adopted by the ILO emphasizing that the member countries should design and implement programs of action to eliminate the worst forms of child labour comprising of all forms of slavery such as sale and trafficking of children, debt bondage, compulsory labour like recruitment of children for use in armed conflict, offering of a child for prostitution for purposes of pornography, for illicit activities like production or trafficking of drugs or any work likely to harm the health, safety or morals of the children.

The three Global Reports launched by the ILO in the year 2002, 2006 and 2010 closely focused on eradication of child labour. The ILO adopted the Declaration on Social Justice for a Fair Globalization, 2008 further in this direction. In 2009,

⁶⁸ Relates to the Convention No.79.

⁶⁹ Recommendation No.80, art. 9

⁷⁰ This Convention revises the Convention No.6 of 1919.

⁷¹ Convention No. 90, art. 2 & 3

⁷² IPEC operates in around 92 countries of the world & has benefitted around three lakh children directly & 52 million indirectly.

⁷³ Convention No.182

183 member states of the ILO unanimously adopted the Global Jobs Pact. And the 2010, the Hague Global Conference on Child Labour aimed at strengthening progress towards eradication of child labour by 2016 and for complete ratification and implementation of Convention No.138 and 182.⁷⁴

Ironically, the ILO has also adopted many Conventions⁷⁵ and Recommendations⁷⁶ for ensuring that the employment of child or young person below 18 years is subject to production of a medical certificate attesting fitness for such work. It has been undermined is that even a physically fit child or young person is at times not aware of its other needs regarding education, leisure, play and entertainment. India has not ratified many of the conventions requiring production of medical certificate by the children but the Mines Act, 1952 does provides for production of fitness certificate for working underground..⁷⁷ It has also not ratified around ten International Conventions relating to child labour but some of the laws like Factories Act, 1948, Plantations Labour Act, 1951, Mines Act, 1952, Bidi and Cigar Workers (Conditions) of Employment Act, 1966 do prescribe the minimum age for the employment of children and young persons and

⁷⁴ See generally *2010 Global Action Plan and Technical Cooperation Priorities*, available at www.ilo.org

⁷⁵ Convention No.16 -Compulsory Medical Examination of Children and Young Persons employed at Sea, 1921(ratified by India); Convention No.77 -Medical Examination of Young Persons (Industry), 1946 -This Convention covers work in mines, quarries, manufacturing units (Not ratified by India but some of its provisions have been incorporated in Factories Act, 1948); Convention No.78 -Medical Examination of Children and Young Persons for fitness for employment in non-industrial Occupations, 1946 (Not ratified by India); Convention No.124 -Medical Examination of Young Persons (Underground Work), 1965. This Convention provides for medical examination of a young person aged between 18-21 years (Not ratified by India); Convention No.73 - Medical Examination (Seafarers) Convention, 1946 (Not ratified by India).

⁷⁶ Recommendation No.79 -Medical Examination of Young Persons which provides for medical examination of children & young persons in all occupations connected with commercial establishments, postal & telecommunications & all other jobs which are neither industrial, agriculture or maritime in nature.

⁷⁷ Convention No.77 & 78 of 1946 dealing with the requirement of medical examination in industrial & non-industrial occupations; Convention No.124 dealing with requirement of medical examination of young children in underground work has not been ratified by India.

VI. NATIONAL LEGAL SCENARIO

The Indian municipal law emphatically deals with child labour. The discussion here can be conveniently divided into two heads *viz.*, position under the Indian Constitution and the position under the various labour laws.

A. POSITION UNDER THE CONSTITUTION

As read out in the Preamble, the Indian Constitution aims at securing justice, liberty, equality and fraternity to all the citizens, including children. The Constitution incorporates many provisions enumerated in Table 5 for eradicating this evil.

| TABLE 5: SAFEGUARDS UNDER THE CONSTITUTION OF INDIA | | |
|--|------------------|--|
| | PROVISION | SUBSTANCE |
| PART III | Article 15(3) | *The State is empowered to make special provisions for women & children. |
| | Article 21A | *The State shall provide free and compulsory education to all children of the age of six to fourteen years |
| | Article 23 | *Prohibits forced child labour & any agreement for employing children until the repayment of a loan contravenes this provision. |
| | Article 24 | *No child below 14 years shall be employed in any factory or mine or engaged in any other hazardous employment. |
| PART IV | Article 39(e) | *The health, strength of the tender age of children is not abused & citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. |
| | Article 39 (f) | *Children are given opportunities & facilities to develop in a healthy manner & in conditions of freedom & dignity & that childhood & youth are protected against exploitation & against moral & material abandonment. |

B. POSITION UNDER VARIOUS LABOUR LAWS

The Government of India has clearly depicted its intention towards child labour by adopting the National Policy for Children⁷⁸ which aims at prohibiting a child under 14 years, from engaging in any hazardous occupation or heavy work and at protecting children against neglect, cruelty and exploitation. The other prominent labour laws complying with the mandate laid down in the Indian Constitution and the international documents are delineated in Table 6 below.

| TABLE 6: SAFEGUARD AGAINST PLEDGING OF CHILDREN | |
|--|--|
| Children (Pledging of Labour) Act, 1933 | *Prohibits pledging of the labour of a child below 15 years. ⁷⁹ |

Subsequent to the repeal of the Employment of Children Act, 1938, the Child Labour (Prohibition and Regulation) Act, 1986 (1986 Act) attempts to cover all the cases of child labour not covered under the aforementioned specific labour laws. The 1986 Act defines child as a person who has not completed 14 years of age.⁸⁰ It prohibits the employment of children in certain occupations while at the same time regulates the conditions of their work.

If a child below 14 years is employed under Factories Act, 1948, Mines Act, 1952, Merchant Shipping Act, 1958, Motor Transport Workers Act, 1961, the employer is punished under the 1986 Act and not under these respective laws as the 1986 Act provides for enhanced punishment.⁸¹ Ironically, though 1986 Act strictly prohibits employment of children below 14 years in some occupations and processes, it regulates, rather permits the employment of the same children in some other occupations and processes. This has been one of the major reasons behind the failure in eradicating child labour from our country.

Apart from the aforementioned specific labour laws, Indian Government has issued a clear mandate for protecting the child rights in the form of the National

⁷⁸ This Policy was adopted through a resolution dated Aug. 22, 1974.

⁷⁹ sec. 2

⁸⁰ Child Labour (Prohibition and Regulation) Act, 1986, sec. 2 (ii)

⁸¹ *Id.*, sec. 15

Charter for Children, 2003⁸² which envisages that the State and the community shall undertake measures for protecting the survival, life and liberty of all children⁸³ and for ensuring opportunities for their all round personality development including expression of creativity.⁸⁴ It recognizes their need for adequate play, leisure,⁸⁵ early childhood and care.⁸⁶

For more informed action in this direction, the Commissions for Protection of Child Rights Act, 2005⁸⁷ provides for the constitution of the National⁸⁸ and State Commissions⁸⁹ for better protection and enforcement of the child rights.⁹⁰ These Commissions have a duty to inquire into complaints relating to deprivation and child rights violations and recommend initiation of proceedings;⁹¹ to spread child rights awareness among various sections of the society and promote awareness of the available safeguards through publications, media, seminars⁹² and to look into the non-implementation of concerned laws.⁹³ These bodies being recommendatory in nature, they can only recommend to the concerned authority for further prosecution of violators and to grant interim relief to the victim or their families or approach the Courts for required directions.⁹⁴ Further, though this law provides for the specification of Sessions Court as Children's Court for providing speedy trial of offences against children or of violation of their rights,⁹⁵ the real effect is yet to be seen.

⁸² MIN. OF HUMAN RESOURCE DEVELOPMENT, GOV'T OF INDIA, Resolution No. 6/15/98 C.W., Feb. 9, 2004.

⁸³ National Charter for Children, 2003 art. 1

⁸⁴ *Id.*, art. 14

⁸⁵ *Id.*, art. 5

⁸⁶ *Id.*, art. 6

⁸⁷ This Act received the assent of the President of India on Jan. 20, 2006.

⁸⁸ Commissions for Protection of Child Rights Act, 2005 Section 3 (1)

⁸⁹ Karnataka State Commission for Protection of Child Rights was set up in 3 July 2009

⁹⁰ Commissions for Protection of Child Rights Act, 2005 sec. 17 (1)

⁹¹ *Id.*, sec. 13 (1) (c)

⁹² *Id.*, sec. 13 (1) (h)

⁹³ *Id.*, sec. 13 (1) (j)

⁹⁴ *Id.*, sec. 15

⁹⁵ *Id.*, sec. 25

VII. CONCLUSIONS AND SUGGESTIONS

Child is the most fragile component of human race and needs utmost care and protection for a better future of the nation. Every child has a right to development, which comprises the right to education, which helps in the development of its personality, talents, mental and physical abilities to their fullest potential, right to rest and leisure, play and recreation.⁹⁶ Declaration on Survival, Protection and Development of Children, 1990⁹⁷ emphasizes that all the children must be given the chance to find their identity and realize their worth in a safe and supportive environment.

Child labour is the most pressing social, economic and legal problem confronting the contemporary international community. India enjoys the distinction of having the world's largest child labour force. Despite legal efforts at the national and international levels, child labour exists in rampant figures substantiating the government's absolute failure in checking it. Despite plethora of laws, the country ends up having the largest workforce of children in the world, due to the prevailing socio-economic scenario. In the end it can be concluded that :The Planning Commission of India has accepted the Tendulkar Committee Report, which says that 37% of people in India live below the poverty line BPL. The Arjun Sengupta Report states that 77% of Indians live on less than Rs.20 a day.⁹⁸ A study by the Oxford Poverty and Human Development Initiative using a Multi-dimensional Poverty Index (MPI) found that there were 645 million poor living under the MPI in India, 421 million of who are concentrated in eight North Indian and East Indian states of Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Orissa, Rajasthan, Uttar Pradesh and West Bengal. This number is higher than the 410 million poor living in the 26 poorest African nations.⁹⁹ Unless India adequately provides for and satisfies the

⁹⁶ CRC, art. 29 & 31

⁹⁷ This declaration was adopted in 1990 in the United Nations General Assembly World Summit for Children, New York in 1990.

⁹⁸ NATIONAL COMMISSION FOR ENTERPRISES IN THE UNORGANISED SECTOR, GOV'T OF INDIA, *Report on Condition of Work and Promotion of Livelihoods in the unorganized sector 1* (2007)

⁹⁹ 8 Indian states have more poor than 26 poorest African nations, TIMES OF INDIA, Jul. 12, 2010, available at <http://timesofindia.indiatimes.com/india/8-Indian-states-have->

basic human needs of the poor in India, complete eradication of child labor only on the basis of legislation is highly impossible.

- Though child labour is the cause of poverty, child labour in turn causes and perpetuates poverty. Regulating child labour for eradicating poverty is a misnomer.
- A need-based minimum wage (NBMW)¹⁰⁰, covering all the needs of a worker's family of four members for food, clothing, shelter with 20% of wage additionally for fuel, lighting and another 25% of wage for health care, education and recreation should be the criteria for determining the persons under below poverty line (BPL).¹⁰¹ The Government should try to provide NBMW to the poor and lower middle class families in India.
- Inadequate family income is the main reason for child labour. Steps need to be taken for enhancing the family income.
- Failure to effectively implement the concerned laws has worsened the situation.
- The Committee on Child Labour¹⁰² observes that bulk of children continue to be employed in dangerous occupations though very little evidence is available of such employment. Immediate measures need to be taken to check this.
- All exemptions from prohibitions on child labour recognized under the different labour laws, except training or apprenticeship, ought to be removed.

more-poor-than-26-poorest-African-nations/articleshow/6158960.cms (last visited Feb. 27, 2015)

¹⁰⁰ 15th Indian Labour Conference, 1957

¹⁰¹ Kathyayini Chamaraj, *Humane criteria for fixing poverty line*, DECCAN HERALD, May 11, 2011, available at <http://www.deccanherald.com/content/160420/humane-criteria-fixing-poverty-line.html> (last visited May 2, 2015)

¹⁰² It is a 16 member Committee set up by the Government of India under the chairmanship of Mr. M.S. Gurupadswamy in Feb. 1979.

