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Research Papers

Note and Comments

Book Review

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Volume 5-6: Issue 2-1, 2015-16

Panel of Referees

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From the Chief Editor

Publication of Law journal is an integral part of legal academics and research initiatives.Pragyaan – Journal of Law is a collection of scholarly research papers contributed by legal scholars all across India and abroad. It is our collective efforts to constantly upgrade the contents and quality of Pragyaan: JOL, with each issue.

This academic venture has strong support and motivation of ShriAmitAgarwal,Chairman, Board of Governors, IMS Unison University; Prof. M. P. Jain, Chancellorand Dr. R. K. Pandey, Vice Chancellor.

Presence of eminent scholars from various continents and countries as honorary members of International Advisory Board and, similarly, the active association of distinguished legal scholars of India as members of National Advisory Board add grace and glory toPragyaan: JOL. I am sincerely thankful to them all for associating with us.Since this journal is Peer reviewed our dedicated team of Referees help us in selecting quality material for each issue.

Dr. SarojBohra, as Editor and the team of Assistant Editors deserve all praise for doing hard work in bringing this combined issue of December 2015 and June 2016 in record time.

I take this opportunity to invite articles, notes and comments, case analysis and reviews of leading contemporary books in the field of law and justice, from among legal fraternity. It is our policy to encourage our younger and upcoming legal scholars. However, the selection of articles will be strictly based on merit and report of reviewers.

Best wishes and season's greetings.

Dr. M.K.Bhandari
Professor & Dean, School of Law
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From the Desk of Editor

Education in the real sense is the spirit of enquiry ensuing in new knowledge and path breaking acumens on mundane ideas and ways of living. Pragyaan: Journal of Law (JOL) is a bi – annual, peer reviewed Journal which is designed to cover a broad spectrum of topical issues, which are set within the framework of changing global scenario; highlighting the catalytic nature of legal framework of society. The result is an articulate exposition which offers the readers a clear overview of the broader thematic influences on the law generally whilst also focusing more specifically on current manifestations of legal questions.

Its aim is to encourage writing that is interdisciplinary in nature expounding contemporary issues across the disciplines. It exhibits contemporary issues and challenges specific to law; with an interdisciplinary approach towards knowledge. It is the attempt of School of law to become the beacon of legal education by encouraging amalgamation of knowledge and best practices cutting across academia and research fraternity. In the current journal issue, we present a diverse selection of stimulating articles from scholars and students.

We express sincere gratitude to Shri Amit Agarwal, Chairman, BoG ; Dr. M.P. Jain, Chancellor; Dr. R. K. Pandey, Vice Chancellor and Dr. M.K. Bhandari, Dean, School of Law who has always encouraged our academic pursuits. We would like to thank our steadfast International and National Advisory Board and also Panel of Referees whose guidance and support make our journal possible and we are deeply indebted to them for the time and effort that they put into our journal. In addition, we thank the generous contributors who have made publishing the *Journal* possible. We hope that the journey of legal research is fruitful for not only to the fraternity and students but also to general public at large.

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Rights of Women under Indian Constitution: An Overview

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ABSTRACT

Women have been victims of various forms of discrimination. Many scholars aver that the position of women in a given epoch has to be studied in the context of the material culture of the society concerned. In studies relating to Indian Women, some historians have attempted to link the economic development of the society with the position of women. Women constitute almost fifty of the world's population but India has shown disproportionate sex ratio whereby female population has been comparatively lower than males. There are constitutional and legal provisions to safeguard the interest of women. In this article an attempt is made to analyze critically effectiveness of these provisions to enhance the status of women and protect their rights. The Parliament of India has realized the importance of a monitoring institution to examine and investigate all matters relating to the safe guards provided to woman under the Constitution and other laws.

Key Words: Constitution, Governance, Human rights, Innovative approach

1. Introduction

Women have a unique position in every society whether developed, developing or underdeveloped. It is evident from the various roles a woman plays during various stages of her life, as a daughter, wife, mother, sister etc., Inspite of her priceless contribution in the life of every individual; she still belongs to a vulnerable section of the society due to several social barriers and impediments. The position of Indian women is no better compared to their counterparts in other parts of the world. The rich and the poor alike are the victims of social barriers and disadvantages of varying kinds.[1]

India seems to be occupying a significant position in terms of quantity and diversity of material in women's studies. Though the concern for studying the position of women and organizing action for improving the conditions of women is not new, what is strikingly different is the new perspective based on theoretical knowledge and ideological underpinning both in research and in action?[2] In order to have a better understanding of the present social structure and position of women therein, it is imperative to know the operation of various historical, political, cultural and economic factors moulding the society. It is crucial to have a brief look at the past society, because some of the norms and values affecting women today have their roots in the past.[3]

In India almost half of the Indian population is women. They have always been discriminated against. They are suffering discrimination in silence in this civilized world. It requires therefore no evidence to prove her pathetic situation in the primitive society. Even though self-sacrifice and self-denial are their nobility and virtue, yet they have been made the victims of all inequalities, indignities, inequity and discrimination, from time immemorial. These factors prompted the legislature to make various laws to give the women their due. The Constitution of India prohibits interalia any discrimination solely based on the grounds of sex in general and in the matter of public employment. Various other laws have been enacted to deal with personal matters like marriage, divorce and succession etc., of the women.[4]

2. Status of Women in India

India is a multifaceted society where no generalization could apply to the nation's various regional, religious, social and economic groups. Nevertheless certain broad circumstances in which Indian women live affect the way they participate in the economy. A common denominator in their lives is that they are generally confined to home, with restricted mobility, and in seclusion. Other, unwritten, hierarchical practices place further constraints on women.

Women in India enjoy a unique status of equality with the men as per constitutional and legal provision.[5] But the Indian women have come a long way to achieve the present position. In ancient India, though patriarchal system was highly prevalent; women enjoyed a position of respect and reverence. Several inscriptions make reference to the status of women in that they enjoyed the freedom to make liberal gifts to religious institutions like temples, dharmasalas not merely for the welfare of heads of the families but for their parents as well.[6]

Gender inequality in India can be traced back to the historic days of Mahabharata when Draupadi was put on the dice by her husband as a commodity. History is witness that a woman was made to dance both in private and public places to please men. In Indian society, a female

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1 Dr. G.B. Reddy, Women and the Law, Gogia Law Agency, Hyderabad (2012) at p. vii.

2 Neera Desai, M. Krishnaraj, *Women and Society in India*, 2nd Edition, Ajanta Publications, Delhi (1990) at p. 4.

3 Ibid at p. 23

4 Supra Note 1 at p. viii

5 Dhruba Hazarika, *Women Empowerment in India: A Brief Discussion*, International Journal of Educational Planning & Administration, Volume 1, Number 3 (2011) at p. 199.

6 *Status of Women In India – Historical Background*. Available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/8105/10/10_chapter%202.pdf

has been always dependent on male members of the family even though the scenario is changing slowly. A female was not allowed to speak in a loud voice in the presence of elder members or her in-laws. In the family, every fault fell on her to make her responsible. As a widow her dependence on male members of the family will be more. In many social activities she is not permitted to mix with other members of the family. On the other hand, she has a very little share in political, social and economic life of the society.[7]

The status of women in any civilization shows the stage of evolution at which, the civilization stands. The term 'status' includes personal, proprietary rights and also duties, liabilities and disabilities. With regard to the status of women in Indian society at large, it should be noted that no nation has held their women in higher esteem than the Hindus. The Indian civilization which dates back to thousands of years has produced great women ranging from Braham vadinis (lady Rishi) to states woman, from ideal wife to warrior queen. Hindu mythology bears testimony to the fact that the status of Hindu woman during the Vedic period was honorable and respectable. The marriage was regarded as sacrosanct and the family ideal was high.[8]

There are references to manifest that, equal social and religious status was allowed to boys and girls in Vedic society. Boys and girls had equal opportunity for advanced education. Attainment of women in intellectual field is to be inferred from the fact that some of the hymns are attributed to female Rishis. They were on the same footing as men. They learnt the Vedas, were entitled to recite the Vedas and they were teachers as well as learners. They were poetesses, teachers and intellectuals of the day. In the Vedic era, women had sufficient freedom of going out to attend fairs, festivals, and assemblies. They were not confined to four walls of their family houses. There is no mention of Purdah system.

During the Moghul rule, the socio-economic status of women was very much lowered and they had to depend on the male in every activity. Social evils like purdah system came into force. Child marriage was prevalent. Lack of education, early marriage, non-existence of employment opportunities and absence of absolute property rights resulted in socio-economic inequality of females. Economic dependence made women socially backward. Incidence of female infanticide and custom of Sati could be witnessed.

During the British rule in India, legislation was used to bring about significant modifications in the structure of society. Various reforms were initiated with respect to status of women. Free India has carried forward the process to a point where legally at least men and women are equal. However, some of the basic cultural orientations towards men and women in contemporary Indian society have been shaped by the authority of classical texts, religious preaching, factors of historical development and the persistence of regional and local traditions. The contradictory attitudes expressed about women in classical texts persist in contemporary society. On the one hand, they are regarded as the highest embodiment of purity and power – a symbol of religiousness and spirituality; on the other hand, they are viewed essentially as weak and dependent beings requiring constant guidance and protection.

The early twentieth century, witnessed rise of the National Movement under the leadership of Mahatma Gandhi who gave a call for removing all the disabilities associated with women. At the same time, Raja Ram Mohan Rai, Iswar Chandra Vidyasagar and various other social reformers laid stress on women's education, prevention of child marriage, withdrawals of evil practice of sati, removal of polygamy etc. The National Movement and various reform movements paved the way for their liberations from the social evils and religious taboos. Culminating in the enactment of Act of Sati (abolish) 1829, Hindu Widow Remarriage Act' 1856, the Child Restriction Act, 1929, Women's Property Right Act, 1937, etc.[9]

Independence of India heralded a new era witnessing introduction of laws relating to women. The Constitution contemplates equality to men and women. It also confers special protection to women to promote their welfare effectively. Special laws were enacted to prevent indecent representation of women in the media and sexual harassment in workplaces. The law also confers women rights in the matter of adoption, maternity benefits, equal pay, good working conditions etc. At the international level, the UN Charter, the Universal Declaration of Human Rights and Convention on Elimination of All Forms of Discrimination against Women (CEDAW) seeks to guarantee better legal status to women.[10]

3. Role of Legislation in Ameliorating the Position of Women

Position of women in any society is the measuring rod of its civilization. In ancient India woman enjoyed equal status with man in all fields of life. She received the same education like men. Many Hindu religious books like Vedas, Upanishads, Ramayana, Mahabharata have mentioned the names of several women who were great scholars, poets and philosophers of the time. Wife was regarded as 'Ardhangini' which means she is half of her husband. An unmarried man was considered to be an incomplete man. All religious ceremonies were performed by the husband along with his wife.

But in the medieval period, the status of women went down considerably. She was considered to be inferior to man. Decline in the status of women in Indian society begins with the Muslim rule in India: customs of pardha, sati, child marriage, restrictions on widow marriage and prevalence of joint family system have been the factors responsible for the injustice meted out to women. The position of women in modern India has changed considerably. Her position in modern India is equal to that of men, socially,

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[7] Supra Note 5 at p. 200.

[8] Prof. Nirupama Prakash, Status of Women in Indian Society – Issues and Challenges in Processes of Empowerment. Available at : https://numerons.files.wordpress.com/2012/04/4status-of-women-in-indian-society.pdf

[9] Supra Note 5 at p. 200

[10] Centre for Study Of Society And Secularism, *"Status of Women in India: Problems and Concerns"* Mumbai. pp. 6-7.Available at: http://www.csss-isla.com/Status%20of%20Women%20in%20India%20Internees%20report%5B1%5D.pdf

economically, educationally, politically and legally. Her sufferings from Sati, Child arriage, Institution of temple prostitution do no longer exist. Today women have the right to receive education, inherit and own property and participate in public life. She has become economically independent. She can seek employment anywhere and remains a free individual. She enjoys the equal status with men in all.

Several factors like women's education, reform movements, women's participation in politics and much social legislation are responsible for the changes in the day-to-day life of women in contemporary India. To improve the positioning of women Parliament passed numeral statutory legislations to safeguard the Constitutional Rights of women. These legislative measures include, Hindu Widow Re-marriage Act (1856), Hindu Widow Re-marriage Act (1856), Hindu Marriage Act (1955), The Hindu Succession Act (1956), Equal Remuneration Act (1976), Child Marriage Restraint Act (1976), Immoral Trafficking (Prevention) Act (1986) and finally Pre-natal Diagnostic Technique (Regulation and Prevention of Measure) Act (1994) etc. Apart from these, various welfare measures have been taken up by the Government from time to time to empower the women take Mahila Samriddhi Yojana (1993), the Rashtriya Mahila Kosh (1992-93), Indira Mahila Yojana (1995), DWCRA Plan (1997) and Balika Samriddhi Yojana (1997). The Mahila Samriddhi Yojana and Indira Mahila Yojana have been merged into the integrated self-help group programme i.e., Swayam Siddha. The Government of India in 1953 established a Central Social Welfare Board with a nation-wide programme for grants-in-aid for women, children and underprivileged group. A separate department of women and child development was set up at the Centre in 1985 to give a district identity and provide a nodal point on matters relating to women's development. National Commission on Women was created by an Act of Parliament in 1992. Besides these, India has also ratified various International conventions and human rights.[11] Recently government of India introduced Sukanya Samruddhi Yojana exclusively for girl child between the ages of 1 to 10 years.

4. Women and their Constitutional Rights

'Women constitute half of the world population, perform nearly two-thirds of works hours, receive one-tenth of the world's income and own less than one-hundredth per cent of world's property.[12] Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequalities, indignities, inequality and discrimination.[13]

The Constitution contains many positive provisions which go a long way in securing gender justice. While incorporating these provisions, the framers of the Constitution were well conscious of the unequal treatment meted out to the fairer sex, from the time immemorial. The history of suppression of women in India is very long and the same has been responsible for including certain general as well as specific provisions for upliftment of the status of women. The rights guaranteed to the women are on par with the rights of men and in some cases the women have been allowed to enjoy the benefit of certain special provisions.

4.1 Preamble

The preamble to the Indian Constitution contains various goals including "the equality of status and opportunity" to all the citizens. This particular goal has been incorporated to give equal rights to the women and men in terms of the status as well as opportunity. It has been the basis for several legislations like Modern Hindu laws which aim at giving equal status and rights to the women.[14]

4.2 Political Rights

Even though the fact that women participated equally in the freedom struggle and, under the Constitution and law, have equal political rights as men, enabling them to take part effectively in the administration of the country has had little effect as they are negligibly represented in politics. There were only seven women members in the Constituent Assembly and the number later decreased further. Their representation in the Lok Sabha is far below the expected numbers. This has led to the demand for reservation of thirty three percent seats for women in the Lok Sabha and Vidhan Sabhas. Political empowerment of women has been brought by the 73rd and 74th Amendments which reserve seats for women in Gram Panchayats and Municipal bodies. Illiteracy, lack of political awareness, physical violence and economic dependence are a few reasons which restrain women from taking part in the political processes of the country.

4.3 Economic Rights

There have been series of legislation conferring equal rights for women and men. These legislations have been guided by the provisions of the Fundamental Rights and Directive Principles of State Policy but there is a total lack of awareness regarding economic rights amongst women. Laws to improve their condition in matters relating to wages, maternity benefits, equal remuneration and property and succession have been enacted to provide the necessary protection in these areas.

4.4 Social Justice

For providing social justice to women, the most important step has been codification of some of the personal laws in our country which pose the biggest challenge in this context. In the area of criminal justice, the gender neutrality of law worked to the disadvantage of a woman accused because in some of the cases it imposed a heavy burden on the prosecutor, for e.g. in cases of rape and dowry.

4.5 Fundamental Rights

The Constitution confers fundamental rights under Part III to all without any distinction between male and female. The framers of the Constitution were conscious of the unequal treatment and discrimination meted out to the fairer sex from time immemorial. Therefore in addition to

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[11] Supra Note 6

[12] A Report of the United Nations (1980)

[13] Justice K. Rama Swamy in Madhu Kishwar v. State of Bihar [(1996) 5 SCC 148

[14] Supra Note1 at p. 1

fundamental rights they included certain provisions in the directive principles of state policy and fundamental duties for the upliftment of the status of women.

Regarding fundamental rights Justice Bhagwati in Maneka Gandhi v. Union of India[15] observed

"These fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent."

(i) It follows that women should also be conferred fundamental rights for the development of their personality to the fullest extent.

(ii) The State shall not discriminate against any citizen interalia only on ground of sex.

(iii) It is empowered to make any special provision in favour of women and children (Article 15 (3). Accordingly women are entitled for equality before law, equal opportunities in matters relating to employment to any office under the state.

(iv) Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state (Article 16).

(v) The right to life and personal liberty of a woman can--'t be taken away except in accordance with the procedure established by law.

In Madhu Kishwar v. State of Bihar,[16] the apex court observed that denial of right of succession to women of Scheduled Tribes amounts to deprivation of their right to livelihood under Article 21. In Vishaka v. State of Rajasthan,[17] The Supreme Court, in the absence of legislation in the field of sexual harassment of working women at their place of work, formulated guidelines for their protection. These guidelines have become instrumental in enacting the prohibition of Sexual Harassment at Workplaces Act, 2013.

4.6 Directive Principles of State Policy

It contains the following important directives which aim at the betterment of women. The state has to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (Article 39 (a); and equal pay for equal work for both men and women (Article 39 (d)), promote justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39 A), make provision for securing just and humane conditions of work and for maternity relief (Article 42), promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitations (Article 46), raise the level of nutrition and the standard of living of its people and the improvement of public health (Article 47), promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (Article 51 (A) (e).

4.7 Fundamental Duties

There are provisions interalia which is concerned with the women. It can be inferred from one of the fundamental duties which enjoin an obligation on us to strive for excellence individual and collective in all spheres of life. It follows that a woman cannot be excluded in the nation building process. If excluded excellence cannot be achieved there is a fundamental duty which specifically envisages that practices which detrimentally affect the dignity of women shall be renounced.

5. Participation of Women in Government

The constitution ensures participation of women in government. Accordingly it provides as follows:

- Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Caste and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243 D (3).
- Not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243 D (4).
- Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243 T(3)) and
- Reservation to offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a state may by law provide (Article 243 T (4).[18]

6. Conclusion

Law cannot change society overnight. The change should also come from within. Law can certainly ensure that the disadvantaged are not given a raw deal. Constitution of India has ensured that women cannot be ignored. The Preamble to the Constitution, inter alia, assures justice, social economic and political, equality of status and opportunity and dignity of the individual. It recognizes women as class by itself and permits enactment of laws and reservations favoring them. Our Constitution prohibits all types of discrimination against women and lays a carpet for securing equal opportunity to women in all walks of life, including education, employment and participation. The legislature has also done a remarkable work in this regard. Various laws or legislations have been enacted to protect the women and their rights with a focus on principle of equality for permitting exceptions in the form of special provisions aiming at their welfare.

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[15] AIR 1978 SC 597

[16] (1196) 5 SCC 125

[17] AIR 1997 SC 3011

[18] *'Rights and Privileges of Women in India'. Available at:* http://statistics.puducherry.gov.in/new%20update/women%20and%20men%202010-11/II-1.pdf

Achieving Human Rights Objectives with Good Governance

Dr. Saroj Bohra*

ABSTRACT

Human rights are not only fundamental to the development of a stable, democratic and a prosperous society.Human rights and Good Governance are echoed globally and has become the yardstick of measurement of the democratization. The Constitution of India provides for a mechanism to ensure fundamental rights to every citizen of the country and to highlight the diverse spectrum of struggles would include land rights, dalit issues, adivasis, labour reforms, child rights, and rights of physically challenged people, gender discrimination, refugee rights and minority rights. This paper makes an effort to provide a framework for good governance in India by identifying its essential features and shortcomings in its working and emphasizes need for innovative approaches.

Key Words: Constitution, Governance, Human rights, Innovative approach

1. Meaning of Good Governance:

Good governance is associated with efficient and effective administration in a democratic framework. It is considered as citizen-friendly, citizen caring and responsive administration. Good governance emerged as a powerful idea with global agencies like the World Bank, United Nation Development Programme, Organisation for Economic Co-operation and Development, Asian Development Bank, etc. in the aid receiving countries.[1]

There is no single and exhaustive definition of "good governance," nor there is a limitation of its scope, that commands universal acceptance. The term is used with great flexibility; this is an advantage, but also a source of some difficulty at the operational level. According to General Kofi Anna[2] "Good governance is perhaps the single most important factor in eradicating poverty and promoting development."Francis Fukuyamacommentary[3] highlights the conceptual challenge of defining governance, for which there is very little agreement and there exists few empirical measures. It proposes a two-dimensional framework of using capacity and autonomy as a measure of executive branch quality. This framework explains the conundrum of why low income countries are advised to reduce bureaucratic autonomy while high-income ones seek to increase it.

Depending on the context and the overriding objective, good governance is said to encompass respect to human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance. According to O.P. Minocha, governance refers to "forms of political system and the manner in which power is exercised in utilizing a country's economic and social resources for development, where Government is defined as "the most powerful and coercive institution, which continues to be the major element of any system of governance".[4] The term good governance is being entangled in a debate of whether it means a government that governs the least" or "a Government that controls everything".[5] According to World Bank,[6] good governance is epitomized by predictable, open and enlightened policy making; a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs, and all behaving under the rule of law. From this definition it is clear that the good governance is an important task of a democratic government. There is a significant degree of consensus that good governance relates to political and institutional processes and outcomes that are deemed necessary to achieve the goals of development.

2. Fundamental characteristics of Good governance

The concept of good governance has been defined by The United Nations High Commission for Human Rights

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1 Rajalakshmi Mishra, Good Governance and Changing Role of Bureaucracy in Developing Countries: The Indian Experience, in Globalization and Good Governance (2004)

2 Kofi Atta Annan is a Ghanaian diplomat who served as the seventh Secretary-General of the United Nations from January 1997 to December 2006

3 Francis Fukuyama, "What is Governance?" GOVERNANCE, Volume 26 Issue 3 (2013)

4 O.P. Minocha, 'Good Governance: New Public Management Perspective' Indian Journal Of Public Administration, Vol. 44, No.3 (1998) at pp. 270-280

5 C. P. Barthwal, Good Governance in India, New Delhi, Deep & Deep publication (2003) at p.3

6 World Bank, Managing Development: The Governance Dimension, Washington Dc, Word Bank (1991), Word Bank, Governance and Development, Report of the task force Improving project Quality manila, ADB (1994)

(UHCHR)[7] which identifies five key attributes of good governance transparency; responsibility; accountability; participation; responsiveness (to the needs of the people).By linking good governance to sustainable human development, emphasizing principles such as accountability, participation and the enjoyment of human rights, and rejecting prescriptive approaches to development assistance, the resolution stands as an implicit endorsement of the rights-based approach to development.

The United Nations Development Programme's (UNDP)[8] report states that good governance comprises of the existence of effective mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences. Its essential characteristics are:

Rule of law. The attribute of "rule of law" is a prerequisite to enforce "full protection of human rights", especially of the vulnerable sections of the society. The protection of individual liberties follows the notion of democracy as a natural corollary. It envisages the pre-eminence of law as opposed to anarchy or capricious dictates. It involves equal accountability of all before the law irrespective of one's status.

Transparency. This concept is built on the free flow of information. Processes, institutions and information should be directly accessible to those concerned, and enough information should be provided to render them understandable and monitored.

Responsiveness. Institutions and processes should serve all stakeholders.

Equity. All men and women should have equal opportunity to maintain or improve their well-being.

Consensus orientation. Good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures

Effectiveness and efficiency. Processes and institutions should produce results that meet needs while making the best use of resources.

Strategic vision. Leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.

Participation. All men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their interests. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively

Accountability. Decision-makers in Government, the private sector and civil-society organizations should be accountable to the public as well as to institutional stakeholders. This accountability differs depending on the organization and whether the decision is internal or external to an organization.

It expressly linked good governance to an enabling environment conducive to the enjoyment of human rights and "prompting growth and sustainable human development." In underscoring the importance of development cooperation for securing good governance in countries in need of external support, the resolution recognized the value of partnership approaches to development cooperation and the inappropriateness of prescriptive approaches.

3. Good governance in the International Human Rights instruments

Human rights set out in the Universal Declaration of Human Rights of 1948 and codified and further spelled out in a series of international conventions. These lay down the minimum standards to ensure human dignity, drawing on the values found in different religions and philosophies. Governments worldwide have agreed that these conventions constitute an objective set of standards by which they can be judged. These instruments are applicable in the countries that have ratified them. From a human rights perspective, the concept of good governance can be linked to principles and rights set out in the main international human rights instruments. Article 21 of the Universal Declaration of Human Rights recognizes the importance of a participatory government and Article 28 states that everyone is entitled to a social and international order in which the rights and freedom set forth in the Declaration can be fully realized.

The core conventions are The International Convention on the Elimination of All Forms of Racial Discrimination (1965);The International Covenant on Civil and Political Rights (1966); The International Covenant on Economic, Social and Cultural Rights (1966). The two International Covenants on Human Rights contain language that is more specific about the duties and role of governments in securing the respect for and realization of human rights. Article 2 of the International Covenant on Civil and Political Rights requires states parties to respect and to ensure the rights recognized in the Covenant and to take the necessary steps to give effect to those rights. In particular, states should provide an effective remedy to individuals when their rights are violated, and provide a fair and effective judicial or administrative mechanism for the determination of individual rights or the violation thereof. Under the International Covenant on Economic, Social and Cultural Rights, states are obliged to take steps with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means. The other prominent instruments are Convention on the Elimination of All Forms of Discrimination against Women (1979) ;The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) ;The Convention on the Rights of the Child (1989); The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).The Convention on the Rights of Persons with Disabilities (2006) and The

[7] 'Office of the High Commissioner for Human Rights, Development -Good Governance', Available at: www2.ohchr.org/english/issues/development/governance/.../forside_02.html

[8] UNDP Report, Governance for Sustainable Human Development (1997)

International Convention for the Protection of All Persons from Enforced Disappearance (2006) are the recent one's in direction.

The human rights treaty monitoring bodies have given some attention to the different elements of good governance. The Committee on Economic, Social and Cultural Rights stated that "Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all." The Committee on the Rights of the Child has on several occasions addressed the issue of governments' capacity to coordinate policies for the benefit of the child and the issue of decentralization of services and policy-making. It has also addressed corruption as a major obstacle to the achievement of the Convention's objectives. The Human Rights Committee generally addresses issues related to the provision of adequate remedies, due process and fair trial in the context of the administration of justice in each state. It regularly emphasizes the importance of independent and competent judges for the adequate protection of the rights set forth in the Convention. It was debated[9] in UN General Assembly regarding the practical strategies to counter the threat of radicalization through people centered and inclusive measures, and the need to address drivers of violent extremism through "renewed focus on good governance, rule of law, sustainable development, respect for human rights, accountable institutions, the equitable delivery of services, the role of youth, women and marginalized and disenfranchised communities, education and inclusivity in the political process."

4. Relationship between Good governance and Human rights

Good governance and human rights are mutually underpinning. Human rights require a conducive and enabling environment, in particular appropriate regulations, institutions and procedures framing the actions of the State. Human rights principles provide a set of standards to guide the work of governments and other political and social actors and also provide a set of performance standards against which these actors can be held accountable. At the same time, good governance policies should empower individuals to live with dignity and freedom. Moreover, human rights principles inform the content of good governance efforts like they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. Although human rights empower people, they cannot be respected and protected in a sustainable manner without good governance. In addition to relevant laws, political, managerial and administrative processes and institutions are needed to respond to the rights and needs of populations. There is no single model for good governance. Institutions and processes evolve over time.[10] The importance and desirability of good governance and the relationship to respect for human rights was recognised and highlighted in the Government's 2003 foreign and trade policy white paper, Advancing the National Interest " Good governance is a basic condition for stability and prosperity in all countries. Open, accountable and transparent institutions and sustainable polices help deliver security, respect for human rights and economic development"[11]

The United Nations High Commission for Human Rights takes the definition even further by expressly linking it to the realisation of human rights: Governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights.[12] Good governance accomplishes this in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights. It has been said that good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights. The key question is: are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security?

5. Good governance, Human rights and Development

The interrelationship between governance, human rights and development is highlighted in the Department of Foreign Affairs and Trade Human Rights Manual. The Manual[13] states that effective governance, human rights and sustainable development are closely linked. Economic and social well-being influence a country's capacity for effective governance, which is in turn critical to realizing human rights, not least because it facilitates sustainable improvements in economic and social well-being. This view was generally supported in the evidence to the inquiry peace, justice; human rights and good governance are the pillars of development.[14]

The interconnection between good governance, human rights and sustainable development has been made directly or indirectly by the international community in a

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9 "High-Level Thematic Debate on Promoting Tolerance and Reconciliation: Fostering Peaceful, Inclusive Societies and Countering Violent Extremism." United Nation General Assembly, New York (2015)

10 HRBA Portal "What is the relationship between human rights and good governance?" Available at: http://hrbaportal.org/faq/what-is-the-relationship-between-human-rights-and-good-governance

11 DFAT, Advancing the National Interest, Canberra (2003) at p.114

12 'What is Good Governance', UNHCHR, Copyright 1996-2002, Office of the United Nations High Commissioner for Human Rights - Geneva, Switzerland. Available at: www.unhchr.ch/development/governance-01.html

13 DFAT. 1998. Human Rights Manual. Canberra, Commonwealth of Australia. See Submission 4, New South Wales Attorney General; Submission 16, UNICEF Australia; and Submission 17, Australian Legal Resources International

14 Mr. Paul Seger, Ambassador of Switzerland, Interview. Available at: http://mizzima.com/news-opinion/peace-justice-human-rights-and-good-governance-are-pillars-development-says-swiss

number of declarations and other global conference documents.[15] The Declaration on the Right to Development 1986 proclaims that every person "is entitled to participate in, contribute to, and enjoy economic, social, cultural and political development". In the Millennium Declaration, 2000, world leaders affirmed their commitment to promote democracy and strengthen the rule of law as well as to respect internationally recognized human rights and fundamental freedom, including the right to development. According to the United Nations strategy document on the millennium development goals (MDGs), entitled "The United Nations and the MDGs: a Core Strategy', "the MDGs have to be situated within the broader norms and standards of the Millennium Declaration," including those on "human rights, democracy and good governance."

6. Good Governance and Constitutional provisions

The Constitution of India is one of the most elaborate fundamental laws ever adopted. It is evident that during the period between 1946 and 1949 Indian had formulated the concept of human rights. The Constitutional historian Granville Austin said the transcendent goal of the Indian Constitution was to promote "social revolution." For this, the framers intended to fulfill the basic needs of citizens, and hoped that it would bring about fundamental changes in the structure of Indian society. The theme of social revolution runs throughout the proceedings and documents of the Constituent Assembly. This theme formed the basis of the decision to adopt the parliamentary form of government and direct elections, the Fundamental Rights, the Directive Principles of State Policy, and many of the executive, legislative, and judicial provisions of the Constitution. The preamble to the Indian Constitution reflects broadly the goals and ideals the Indian state should pursue for the well-being of its people. The most important goal is "to secure to all its citizens justice, social and political' summarized the very purpose of any good state. The government has also to respect the dignity of the individual and promote national unity.