- Any Convention or Legislation permitting child labour, even if light in nature, on the condition that their participation in the school should not be prejudiced is still harmful since it interferes with the child's ability to participate in the education process. Every child must be allowed to learn without any kind of distractions due to work.
- Violation of child labour laws should be strictly viewed. The employer should be severely punished depending upon occupation or work. Stringent actions like cancellation or suspension of licenses, work permits of industrial or factory units, manufacturing units etc can be envisaged.
- Punishment for employing children below 18 years should be imposed on the employers and not the parents.
- Medical examination should be made compulsory for persons above 18 and below 21 years of age.
- There is need to adopt a uniform definition of child and child labour in all the concerned laws.
- Any person below 18 should not be allowed to engage in any type of employment, whether hazardous or non-hazardous, and provide them adequate nutrition, education, skill development opportunities, medical aid and other social security benefits -to them and their families
- The lower socio-economic groups should be made aware of the role which education can play in their lives.
- One of the recent initiatives for eradicating child labour in India has been the introduction of free and compulsory education for all children below 14 years as a fundamental right in the Indian Constitution under Article 21-A. Law needs to be modified in this regard for extending free and compulsory education for all persons below 18 years. Destitute children working as child labourers should be taken care of by social welfare institutions for preventing them from resorting to work instead of education.

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- Education as a key to ending child labour must come into the centre stage of child labor discussions.¹⁰³ As per the report of the ILO, prevention of all forms of child labour through compulsory education has seven times higher returns than the investment.¹⁰⁴ Thus, the government must, apart from providing free and compulsory education to the children below 18 years, also fill the immediate loss of the child's income to the concerned family for complete eradication of child labour. This reduces the family's burden in sending the child to school.
 - The responsibility of taking care of the educational needs of the children below 18 years should rest on the concerned Governments.
 - As per the ILO report, the average annual cost of providing basic education for all with an aim of eliminating child labour is far less than the public expenditure on military or debt relief. Thus, the choice of investing in the elimination of child labour is not economic but more political in nature.¹⁰⁵
 - Conditional cash transfers *i.e.*, CCT as introduced and proved successful in Brazil can be introduced in India. Here payments are made to the parents on the condition that their child attends school.¹⁰⁶
 - Though Global March applauds the ILO Convention No.138 - Minimum Age for Admission to Employment, 1973 for its emphasis on the value of education as a concrete factor in the elimination of child labour, unfortunately India has not ratified this Convention. The critical link between education for all and the elimination of child labour

¹⁰³ *Supra* note 3

¹⁰⁴ ILO, *Investing in Every Child: An Economic Study of the Costs and Benefits of Eliminating Child Labour* 35 (2003)

¹⁰⁵ *Supra* note 3.

¹⁰⁶ See generally UNDP, *Conditional Cash Transfer Schemes for Alleviating Human Poverty: Relevance for India* 9 – 10 (2009).

created by this Convention should be recognized and implemented in all our policies and actions.¹⁰⁷

- The international conventions adopted by the ILO prohibit child labour amongst children aged between 12-18. There is no uniform age below which child labour is prohibited by all the conventions. This leads to confusions amongst the law enforcing agencies.
- The Factories Act, 1948 does not cover all the factories in its ambit and excludes the units with the workers strength of less than 10 and carrying manufacturing process with the aid of power. It also excludes the units running the manufacturing process without the aid of power and employing less than 20 workers. The enactment should be extended even to these excluded units for the purposes of prohibiting child labour.
- Child labour prohibitions in the unorganized sector can be effectively enforced by proper awareness among the prospective employers and stringent action against the defiant ones.
- As a grass root level initiative, Village Panchayats ought to be educated regarding the child labour laws and empowered to provide employment to the parents of the child labourers. These bodies can thus play a prominent role in eradication of child labour.
- Apart from child rights violation, child labour also has negative impact on the country's economy. Children are the employers' choice since they can be made to work for longer hours for meagre or no pay. Such employment of children affects the employment prospects of the adult workers, thereby slowing down country's economic development.
- Trade unions, if become more effective, can improve the standard and situations of the adult workers. Improvement in their economic conditions will lead to voluntary withdrawal of their children from work.

¹⁰⁷ *Supra* note 3

The Convention on the Rights of the Child, 1989 recognizes the right of every child to a standard of living adequate for its physical, mental, spiritual, moral and social development;¹⁰⁸ right to rest, leisure, engage in play and recreational activities appropriate to its age and to participate freely in cultural life.¹⁰⁹ Though the working children contribute to the family income, they stand denied of their childhood, education and all the opportunities of personality development and trainings and are rendered incapable of entering into remunerative employments in their future life.

Being unaware of the art of expressing themselves and poor in negotiation skills, young persons below 18 years can hardly contribute effectively to the nation's economy in the long run. Thus, the real task before the nation and the society is to optimize the opportunities for them to ensure their meaningful participation.

Honoring its commitments under the international law and that towards its citizens, the Government should accelerate action against child labour. Fortunately, the Planning Commission, Government of India proposed to focus on improving the quality in school education and the delivery mechanism under the Right of Children to Free and Compulsory Education Act, 2009 in the 12th five-year plan for 2012-2017. This may prove a stepping stone in the complete eradication of child labour in India. Employers, trade unions and civil society members, parents all have a much greater role to play in this direction. The aim has to be the complete eradication of child labour for all the children below 18 years of age and ensure them opportunities of enjoying leisure and comforts of a better childhood.

¹⁰⁸ CRC, art. 27

¹⁰⁹ CRC, art. 31

UNIFORM PERSONAL LAW – IF NOT NOW, WHEN?

P. Lakshmi

I. BACKGROUND

Najma was married to Sher Mohammad and they lived in Nanga Mohalla village in the Bhadrak district of Orissa. They lived a happy life and were blessed with four children. On July 3, 2003 he reached home in a drunk, and had a fight with his wife. In an inebriated condition he pronounced *talaq* thrice, which while the neighbors heard, the wife was unaware of. Though the couple wanted to continue with their married life, the neighbors did not let them do so. While the husband was driven out of the village, Najma was ostracized from the village for the only reason that she wanted to continue her marital life with her husband. The National Commission for Women (NCW) and the State Commission for Women (SCW) could not solve this issue. The family court in Cuttack ruled that *talaq* in a drunken state was invalid. All initiatives taken to protect the family were construed as interference by the community with the Muslim personal laws. They took out a procession in protest and even the police were afraid to take any action due to the fear of communal violence.¹ Najma was asked to undergo the procedure of *Halala*² if she wished to live with her husband.

In another shocking incident, Imrana, who lived with her husband and 5 children in Charthawal village, near Muzaffarnagar town. On June 6, 2005, her father-in-law, Ali Mohammad raped her. The village panchayat dissolved her marriage. She was declared a “haram” for her husband and was forced to accept him as her son. She was then ordered to purify herself by staying in isolation for 7 months which would qualify her to become the wife of the rapist father-in-law. The

¹ Bibhuti Misra , *Divorced From Reality* , TRIBUNE INDIA.COM, Jul. 3, 2003, available at <http://www.tribuneindia.com/2004/20040704/women.htm> , (last visited Feb. 8, 2015)

² Halala is the procedure by which she has to marry another Muslim man and live as his wife. She should willingly divorce her husband and re-marry her husband again and live with him.

powerful clergymen brushed aside all criticisms against their decision by quoting their personal law. They sought their personal law to decide the punishment of the rape victim and not of the rapist. According to the Muslim law, such a punishment for the rapist would allow him to encounter being stoned to death. However, the clergy did not even bring it up.³

Babli lived in the Karorua, village of Haryana. She fell in love with Manoj who hailed from the same village. All residents of the village belonged to the Banwala caste of the Jat community. On April 7, 2007, they had both eloped to get married in Chandigarh as marriages were not permitted in their village when the bride and groom were of the same “gotra”. Babli’s family had later approached the Khap panchayat to get the marriage annulled and thus announced a social boycott on Manoj’s family. On June 15, 2007, they were kidnapped by Babli’s family members and killed mercilessly. Dharmender and Nidhi, were yet another couple who were killed in 2013, for violating the same-gotra norm in Garnauthi village of Rohtak.⁴ These two honour killings took place to save the honour of the families of whose children had violated their personal laws.⁵

How long are we going to permit this kind of violation of basic human rights in the name of religion based personal laws? This Article will discuss the importance of a Uniform Civil Code (UCC) as an instrument to provide solution for human rights violation of women in the name of different personal laws of different communities in our country. The demand for a uniform codified personal law in India is almost as old as the history of personal laws themselves. The supreme court of India and the various High courts of India have repeatedly stressed the importance of a UCC. It is not only the judiciary which has repeatedly stressed about the importance of a UCC, but also our Constitution.

³ *Imrana rape case*, WIKIPEDIA.ORG, available at http://en.wikipedia.org/wiki/Imrana_rape_case

⁴ Sukhbir Siwach, *Khap leader's poll promise: Will make same-gotra marriages illegal*, TIMES OF INDIA, Apr. 2, 2014, available at <http://timesofindia.indiatimes.com/news/Khap-leaders-poll-promise-Will-make-same-gotra-marriages-illegal/articleshow/33101850.cms?> (last visited Jan. 24, 2015)

⁵ Under Hindu Marriage Act, 1955 sagotra marriages are valid marriages. Only under ancient Hindu law sagotra marriages were prohibited.

II. UNIFORM CIVIL CODE – WHAT DOES IT MEAN?

The term UCC is an outcome of the concept of civil law code.⁶ It envisages the application of a secular civil law to every citizen of India, irrespective of the religion to which he or she belongs. Currently in India, people are governed by different personal laws, depending upon the religion which they follow. Generally these religion based personal laws are based on scriptures and customs of the religious community. The demand for a UCC is to unify all religion based personal laws prevailing in India into one law which will apply to every citizen irrespective of the community or religion he belongs to in matters of personal status, marriage, divorce, adoption and succession to property and administration of property.

India is the largest democracy in the world. The Indian Constitution in its preamble emphasizes on secularism. But it's complicated history made it impossible to reconcile with certain problems in its secular legal system even today. The root problem in India having a UCC is the presence of diversity of faiths, numerous customary practices among those belonging to different faiths. The legal history of India circumscribes a large population of Hindus who lived under the Muslim rule and British rule. It was in the 11th century that Islam arrived in India. It grew steadily and under the Mughals it spread through a substantial part of the continent. There were many Muslim groups with their own customs. During colonial rule they followed a policy of non-intervention with the Indian laws concerning personal matters in order to avoid any controversy. Warren Hastings' judicial plan of 1772, pronounced that the Muslims would be governed by the Koran and Hindus would be governed by Dharmashastras in matters concerning their respective personal laws. The British were not interested in any confrontation with the native communities of India in regards to such matters. Thus they did not opt for a UCC. The need and significance of codification of Indian laws in areas relating to contract, evidence,

⁶ Civil code –The name for systematic collection of statutes and laws designed to comprehensively deal with business and negligence lawsuits and practices.

crimes and procedural laws, was stressed upon by the Lex Loci Reporter, October, 1840. But the said recommendation proposed the uncodified personal laws of Hindus and Muslims and for it to be governed by the religious scriptures and customs of the different religious communities. The Queen's proclamation of 1859 promised absolute non-interference in religious matters. UCC in personal matters for Indians was never an agenda of the British. Meanwhile, the territory of Goa was under the colonial power of the Portuguese whereby they had successfully implemented a UCC in matters relating to marriage, divorce, succession to property and other things

India's Muslims form the largest minority group in the country with the population being around 12%. In 1973, the Muslim population in India was approximately 61 million.⁷ The Majority of Muslims were against the idea of UCC as they considered it as an interference with their religious law. After Independence, the Congress party dominated the Government of India. They had an appeasing policy towards Muslims for political reasons and they did not make any serious initiative for a UCC. Thus it may be concluded that the debate for UCC is one of the most controversial issues of the 21st century Indian politics.

III. INDIAN CONSTITUTION ON UNIFORM CIVIL CODE

The Preamble of the Indian Constitution states that India is a social, secular, democratic republic country. The Preamble outlines the main objectives of the Constitution of India. The principles which are laid down in the preamble are effectuated by the Fundamental Rights guaranteed to the citizens and Directive Principles of State Policy (DPSP) of the Constitution. The Preamble of the Constitution is not the operative part of the Constitution. It cannot be enforced in any court, but as explained by the Supreme Court in *Kesavananda Bharati v. State of Kerala*⁸, it helps to interpret the Constitution. The interpretation of the

⁷ *Uniform Civil Code*, INDIA.WIKIA.COM., available at http://india.wikia.com/wiki/Uniform_civil_code (last visited Feb.10, 2015)

⁸ (1973) 4 SCC 225

Constitution in terms of the definition of the word ‘secular’ in the preamble clearly means that there cannot be any discrimination based on religion followed by the people. Starting from the Preamble, throughout the body of the Constitution, the concept of secularism runs through as blood running through the body of a person. It forms the basic structure of the Indian Constitution.

Article 14 and 15 of the Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. Article 27 is an outcome of the secular thought running through the Constitution. It states that, “no person shall be compelled to pay any taxes, whose proceeds are used for the promotion of any religion”. This makes it clear that State is barred from patronizing or supporting any religion. Article 44 of the Constitution says – “The State shall endeavour to secure for the citizens a UCC throughout the territory of India.” Article 44 comes under the DPSP of the Constitution. DPSP shall not be enforced by any court, they are fundamental in the governance of the country.⁹

IV. CONTRADICTION AMONG PERSONAL LAWS IN INDIA

In serious contradiction to the above principles laid down in the Preamble and other provisions of the Constitution, different personal laws for different religious communities prevail in our country. A different personal law for ever different community is nothing but discrimination of people based on the religion they follow. The framers of the Constitution preferred a secular Indian Constitution based on the western model. But the Indian version of secularism is totally different from the western sense of it. In India, secularism promotes the idea of a ‘secular’ state despite several religious laws. In Article 13 and Article 372 of the Constitution there is a basic contradiction. Article 13 says that all pre-Constitutional laws which are in force at the time of commencement of the Constitution will cease to apply in any manner whatsoever to the extent that they are inconsistent with the primary fundamental rights guaranteed under the Constitution.

⁹ INDIA CONST., art. 37

Many provisions of various personal laws prevailing in India are against Article 14 and 15 of the Constitution as they are highly discriminative based on sex and religion. If Article 13 is strictly applied, many provisions of the personal laws will become invalid. Monogamy is the rule for Hindus, Christians, Parsis and Jews of India. Limited polygamy is the rule for Muslim Males. A Muslim male is permitted to have 4 wives at a time. It is discrimination based on religion. Hence for a person who professes Islam, the luxury of polygamy is provided. Nevertheless, the liberty of being married to four spouses at a time is permitted only to the Muslim males and not to the females. Several provisions of Muslim law are exceedingly in favor of Muslim men. It discriminates based on sex. Particularly provisions relating to divorce, maintenance, marriage and inheritance are all in favor of men. All these provisions have been considered as invalid and unconstitutional according to Article 13 of the Constitution.

On the other hand Article 372 of the Constitution says that the pre Constitutional laws which are in force at the commencement of the Constitution shall continue to apply or to be in force till it is altered, amended or repealed by a competent legislature or other competent authority. It encompasses all the personal laws which were in force at the time of commencement of the Constitution. Thus even though the personal laws violate the fundamental rights guaranteed under the Constitution they are valid as long as altered, amended or repealed by a competent legislature or competent authority. It can be said that Article 372 protects the existing discriminative religion based personal laws of India.

Article 25 of the Constitution perpetuates the discrimination effected by Article 372. It states: "All persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate any religion". To sum up there are certain Articles of the Constitution which prohibit any law discriminative in nature¹⁰ and there are certain Articles which protect laws which are discriminative in nature.¹¹

¹⁰ INDIA CONST., art. 15 and art. 13

¹¹ *Id.* at art.25 and art. 372

V. UNDERLYING INTENTION OF CONSTITUENT ASSEMBLY

Why are there many contradictions in our Constitution regarding uniform personal laws? The framers of the Constitution at the time of framing understood the importance of protecting the laws of the minority communities in India. They had fear that if the laws of the minorities were not protected it might lead to a civil war, rioting and ultimately to the disintegration of India itself. This fear was further accelerated by the dissolution of princely states like Kashmir and Hyderabad. In these circumstances, one can understand the Indian Constitution envisaging several personal laws with a secular state. Yet Article 44 stands as evidence to show that UCC was their ultimate objective. They intended to have a UCC at some point in time.

The Constitutional debates reflect their minds on UCC. On November 23, 1948, the Constituent Assembly debated on having a UCC. The motion was on Article 35 of the Directive Principles of Draft Constitution on which the members of the Drafting Committee of the Constitution debated.¹²

Mr. Mohamad Ismail Sahib, a Muslim member from Madras said that to adhere and follow their own personal law is the right of a group or a community and it is protected under fundamental rights. The whole object of the discussion of UCC is to bring uniformity and to secure harmony among people by bringing about uniformity. If securing harmony among people is the object, it is not necessary to regiment the civil law in the name of unification of personal law. It will but destroy the harmony.

Another member Mr. Naziruddin Ahmad said that our personal laws have already been interfered by certain provisions of Civil Procedure Code. He said that, "In spite of the British ruling us for 175 years, there was not much interference with the personal laws. Of course they had enacted certain legislations¹³ which clashed with the personal laws of certain communities. Procedural laws like Civil Procedure code and Criminal Procedure Code were

¹² 2 CONSTITUTIONAL ASSEMBLY DEBATES (CAD), Nov 23, 1948

¹³ Legislations like Child Marriage Restraint Act, 1929; Shariat Act, 1937; Dissolution of Muslim Marriages Act, 1939

enacted during the British period. Registration Act, the Transfer of property Act, Limitation Act, the Indian Penal code, the Evidence Act and Child Marriage Restraint Act were some of the other legislations which were enacted during British rule to bring about uniformity in the applicable laws. These laws were gradually introduced depending upon the occasion. They never interfered with the laws relating to marriage and inheritance. The inheritance laws followed by Muslims were religious injunctions. The interference with these religious laws should be very gradual. I agree that a UCC is essential. But it should take place with advance of time. I sincerely believe the time is not yet ripe for it. The goal should be a UCC. It should be attained gradually with the consent of the concerned people. Otherwise it will end in misunderstanding and resentment among people belonging to various communities living in this country. What the Muslims refrained from doing in 500 years, what the British refrained from doing in 175 years, should not be done by a state at once. We should not proceed in haste. We should proceed with sympathy and statesmanship”.

Mr. Mahboob Ali Baig Sahib Bahadur also had similar opinion. He said as far as the Muslims are concerned, their laws of succession, inheritance, marriage and divorce are completely dependent upon their religion.¹⁴ For more than 1350 years this law has been practiced by Muslims. A UCC cannot be thrust upon Muslims or any religious community, all of a sudden. If their religious tenets prescribe certain practices to be followed, one cannot insist them to follow a different practice in the name of civil code.

He was supported by B. Pocker Sahib Bahadur. He said, “British conquered our country but they were able to carry on the administration of this country for nearly 150 years. Even though it was a foreign rule, they were successful because they allowed the native Indians to follow their own personal law. That was the secret of their successful administration of India for the past 150 years. He asked what kind of freedom we have achieved if we have to lose the freedom of conscience and freedom of religious practices in the name of civil code. In

¹⁴ 7 CAD at 11

such case it will be a tyrannous provision. It will not be tolerated by the Muslims of this country. The voice I raise here is the feeling of the Muslims of this country. He pointed out that there are great differences in the personal laws of different communities. If this assembly is planning to set aside those differences and come out with a uniform law, what do you mean by that uniform law? Which particular law, or the law of which community will be taken as the standard to make the uniform law applicable to all. This will be against the fundamental rights guaranteed under the Constitution. If this provision is being copied from Constitution of some other country I condemn that Constitution also. The Constitution from which this provision is being copied may be different in terms of circumstances. In our country, there are number of communities following various customs for more than thousands of years. Imposing a uniform law on them will be nothing but murdering their conscience and strangulating their religious rights and practices. In a democracy, the majority has the duty to protect the interest of every minority. Otherwise democracy will become meaningless”.

Mr. Hussain Imam of Bihar, another Muslim member joined this argument and views of B. Pocker Sahib Bahadur and Mahboob Ali Baig Sahib Bahadur. He said that India is a vast country with diversified population. There is nothing uniform about it. He said that matters relating to marriage, divorce and succession had been placed in concurrent jurisdiction. It means both the Centre and the States can legislate in those matters. The reason why the state legislatures have been given power to legislate in these areas is because they have to legislate according to the local requirements. They have to legislate according to the specific necessity of people in that particular geographical location and their own circumstances. Mr. Imam also noted that, special protection had been given to the backward class people. Their property was given special protection which was not given to others. Aboriginal people¹⁵ of scheduled areas of Jharkhand and Santhal Parganas were given special protection. Under certain circumstances, civil laws demand diversity. The concept of uniform law cannot be conceived in a country that is not even

¹⁵ People inhabiting or existing in a land from the earliest times

uniformly developed. Some parts of the country are extremely backward. "It is certainly desirable to have a uniform law to govern all the citizens of India, but the time is not ripe now", he said. "We can have it at a distant date. For that we have to prepare our people first. The whole mass of India must be educated. Illiteracy must be absolutely removed. Economic condition of every citizen of this country should improve. Only on that day a uniform law will be correct to impose. Only equals should be treated equally. Even under criminal law a child and a man are not treated equally. A lighter punishment is prescribed for a juvenile offender than grown up adult".

Shri K.M.Munshi replied to the issues raised by Mr. Hussain Imam of Bihar, B. Pocker Sahib Bahadur and Mahboob Ali Baig Sahib Bahadur related to UCC. According to him, several committees had already discussed the issue. The grounds on which it was objected were,

1. It is violative of the Fundamental Rights guaranteed under the Constitution of India.
2. It would be a tyranny to the minority community.

As regards the first ground, by unanimous decision the house had already decided that if a religious practice came under secular activity, whenever a social reform or social welfare was a necessity, the Parliament would be open to make laws without infringing the fundamental rights of the minority. It clearly means that whenever the Parliament thinks that it is the proper time or right time to unify the personal laws for a social reform it can bring in a UCC.

As far as the second ground is concerned, Shri K.M.Munshi said, "I wonder how enactment of a civil code will be tyrannical to minorities. No advanced Muslim country in the world has recognized each and every minority community living in its country and restrained from enacting a UCC. In Muslim countries like Turkey or Egypt no minority community is permitted to have their own law. Even in India when the Shariat Act was passed, the Cutchi Memons and

Khojas¹⁶ were not happy. They had been following Hindu customs for generations and even after conversion to Islam they were following the same customs for a long period of time. They did not follow Shariat. But the Muslim members who felt that uniform law should be applied to all by a central legislation, Shariat law was imposed on them. Where was the concern about minority rights then? How suddenly it has become a tyranny now? In countries like Europe which has a civil code, whoever goes there from any part of the world, irrespective of the religion to which they belong they have to submit themselves to the civil code of their country. What we want to do here is only to separate religion and law. We want to consolidate and unify our personal law, so that in course of time the way of life of people in this country will be unified and become secular. I really could not understand what religion has to do with social relations. This is the right and ripe time to put our foot down on this issue and say that these matters are purely secular matters and we will not permit religious practices to cover it. You may succeed in preventing a UCC. Think about the disadvantages of not having a civil code. You are always talking about the right of minorities and you think that UCC is going to affect only the minorities which is not so. Consider Hindus. They have two different schools, called Miatakshra and Dayabhaga. There are different sub schools like Mayuka, Benares, Mithila and Dravida. All these laws are different in application. Already different provinces have started making different and separate Hindu law for themselves. Can we permit these piece meal legislations to continue in the name freedom to follow their personal law? A uniform personal law means these different laws of the Hindus will also be unified. Therefore it is not the question of the rights of minorities. It is equally going to change the law of everyone, whether belonging to majority or minority community. There are many Hindus who oppose UCC. They feel that matters like inheritance, succession and other things covered by personal law are part of the religion itself. If that is agreed we can never achieve equality for women as these laws are generally discriminative in nature. We have already passed an article which

¹⁶ The Khojas and Cutchi Memons were originally Hindus. They converted to Islam nearly 500 years ago.

guarantees a fundamental right to the effect that there will no discrimination based on sex. I take Hindu law as instance. How many discriminative practices against women are there under Hindu law? If we accept the discriminative practices as part of religion and justify it saying that it cannot be altered, we cannot pass a single law to protect the rights of women. Is it agreeable to all of us? I don't see any correct reason or justification for not having a UCC.”

Shri K.M.Munshi reminded everyone that there is one important consideration which has to be realized and kept in mind by everyone including the Muslims. A different personal law for every different community is nothing but the outcome of the isolationist outlook. The soon we disregard this isolationist outlook and come out of it, it is better for our country. Religion must be restricted to religious spheres. It should not spell out to other issues which are not connected to the religion. Rest of the life of a person must be necessarily regulated, unified and modified in a manner which will gradually lead our country to a strong and consolidated nation. This process of emerging as a strong and consolidated nation should happen as early as possible. The foremost problem that we face in the current situation on our country is unity among people. There are many serious and dangerous factors posing threat to national unity. It is very essential in such a condition that whole of our lives in secular spheres are unified.