India incorporated a number of basic human rights as guaranteed fundamental rights, elaborated in every possible manner, in Part III of the Constitution. They did draw upon the Universal Declaration of Human Rights issued by the United Nations in 1948 incorporating alongside, in Part IV of the Constitution, certain 'Directive Principles of State Policy' which are principles that would be fundamental for "good governance."[16] The Fundamental Rights have been evident through legislative measures, executive action or judicial pronouncements to further the object sought to be achieved by the Directive Principles. The Universal Declaration of Human Rights, 1948 recognizes that "Everyone is entitled to a social and international order in which the rights and freedom set forth in this declaration can be fully realized,[17] closely following this Art. 38 of the Indian Constitution requires the state to "Strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice social, economic and political shall inform all the institutions of the national life".

Fundamental Rights and the Directive Principles of State Policy are the conscience of the Constitution, because they provide the base for human rights and human development policies for governance. These are basic human rights and have been interpreted as civil, political, economic, social and cultural rights. Articles 12-35 of Part III elaborate on the fundamental rights. Articles 36-51 outline the framers' vision for good governance and constitute the Directive Principles of State Policy. They are not enforceable in a court of law, but the principles laid down therein are fundamental to governance. It is the duty of the state to apply these principles in making and implementing laws.

7. Judicial Governance

The term 'judicial governance' in itself is subject to challenge as the judiciary is not supposed to be involved in 'governance'. Yet, the judiciary's efforts to infuse accountability in the functioning of government institutions and the growth and development of human rights jurisprudence have demonstrated the importance of judicial governance.[18] The judiciary is uniquely placed in the matrix of power structure within the system of governance. In order to guarantee that the role of law would inure to, the Constitution makers made provisions for independence of the judiciary. There may be a plethora of regulations, rules and procedures but when disputes arise, they have to be settled in a court of law. The efforts of the Indian judiciary to infuse accountability in the functioning of government institutions, and the growth and development of human rights jurisprudence have demonstrated the central importance of judicial governance. And that it has posed critical challenges to parliamentary accountability and executive powers and, reinforced the need for improving efficiency and effectiveness of governmental institutions.

In Public Interest Litigation and Anr. v. Union of India and Anr.[19] the Supreme Court held that State actions causing loss are actionable under public law and this is as a result of innovation to a new tool with the court, which are the protectors of civil liberty of the citizens and would ensure protection against devastating results of State action. The principle of public accountability and transparency in State action even in the case of appointment, which essentially must not lack bonafide was enforced by the Court. Earlier in Prem Shankar Shukla,[20] the Supreme Court found the practice of using handcuffs and fetters on prisoners violating the guarantee of basic human dignity, which is part of the constitutional culture in India and thus not standing the test of equality before law guaranteed under Article 14 , fundamental freedom under Article 19 and the right to life and personal liberty under Article 21, which

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15 Article 1

16 Article 37

17 Article 28

18 http://www.thehindu.com/todays-paper/tp-opinion/constitutionalism-and-judicial-governance/article1932166.ece

19 (2005) 8 SCC 202

20 Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526

insists upon fairness, reasonableness and justice in the very procedure which authorities stringent deprivation of life and liberty. Reiterating the view taken in Motiram,[21] the Supreme Court in Hussainara Khatoon,[22] expressed anguish at the "travesty of justice" on account of under-trial prisoners spending extended time in custody due to unrealistically excessive conditions of bail imposed by the magistrate or the police and issued requisite corrective guidelines, holding that "the procedure established by law" for depriving a person of life or personal liberty (Article 21) also should be "reasonable, fair and just".

In Nilabati Behera,[23] the court asserted the jurisdiction of the judiciary as "protector of civil liberties" under the obligation "to repair damage caused by officers of the State to fundamental rights of the citizens", holding the State responsible to pay compensation to the near and dear ones of a person who has been deprived of life by their wrongful action, reading into Article 21 the "duty of care" which could not be denied to anyone. The court referred to Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 which lays down that "anyone who has been the victim of unlawful arrest or Detention shall have an enforceable right to compensation".In Delhi Domestic Working Women's Forum,[24] the Court asserted that "speedy trial is one of the essential requisites of law" and that expeditious investigations and trial only could give meaning to the guarantee of "equal protection of law" under Article 21 of the Constitution. In D.K. Basu,[25] the Court found custodial torture "a naked violation of human dignity" and ruled that law does not permit the use of third degree methods or torture on an accused person since "actions of the State must be right, just and fair, torture for extracting any kind of confession would neither be right nor just nor fair".

Later in Vishaka and others v. State of Rajasthan and others[26] the court said that "gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. In the absence of domestic law occupying the field, to formulate effective measures to check the sexual harassment of women at all workplaces, the contents of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein and for the formulation of guidelines to achieve this purpose in the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at all workplaces, guidelines and norms are hereby laid down for strict observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution."

The aforesaid cases are only few examples from the judgments on human rights. The paradigm of Indian judicial system is a testimony to the manner in which judiciary can contribute in good governance. Judiciary has, thus, played a crucial role in development and evolution of society in general and in ensuring good governance by those holding reign of power in particular. Perhaps, there can be no two views about the significance of the role expected of judiciary, vis-a-vis the goal and good governance in a free society.

8. Summary and Conclusion

The human rights issues primarily concern the relationship between the state and its citizens. The economic development mainly depends on good governance. There are two aspects of good governance, the legitimacy and capacity. World Bank publications show that strong government intervention and support services can promote economic growth. Governance capacity of the State is concerned with the ability to provide services to the public and to promote efficiency and economy in the provision of human rights.

How can human rights principles be meaningfully brought into governance reforms? What types of policies and initiatives do these principles translate into? Once States have adopted appropriate legal frameworks, how can they and other social actors improve implementation through governance reforms? By presenting innovative efforts from around the world to design and carry out governance reforms and protect human rights, this is an attempt to show how governance can be reformed to contribute to the protection of human rights. The following are good governance practices for the protection of human rights.[27]

Strengthening Democratic Institutions: When led by human rights values, good governance reforms of democratic institutions create avenues for the public to participate in policymaking either through formal institutions or informal consultations. They also establish mechanisms for the inclusion of multiple social groups in decision-making processes, especially locally. Finally, they may encourage civil society and local communities to formulate and express their positions on issues of importance to them. There should be institutionalizing public participation in local development ;strengthening women's political representation; there must be role of the media in building the capacity of rights-holders to participate in local decision-making; human rights must be strengthen and managing conflict through a participatory, inclusive and transparent constitution-

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21 Motiram and others v. State of M.P. AIR 1978 SC 1594

21 Hussainara Khatoon and others v. Home Secretary State of Bihar AIR 1979 SC 1360

22 Nilabati Behera v. State of Orissa 1993 SCC 746

23 1995 SCC 14

24 AIR 1997 SC 610

25 AIR 1997 SC 3011

26 Office of The United Nations High Commissioner For Human Rights"Good Governance Practices For The Protection of Human Rights". Available at :http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf

making process ; promoting the political participation of indigenous groups and managing conflict.

Improving Service Delivery: In the realm of delivering State services to the public, good governance reforms advance human rights when they improve the State's capacity to fulfill its responsibility to provide public goods which are essential for the protection of a number of human rights, such as the right to education, health and food. Reform initiatives may include mechanisms of accountability and transparency, culturally sensitive policy tools to ensure that services are accessible and acceptable to all, and paths for public participation in decision-making. Like education services must be adapted to the needs of the rural poor; strengthening institutional capacities to improve family protection services; equitable access to social services through a transparent budget process; improving access to health services through inter cultural mediation; social entitlements to promote social inclusion.

The Rule of Law: When it comes to the rule of law, human rights sensitive good governance initiatives reform legislation and assist institutions ranging from penal systems to courts and parliaments to better implement that legislation. Good governance initiatives may include advocacy for legal reform, public awareness-raising on the national and international legal framework and capacity-building or reform of institutions. Like implementing civil rights in the prison system through capacity development and empowerment; legal and policy reform for the protection of the rights of migrant workers ; implementing the right to effective remedy and redress for the victims of torture; to strengthen human rights in legislation and policy.

Combating Corruption: Finally, anti-corruption measures are also part of the good governance framework. Although the links between corruption, anti-corruption measures and human rights are not yet greatly explored, the anti-corruption movement is looking to human rights to bolster its efforts. In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information sharing, and monitoring Governments' use of public funds and implementation of policies, empowering the public against corruption by publishing administrative procedures and fees; transparency in public expenditures through participatory social auditing; combating bribery in the public health sector; municipal reform to combat corruption and improve the delivery of services; to address the supply side of corruption by curbing bribery by companies supported by export credit agencies.

The government must amend laws to include a time frame to carry out work in a transparent manner that ensured accountability. The penal clauses must also be introduced so that action could be taken against the official. Rulers must be strictly bound by generally accepted norms and controlled by institutions to enforce those. Good governance must be made a fundamental right and justiciable there was scope for corruption within the Constitutional framework as well as outside it. Widening the scope of the definition of corruption and creating the Lokpal institution through an act of Parliament. Also, the Lokpal institution should be accountable to the Lok Sabha and the general public. To ensure sustainable human development, actions must be taken to work towards this ideal with the aim of making it a reality.

Foreign Direct Investment in Retail Sector in India: An Analysis

Gowri Vishnuprasad*

ABSTRACT

The milestone in Foreign Direct Investment (FDI) took place after the liberalization in 1991, when the laws relating to the foreign investments were relaxed. However liberalization of the policy allowing FDI was not a sudden change but it was a gradual process which took nearly four decades. The role played by international community was appreciable because it was responsible to develop liberal attitude of the countries towards the foreign investment. The paper aims to focus on the Foreign Direct Investment in Retail Sector in India.

Key Words : Liberalization, Foreign investments, Retail Sector

1. Introduction

India is the founder member of World Trade Organization (WTO)[1] and signatory to its General Agreement on Trade in Services (GATS).[2] This agreement includes wholesale and retailing services and all member countries are required to open up the retail trade sector to foreign investment. The government in a series of moves has opened up the retail sector slowly to FDI in India.[3] In India, retailing has been an important service industry. In particular, with faster growth of the overall economy, higher disposable incomes, and rapid urbanisation in recent years, there has been acceleration in the growth of this sector. I

t has been identified as a sunrise industry with enormous future growth potential.[4]

2. Overview of Foreign Direct Investment

FDI refers to capital inflows from abroad that is invested in or to enhance the production capacity of the economy.[5] It can be a subsidiary, joint venture or merger or acquisition and includes Greenfield and Brown field projects.[6] So, FDI is an investment made by a foreign company or entity into a company or entity based in another country.[7] FDI differ substantially from indirect investments such as portfolio flows, wherein overseas institutions invest in equities listed on a nation's stock exchange. Entities making direct investments typically have a significant degree of influence and control over the company into which the investment is made. Open economies with skilled workforce and good growth prospects tend to attract larger amounts of FDI than closed, highly regulated economies.[8] Organization

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1 The WTO is an intergovernmental organization which regulates international trade. The WTO officially commenced on 1 January 1995 under the Marrakech Agreement, signed by 123 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. The WTO deals with regulation of trade between participating countries by providing a framework for negotiating trade agreements and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements, which are signed by representatives of member governments and ratified by their parliaments. Most of the issues that the WTO focuses on derive from previous trade negotiations, especially from the Uruguay Round (1986–1994)

2 The GATS is a treaty of the WTO that entered into force in January 1995 as a result of the Uruguay Round negotiations. The treaty was created to extend the multilateral trading system to service sector, in the same way the GATT provides such a system for merchandise trade. All members of the WTO are signatories to the GATS. The basic WTO principle of most favoured nation (MFN) applies to GATS as well. However, upon accession, Members may introduce temporary exemptions to this rule.

3 Dr. Kapil Kumar Bansal and K.R.Kaushik, Foreign Direct Investment in Indian Retail Sector Pros and Cons, International Journal of Emerging Research in Management & Technology (2012) Available at http://www.ermt.net/docs/papers/Volume_1/Issue_1_November2012/V2N1001.pdf

4 Dr.Hiranya K. Nath, Foreign Direct Investment (FDI) in India's Retail Sector, Space and Culture, India (2013). Available at: http://spaceandculture.in/index.php/spaceandculture/article/view/17/7

5 Dr. Dinesh Bhakkad, Changing Scenario of Business and Commerce, Jalgaon: Prashant Publications, (2012) at p.127

6 Mahdi Naqdi Bahar, Foreign Direct Investment (FDI) in Indian Retail Sector, IOSR Journal of Business and Management, Vol.17, Issue 7 (July 2015) at pp.89-94.Available at: http://iosrjournals.org/iosr-jbm/papers/Vol17-issue7/Version-3/N017738994.pdf

7 Bryan Christiansen Pry Marke, Handbook of Research on Economic Growth and Technological Change in Latin America, USA: Business Science Reference(an imprint of IGI Global, 2014) at p.433

8 P.Veeraiah, Sunil Desai and G.Chaitanya, Impact of FDI on Indian Agriculture Sector – a Study, Tactful Management Research Journal, Vol.2, Issue 6 (March 2014) Available at : http://tmgt.lsrj.in/UploadedArticles/146.pdf

for Economic Cooperation and Development (OECD)[9] has defined FDI as investment by a foreign investor in at least 10 percent or more of the voting stock or ordinary shares of the investee company.[10]

2.1 Pre Liberalization Era: Foreign Direct Investment

Indian liberal attitude towards FDI was a gradual process which has evolved over time in tune with the requirements of the process of development in different phases. However it is pertinent to know that compared to industrializing economies, India followed a fairly restrictive foreign private investment policy until 1991 relying on bilateral and multilateral agreements. After independence India took up import substituting industrialization with a hope to improve the local capability in heavy industries including the machinery manufacturing sector. The main reason for concentrating on this sector was the limited skills and entrepreneurship in country. Foreign investors were assured of no restrictions on the remittance of profits and dividends and fair compensation in the event of acquisition. The foreign exchange crisis of 1957-58 led to the further liberalization in the government attitude towards FDI.[11]

However strict attitude was adopted by India in late 1960s as there was growth in capacity of domestic industry in manufacturing machineries and the remittances of dividends, royalties and technical fees etc. abroad grew up sharply on account of servicing of FDI and technology imports. Restrictions were put on proposals of FDI unaccompanied by technology transfer and those seeking more than 40 percent foreign ownership.[12] The government listed industries in which FDI was not considered desirable in view of local capabilities.[13] The guidelines evolved for foreign collaborations required exclusive use of Indian consultancy services wherever available. The renewals of foreign technical collaboration agreements were restricted.[14]

In 1973 new law that is Foreign Exchange Regulation Act (FERA) came into being according to which the foreign companies operating in India were required to reduce the foreign equity to 40% or below and it was mandatory to register under Indian corporate legislation. Exceptions were provided for companies operating in high priority or high technology sectors, tea plantations or those producing predominantly for exports.[15]

1980s witnessed liberalized attitude in FDI, as greater importance was given to Transnational Corporations and Indian market was thrown open for competition, policies were liberalized for import of technologies.[16] The policy changes adopted was the liberal for the purpose of granting license for industrial set up. Furthermore exemptions were granted from foreign equity restrictions under FERA to 100% export oriented units. Four more export processing zones were created to attract TNCs to set up export-oriented units. A degree of flexibility was introduced in the policy concerning foreign ownership, and exceptions from the general ceiling of 40% on foreign equity were allowed on the merits of individual investment proposals. Rules and procedures concerning payments of royalties and lump sum technical fees were relaxed and withholding taxes were reduced.[17]

2.2 Post Liberalization Era: Foreign Direct Investment

The major affirmative step towards FDI was adopted only after 1990. After 1991 foreign investment is now seen as a source of scarce capital, technology and managerial skills that were considered necessary in an open, competitive, world economy.[18] The main reason behind opting such a liberal view was the incident witnessed by world at large in Latin America in early 1980s when other forms of capital inflows dried up accentuating the macroeconomic vulnerability of these economies.[19]

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[9] OECD is an international economic organisation of 34 countries, founded in 1961 to stimulate economic progress and world trade. It is a forum of countries describing themselves as committed to democracy and the market economy, providing a platform to compare policy experiences, seeking answers to common problems, identify good practices and coordinate domestic and international policies of its members

[10] Supra Note 3

[11] Shujiro Urata, Chia Siow Yue and Fukunari Kimura, Multinationals and Economic Growth in East Asia: Foreign Direct Investment, Corporate Strategies and National Economic Development, Routledge, New York (2006) at p.454

[12] Anil Kumar Thakur and T.K.Shandilya, Foreign Direct Investment in India: Problems and Prospects, Deep & Deep Publications, New Delhi (2008) at p.332

[13] John H,Dunning and Rajneesh Narula, Foreign Direct Investment and Governments: Catalysts for economic restructuring, Routledge, New York (1996) at p.350

[14] Shankar Acharya, Managing External Economic Challenges in the Nineties in Raj Kapila and Uma Kapila, India's Economy in the 21st Century, Academic Foundation, New Delhi (2001) at p.400

[15] Suvranshu Pan and Raj Kumar Sen, Foreign Direct Investment and Trade in India, Deep & Deep Publications, New Delhi (2007) at p.120

[16] United Nations Conference on Trade and Development, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries (2003). Available at: http://unctad.org/en/Docs/iteiia20037_en.pdf

[17] Prof. B. Satyanarayan, A Comparative Study of Foreign Direct Investment (FDI) in China and India, Himalaya Publishing House, Delhi (2008) at p.21

[18] Monika Kothari, Export Promotion Measures in India: Role of Institutitional Support, Deep & Deep Publications, New Delhi (2007) at p.17

[19] R. Nagaraj,' Foreign Direct Investment in India in the 1990s: Trends and Issues', Economic & Political Weekly (April 26, 2003) at p.1701

In 1991 India took a significant step to promote foreign investment when the government removed all the obstacles and opened its doors for foreign investment. The Industrial Policy of 1991 greatly enhanced the business climate in India and provided clarity to foreign businesses looking to invest in India.[20] Prior to the implementation of this policy, foreign investment was allowed on a case-by-case basis. It was usually capped at 40% of the total equity capitalization, unless the investment included sophisticated technology that was unavailable in India, or the venture was predominately export-oriented. The new welcoming attitude of the government was reflected in the Industrial Policy, which liberalized the internal licensing requirements for businesses and retained only minimum procedural formalities. In the words of policy makers: "The industrial policy reforms have reduced the industrial licensing requirements, removed restrictions on investment and expansion, and facilitated easy access to foreign technology and foreign direct investment". Under this policy, most investments can come in under the automatic route. There are also categories of investment that, while not listed as eligible for automatic approval, may be eligible as such if the investment falls within the foreign investment caps.[21] The main objectives of the Industrial policy were:-

1. to maintain a sustained growth in productivity;
2. to enhance gainful employment;
3. to achieve optimal utilisation of human resources;
4. to attain international competitiveness and
5. to transform India into a major partner and player in the global arena.[22]

The process of liberalisation adopted by India was not free from hurdles. A significant protest that took political roots began in the form of the Swadeshi Jagaran Manch (SJM) created by the RSS in the November of 1991; a few months after the new liberal economic policy. The 'fight' against globalisation and privatisation found its chief targets in multinational companies (MNCs). FDI was seen to be a new form of 'western imperialism' which the Indian nation was to combat through indigenous capabilities.[23] The rhetoric aimed at exploiting the feeling of insecurity spawned by the liberalization of the economy and strengthening national identity which was held synonymous with Hindu consciousness by invoking the spectre of foreign domination.[24]

However congress came to power and reforms began, FDI was not in any way defined in 1991 nor was it considered a mechanism for development. In the context of the time the emphasis is placed on stabilizing the economy. The goals for the upcoming year were to consolidate gains, bring problems under control and restore "the government's capacity to pursue the social goals of generating employment, removing poverty and promoting equity".[25]

New sectors such as mining, banking, insurance, telecommunications, construction and management of ports, been thrown open to private, including foreign companies. However, restrictions on the extent of foreign ownership are applied to some of these service sectors. The expansion of FDI inflows in the mid 1990s can be partly attributed to the liberalisation of FDI policy in the form of the opening up of new sectors and partly to the expanded scale of global FDI inflows in the 1990s.[26]

2.3 FDI Policy in India

Foreign investment in India is governed by the FDI policy announced by the Government of India and the provision of the Foreign Exchange Management Act, (FEMA) 1999. The Reserve Bank of India (RBI) in this regard had issued a notification, which contains the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000. This notification has been amended from time to time.[27] Department of Industrial Policy and Promotion (DIPP) under the Ministry of Commerce and Industry, Government of India is the nodal agency for monitoring and reviewing the FDI policy on continued basis and changes in sectoral policy/sectoral equity cap which goes from 26% to 100% at present. The FDI policy is notified through Press Notes/Policy Circulars by the Secretariat for Industrial Assistance (SIA), Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry.[28] FDI is allowed under

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[20] Sukhvinder Singh Dari, Impact of Privatisation Policy and FDI on Life Insurance Corporation vis-à-vis Insurance Regulatory Authority of India, International Journal of Research (IJR), Vol.-I, Issue-8 (Sept. 2014) at p.753

[21] Mark B.Baker, 'Awakening the Sleeping Giant: India and Foreign Direct Investment in the 21st century', International & Comp. Law Review, Vol.15.3 at pp. 392,393. Available at: https://journals.iupui.edu/index.php/iiclr/article/viewFile/17844/18015

[22] Dr. Alok Goyal and Mridula Goyal, Business Environment, V. K. (India) Enterprises, New Delhi (2010-11) at p.242

[23] Dr. K. Tirumalaiah, V. Satish Kumar and W.R. Sony, 'Foreign Direct Investment in Brand Retail Sector in India: A Forecasting Approach', International Journal of Scientific Research and Management, Vol.3, Issue 3(2015) at pp.2283-2290. Available at http://ijsrm.in/v3-i3/13%20ijsrm.pdf

[24] Kulwindar Singh, 'Foreign Direct Investment in India: A Critical Analysis of FDI from 1991-2005', Centre for Civil Society, New Delhi, Research Internship Programme (2005). Available at http://econwpa.repec.org/eps/dev/papers/0511/0511013.pdf

[25] Economic Department, Ministry of Finance & Company Affairs, Economic Survey 1991-1992. Ministry of Finance & Company Affairs, Government of India, New Delhi (1992) at p. 2

[26] R. Nagaraj, supra note 19

[27] Mahdi Naqdi Bahar , supra note 6

[28] Dr. Dinesh Bhakkad, supra note 5

Direct Route and Government. The foreign investors are free to invest in India, except few sectors/activities, wherein prior approval from the RBI or Foreign Investment Promotion Board (FIPB) would be required. FDI in retail sector is allowed through Government Route only.[29]

3. Overview of Retail Sector in India

Retail is a French word which means to "cut it again" and essentially mean a sale to the consumer for direct consumption.[30] In 2004, The High Court of Delhi defined the term "retail as a sale for final consumption in contrast to a sale for further sale or processing (i.e. wholesale).[31] According to a definition attributed to Philip Kotler, retailing includes all the activities involved in selling goods or services directly to the final consumers for personal, non-business use.[32] Thus, the retail is an interface between the producer and the individual consumer buying for personal consumption. This excludes direct interface between the manufacturer and institutional buyers such as the government and other bulk customers. Retailing is the last link that connects the individual consumer with the manufacturing and distribution chain. A retailer is involved in the act of selling goods to the individual consumer at a margin of profit.[33]

3.1 Division of Retail Industry

The retail industry is mainly divided into organized retail sector and unorganized retail sector. Organized retailing refers to trading activities undertaken by licensed retailers, that is, those who are registered for sales tax, income tax, etc.[34] Unorganized retailing refers to the traditional formats of low-cost retailing.[35] This sector is the largest source of employment after agriculture, and has deep penetration into rural India generating more than 12 per cent of India's GDP.[36]

3.2 FDI in Single Brand Retail

The Government has not categorically defined the meaning of Single Brand anywhere neither in any of its circulars nor any notifications. In single-brand retail, FDI up to 51 per cent is allowed, subject to FIPB approval and subject to the conditions mentioned in Press Note 3 that (a) only single brand products would be sold (i.e., retail of goods of multi-brand even if produced by the same manufacturer would not be allowed), (b) products should be sold under the same brand internationally, (c) single-brand product retail would only cover products which are branded during manufacturing and (d) any addition to product categories to be sold under single-brand would require fresh approval from the government. While the phrase 'single brand' has not been defined, it implies that foreign companies would be allowed to sell goods sold internationally under a 'single brand', viz., Reebok, Nokia, Adidas. Retailing of goods of multiple brands, even if such products were produced by the same manufacturer, would not be allowed. Going a step further, we examine the concept of 'single brand' and the associated conditions: FDI in 'single brand' retail implies that a retail store with foreign investment can only sell one brand. For example, if Adidas were to obtain permission to retail its flagship brand in India, those retail outlets could only sell products under the Adidas brand and not the Reebok brand, for which separate permission is required. If granted permission, Adidas could sell products under the Reebok brand in separate outlets.[37]

3.3 FDI in Multi Brand Retail

The government has also not defined the term Multi Brand. FDI in Multi Brand retail implies that a retail store with a foreign investment can sell multiple brands under one roof. In July 2010, DIPP, Ministry of Commerce circulated a discussion paper on allowing FDI in multi-brand retail. The paper doesn't suggest any upper limit on FDI in multi-brand retail. If implemented, it would open the doors for global retail giants to enter and establish their footprints on the retail landscape of India. Opening up FDI in multi-brand retail will mean that global retailers including Wal-Mart, Carrefour and Tesco can open stores offering a range of household items and grocery directly to consumers in the same way as the ubiquitous 'kirana' store.[38]

3.4 The Evolution of India's Retail Sector

The origins of retail are old as trade itself. Barter was the oldest form of trade. For centuries, most merchandise was sold in market place or by peddlers. Medieval markets were dependent on local sources for supplies of perishable food because Journey was far too slow to allow for long

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[29] Dr. Kapil Kumar Bansal and K.R.Kaushik, supra note 3

[30] Ibid

[31] Association of Traders of Maharashtra v. Union of India, 2005 (79) DRJ 426

[32] Swapna Pradhan, Retailing Management: Texts & Cases, 3rd Edition., Tata McGraw Education Pvt. Ltd., New Delhi(2009) at p.4

[33] R. Balakumar, Recent Trends of Retail Market in India, IJAMBU, Vol.2, Issue 1 (Jan-Mar 2014) Available at http://www.ijambu.in/assets/280-2843.pdf

[34] These include the corporate-backed hyper markets and retail chains, and also the privately owned large retail businesses. It covers only 3% of retail Business.

[35] For example, the local kirana shops, owner manned general stores, paan/beedi shops, convenience stores, hand cart (street sellers) and pavement vendors etc. and covers almost 97% of the retail Business.

[36] Dr. M. S. Rangaraju and Dr. S. Hanuman Kennedy, Innovation in Management: Challenges and Opportunities in the next decade, Ravi Sachdev at Allied Publishers Pvt. Ltd, New Delhi at p.129

[37] Ibid at pp.130,131

[38] Dr. Dinesh Bhakkad , supra note 5 at p.128

distance transportation. However, customer did travel considerable distance for specialty items. The peddler who provided people with the basic goods and necessities that they could not be self sufficient in, followed one of the earliest forms of retail trade. Even in prehistoric time, the peddler traveled long distances to bring products to locations which were in short supply. "They could be termed as early entrepreneurs who saw the opportunity in serving the needs of the consumers at a profit." Later retailers opened small shops, stocking them with such produce. As towns and cities grew, these retail stores began stocking a mix of convenience merchandise, enabling the formation of high-street bazaars that become the hub retail activity in every city.[39]

The economic reforms and liberalisation in the 1990s facilitated the entry of foreign brands. With the rise in disposable income and the growth of urban middle class, the household consumption basket expanded to include items that Indian consumers did not typically purchase until then. The entry of foreign goods contributed to this trend and expanded consumers' choice set. These developments created an environment conducive to the introduction of modern retailing that includes Exclusive Brand Outlets (EBOs), super markets, departmental stores, and shopping malls. Almost all major Indian private corporate groups (the Tatas, the Reliance, the Birlas) have now entered the retail sector. Although, the evolution of India's retail sector has seen the ushering in of modern formats of retailing, all other formats that can be seen in the earlier stages of this process coexist. In fact, the potential changes in the relative balance of power among these various formats and their direct beneficiaries in the advent of large foreign retailers are at the core of the ongoing debate.[40]

3.5 Background of FDI in Retail Sector in India

(i) During nineties Mr. P.V. Narsimha Rao lead government allowed limited FDI in retail and as a result "Dairy Farm" a MNC made entry in India.

(ii) In 1997, FDI in cash and carry (wholesale) with 100 percent ownership was allowed under the Government approval route. It was brought under the automatic route in 2006.

(iii) NDA Government was willing to introduce FDI in retail sector in May, 2002 but it could not materialize due to unknown reasons.

(iv) 51 percent FDI in single brand retail was also permitted in 2006.

(v) In 2011 100 percent FDI was allowed in Single Brand retail withholding the FDI in Multi Brand Retail due to various political reasons.

(vi) 100 percent FDI in Single Brand (with revised guidelines) and 51 percent in Multi-Brand retailing with some conditions have now been allowed in India w.e.f. 20th September 2012 with an option to the State governments to allow or not to allow the FDI in retail sector in their States.[41]

Some Parties have opposed the FDI in Retail Sector particularly in the Multi Brand Retail. Agitations and Bandhs have been called. Government of India is firm on implementing the FDI policy in retail sector as it feels that FDI is beneficial for the economic growth of country and the rights of the local retailers have been protected in the FDI Policy.[42]

It will be prudent to look into Press Note 4 of 2006 issued by DIPP and consolidated FDI Policy issued in October 2010 which has further been revised in 2011 and 2012[43] provides the sector specific guidelines for FDI with regard to the conduct of trading activities. Press Notes 4 &5 dt. 20.9.2012 particularly pertains to the FDI policy for Retail Sector. Detailed guidelines are available in the following press notes.

1) FDI up to 100% for cash and carry wholesale trading and export trading allowed under the automatic route in 2006.