Shri K.M.Munshi, said, the concept that personal laws are part of religion was fostered on us by the British or the British courts. We cannot continue with that attitude. He referred to the changes made by Allauddin Khilji¹⁷ to Shariat law. Allauddin Khilji was the first ruler to establish the Muslim Sultanate in our country. When the Kazi of Delhi objected to the reforms made by Allauddin Khilji against shariat he replied: “I am an ignorant man and I am ruling this country in its best interests. I am sure, looking at my ignorance and my good intentions, the Almighty will forgive me, when he finds that I have not acted according to the Shariat”. Shri K.M.Munshi asked, if Allauddin Khilji cannot accept the proposition that religious rights cover personal laws or other matters

¹⁷ Alauddin Khilji was the most powerful king of Khilji Dynasty. From the time of Alauddin Khilji, Muslim imperialism in India began.

which we have been made to believe that it does, then how can a modern government accept it?

Dr. B. R. Ambedkar answered the questions raised by Muslim members. For dealing with every aspect of the human relationship we have uniform law in our country. The criminal code that we follow uniformly for everyone as contained in the Indian Penal Code and the Criminal Procedure Code is a uniform law applicable to all. Property related issues among people are dealt with a uniform law called law of transfer of property. We have Negotiable instruments Act and several other enactments which prove that we practically have a UCC in almost all matters. The only area in which we could not have uniform civil law is marriage and succession. He said, "I think when almost all the substantial areas have been covered with uniform law, it is too late to raise a question whether uniform law is possible. It has been proved beyond doubt by the number of uniform laws that we have, it is absolutely possible to have a uniform law."

The members who supported and argued for a UCC raised a very valid question to the Muslim members who were against it. If Shariat is non-negotiable, when Muslim criminal law was abrogated and a uniform criminal was imposed on all including Muslims why there was no objection from them?

The Muslim members could not answer this very relevant and pertinent question raised by the members who advocated for a UCC. Even today the Muslims who are against UCC cannot answer this question. The fact is, change of Shariat law started from the period of British. It was accepted by all the Muslims without any objection. Shariat covers both civil and criminal matters of the Muslim society. Muslims who invaded India lost their power to the East India Company. East India Company subsequently transferred the power to British Empire. During the period of British, criminal law of Muslims were abrogated. It was superseded by a criminal law codified by British under Indian Penal Code of 1860 and the Criminal Procedure Code 1861.¹⁸ There was absolutely no opposition for this act of the British by the Muslims. Similarly Muslims had no

¹⁸ The British Parliament passed The Criminal Procedure Code, 1861. It continued after independence. It was amended in 1969 and was finally replaced in 1972.

objection to certain other uniform laws, like Transfer of property Act and Indian Evidence Act. These are all evidences to show that Shariat becomes negotiable according to convenience. Even after the British period, Muslims never had any objection to these non-shariat laws.

VI. REASONS BEHIND NON-ACCEPTANCE OF UNIFORM CIVIL CODE IN INDIA

One of the main arguments of the Muslim members, who are against UCC, is that even the British had a policy of non-interference with the personal laws of Indians. However, the British had a policy of non-interference with the personal laws for two important reasons.

1. Initially British did not want to interfere with the laws of the local people, because they did not want to antagonize the local people, which will be a hindrance in establishing their power over the country.

2. Later on, the British used the policy of non-interference with personal laws as divisive politics. They allowed all communities living in India to follow their customary laws in matters relating to marriage, divorce, succession to property and adoption. During the British period, in several parts of India, Muslims were following the non-Muslim customary laws prevailing in the local area. On persuasion of some Muslim leaders Shariat law was imposed on them by the British. This was an absolutely calculated move of the British. The colonial power, by this move wanted to keep the Hindus and Muslims divided for its own political gain. With enactment of Shariat Act in 1937 the British could satisfy the conservative Muslims. The divide and rule policy followed by the British throughout their rule led to the partition of the country.

During the British period, the territory of Goa was under another colonial power, the Portuguese. In Goa, the Portuguese successfully implemented a UCC in matters relating to marriage, divorce, succession of property and other things. The Goa civil code is followed even today. In 1961 Goa was liberated by India. At the time of liberation, the people of Goa were promised that their laws would

be left intact by the Indian government. The entire population of Goa including Muslims is governed by a UCC called the Goa Family Law. If it could be possible in Goa, why is it not possible in other states? British did not implement UCC, not because they could not but because they did not want to. In the words of Dr. Ambedkar, “This attitude of mind perpetuated under the British rule, that personal law is part of religion, has been fostered by the British and by British courts. We must, therefore, outgrow it”.

Though there was severe opposition for UCC, the constituent assembly successfully pushed the article relating to UCC. Though it was successful in pushing the article, its enforceability always remained uncertain due to Article 37. This provision has given the state infinitely long time to implement it. The words of the honorable members M. R. Masani, Hansa Mehta and Rajkumari Amrit Kaur of the sub-committee on fundamental rights, that UCC must be guaranteed within a specified period of time, shows that they have foreseen this situation.

During the debate of the Hindu Code Bill in the legislative assembly many expressed their opinion that instead of codifying the law of one community, it is better to enact a uniform code for all communities in the country. Jawaharlal Nehru, the first Prime Minister of our country defended the idea of codifying the law of Hindus alone by saying, “Well, I should like a Civil Code which applies to everybody but wisdom hinders. If the member or anybody else brings forward a Civil Code Bill, it will have my extreme sympathy. But I confess I do not think that at the present moment time is ripe in India for me to try to push it through. I want to prepare the ground for it”.¹⁹ Starting from the period of Nehru, successive leaders, governments and political parties are still in the process of preparing the ground to push this Code through.

¹⁹ R. Upadhyay, *Discrimination & Appeasement - Uniform Civil Code must be implemented urgently*, INDIA FACTS.CO.IN, Jul. 10, 2014, available at <http://www.indiafacts.co.in/uniform-civil-code-must-be-implemented-urgently/#.VJnWnsAA> (last visited Feb. 11, 2015).

VII. CONCLUSION

During the British period UCC was not implemented because they wanted to divide and rule the state. Even today we are not able to implement it because of the same policy followed by the political leaders of this country. The issue of UCC divides the nation in many ways. Political parties are divided on this issue. During every election one of the important political agenda of the parties is the promise either to implement or not to implement it. It has social aspects of division as well. There is a group of reformative thinkers who support and another group which is always against it for the same old reasons. Hindus and other minority communities are divided on this issue. The only way to put an end to all kinds of division in the society is to bring about the much awaited UCC. UCC is the need of the hour.

READING REASON INTO RELIGION: A LEGAL ANALYSIS ON ANIMAL SACRIFICE IN THE LIGHT OF GADHIMAI FESTIVAL

Manjeri Subin Sunder Raj

I. OPENING PANDORA'S BOX

Gadhimai! Such has been the coverage meted out by the national as well as the international media, that the gory festival, if it can ever be addressed as a festival, has become the point of heated discussion, deliberation and debate, cut across religious, political, national as well as international lines, all alike, in the recent past. Appalled by the gravity of the situation, and naturally so, taking into consideration the disturbing images that surfaced in the media, a lot of hue and cry has been raised over this issue. However, it still remains a fact that we, humans, in the name of religion have committed a massacre, yet again; and that something has to be done about it, imminently.

Delving into the fundamental question of whether animals too, similar to that of humans, have a right to live, the author purports to draw a connection between religion, morality and animal rights. Taking clue from the recent judgment, passed by the Himachal Pradesh High Court, in *Ramesh Sharma v. State of Himachal Pradesh*,¹ wherein animal sacrifice was discussed at length, parallels are sought to be drawn which might serve as a beacon light for courts in Nepal; and rightly so. Probing into the rationale put forward by the two judge bench, in the said case, it is sought to determine as to whether animal sacrifice should be done away with altogether.

Falling in line with the title to this section, one cannot but help notice the myriad issues that crop up while discussing such a touchy topic. As delicate as it is, there seems to be no other way to circumvent the situation rather than taking the bull by its horns. Keeping in mind, the Father of our Nation, Gandhiji's observation, "The moral progress and strength of a nation can be judged by the

¹ MANU/HP/0934/2014

care and compassion it shows towards its animals”, one can be relieved and at the same time be proud that the Himachal Pradesh High Court has followed the advice and furthermore, has come up with a bold observation: “We must permit gradual reasoning into religion”.²

It was only in the recent past that the world came to know about the Gadhimai festival that is held in Gadhimai Temple, Bariyapur, Nepal, every five years. Though said to be based on a legend, which took place more than two and a half centuries ago, wherein an imprisoned feudal landlord, Bhagwan Chaudhary, had a dream that if he offered a blood sacrifice to Goddess Gadhimai, all his misery and travails would end, modern day reference can only be attached to a similar sacrifice ritual that occurred, amidst widespread protests from animal rights activists, in 2009, wherein an estimated 350,000 animals were killed.³

II. THE FIASCO AS IT IS

For those who wonder as to what India has to do with this dreaded ritual, it is brought to notice that a large chunk of the mindboggling numbers of animals to be sacrificed, are illegally transported to Nepal from India.⁴ That apart, since animal sacrifice is banned in India, quite a lot of worshippers too, cross the border into Nepal to take part in the ritual. That being the situation, when this time around, the ritual was to be conducted on November 28 and 29, 2014, Ms.Gauri Maulekhi, noted animal rights activist and environmentalist, filed a writ petition before the Supreme Court of India.⁵

²*Ramesh Sharma v. State of Himachal Pradesh*, MANU/HP/0934/2014, ¶ 78

³Natasha Bertrand, *The World's Largest Animal Sacrifice*, Dec.2, 2014, BUSINESS INSIDER. COM, available at <http://www.businessinsider.com/stunning-photos-of-the-worlds-largest-animal-sacrifice-2014-12#ixzz3L1fR55US>, (last visited Dec. 4, 2014).

⁴Merritt Clifton, *Supreme Court of India ruling covers tracks on Gadhi Mai sacrifice*, ANIMALS 24-7. ORG., Oct. 24, 2014, available at <http://www.animals24-7.org/2014/10/24/supreme-court-of-india-ruling-covers-tracks-on-gadhi-mai-sacrifice>, (last visited Dec. 12, 2014).

⁵Writ Petition (Civil) No. 881/2014

Bringing to light before the court, that pursuant to the powers given under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992,⁶ the Central Government has in Schedule 2, Table B, Item No. 10 of the Export Policy,⁷ restricted the export of live cattle and buffaloes, without a valid license, the petitioner urged the court to ensure that the same is not violated. Justice Jagdish Singh Khehar along with Justice Arun Kumar Mishra, observing that the sacrifice of animals at the Gadhimai festival is ‘demeaning and cruel’, passed an interim order directing that the export of live cattle and buffaloes should only be permitted under a valid licence. While vigorous efforts to ensure compliance in furtherance of the said directive were made mandatory, the court also opined that the issue need be addressed on a long term basis and has kept the matter pending, providing time to all concerned to file affidavits detailing steps that need be taken to curb such illegal activities.

It was also heartening to note that the Ministry of Home Affairs, Government of India, pursuant to the directive passed by the Supreme Court of India, ordered all field formations of Sashastra Seema Bal to prevent cattle transport without license.⁸ Concerted efforts have paid dividends also, with reports stating that quite a large number of animals, while trying to be illegally sent over to Nepal, have been confiscated.⁹

⁶Sec. 5: Export and import policy-. The Central Government may, from time to time, formulate and announce by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy.

⁷Government of India, Export Policy, Schedule 2, ITC (HS), 2012, available at <http://dgft.gov.in/Exim/2000/NOT/itc%28hs%29/Eschedule2.pdf>, (last visited Dec. 12, 2014).

⁸Navamita Mukherjee, *Government of India Orders Sashastra Seema Bal to Stop the Illegal Movement of Animals to Nepal*, HUMAN SOCIETY INTERNATIONAL. ORG., Nov. 4, 2014, available at <http://www.hsi.org/world/india/news/releases/2014/11/india-ministry-home-affairs-order-ssb-prevent-cattle-transport-110414.html>, (last visited Dec. 4, 2014).

⁹Navamita Mukherjee, *India Confiscates Hundreds of Animals at Nepal Border as Illegal Transport Ban Takes Effect Ahead of Gadhimai Festival*, HUMAN SOCIETY INTERNATIONAL. ORG., Nov. 20, 2014, available at <http://www.hsi.org/world/india/news/releases/2014/11/gadhimai-coordinated-action-plan-112014.html> (last visited Dec. 4, 2014).

III. RELIGION AND LAW - AT CROSSROADS?

The role played by 'religion' as we all are aware of, in the life of humans is quite definitive. Commencing from shaping a man's attitude and way of life, to affecting almost all the day to day activities that he has to function; religion has carved an unquestionable influence over mankind. To govern the activities of man, law as a mechanism, has grown exponentially. Having been able to imbibe within it, time and again, the spirit and pulse of the society, law, as an ever evolving entity has been able to keep pace with the changes occurring in the society. However, this does not take away from its ambit, testing times that it has had to face, as is the situation now. Like chalk and cheese, law and religion has had its fair share of incongruities. To bring about something sort of a relation between the two, which in the present context is highly necessary, it is inevitable that one falls back on cases which have dealt with the same.

Religion, it was held, in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*,¹⁰ is a matter of faith with individuals or communities and it is not necessarily theistic. Looking into as to what would encompass an essential part of a religion, it was held by the court that it should principally be established with reference to the doctrines of that particular religion itself.

In *Davis v. Beason*¹¹, it was held:

. . . religion has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with 'cultus' of form or worship of a particular sect, but is distinguishable from the latter.

The cross roads that the two find themselves in, quite often, can also be understood from the observation put forward by the Chief Justice of the High

¹⁰AIR 1954 SC 282

¹¹(1888) 133 US 333, at 342 G

Court of Australia, Justice Latham, in *Adelaide Company of Jehovah's Witnesses Inc v. Commonwealth*,¹² wherein he opined:

. . . [I]t is sometimes suggested in discussions on the subject of freedom of religion that, though the civil government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion.¹³

Coming down to the situation in India, one is sure of the fact that freedom of religion is protected in the Constitution of India. Looking into the scope and ambit of the same, it can very well be seen that the rights guaranteed are not restricted to religious beliefs only. The myriad religious practices that followers engage themselves in, as well, are protected, subject to the limitations which have been prescribed in the Constitution.

Falling back on decisions of the court, it can be seen that in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, the above claim made, wherein not only religious beliefs, but religious practices as well are guaranteed by the Constitution, holds good. The same was further reiterated by the courts in *Sri Venkataramana Devaru v. State of Mysore*¹⁴ and *Sardar Sarup Singh and Others v. State of Punjab and Others*.¹⁵

But what exactly can be termed to fall under religious practices, so as to extend the cloak of religion? How does one decide as to whether such an extension is valid or not? Questions which are raised on a shaky platform bring about with it a lot of matters that need have to be carefully decided.

¹²[1943] HCA 12

¹³*Id.* at ¶ 5

¹⁴AIR 1958 SC 255

¹⁵AIR 1959 SC 860

IV. SCOPE OF 'MATTERS OF RELIGION' AND 'ESSENTIAL AND INTEGRAL PART OF RELIGION'

The Supreme Court of India, having had an opportunity to discuss the concept, in *Mahant Moti Dass v. S.P. Sahi*,¹⁶ had opined that 'matters of religion' include practices which religious denominations regard as part of their religion. Looking into the aspect of whether such practices are being followed by the large majority of believers, the courts have followed such a test to decide accordingly.

This was exactly in question before the Supreme Court in *Durgah Committee, Ajmer and another. v. Syed Hussain Ali and others*.¹⁷ The Court had to decide as to whether such practices indulged in by the community would be protected under Art.26 of the Constitution of India. Looking into the objective of Art.26, the court opined that it would definitely come under the ambit of the same. The religious practices had to be construed, considered and afforded the same protection as was given to the religion as such. But however, adding a note of caution, the court was quick to note and reiterate as was done in quite a lot of earlier decisions as well, that for such practices and rites to be considered as part of the religion which professes it, the same should be regarded by the religion as its 'essential and integral part'. Throwing light into the problems that would surely arise in case this protection is not afforded, the court cautioned that if that not be so, then such activities, though secular in nature, but not necessarily forming an integral or essential part of the religion, would be brought under the garb of religion so as to enable it to be treated and afforded the same protection as religious practice which by far is never advisable.

The influx of quite a large number of superstitious, irrational and credulous beliefs into religion is what prompted the court to opine so. Having brought about such an explanation, the court was quite successful in detaching those practices which need not necessarily form an essential and integral part of religion, from the ambit of protection afforded to such religion and religious

¹⁶ AIR 1959 SC 942

¹⁷ AIR 1961 SC 1402

practices. A careful scrutiny of all such practices is what the court intended and only if it passes the test, should it be afforded the same protection.

Having brought to light the problems attached with superstitions, this decision can be treated as one which tried to bring about a clear demarcation of the rights of religion and religious practices that has been guaranteed under the Constitution. Clearing the ambit of the rights guaranteed, the court's step was a pro-active one.

Further in *Sardar Syedna Taher Saifuddin Sahib v. State of Bombay*,¹⁸ when the court had an opportunity to deal with the rights that have been guaranteed under Art. 25 of the Indian Constitution, one can note of the proactive role that was taken by the Court. The power of the state, rather the prerogative of the state, wherein it had the right vested in it to intervene, restrict or regulate such activities which do not tend to follow the law of the land was discussed. The court said that there might be instances of practice or tradition wherein animal sacrifice or even human sacrifice is conducted in the name of religion. In such cases, it was held that the state had the inherent power to intervene and stop such abhorrent, detestable and despicable practices.

A similar line of argument was taken in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and others*,¹⁹ wherein the Supreme Court discussed at length the objective and rationale behind Articles 25 and 26 of the Constitution of India. The religious practices that have been afforded protection under Article 25 and the affairs related to matters of religion as discussed under Article 26 were said to include practices that were to be considered as integral to the practice and propagation of the religion itself. The court also took the same line in deciding as to whether such a practice would form an essential or integral part of the religion. The community who practised such religion was given the prerogative to decide as to whether the same was indispensable. However, the court tread cautiously and held that the question would be decided by it as to whether the said practice or ritual is religious in character in the first place. This

¹⁸ AIR 1962 SC 853

¹⁹ AIR 1963 SC 1638

afforded a much needed opportunity to the court to delve deeply into the same and get rid of and not afford protection to superstitions and other despicable practices conducted in the name of religion. The court is to look into the evidence put before it and then should decide the same. Such evidence, which need be taken into consideration, should definitely be in line with the conscience of the religious followers and more importantly in line with the doctrines put forward by the religion.

Difficulties that arise when a religion and its tenets are sought to be deciphered also causes its own set of problems. In quite a lot of circumstances, the religious practices and religious principles might not be found in a single place. This would all the more cause more irregularities and differences of opinion as regards matters professed and practised by the said religion. The case of Hindu religion being so was brought to the forefront by the Supreme Court of India in its decision rendered in *Shastri Yagnapurushdasji and others v. Muldas Bhundardas Vaishya and another*.²⁰ Herein the court found it difficult to explain as to what exactly can be said to be Hinduism. Owing to the religion having, unlike other religions that are present, quite a lot of gods and not one set of principles, dogma, rites and practises, the court found it suitable to treat it as a way of life rather than a religion in its true sense. Looking into who the Hindus are and from where they originated, the court delves into the myriad concepts and principles attached to Hinduism.

Falling back on such difficulties faced by the courts in deciding as to whether a practice forms an essential or integral part of religion or not, one can understand that it is not an easy task but quite an onerous one. To look into the principles and practices of religion, one which may be vague or has too many connotations, would undoubtedly lead and put the court in a spot wherein it might be difficult to reason and give a clear expression of thought. Such situations being aplenty, the way forged by the courts in such decisions need be hailed as revolutionary.

²⁰ AIR 1966 SC 1119

Even in *His Holiness Srimad Perarulala Ethiraja Ramanuja Jeeyar Swami etc v. State of Tamil Nadu*,²¹ the court held that the protection afforded by Articles 25 and 26 cannot be restricted to just doctrines or religious beliefs. Acts and actions which are done in fulfilment of tenets of religion would also be afforded the protection. The court was, as usual, given the prerogative to decide as to what all would come under the essential part of religion or practices associated with a particular religion. The court was also to take into consideration the doctrines and ideals laid down by the religion. More importantly, it was to look into as to whether such practices indulged in by the community in furtherance of religion, was treated, regarded and observed by that community as part of the religion that they follow.

Following this test that has been laid down, several practices and rites which have been indulged in by religious sects have been decided not to form an essential or integral part of the religion. In the case of *Acharya Jagdishwaranand Avadhuta etc. v. Commissioner of Police, Calcutta and another*,²² the Supreme Court of India had to consider as to whether Tandava dance performed by Anandmargis was legal or not. It was held that the performance of the dance in procession or at public places is not an essential religious rite to be performed by every Anandmargi. The court even decided that Ananda Marga is not a separate religion and cannot be treated as an institutionalized religion. The same was to be treated as a religious denomination. The court fell back on the decision given by Gajendragadkar, C.J., in *Sastri Yagnapurushadji v. Muldas Bhudardas Vaishya*²³ wherein it was held that Ananda Marga cannot be treated as a separate religion. The reasoning accorded to by the court, in justifying its take on the same, was that whenever a new sect is born in Hindu religion, even if it is governed by its own tenets, it cannot be treated as something which is different from Hinduism. The sect was observed to fall back basically on those tenets and religious notions put forth by Hindu religion and Hindu Philosophy.

²¹ AIR 1972 SC 1586

²² AIR 1984 SC 51

²³ (1966) 3 SCR 242

There were also doubts and aspersions cast on whether all such practices that a religion mandates would necessarily fall under the broad ambit of ‘essential and integral part’ of religion. Such a point of law came before the Supreme Court of India in *Dr. M. Ismail Faruqui v. Union of India*.²⁴ The court discussed about whether the right to worship is present at each and every place. As long as the right can be exercised in an effective manner, it was held by the court that the right to worship cannot be extended to each and every place. However, it is also good to note that the Court took into consideration the fact that if the right to worship at a particular place, by itself, is an integral part of the religion, then such right would definitely be protected under the law of the land.

Holding that a mosque need not be treated as an essential part of the practice of Islam, the court brought about a subtle difference between ‘religious practice’ and ‘essential and integral religious practice’. The court was of the opinion that there can be a practice that can be treated as a religious practice but need not necessarily be an essential and integral part of the religious practice. Such practices which in normal course form a part of religion cannot be afforded the same protection as that has been afforded to essential and integral practices of the religion. The practice of offering prayer and its offering at every place was distinguished by the court, rather deftly. It was held that while the offering as such would amount to a religious practice, it need not necessarily form part of an essential and integral part of that religion to enable it to be offered at every location where it is possible.

Tracing the Court’s journey, it can be noticed that the common thread is present in each and every one of the decisions rendered by the courts as far as religion and religious practices are concerned. Hanging on to the ‘essential and integral part of religion, the Supreme Court has in *A.S. Narayana Deekshitulu v. State of A.P.*,²⁵ held that only such aspects of religion would be protected. It also further clarified the position of law by stating that non-integral or non-essential part of religion, being secular in character, can be regulated by legislation. The court

²⁴ (1994) 6 SCC 360

²⁵ (1996) 9 SCC 548

quoted an example wherein it put forth the idea that performing religious rites can be treated as an integral part of religion but the priest performing such a rite is not so. Discussing in depth as to what exactly forms part of religion; the court held that it cannot be purely treated as an opinion, doctrine or belief. The expressions and outward acts that it has also need be taken into consideration. It was held by the court that even that it be so, every aspect of religion has not been safeguarded by Article 25 and Article 26 of the Constitution of India. Similarly, the said Articles do not also provide a blanket ban on all religious activity. Religious activities can be interfered with, by court as well as the state by coming up with legislations, but only in accordance with the provisions of law. Applying the same principle, the Andhra Pradesh High Court, in *Pogakula Laxmireddy v. Principal Secretary to Govt. of Andhra Pradesh*,²⁶ held that the local community's belief as regards a particular tamarind tree been considered as sacred should be considered and it should not be felled.