2) FDI up to 100 % with prior Government approval (i.e. FIPB) for retail trade of „Single Brand? products, subject to Press Note 4 (2012 Series)

3) 51% FDI is permitted in Multi Brand Retailing in India under Government Route (Press Note 5 of 2012).[44]

In December 2012, Indian Parliament approved of the central government's decision to allow FDI in multi-brand retailing. This paved the way for foreign retailers to open retail stores with 51 per cent ownership in major cities to sell a large variety of products under one roof.[45] However, the State governments will have the rights to prevent

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[39] Dr. Mandeep Singh, 'Retail in India: Historical perspective, Spectrum' A Journal of Multi disciplinary Research, Vol.1, Issue 6 (Sept. 2012) Available at http://prj.co.in/setup/socialscience/paper26.pdf

[40] Ibid

[41] Pros and Cons of Foreign Direct Investment in the context of India's Retail Sector. Available at http://shodhanusandhann.com /WebGallery/201551411_neha.pdf

[42] Ibid

[43] Vide Press Note 1 of 2011 dt. 14. 2011, Press Note 2 of 2011 dt. 1.10.2011, Press Note 3 of 2011 dt. 8.11.2011, Press Note 1 of 2012 dt. 10.1.2012, FDI Policy Circular 1 of 2012 dt. 10.4.2012, Press Note 2 of 2012 dt. 31.7.2012, Press Note 3 of 2012 dt. 1.8.2012 and Press Notes 4, 5, 6, 7 & 8 dt. 20.9.2012

[44] Supra Note 3

[45] For now, the foreign retailers will be allowed only in cities with population of more than one million.

foreign retailers from opening up stores in their respective States. It may be noted that foreign capital has already been allowed in single-brand retailing. Furthermore, there are several indirect channels, such as franchise agreements, cash and carry wholesale agreements, strategic licensing agreements, manufacturing and wholly owned subsidiaries, through which foreign companies including large retailers have already had access to the Indian market.[46]

4. Impact of Foreign Direct Investment in Retailing

4.1 Beneficial Impacts of FDI in Retailing

India is becoming a top destination for retail investors across the globe. The Government of India has also taken initiatives to allow FDI in retail sector. Its advantages are:

a) Large organized retailers can procure directly from producers at most competitive prices and pass on price benefits to consumers.

b) If States allow retailers to buy directly from farmers, they will get better prices due to elimination of middlemen.

c) Organized retailers would be in a position to reduce price disparity as they would directly purchase from the producers in bulk quantities and pass on the advantage by way of discounts to consumers.

d) Opening of retail sector to FDI can be beneficial in terms of price and availability of products as it would give boost to food products, textiles and garments, leather products, etc. They would benefit from large scale procurement by international chains, in turn creating job opportunities.[47]

4.2 Detrimental Impacts of FDI in Retailing

a) It is feared that FDI in retail can result in job losses. If foreign retailers could capture 20% of Indian Retail Market, about 8 Million jobs will be lost. Their levels of efficiency mean they need less manpower for each Rs.1000 crores of turnovers.[48]

b) Wal-Mart emphasizes the amount that it sources from India, as a reason it should be allowed to build stores. But it could upset the import balance of India by importing massively from China rather than using local production.[49]

c) It is feared that FDI will drain out country's share of revenue to foreign countries which may cause negative impact on India's overall economy.[50]

d) Domestic organized retail sector might not be competitive enough to tackle international players and might lose its market share.[51]

e) Many small business owners and workers of small shops may lose their jobs.[52]

5. Conclusion

India's retail sector remains off-limits to large international chains especially in multi-brand retailing. A number of concerns have been raised about opening up the retail sector to FDI in India. The first concern is the potential impact of large foreign firms on employment in the retail sector. A second related concern raised is that opening up FDI would lead to unfair competition and ultimately result in large-scale exit of incumbent domestic retailers, especially the small family owned business. A third concern raised by domestic incumbent firms in the organized retail sector is that this sector is under developed and in a nascent stage. The potential benefits from allowing large retailers to enter the Indian retail market may outweigh the costs. Evidence from the United States suggests that FDI in organized retail could help tackle inflation, particularly with wholesale prices. It is also expected that technical know-how from foreign firms, such as warehousing technologies and distribution systems, for example, will lend itself to improving the supply chain in India, especially for agricultural produce. Creating better linkages between demand and supply also has the potential to improve the price signals that farmers receive and by eliminating both waste and middlemen also increase the fraction of the final sales prices that is paid to farmers. An added benefit of improved distribution and warehousing channels may also come from enhanced exports.

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[46] For example, German retailer Metro AG entered India through cash and carry wholesale trading channel. Wal-Mart has entered India as a joint venture with Indian firm Bharati Enterprises

[47] Dr. Mahalaxmi Krishan and Ms.Usha Bhandare, 'A Study of Emerging Trends in Indian Retailing, Indian Journal of Applied Research', Vol.3, Issue 8 (Aug.2013) Available at : http://www.theglobaljournals.com/ijar/file.php?val=August_2013_1375511484_1c067_30.pdf

[48] Ibid

[49] AFL-CIO Report on Wal-Mart in India. Available at: http://indiafdiwatch.org/wp-content/uploads/2013/03/indiwm.pdf

[50] Supra Note 47

[51] Pankaj Kumar and Dr. Sanjeev Bansal, SWOT analysis: What does FDI hold for the Indian Retail Sector in 21st century, International journal of Research in Management, Economics & Commerce, Vol.5, Issue 1, (Jan 2015) Available at http://www.jiarm.com/FEB2015ISSUES.html

[52] Supra note 47

Shackles of Gender Identity: Considering Transgender Perspective in Human rights in India

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ABSTRACT

Gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. With the advent of brutal legislations by the British like Criminal Tribes Act, 1871 their image in the eyes of the society got tarnished as they were registered and were under constant surveillance. They were deprived of basic civil rights as acting as guardians to minors, making gift deed or a will or from adopting a son. Section 377 of the IPC criminalized all penile-non-vaginal sexual acts between persons at a time when transgender persons were typically associated with the prescribed sexual practices. At that time a transgender person was considered as a habitual sodomite. In the Indian legal context Article 14, 15 and 16 of the Constitution of India prohibit the discrimination on the basis of sex of the person. Article 19(1)(a)states that citizens shall have the right to freedom of speech and expression, which shall include one's right to expression of his self-identified gender. Transgender person's inspite to such constitutional protections, as a whole face multiple forms of oppression in this country. Discrimination is so large and pronounced, especially in the field of health care, employment, education, leaves aside social exclusion.

Key Words : Gender, Human Rights, Constitution, Discrimination

1. Introduction

Transgender is a broader term usually applicable to such people and (in certain cases) such behavioral attributes that are often distinct and divergent from the normative two gender roles i.e. male and female which are usually assigned at birth. It may also include trans men and trans women whose gender identity is the opposite of their assigned sex (and who are sometimes specifically termed transsexual), it may include gender queer people (whose identities and expressions have been a fixture in culture since times immemorial) amongst various definitions aimed at identifying their gender identity. Many definitions include third-gender people as transgender or conceptualize transgender people as a third gender such transgender identities Asian countries where Hijrasare considered members of Third Gender, and infrequently the term is defined very broadly to include cross-dressers such as in South exclusively masculine or feminine, but may, for example, be bi-gender, pangender, gender fluid, or agender).[1] These people often experience, what could be termed as a "mismatch" between their assigned sex and their Gender Identity or Gender Expression.[2] The degree to which individuals feel genuine, authentic, and comfortable within their external appearance and accept their genuine identity is referred to as trans gender congruence.[3] The paper aims at resolving this age old problem and also aims at identifying the various obstacles and human rights violation faced by this Third Gender despite playing a pivotal role in our society and culture.

2. Evolution of Transgender Terminology

The Terminology was first coined by a psychiatrist named John F. Oliven at Columbia University in his 1965 seminal work *Sexual Hygiene and Pathology.*[4] The term was thereafter popularized with varying definitions by various transgender and transgender people. By the mid-1970s both trans-gender and trans-people were in use as "umbrella terms" and 'transgenderist' was used to refer to people who wanted to live as cross-gender without sex reassignment surgery (SRS).[5] By 1984, the concept of a "transgender community" had developed, in which transgender was used as an all-inclusive term.[6] By 1992, the International Conference on Transgender Law and Employment Policy defined transgender as an expansive umbrella term including "transsexuals, transgenderists, cross dressers" and anyone transitioning.[7] Health-practitioner manuals, professional journalistic style guides, and LGBT advocacy groups advise the adoption by others of the name and pronouns identified by the person in question, including present references to the

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1 Lynne Layton, '*In Defense of Gender Ambiguity: Jessica Benjamin. Gender & Psychoanalysis. I'(1996)at pp27-43*

2 Gay and Lesbian Alliance against Defamation. GLAAD Media Reference Guide - Transgender glossary of terms(2010) "An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth"

3 H. B Kozee., T. L Tylka& L.A.. Bauerband, 'Measuring transgender individuals' comfort with gender identity and appearance: Development and validation of the Transgender Congruence Scale'. *Psychology of Women Quarterly 36*(2012) at pp.179-196

4 Oliven, John F., *Sexual Hygiene and Pathology*(1965). Also R.A., 'Book Reviews and Notices: Sexual Hygiene and Pathology'. *American Journal of the Medical Sciences* (1965)at p. 235

5 S. Stryker,"… lived full-time in a social role not typically associated with their natal sex, but who did not resort to genital surgery as a means of supporting their gender presentation ..." in Transgender from the GLBTQ: An encyclopedia of gay, lesbian, bisexual, transgender and queer culture(2004)

6 TV-TS Peo, Tapestry Board of Advisors, E. Roger, The 'Origins' and 'Cures' for Transgender Behavior. *The TV-TS Tapestry* (1984)

7 First International Conference on Transgender Law and Employment Policy, Pamphlet, ICTLEP (1992)

transgender person's past.[8] In contrast, people who are neither transgender nor gender queer -people whose sense of personal identity corresponds to the sex and gender assigned to them at birth- are termed cisgender.[9]

2.1 Yesteryears of Transgender in the Indian Society

The transgender community in India (made up of Hijras and others) has a long history in Indian history and in Hindu mythology.[10] The importance and prominence of Hijras in the cultural and ethnic milieu in the pre-colonial Indian society which could be traced to Vedic and Puranic literature which has Tritiya Pravrati or Napunsakta as its integral part. References were made to the Transgender community in Ramayana wherein Lord Rama grants a boon to the Hijra Community impressed by their devotion, thereby enabling them to bless on auspicious occasions.[11] According to Mahabharata, Aravan, the son of Arjunand Nagakanya, offered to be sacrificed to goddess Kali to ensure the victory of the Pandavs in Kurukshetra war, on the condition that he could spend the last night of his life in matrimony in which case Lord Vishnu assumed a female form of Mohini. The Aravanis of Tamil Nadu consider themselves as the progenitor of this marriage.[12] Jain texts refer to transgenders which mention the concept of 'psychological sex'.[13] The hijras also played a prominent role in the courts of the Islamic world especially in the Ottoman and the Mughal empires in medieval India.[14]

A marked shift can be seen in the attitude of the people towards their fellow citizens from one of love and respect to strong feeling of hatred towards the 18th century. In the colonial era a drastic change in the situation occurred due to the British administration enacting brazen legislation like Criminal Tribes Act, 1871 and Section 377 of the Indian Penal Code. The Act provided for registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered and appeared to be dressed as a woman in public places or danced or played music. Such people could be arrested and imprisoned for 2 years or fine or both.[15] With the media under their control and censorship and oppressive laws the British were able to push the transgender community to move to ghettos and be ostracized by the society as criminals and a threat to the society.[16] With the 200 hundred year reign of the colonial power the idea of transgender being a threat was soon embedded deep in the mind set of the people of modern India. The way they behave and act differs from the 'normative' gender role of men and women. Leading a life as a transgender is far from easy because such people can neither be categorized as male nor female and this deviation is "unacceptable" to society's vast majority.[17]

3. Gender Identity

Gender identity is one's personal experience of one's own gender.[18] All societies have a set of gender categories that can serve as the basis of the formation of a person's social identity in relation to other members of society.[19] In most societies, there is a basic division between gender attributes assigned to males and females,[20] a gender binary to which most people adhere and which enforces conformance to ideals of masculinity and femininity in all aspects of sex and gender: biological sex, gender identity, and gender expression.[21] In all societies, some individuals do not identify with some (or all) of the aspects of gender that are assigned to their biological sex;[22] some of those individuals are transgender or gender queer. Some societies have third gender categories. Core gender identity is usually firmly formed by age three.[23] After age three, it is extremely difficult to change, and attempts to reassign it can result in gender dysphoria.

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8 Eve Glicksman, 'Transgender terminology: It's complicated.', American Psychological Association,Vol 44, No. 4,(April 2013)

9 Katherine Martin, New words notes, *Oxford English Dictionary*, Oxford University Press (June 2015)

10 Why transgender not an option in civil service exam form: HC, The Times of India,15 June, 2015

11 GovindasamyAgoramoorthy and Minna J. Hsu, Living on the Societal Edge: India's Transgender Realities, Journal of Religion and Health, Volume 54, Issue 4 (August 2015) at pp. 1451-1459

12 'Hijras - The Ramayana, Mahabharata &The Islam'. Avaiable at : http://kinnarsamaj.blogspot.in/2013/07/hijras-ramayana-mahabharata-islam.html

13 Somasundaram, Transgenderism: Facts and fictions, Indian Journal of Psychiatry. (2009 Jan-Mar; 51(1) at pp.73-75

14 'VarshaPandey,Transindia: Bringing the Stories of the Indian Transgender Community to Life'. Available at: http://fembotmag.com/2015/02/11/transindia-bringing-the-stories-of-the-indian-transgender-community-to-life/

15 Claire-Renee Kohner, Transindia: 'Who Are the Hijras? A Documentary of India's Forgotten Transgender Community'. Available at http://thecolu.mn/15650/transindia-hijras-documentary-indias-forgotten-transgender-community

16 Human Rights Violations against the Transgender Community: A PUCL Report-'A Study of Kothi andHijra Sex Workers in Bangalore' (Sept. 2003).Available at: http://www.pucl.org/Topics/Gender/2004/transgender.html

17 'Rights of Transgender People – Sensitizing Officers to Provide Access to Justice, Lecture delivered on Refresher Course for Civil Judges (Junior Division)-I Batch at Tamil Nadu State Judicial Academy on 12.02.2011, by Hon'ble Justice P.Sathasivam, Judge, Supreme Court of India.

18 Deana F. Morrow and Lori Messinger (Editors), *Sexual Orientation and Gender Expression in Social Work Practice*(2006).

19 V. M. Moghadam, *Patriarchy and the politics of gender in modernising societies* in *International Sociology*(1992).

20 Carlson, R. Neil, Heth, C.Donald, "Sensation", *Psychology: The Science of Behaviour,* 4th Edition, Toronto, Canada: Pearson(2009)at pp.140-141

21 Jack David Eller, *Culture and Diversity in the United States (2015) at p.137*

22 G. O. MacKenzie, *Transgender Nation*,(1994). Also seeCharles Zastrow, *Introduction to Social Work and Social Welfare: Empowering People* (2013) at p. 234

23 Ann M. Gallagher, James C. Kaufman,*Gender differences in Mathematics: An integrative psychological approach*, Cambridge University Press (2005)

3.1 Age of Formation

There are several theories about how and when gender identity forms, and studying the subject is difficult because children's lack of language requires researchers to make assumptions from indirect evidence. John Money suggested children might have awareness of and attach some significance to gender as early as 18 months to two years; Lawrence Kohlberg argues that gender identity does not form until age three. It is widely agreed that core gender identity is firmly formed by age three. At this point, children can make firm statements about their gender and tend to choose activities and toys which are considered appropriate for their gender, although they do not yet fully understand the implications of gender. After age three, core gender identity is extremely difficult to change, and attempts to reassign it can result in gender dysphoria. Gender identity refinement extends into the fourth to sixth years of age, and continues into young adulthood.

Martin and Ruble conceptualize this process of development as three stages: (1) as toddlers and preschoolers, children learn about defined characteristics, which are socialized aspects of gender; (2) around the ages of 5–7 years, identity is consolidated and becomes rigid; (3) after this "peak of rigidity," fluidity returns and socially defined gender roles relax somewhat.

3.2 Gender Variance and Non-Conformance

In some cases, a person's gender identity is inconsistent with their biological sex characteristics (genitals and secondary sex characteristics), resulting in individuals dressing and/or behaving in a way which is perceived by others as outside cultural gender norms. These gender expressions may be described as gender variant, transgender, or gender queer and people who have such expressions may experience gender dysphoria (traditionally called "gender identity disorder" or GID). Many people consider themselves to belong to the binary gender which corresponds to their binary (male or female) sex, i.e. they are cisgender. A survey of the research literature from 1955–2000 suggests that as many as one in every hundred individuals may have some intersex characteristic.

Besides transgender people, other people who do not believe that their gender identity corresponds to the sex they were assigned at birth include many intersex individuals. One reason for such discordances in intersex people is that some individuals have a chromosomal or phenotypical sex that has not been expressed in the external genitalia because of hormonal or other conditions during critical periods in gestation. Such a person may later disagree with a clinical assignment of sex of rearing made at time of birth.

3.3 Gender Dysphoria and Gender Identity Disorder

Gender dysphoria (previously called "gender identity disorder" or GID in the DSM) is the formal diagnosis of people who experience significant dysphoria (discontent) with the sex they were assigned at birth and/or the gender roles associated with that sex: In gender identity disorder, there is discordance between the natal sex of one's external genitalia and the brain coding of one's gender as masculine or feminine. The Diagnostic and Statistical Manual of Mental Disorders has five criteria that must be met before a diagnosis of gender identity disorder can be made, and the disorder is further subdivided into specific diagnoses based on age, for example gender identity disorder in children (for children who experience gender dysphoria). The classification of gender identity problems leads to mental disorder, speculating that certain DSM revisions may have been made on a tit-for-tat basis when certain groups were pushing for the removal of homosexuality as a disorder. This remains controversial, although the vast majorities of today's mental health professionals follow and agree with the current DSM classifications.

4. International Human Rights Principle

The Yogyakarta Principles, a document on the application of international human rights law, provide in the preamble a definition of gender identity as each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the person's sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other experience of gender, including dress, speech and mannerism. Principle 3 states that "Each person's self-defined gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.";[33] and Principle 18 states that "Notwithstanding any classifications to the contrary, a person's sexual

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[24] J. KalbfleischPamela, j.Cody Michael, *Gender, power, and communication in Human relationships*, Psychology Press(1995) at p. 366

[25] George J. Bryjak and Michael P. Soraka, *Sociology: Cultural Diversity in a Changing World*, Ed. Karen Hanson, Allyn& Bacon (1997) at pp. 209-245

[26] Barbara Newmann, *Development Through Life: A Psychosocial Approach*, Cengage Learning at p. 243

[27] Christopher Bates Doob, *Social Inequality and Social Stratification, US Society*

[28] E. Coleman, '*Developmental stages of the coming out process*', *Journal of Homosexuality (*1982)

[29] C. Martin.; D. Ruble,"Children's Search for Gender Cues Cognitive Perspectives on Gender Development", *Current Directions in Psychological Science*, (2004) at pp. 67-70

[30] Melanie Blackless,M. Bresser, S. Carr others, ' Atypical Gender Development – A Review'. *International Journal of Transgenderism* (2003) at pp. 29-44

[31] Melanie Blackless, and others, 'How sexually dimorphic are we? Review and synthesis'. *American Journal of Human Biology (2000) at pp.151-166*

[32] Psychology Today: Health, Help, Happiness Find a Therapist, Psychology Today, 24 Oct. 2005. Available at :<http://www.psychologytoday.com/conditions/gender-identity-disorder>.

[33] The Yogyakarta Principles, Principle 3: The Right to Recognition before the Law.

orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed."[34] Relating to this principle, the "Jurisprudential Annotations to the Yogyakarta Principles" observed that "Gender identity differing from that assigned at birth, or socially rejected gender expression, have been treated as a form of mental illness. The pathologization of difference has led to gender-transgressive children and adolescents being confined in psychiatric institutions, and subjected to aversion techniques — including electroshock therapy- as a 'cure'.[35] "The "Yogyakarta Principles in Action" says "it is important to note that while 'sexual orientation' has been declassified as a mental illness in many countries, 'gender identity' or 'gender identity disorder' often remains in consideration."[36] These Principles influenced the UN declaration on sexual orientation and gender identity.

5. Law and Legal Aspects

Legal procedures exist in some jurisdictions, allowing individuals to change their legal gender or name to reflect their gender identity. Requirements for these procedures vary from an explicit formal diagnosis of transsexualism to a diagnosis of gender identity disorder to a letter from a physician that attests the individual's gender transition or having established a different gender role.[37] In 1994, the DSM IV entry was changed from "Transsexual" to "Gender Identity Disorder." In many places, transgender people are not legally protected from discrimination in the workplace or in public accommodations.[38] A report released in February 2011 found that 90% of transgender people faced discrimination at work and were unemployed at double the rate of the general population. Over half had been harassed or turned away when attempting to access public services.[39] Members of the transgender community also encounter high levels of discrimination in health care on an everyday basis.[40] In India, the Supreme Court on April 15, 2014, recognized a third gender that is neither male nor female, stating "Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue.[41] Justice KS Radha Krishnan noted in his decision that, "Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex".

5.1 Rights of Transgender through the Constitutional prism

The Pre-colonial India witnessed a drastic change in the situation that occurred due to the British administration enacting brazen legislations like Criminal Tribes Act, 1871 and Section 377[42] of the Indian Penal Code. The Act provided for registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered and appeared to be dressed as a woman in public places or danced or played music. Such people could be arrested and imprisoned for 2 years or fine or both.[43]

In contemporary times the Preamble to the Constitution commands Justice - social, economic, and political equality of status. Thus the first and foremost right that they deserve is the right to equality under Article 14. In the same light Article 15 speaks about the prohibition of discrimination on the ground of religion, race, caste, sex or place of birth and Article 21 as well as Article 23 through safeguarding of privacy rights and by prohibition of trafficking protects Human dignity of human beings and any contravention of these provisions shall be an offence punishable in accordance with law.[44] The Constitution affirms equality in all spheres but the application of these rights remains moot. The development of this sexual orientation and gender identity-related human rights legal doctrine can be categorized thus:

a) Non-discrimination

b) Protection of Privacy rights and

c) the ensuring of other general human rights protection to all, regardless of sexual orientation of gender identity

As per the Constitution most of the protections under the Fundamental Rights Chapter are available to all persons with some rights being restricted to only citizens. Beyond this categorization the Constitution makes no further distinction amongst rights holders. Official identity papers provide civil personhood. Among the instruments by which

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34 The Yogyakarta Principles, Principle 18: Protection from Medical Abuse.

35 Jurisprudential Annotations to the The Yogyakarta Principles at p.43

36 Activist's Guide to The Yogyakarta Principles at p.100

37 Paisley Currah, Richard M. Juang, Shannon Price Minter, *Transgender Rights*, Minnesota University Press (2006) at pp 51-73

38 Stephen.Whittle, "Respect and Equality: Transsexual and Transgender Rights, Routledge Cavendish (2002)

39 Gay and Lesbian Alliance AgainstDefamation."Groundbreaking Report Reflects Persistent Discrimination Against Transgender Community", "GLAAD", USA (February 4, 2011)

39 Gay and Lesbian Alliance Against Defamation. "IN THE LIFE Follows LGBT Seniors as They Face Inequality in Healthcare", "GLAAD", USA (November 3, 2010)

40 "Transgenders are the 'third gender', rules Supreme Court". NDTV,April 15, 2014.

41 Transgender Rights in India, The Editorial Board, New York Times (April 25, 2014) Available at : http://www.nytimes.com/2014/04/26/opinion/transgender-rights-in-india.html?_r=0

42 NarainSiddharth,'Being A Eunuch'. Available at: http://www.countercurrents.org/gen-narrain141003.htm

43 Supreme Court recognises the right to determine and express one's gender; grants legal status to 'third gender', Available at: http://www.lawyerscollective.org/updates/supreme-court-recognises-the-right-to-determine-and-express-ones-gender-grants-legal-status-to-third-gender.html

44 Supra Note 17

the Indian state defines civil personhood, sexual (gender) identity is a crucial and unavoidable category. Identification on the basis of sex within male and female is a crucial component of civil identity as required by-the Indian state.[45] The Indian state's policy of recognizing only two sexes and refusing to recognize hijras as women, or as a third sex (if a hijra wants it), has deprived them of several rights that Indian citizens take for granted. These rights include the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on.[46] The main problems that are being faced by the transgender community include discrimination, unemployment, lack of educational facilities, homelessness, lack of medical facilities like HIV care and hygiene, depression, hormone pill abuse, tobacco and alcohol abuse, penectomy and problems related to marriage and adoption. In 1994, transgender persons got the voting right but the task of issuing them voter identity cards got caught up in the male or female question. Several of them were denied cards with sexual category of their choice.

5.2 Predicaments of the Transgender community in India

Researches show that hate crimes are committed against the transgender individuals sometimes with the intent being not to kill but to make these individuals extinct or commit genocide against them. Also, there are various incidences of extortion, illegal detention and abuse. Often the victims in such cases do not go to the police for fear of being harassed. See 377 of the 1860 Code drafted by Lord Macaulay is under the Section titled 'Offences Affecting the Human Body' and provisions hereunder provides sanction for the prosecution of certain kinds of sexual acts deemed to be unnatural. It is important to note that regardless of consent these sexual acts are liable for prosecution, provided, they are seen as carnal intercourse against the order of nature, with man, woman, or animal and, thus satisfy the requirement of penetration and to be a homosexual or a hijra is to draw the presumption that the hijra or the homosexual is engaging in "carnal intercourse against the order of nature.[47]

Section 377 has been extensively used by the law enforcers to harass and exploit homosexuals and transgender persons. Various such incidents· have come to light in the recent past. Pandian, a transgender, was arrested by the police on charges of theft. He was sexually abused in the police station which ultimately led him to immolate himself in the premises of the police station.[48] Similarly, policemen arrested Narayana, a transgender, In Bangalore on suspicion of theft without informing him of the grounds of arrest or extending any opportunity to him to defend himself. His diary was confiscated by the police and he was threatened with dire consequences if he did not assist in identifying other transgenders he was acquainted with.[49]

Homosexuals have also been at the receiving end of financial extortion by the police in exchange for not revealing their identities to society. Similarly, the Indian Council for Medical Research (ICMR) and Indian Medical Association (IMA) have not prescribed any guidelines for Sex Reassignment Surgery (SRS). This reticence on the part of the medical sphere has led many transgenders to approach quacks, putting themselves at grave risk. Stereotypical gender identity leaves a divide in the societal role of genders which often results in various form social exclusion of transgender community members including but not restricted to ousting from their homes or social banishment. Individuals of the transgender community are rendered homeless as their parents are forced to oust them from the home due to societal pressures. Leading life of banishment and exclusion they are bound to miss out on certain quintessential elements like education as they are forced to live in institutions where they are many times forced to be in institutional bondage by the leader of the groups. Being deprived of education they are cannot take up skilled jobs so they are forced to take up menial professions like singing and dancing for money and sometimes this also leads them to be forced into sex trade for earning. This ultimately leaves them vulnerable to sexually transmitted diseases like HIV.[50]

6. Tentative solutions to the existent problems of The Transgender Community

Every person must have the right to decide their gender expression and identity, including transsexuals, transgenders, transvestites and hijras. Comprehensive civil rights legislation should be enacted to offer hijras and kothis the same protection and rights now guaranteed to others on the basis of sex, caste, creed and colour. The Constitution should be amended to include sexual orientation/gender identity as a ground of non-discrimination. There should be a special legal protection against this form of discrimination inflicted by both state and civil society which is very akin to the offence of practicing untouchability. The Immoral Trafficking Prevention Act, 1956, as has been pointed out earlier, is used less for preventing trafficking than for intimidating those who are the most vulnerable i.e., the individual sex worker as opposed to brothel keepers or pimps. This law needs to be reformed with a clear understanding of how the state is to deal with those engaged in sex work.[51]

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45 NALSA. v. Union Of India &Ors, WP (CIVIL) NO(s). 400 OF 2012 with W.P(C) NO. 604 of 2013.

46 Anjaneya Das, Gay and Transgender Rights in India: Naz Foundation v. Government of NCT of Delhi ,Selected Works Publication (2009)Available at :http://works.bepress.com/anjaneydas/2/.

47 Jayalakshmi v. The State Of Tamil Nadu (2007) 4MLJ 849

48 Jeremy D. Kidd and Tarynn Witten, Transgender and Transsexual Identities: The Next Strange Fruit— Hate Crimes, Violence and Genocide against the Global Trans Communities Available at: https://www.researchgate.net/publication/237301711.

49 Venkatesan Chakrapani and Arvind Narrain, Legal Recognition Of Gender Identity Of Transgender People In India: Current Situation And Potential Options, UNDP (India) Policy Brief Report (2012)

50 Martin Mitchell and Charlie Howarth, 'Equality and Human Rights Commission, Trans Research Review(2009)

51 Human rights violations against sexuality minorities in India: A PUCL-K fact-finding report about Bangalore, A Report of PUCL-Karnataka (February 2010) at pp. 11-16

Section 375 of the IPC should be amended to punish all kinds of sexual violence, including sexual abuse of children. A comprehensive sexual assault law should be enacted applying to all persons irrespective of their sexual orientation and marital status. Civil rights under law such as the right to get a passport, ration card, make a will, inherit property and adopt children must be available to all regardless of change in gender / sex identities.

The police administration should appoint a standing committee comprising Station House Officers and human rights and social activists to promptly investigate reports of gross abuses by the police against kothis and hijras in public areas and police stations, and the guilty policeman be immediately punished. Protection and safety should be ensured for hijras and kothis to prevent rape in police custody and in jail. Hijras should not be sent into male cells with other men in order to prevent harassment, abuse and rape.[52] A comprehensive sex-education program should be included as part of the school curricula that alters the heterosexist bias in education and provides judgment-free information and fosters a liberal outlook with regard to matters of sexuality, including orientation, identity and behavior of all sexualities. Vocational training centers should be established for giving the transgender new occupational opportunities.[53]

7. Conclusion

Transgender are in need of equality and security. They are being shunned by the society, suffer offences and crimes and are deprived of basic housing facilities. The sorry state of transgenderis not an age old phenomena. In ancient and medieval times they had some respect in the society. Recorded history says that transgender were used as palace guards. They were entrusted with the responsibility to look after the security of the female chamber of the Royal Palace. However, with the advent of Victorian sense of morality imposed by the British rule the transgender fell out of the mainstream in India. The Indian society now sees them as evil and immoral. A solution for Transgender Human Rights problems is not a far cry in contemporary Indian society. A solution was reached in Tamil Nadu for the native Transgender community known colloquially as Aravanis (in the vernacular language). The State Government took bold steps for their Human Rights including creation of a State welfare board for the provision of basic amenities and to redress their grievances such that they could be inducted into the mainstream of the society through induction into educational institutions and provision of various vocation induced jobs such as agarbatti making which was made possible through State funding. They should be brought under one umbrella, where people from mainstream society enjoy certain rights and benefits. They could be accorded security and further benefits through social, political and legislative intervention. Separate law is needed to ameliorate the condition of eunuchs, and ensure that they enjoy the rights granted to every citizen. In western countries, the transgender are very much part of the society, then why not in India they should be given recognition and respect like others. We need to take a look either into their past or into the future to stop vast discrimination against such a large portion of the population and to help them to divert their way from sex workers to good citizens..

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[52] Anjaneya Das, Gay and Transgender Rights in India: Naz Foundation v. Government of NCT of Delhi, Selected Works Publications (2009) Available at :http://works.bepress.com/anjaneydas/2/.