The role that need be played by religion, in the betterment of the society, too was dealt with by the Supreme Court of India, in *Sri Adi Visheshwara of Kashi Vishwanath Temple Varanasi v. State of U.P.*²⁷ Religion, it was opined, was to guide community life and advise people to follow the tenets laid down so as to ensure that an egalitarian social order can be created. Treading a slightly different line, it was held by the court that the concept of essentiality, as put forward till now, cannot by itself be treated as the single determining factor. It can only, by far, be treated as one of the factors to be taken into consideration while deciding as to whether a religious activity or practice is an essential or integral part of the religion. The court cast the duty on itself to check whether such practice is an essential one or not and if so, lays down that under the ambit of Article 25, the same need be afforded protection. An unfettered or unrestricted right to propagate or profess religion is not provided for, as made clear by the court.

²⁶ AIR 1997 AP 6

²⁷ (1997) 4 SCC 606

One of the most common arguments being put forth, being that the religious rites have been in vogue as a custom, for a long time, has been dealt with by the Supreme Court's decision in *N. Adithayan v. Travancore Devaswom Board*,²⁸ wherein it was held that custom as such cannot be treated as a source of law. Especially in situations where such customs violate concepts of human rights, dignity and the like, it was held that they should not be treated to be a source of law, even if it has been in prevalence for quite a long time. It is also interesting to note that the court, throwing light on the vision and far sightedness of the framers of the Constitution, held that the object was to liberate society from blindly following traditions, superstitions and beliefs which lacked reason as well as a rational backing.

The core beliefs and principles on which the religion and religious tenets is based on was said to be the essential part of religion by the Supreme Court in *Commissioner of Police v. Acharya Jagadishwarananda Avadhuta*.²⁹ Terming it as the cornerstone on which the religion is built on, the court clarifies that only such practices can be afforded the protection as guaranteed under the Constitution. It further held, to clarify, that absence of such practices would deem that religion not to be a religion. The test was to see as to whether in the absence of such a practice, the nature of the religion, would alter. If only so, such practice should be treated as an essential practice. This necessarily has to consider amongst others, doctrines, practices, tenets, historical background and other related information of the given religion.

In *Om Birangana Religious Society v. State of West Bengal*,³⁰ an interesting turn of events took place wherein the court had to decide as to whether the use of loudspeakers during festivals need be considered as an essential and integral part of religion. Holding that the religion was not new, the court said that it cannot be interpreted that the religious leaders who laid down the tenets desired the use of loudspeakers. Relying on the judgment in *Narandra Prasadji v. State of*

²⁸ (2002) 8 SCC 106

²⁹ (2004) 12 SCC 770

³⁰ 1996 (100) Cal.W.N. 617

Gujarat,³¹ the court looked into the inter-relationship that existed amongst fundamental rights to control abuse of the freedom of religion. Use of loudspeakers was prohibited between 9 pm and 7 am. Similar steps were taken by the Madras High Court in *Appa Rao v. Government of Tamil Nadu*³², wherein the churches were asked to reduce their loudspeaker levels. Similar steps were also taken to restrict and regulate the use of loudspeakers by the Supreme Court in *Church of God (Full Gospel) in India v. K.K.R.M.C. Welfare Association*,³³ wherein it was held that no religion had the right to create and increase noise pollution.

In the United States too, courts have had the opportunity to delve into and decide as to what all would be covered under the right to religion that has been granted by various constitutions. In *Minersville School District Board of Education v. Gobitis*,³⁴ Justice Frankfurter had an opportunity to deal with religion and society. He opined that individuals should never be relieved from obeying general law. Just because one has a religious belief or conviction, it does not, in any way, if it contradicts the rules of the society, take away the duty from the person to follow the general law which casts on him political as well as social responsibilities. .

Similarly in the case of *Reynolds v. United States*,³⁵ the United States Supreme Court has made a very pertinent observation. Looking into aspects of why laws are made and what they can interfere in, the court states that laws are made for the society and aim at its betterment. It proceeds to say that, in general, laws are not supposed to impede with mere religious opinions and beliefs. However, the United States Supreme Court takes a stand that laws can impede religious practices. The reasoning that it puts forth is that if a person is given a liberty to do so as regards his religious practices, then it would place the religious beliefs in a superior position to that of the law of the land, which is never right. This

³¹ AIR 1974 SC 2098

³² (1995) 1 Mad. L.W. 319

³³ AIR 2000 SC 2773

³⁴ 310 US 586, 594-595, 84 L. Ed. 1375, 60 S Ct 1010 (1940)

³⁵ 98 US 145, 25 L Ed 244 (1879)

would inevitably permit each and every citizen to be a law unto him, which is not what is intended or desired.

Taking clue from such situations, it can be seen that the cross roads that religion and law find themselves at, quite often, are varied and myriad, though all of them have a semblance of uniformity. It is keeping in mind that such a semblance need be tackled with the same vigour and passion, law, as it should be, come to the forefront in limiting such activities and in apt circumstances get rid of it as well.

V. LEGALITY OF ANIMAL SACRIFICE

Keeping in mind the object of the current work, wherein animal sacrifice was the point of discussion, it is necessary that one looks specifically into the same and learn as to how courts have been pro-active in curbing the menace. Sacrifice of animals has long been attached to man. It has been put to use in such a way so as to ensure that man gets some sort of a divine return in the form of blessing. However, with changes in the society and the ways in which rights and duties are construed, the situation has changed drastically. Considering the threats that religious sacrifice poses, courts have time and again tried to restrict and do away with such sacrificial killings altogether.

In the *State of West Bengal v. Ashutosh Lahiri*,³⁶ the court held that on Bakrid, slaughtering of any animal does not necessarily include slaughtering of cows itself as the way of carrying out the sacrifice. Such slaughter therefore is not essential or a requisite and thereby would not form part of any religious requirement. A similar stand was taken by the Supreme Court in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*,³⁷ wherein it was reiterated that slaughter of cow and cow progeny on Bakrid is neither essential to nor necessarily required as part of the religious ceremony. It was also held that such religious practice which is purely optional in nature is not covered by Article 25.

³⁶ (1995) 1 SCC 189

³⁷ (2005) 8 SCC 534

It is interesting to note that the Himachal Pradesh High Court in Ramesh Kumar's case, when presented with a wonderful opportunity to decide on the legality of animal sacrifice, decided to take the bull by its horns. The State Representative of 'People for Animals', an organization that works for the betterment of animals and protection of their rights, approached the High Court, detailing instances of animal sacrifices prevalent in the state of Himachal Pradesh and the callousness of the state administration in curbing the issue. A prayer was put across in the writ petition wherein it sought to stop illegal animal slaughtering. The court, pro-active as ever, took cognizance of the issue. A direction was made by the Court to ensure that a public notice be issued in two newspapers so as to afford an opportunity to all interested, to air their views.

Quite a lot of people came forward to air their views, in response to the clarion call and the court in detail, has quoted, from the affidavits filed by various Karyakartas of temples,³⁸ who have relinquished their positions and have voiced their dissent as regards this heinous practice. It can however be noted that there was an equally strong opinion, put forward which supported the sacrifice, placing reliance on the fact that such practices were in vogue since time immemorial and has taken the shape of a valid custom.

Having had to decide a delicate and touchy matter relating to animal sacrifice, the discussions and deliberations that form part of this case trickled down to a point wherein the question that had to be answered was whether sacrifice of animals is an essential/central theme of Hinduism and whether it forms an integral part of the religion.

Relying on a number of precedents, the court looks into as to whether such a ritual forms an essential or integral part of Hinduism. Following the decisions laid in previous decisions, the Himachal Pradesh High Court, takes the test as to whether animal sacrifice is an integral or essential part of Hinduism. Coming out with scathing remarks, the High Court is dead against the acts of cruelty that is

³⁸ For a detailed description of the averments raised by various karyakartas in the affidavits filed before the High Court, refer paragraphs 10, 11, 12, 13 14 and 15 of the judgment. These throw light on the various acts of utmost cruelty to which the animals are being subjected to, in the name of religion.

being meted out, under the guise of religion, on animals as well as birds. The Himachal Pradesh High Court also has been successful in sending a strong message that such dastardly practices have no social sanction but are merely based on superstition and ignorance.³⁹

It is also heartening to note that the court reiterates, strongly, that Articles 25 and 26 protects only religious practices and not superstitions. Describing essentials of any religion as eternal and the non-essentials as relevant for some time, the court opined that animal/bird sacrifice cannot be treated as eternal.⁴⁰

By taking into consideration and throwing light on the principle that every living being has a right to live, the observation by the court that ‘humanism’ under Art 51A(h)⁴¹ increasingly designates as an inclusive sensibility for mankind, strikes perfect harmony. Urging people to imbibe the true spirit of the preamble of the Prevention of Cruelty to Animals Act (PCA Act), 1960, the court states that a spirit of compassion and humanism should be developed. By asking one to read both Articles 51A (g)⁴² and (h) into PCA Act, especially Sections 3⁴³ and 11⁴⁴, the Himachal Pradesh High Court vehemently puts across the true significance of ‘humanism’ as envisioned by the framers of the Constitution.

It is also good to see that the Himachal Pradesh High Court has taken note of the recent judgment delivered by the Supreme Court in *Animal Welfare Board of India v. A. Nagaraja*.⁴⁵ This case while holding Jallikattu as unconstitutional restated that animal welfare laws have to be understood by observing animals’

³⁹*Ramesh Sharma v. State of Himachal Pradesh*, MANU/HP/0934/2014, ¶ 67

⁴⁰*Id* at ¶ 74

⁴¹Fundamental duties: It shall be the duty of every citizen of India..... (h) to develop the scientific temper,

humanism and the spirit of inquiry and reform

⁴² Fundamental duties: It shall be the duty of every citizen of India.....(g) to protect and improve the natural

environment including forests, lakes, rivers and wild life, and to have compassion for living creatures

⁴³Duties of persons having charge of animals

⁴⁴Treating animals cruelly

⁴⁵(2014) 7 SCC 547

welfare and best interest subject to just exception out of human necessity.⁴⁶ It also opined that rights and freedoms guaranteed to the animals under Sections 3 and 11 of the Prevention of Cruelty to Animals Act have to be read along with Article 51A(g) and(h) of the Constitution, which is the *Magna Carta* of animal rights.⁴⁷

The court has tread the right path in driving home the point that Ss. 11 and 28⁴⁸ of the PCA Act need be understood keeping in mind the constitutional duties, enumerated in Arts.48,⁴⁹ 48A⁵⁰ and 51 (A) (g). Going by the petitioner's argument that S. 28 PCA does not sanction animal sacrifice,⁵¹ the court too has taken a proactive step and interpreted the principle of S. 28 in a liberal manner. It was held that it would not be an offence to kill an animal in a manner required by the community, but, the section as such, does not permit, in any manner, sacrifice of an animal in a temple.⁵²

The court also issued quite a large number of mandatory directions, including among others, prohibition/banning animal as well as bird sacrifice. It also laid down that no person shall knowingly allow any sacrifice to be performed at any place which is situated within any place of public religious worship. The State Government was asked to ensure that due publicity was given to this in the media so as to augur its implementation.

VI. FORGING THE WAY FORWARD

Delving into the large number of cases that has been discussed what one can see is a gradual, albeit steady change from an anthropocentric approach to an eco-

⁴⁶*Id* at ¶ 12

⁴⁷*Id* at ¶ 56

⁴⁸Sec. 28- Saving as respects manner of killing prescribed by religion: Nothing contained in this Act shall render it an offence to kill any animal in a manner required by the religion of any community.

⁴⁹Organisation of agriculture and animal husbandry

⁵⁰Protection and improvement of environment and safeguarding of forests and wild life

⁵¹*Ramesh Sharma v. State of Himachal Pradesh* ; MANU/HP/0934/2014, ¶ 7

⁵²*Id* at ¶ 81. The Supreme Court in *Sardar Syedna Taher Saifuddin Sahib v. State of Bombay*, AIR 1962 SC 853 had held that human as well as animal sacrifice is deleterious.

centric approach. It is quite necessary and imminent that we humans realize that this world is not only for our own needs and essentials but is for us to share the benefits with all the living creatures that occupy, exercise and have an equal right over the same. The Himachal Pradesh High Court, in *Ramesh Kumar's case* by exhorting that '*we must permit gradual reasoning into religion*',⁵³ has struck the right chord. Signing off with a powerful quote, '*Live and let live*',⁵⁴ the High Court has given the world a simple yet powerful message, which it is felt, need be imbibed by courts and people all over the world.

Drawing an analogy to all that has been discussed, with the gory festival, Gadhimai, which has been the centre piece of this work, one necessarily feels that it is high time that religion imbibes within it the spirit of oneness, not only amongst human beings but also amongst other forms of life as well. The shift, though gradual, from anthropocentrism to eco-centrism has been definitive. It is up to each one of us to ensure that the same continues and reaches its goal lest we humans suffer in ignominy.

The steps taken by the Supreme Court of India, pursuant to the Public Interest Litigation filed before it, by Ms. Gauri Maulekhi, renowned animal rights activist and environmentalist, is laudable. Noting that quite a lot of animals are smuggled into Nepal, to be slaughtered, the Supreme Court has been proactive in ensuring that adequate steps are taken to prevent the same. Decisions akin to *Ramesh Kumar's* should be publicized and brought to the limelight.

However, it is to be kept in mind that unless the people themselves realize that such dastardly acts need be done away with, there is no escape from such incidents. Educating the people about the true spirit of religion and inspiring them to be a part of the revolutionary change that one needs to have in the field of religion, by far, is felt to be the best solution to the whole fiasco.

Though we may have our own doubts, which by far are reasonably grounded as well, that such a definitive change from anthropocentrism to eco-centrism is necessitated not *only* due to the fact that man cared for other beings as well, but

⁵³*Ramesh Sharma v. State of Himachal Pradesh*, MANU/HP/0934/2014, ¶ 78

⁵⁴*Id* at ¶ 88

also due to the fact that man cared for himself *more*. Dismissing such doubts, though courts have time and again come up with progressive judgments, it is high time that each one of us play a particular role, however small in furthering such a cause.

POST PARTITION LAWS ON DISPLACED PERSONS - CHARTING THE LEGAL HISTORY

Shubhojeet Kundu

I. INTRODUCTION

The 1947 partition of British India in two independent states, India and Pakistan, resulted into one of the largest and most hurried migrations in the history of refugee studies. This involuntary migration which happened on a massive scale has baffled and would continue to baffle researchers and scholars of migratory demographics for years to come. An estimated 14.5 million people migrated within four years from 1947 to 1951.¹ Being an involuntary migration, it involved a movement of large number of people in a very short span of time. Unfortunately, this involuntary migration also ensured that a great deal of property is hurriedly abandoned by the fleeing people. It was not possible for such people to make any satisfactory arrangement for the management of the property left behind by them.

For purposes of this study, 'refugee' refers to those people who migrated between India and Pakistan due to the partition of 1947. As it is known, India does not have the concept of 'refugee', as understood today in international law², in any of its statute book, i.e. in any legal sense, national or international. Neither India is a party to the Convention Relating to the Status of Refugees³, or the Protocol Relating to the Status of Refugees⁴ nor has India enacted national laws that enabled the migrated population in India during the partition of 1947 to petition for determination of their legal status as refugees. However, there should not be any confusion as to India's intention in rehabilitating the migrated

¹ Prashant Bharadwaj et al., *The Big March: Migratory Flows after the Partition of India*, 43 ECO. & POL. WEEKLY 39 (Aug. 30 - Sep. 5, 2008).

² As explained later, India did use and defined the term 'refugee' in many federal and provincial laws owing to the 1947 partition, but the connotation and meaning of the term 'refugee' therein was very municipal in nature, bereft of the current international understanding, but it managed to contain all the elements of the refugee definition as contained in the 1951 Refugee Convention.

³ July 28, 1951, 1989 U.N.T.S. 150

⁴ Jan 31, 1967, 606 U.N.T.S. 267

population. India, being a new democracy at that time, did everything from creation of laws to rehabilitation of the migrated population. It is just that owing to several reasons, one being the absence of any refugee convention at that point of time, the term refugee in its pristine legal understanding has never been a part of Indian legislative and administrative structure. Accordingly, throughout this study, the use of the phrase 'refugee' is only in the colloquial sense.

The Governments of both India and Pakistan realised this issue and pertaining to a kneejerk reaction immediately created a bogey of laws. On August 27, 1947, at a meeting of the Joint Defence Council of India and Pakistan, held under the chairmanship of Lord Mountbatten, the Prime Ministers of both countries agreed that each Government should appoint a custodian of Refugees' Property.⁵ The scope of this present study is limited to the laws made in the dominion of India for managing the claims, *especially property claims*, of the refugees. The study charts out the chronological creation of the laws for regulating and managing the claims and for rehabilitation of the migrants in India. A concerted effort has also been made to disentangle the complex web of laws created for the aforementioned purposes in India.

One of the basic features of such laws was their time barred operation. Reference can be made to the Displaced Persons (Claims) Act, 1950, which was initially created for a period of two years but owing to ongoing claims disputes its operation was periodically extended. Therefore, this study becomes necessary as there are very few studies which have thrown light on the working of such post partition laws for displaced persons. More interestingly, the Union government *vide* the Displaced Persons Claims and Other Laws Repeal Act, 2005 notified on September 6, 2005 has repealed the following major union laws pertaining to the management and regulation of the claims and disputes of the displaced persons:

1. *The Displaced Persons (Claims) Act, 1950;*
2. *The Administration of Evacuee Property Act, 1950;*
3. *The Evacuee Interest (Separation) Act, 1951;*

⁵ Mohammed Ahsen Chaudhri, *Evacuee Property in India and Pakistan*, 10 PAKISTAN HORIZON 96-97 (Jun. 1957).

4. *The Displaced Persons (Claims) Supplementary Act, 1954; and*

5. *The Displaced Persons (Compensation and Rehabilitation) Act, 1954*

Unfortunately, it is pertinent to note that the disputes and claims filed by the displaced persons under such laws still continues to be sub-judiced before various authorities created across India, but the notification of the Displaced Persons Claims and Other Laws Repeal Act, 2005 has created a massive confusion, both in the minds of the affected people as well as the authorities before whom may such disputes are pending.

Therefore, *vide* this study a modest attempt has been made also to identify the issues, concerns and challenges regarding the claims and disputes of the displaced persons regarding their property which they claim to have left in Pakistan.

II. DEFINING REFUGEE MUNICIPALLY– EXTRAORDINARY MEASURES IN EXTRAORDINARY TIMES

The aforementioned caveat on the use of the term ‘*refugee*’, though did not proved to be a hindrance in creation of laws wherein the term ‘*refugee*’ was defined during the extraordinary times of the 1947 partition. It is interesting to see that, during the 1947 partition several laws both at the central level as well as the provincial level were made for regulating and managing the affairs of the displaced persons and many such laws contained the definition of a refugee in the light of the 1947 partition and which was slightly different from the current understanding of refugee issues. Table 1.0 below lists down the federal and provincial laws dealing with refugee issues.

Table 1.0

| S. No. | Legislation | Year |
|--------------------------|--|------|
| Union Legislation | | |
| 1. | Administration of Evacuee Property Act | 1950 |
| 2. | Displaced Persons (Claims) Act | 1950 |
| 3. | Evacuee Interest (Separation) Act | 1951 |
| 4. | Displaced Persons (Debts Adjustment) Act | 1951 |

Post Partition Laws on Displaced Persons

| S. No. | Legislation | Year |
|-------------------------------|--|-------------|
| 5. | Influx from Pakistan (Control) Repelling Act | 1952 |
| 6. | Displaced Persons (Claims) Supplementary Act | 1954 |
| 7. | Displaced Persons (Compensation and Rehabilitation) Act | 1954 |
| 8. | Transfer of Evacuee Deposits Act | 1954 |
| 9. | Foreigners Law (Application & Amendment) Act | 1962 |
| 10. | Railway Passenger Fare Act | 1971 |
| 11. | Postal Articles Act | 1971 |
| 12. | Indian Air Travel Tax Act | 1971 |
| 13. | The Refugee Relief Taxes (Abolition) Act | 1973 |
| 14. | Illegal Migrants (Determination by Tribunals) Act | 1983 |
| Provincial Legislation | | |
| 15. | East Punjab Evacuees (Administration of Property) Act | 1947 |
| 16. | United Provinces Land Acquisition (Rehabilitation of Refugees) Act | 1948 |
| 17. | Bombay Refugees Act | 1948 |
| 18. | U.P. Land Acquisition (Rehabilitation of Refugees) Act | 1948 |
| 19. | East Punjab Refugees (Registration of Claims) Act | 1948 |
| 20. | East Punjab Refugees (Registration of Land Claims) Act | 1948 |
| 21. | East Punjab Refugees Rehabilitation (Buildings and Building Sites) Act | 1948 |
| 22. | East Punjab Refugees Rehabilitation (House Building Loans) Act | 1948 |
| 23. | East Punjab Refugees (Rehabilitation and Building Sites) Rules | 1948 |
| 24. | Madhya Pradesh Refugees Rehabilitation (Loans) Act | 1949 |
| 25. | Mysore Administration of Evacuee Property (Emergency) Act | 1949 |
| 26. | Mysore Administration of Evacuee Property (Second | 1949 |

| S. No. | Legislation | Year |
|--------|---|------|
| | Emergency) Act | |
| 27. | Patiala Refugees (Registration of Land Claims) Act and later the Patiala Refugees (Registration of Land Claims) Ordinance, 2004 | 1948 |
| 28. | Immigrants (Expulsion from Assam) Act | 1950 |
| 29. | Goa Daman & Diu Administration of Evacuee Property Act | 1969 |

The definitional elements of the term ‘refugee’/ ‘displaced person’/ ‘evacuee’ in some of the aforementioned legislation indicated towards a property and ‘point in time’ based concept.

As per the Displaced Persons (Claims) Supplementary Act, 1954 a ‘*displaced person*’ someone who, on account of the setting up of the Dominions of India and Pakistan, or on account of civil disturbances or the fear of such disturbances in any area now forming part of Pakistan, has after the 1st day of March, 1947 left, or been displaced from, his place of residence in such area and who has been subsequently residing in India and includes any person who is resident in any place in India and who for that reason is unable or has been made unable to manage, supervise or control any immovable property belonging to him in Pakistan.⁶

The Administration of Evacuee Property Act, 1950 defines an ‘evacuee’ as any person who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1st day of March 1947, left, any place in a State for any place outside the territories now forming part of India, or who is resident in any place now forming part of Pakistan and who for that reason is unable to occupy, supervise or manage in person his property in any part of the territories to which this Act extends; or whose property in any part of the said territories has ceased

⁶ See also V. Vijayakumar, Institutional Response to Refugee Problem in India, Paper presented at the Conference of Scholars & other Professionals working on Refugees and Displaced Persons in South Asia (Feb. 9-11, 1998).

to be occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorised person or who has, after the 14th day of August 1947, obtained otherwise than by way of purchase or exchange, any right to, interest in or benefit from any property which is treated as evacuee or abandon property under any law for the time being in force in Pakistan or who has, after the 18th day of October 1949, transferred to Pakistan without the previous approval of the Custodian, his assets or any part of his assets situated in any part of the territories which this Act extends; or someone who has, after the 18th day of October 1949, acquired, if the acquisition has been made in person, by way of purchase or exchange or, if the acquisition has been made by or through a member of his family in any manner whatsoever, any right to interest in or benefit from any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan.

III. THE EXTRAORDINARY CASE OF THE BOMBAY REFUGEES ACT, 1948

One of the provincial legislation which stands out in defining ‘refugee’ was the Bombay Refugees Act, 1948. The Bombay Refugees Act, 1948 *vide* Section 2 defined the term ‘*refugee*’ as any person who has since the first day of August 1947, entered the State of Bombay, having left his place of residence elsewhere on account of civil disturbances in that place or the fear of such disturbances. The aforementioned definition gave a top spin to the refugee concept as it provided a scope for recognising even such persons as refugees who migrated to the State of Bombay from within the Indian territories and not necessarily from East or West Pakistan only.