International Nuclear Law and its Implementation in the State Legal System: An Analysis

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ABSTRACT

In 1996, the International Court of Justice delivered an Advisory Opinion on the legality of the use of nuclear weapons in which the Court stated that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.[1] Nuclear energy poses special risks to the health and safety of persons and to the environment, risks that must be carefully managed. However, nuclear material and technology also hold the promise of significant benefits, in a variety of fields, from medicine and agriculture to electricity production and industry. A human activity that involves only hazards and no benefits calls for a legal regime of prohibition, not regulation. Thus a basic feature of nuclear energy legislation is its dual focus on risks and benefits.

Key Words : Nuclear, Environment, Hazards, Legal System

1. Background

Nuclear related activities create risks of a specific character. The 1986 Chernobyl accident confirmed prior theoretical assessments that a nuclear accident might cause damage of an extreme magnitude. The detrimental effects of such an accident do not stop at State borders; they may extend into regions far beyond the territory of the Accident State. There may be damage to individuals, to property and to the environment in several States. The damage caused by ionizing radiation to living cells, especially human cells, may not be immediately recognizable; it may be latent for a long time.[2]

Since the radiation doses received by living cells have cumulative effects, there may be damage caused by different sources of radiation. In many cases there is no typical radiation injury. Moreover, cancer may result from a radiological accident or from, for example, smoking. Even in situations for which the highest standard of safety has been achieved, the occurrence of nuclear and radiological accidents cannot be completely excluded. Legislators must therefore provide legal regimes to compensate for nuclear damage.

The first step in this procedure is to determine whether the existing tort law is appropriate for dealing with questions of compensation for nuclear damage. All States that engage in nuclear related activities have concluded that general tort law is not an appropriate instrument for providing a liability regime adequate to the specifics of nuclear risks, and they have enacted special nuclear liability legislation. Further, States recognized at an early stage that the possibility of trans-boundary nuclear damage required an international nuclear liability regime. International nuclear liability conventions are necessary in order to facilitate the bringing of actions and the enforcement of judgments without hindrance by national legal systems.[3]

In 2008 the Indian government undertook to "take all steps necessary to adhere to the Convention on Supplementary Compensation (CSC)", which it has since signed but not ratified. The government passed the Civil Liability for Nuclear Damage Act related to third party liability in August 2010. It brought the country's nuclear liability provisions broadly into line internationally, making operators primarily liable for any nuclear accident, but without protecting third party suppliers.[4]

The 2010 Act places responsibility for any nuclear accident with the operator, as is standard internationally, and limits total liability to 300 million SDR (about US$ 450 million) "or such higher amount that the Central Government may specify by notification". Operator liability is capped at Rs 1500 crore (15 billion rupees, about US$ 250 million) or such higher amount that the Central Government may notify, beyond which the Central Government is liable. Plans for building reactors from Russian, French and US suppliers are at a standstill as of mid-2015, and India's private sector suppliers are also affected. In June 2015, a Rs 1,500 crore ($234 million) Indian nuclear insurance pool (INIP) was announced by GIC Re, which will manage it. The UK pool, Nuclear Risk Insurers, is part of the consortium, with 11 domestic insurers, and will provide Rs 500 crore reinsurance. One of the consortium members, state-controlled New India Assurance, will issue policies and manage coverage for

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1 'Legality Of The Threat Or Use Of Nuclear Weapons' By ICJ (July 8, 1996) Available at http://www.icj-cij.org/docket/files/95/7495.pdf

2 '*Summary Report on the Post Review Meeting on the Chernobyl Accident',* International Atomic Energy Agency Report by the International Nuclear Safety Advisory Group. Safety series N75-INSAG-1. IAEA, Vienna, 1986.

3 Nuclear Liability Act,2010

4 Clause 17 (b) of the Act 2010 gives recourse to the supplier for an operational plant is contrary to international conventions and undermines the channeling principle fundamental to nuclear liability.

operators and suppliers, initially for third-party liability. It will require NPCIL to pay affected parties in the event of an accident. GIC Re as a pool manager aims to develop INIP into a one-stop facility for covering all nuclear risks. There has previously been no nuclear insurance pool in India, apparently due to restrictions on inspection of facilities by international pools.[5]

2. International Nuclear Liability Conventions

The following international nuclear liability conventions have been concluded, at the worldwide level (open to all States):The 1963 Vienna Convention on Civil Liability for Nuclear Damage, revised in 1997 called the Vienna Convention, the 32 Contracting Parties to the1963 Vienna Convention;

a) The 1997 Protocol revising it is not yet in force.

b) The 1997 Convention on Supplementary Compensation for Nuclear Damage.

c) The 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, the Joint Protocol where 24Contracting Parties signed.

The following international nuclear liabilities conventions have been concluded at the regional level open to Organization for Economic Co-operationand Development (OECD) States; open to other States only if all Parties give their consent'

(a) The 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy (the Paris Convention) 15 European Contracting Parties, revised in 1964, 1982, 2003 and 2004 protocol to amend the Paris Convention on Nuclear Third Party Liability

(b) The 1963 Brussels Convention Supplementary to the Paris Convention(the Brussels Supplementary Convention), European Contracting Parties, revised in 1964, 1982 and 2003.[6]

(c) 1997 Convention on Supplementary Compensation for Nuclear Damage

The Vienna Convention and the Paris Convention establish comprehensive and identical regimes for civil liability for nuclear damage. The purpose of the Brussels Supplementary Convention is to provide for additional compensation out of national and international public funds incases in which the compensation under the Paris Convention is not sufficient to cover all damage. The Convention on Supplementary Compensation for Nuclear Damage, which is based on either the Vienna Convention or the Paris Convention or national legislation in compliance with the Annex to the Convention, also provides for additional compensation out of international public funds. The Joint Protocol links the Vienna Convention and the Paris Convention for the purpose of ensuring that the benefits of one convention are also extended to the Parties to the other convention.

The main principles and the essential content of the nuclear liability conventions are today internationally accepted as appropriate legal means for dealing with nuclear risks. They form the international yardstick for assessing whether nuclear liability legislation is risk adequate. National legislators should consider the advantages of aligning their domestic nuclear legislation with these conventions. Given the potential international dimensions of nuclear damage, a State may also wish to consider adherence to one or more of the nuclear liability conventions. Possible options are:

a. The Vienna Convention and the Joint Protocol and/or the Convention on Supplementary Compensation for Nuclear Damage;[7]

b. The Paris Convention and the Joint Protocol and/or the Convention on Supplementary Compensation for Nuclear Damage and/or the Brussels Supplementary Convention;

c. National nuclear liability legislation and the Convention on Supplementary Compensation for Nuclear Damage.

Provided that all the conventions are in force, any of these options would create treaty relations between that State and a number of other States. A State may wish to consider options that create treaty relations with as many States in its respective region as possible. States have two options for the implementation of the conventions at the domestic level. They may transform the content of the conventions into a national liability law. This has the advantage that national legislative techniques and language can be used, but there is a risk of a misinterpretation of the treaty language. The other option, which avoids that risk, is to implement the conventions directly as self-executing instruments. The structure and language of the operative parts of the Vienna Convention and the Paris Convention and of the Annex to the Convention on Supplementary Compensation for Nuclear Damage provide for this option. This option has already been chosen by a number of States.

3. The Principles of Nuclear Liability under International Regime

Application of the international nuclear liability regime created by the conventions and the corresponding national legislation will be triggered if a nuclear installation causes a nuclear incident. The terms 'nuclear installation 'and 'nuclear incident' therefore form the core of the regime. The definition of a nuclear installation in the nuclear liability conventions, which differs from that in the Convention on Nuclear Safety, is as follows:"any nuclear reactor other than one with which a means of sea or air transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose; any factory using nuclear fuel for the production of nuclear material,

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5 'Information Library'.Available at:http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Liability-for-Nuclear-Damage

6 Revised in 2003 but not yet in force.

7 Adopted on 12 September 1997 by a Diplomatic Conference held 8-12 September 1997, and was opened for signature at Vienna on 29 September 1997

or any factory for the processing of nuclear material, including any factory for the reprocessing of irradiated nuclear fuel; and any facility where nuclear material is stored, other than storage incidental to the carriage of such material; provided that the Installation State may determine that several nuclear installations of one operator which are located at the same site shall be considered as a single nuclear installation."[8]

In the nuclear liability conventions the operator is the person designated or recognized as the operator of a nuclear installation by the Installation State.[9] Under the conventions, a 'person' is an individual or any other private or any public entity having a legal personality. Normally, the operator will be the person responsible for safety, namely the license holder. However, States have discretion to designate any other person who is linked to the installation, for example the owner of the installation.

The term 'nuclear incident' means any occurrence, or any series of occurrences having the same origin, that causes nuclear damage or, but only with respect to preventive measures, creates a grave and imminent threat of causing such damage.[10] In general tort law the general concept of compensable damage already exists. It may be broader or narrower than the definition of nuclear damage in nuclear legislation. If States seek to obtain the benefits of a nuclear liability convention, however, they have to accept its definitions. The definition of 'nuclear damage' in the revised Vienna Convention reads as follows:

"Nuclear damage" means:

(i) loss of life or personal injury;

(ii) loss of or damage to property; and each of the following to the extent determined by the law of the competent court

(iii) economic loss arising from loss or damage referred to in subparagraph(i) or (ii), insofar as not included in those sub-paragraphs,if incurred by a person entitled to claim in respect of such loss or damage;

(iv) the costs of measures of reinstatement of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken, and insofar as not included in subparagraph(ii);

(v) loss of income deriving from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment, and insofar as not included in subparagraph(ii);

(vi) the costs of preventive measures, and further loss or damage caused by such measures;

(vii) any other economic loss, other than any caused by the impairment of the environment, if permitted by the general law on civil liability of the competent court, in the case of sub-paragraphs (i) to (v) and (vii) above, to the extent that the loss or damage arises out of or results from ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive property of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter."[11]

Finally, there must be a causal link between a certain nuclear installation and a certain occurrence and the damage suffered. The causal link has to be proved by the person claiming compensation. The conventions do not contain any provisions regarding causality, this issue is left to the law of the competent court (i.e. to national law), and so States may apply the principles of causality applied in their national law. In most States not all causes of damage are legally relevant, remote causes are not considered. In many States the law requires adequate causality, which means that a cause is only legally relevant if that cause is generally likely to cause damage of the kind suffered.

4. Strict liability

The operator of a nuclear installation is held liable, regardless of fault. This is called strict liability, or sometimes absolute liability or objective liability. It follows that the claimant does not need to prove negligence or any other type of fault on the part of the operator. The simple existence of causation of damage is the basis of the operator's liability. Strict liability, which is an adequate basis for claims also in other potentially hazardous fields of activity, facilitates the bringing of claims by or on behalf of the victim.

The operator of a nuclear installation is exclusively liable for nuclear damage. No other person may be held liable, and the operator cannot be held liable under other legal provisions (e.g. tort law). Liability is legally channeled solely on to the operator of the nuclear installation. This concept is a feature of nuclear liability law unmatched in other fields of law. The Exposé des Motifs of the Paris Convention (as revised and approved by the OECD Council on 16 November 1982) justifies this concept as follows:" Two primary factors have motivated in favour of this channeling of all liability onto the operator as distinct from the position under the ordinary law of torts. Firstly, it is desirable to avoid difficult and lengthy questions of complicated legal cross-actions to establish in individual a case that is legally liable. Secondly, such channeling obviates the necessity for all those who might be associated with construction or operation of a nuclear installation other than the operator himself to take out insurance also and thus allows a concentration of the insurance capacity available."[12]

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8 Article 1 (j), Vienna Convention on Civil Liability for Nuclear Damage, 1996.

9 Ibid, Article 1 (c)

10 Duncan E. J. Currie, 'The problems and gaps in the nuclear liability conventions and an analysis of how an actual claim would be brought under the current existing treaty regime in the event of a nuclear accident', DENV. J. INT'L Law & Policy, Vol 35 at p. 86

11 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, INFCIRC/566, IAEA, Vienna, 1998.

12 Clause 15 of Revised text of the Exposé des Motifs of the Paris Convention, approved by the OECD Council on 16th November 1982.

With the exceptions of only Austria and the USA, all States that have enacted nuclear liability laws have accepted the concept of legal channeling. The USA has a system of economic channeling, which produces substantially the same result as legal channeling. Legal channeling is today one of the principal aims of international harmonization. Some States may be reluctant to accept the concept, because they feel that it is unjust to exempt, for example, suppliers from any liability. However, those States should take into account the obvious benefits in terms of legal certainty that legal channeling brings for victims, and also the perhaps less obvious benefits in terms of legal certainty (an important cost factor) that it brings for operators. The international conventions support the channeling concept by additional legal means. The main example is that the operator is also held liable for the transport of nuclear material from and to its installation. Unless approved in a special procedure, the carrier is not held liable for such transport damage, but the transport liability is also channeled to the operator. This approach also is a simplification of the legal situation.

4.1 Exonerations from liability

The operator is held liable even if the incident is caused by force majeure (i.e. 'an act of God'). Only certain kinds of special circumstances exempt the operator from liability. The operator will be exonerated from liability if it proves, for example, that the nuclear incident was directly due to an armed conflict, hostilities, civil war or insurrection, or that it resulted wholly or partly either from gross negligence of the victim or from an act or omission of the victim committed with intent to cause harm.

4.2 Limitation of liability in amount

The nuclear liability conventions permit contracting States (i.e. States that are Parties to them) to limit the liability of the operator of a nuclear installation in amount. Without express limitation, the liability of the operator would be unlimited. Only a few States apply the concept of unlimited liability of the operator of a nuclear installation, namely Austria, Germany, Japan and Switzerland. Other States limit the liability of the operator. The minimum liability amount under the revised Vienna Convention is 300 million Special Drawing Rights (SDRs) of the International Monetary Fund; the minimum amount under the revised Paris Convention is 700 million euros.[13] Limitation of liability in amount is clearly an advantage for the operator. Legislators feel that unlimited liability, or very high liability amounts, would discourage people from engaging in nuclear related activities. Operators should not be exposed to financial burdens that could entail immediate bankruptcy.

The liability amount has always been a major issue in the international nuclear liability debate. Whatever figure is established by the legislator will seem to be arbitrary, but, in the event of a nuclear catastrophe, the State will inevitably step in and pay additional compensation. Civil law is not designed to cope with catastrophes; these require special measures. Consequently, the Brussels Supplementary Convention and the Convention on Supplementary Compensation for Nuclear Damage provide for the payment of additional compensation out of public funds in the event of damage in excess of the operator's liability amount.

4.3 Limitation of liability in time

In all legal systems there is a time limit for the submission of claims. In many States the normal time limit in general tort law is 30 years. Claims for compensation for nuclear damage must be submitted within 30 years for the damage may be latent for a long time; other damage should be evident within the 10 year period.

4.4 Congruence of liability and coverage

The nuclear liability conventions require that the operator maintain insurance or provide other financial security covering its liability for nuclear damage in such amount, of such type and in such terms as the Installation State specifies. This congruence principle ensures that the liability amount of the operator is always covered by an equal amount of money. The congruence principle is to the advantage both of the victims of a nuclear incident and of the operator. The victims have the assurance that their claims are financially covered, and the operator has funds available for compensation and does not need to convert assets into cash.

As unlimited financial coverage is not possible, the congruence principle will not apply where there is unlimited liability of the operator. For that reason, the nuclear liability conventions require that the operator, if liable without limitation, provide financial security up to an amount that is at least equal to the minimum liability amount under the convention in question (300 million SDRs under the revised Vienna Convention; 700 million euros under the revised Paris Convention).In most cases the coverage is to be provided by the insurance industry. Since the capacity of the international insurance market is limited, the congruence principle sometimes seems to be an impediment to increasing the liability amount substantially. Very often, liability amounts are fixed on the basis of the coverage available on the insurance market.

Insurance against nuclear risks is to a certain extent different from insurance against other risks. There are not many nuclear clients of the insurance industry, but the amounts to be covered are relatively high. Legislators therefore sometimes encourage domestic insurance companies to organize nuclear insurance pools, in order to bring together the financial capacities of several companies. Moreover, nuclear insurance pools normally make use of the international insurance market by concluding reinsurance contracts. Today, most national nuclear insurance pools are able to provide coverage of 300 million SDRs per nuclear installation and incident. As such coverage is per nuclear installation and incident, if a nuclear incident entailing the payment of compensation occurs, the insurance policy must be reinstated. If the yield of the financial security is inadequate to satisfy the claims for compensation, the Installation State must ensure payment out of public funds up to the operator's liability

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Available at:http://www.oecd-nea.org/law/nlparis_motif.html

[13] Article 7 and 10 of Revised Paris Convention

[14] Article XI of Revised Vienna and Article 13 of the Revised Paris conventions. Available at :http://www.un.org/Depts/los/convention_agreements /texts/unclos/unclos_e.pdf

amount or, in cases of unlimited liability, up to the coverage amount.

In some States the insurance industry does not have the capacity to provide coverage up to an amount of 300 million SDRs. The revised Vienna Convention offers two options for such cases: the amount of the operator's liability to be covered by insurance may be fixed at not less than 150 million SDRs provided that the State covers the difference between that amount and300 million SDRs; or, for a maximum of 15 years from the entry into force of the Protocol to the Vienna Convention, a transitional amount of not less than100 million SDRs is considered sufficient. Coverage of the operator's liability may be provided by financial security other than insurance, but operators have not chosen this option very often. In states with a substantial number of nuclear installations, operators may pool their financial capacities in order to provide coverage jointly. This solution is used in Germany and in the USA. Another solution is for the State to provide coverage and charge the operator a fee. Theoretically, there are further ways of covering the operator's liability (e.g. bank guarantees or the capital markets). However, they are not widely used, as they are apparently either too expensive or, from the point of view of regulatory bodies, too insecure.

5. Equal treatment

One of the leading principles of the nuclear liability conventions is then on-discrimination principle: the conventions and the national laws applicable under them must be applied without discrimination based on nationality, domicile or residence. This ensures in particular that victims in States other than the Accident State are treated in the same way as victims in the Accident State.

6. Jurisdiction

General procedural law may provide that many courts have jurisdiction to deal with the claims arising out of a major nuclear incident. This would, of course, be most problematic. For that reason, the nuclear liability conventions(as a general rule, with only a few exceptions) provide, firstly, that only courts of the State in which the nuclear incident occurs have jurisdiction and, secondly, that each State Party shall ensure that only one of its courts has jurisdiction in relation to any one nuclear incident. The concentration of procedures within a single court not only creates legal certainty but also excludes the possibility that victims of nuclear incidents will seek to submit their claims in States in which their claims are more likely to receive favorable treatment. Such forum shopping is costly for operators and may result in the financial resources available for compensation being quickly exhausted, leaving other victims without compensation.[14]

7. Liability for Nuclear Damage Occurring During Transport

It is settled among the states that liability for nuclear damage occurring during transport is channelled on to the operator of a nuclear installation. The basic approach of the nuclear liability conventions to such transport liability is, in principle, clear and simple, for nuclear incidents involving nuclear material during transport, either the operator of the nuclear installation from which the material comes is liable or the operator of the installation to which the material is being sent is liable. In other words, either the sending or the receiving operator is held liable. By a written contract, the sending and the receiving operator agree at which transport stage the liability shifts from one operator to the other. In the absence of such a contract, the liability shifts from the sending operator to the receiving operator being liable when the receiving operator takes charge of the nuclear material. The storage of nuclear material incidental to transport has no influence on the transport liability, even if the storage takes place at a nuclear installation of a third operator.[15]

If the nuclear material is being sent to a person within the territory of anon-contracting State, the sending operator remains liable as long as the material has not been unloaded from the means of transport by which it arrived in the territory of that State. If the nuclear material is being sent by a person within the territory of a non-contracting State to a receiving operator in the territory of a contracting State, with the receiving operator's written consent, the receiving operator is liable only after the material has been loaded on to the means of transport by which it is to be carried from the territory of the former State.

With regard to transport from and to non-contracting States, the legal situation is more complex than these two liability rules suggest: nuclear liability conventions apply only if the general principles of private international law permit. Private international law may also point at the law of the non-contractingState or at the law of the States of the victims of the incident as the applicable law. This situation creates legal uncertainty, and it is an additional reason why it is desirable that as many States as possible become Parties to the nuclear liability conventions.

The nuclear liability conventions allow contracting States to make the carrier the person liable instead of the sending and/or the receiving operator, subject to the consent of the operator or operators who will be replaced and the approval of the competent national authority or authorities. If the carrier is made liable, it is treated like the operator of a nuclear installation. In practice, this option is not chosen very often. It is chosen mostly for railway companies or other carriers that transport nuclear material on a regular basis.

8. Liability for other Radiation Damage

The nuclear liability conventions cover neither radiation or damage caused by radioisotopes used for scientific, medical, commercial and other purposes nor radiation damage caused by X rays, as the use of radioisotopes and X ray equipment does not present risks comparable to those for which the conventions were designed. The regime created by the conventions with their very specific concepts is meant for dealing with extraordinary nuclear risks only. Most States deal with liability for radiation damage caused by radioisotopes and X rays under general tort law.

Nevertheless, experience has shown that radioisotopes and medical irradiation equipment can also cause serious damage if not handled properly(e.g. the 1987 Goiânia accident).[16] For that reason, States may wish to enact, at

[15] Vienna Article I (K), CSC Article I (f) and Revised Paris Article (a) (vii)-(X)

the national level, special liability laws also for damage caused by radioisotopes and X rays. There are such laws, providing for modified strict liability (i.e. there is liability without fault), but the person liable may be exonerated if he or she proves that he or she could not prevent the occurrence of the damage even though he or she complied with all radiation protection requirements and if he or she proves that any equipment used was not defective. In cases of medical treatment with radioisotopes or X rays, other liability principles should be applied. Such medical treatment will normally take place only if the patient has agreed after being informed about the risks. In that case, even modified strict liability is not justified. The rules of general tort law, with the principle of liability on the basis of fault, should apply. States establishing special regimes of liability for radiation damage caused by radioisotopes and X rays should ensure that financial arrangements are made for covering such liability.

9. Conclusion

While the minimum limits have been increased by the 1997 and 2004 Protocols, non-nuclear States may wish to consider whether agreeing to limitation of liability is in their best interests. States considering joining the Paris or Vienna Conventions should measure the provisions against the criteria discussed, including the importance of a backup fund; that absolute liability should govern; that limitation should be unlimited in amount; that there should be a just time limit of liability; that all responsible parties should bear liability; that claimants should be able to bring claims in a neutral tribunal; that the applicable law should be that of the claimant; that there should a broad definition of recoverable damage; and that there should be just rules on standing, access to justice, and burden of proof and causation.

[16] 'The Radiological Accident In Goiania', IAEA, Austria (September 1988)

Role of Informed Consent in Medical Practice

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ABSTRACT

Informed consent is a process for obtaining permission before conducting a healthcare intervention on a person. A health care provider may ask a patient to provide a prior consent for the purpose of medical treatment, or a clinical researcher may ask a research participant before enrolling that person into a clinical trial. Informed consent is being collected by the medical practitioners according to guidelines of medical ethics and research ethics. An informed consent can be said to have been given based upon a clear appreciation and understanding of the facts, implications, and consequences of an action. To give informed consent, the individual concerned must have adequate reasoning faculties and be in possession of all relevant facts. Impairments to reasoning and judgment that may prevent informed consent include basic intellectual or emotional immaturity, high levels of stress such as Post Traumatic Stress Disorder (PTSD) or a severe intellectual disability, severe mental illness, intoxication, severe sleep deprivation, Alzheimer's disease, or being in a coma.

Some acts can take place because of a lack of informed consent. In cases where an individual is considered unable to give informed consent, another person is generally authorized to give consent on his behalf, e.g., parents or legal guardians of a child (though in this circumstance the child may be required to provide informed assent) and conservators for the mentally ill.

Key Words: Informed Consent, Clinical Trial, Medical Ethics, Bolam Test

1. Introduction

Informed consent is a complex issue to evaluate. The reason is that neither expressions of consent, nor expressions of understanding of implications, necessarily mean that full adult consent was not in fact given, nor that full comprehension of relevant issues is internally digested. Consent may be implied within the usual subtleties of human communication, rather than explicitly negotiated verbally or in writing. In some cases consent cannot legally be possible. There are also structured instruments for evaluating capacity to give informed consent, although no ideal instrument presently exists.

There is always a degree to which informed consent must be assumed or inferred based upon observation, or knowledge, or legal reliance. This especially is the case in sexual or relational issues. In medical or formal circumstances, explicit agreement by means of signature regardless of actual consent is the norm. The normal procedure is that such consent is legally relied upon. This is the case with certain procedures, such as a "resuscitate" directive that a patient signed prior to their illness. Few brief examples of each of the above:

1. A person may verbally agree to something from fear, perceived social pressure, or psychological difficulty in asserting true feelings. The person requesting the action may honestly be unaware of this and believe the consent is genuine, and rely on it. *Consent is expressed, but not internally given.*
2. A person may claim to understand the implications of some action, as part of consent, but in fact has failed to appreciate the possible consequences fully and may later deny the validity of the consent for this reason. *Understanding needed for informed consent is present but is, in fact (through ignorance), not present.*
3. A person signs a legal release form for a medical procedure, and later feels he did not really consent. Unless he can show actual misinformation, the release is usually persuasive or conclusive in law, in that the clinician may rely legally upon it for consent. *In formal circumstances, a written consent usually legally overrides later denial of informed consent unless obtained by misrepresentation.*
4. Informed consent in the U.S. can be overridden in emergency medical situations, which was first brought to the general public's attention via the controversy surrounding the study of Poly Heme. It is a temporary oxygen-carrying blood substitute made from human hemoglobin that is in development for emergency treatment of trauma situations where large volumes of blood are lost, with emphasis on situations where fresh blood for transfusion is not readily available. It originally began as a military project following the Vietnam War.

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2. Elements of Valid Informed Consent

For an individual to give valid informed consent, three components must be present: disclosure, capacity and voluntariness.[1]

- While Disclosure requires the researcher to supply the subject with the information necessary to make an autonomous decision, the investigators must ensure that subjects have adequate comprehension of the information provided. This latter requirement implies that the consent form be written in lay language suited for the comprehension skills of subject population, as well as assessing the level of understanding during the meeting.
- Capacity pertains to the ability of the subject to both understand the information provided and form a reasonable judgment based on the potential consequences of his/her decision.
- Voluntariness refers to the subject's right to freely exercise his/her decision making without being subjected to external pressure such as coercion, manipulation, or undue influence.

3. Waiver of Requirement

Waiver of the consent requirement may be applied in certain circumstances where no foreseeable harm is expected to result from the study or when permitted by law, federal regulations, or if an ethical review committee has approved the non-disclosure of certain information.[2]

Besides studies with minimal risk, waivers of consent may be obtained in a military setting. According to 10 USC 980, the United States Code for the Armed Forces, Limitations on the Use of Humans as Experimental Subjects, a waiver of advanced informed consent may be granted by the Secretary of Defense if a research project would:[3]

1. Directly benefit subjects;
2. Advance the development of a medical product necessary to the military;
3. Be carried out under all laws and regulations (i.e., Emergency Research Consent Waiver) including those pertinent to the FDA

While informed consent is a basic right and should be carried out effectively, if a patient is incapacitated due to injury or illness, it is still important that patients benefit from emergency experimentation. The Food and Drug Administration (FDA) and the Department of Health and Human Services (DHHS) joined together to create federal guidelines to permit emergency research, without informed consent. However, they can only proceed with the research if they obtain a waiver of informed consent (WIC) or an emergency exception from informed consent (EFIC).[4]

4. Background

"Informed consent" is a technical term first used in a medical malpractice United States court case in 1957.[5] In tracing its history, some scholars have suggested tracing the history of checking for any of these practices:[6]

1) A patient agrees to a health intervention based on an understanding of it;
2) The patient has multiple choices and is not compelled to choose a particular one;
3) The consent includes giving permission.

These practices are part of what constitutes informed consent, and their history is the history of informed consent. They combine to form the modern concept of informed consent-which rose in response to particular incidents in modern research. Whereas various cultures in various places practiced informed consent, the modern concept of informed consent was developed by people who drew influence from Western tradition.

Historians cite a series of medical guidelines to trace the history of informed consent in medical practice.

The Hippocratic Oath, a 500 BC Greek text, was the first set of Western writings giving guidelines for the conduct of medical professionals. It advises that physicians conceal most information from patients to give the patients the best care. The rationale is a beneficence model for care—the doctor knows better than the patient, and therefore should direct the patient's care, because the patient is not likely to have better ideas than the doctor.[7]

Henri de Mondeville , a French surgeon who in the 14th century, wrote about medical practice, traced his ideas to the Hippocratic Oath.[8] Among his recommendations were that doctors "promise a cure to every patient" in hopes that the good prognosis would inspire a good outcome to treatment. Mondeville never mentioned getting consent. But he emphasized the need for the patient to have confidence in the doctor. He also advised that when deciding therapeutically unimportant details the doctor should meet the patients' requests "so far as they do not interfere with treatment".[9]

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1 R. R. Faden, T. L. Beauchamp, A History and Theory of Informed Consent, Oxford University Press, New York(1986). Tom L Beauchamp, et. el. ,Principles of Biomedical Ethics, 4th Edition, Oxford University Press, New York (1994).

2 Council for International Organization of Medical Sciences (CIOMS) and World Health Organization (WHO).*'International Ethical Guidelines for Biomedical Research Involving Human Subjects', Geneva, Switzerland* (2002)

3 J. McManus, S. G. Mehta; et al. *"Informed consent and ethical issues in Military Medical Research"*, Academic Emergency Medicine (2005)

4 Jill Baren, "Informed Consent to Human Experimentation", Springer Publishing Company.

5 Eric Pace, 'P. G. Gebhard, 69, *Developer of the Term Informed Consent*', The New York Times(26 August 1997)

6 Ruth R Faden,et al, A history and theory of Informed Consent, Oxford University Press,New York(1986)

7 Ibid

8 Chester R. Burns, Legacies in ethics and medicine, Science History Publications , New York (1977). In this book see Mary Catherine Welborn's excerpts from her 1966 The long tradition: A study in fourteenth-century medical deontology. The silent world of doctor and patient (Johns Hopkins Paperbacks ed.). Johns Hopkins, University Press. pp. 7–9.

9 Ibid ,In this book see De Mondeville's"On the morals and ethics of medicine" from Ethics in Medicine.

Benjamin Rush an 18th-century United States physician influenced by the Age of Enlightenment cultural movement advised that doctors ought to share as much information as possible with patients. He recommended that doctors educate the public and respect a patient's informed decision to accept therapy. There is no evidence that he supported seeking consent from patients. In a lecture titled "On the duties of patients to their physicians", he stated that patients should be strictly obedient to the physician's orders. John Gregoryhas expressed similar view that a doctor could best practice beneficence by making decisions for the patients without their consent.

Thomas Percival a British physician makes no mention of soliciting the consent of patients or respecting their decisions. Percival said that patients have a right to truth, but when the physician could provide better treatment by lying or withholding information, he advised that the physician do as he thought best.

American Medical Association Code of Medical Ethics contemplates that physicians should fully disclose all patient details truthfully when talking to other physicians. But it is silent as to disclosing information to patients.

Worthington Hooker an American physician rejected all directives that a doctor should lie to patients. According to him, benevolent deception is not fair to the patient.

5. Informed Consent for Research

Historians cite a series of Human subject research experiments to trace the history of informed consent in research.

'*Tearoom Trade*' is the name of a book by American psychologist Laud Humphreys. In it he describes his research into male homosexual acts.[10] In conducting this research he never sought consent from his research subjects and other researchers raised concerns that he violated the right to privacy for research participants.

The Milgram experiment is the name of a 1961 experiment conducted by American psychologist Stanley Milgram. In the experiment Milgram had an authority figure order research participants to commit a disturbing act of harming another person.[11] After the experiment he would reveal that he had deceived the participants and that they had not hurt anyone, but the research participants were upset at the experience of having participated in the research. The experiment raised broad discussion on the ethics of recruiting participants for research without giving them full information about the nature of the research.

6. Medical procedures

The doctrine of informed consent relates to professional negligence and establishes a breach of the duty of care owed to the patient. The doctrine of informed consent also has significant implications for medical trials of medications, devices, or procedures.

7. Requirements of the Professional

In the United Kingdom and countries such as Malaysia and Singapore, informed consent in medical procedures requires proof as to the standard of care to expect as a recognised standard of acceptable professional practice (the Bolam's Test), that is, what risks would a medical professional usually disclose in the circumstances (see Loss of right in English law). Arguably, this is "sufficient consent" rather than "informed consent."

Medicine in the United States, Australia, and Canada take a more patient-centeric approach to "informed consent." Informed consent in these jurisdictions requires doctors to disclose significant risks, as well as risks of particular importance to that patient. This approach combines an objective (the reasonable patient) and subjective (this particular patient) approach.

The doctrine of informed consent should be contrasted with the general doctrine of medical consent, which applies to assault or battery. The consent standard here is only that the person understands, in general terms, the nature of and purpose of the intended intervention. As the higher standard of informed consent applies to negligence, not battery, the other elements of negligence must be made out. Significantly, causation must be shown: That had the individual been made aware of the risk he would not have proceeded with the operation (or perhaps with that surgeon).

Optimal establishment of an informed consent requires adaptation to cultural or other individual factors of the patient. For example, people from Mediterranean and Arab appear to rely more on the context of the delivery of the information, with the information being carried more by who is saying it and where, when, and how it's being said, rather than *what* is said, which is of relatively more importance in typical western countries.

The informed consent doctrine is generally implemented through good healthcare practice: pre-operation discussions with patients and the use of medical consent forms in hospitals. However, reliance on a signed form should not undermine the basis of the doctrine in giving the patient an opportunity to weigh and respond to the risk.

8. Obtaining Informed Consents

To capture and manage informed consents, hospital management systems typically use paper-based consent forms which are scanned and stored in a document handling system after obtaining the necessary signatures. Hospital systems and research organizations are adopting an electronic way of capturing informed consents to enable indexing, to improve comprehension, search and retrieval of consent data, thus enhancing the ability to honor patient's intent and identify willing research participants.[12] More recently, Health Sciences South Carolina, a statewide research collaborative focused on transforming healthcare quality, health information systems and patient outcomes, developed an open-source system called Research Permissions Management System (RPMS).RPMS has been released as an open-source application.

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[10] Earl Babbie, The practice of Social Research, 12th Edition.,Calif: Wadsworth,Cengage. (2010).

[11] D. Baumrind, 'Some thoughts on Ethics of Research: After reading Milgram's *"Behavioral Study of Obedience"*', American Psychologist (1964)

[12] 'Health Sciences South Carolina'. Available at: www.healthsciencessc.org

9. Competency of the Patient

The ability to give informed consent is governed by a general requirement of competency. In common law jurisdictions, adults are presumed competent to consent. This presumption can be rebutted, for instance, in circumstances of mental illness or other incompetence. This may be prescribed in legislation or based on a common-law standard of inability to understand the nature of the procedure. In cases of incompetent adults, a health care proxy makes medical decisions. In the absence of a proxy, the medical practitioner is expected to act in the patient's best interests until a proxy can be found.

By contrast, 'minors' (which may be defined differently in different jurisdictions) are generally presumed incompetent to consent, but depending on their age and other factors may be required to provide Informed assent. In some jurisdictions (e.g. much of the U.S.), this is a strict standard. In other jurisdictions like England, Australia and Canada this presumption may be rebutted through proof that the minor is mature which is termed as the 'Gillick standard'. In cases of incompetent minors, informed consent is usually required from the parent and the principle of 'best interest standard 'may be dispensed with. Besides this, a parens patriae order is also applicable. It allows the court to dispense with parental consent in cases of refusal.

10. Deception

Research involving deception is controversial given the requirement for informed consent. Deception typically arises in social psychology, when researching a particular psychological process requires that investigators deceive subjects. For example, in the Milgram experiment, researchers wanted to determine the willingness of participants to obey authority figures despite their personal conscientious objections. They had authority figures demand that participants deliver what they thought was an electric shock to another researcher. For the study to succeed, it was necessary to deceive the participants so they believed that the subject was a peer and that their electric shocks caused the peer actual pain.

Nonetheless, research involving deception prevents the subject/patient from exercising his/her basic right of autonomous informed decision-making and conflicts with the ethical principle of Respect for persons.

The Ethical Principles of Psychologists and Code of Conduct set by the American Psychological Association says that psychologists may not conduct research that includes a deceptive compartment unless they can justify the act by the value and importance of the study's results, and show they couldn't obtain the results by some other way. Moreover, the research should bear no potential harm to the subject as an outcome of deception, be it physical pain or emotional distress. Finally, the code requires a debriefing session, in which the experimenter tells the subject about the deception, and gives subjects the option of withdrawing their data.[13]

11. Abortion

In some U.S. States, informed consent laws (sometimes called “right to know” laws) require that a woman seeking an elective abortion receive factual information from the abortion provider about her legal rights, alternatives to abortion (such as adoption), available public and private assistance, and “medical facts” (some of which are disputed-see fetal pain), before the abortion is performed (usually 24 hours in advance of the abortion). Other countries with such laws (e.g. Germany) require that the information giver be properly certified to make sure that no abortion is carried out for the financial gain of the abortion provider and to ensure that the decision to have an abortion is not swayed by any form of incentive.[14]

Some informed consent laws have been criticized for allegedly using “loaded language in an apparently deliberate attempt to 'personify' the fetus,”[15] but those critics acknowledge that abortion information provided pursuant to informed consent laws “most of the information in the materials about abortion comports with recent scientific findings and the principles of informed consent, some content is either misleading or altogether incorrect.”[16]

12. Children and vaccination

As children often lack the decision making ability or legal power (competence) to provide true informed consent for medical decisions, it often falls on parents or legal guardians to provide *informed permission* for medical decisions. This “consent by proxy” usually works reasonably well, but can lead to ethical dilemmas when the judgment of the parents or guardians and the medical professional differ with regard to what constitutes appropriate decisions “in the best interest of the child”. Children who are legally emancipated, and certain situations such as decisions regarding sexually transmitted diseases or pregnancy, or for un emancipated minors who are deemed to have medical decision making capacity, may be able to provide consent without the need for parental permission depending on the laws of the jurisdiction the child lives in. The American Academy of Pediatrics encourages medical professionals also to seek the assent of older children and adolescents by providing age appropriate information to these children to help empower them in the decision making process.[17]

Research on children has benefitted society in many ways. The only effective way to establish normal patterns of growth and metabolism is to do research on infants and

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13 '2010 Amendments to the American Psychological Association ethical principles of psychologists and code of conduct', American Psychological Association(2002)

14 Jochen Taupitz, Marion Weschka, 'CHIMBRIDS - Chimeras and Hybrids in Comparative European and International Research: Scientific, Ethical, Philosophical and Legal Aspects', Volume 34 (2009) at p. 298

15 Rachel Gold, Elizabeth Nash, 'State Abortion Counseling Policies and the Fundamental Principles of Informed Consent', Guttmacher Policy Review, Volume 10(2007)

16 Chinue Richardson, and Elizabeth Nash,*'Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials'*, Guttmacher Policy Review, Volume 9, Number (2006).

17 Committee on Bio ethics, *'Informed consent, Parental permission, and Assent in Pediatric practice'*,Pediatrics(1995)

young children. When addressing the issue of informed consent with children, the primary response is parental consent. This is valid, although only legal guardians are able to consent for a child, not adult siblings. Additionally, parents may not order the termination of a treatment that is required to keep a child alive, even if they feel it is in the best interest. Guardians are typically involved in the consent of children, however a number of doctrines have developed that allow children to receive health treatments without parental consent. For example, emancipated minors may consent to medical treatment, and minors can also consent in an emergency.[18] Vaccine recipients in the United States are legally required to be given a document that details the benefits and risks of vaccination prior to being vaccinated.[19]

13. Conclusion

In medical research, the Nuremberg Code set a base international standard in 1947, which continued to develop, for example in response to the ethical violation in the Holocaust. Nowadays, medical research is overseen by an ethics committee that also oversees the informed consent process in it research often involves low or no risk for participants, unlike in many medical experiments. Second, the mere knowledge that they participate in a study can cause people to alter their behavior, as in the Hawthorne Effect. It means in the typical lab experiment, subjects enter an environment in which they are keenly aware that their behavior is being monitored, recorded, and subsequently scrutinized. In such cases, seeking informed consent directly interferes with the ability to conduct the research, because the very act of revealing that a study is being conducted is likely to alter the behavior studied. List exemplifies the potential dilemma that can result: "if one were interested in exploring whether, and to what extent, race or gender influences the prices that buyers pay for used cars, it would be difficult to measure accurately the degree of discrimination among used car dealers who know that they are taking part in an experiment."[20] In cases where such interference is likely, and after careful consideration, a researcher may forgo the informed consent process. This is commonly done after weighting the risk to study participants versus the benefit to society and whether participants are present in the study out of their own wish and treated fairly.[21] Researchers often consult with an Ethics Committee or institutional review board to render a decision.

The birth of new online media, such as social media, has complicated the idea of informed consent. In an online environment people pay little attention to Terms of Use agreements and can subject them to research without thorough knowledge. This issue came to the public light following a study conducted by one Social networking site in 2014.Social networking site conducted a study where they altered the Social networking site News Feeds of roughly 700,000 users to reduce either the amount of positive or negative posts they saw for a week. The study then analyzed if the users status updates changed during the different conditions. The study was published in the Proceedings of the National Academy of Sciences.

The lack of informed consent led to outrage among many researchers and users. Many believed that by potentially altering the mood of users by altering what posts they see, Social networking site put at-risk individuals at higher dangers for depression and suicide. However, supports of Social networking site claim that site details that they have the right to use information for research in their terms of use. Others say the experiment is just a part of Social networking site's current work, which alters News Feeds algorithms continually to keep people interested and coming back to the site. Others pointed out that this specific study is not along but that news organizations constantly try out different headlines using algorithms to elicit emotions and garner clicks or Social networking site shares. They say this Social networking site study is no different than things people already accept. It may be said that Social networking site broke the law when conducting the experiment on user that didn't give informed consent.

The Social networking site study controversy raises numerous questions about informed consent and the differences in the ethical review process between publicly and privately funded researches. Some say Social networking site was within its limits and others see the need for more informed consent and/or the establishment of in-house private review boards.

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18 Annas, et. el., Informed Consent to Human Experimentation, Massachusetts: Ballinger Publishing Company, Cambridge (1977) at pp. 63–93

19 *'Vaccine Information Statement: Facts About VISs - Vaccines* – CDC'. Available at: http://www.cdc.gov Centers for Disease Control and Prevention

20 J.A. List,.; J. A. List"Informed Consent in Social Science", Science(2008)

21 S. D Levitt,.;J. A List, "Field experiments in economics: The past, the present, and the future",European Economic Review(2009).

Judicial Activism: A Preview

Ishaan Verma*

ABSTRACT

In a democratic set up the judiciary has to play a significant role in preserving a government which is for the people, of the people and by the people. An activist role on the part of the judiciary is inevitable. Judicial activism has flourished in India and acquired enormous legitimacy with the Indian public. The judiciary is a reflection of society, government and nation. The judges, therefore, have a huge responsibility to make the justice delivery system smooth and fair. The role of the Judiciary in interpreting existing laws according to the needs of a time and filling in the gaps appears to be the true meaning of Judicial Activism. Written law has to be expounded and given shape to meet justice. Judicial activism has become a necessity when criminals are getting into the legislature and law breakers are becoming law–makers under the present system. *The paper makes an analytical exposition of the judicial activism as big question in Indian society. It contends that courts should ensure the limits of governmental action and private individuals under the principles of a constitutional democracy. For this purpose, various constitutional provisions and judicial decisions are critically examined for the judicial activism and its effect on human rights jurisprudence.*

Key Words: Judicial activism, Public interest litigation, *Constitutional democracy, Separation of powers, Constitution.*

1. Introduction

India practices constitutional democracy with emphasis on constitutionalism. This comes with high rate of political activities with misuse of political powers granted in the Constitution by the political actors. Naturally, the court is called upon to wear its active posture and interpret theConstitution as it affects the political class. However, each decision of the courts interpreting the constitution against the political class is met with cries of "judicial activism" from one side of the political spectrum or the other.

The term judicial activism despite its popularity amongst legal experts, judges, scholars and politicians has not, until recently, been given an appropriate definition of what the term should mean so that it will not be subject to abuse.[1] The effect of this has been a misconception about what the term is all about.[2] This, therefore, creates series of definitions about the concept. Although definitions are usually products of individual idiosyncrasies and it is often influenced by the individual perception or world view, a combination of various definitions gives a description of the concept. The role of the judiciary in a modern legal system is of immense social significance. Law is in a constant process of flux and development, and though much of this development is due to the enactment of the legislature, the judges and the courts have an essential role to play in developing the law and adopting it to the needs of the Society.[3] Judicial activism means the power of the Supreme Court and the high court but not the sub-ordinate courts to declare the laws as unconstitutional and void if it infringes or if the law is inconsistent with one or more provisions of the constitution.

It has to be noted that the judicial activism has greatly contributed in the expansion, protection and enforcement of fundamental rights and has gone to give effect to the directive principles of state policy and the human rights. Supreme Court by the judicial activism has attached importance to directive principles of state policy and many of them have come to be enforced. It has liberally interpreted the fundamental rights, particularly rights of life and personal liberty of the constitution of India.

Human Rights are rooted in the culture and values of every nation of the world. Protection of human rights is a global as well as national concern that is why, since the dawn of the civilization, peace and security have been the principle objective of all nations. The United Nations charter and the Universal Declaration of Human Rights are complementary to each other. The disregard and contempt of human rights have resulted in barbaric act. This has outraged the conscience of mankind and the advent of a world in which human beings shall enjoy their freedom. At the time of the Universal Declaration of Human Rights, the Indian constitution was in the initial period of formation. It has been found that many of the rights incorporated in the declaration of the human rights have been found in the preamble in a concise form.

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1 Chad M., 'Defining Judicial In activism: Models of Adjudication and the Duty to Decide'94, Geo. L.J. 121-122 (2005)

2 Keenan D. Kmiec, 'The Origin and Current Meanings of Judicial Activism', 92, Cal. Law Review, 1441 (2004)

3 Cardozo Benjamin N, The Nature of the Judicial Process , 2nd Edition,Universal Law Publishing, Delhi(2004)

2. Concept of Human Rights and Judicial Activism

Establishment of human rights in the mid twentieth century as part of a modern project of international institutions was a critical moment. It brought into being the possibility that states could no longer shelter behind the fig leaf of sovereignty for violations committed against individuals. State sovereignty could be cast aside and state's acts subjected to human rights scrutiny. It was a new form of interventionism that emboldened the liberal internationalist and his or her belief in the virtue of law and principle of universality. Human rights marked a point of arrival-a step in the progress of human development.[4]

The Universal Declaration of Human Rights, 1948, refers Human Rights as inalienable rights of all members of the human family. Great importance has been attached in the 20th century to the Human Rights issue in the international arena and tremendous efforts have been made, through the formulation of new principles and procedures to transfer the promotion and protection of basic rights, from the hands of the states to an authoritative super national organization. The uncompromising acceptance of the principle that "all men are born free and equal in dignity" has emerged pragmatically from the crucible of experience as the most valid of all working hypothesis of human relations.[5] In collaboration with League of Nations, the International Labor Organization which was set up in 1919 rendered signal service in the field of Human Rights. The ILO was established on the basis of the realization that universal peace could be achieved only if it were based on social justice. The international action to eliminate the worst social evils like slavery, forced labor, the traffic in narcotics and the trafficking in women and children was greatly strengthened under the League. The League and the ILO has provided an efficient system for developing and coordinating new international machinery for economic and social cooperation rather than to define rights and to device measures for promoting them. Human rights and judicial activism go parallel to each other. In Indian society, human rights and judicial activism had helped in maintaining peace and prosperity all over the nation. The Constitution of India has separated the judiciary from the executive and has given judiciary the exclusive power of interpreting the laws and to fulfill the gaps left in the laws.

A significant feature of Indian Constitution is partial separation of powers. The Doctrine of Separation of Powers was propounded by the French Jurist, Montesquieu. It is partly adopted in India since the executive powers are vested in the President, Legislative powers with the Parliament and the judicial powers in the Supreme Court and subordinate courts. Judicial Activism in India can be witnessed with reference to the review power of the Supreme Court and High Court under Arts. 32 and 226 of the Constitution, particularly in public interest litigation cases. Since 1980's we have seen the emergence of Judicial Activism as a powerful tool in Indian Polity. A court giving new meaning to a provision so as to suit the changing social or economic conditions or expanding the horizons of the right of the individual is said to be an activist court. This has given birth to Judicial Activism. In the words of Justice J. S. Verma, "The role of the Judiciary in interpreting existing laws according to the needs of the times and filling in the gaps appears to be the true meaning of Judicial Activism.[6]

In India, ideological confrontation based on the genuine concern for the welfare of the people arose between the executive and legislature on the one hand and the judiciary on the other. A conservative executive and a progressive judiciary, or a progressive Parliament and a conservative judiciary coexisting at the same point of time, form the basis of judicial activism as opposed to executive excesses or executive enthusiasm beyond the bounds of law. The evolution of the theory of judicial activism in India can be traced back to the late 1960s or early 1970s. In India, the concept originated after a public interest litigation was filed before the Supreme Court when the then Chief justice P N Bhagwati took an unknown case directly from the public who did not have any involvement in the case but it was just for the public welfare and also was related to public at large. Justice P N Bhagwati said "One basic and fundamental question that confronts every democracy, run by a rule of law is what is the role or function of a judge. Is it the function of a judge merely to declare law as it exists-or to make law?" And this question is very important, for on it depend the scope of judicial activism.[7] "Judges do not make law; they merely interpret. Law is existing and imminent; the judge merely finds it. He merely reflects what the legislature has said. This is the photographic theory of the judicial function". It is for the judge to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of a judge. This has lead to the advent of an over active judiciary which assumed upon itself the need to adjudicate even where it was not perceived to be warranted. Although Article 50(8) of the Indian Constitution expressly provides for Separation of Powers between the different organs of the State, but time and again, the Indian Supreme Court has taken on itself the task of filling in the gaps created by the Legislature and the Executive to do justice.

While doing so, the judiciary has been often criticized for overstepping its limits. In the case of Vineet Narain vs. Union of India,[8] the Supreme Court had invented a new writ called "continuing mandamus" where it wanted to monitor the investigating agencies which were guilty of inaction to proceed against persons holding high offices in the executive who had committed offences. Rising judicial activism has hindered governance in the country and impacted the growth in Asia's third largest economy but nowhere in the world would we see ideal balance between legislature and judiciary. But in India, we have seen intensifying judicial activism, which had impacted the balance of governance.

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4 'Ratna Kapur, *Human Rights in the 21st Century: Take a Walk on the Dark Side*',Julis Stone 4(2005).

5 James Frederick Green, The United Nations and Human Rights, The Brooking Institutions Washington DC (1956) at pp.10-11

6 Arjun. M, 'Judicial Activism in India- an Overview', Centre for Public Policy Research, New Delhi (2004)

7 Vipin Kumar, 'The Role of Judicial Activism in the Implementation and Promotion of Constitutional Law and Enforcement of Judicial Over Activism 19(2)' IOSR-JHSS (2014) at pp.20-25

8 Vineet Narain vs. Union of India, 1998 Cri. LJ 1208(SC)

3. Implication of Judicial Activism in India

The role of the judiciary in a modern legal system is of immense social significance. Law is in a constant process of flux and development, and though much of this development is due to the enactment of the legislature, the judges and the courts have an essential role to play in facilitating developing the law and adopting it to the needs of the Society. In our constitutional scheme the judiciary alone has been entrusted with the power and duty to test the constitutional validity of legislative provisions and the validity of administrative actions. The superior courts are empowered to declare a statute ultra vires the constitution and to nullify an executive action as unconstitutional. Judicial policy making can be either an activity in support of legislative and executive policy choices or in opposition to them. But the latter one is usually referred to as judicial activism. The essence of true judicial activism is the rendering of decision which is in tune with the temper and tempo of the times. Activism in judicial policy making furthers the cause of social change or articulates concepts such as liberty, equality or justice. It has to be an arm of the social revolution. An activist judge activates the legal mechanism and makes it play a vital role in socio-economic process.[9]

The following trends were the cause for the emergence of judicial activism such as expansion of rights of hearing in the administrative process, excessive delegation without limitation, expansion of judicial review over administration, promotion of open government, indiscriminate exercise of contempt power, exercise of jurisdiction when non-exist; over extending the standard rules of interpretation in its search to achieve economic, social and educational objectives; and passing of orders which are unworkable.

Although the Supreme Court of India has widened its scope of interference in public administration and the policy decisions of the government, it is well aware of the limitations within which it should function. In 'P Ramachandran Rao vs. State of Karnataka',[10] it has been observed, the Supreme Court does not consider itself to be an imperium in imperio or would function as a despotic branch of the State.

In the case of Kesavanada Bharati (1973), the Supreme Court held for the first time that a constitutional amendment duly passed by the legislature was invalid for damaging or destroying its basic structure. This was a gigantic judicial leap unknown to any legal system. The supremacy and permanency of the constitution was ensured by this pronouncement, with the result that the basic features of the constitution are now beyond the reach of Parliament. The criticism of this judgment by the Supreme Court is that since the court has not exhaustively defined what these basic features are, the judicial arm can be extended at will. In the Bhagalpur Blinding case (Khatri (II) v State of Bihar, 1980), it was held that Article 21 included the right to free legal aid to the poor and the indigent and the right to be represented by a lawyer. It was also held that the right to be produced before a magistrate within 24 hours of arrest must be scrupulously followed.[11]

Judicial activism has flourished in India and acquired enormous legitimacy with the Indian public. However, this activist approach by the judiciary is bound to create friction and tension with the other organs of the state. Such tension is natural and to some extent desirable. The governance of our Republic, in the totality of administration, is vested in the trinity of executive, legislature, and the judiciary. In a democratic Republic like India the constitution is supreme, and the rule of law requires that every organ of the state, adhere to constitutional policy.

4. Concept of PIL in Judicial Activism

With the advent of Public Interest Litigation (PIL) in recent decades, Article 32 has been creatively interpreted to shape innovative remedies such as a 'continuing mandamus' for ensuring that executive agencies comply with judicial directions. In this category of litigation, judges have also imported private law remedies such as 'injunctions' and 'stay orders' into what are essentially public law-related matters.[12]

Successful challenges against statutory provisions result in reliefs such as the striking down of statutes or even reading down of statutes, the latter implying that courts reject a particular approach to the interpretation of a statutory provision rather than rejecting the provision in its entirety.[13]

The PIL matters are filed straightaway at the level of the Supreme Court or the High Court so this prevents the party from presenting meaningful evidences before the start of the proceedings. In Parmanand Katarav. Union of India,[14] the Supreme Court accepted an application by an advocate that highlighted a news item titled Law Helps the Injured to Die" published in a national daily, 'The Hindustan Times'. The petitioner brought to light the difficulties faced by persons injured in road and other accidents in availing urgent and life-saving medical treatment, since many hospitals and doctors refuse to treat them unless certain procedural formalities were completed in these medico-legal cases. The Supreme Court directed medical establishments to provide instant medical aid to such injured people, notwithstanding the formalities to be followed under the procedural criminal law. In many other instances, the Supreme Court has risen to the changing needs of society and taken proactive steps to address these needs. It was, therefore, the extensive liberalization of the rule of locus standi which gave birth to a flexible public interest litigation system.

The unique model of public interest litigation that has evolved in India not only looks at issues like consumer protection, gender justice, prevention of environmental pollution and ecological destruction, it is also directed towards finding social and political space for the

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9 Negi Mohita, 'Judicial Activism in India: Origins, Meaning, Causes and Course' Available at: http://www.yourarticlelibrary.com/essay/judicial-activism-in-india-origins-meaning-causes-and-course/24914/

10 *P Ramachandran Rao v State of Karnataka* (2002) 4 SCC 578

11 R. Shunmugasundaran, 'Judicial Activism and Overreach in India amicus curiae' (2007)at pp. 2-7

12 Ashok H. Desai and S. Muralidhar, Public Interest Litigation: Potential and Problems' in OUP (2000) at pp.159-192

13 Mr. K.G. Balakrishnan, 'Judicial activism under Indian Constitution' Trinity College Dublin, Ireland – October 14 (2009).

14 *Parmanand Katarav. Union of India* (1989) 4 SCC 286.

disadvantaged and other vulnerable groups in society. The Courts have given decisions in cases pertaining to different kinds of entitlements and protections such as the availability of food, access to clean air, safe working conditions, political representation, affirmative action, anti-discrimination measures and the regulation of prison conditions among others.[15]

The judicial activism has of course raised the popular profile of the higher judiciary in India. However, arguments are routinely made against the accommodation of 'inspirational' directive principles within the ambit of judicial enforcement. The Supreme Court of India has further internalized the importance of laying down clear normative standards which drive social transformation. Its interventions through strategies such as the expansion of Article 21 and the use of innovative remedies in Public Interest Litigation (PIL) cases has actually expanded the scope and efficacy of constitutional rights by applying them in previously un remunerated settings. Thus the concept of PIL and the judicial activism has developed parallel to each other at a constant speed. The judicial activism and PIL have been dependent upon each other for their survival, and judicial activism is more dependent on the PIL. The decisions of the judges in different PIL cases have been mostly dependent upon their own set of values and on legal provisions.

The concept of judicial activism and PIL has definitely raised the standard of Indian judiciary to a whole new level. Judges have been entrusted with the power to give judgment not only on the common law or customs or the written laws but now they can also interpret and amend according to their needs. The advent of the PIL has marked new boundaries for the Indian judiciary as now judges can decide and amend the different law points. The judicial activism has helped not only the judiciary but also the legislature in framing of laws.

5. Defence of Judicial Activism

Judicial activism has been a very wide concept. It has given judiciary the power to interpret the laws as per the needs of the society. With the change in the society the laws are also consistently changing, the judicial activism gives the Supreme Court and high court judges to declare any law void which is infringing one or more provisions of the society. In a democratic set up the judiciary has to play a significant role in preserving a government which is for the people, of the people and by the people. An activist role on the part of the judiciary is inevitable. There is no room for a passive role of the judiciary. It is also found that judicial activism increases judicial power. However, judicial activism not only involves power but it also involves responsibility. Where a power is coupled with a duty to exercise it there is no liberty, not to exercise it.[16] In the post independent era, India has faced scams such as 2G scam, money laundering and the like. These need to be checked from time to time, so it is important that judiciary should not only work according to the law but it should also overcome its boundaries to remove the corruption. The Supreme Court of India was quick to remind that there should not be usurpation of power even by the judiciary. The judiciary must be cautious in treading the path of judicial activism. Judicial activism is never meant to terrorize either the people or the public authorities. In fact, judicial activism is meant for the people though through judicial activism it has made the public authorities aware of their obligations towards the people. The judges should be given the power to shape law to meet justice and procedural innovations. Written law has to be expounded and given shape to meet justice. Such procedural innovations are required for the larger interest of the people. Judicial activism is a necessity in shaping the law according to the changing circumstances. Judicial activism has been a vacuum of legislations of the Indian Supreme Court, as it has come with guidelines to supplement the law to meet the required needs of the society.

6. Conclusion

"Every legal order, federal or unitary, whether of civilian or common law ground faces the problem of the role of the courts in the evolution of law."[17] The Supreme Court which is the final arbiter of the dispute and interpreter of the Constitution ensures that the flexibility should be used according to the needs of the society. This is essential to promote justice and preserve the supremacy of the constitution. The importance of human rights gained momentum after the Second World War. The universality of human rights has been recognized by the United Nations as well as by countries who were participants or non – participants to the Second World War. In post-world war II constitutions of Japan and Germany, which had experienced the horrors of war, it is found that the judiciary has played an activist role in protecting and promoting the human rights of its citizens. Judicial activism in India enjoys constitutional mandate under Article 32, 141 and 142. These constitutional provisions give plenary power and jurisdiction to provide remedies in order to meet the ends of justice. Such judicial activism may be in the area of constitutional law or even under ordinary law. The Indian Supreme Court developed the human rights jurisprudence through a harmonious construction of Article 14, 21 and the directive principles often referred to as "a vertible dustbin of sentiments." The Indian Supreme Court through judicial activism guaranteed not only the first generation rights and the second generation rights but also third generation rights like the right to healthy environment, clean air, water etc. The reason for judicial activism is the increase in the problems faced by the society as a whole – the problems of a big and complicated society. With regard to judicial activism for socio-economic justice, PIL proved a boon. Through PIL, the Indian Supreme Court ensured that the Constitution is meant not only for the elite but also for the butcher, the baker and the candlestick maker.[18] The role of the judiciary is crucial in a democratic government. Hence judicial activism exists, has to exist and will exist even if a country is governed by the principle of parliamentary sovereignty.

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[15] Supra Note 13

[16] R. W. M. Dias, *Jurisprudence*, 5thEdition, Aditya Books Private Limited, New Delhi(1994).

[17] W. Friedmann, *Law in a Changing Society*, 2nd Edition ,Universal Book Traders, New Delhi, 1996

[18] *Bidi Supply Co v. Union of India* AIR 1956 SC 479

Punitive Correctional Techniques and Collateral Damages: A Review

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ABSTRACT

In this study an endeavour will be made to examine the Punitive Correctional Techniques which are honed over the world alongside an exploration on 'Treatment of Offenders' while centring upon the outcomes and collateral damages confronted by the convicts in our society. What should be done with those who evade law? The answer to this continues to be a source of much dispute and debate. Some believe that the criminal should be ruinously punished to exterminate its existence and set an example in front of the rest of the society while some believe that the aim of punishment is to reform the criminals by inducing training and providing restoration to them. But does this make us more secure? We shall discuss in this article various punitive correctional techniques adopted in order to deal with such problems.

The thought that correctional and reformative organizations should reform offenders—should transform them so that they will be less criminal? Again imprisonment leads to various collateral consequences to that of the offenders faced in the society adversely affect their life. Absence of occupation opportunity, disentitlement from military posts, and different issues connected with social acknowledgment however never permit a criminal to lead an ordinary life.