The *vires* of the term ‘*refugee*’ as contained in the Bombay Refugees Act, 1948 was challenged in the 1952 case of *Sanwaldas Gobindram v. State of Bombay*,⁷ wherein it was categorically held by Tendolkar, J. that the definition of ‘*refugee*’ as per the Bombay Refugees Act, 1948 embraces within its scope persons coming from another province also. Per Tendolkar, J.:

[I]n my opinion, the definition clearly embraces within its scope a person who has come into the Province from another Province and

⁷ AIR 1953 Bom 415

to the extent to which it does so the Act falls within entry 50 in the Federal Legislative List in Sch. 7, Government of India Act, viz., "Migration within India from or into a Governor's Province or a Chief Commissioner's Province."⁸

Moreover, the Bombay Refugees Act, 1948 proved to be a social legislation too. It facilitated the public health, sanitation and safety of the refugees as well as the local population, which also faced a danger of getting affected by any contagious disease and health concerns of refugees coming from outside the State of Bombay. The preamble of the Bombay Refugees Act, 1948 stated:

Whereas it is expedient to provide for the registration and to regulate the movement of refugees with a view to facilitating their relief and rehabilitation and to securing public health, sanitation and safety and for certain other purposes herein specified; It is hereby enacted as follows.⁹

IV. UNDERSTANDING THE HISTORY OF LAWS PERTAINING TO DISPLACED PERSONS FROM PAKISTAN

On the mid-night of August 15, 1947, unfortunately our current Constitution was not in place. The Government of India Act, 1935, which held the stamp of our colonial masters, was the *grund norm*. The Government of India Act, 1935 originally kept matters relating to evacuee property and the relief and rehabilitation of displaced persons in the Provincial Legislative List i.e. List II of the Seventh Schedule of the Government of India Act, 1935, as adapted. In August 1949 *vide* the Government of India (Third) Amendment Act, 1949, Entry 31B- '*Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property*' and entry 31C- '*Relief and rehabilitation of persons displaced from their original Place of residence by reason of the setting up of the Dominions of India and Pakistan*' were added to the Concurrent Legislative List i.e. List III of the Seventh Schedule of the Government of India Act, 1935, as adapted.

⁸ *Id.* at ¶ 9

⁹ Bombay Refugees Act, 1948

At this juncture, it would be important to see the need and legislative intent behind shifting the matters relating to evacuee property and the relief and rehabilitation of displaced persons from the Provincial Legislative List to the Concurrent Legislative List of the Seventh Schedule of the Government of India Act, 1935, as adapted. At this point in time our Constitution was not in place and the laws were made by the Constituent Assembly created post independence. The Constituent Assembly showed immense exuberance in realising the need to pass the Government of India (Third) Amendment Act, 1949. The law empowered the Union legislature to make and consolidate laws pertaining to displaced persons. Before that, as mentioned above, there was plethora of provincial laws pertaining to this subject which was source of lot of jurisdictional ambiguity.

Per, Biswanath Das, member Constituent Assembly of India (Orissa, General)-

[R]egarding evacuee property the Government have been negotiating with the Pakistan Government. Sub-clause (1) of paragraph I reads: "Property has been left behind in either Dominion by those who have migrated to the other. This is being called evacuee property. It has to be taken over, managed and disposed of according to any agreement reached between the two Dominions". They propose to have further negotiations in this regard. There cannot, therefore, be any objection in this regard from any quarter. I for myself feel that strong measures in this regard are necessary to ensure rehabilitation of evacuees who have migrated from Pakistan. To me it seems that the Bill is a necessity and that it should be passed without much discussion, and the sooner you do it the better for all.¹⁰

Our constitutional forefathers in the constituent assembly were also wise enough to identify the crises at that time and their determination was reflected in the swiftness by which complex amendments were made in the Government of India Act, 1935 in order to tackle the refugee related issues.

¹⁰ 9 CONSTITUTIONAL ASSEMBLY DEBATES, 1949, 451

V. CHARTING THE HISTORY OF EVACUEE LEGISLATION IN INDIA

The first and foremost legislation regarding claims and management of the evacuee properties was the East Punjab Evacuees (Administration of Property) Ordinance, 1947 (hereinafter referred to as the '*1947 Ordinance*') Thereafter, the ordinance was enacted into the East Punjab Evacuees (Administration of Property) Act, 1947 (hereinafter referred to as the '*Act of 1947*'). The Act of 1947 received the assent of the Governor General on December 12, 1947 and was first published in the East Punjab Gazette Extraordinary on December 13, 1947. By application of Section 23 it repealed the 1947 Ordinance. It was extended to Delhi and remained in force till it was repealed.

The Evacuee Property (Chief Commissioners' Provinces) Ordinance, 1949 (hereinafter referred to as the '*Ordinance No. XII*') was further amended by the Administration of Evacuee Property (Chief Commissioners' Provinces) Amendment Ordinance No. XX of 1949 which was published in the Gazette of Indian Extraordinary on August 23, 1949, after compliance with the provisions of Section 103 of the Government of India Act, 1935. The amendments were more or less of a formal nature. As already mentioned in August 1949 the Government of India (Third) Amendment Act, 1949, was enacted by which entry 31B was added in the Concurrent List III of the Seventh Schedule in the Government of India Act, 1935, as adapted. The entry which was inserted was to the "Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property" in the Concurrent List.

Thereafter came, the Administration of Evacuee Property Ordinance No. XXVII of 1949 (hereinafter referred to as the '*Ordinance No. XXVII*'). By Section 55 Ordinance No. XII was repealed and by sub-section (3) anything done or any action taken in the exercise of any power conferred by that Ordinance was saved in the same manner as by the previous legislation. Ordinance No. XXVII was followed by the Administration of Evacuee Property Act, 1950 which was published in the Gazette of India Extraordinary dated April 18, 1950, Section 58 of which repealed Ordinance No. XXVII and saved the previous operation of the said Ordinance. Finally on September 6, 2005, *vide* the application of Section 2

of the Displaced Persons Claims and Other Laws Repeal Act, 2005, the Administration of Evacuee Property Act, 1950 was finally repealed. Table 2.0 below lists down the chronological enactment of the laws leading to the creation of the principal legislation of the Administration of Evacuee Property Act, 1950.

Table 2.0

| S. No. | Legislation | Year |
|---------------|---|-------------|
| 1. | East Punjab Evacuees (Administration of Property) Ordinance | 1947 |
| 2. | East Punjab Evacuees (Administration of Property) Act | 1947 |
| 3. | Evacuee Property (Chief Commissioners' Provinces) Ordinance | 1949 |
| 4. | Administration of Evacuee Property (Chief Commissioners' Provinces) Amendment Ordinance | 1949 |
| 5. | Government of India (Third) Amendment Act | 1949 |
| 6. | Administration of Evacuee Property Ordinance | 1949 |
| 7. | Administration of Evacuee Property Act | 1950 |
| 8. | Evacuee Interest (Separation) Act | 1951 |
| 9. | Displaced Persons Claims and Other Laws Repeal Act | 2005 |

VI. REPEAL AND SUBSEQUENT CONFUSION

The Displaced Persons (Claims) Act, 1950, the Administration of Evacuee Property Act, 1950, the Evacuee interest (Separation) Act, 1951, the Displaced Persons (Claims) Supplementary Act, 1954 and the Displaced Persons (Compensation and Rehabilitation) Act, 1954 were enacted, inter-alia to make provisions for the registration and verification of claims of displaced persons in respect of immovable property in Pakistan, the administration of evacuee, providing for the separation of the interests of evacuees from those of other persons in property in which other persons are also interested, the payment of compensation and rehabilitation grant to displaced persons and the disposal of

certain proceedings pending under the Displaced Persons (Claims) Act, 1950. The Government of India, in consultation with the State Governments and Union Territories, enacted and notified the Displaced Persons Claims and Other Laws Repeal Act, 2005, on September 6, 2005, thereby repealing the aforementioned legislation.

This step was taken after reviewing the current issues which have cropped with regard to the settlement of the claims of the displaced persons. A number of persons unconnected with claimants, posing as their legal heirs were presenting fraudulent claims for lands. It was therefore, felt necessary to repeal the aforesaid Acts and to discourage such fraudulent claims. The repealing Act was enacted pursuant to the recommendation of a Core Group which recommended the repeal of aforesaid Acts and Rules made thereunder.

The major ambiguity appeared subsequent to the repeal of the above mentioned Acts. Various State Governments uncertain as to whether the proceedings, which were initiated before the repeal of aforesaid Acts, could continue even after the said repeal. Owing to this technical glitch, the Ministry of Home Affairs issued two advisories, containing advice of the Ministry of Law and Justice *vide* letter No.MHA/RD/SW/CC/99 dated October 19, 2005 and letter No.MHA/RD/SW/CC/99 dated November 18, 2005. The purpose of these advisories was to bring to the notice of the States/UTs the interpretation and applicability of Section 6 of the General Clauses Act, 1897 as interpreted in the judgements of the Hon'ble Supreme Court in *M.S. Shivananda v. Karnataka State Road Transport Corporation*¹¹ and *Bansidhar v. State of Rajasthan*¹² and also to advise the States and the UTs about continuance or other wise of the authorities prescribed under the repealed Acts.

Section 6(c) of the General Clauses Act made it clear that where this Act, or any Central Act or regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears shall not affect any right , privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

¹¹ (1980) 1 SCC 149

¹² (1989) 2 SCC 557

In *Kolhapur Canesugar Works Limited v. Union of India*¹³, the Apex Court has held that the operation of repeal or deletion as to the further and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provisions dealing with the same contingency is introduced without a saving clause then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision.

In *M.S. Shivananda v. Karnataka State Road Transport Corporation*¹⁴ the Apex Court has held that the distinction between what is and what is not a right preserved by the provision of Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope or expectation of, or liberty to apply for acquiring a right.

The Apex Court in *Bansidhar v. State of Rajasthan*¹⁵ has again held that the 'right' must be 'accrued' and not merely an inchoate one. Thus under the repealed Acts, there is no 'accrued' or 'acquired' right in favour of the claimants but is a mere hope or expectation. In view of the above legal position and reading through statement of objects and reasons of said repealing Act, it can be said that the proceedings under the repealed Acts will come to an end and cannot continue after such repeal.

However, the aforementioned two advisories appear to have been interpreted by some of the State Governments to imply that all the proceedings under the repealed Acts, including settlement of unsatisfied verified claims, consideration of appeals and revision/review petitions, implementation of directions of the Courts for settlement of pending claims etc., will come to an end. This has resulted in filing of a number of representations/legal petitions for settlement of pending claims under Section 6 of the General Clauses Act.

¹³ AIR 2000 SC 811

¹⁴ *Supra* note 11

¹⁵ *Supra* note 12

The matter was therefore, considered in detail by the Ministry of Home Affairs, in consultation with the Ministry of Law & Justice and after ascertaining the ground situation from some of the State Governments/UTs concerned.

Pursuant thereto, and in order to remove ambiguity and doubts which appear to have been created, it has now been clarified that the enactment of the Displaced Persons Claims and Other Laws Repeal Act, 2005 would not affect disposal of the following categories of cases and the State Governments/UTs may, therefore, take action as appropriate, to settle them under the relevant State Laws or the General Clauses Acts:

1. Unsatisfied verified claims filed under the Displaced Persons (Claims) Act, 1950, in which right has accrued or has been acquired and which were pending as on 6.9.2005, the date on which the Displaced Persons (Compensation & Rehabilitation) Act, 1954 and other related Acts were repealed;
2. Cases in which directions have been issued by various Courts for settlement of claims filed, confirming that an acquired or accrued right exists in favour of the claimant, under Displaced Persons (Claims) Act, 1950;
3. Verified claims in which full compensation has not been given so far; and
4. Appeals revision/review petitions filed against orders passed by the authorities prescribed under the repealed Acts which are yet to be disposed of.

It has been finally been clarified that cases in which right has not accrued or has not been acquired and are merely inchoate in nature or based on mere hope or expectation cannot be considered under the General Clauses Act as per the judgements of the Apex Court mentioned above. As regards revival of the authorities prescribed under the repealed Acts, it has been clarified that since the subject stands transferred to the State Governments, action for settlement of pending matters, can be taken by the authorities prescribed under any state law that may have been enacted or in any other manner as considered appropriate and it may not be necessary to revive the authorities prescribed under the

repealed Acts.

VII. CONCLUDING REMARKS

Indian directory on refugee and displaced person laws was a result of an extraordinary time which called for extraordinary measures. It is matter of rather immense proud that the Indian laws related to refugees and displaced persons showed a great deal of vision as such laws were not narrow and were capable of providing solutions to a wide range of unforeseen refuge related problems.

The refugee laws in India also exemplified serious governmental consideration and backing which is very rare to expect from Indian administration. Be it the formulation of special tax laws for supporting welfare measures for the refugees of erstwhile East Pakistan or laws for a regulated transfer of property via custodian between the subjects of Pakistan and India, Indian laws did provide practical solutions.

It is also noteworthy that the delicate implementation of the refugee laws and regulation of refugee issues received a setback only by the attitude of the recent governments. The whole constitutional ambiguity regarding the appropriate jurisdictional list of the Seventh Schedule has not been dealt properly by the government and its law offices. Contradictory directions and advisories have added to the already existing ambiguity post the repeal of the refugee laws discussed in this paper.

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