Key Words: Imprisonment, Punishment, Punitive correctional techniques, Justice System, Specific correctional techniques

1. Introduction

"Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behaviour of many innocent convicts. Law must rise with life and jurisprudence responds to humanism." Coercion means a state where a perceived power is constrained to castigate the person who contradicts the tenets and regulation of the society. Hence, logic behind the idea of sentencing is to deliver justice to the wronged as well as other than this to keep up security and well being in the general public. To penalize a criminal is not just to offer torment to him or to mortify, yet there is a higher target to be accomplished and that is to set up a tranquil society.

In the setting of 'Treatment of Offenders', it is in methodology today, to call the jails as Correctional institutions. The essential set-up and structure and notwithstanding working of Indian Jails was set up under the British Government, where in the early Hindu period straight up to the Mohammedan period, there was no arrangement of confinement of the under trials or those discovered liable of an offense. Justice and righteousness amid those periods, was all the more rapid and instantaneous. Discipline comprised of remuneration, fine and repentance and social limitations without detaining the guilty ones in a prison. At the point when Lord Macaulay enacted the Indian Penal Code, 1860, the essential guideline for suppressing crime, both at the level of counteractive action and its treatment, a novel line of methodology was set down. Therefore in 1894, the Prisons Act was established and correctional facility turned into a crucial element of each authoritative unit, for the most part called a region with the end goal of administration of Law and order in the society.

2. History and Development of Correctional Techniques in India

The development of India's punitive measures and correctional techniques is described from the ancient-medieval period through the British period to the post-independence period, including the evolution of structure and the concept of treatment of prisoners.

In India, the early jails were just places of confinement where a criminal was kept during the trial, judgment and the execution. The structure of the general public in ancient India was established on the standards articulated by Manu and clarified by Yagnavalkya, Kautilya and others. Among different sorts of whippings- marking, mutilation, hanging and death, and detainment that was the most gentle sort of punishment known unmistakably in old Indian penology. Fine, detainment, expulsion, mutilation and capital punishment were the disciplines in vogue. Fine was the most widely recognized, and censured individual who couldn't pay his bill to subjugation until it was paid by his work.

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[1] Justice Krishna Iyer Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation', J. H. Burns & H. L. A. Hart eds., (1970) (1789)Pillai, P S A, Criminal Law, 9th Ed.,Butterworths India, New Delhi (2000) at p. 286.

[2] Praveen Dalal, 'Prison Reforms in India'.Available at: http://india.indymedia.org/en/2005/04/210469.shtml

Kautilya depicted the spot of jail area and also the events when the detainees can be discharged. The officers of the correctional facility were known as Bhandanagaradhyaksa and Karka. The Bhandanagaradhyaksa was director and the Karka was one of his associates. The correctional facility division was under the charge of Sannidhata.

The legal framework in the Medieval India bear a resemblance to that of Ancient India and the contemporary Muslim rulers often, if by any stretch of the imagination, tried to interfere with the everyday system of Justice delivery. Amid the Mughal period origin of law, its characteristics were basically Quranic in nature. Crimes were divided into three groups, Offences against God or Deity, Offences against State; Offences against private individual. Punishment for these crimes were of four types, they were, Hadd, Tazir, Quisas, Tasir. Detainment and imprisonment was not considered as a type of justice on account of normal hoodlums. It was utilized for the most part as a method for confinement only.

Modern India: With the British period in India, detainment turned into the most regularly utilized instrument for reformatory treatment. In 1897, the Reformative Schools Act was passed to regulate the sending of youth offenders under 15 years of age to reformative school rather than to penitentiaries. The Indian Jails Committee of 1919 issued a report that offered force to jail changes all through India and established the framework for the cutting edge jail framework in India. Suggestions, nonetheless, were not executed in full because of authoritative challenges. The establishment of the Borstal School Act, Children Act, Probation of Offenders Act, and Good Conduct Prisoners Probation Release Acts of a few States were the consequences of the Committee's report. In the post-freedom period, the Government of India looked for specialized help from the United Nations to propose dynamic projects for logical consideration and treatment of criminals. One suggestion was the foundation of the Central Bureau of Correctional Services at Delhi and the update of prison manuals. The All India Conference of Inspectors General of Prisons was held in Bombay in 1952, and it prescribed building up a board of trustees to draft a model jail manual. The Central Bureau of Correctional Services was made in 1961 (renamed the National Institute of Social Defence) to arrange and create uniform strategy, institutionalize the gathering of insights, and trade data with outside governments and U.N. offices to advance research. Reformatory and retributive ways to deal with remedies have been supplanted by the idea of recovery. Open detainment facilities have been built up in various parts of the nation.

3. Punishment

H.L.A Hart along with Mr. Bean and Professor Flew have stated "punishment" in terms of five essentials like it must entail pain or other consequence normally considered distasteful ;It must be for an offence or act against legal rules; It must be deliberately administered by human beings other than the offender; It must be an actual or supposed offender for his offence; It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

Under section 53 of the Indian Penal Code, 1860 prescribes five kinds of punishments are prescribed:

(i) Death Penalty

(ii) Life Imprisonment

(iii) Imprisonment

(a) Rigorous Imprisonment

(b) Simple Imprisonment

(iv) Forfeiture of property

(v) Fine or Penalty

3.1 General System and Programs

Amid the previous two centuries, the central societal response to guiltiness has been reformatory. Punishment for offenders is torment or suffering them purposefully which is delivered by the state is the prevalent belief and also the practice in some cases. In organization of the criminal law, we have accepted that one quality originating from punishment of pain on guilty parties is reorganization or, in a more up to date phrasing, "restoration" or "rehabilitation" or "correction" of those wrongdoers. Reliably, the general programs undertaken for executing the reformatory response to wrongdoing likewise have been seen as remedial systems. Physical torment, social corruption, limitation of riches, and confinement of flexibility are among the projects utilized for dispensing agony on offenders. At present, the most well known systems of this sort are limitations on wealth (fines) and confinements on freedom (detainment). As a general system for managing offenders, the jail, similar to the mental healing facility, performs a coordinating capacity for society. "Undesirables," , "protesters," "outlaws," and so forth., are isolated behind dividers.

In the current scenario, there has been a particular pattern far from the thought that perpetrating torment changes or reforms culprits. Additionally, it is presently contended that penitentiaries don't remedy and that, in this manner, they should be diminished or something like that altered that they get healing/hospital facilities in place of cruel punitive measures. In any case, neither the pattern nor the chic contentions depend on investigative proof that punishment is not powerful as a general restorative system. This is genuine essentially on the grounds that there never has been a satisfactory measure of "proficiency".

4. Punitive Correctional Techniques

The criminological and penological writing contains two main originations of "restorative strategies." The old practice is considered as remedial procedures, general frameworks and general projects, utilized for taking care of offenders and, thought to be, by one means or another reformative. Accordingly, inconvenience of either physical or mental agony, in any of an assortment of settings, keeps on being seen as a general framework for correcting offenders and criminals. Likewise, the main aim behind introducing the system of probation, parole, and detainment has resulted to be more "restorative" than the

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[3] (1970) 2 SCC (Jour) 37

projects utilized as a part of the past.[4]

A more up to date concept of "correctional techniques," in any case, puts more accentuation on the particular techniques utilized as a part of endeavors to change individual offenders. While portrayals of such routines are in no way, as exact as, depictions of therapeutic strategies, yet a similarity with clinical pharmaceutical is made, with the outcome that the use of these techniques is called "treatment" or "therapy." The restorative systems have demonstrated helpful in the event of Juvenile Delinquents, First Offenders and Women. All the more, as of late, the reformative hypothesis is as a rule broadly utilized as a strategy for treatment of rationally debased guilty parties. This is finished by grouping wrongdoers on the premise of age, sex, gravity of offense and mental wickedness. Gandhiji stated, "Hate the sin and not the sinner". It should be the guide in the administration of criminal justice and equity.

4.1 Prison System

Jail is a medium where the criminal justice framework places its whole trust. The restorative system, if becomes unsuccessful, it will make the entire punitive technique futile. The idea of renewal has turned into the watchword for jail organization. Human rights statute promoters claim that no wrongdoers are ought to be treated in a brutal, corrupting or in a barbaric way. The term jail has been characterized by the Prisons Act, 1894 in a comprehensive way.[5] During the initial period, detainment was a method of keeping under trial persons. The fundamental reason for detainment and imprisonment are those of:

- Disabling the wrongdoer from harming or to become a risk to society;
- Preventing potential offenders to become a dander for the society by keeping him locked up;
- Altering and reforming the criminal under vigorous and changing condition;

It has been understood that detainment or imprisonment, keeping in mind the end goal to be a viable transformation system for managing guilty parties, must be long haul detainment, or detainment for no less than an adequate time, in order to give the jail authorities adequate chances of effectively managing the wrongdoer for his re-training and recovery. Short sentences are viewed as more regrettable as they don't have any restorative worth. Imprisonment facilities and prisons - are the most surely understood remedial foundations. Customarily these establishments are situated far from urban and populated focus, and are manufactured of stone, steel and cement, for safety and custody.

4.2 Parole

It is often alleged that a detainee who is discharged from jail is a threat to society. Ex-detainees are by and large evaded, feared and separated and hence they are constrained to wind up devilish as opposed to being driven an upright life. With a specific end goal to hinder this circumstance, a remedial strategy known is "Parole", which has been devised to provide a chance for the prisoner to rehabilitate himself in the society on a guarantee to return to prison if he disobeys the law. In this way parole is the arrival of a long haul detainee from a correctional organization after he has served a piece of his sentence (by and large 1/3) in jail custody and on condition that he might come back to the jail to experience the unexpired sentence in the occasion of misconduct. In India, the power to discharge the detainees on parole is practiced by the executives under the separate laws of the State. President and Governors of States are vested with forces to give pardon. Parole is otherwise called a pre-mature arrival of wrongdoers after a strict examination of long haul detainees, under the standards set around different governments. Untimely discharge from jail is contingent subject to his acting in the public eye and tolerating to live under the direction and supervision of Parole Officer.

4.3 Indeterminate Sentences

For infringement of different crimes, maximum and minimum punishments were awarded by law. It was the capacity of the courts to decide the length of detainment inside of the cut-off points set up by the lawmaking body after a man had been discovered blameworthy of an offense. In 'Indeterminate sentence' the courts let the time limit of detainment in the hands of the discretionary powers of those who are executing the sentencing. The choice to discharge the guilty parties at the fitting time was to be taken up by the jail authorities when found that the wrongdoer has improved. In reality, the sentence is 'indeterminate' only when no minimum or maximum time span of imprisonment is defined. But in actual practice, the minimum and maximum limits are set out by the court before the initiation of the imprisonment.

4.4 Admonitions

Having respect to the age, character, predecessors, physical or mental state of the offender, and to the inconsequential way of the offense or any special conditions under which the offense was done, the court might, in the wake of indicting the blamed individual, discharge him after due admonition. Such a discharge is passable just if the following accompanying conditions are fulfilled:

i. There is no past conviction demonstrated against the charged individual.

ii. The offense of which he has been blamed for is either theft, robbery in a building or dishonest misappropriation or is chargeable under the IPC with not over 2 years' detainment or is punishable only with fine.

iii. offences under the IPC that are not culpable with over two years' detainment. The court has discretion to discharge the wrongdoer after admonition in place of sentencing him to any sentencing.

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[4] Francis T. Cullen, Paul Gendreau, 'Assessing Correctional Rehabilitation: Policy, Practice, Prospects'. Available at: http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/cullen%20and%20gendreau_CJ2000

[5] Universal Declaration Of Human Rights, 1948

iv. Any guilty party who is a first time wrongdoer or offender.

4.5 Probation

The law dealing with Probation of Offenders in India is contained in the Probation of Offenders Act, 1958 which is a thorough enactment on probation law. The discharge of offenders on probation is another reformative practice developed as an alternative to conservative incarceration of wrongdoers in prison. In this method, the guilty party is discharged on post trial supervision with or without conditions and is permitted to live in the commune for his self-recovery. His discharge on post trial supervision may be on the condition that he may be put under the direction or supervision of a Probation Officer. The Supreme Court stated in *Rattan Lal v. State of Punjab*[6] that the Act is a landmark in the advancement of the contemporary liberal tendency of reform in the ground of penology.

4.6 Juvenile Justice

The early criminal justice framework did not perceive any refinement between adult and adolescent juvenile wrongdoers, so far punishments were concerned. It is just with the prevalence of Reformative hypothesis of discipline, it was understood that the adolescents between a particular age ought to be diversely treated. Act entitled Juvenile Justice (Care and Protection of Children) Act,2000 was passed which came into power on first April 2001. Under this Act, a juvenile or child means a person (boy or girl) who has not completed eighteenth years of age.[7] This Act was repealed with Juvenile Justice (Care and Protection) Act 2015[8] which states that, "Court has power to convict the child below 18 but above 16 to treat as an adult". The Act confers that no juvenile felonious shall be punished to death or imprisonment. In Musa Khan v. State of Maharashtra,[9] the Supreme Court found that this statute is a piece of social legislation which is intended to reform juvenile wrongdoers with a vision to prevent them from becoming tough criminals by inducing an educative and reformative conduct to them by the government. In Sheela Barse case, the Supreme Court has tinted the importance[10] of proper handling, training, and guidance of children both on the part of society & government.

Also Section 27 of the Criminal Procedure Code, 1973 provides that any offence not punishable with death or imprisonment for life committed by any person who, on the date, appears or is brought before the court, is under the age of 16 years, may be tried by the court of a Chief Judicial Magistrate or by any court especially empowered under the Children Act, 1960 or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders. Section 360 of the Code of Criminal Procedure, 1973 empowers the court to order the discharge on probation of good behaviour or after admonition.

5. Specific Correctional Techniques

(i) Borstal: The penologists suggested Borstal treatment for the adolescent delinquents. Borstal system was found in England in the village named Borstal in Kent. At the age of 16, the period of childhood comes to an end, and next is the stage of adolescence. According to the penologists, it is the important age of transformation, changes come so fast to them that many cannot resist themselves. Out of confusion, obsession, curiosity etc. many individual indulge in crime. So, to keep such perverted youths under control, Borstal system was introduced. There are some Borstal institutions in some states of India where adolescent delinquents are kept to train them and treat them. But unfortunately these institutions are set in traditional pattern, so inadequate to deal with psychological and psychiatrically treatment of the delinquents.

(ii) Multi-systemic Therapy: The main goal of it is to assist parents in dealing with their child's behaviour problems. The duration of the treatment is four months, including 50 hours of time with a counsellor. This approach persuades the complete family to contribute, in addition to teachers, school superintendent, "and other adults who cooperate with the youth".

(iii) Multi-dimensional Treatment Foster Care: It puts delinquent youth into a foster habitat, alone or with another juvenile. Foster parents are educated and use behavioural parenting practices prior to taking a youth into the home. Adolescent are treated by an individual therapist while another therapist works with the natural parents.

(iv) Functional Family Therapy: Here handling and treatment is delivered to children aged between of 11 and 18 years who have engaged in felony, aggression or substance abuse. Essentially, the program works on relationships between family members in order to improve the functioning of the family unit as a whole.

(i) Cognitive-behavioural Therapy: It utilises workout and training that are designed to alter the dysfunctional thought patterns demonstrated by many wrongdoers. It helps people become aware of the existence of these dysfunctional thinking prototypes, or "automatic pessimistic believes, approach prospects and beliefs, and to understand how these negative thinking patterns put in to unhealthy feelings and conducts".[11]

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6 AIR 1965 SC 444

7 Section 2(k), Juvenile Justice (Care & Protection of Children) Act, 2000

8 Section 18-19, Juvenile Justice (Care and Protection) Act 2015

9 AIR 1976 SC 2566

10 Sheela Barse v. Union of India, JT 1988 (3) 15

11 "Rehabilitation Strategies."Available at: http://www.children.gov.on.ca/htdocs/English/topics/youthandthelaw/roots/volume5/preventing05_rehabilitation_strategies.aspx

6. Collateral Damages and Societal Consequences

Collateral consequences are stated simply as the aberrant outcomes that spill out of government and state criminal feelings. Collateral outcomes, by contrast, are not part of the unequivocal punishment passed on by the court; they come from the actuality of conviction and not from the sentence of the court. "Collateral Consequences" incorporate both those assents forced by law which follow in the wake of a conviction for a criminal offense, and additionally, what have been alluded to as the "unintended" results of equity frameworks identity.[12] They also include a vast network of "civil" sanction that limit the convicted individual's social, financial, and political admittance. Some of the most notable include temporary or permanent banning for public benefits, public or government-assisted lodging, and various job-related limitations; disentitlement from military service; community disqualifications such as murderer disappointment and debarment for jury service; and, for non-residents, extradition.

For criminal feelings to be regarded just and viable, both society and the guilty party must have some level of understanding, around what the way of a given conviction really was or is, the thing that the punishment allotted for said conviction will be and when that punishment might have been forked over the required funds. By then when the sentenced party's obligation to society has been paid in full, there ought to exist a sensible level of desire that he or she will have the capacity to be appreciated and given the full advantages of citizenship. Collateral consequences are often separated into major categories of consequences such as obstacle to employment, difficulty to housing, disfranchisement (failure of the right to vote), and loss of eligibility for extensive range of remuneration, the aforesaid loss of the right to voyage, and the loss of capability to use credit.

7. A Way Forward, Conclusion and Recommendations

The discussion focused on conduct and guidance in prisons is not oratory; it can prove to be bona fide, depending upon the enthusiasm and willpower. Efforts should be made to develop our prison structure by initiating new procedures of administration and by educating the prison personnel with our constitutional commitment towards prisoners.

The perspectives offered recognize that the criminal justice system has reached a transformative stage that will shape the perceptions of individuals, families, and communities that are affected by and operate within the system. These perceptions could potentially influence philosophical perspectives on punishment and debates involving the viability or applicability of collateral consequences. These may also influence the legal and non-legal services provided to individuals exiting correctional facilities. Perhaps most importantly, these may influence community perspectives of the legal and social obstacles imposed upon these individuals and how those obstacles further stigmatize re-entering individuals and potentially impact community safety. Moreover, these perspectives will be shaped at a critical moment as increasing number of individuals exit correctional facilities, as collateral consequences impede their ability to successfully reintegrate, and as these complex issues present numerous public safety and social concerns for the various communities to which these individuals return. Let the emerging ray of hope see the end of darkness casted on the faces of bulk of prisoners and let a new arousing infiltrate each prison wall.

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[12] Mele, Christopher, Teresa A. Miller,'Collateral Civil Penalties as Techniques of Social Policy', *Civil Penalties, Social Consequences* (2005) at pp. 9-26.

[13] Aba Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons Standard, 3rd edition (2004).Available at http://www.abanet.org/crimjust/standards/collateralsanction with commentary.pdf

A Uni- dimensional approach to Gender bias- Male Victimization

Shruti Das*

ABSTRACT

In the era of globalized ideology and gender sensitization, where the tenet of equality are sought to be upheld in every sphere, victimization of any gender is a grave danger to such ideals. Where the victimization of Women across the world is well known, documented and discussed, little is known about how the men fare in this regard. The Supreme Court has recognized that the Dowry Act and Domestic Violence Act is a legal terrorism, which many unscrupulous women use to threaten to mend the husband and his family, using the draconian provisions. Section 41A and Sec 41 were modified in amendment to Criminal Procedure Code in 2010 to minimize abuse of powers of arrest by police, especially in cases like IPC 498A. But situation hardly changed. The paper shall address certain legislation which was legislated for protecting women which is at certain instances used by women to abuse men and their families.

Key Words : Gender Bias, Sensitization, Discrimination, Victimization

1 Introduction

"Criminology and the sociology of deviance must become more than the study of men and crime if it is to play any significant part in the development of our understanding of crime, law and the criminal process and play any role in the transformation of the existing social practices."

L. Gelsthorpe

In the era of globalised ideology and gender sensitization, where the general concept of Gender Victimization is known to be synonymous with women victimization, the society is awakening to the fact that Women are not the only ones victimized. The legal torture of men is not an issue of physical strength or abusive behavior of one party, it is an issue of a legal system, which is designed to do injustice and hand-over powerful unguarded tools of torture in the hands of one-section of the society in some instances. The system is indeed eradicating evils from society but at the same time there are such a huge proportion of innocent individuals who are ground in the system, which is crumbling the not so bad patriarchy as it is portrayed through media. Such a Nazis legal system created by feminist groups is making feminism synonymous to Nazism in India. The society also needs to be awakened to the fact that not just the husband, but also his family members, near and distant relatives and even minor children and grandparents are roped in this mess for sometimes no fault of their own. The system is churning down helpless families and destroying innumerable marriages. Dowry and abuse destroys marriages, but so does false cases and victimization of family. Certain legislations which were legislated for protecting women are in certain instances used by women to abuse men and their families.

Indian Constitution states under Article 44 of the Constitution of India "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." The first Prime Minister of India, Jawaharlal Nehru, and the first Law Minister, BR Ambedkar, wished to take up a modernists approach by reforming archaic personal laws and bring them in consonance with progressive design of gender justice. They were both in favor of giving a Uniform Civil Code. However, faced with the bitter opposition of Muslim members in the Constituent Assembly, and political oppositions the notion was nipped in the bud. Our Constituent Assembly wanted to give a gender equal society and laws. As the personal laws were not giving women equal rights that they deserve they were amended and gradually they were given their equal rights. Looking into the society's behavior towards women laws were legislated and on the gradual progression of the society the women started misusing the laws. Every nations laws should be made in a way they protect each and every individual irrespective of their gender as it is conferred by Article 14 of the Constitution of India which states that "Equality before law.- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Though it confers positive discrimination but when a great number of men are discriminated then have to live a threatened life then we cannot call it a positive discrimination. Moreover law of a land should have immunity towards abuse of law. Indian Constitution does not allow for criminal prosecution of one gender against another. The Article 15(3) of constitution reads as "Nothing in this article shall prevent the state from making any special provision for women and children." This Article 15 must be read with article 44. Article 44 maintains that discrimination is allowed in the drafted laws by the parliament, in "civil laws", to give social, economical and political advantage on the criterion mentioned in sub-articles of Article 15.

2. Women Not Getting Same Sentencing as Male Perpetrators

It's accepted that men commit offenses at a much higher rate than women, this can't be disputed. However, women are not receiving the equivalent sentencing in the court system compared to their male counterparts. The Supreme Court has recognized that the Dowry Act and Domestic Violence Act is a legal terrorism, which many unscrupulous

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1 Sushil Kumar Sharma v. Union of India Writ petition no. 141 of 2005 JT 2005 (6) SC 266

2 NCRB Report 2004 Table 12.4

women use to threaten to mend the husband and his family, using the draconian provisions.[1] The torture to men comes from the draconian provisions and presumptions of Indian law against the natural principles of justice, in pursuit of quick questionable justice to woman, with the predisposition against husband and his family. The definitions of act constituting crime in matrimonial matters are extremely vague and the procedures are attempts to make justice before court's verdict.

For example, Sec 498A where a woman has only caused minor hurt to "a man" is a bailable offence, but if man causes the same hurt to a woman who happens to be "a wife", it is a non-bailable offence. Thus the legal position is that a man causing the hurt to a wife is liable to be imprisoned immediately, but a wife committing the same has to undergo trial and is free in society. Thus man is punished before the Court's verdict. The definition of S 498A makes mental and physical cruelty punishable. But being in husband's family, the woman is anguished by myriad reasons. High amount of tension among family members against the wife, many times result in filing S498A, which immediately leads to arrest of all the family members. Most of such family members are well educated and have never experienced criminal prosecution. The Indian Law also allows for dismissal of a person, who is imprisoned for more than 24 hours. Such arrests invariably lead to loss of job among family members of husband. The husband is under excruciating pressure and embarrassment, because of the first time imprisonment in life and seeing his close relative jailed and lose jobs. It puts him in the lifetime shameful position in front of his family members. All this is done at the behest of a new bride. It is not at all necessary that the actual crime has ever been committed for all this to happen according to Indian Legal Procedures.

Surprisingly all the criminal provisions in laws relating to women are non-bailable crimes. Crimes, which are of extremely serious nature, are only supposed to be made non-bailable and cognizable and non-compoundable. But every draft of women's laws makes each crime non-bailable, so that man can be held under terror of being imprisoned. Like, a man against whom restraining orders are obtained by wife for resisting her wife from working, is liable to be imprisoned only on the complaint of woman. The domestic violence law goes further one step, in allowing the conviction of the man only on wife's testimony. A man who is caught with an unscrupulous wife, which is more often than not the case, is doomed for life. He constantly lives under terror in house as his liberty financial, social and physical is completely at the behest of a woman.

There is another component of presumptions in Indian law. The example is dowry death. A man whose wife is dead under unnatural circumstances within first 7 years of marriage is presumed to have murdered her, if there is cruelty mentioned by the wife soon before the death. The law allows for unimaginable injustice. A man who might has lived happily and only because of some tiff the woman complains about her husband and then someday she is found dead. It is not uncommon to find such situation. There are always suicides and there will be more suicides. But how can a man be presumed to be a murderer and forced into murder trial. Even if the man is acquitted after being found innocent the scars of being forced into murder trial are heinous enough to not let him live in the society again and the precious years during his young life are already lost, which no feminist scraps can recompense for.

Most of the Section 498A of Indian Penal Code cases results in payment of high amount of alimony to woman and withdrawal of the cases. Because the woman is not interested in jailing her husband as there is hardly anything that can be achieved from it and husband is already enough frustrated by the imprisonment, dealing with police and long-drawn trial, in which his parents and younger siblings are also implicated. The husband wants to get out of the trouble by hook or crook. The example of the trauma can be witnessed in Crime against women cell, where men are regularly threatened and made to mend their ways. A day's anonymous visit in such cell will easily show many men, elders and younger ones being abused by legal machinery at the behest of women.

The rigidity of laws is so strict that it absolutely blocks any access to wife by husband, as he fears cases fabricated against him, which will immediately lead to his and his family's arrest. The presumptions are also such that once the wife has left home, the husband fears that untimely death of the wife will land him in a murder trial and moreover union with the wife, will result in more legal torture. In such a legal system created by Indian government, divorce is usually the best solution for him, despite the short-term jail and severe financial loss as it is at least a short time torture, instead of continuous life-long one. All crimes including rape, sexual assault, cruelty and domestic violence can be committed by women. The criminal tendencies of feminine gender will be quite clear, by looking at the no. of cases registered against females which is staggering 151675 in year 2003.[2]

3. Abuse of laws

The women usually make baseless allegations against their husbands because of spite or vengeance.[3] The Courts have also stated that bigamy does not exactly constitute cruelty under 498A.[4] Further, most of the times, the story put forth by the complainant doesn't seem credible and far fetched.[5] Poverty and failed marriage must not be allowed to become a crime. The complainant must not be allowed to make false statement implicating the entire family and other relatives under 307 and 498A.[6] The Court has also extensively stated what amounts to mental cruelty and how it should be grave danger. Sometimes the claims are false and the women in rare cases impersonate or provide false information before marriage and when found out frame a false 498A case.[7] Sometimes the complainant knowing about the false complaints evades coming to the Court even after summons. After reaching compromise, they also

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3 Neera Singh v The State (Govt. of NCT of Delhi) and Ors, I (2007) DMC 542 Dharm Raj and Ors. v. State of Uttar Pradesh and Ors. 2006 (2) A.D.J. 403 (LB)(DB)

4 Manju Ram Kalita v. State of Assam (2009) 13 SCC 330

5 Surender Kumar and Another v. State(NCT of Delhi) I (2007) DMC 723

6 Narendar Kumar and Another v. State(NCT of Delhi) I (2008) DLT 337

7 Rajesh Dhingra and Ors. v. The State and Ors. AIR 2006 Bom 147

wish to withdraw the matter.[8] 498A is not a provision made to exact revenge from the husband and his relatives.[9] The Supreme Court has also on several occasions quashed proceedings in lower courts due to false allegations.[10] The State has also been ordered in specific matters to pay compensation to the accused that were illegally detained and humiliated for no fault of theirs.[11] Even worse are the matters of women who have made such extortion as a profession to usurp money from unsuspecting husbands by threatening to file a case[12] and in these cases and the other matters that can be termed as the rarest of rare cases, can the complaint be quashed.

Whenever there is a law, it can be presumed to an extent that it cannot be foolproof in catering to the needs of the society and yet have necessary safeguards in place. Laws are meant for the protection of the general public or a specific group. Yet this protection should not be sought to be afforded to them at the expense of the other sections of the society. The Law of the land should ensure equality in the treatment it meets out to the society. It should have the necessary safeguards in place to prevent any abuse that is likely to take place. In India, Crimes against women are always on the rise. Yet, very few of these crimes are actually reported. There are many provisions in different acts that cater specifically to the needs of the fairer sex. Specific section in the IPC such as 498A, 304B and other such acts were introduced relatively later than other acts such as the Dowry Prohibition Act, 1961 etc. These provisions were inserted at a time of need to stop or curb the menace of Women Victimization. Ironically, they have become the catalyst of a relatively unknown phenomenon in India, Male Victimization. The provisions were enacted with relatively no safeguards at all, hence leading to rampant abuse and false matters.

Where the provision on Dowry Death can be justified to a large extent owing to the severity of the act, offences under S. 498A have become a real menace owing to a few reasons. Mostly urban women respond to this provision and thus majority of women in India i.e. rural areas, who suffer abuse, remain in oblivion to these provisions. The legislation is thus failing to reach the women that it was designed for. The conviction rates for these crimes, especially the one under 498A are abysmally low. As per National Crime Bureau (NCRB), in the year 2007, 187540 people were arrested under Section 498A, of which, the offense could be proved only for 13247 people. 94% of those arrested were found innocent.[13] And as more and more women realize the lucrative "business" that this could be, the situation is only bound to get worse.

The major issues with the said provision are that it is Cognizable, Non-bailable and Non-compoundable which basically means that on the basis of a mere complaint by the woman, the man along with his family and relatives can be put behind bars. Further, the police will not grant bail and thus the accused must go to the judicial magistrate only. Further the complaint cannot be withdrawn by the complainant. So even if a compromise has been reached or the wife decides she does not want to pursue legal recourse, it is now out of her hands. Therefore any wife who, in a fit of rage complains against the husband wants to withdraw the said complaint, she cannot do so. Therefore it also effectively ruins any chances of reconciliation after the trauma the husband and his family have gone through. Another interesting fact is that nearly anyone can be put behind bars, including minors, aged individuals and even distant relatives. Therefore, the husband effectively loses his job, reputation, money, time as well as his marriage! Further, there are no repercussions for filing a false complaint for the woman. The avowed object of these provisions is to combat dowry death and cruelty. Yet, they are giving rise to a new form of cruelty. Today the educated urban Indian women with the aid of jingoistic feminism have turned the tables on the men who had "victimised" them before.

The Supreme Court of India and various High Courts have, from time to time, expressed their concern over the misuse of this particular provision. The Court has on several occasions accepted that there have been instances of abuse of these particular provisions and that it is for the legislature to amend, modify or repeal such laws.[14] Further, in order to bring home the applicability of Section 498A, consequences of cruelty which are likely to drive a woman to commit suicide, whether mental or physical are required to be proved.[15]

Only on the basis of possibility of abuse and certain instances, legislation cannot be held to be arbitrary and discriminatory and violative of Art. 14 of the Constitution. It has been accepted for long that mere possibility if abuse of a provision is not a ground for holding a provision procedurally or substantively unreasonable.[16] The defense given for inability to contain the abuse is that the wisdom of man has not yet been able to conceive of a Government with power sufficient to answer all its legitimate needs and at the same time incapable of mischief.[17] It is for the legislature to amend, modify and repeal it.[18]

Therefore the Court has tried to shirk is responsibility to impart justice on the flimsy pretext that it is not possible for them to check the abuse.

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8 Mohd. Nasir and Ors v. State of NCT of Delhi, Crl. M.C. No. 1643-50/2006 Vinod Kumar Sharma v. The State and Another, [2001] RD-SC 201 Ratanvir Singh and Ors. v. State of NCT of Delhi and Anr. AIR 2003 SC 1386

9 Rajinder Kumar Sharma v. State and Another. 2008LLR 569 (Del HC)

10 Sanapareddy Maheedhar and Anr v. State of Andhra Pradesh and Anr., [2007 (14) SCALE 321 Onkar Nath Mishra and Anr. v. State(NCT of Delhi) and Anr., [2008 (1) JCC 65], Sundar Babu and Anr v, State of Tamil Nadu, 2009 (5) SCALE 25 Bhaskar Lal Sharma and Anr v. Monica (2014) 3 SCC 383

11 Arvinder Singh Bagga v. State of U.P. and Ors. (1995) Supp (3) SCC 716

12 Rajesh Dhingra and Ors v. State and Ors. AIR 2006 Bom 147

13 Sonali Singh, 'Section 498A geared by a circle of questions' Available at: http://legalfighter.wordpress.com/2010/05/04/section-498a-gheraoed-by-a-circle-of-questions/

14 Satish Kumar Batra and Ors. V. State of Haryana, AIR 2009 SC 2180

15 Ibid

16 Mafatlal Industries Ltd v. Union of India 1997 (89) ELT 247(SC); Collector of Customs v. Nathella Sampathu Chetty, 1963 (3) SCR 786

17 State of Rajasthan v. Union of India [1978] 1 SCR 1

18 Maulavi Hussein Haji Abraham Umarji v. State of Gujara 2004CriLJ3860 , Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation [2002] SUPP 5 SCR 666 and Padma Sundara Rao v. State of T.N. (2002)255ITR147(SC)

The Court has also stated that in false cases under 498A, the acquittal of the accused does not wipe out the ignominy that has been suffered during and prior to trial. Merely because the provision is constitutional and intra vires, does not give a license to unscrupulous persons to wreck personal vendetta or unleash harassment. Therefore it is the responsibility of the legislature to come out with how the makers of the frivolous complaints are meant to be dealt with.[19] The ultimate objective of every legal system is to arrive at truth, punish the guilty and protect the innocent.

Further the role of the court and the investigating agencies is that of a watchdog and not a bloodhound and it should be their endeavor to see that an innocent person should not suffer on account of unfounded, baseless and malicious allegations. Further the Court has held in several instance that mere "abuse" regarding family matters does not always result in Ill-treatment as held under 498A.[20] Not every incident that hurts the feelings of the woman counts as cruelty. On such incidents, the woman is not allowed to use the law as a tool to hold the entire household to ransom.

The Delhi High Court has already quoted its dissatisfaction in no small words regarding the application and implementation of these laws, regarding them as anything but satisfactory or punctilious. The Hon'ble Judge from his own experience of having dealt with thousands of these cases stated that the provisions were made with good intentions but the implementation has left a bad taste and the move has been counter-productive to say the least. Such misuse is against the institution of the marriage itself and is not good for the health of the society at large. There is a growing tendency amongst the women which is further perpetuated by their parents and relative is to rope in each and every relative- including minors and even school going kids nearer or distant relatives and in some cases against every person of the family of the husband whether living away or in other town or abroad and married, unmarried sisters, sister-in-laws, unmarried brothers, married uncles and in some cases grand-parents or as many as 10 to 15 or even more relatives of the husband. The Court has also reiterated how thousands of these cases are being lodged day in day out.

Further the institution of marriage itself is being threatened by this menace. These false cases further result in a large number of divorce cases because once the accused and his relatives have been put in jail without any immediate reprieve of bail, the marriage for all practical purposes becomes dead. Differentiating the cases from genuine to frivolous to downright vengeance takes much of the time of the Court. The marriage ends as soon as a complaint is lodged and the cognizance is taken by the police. The accused is then usually scared of attempting to enter into holy matrimony again.

These provisions have tendency to destroy whole social fabric as power to arrest anybody by extending or determining the definition of harassment or cruelty vests with the lower police functionaries and not with officers of higher rank who have intellectual capacity to deal with the subject.[21] Further, the police and that too its lower functionaries have been given the decision making power regarding whether the complaint is true and evidence is sufficient. They get to decide whether the husband, relatives, minor brothers and sisters must be put behind bars eventually scarring them for the rest of their lives. Such was neither the intention nor the object of the legislation.

This provision is slowly but surely becoming a social catastrophe with thousands of divorce cases arising out of it and equal or more number of marriages in limbo. Sterner provisions have failed to make any dent. Menace and evil of dowry is still looming large. In spite of stringent measures, sections of society are still boldly pursuing this chronic evil to fulfil their greedy desires.[22] The frivolous allegations are usually vague and omnibus and against every other family members. They do not in any way prove cruelty done upon her and sometimes are so exaggerated that they are hard to believe.[23]

A few courts now allow the matter to be settled between the parties. This only causes for more harassment as now there is an option of putting the relatives in prison and then asking for monetary settlement to rescind the matter, hence holding the whole justice system at a ransom.[24] The CAW cell devises its own methods to identify the nature of offence, collection of evidence and examination of witnesses. Even vague, unspecific or exaggerated allegations bereft of any evidence of any physical or mental harm or injury inflicted upon the woman cater to the cells quest to hound the husbands with the threat of arrest, making them run here and there like fugitives and force them to hide at their friends or relatives houses till they get anticipatory bail. Thousands of such complaints and cases are pending and are being lodged day in and day out.[25] Sometimes the cell, instead of bringing out an amicable settlement, blackmails and threatens the husband to mend his ways for the fear of an FIR against.[26] Along with husband, the relatives, distant or otherwise are also caught up in it. A substantial number of women are also arrested under this provision. Statistics reveal that during 2004-2009, more than 100, 000 women were false detained under this provision.

This provision seems to have converted failed marriage into a crime. Where the punishment for the husband is monetary, physical as well as psychological for a broken marriage that ironically may not even have been his complete fault, the women gets to go scot free for any false allegations she may have called for. It is being used as a tool to extract as much monetary benefit as possible. Further it is the duty of the police to collect circumstantial

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19 Sushil Kumar Sharma v. Union of India and Ors, JT 2005 (6) SC 266

20 G R Lokanath & Veerbhadrappa v. Gowramma & State of Karnataka AIR 2007 SC 3120

21 Sushil Kumar Sharma v. Union of India and Ors, JT 2005 (6) SC 266

22 Pawan Kumar's Case AIR 1998 SC 958

23 Smt. Neera Singh v. State (Govt. of NCT of Delhi) and ORS I (2007) DMC 542

24 Rajinder Kumar Sharma and Another v State and Another, Crl.M.C. 1216-17 of 2006

25 Savitri Devi Versus Ramesh Chand and Ors, 2003 (11) DMC 328

26 Jasbir Kaur Vs State (2006) RD-P&H 5369

evidence and find out the veracity of the complaint stated by the complainant. Yet, the police does not verify any circumstantial evidence and on top of fails to collect any evidence regarding the claims made by the complainant. Therefore, solely on the basis of oral testimony of the complainant and her relatives, the husband is put behind bars. Courts should always be careful in considering the credibility and truthfulness of the statement of the complainant and relatives.[27]

4. Committee and Commission Reports

Justice Malimath Committee on Reforms of Criminal Justice System and even the Law Commission of India, in its 154th Report have asked for this offence to be made compoundable. Further, Malimath Committee has also recommended that the offence be made bailable and that the police must be very careful while investigating in such matters. Further the committee has stated that this provision in the present form does not help the woman, man or institution of marriage. Further cruelty under 498A must be measured determined/inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc.; it is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint[28] An attitude that has the potential to uncover great institutional damage is that justice is required to be done only in the courts. It should instead be taken to be that any and every authority under the statute has to discharge its duties in a just manner, otherwise people will lose faith in the governance. Public authorities should stringently desist from unnecessarily burdening courts by placing before it frivolous and fabricated cases.[29] A cardinal principal of the sentencing policy is that it is better to forgive ten suspected criminals than to punish one innocent person but today, the IPC 498A is powerfully working its way towards uprooting the very foundation of any such Rule of Law.

5. Changing perception of Judiciary

Gradually judiciary is also changing its perception and the Supreme Court in the matter of Monju Roy v. State of West Benga,[30] highlighted the likely hood of naming all the family members in the complaint/FIR to built pressure on the husband and his relatives. The Supreme Court relying upon a previous judgment of Kans Raj vs State of Punjab[31] held as follows: "A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused as appears to have happened in the instant case.

The Court has, thus, to be careful in summoning distant relatives without there being specific material. Only the husband, his parents or at best close family members may be expected to demand dowry or to harass the wife but not distant relations, unless there is tangible material to support allegations made against such distant relations. Mere naming of distant relations is not enough to summon them in absence of any specific role and material to support such role"

6. Recommendations and Conclusions

After the complete study of the discrimination made to the so called "perpetrator" we came to the following recommendations:

Amendment of Laws: On the basis of the Law Commission of India Reports and other International reports we can well make out that there is abuse of laws happening in the legal system and which is against the social welfare state concept. Our laws need to be gender neutral as directed by Supreme Court of India in many instances.

Social Awareness: Human are social animal so mentality of the general people should be changed to change the society. In this twenty-first century we are well aware of the changing society and keeping pace with the society only amendment of the laws is not sufficient but society should be well aware of the occurrence of male victimization along with the fact that women are tortured by males.

Role of Media: Media is an important forum to make the society aware of the present society. Media has to come out of their archaic ideology and have to come up with the unreported news. Media has a responsibility to uphold the sections and the individuals who are getting marginalized. Media which is the mirror of the society needs to uphold the true colors of the victimization without marginalizing one section of society.

A change has been started with the first ever gender neural sexual harassment regulation by university Grants Commission. The UGC (Prevention, prohibition and redressal of sexual harassment of women employees and students in higher educational institutions) notified recently says that it is the responsibility of Higher Educational Institutions to 'act decisively against all gender based violence perpetrated against employees and students of all sexes recognising that primarily women employees and students and some male students and students of the third gender are vulnerable to many forms of sexual harassment and humiliation and exploitation.[32]

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27 Narender Kumar and Anr. v. State [Govt. of NCT of Delhi], 94 (2001) DLT 534, 2001 (60) DRJ 286

28 Manju Ram Kalita v State of Assam (2009) 13 SCC 330

29 Union of India v. Raja Mohammed Amir Mohammed Khan 2005 AIR (SCW) 5303

30 Criminal Appeal NO.1797 of 2012 decided on 17 April 2015

31 2000 (5) SCC 207

32 Available at: http://www.livelaw.in/ugc-notifies-indias-first-gender-neutral-regulations-sexual-harassment/

The Rights of Transgender Persons Bill, 2014: Examining the recognition of Transgender rights

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ABSTRACT

Following the unanimous passage of the Rights of Transgender Persons Bill in the Rajya Sabha, this paper seeks to critically evaluate the aim and operative elements of the Bill. We examine the object of the formulation and implementation of national policy for the development of transgender persons. Let us assume that the Bill professes a mechanism for recognition and enforcement of these rights. The welfare measures suggested in the bill have also been examined from a constitutional perspective, examining the imparting of a differential standard of equality alongwith directive principles of state policy, in order to purposively construct whether it imparts a compulsory duty upon states and center to ensure that these measures are duly accorded to the transgender or not. Based on the Supreme Court's interpretation that transgender are to be treated as a socially and educationally backward class for the purpose of affording the application of Articles 15 and 16 to them, we further seek to examine the enforcement machinery of the bill, i.e. the National and State Commissions for Transgender Persons coupled with the establishment of Transgender Courts. The ultimate aim of the paper is to understand if the guiding principles of the act reflect the constitutional scheme of equality as well as the Supreme Courts' interpretation of applying this equality principle to recognize their inherent differences.

Key Words: Constitution, Transgender, Transgender rights, Equality.

1. The Origins of the Transgender Rights Bill, 2014.

History has viewed the transgender community in a skewed manner. Despite this community being an inclusive part of the society, legislation, historically, has been far from supportive in recognizing the inherently different rights of the transgender community. Their discrimination has primarily resulted from them being viewed as non-conformists to the existing rigid gender groups, i.e. either male or female. Introduced by the British, The Criminal Tribes Act, 1871, specifically included Hijras or eunuchs on the presumption that they, as a community, were more 'predisposed' towards committing a crime.[1] The Act specifically provided for the registration, surveillance and control of eunuchs, amongst other communities.[2] Eunuchs were defined to include all persons of the male sex who, either admitted themselves or upon medical inspection, to be impotent.[3] They were penalized for appearing in female clothes or for dancing in public[4] and were disabled from adopting, acting as a guardian, making a gift, will.[5] This statute was subsequently repealed after India gained independence.

Despite the act being repealed, the social stigma, the cultural and social alienation that one experiences as a transgender, is writ large on numerous of circumstances in India. It has only been in the recent times, that steps have been taken to improve the conditions of the transgender community as a whole. The Election Commission of India in this regard, took the decision to include the option of "other gender" in 2009. This was viewed as the first step towards accepting the transgender community. The landmark judgment by the Supreme Court in the matter of National Legal Services Authority v. Union of India[6] directed the state and central governments to treat the transgender community as "socially and educationally backward classes of citizens and to extend to them all kinds of reservation along with various health and economical facilities." The judgment also aimed towards rehabilitation and restitution of the community.

At the very outset of this discussion it is imperative to highlight that the Rights of Transgender Persons Bill is a private member's bill. A Member of Parliament other than ministers is called a private member. In its history, the Indian Parliament has only passed 15 private member bills in total.[7] This Bill was the first since 1970, to be passed as a

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1 The Criminal Tribes Act, 1871, Act XXVII of 1871, amended in 1897 (hereafter referred to as 'The Criminal Tribes Act'). See: Meena Radhakrishna, Dishonored by History: 'Criminal Tribes' and British Colonial Policy (2001).

2 Preamble of The Criminal Tribes Act, 1871

3 Section 24, The Criminal Tribes Act,1871

4 Section 26, The Criminal Tribes Act,1871

5 Section 29, The Criminal Tribes Act,1871

6 National Legal Services Authority v. Union of India, (2014) 5 SCC 438

7 Available at: http://www.prsindia.org/media/articles-citing-prs/rs-passes-pvt-members-bill-on-transgender-rights-first-time-in-45-years-3760/.

private member bill, the last bill being so passed was the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Bill, 1968.

2. The Intention of the Legislature to Emancipate the Transgender People

A principal aid of interpretation or construction of legislation is inferred from the intent of the Legislature. The statute, or bill as is the present case, is an edict of the Legislature.[8] The duty of the judiciary is to act upon the true intention of the Legislature –the *mens* or *sententia legis*.[9]

Chief Justice Dyer has opined that the preamble clause to an act is a 'key to open the minds of the makers of the Act, and the mischief which they intended to redress.[10] 'Reading the preamble of the Transgender Rights Bill, it is explicit that it provides to be an effective piece of legislation for the 'formulation and implementation of a comprehensive national policy for ensuring overall development of the transgender persons and for their welfare to be undertaken by the State and for matters connected therewith and incidental thereto.'The Bill in its present form defines a transgender person as 'a person, whose gender does not match with the gender assigned to that person at birth and includes trans-men and trans-women, gender queers and a number of socio-cultural identities such as *–kinnars, hijras, aravani, jogtas* etc.'[11]

This definition falls within the ambit of the expansive interpretation that the term 'transgender' connotes. It does not, for example, simply imply that the people of the transgender community are solely *hijras*. For understanding that the transgender community consists solely of *hijras* would denote an extremely narrow and uninformed understanding of a social community that pervades over the existing gender division. This definition falls in line and is in fact is similar *in toto* with the interpretation accorded to the term by the Supreme Court of India in the landmark judgment. It is imperative to understand that while the act recognizes transgender to constitute a separate gender identity from the commonly construed ones of male and female, it at the same time fails to provide for any proclamation which affords recognition to the sexual rights of the transgender community. In fact, the Supreme Court of India itself chose to direct its arguments away from touching upon the subject as well.[12] Recognition of the personal rights of the transgender community does not acquire its full force and significance, if such rights are not granted to recognize one their most private and inalienable rights as constituent members of the human race. While the argument for recognition of sexual rights pans much more than the validity of section 377 of the Indian Penal Code, this right of intercourse acquires an added significance for the transgender community which has throughout modern history been discriminated unequivocally, on grounds of their sexuality and sexual preferences. In the uninformed intelligentsia of contemporary India, it is, in fact taboo to even consider discourse upon the sexual practices of the transgender community.

The landmark judgment of the Supreme Court recognizes that gender identity is one of the most fundamental aspects of life. This right recognizes that an individuals' inner perception of themselves does not in their opinion conform with the sex assigned to them at birth. The mere fact that such a right is recognized for the transgender community evokes rights imbibing the right to freedom of speech and expression which has been couched in reasonable terms as a fundamental right under Article 19 of the Constitution of India.

The reasoning prescribed by the Supreme Court is a constrained one. It reasons that the right to securing gender identity is central to that of the transgender community while the sexual orientation of an individual does not ascribe itself to understanding individuals on the basis of their self-ascribed gender identity. The bill furthermore, places no such mention regarding the recognition of the sexual rights of the transgender community.

2.1 The Equality Clause and the Transgender Community

The Bill vide section 4 provides for the right to equality to be extended to members of the transgender community in view of Article 15 of the Constitution of India. Article 15 is in fact an operative article which prohibits any form of discrimination against protected persons. It couches the grand principle of equality contained in Article 14 of the Constitution. The Bill, by way of section 5, extends to the transgender children, human rights on an equal basis as that which is available to other children. However, the right contained in section 5(2) is, in all fairness, ambiguous. It is not enough that the bill provides for a mandatory directive upon the appropriate government to ensure that transgender children have equal rights. The term equal

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8 Vishnu Pratap Sugar Works (Pvt.) Ltd. v. Chief Inspector of Stamp, U.P.,1967 (3) SCR 920; Institute of Chartered Accountants of India v. Price Waterhouse, (1997) 6 SCC 312; PadmasundaraRao v. State of T.N., (2002) 3 SCC 533.

9 South Asia Industries (Pvt.) Ltd. v. S. Sarup Singh, 1965 (3) SCR 829.

10 Sussex Peerage case,(1844) 8 ER 1034 (HL).

11. Section 2(t) of the Rights of Transgender Persons Bill, 2014.

12. National Legal Services Authority v. Union of India, (2014) 5 SCC 438

human rights, upon a purposive interpretation of Section 2(d) of the Human Rights Act, 1993 reveals that it includes the fundamental rights couched in Articles 14, 19 and 21. The freedom to express is an integral part of Article 19 itself and requires no specific and separate enforcement apart from the other human rights.

Article 14 in its application does not restrict the word 'person' contained in its terms to be restrictively applied to males or females alone. The Supreme Court have purposively construed that the construction of the term 'person' includes transgender people and accordingly they are entitled to legal protection of laws in 'all' spheres of state activity.[13] Furthermore, discrimination on the ground of 'sex' falls foul of Articles 15 & 16 of the Constitution. The Court has held that the expression 'sex' used in Articles 15 & 16 extends to transgender people as well.

2.2 Rights & Entitlements afforded to the Transgender Community

Aside from the Right of equality afforded in sections 4 & 5 of the bill, Chapter II charts out a definitive, yet not exhaustive bill of rights for the transgender community. Section 6(2) of the Bill for example, involves a play of words upon the pre-existing Article 21 of the Constitution. It acts as an interplay of Articles 15 and 21 and provides that no person shall be deprived of their right to life and liberty only on the grounds of being a transgender. However, understanding this right from a constitutional perspective, it is evident that such a provision cannot operate. The right to life and personal liberty can be abrogated by a procedure established by law. What the provision seeks to achieve is that, there should be no discrimination against transgender people in a manner which would impinge upon their right to life and liberty. Article 6(1) is in its truest construction, a reiteration of the Supreme Court's interpretation of Article 21 of the Constitution.[14]

Entitlements which run from Section 7 onwards, provides for the right to live in a community. The ambiguous section only imbibes a direction to the appropriate government to ensure that the transgender community is able to fully enjoy this right. This duty enjoins, upon the state to ensure, that people from the transgender community have access to residential and community support services. However, the importance of equal and full social participation without any discrimination is a precondition for any inclusive and cohesive society. This enables the transgender community to take advantage of their human capital and provides for a guarantee of well-being and prosperity for all the members of their community. Section 8 provides that every transgender person has a right to be respected for his/her physical/mental integrity on an equal basis as others. What would amount to such integrity would vary on a case-to-case basis and largely will be a matter to be interpreted by the courts, as and when a claim of a transgression of such rights is alleged by a transgender person to have been violated. The right in itself, has been borrowed from Article 3(1) of the Charter of Fundamental Rights of the European Union.[15] This right was deliberated upon in the case of van Kück v. Germany,[16] which held that the concept of private life covers the physical and mental integrity of the person. The court opined that the right to preservation and maintenance of this right to private life was itself enshrined in Article 8 of the European Convention on Human Rights.[17]

Further, Section 9 of the Bill is a stark reiteration of the Convention against Torture (CAT) and empowers the appropriate government to take measures to protect persons of the transgender community from being subjected to torture, or cruel, inhuman or degrading treatment or punishment. Section 10 mandates upon the appropriate government to ensure protection to transgender persons from all forms of abuse, violence and exploitation.[18] Section 10 incorporates the transgender rights in consonance with Articles 21,23 and 24 of the Constitution of India. Section 10 provides for a wide diaspora of measures, in order to prosecute acts of abuse, exploitation and violence against members of the transgender community. These include measures for protection, rehabilitation and free legal aid. Section 11 incorporates rights for transgender children, granting them the basic human right to a home and family. Removing the disabilities incorporated socially, the explanation attached to section 11 is of prime importance. It recognises that all persons can be a part of the definition of 'family' – even through adoption to a transgender

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13 Ibid

14 Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608

15 European Union, Charter of Fundamental Rights of the European Union, Article 3(1)(26 October 2012) Available at: http://www.refworld.org/docid/3ae6b3b70.html

16 Van Kück v. German, Application no. 35968/97, European Court of Human Rights. Placing reliance upon; X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91at p. 11.

17 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Article 8 (4 November 1950) ETS. A available at: http://www.refworld.org/docid/3ae6b3b04.html

18 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.T.S., vol. 1465,(10 December 1984) at p. 85. Available at: http://www.refworld.org/docid/3ae6b3a94.html. Also see: Article 4 of the European Convention on Human Rights

person. This recognizes the right of transgender people to adopt. Section 13 provides for the incorporation of the provisions of the Right of Children to Free and Compulsory Education Act, 2009 coupled with the fundamental right to education under Article 21A of the Constitution of India. Section 21 and 22 further provides for reservation in consonance with Articles 15 and 16 of the Constitution of India.

In terms of granting allied right to members of the transgender community, sections 14-16 provide for imparting skill development to transgender persons by – (a) Ensuring participation of adult transgender persons in a comprehensive education programme; (b) Imparting schemes/programmes for vocational training and avenues for self-employment; (c) Ensuring non-discrimination at any avenue of employment – be it the public or private sector. Chapter V of the Bill incorporates provisions which enable and ensure social security, health, rehabilitation and recreation of the transgender community. A large number of the measures find a mention in the directive principles of state policy, i.e. for example ensuring minimum standards of health care, sanitation, shelter, drinking water etc.

3. Importance of the Right to Freedom of Expression in the Bill

The Supreme Court verdict, while liberally drawing upon established American jurisprudence on the matter, highlights an important aspect of rights to be considered for people of the transgender community. The Court highlights judgments in the United States on the rights of transgender people's freedom of expression. This freedom of expression though enshrined in Article 19 of the Constitution of India, finds a bare recognition in the bill vide the chapter on rights and entitlements to the transgender community.

In City of Chicago v. Wilson et al.,[19] a public law which prohibited cross-dressing was struck down as ultra vires to the fundamental tenets of the United States Constitution. The Supreme Court of Illinois in that matter, held "..the notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with [the] values of privacy, self-identity, autonomy and personal integrity that …the Constitution was designed to protect."In Pat Doe v. John Yunits;[20] the Superior Court of Massachusetts considered the action brought by a 15-year-old student which challenged the action of her school whereby, she was excluded from attending school. The plaintiff was born biologically male, yet she associated herself with the female gender identity. Agreeing that the plaintiff's conduct is tantamount to her expression of identity the court in that regard held;"..by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender...Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity."

The court further observed that the plaintiff's expression of her identity was of such a nature that her representation of her identity as female has been established to her peers and the school faculty. The court enjoined the school from prohibiting the plaintiff from dressing in feminine attire to school and held that the plaintiff's selfhood cannot be stifled merely because some members of the community felt discomfort with such conduct being allowed. Relying upon the historical dissent of Harlan, J. in Plessy v. Ferguson[21] the court concluded that the U.S. Constitution neither knows nor tolerates classes amongst citizens. The reliance upon the aforementioned decisions is a bare precipice of the ongoing debate, on the right of self-expression which is to be afforded to individuals of the transgender community. Arguably, the right of self-identification and the right of self-determination; which the concept of gender identity carries, does include the freedom of expression, this freedom has not been exclusively translated into the bill. The freedom acquires added significance in the context of the transgender community, wherein such expression, wherein, by wearing clothes or expressing a behavioral pattern associated with the opposite gender the transgender expresses his/her free will and actively exercises his/her freedom of speech and expression.

In the context of deliberating the issue in the lines of Indian Constitutional law, article 19 is of prime significance. The freedom of speech and expression can, reasonably, be restricted on the grounds mentioned in Article 19(2). In the pursuit of actively recognizing that freedom of expression is central to the transgender persons' identity as well as personal liberty, the interpretation and understanding of reasonable restrictions must be construed liberally. While understanding that morality or decency are the prime grounds for attacking freedom of expression rights, the object and inherent purpose of affording rights to the transgender community would be defeated if their freedom is curtailed on the ground that the general public finds the act of cross-dressing as indecent. When the supreme court of India recognized that the transgender community is a socially and economically backward class, the trinity of Articles 14, 19 and 21 must be construed in a manner wherein they are afforded a reasonable standard of

[19] City of Chicago v. Wilson et al.,389 N.E.2d, 525 (1978)
[20] Pat Doe v. John Yunits ,2000 WL 33162199 (Mass. Super)
[21] Plessy v. Ferguson, 163 U.S. 537, 529 (1896)

equality. The Supreme Court has already established that these 3 articles are not watertight compartments and as such they flow into each other. A constructive reading of these while weighing reasonable restrictions on the other hand would entail that restrictions yield towards recognizing that transgender community has an equitable freedom of expression.

4. The Enforcement Mechanisms – Commissions for Transgender Persons and the Transgender Rights Courts.

The Bill provides for the constitution of National and State level commissions for transgender persons. An analysis of sections 26, 34, 36 and 38 of the Bill reveals an institutional structure similar to that created for Scheduled Castes and Scheduled Tribes under Article 338 of the Constitution of India. The functions carried out by the commissions also bear a striking similarity.

Section 26 of the Bill provides that the Central Government shall constitute a National Commission for Transgender People to carry out the functions mentioned in the Bill. The commission shall have 3 members belonging to the transgender community and 3 members who have a distinguished record of services in the field of rehabilitation, advocacy, law, relating to transgender. The commission is to be headed by the chairperson, who is an "eminent person" with distinguished record of service in the field of transgender rights and rehabilitation. The functions that shall be carried out by the commission are contained in the section 34 (a) to (k). Section 36 grants the power to the commission to have all the powers of a Civil Court trying a suit.

Section 47 provides that Exclusive Transgender Rights Courts shall be established by the State Government with the concurrence of the Chief Justice of the High Court for the purpose of speedy disposal of suits of a civil nature which may be filed by or on behalf of transgender persons regarding infringement of their rights.

5. Concluding thoughts

It is held to be the truth that all human beings are born equal and have a set of inalienable rights that nobody can curtail unreasonably. The United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) in December, 1948.[22] The UDHR is a global expression of the human rights that every human being inherently possesses. These rights are inalienable. Article 1 of the document provides that all human beings are born free and equal in dignity and rights. Article 2 of the declaration provides that every human being, irrespective of race; colour; sex; language; religion; political or other opinion; national or social origin; property; birth or other status, is entitled to all the rights and freedoms enshrined in the document. For the longest time in history, the transgender community has been forced to live in deplorable conditions due to their non-conformity with the sexual dimorphism.

Despite progressive measures undertaken by the Government of India to improve their conditions, they have been continually viewed as abnormal by the society. The Bill is, in essence, the first step aimed towards the betterment of the transgender community in India. It, ideally, strives to make good of the denial of social justice that has led to economic and political discrimination against the said community.

The bill, in that stead, aims to guarantee the rights of the transgender. It also aims to provide healthcare, education and other welfare functions. Apart from that, the bill provides for the constitution of a national and state transgender commission. This step is in line with the creation of commissions for the socially and educationally backward classes.[23] The bill also provides for establishment of special and exclusive transgender courts.

The Supreme Court now recognizes transgender as the third gender. However, what still poses a grave problem in the overall upliftment of their condition is the blatant disregard to a very important aspect of their life, their sexual rights. With Section 377 of the Indian Penal Code still operating, the Supreme Court steered clear of any argument in this regard till date. While the bill has a lot of positives, still some lacunae can be seen. The major shortcoming of the bill, too, is that while it looks out to ensure development, it ignores this important aspect in its entirety.

To conclude, it may be said that the strategy of the Indian state towards a problem, is to rely largely on law and often only on law. The responsibility of the state ends with the drafting of the required laws, whereas the problems relating to the transgender community, particularly discrimination in a social sphere, are a socio-economic and cultural problem which demands a multi-faceted approach. The bill, first of its kind for the country, has a lot of positives that can uplift the condition of the transgender community however, what cannot be ignored is the grey area that the bill leaves in its wake.

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[22] UN General Assembly, Universal Declaration of Human Rights, 217 A (III)(10 December 1948) Available at: http://www.refworld.org/docid/3ae6b3712c.html

[23] Art. 340, Constitution of India

Note and Comments

Intellectual Property Rights in Knowledge Economy: An Overview

Santhosh Prabhu*

1. Introduction

It is true that Nations, Organizations, and Individuals are pushed into and have to live in knowledge economy, where ideas generated by talented people and the inventions they make are the new currency. Research and innovation are now seen as the key differentiating factors determining the market value of a product or service. The emphasis today has graduated from cost arbitrage and quality deliverables to Intellectual Property (IP) creation and R&D.

The credible face of incredible India is being reflected in its Intellectual Property (IP) wealth. An economy is assessed through its IP wealth. IP protection plays a key role in gaining competitive advantage in terms of technological gains for achieving higher economic growth in a market driven economy. It is felt that Intellectual Property Rights (IPR) require greater understanding and attention by the industry & all relative sectors in India.

Many view these as business or legal concepts with little relevance to their own lives, while majority of the countries have adopted strategies for implementing strong IPR protection for strengthening their industries and trades. Indian industries are lagging behind in recognizing the importance of IPR and adopting IPR as a business strategy for enhancing competitiveness.[2] According to Asian Development Bank document, India is underperforming in terms of innovation potential. The country is not aiming at high-end technology.[3]

The area of management of Intellectual Property Rights has assumed a greater significance in the present day world of explosive technological growth and developments. Intellectual Property Right & its ambiguity is a complex proposition. Hence, it requires a greater skill-set to understand the intellectual Property portfolio valuation & management. This study is an attempt to focus on understanding of IPR regime en route for knowledge economy.[4] Sustainable knowledge economy will become true after effective intellectual property protection or management.

2. Intellectual Property Rights (IPRs)

The term 'Intellectual Property' is the property of human intellect, which has commercial value. The intent and the object of intellectual property rights in general are to protect expressions of all ideas, information and knowledge. 'Intellectual asset' is a term, used to describe all the tacit and codified knowledge resources held by an organization, regardless of whether or not they are protected by Intellectual property Rights.[5]

Intellectual property rights are therefore a subset of intellectual assets and are the legal rights granted by the state to stop the unauthorized use of knowledge resources and include Patent, Copyright, Industrial design, Trade mark, Geographical indications, Plant breeders rights, Semi-conductor and layout designs, trade secrets, etc.

2.1 Nature of Intellectual Property Rights

Intellectual Property is a result of labour, skill and judgment. This property is not only individual property, but also industrial property and international property as well. There is global acknowledgment and reverence to IPR after Patent Cooperation Treaty and TRIPs agreement. IPR is largely territorial right except copyright, which is global in nature in the sense that it is immediately available in all the members of the Berne Convention. These rights are awarded by the State and are monopoly rights implying that no one can use these rights without the consent of the right holder. It is important to know that these rights have to be renewed from time to time for keeping them in force except in case of copyright and trade secrets. IPRs have fixed term except trademark and geographical indications,

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1 David Walsh, Knowledge and wealth of the nations, Citing Greg Mankiw paper on the growth of nations, 'Knowledge economy', an economy that creates, manages and uses knowledge for growth, is now attracting more and more attention in India. (2006). Available at: ww.adb.org/sites/default/files/publication/29699/knowledge-based- economics.pdf

2 J Hudson, AMinea., 'Innovation, Intellectual Property Rights & Economic Development: An Unified Empirical Investigation', World Development (2013) at p.46

3 'Technical notes-ADB, Moving Toward Knowledge-Based Economies', Asian Development Bank, Regional and Sustainable Development Department (September 2010) at pp.1-9

4 Kay Withers, 'Intellectual Property and the Knowledge Economy', Institute for Public Policy Research (February, 2006) at p.6

5 S.Manton, et. el., 'Refocusing knowledge and Intellectual Property Management within the Industry' at p.2

which can have indefinite life provided these are renewed after a stipulated time specified in the law by paying official fees.

Trade secrets also have an infinite life but they don't have to be renewed. IPR can be assigned, gifted, sold and licensed like any other property. Unlike other moveable and immoveable properties, these rights can be simultaneously held in many countries at the same time. IPR can be held only by legal entities i.e., who have the right to sell and purchase property. In other words an institution, which is not autonomous, may not be in a position to own an intellectual property. These rights especially, patents, copyrights, industrial designs, IC layout design and trade secrets are associated with something new or original and therefore, what is known in public domain cannot be protected through the rights mentioned above. Improvements and modifications made over known things can be protected. It would however, be possible to utilize geographical indications for protecting some agriculture and traditional products.[6]

IPRs, like general property, give their holders a bundle of rights, most importantly the rights of exclusion, transfer and licensing. Like general property rights they facilitate bargaining and investment activity. But there are also important differences between IPRs and other types of property, differences that flow from the fact that the object of IPRs protection is, at base, information of one kind or another. An important characteristic of information for economic purposes is that it exhibits non-rivalry in consumption.

2.2 The Contribution of Intellectual Property to Economic Growth

Intellectual property rights (IPRs) have a significant role to play in economic growth and competitiveness. They provide the regulatory construct to overcome market failure in information goods by providing an incentive for firms to invest in R&D and enabling firms to capture the benefits of innovations and product developments. This is all largely taken as given by policymakers. But it does little to reflect the complexity of the relationship between R&D, the processes of creation and innovation, IPRs and economic growth.

2.3 Difficulties in Protection of Intellectual Property

Companies have come to realise that intellectual assets are amongst their most valuable. IP rights such as trademarks, patents, trade secrets and copyright provide the tools to protect such assets and to achieve business goals. IP is a competitive advantage and can help maintain the freedom to operate. However, intellectual assets face threats from free-riders and fraudsters. It is important to take appropriate steps to protect them adequately.[7]

Comprehensive Approach for the protection of IPs

- If the machine is a substantial improvement over the existing ones, the new features or the new machine can be a subject matter of Patent. (Indian Patent Act, 1970)
- If the machine is made in a unique shape or appearance (not encompassing functional features) the shape or appearance can be a subject matter of Design Act, 2000)
- The brand name and logo can be a subject matter of Trademark.(Trade Mark Act, 1999).
- Advertising material can be subject matter of Copyright. (Copy Right Act, 1957)
- The semiconductor chips that the machine employs can be protected under the Semiconductor Circuits and Topography of Integrated Circuit Act. (Integrated Circuits Act, 2000)
- The employees or subcontractors/service providers, involved with the project may be subjected to Trade secret confidentiality and non-competition in the same area, for a period of at least Three years. Dissemination of knowledge is no longer a charity but considered for IP value creation and addition.

An instance may give an insight as to the importance of IP in Knowledge economy. Knowledge or expertise gained by, say Ms. X, with his/her own efforts is him/her intellectual property. If the same is gained in the course of his/her work in an organization, justifiably it should be the intellectual property of the organization. As long as Ms. X is the employee of the organization, there is no problem. While leaving, Ms. X will not be able to deposit back his/her intellectual property to the organization. He/she will carry it with him/her. If he uses or divulges this intellectual property in another organization, will it be a breach of IPR? If the answer is 'Yes', then immediately the questions arises – what is the solution? What weapons the organization should have to stall the transfer of the property to another organization? It should also be remembered that quite often an organization poaches an

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6 R Saha, 'Management of Intellectual Property Rights in India',Department of Science and Technology and Director, Patent Facilitating Centre, Technology Information, Forecasting and Assessment Council, New Delhi atpp. 1-6

7 Technical notes-ADB, Moving Toward Knowledge-Based Economies: Asian Development Bank, Regional and Sustainable Development Department(September 2010) at pp.1-9

employee of another organization at a high price just to milk the intellectual property s/he has gained there. This is a tricky problem of knowledge management begging solution.

The IPR regime considers this instance as protection of trade secret. But, in India there is no specific legislation in this regard. Protection can be sought under general provisions of Indian Contract Act or Tort law. In spite of such provisions, remedy against abuse is eventually impairing the justice as harm can't be undone; it no longer remains secret information. Only effective managerial strategy in employment contract can do better such as Non Disclosure Agreement (NDA), Non Competition Clause (NCC) or Non Analysis Agreement (NAA).

3. Comments

No doubt, all sorts of IP, in one or the other way, foster the economy and boost the morale of the inventor or creator. R&D and technology can be well placed, distinctive trade identity can be established, appreciable ideas can be expressed in safe platform and valuable information can be fenced effectively. But, Knowledge economy is depending on the competitiveness of the trade in given market. The IPR regime stifles such fair expectations by allowing monopoly and exclusive dealings. There is a need to strike a balance between 'sharing' and 'secrecy' by IP strategy. Knowledge economy will suffer when there are no adequate legal provision address issues effectively. Protection of IP is better possible beforehand. It implies IP management is preferable to IP litigation management.

Today, managing intellectual property (IP) rights is of first-order importance in many organizations. To set the right strategic direction, it needs a greater skill to understand the tools and techniques that enable the organization to protect their innovative products and creative works. With the advent of the new knowledge economy, the old and some of the existing management constructs and approaches would have to change. The knowledge economy places a tag of urgency on understanding and managing knowledge based assets such as innovations and know-how. Intellectual property rights (IPR) have become important in the face of changing trade environment which is characterized by global competition, high innovation risks, short product cycle, need for rapid changes in technology, high investments in research and development (R&D), production and marketing, and need for highly skilled human resources.

4. Conclusion

Intellectual property, is no longer confined to the legal department, it has become the responsibility of business managers too. IPR is a quasi-legal concept as 'property' needs management and 'right' needs protection.[8] Hence, Management Schools can certainly think of 'IP Management' as a specialization in their curriculum. This may facilitate the top executives in the organizational set up proverbial with IP practices and IP management strategies. The industrialized nations have to recognise and use Intellectual Property as an important instrument in the economic and technological advancement. Many developing countries are also following a similar path. It is widely acknowledged, with empirical evidence, that successful use of the Intellectual Property System by those concerned such as industries, R & D institutions and enterprises greatly contributes to their success – nationally and internationally. Their success is a clear indication of economic growth and development of any country. We in India are now in the process of reconstruction and redefining our development goals and attempting to integrate the national economy into the knowledge-driven global economic landscape. Against this backdrop, it is time for us to take a serious note of the promotion of national creativity and the role of the Intellectual Property system in the overall economic growth.

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[8] SanthoshPrabhu, 'IPR Management- A New Stake', Legal journal for Layman to Lawman, Vol.3, Issue 1 (2012), at p.5

Status of Transgender: Indian Perspective

Arshpreet Kaur Bedi*
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1. Introduction

The word "hijra" is an Urdu-Hindustani word derived from the Semitic Arabic root hjr in its sense of "leaving one's tribe," and has been borrowed into Hindi[1]. The Indian usage has traditionally been translated into English as "eunuch" or "hermaphrodite," where "the irregularity of the male genitalia is central to the definition."[2] However, in general hijras are born with typically male physiology, only a few having been born with intersex variations. Some Hijras undergo an initiation rite into the hijra community called nirwaan, which refers to the removal of the penis, scrotum and testicles.

The Preamble to the Constitution mandates justice, social, economic and political equality of status. Transgender is not a term limited to persons whose genitals are intermixed but it is a blanket term of people whose gender expression, identity or behavior differs from the norms expected from their birth sex. The first and the foremost requirement is fulfilled by article 14, that states the equality before the law and article 15 by protecting them against the discrimination. Article 21 and 23 widens the scope for exercise of actual rights for these people.[3] Also sec 377 of IPC has been extensively exercised by the legal practitioners to exploit the exercise of rights given to them. This paper will extensively work to extract out the ways in which their rights can be deprived and also what is the status of the transgenders in Indian Perspective of both the Law & the Society.

The Supreme Court of India in its landmark judgment by the division bench of Justices K.S. Radhakrishnan and A.K. Sikri in National Legal Services Authority v. Union of India & Ors[4] recognized the third gender in addition to the male and female. By recognizing diverse gender identities, the Court has busted the dual gender structure of 'man' and 'woman' which is recognized by the society. While India has made considerable progress on rights of transgender people in recent years, most remain socially marginalized and deprived of basic rights, including the right to vote, own property, marry, and claim a formal identity through a passport or other government identification. They are frequently exploited from general society, enduring discrimination and humiliation from the police and medical authorities.

The Supreme Court of India issued a ruling, recognizing the country's large transgender population as a legal third gender. In so ruling, the court ordered that the government ensure that transgender people are not discriminated against and are eligible for government jobs and education in the same way as it does with other minority groups. It also ordered that the government take steps to promote awareness and to ensure that they are provided with proper medical treatment and public facilities. The landmark two-judge ruling acknowledged the history of marginalization that transgender individuals have faced. "Recognition of transgenders as a third gender is not a social or medical issue but a human rights issue," the opinion stated. India has a long cultural history of recognizing transgender individuals, but their lack of legal recognition has led to discrimination, including prevalent hate crimes.[5]

2. Status in Society

In India there are a host of socio – cultural groups of transgender people like hijras/ kinnars, and other transgender identities like – shiv-shaktis, jogtas, jogappas, Aradhis, Sakhi, etc. However, these socio-cultural groups are not the only transgender people, but there may be those who do not belong to any of the groups but are transgender persons individually. Though an accurate and reliable estimate of transgender people is not available, it cannot be denied that their number is miniscule compared with the total population of the country.[6] Transgender people in India face a variety of issues. So far, these

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1 S. Nanda, Huras : An Alternative Sex and Gender role in India Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History, Zone Books, (G. Herdt) (1996).

2 Serena Nanda, 'NeitherMannor Woman', The Hijras of India (1999).

3 India: Back Equal Rights for Transgender People, Enact Bill Providing Legal Gender Recognition. Available at :https://www.hrw.org/az/node/279479

4 (2014) 5 SCC 438

5 Nicholas Tomsho, India Supreme Court recognizes legal status for transgender people (2014) Available at: http://jurist.org/paperchase/2014/04/india-supreme-court-recognizes-transgenders-as-third-gender.php

6 Hon'ble Justice P. Sathasivam, the Judge, Supreme Court of India. Available at http://www.hcmadras.tn.nic.in/jacademy/Article/PSJ-CJO-

communities perceive that they have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes. A primary reason (and consequence) of the exclusion is perceived to be the lack of (or ambiguity in) recognition of the gender status of hijras and other transgender people. It is a key barrier that often prevents them in exercising their civil rights in their desired gender. So far, there is no single comprehensive source on the basis of which an evidence-based advocacy action plan can be prepared by transgender activists or possible legal solutions can be arrived at by policymakers. Reports of harassment, violence, denial of services, and unfair treatment against transgender persons in the areas of employment, housing and public accommodation have been discussed in local media, from time to time.

Coming to the reality in India, transgender till the present date are considered to be as a Taboo, they have various myths linked to them, few of them being they are the disciples of various gods like Shiv & Vishnu. In the Indian Mythology Gods were seemed to be transgenders too. One of the forms of Lord Shiva is a merging with Parvati where together they are Ardhanari, a god that is half Shiva and Half Parvati. Ardhanari has special significance as a patron of hijras, who identify with the gender ambiguity.[7] In some versions of the Ramayana, when Rama leaves Ayodhya for his 14-year exile, a crowd of his subjects follow him into the forest because of their devotion to him. Soon Rama notices this, and gathers them to tell them not to mourn, and that all the "men and women" of his kingdom should return to their places in Ayodhya. Rama then leaves and has adventures for 14 years. When he returns to Ayodhya, he finds that the hijras, being neither men nor women, have not moved from the place where he gave his speech. Impressed with their devotion, Rama grants hijras the boon to confer blessings on people during auspicious inaugural occasions like childbirth and weddings. This boon is the origin of badhai in which hijras sing, dance, and give blessings.[8]

Transgender individuals encounter a mismatch between their sex character or sex expression and their appointed sex. Transgender is additionally an umbrella term on the grounds that, notwithstanding including trans men and trans ladies whose parallel sexual orientation personality is the inverse of their relegated sex (and who are some of the time particularly termed transsexual in the event that they covet restorative help to move), it might incorporate genderqueer individuals (whose characters are not solely manly or female, but rather might, for instance, be bigender, pangender, genderfluid, or agender). Different definitions incorporate third-sexual orientation individuals as transgender or conceptualize transgender individuals as a third sex, and rarely the term is characterized comprehensively to incorporate cross-dressers.

3. Legislation and Judiciary

In India, Homosexual intercourse was made a criminal offence under Section 377 of the Indian Penal Code, 1860. In 2009, the Delhi High Court decision in Naz Foundation v. Govt. of NCT of Delhi found Section 377 and other legitimate denials against private, adult, consensual, and non-business same-sex behavior to be in direct infringement of fundamental rights gave by the Indian Constitution. Human rights groups expressed worries that this would render homosexual couples vulnerable to police harassment, saying: "The Supreme Court's ruling is a disappointing setback to human dignity, and the basic rights to privacy and non-discrimination" The Naz Foundation (India) Trust stated that it would file a petition for review of the court's decision. In a landmark judgment, the Supreme Court created the "third gender" status for hijras or transgenders. Earlier, they were forced to write male or female against their gender. The SC asked the Centre to treat transgender as socially and economically backward. The apex court said that transgenders will be allowed admission in educational institutions and given employment on the basis that they belonged to the third gender category. The court said absence of law recognizing hijras as third gender could not be continued as a ground to discriminate them in availing equal opportunities in education and employment. This is for the first time that the third gender has got a formal recognition. The third gender people will be considered as OBCs. The court also said they will be given educational and employment reservation as OBCs.

The apex court also said states and the Centre will devise social welfare schemes for third gender community and run a public awareness campaign to erase social stigma. The SC said the states must construct special public toilets and departments to look into their special medical issues. The apex court also added that if a person surgically changes his/her sex, then he or she is entitled to her changed sex and cannot be discriminated. The apex court expressed concern over transgender being harassed and discriminated in the society and passed a slew of directions for their social welfare. The apex court said that transgender were respected earlier in the society but situation has changed and they now face discrimination and harassment. It said that section 377 of IPC is being misused by police and other authorities against them and

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[7] VidyaVenkat ,'From the Shadows',The Hindu Group (2008).

their social and economic condition is far from satisfactory. The bench clarified that its verdict pertains only to eunuchs and no other sections of society like gay, lesbian and bisexuals who are also considered under the umbrella term 'transgender'. The bench said they are part and parcel of the society and the government must take steps to bring them in the main stream of society. The apex court passed the order on a PIL filed by National Legal Services Authority (NALSA) urging the court to give separate identity to transgender by recognizing them as third category of gender. Welcoming the Supreme Court decision, Lakshmi Narayan Tripathi, transgender rights activist said, "the progress of the country is dependent upon human rights of the people and we are very happy with the judgment as the Supreme Court has given us those rights."[9]

The Supreme Court of India ruling brought the change follows similarly in the legislation in Nepal, Pakistan and Bangladesh. This means, for the first time, there are quotas of government jobs and college places for hijras. The decision has been cheered by activists, who say that, despite its distinguished history, the community too often faces violence and harassment. There have been many instances in which we can easily figure out that employment and economy of any county positively counts the third gender people has their productive man force. Despite the fact that the only source of employment which they could indulge in was to sing and collect money in the name of god and curses. However with the changing scenario of the world it will not be too late when the people who used to say that women are no less than man would probably say no gender is inferior or superior to one another.

Hijras were once a revered and accepted group in Indian culture. The Vedas, ancient Hindu texts, include eunuchs and characters with both male and female characteristics. They were believed to bring luck and provide special fertility powers. During the Mughal period, eunuchs played an important role in the court administration as royal guards. For centuries, they have performed badhai, or blessings at weddings and births.Their sanctioned place in Indian culture changed during the British colonial period. Introduced in 1860 and not abolished until 2009, section 377 of the Indian Penal Code outlawed "carnal intercourse against the order of nature." Also that year, the Election Commission allowed "other" gender identification. The government's Aadhar program, started in 2009 that gives each citizen a unique ID number, now recognizes "transgender." The situation for hijras in India is gradually improving. In 2000 Shabnam Mausi was the first hijra to be elected into Indian parliament.

In India, Tamil Nadu has been the only state which has successfully pioneered transgender inclusion by introducing the transgender (aravani, as they are locally called) welfare policy. According to the policy, transgender can access free Male-to-Female Sex Reassignment Surgery (SRS) in the Government Hospital, a free housing program, various citizenship documents, admission in government colleges with full scholarship for higher studies, and alternative sources of livelihood through formation of self-help groups and initiating Income-Generation Programmes (IGP). It was also the first state to form a Transgender Welfare Board in 2008 with representatives from the transgender community. In March 2009, Tamil Nadu government set up a telephone helpline called "Manasu" for transgender, an initiative which was responsible for the formation of India's first helpline for the LGBTQIA community in 2011 at Madurai.

The Chhattisgarh government is also making efforts to empower the transgender community by drafting an action plan for the welfare of around 3000 eunuchs in the state. The welfare plan aims to include Sex Reassignment Surgery as per the choice of the person concerned, along with development schemes to make them financially independent. Joining these efforts, is the Tripura government which announced in July an allowance of Rs 500 per month to the transgender people in the state to ensure their financial independence. The West Bengal government is not far behind. On October 1st, 2015 the government has requested the Kolkata Police to recruit transgenders in the Civic Police Volunteer Force (CPVF) to end the stigma and discrimination against the community.[10]

3.1 Aid to the Transgender

- Access to all the public conveniences and facilities
- Identification proofs like driving license and pan cards should be guaranteed to them
- The bill regarding their reservation should immediately be passed
- Employment schemes for the uneducated transgender should be made
- Free choice should give to them after their surgeries what they want to be called as – in context to the genders
- Freedom of religion ,movement and other basic rights should be out rightly and expressly provided to them

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8 SiddharthNarrain, 'In A Twilight World', The Hindu Group (2003).

9 DhananjayMahapatra, Supreme Court recognizes transgender as 'third gender', TNN (April 15, 2014) Available at:http://timesofindia.indiatimes.com/india/Supreme-Court-recognizes-transgenders-as-third-gender/articleshow/33767900.cms

- ? Job discrimination should be reduced and some fixed amount of seats should be made mandatory in the private enterprises as well
- ? Just like people facing poverty, homelessness for hijraas should also come to an end
- ? Adequate health insurances, life insurances and pension schemes should also be introduced for the people of this community.
- ? A separate ministry should be created for transgender welfare still the reports of their status in India show that they are on the process of upliftment
- ? Any kind of violence that they may face- especially under governmental bodies and police stations should be reduced.
- ? Special provisions should be made to make their travel – immigration safe and worthwhile
- ? An attempt to bring such people for the service of the nation in the form of the Indian army should also be made.
- ? Voting rights should be duly ensured for the people of such community.
- ? Gendered bathroom system should include transgender as the third category.
- ? An attempt to create a comfortable environment for them should be made by not making fun of them due to their cross dressings and bisexual characteristics making them avoid any condition which could lead to their gender dysphoria.
- ? Media should not be constantly encouraged to criticize their lifestyles, instead true need for their rights should be put forward.

4. Conclusion

Each being in this Universe is indeed unique, and an integral part of nature. It would thus be wrong to judge and discriminate people who may be different from the stereotype, which again is man-made. It is time that India realized that every individual in this country has equal rights and privileges, and follow the policy of "live and let live."[11] Despite the new laws being established by the British Raj, England has since moved on; gender identity is more acknowledged here and support is provided without prejudice. In the majority of places ostracism still remains, yet in some, gradual change is taking place. One might change our views or ideas of treating the transgender people in a way that they become acceptable in our opinion, yet from the inside we all know it is never such easy to adapt to certain changes with the slight change of idea. Because the core mentality of individuals rests in them from the time we start learning. Out of various do's & don'ts we are also taught of how to treat the people who are slightly different from us. Just like we are taught to respect the old, protect the young, feed the poor and various good things we are also taught of how to hate someone without reason. Here someone is the Transgender.[12] With the decision of the Apex Court regarding the rights of the transgender, wherein they have been awarded a Status among the Backward Classes and have been given all the rights starting from the point of a new Gender in spite of the Male and Female, they have the right of mentioning the exact category they are the part of irrespective of any discrimination. They are allowed for equal chances in the competitive exams as well as various job sectors.

In this beautiful garden of life all the genders seem to be same kind of flowers but with different colors & fragrances. The fact that all of them now are not same is true that doesn't means any particular flower would be kept away from water & sunlight. Similarly just because of the fact that transgender have modified or diverse body this fact could not take away their basic rights as human beings into the Indian legal context a new concept is taking away the mind of the people and that is legal positivism. The laws made should tend to be positive for every section of the society. Irrespective of the laws laid down by the parliaments several times the only reason why the laws regarding the fundamental rights governing the life of the transgender are not put into force is because one as human beings has limited working capacities only till when it serves one's demand.

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[10] AvilashaGhosh, Am I Included? Calling Them The 'Third Gender' Creates More Problems Than It Solves (Oct. 13, 2015) Available at:http://www.youthkiawaaz.com/2015/10/transgender-rights-and-identity-in-india/

[11] VijiAthreye, 'The Life of Transgenders in India' (Nov. 27, 2015)Available at: http://www.mapsofindia.com/my-india/government/the-life-of-transgenders

[12] Elizabeth, 'Transindia: The True Story Of The Hijras' (May 29, 2015)Available at: http://blogs.coventry.ac.uk/uncovered/ 2015/05/29/ transindia-the-true-story-of-the-hijras/

Book Review

Law and Social Transformation – P. Ishwara Bhat

Eastern Book Company, Lucknow, 2009, XLVII + 967 pp.

Dr. M. K. Bhandari*

Law is an instrument of social change. From birth till death, human beings are regulated under the aegis of law. But law is not a panacea of all socio-political problems, every society come across at any given point of time.

Author, P. Ishwara Bhat,[1] an acknowledged legal scholar has encompassed in the book under review, host of socio-legal issues that are controlled, regulated and transformed with the intervention of Law. He has rightly quoted that; "as a regulator of both social life and individual behaviour through its distinct institutions and practices, and as a body of doctrines that have immense social dimension, law cannot afford to be a dormant or static instrument because of its vital social role and linkage with various facts of human life. The complexity of worldly changes on the one hand, and the enduring values embodied in law on the other, often stand at loggerheads, and pose difficulties in the management of change. Law has to find appropriate via media path for balancing the extremes. The issues of desirability of change, the identification of appropriate new legal policy to bring the desired change, its justification in terms of people's aspiration or paramount ideals, and the determinations about the extent, level and modality of change through law are greatly important factors that could the change management process"[2].

The thematic understanding of social transformation has been aptly narrated in the words of Roger Cotterrell, "social change is held to occur only when structure-patterns of social relations, established social norms and social roles changes"[3]

In chapter 1,[4] author has laid down strong foundations of co-relation between social change and instrumentalities of law. He has extensively quoted Western and Indian thinkers on the notion of justice and social change.[5] Having examined the various currents and counter currents, especially in a democratic model of governance, author has rightly argued for need to create balance between continuity and change.[6]

Historical and sociological discourse on role of law in social transformation is the subject matter of Chapter 2 Concept of collectivism, right duties discourse; social reforms in medieval period are but some key issues, discussed in the chapter.[7]

Gandhism, Marxism, Naxalism and Sarvodaya, are some important doctrinal approaches guiding the society. Same have been meticulously explained in Chapter 3.

Constitution, the fundamental law prescribes the dictates of governance. It also prescribes the blue print for orderly change with continuity. Prof. P. Ishwara Bhat, has very aptly narrated the rule of constitutional law and its philosophy in bringing social change as subject matter of chapter 4.

He has laid down firmly, his hypothesis in first four chapters, as Part I of his treatise, author has moved to Part II. The major areas of study and research in this part are Religion,[8] Language,[9] Region[10] and Ethnicity.[11] Although, author has extensively explained the conceptual aspects vis-à-vis constitutional position, but, the functional and practical impact of distorted version of religious fundamentalism, regional parochialism, and linguistic anachronism have not been critically assessed. The nation today needs a spirit of tolerance and accommodation.

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1 Prof. P. Ishwara Bhat, is currently Vice Chancellor, National university of Juridical Sciences NUJS-, West Bengal, Kolkata.

2 Prof. P. Ishwara Bhat, Law and Social Transformation at p. 1

3 Roger Cotterrel, The Sociology of Law , 2nd Edition, Buttorworth, London (1992) at p. 47

4 Supra Note 2, Chapter 1, A Theoretical Discussion at pp. 1-70

5 Writings of Aristottle, Cicero, Friedmann, Julias Stone, Jerremy Bentham, Dias, Carl Marx, Hart, Steven Vogo, Roger Cartterrel, Amartya Sen, APJ Abdul Kalam, A. Touraine, Hegel and Masodkar, have been referred and cited.

6 Supra Note 2 at p.70

7 Supra Note 2 at pp. 71-126

8 For detail study, see - chapter 5-Religion and Law at pp. 225-312

9 For detail study, see - chapter 7&8-Language and Law, Language Rights at pp. 315-378

10 For detail study, see - chapter 9-Regionalism, Law and Social Transformation at pp. 381-403

11 For detail study, see - chapter 10-Ethnic pluralism and Social Transformation at pp. 405-450

The journey of social transformation is incomplete, unless the vulnerable but significantly important class of populace, viz, women, children and under privileged people are not legitimately empowered. Author has rightly advocated for their upliftment in part III of his book encompassing four chapters, i.e. from Chapter 11 to 14. He has rightly called for participation of private player such as NGOs, civil society and even Business groups. According to the author, "Children's inevitable dependence upon others and their vulnerability have been the immediate causes of their exploitation whereas the overall social atmosphere of poverty, illiteracy and helplessness push them to the wall for protecting them from private actors, law strives hard in umpteen ways. The fact that private actors are parents and guardians and the agencies that exploit include employers and flesh trade racketeers makes the legal task complex. Law's policy is traditionally influenced by the instruments of sticks rather than humanized by the carrots of social benefits. But latest trend is to humanize through beneficent actions".[12]

The society is evolving, both at global and national level. We are witnessing rapid changes. Political, economic, cultural and social parameters are changing. Integration of global economy assisted by tools of technology is the hallmark of modern world.

Therefore, it has become imperative for the legal system and legal institutions to bring synchronization with trends of modernity. As rightly said, "modernization is a specific type of social changes wherein a traditional society inclines to develop new pattern of conduct in response to new challenges if new age".[13] The issues relating to modernization with specific focus on family, economic reforms and justice delivery system are subject matter of Part IV[14] of the book. The author has rightly maintained that "changes yet continuity" is the outcome of modernization's interface with tradition.

While taking overall view of their research based book, this review is of the opinion that author has evolved innovative ideas and has arranged them in proper sequence with jurisprudential insight. The book under review offer reading pleasure and create socio-legal awareness.

In his illuminating forward Justice Dr. Shivraj Patil, has highly appreciated this research based treatise in following words, "This book mirrors Dr. P. Ishwara Bhat's hard work, deep commitment, scholarship and learning, research, critical analysis based on comparative study, facts and the experience gained".[15]

In concluding chapter, Prof. P. Ishwara Bhat, who is also a dear friend of this reviewer, has made an appeal for pro-active role of people. He has aptly summed up by quoting, India's one of the finest legal scholar Upendra Baxi, "All said and done about law's competence to bring social transformation, it could be seen that the relaxed moods, complacence and indifference on the part of people and the officers, and widespread practice of corruption have been the roadblocks to progress. The culture of legalism-the determined attitude to obey law and to set the legal mechanism into motion-has not yet been developed as social force and strong factor of national character. What was depicted by Upendra Baxi few decades ago as a feature of crisis of legal system is continuing to a certain extent in spite of the innovative developments in the legal system's strategies for social justice. Contamination of public life by corruption has inevitable and immediate impact upon the efficacy of law and good governance".[16]

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12 Supra Note 2 at p. 698

13 Syed Hussain Alta, Modernization and social change (Angus and Robertson), Sydney (1972)

14 Part IV contains Chapters 15 to 19

15 Supra Note 2 at p. IX

16 Upendra Baxi, The Crisis of Indian Legal System, Vikas Publishing House, New Delhi (1982) at pp. 5-10

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The Editor
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