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From the Chief Editor

It is with much joy and anticipation that we present the June 2015 issue of our journal, Pragmaan: Journal of Law (Pragmaan: JOL).

Pragmaan: JOL is a bi-annual, peer reviewed, open access Journal that brings to the readers the articles which offer critical evaluation of the Indian legal system. It is committed to rapid dissemination of high quality research that shows directions for reform of our legal system. Priority is given to the contributions that demonstrate practical usefulness.

This issue of Pragmaan: JOL presents articles that deal with real world problems that are complex in nature. These cover the areas like affordability of medicine, right to food security, right to information, social stigma surrounding surrogacy, legal rights of refugees, restorative theory of punishment, role of Panchayati Raj institutions, and extra-judicial killings.

We are thankful to the authors for their scholarly contributions to the Journal. We express our gratitude to our panel of referees for the time and thought invested by them into the papers and for giving us sufficient insights to ensure selection of quality papers. Thanks are also due to Dr. Vijayan Immanuel (Pro VC), Dr. Dilip K. Bandyopadhyay (VC), Dr. M. P. Jain (Chancellor), the members of the Editorial Board, and the members of the Board of Management for their constant guidance and support.

We would like to acknowledge the contribution of Dr. B. S. Venugopal (Editor), and Mr. Devendra (Associate Editor), and all the faculty members of School of Law for their contribution in preparing the reader friendly manuscript for the Press.

We invite contributions from the scholars, scientific community and industry practitioners to ensure a continued success of the journal.

We hope our readers find the contents, findings and suggestions contained in this issue of Pragmaan: JOL as informative, stimulating, and of some practical relevance. We welcome comments and suggestions for further improvement in the quality of our Journal.

Dr. Pawan K. Aggarwal
Associate Pro Vice Chancellor
IMS Unison University, Dehradun

From the Editor

Pragyaan: Journal of Law (Pragyaan: JOL) is not just a collection and publication of a few articles and research papers of chosen experts on the subject, it is a gateway to research and expression of critical views by experts on contemporary socio-economic and politico-legal issues which shape and guide governance. It is also a window of expression. *Pragyaan: JOL* is a valued publication of the School of Law, IMS Union University, Dehradun. I feel honored to be associated with this prestigious Journal as Editor.

Pragyaan: JOL is the result of vision and efforts of eminent scholars. Our International Advisory Board comprises of prominent legal scholars from various countries. I must put on record my thanks and gratitude to Prof. Janine S. Hiller U.S.A., Prof. Yoshitoshi Tanaka, Japan, Prof. Yousuf Dadoo, South Africa and Arnaldo Sobrinho de Morais Neto, Brazil for accepting our invitation to become honourable members of the International Advisory Board. Also, our National Advisory Board comprises of academicians and legal experts. I wish to thank all members of the National Advisory Board for their indulgence in adding value and enhancing the utility of *Pragyaan: JOL*.

I must put on record my thanks to honourable Shri. Amit Agarwal, Chairman, Board of Governors, Dr. M. P. Jain, Chancellor, Dr. Dilip K. Bandyopadhyay, Vice-Chancellor, Dr. Vijayan Immanuel, Pro Vice Chancellor and Dr. Pawan K. Aggarwal, Associate Pro Vice Chancellor for guiding me in this endeavor. I also thank Mr. Devendra, Associate Editor and my colleagues who have worked hand-in-hand for bringing out this issue of *Pragyaan: JOL*.

With Seasons Greetings,

Dr. Venugopal B. S.
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Affordability of Medicine: A Serious Concern to Achieve Health for All

Dr. Gargi Chakrabarti*

ABSTRACT

Health is a primary concern for every nation. Access to medicine is the core concept of health for all and price is the main barrier for patented versions of the medicine. TRIPS provides exceptions but the implementation of them is extremely difficult. This paper analyses the relation of IPR protection with the hindrance of accessibility and affordability of medicine; evaluates the practical aspects of implementation of TRIPS flexibilities; analyses whether the measures taken are adequate enough to ensure availability of medicines and assesses how to incorporate essential terms for access to medicine.

Key Words: Access to medicine, Pharmaceutical patent, Compulsory license, Data exclusivity, Parallel importation.

1. Health: Fundamental Right of Human Being

Health is a primary concern for every nation and recognized as a fundamental right of human being. Regardless of age, gender, socio-economic or ethnic background, it is considered that health is the most basic and essential asset and every single man has a right to live a healthy life.

'Right to health' concept was first articulated in the Constitution of the World Health Organization (WHO) in 1946. Preamble of this constitution states clearly that it is one of the fundamental rights of every human being to enjoy highest standard of health 'without distinction of race, religion, political belief, economic or social condition'.¹ Article 25 of 1948 Universal Declaration of Human Rights also contemplates the right to have 'standard of living, adequate for the health and well-being'.² Right to health is also recognized in the 1966 International Covenant on Economic, Social and Cultural Rights.³ Since then, other international human rights

treaties have acknowledged or referred to the right to health or to its elements, for special consideration.

The right to health is relevant to all States: every State has ratified at least one international human rights treaty recognizing the right to health. Moreover, States have committed themselves to protect this right through international declarations, domestic legislation and policies, and international conferences. In recent years, there is an ever growing focus on the right to the greatest attainable standard of health, for example, by human rights treaty monitoring bodies, WHO and by the Commission on Human Rights (now replaced by the Human Rights Council), which in 2002 declared the mandate⁵ on the right of everyone to the highest attainable standard of physical and mental health.

Article 21⁶ of the Constitution of India envisages that, "No person shall be deprived of his life or personal liberty except according to procedure established by law" which could be related with the health care aspect. WHO is actively escalating its role in providing technical,

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¹ Document of the Constitution of the World Health Organization (WHO) of 1946 available at http://www.who.int/governance/eb/who_constitution_en.pdf last visited on April 04, 2015

² Universal Declaration of Human Rights, 1948 available at <http://www.un.org/en/documents/udhr/index.shtml> last visited on April 04, 2015

³ Article 12 of The International Covenant on Economic, Social and Cultural Rights, 1966 available at <http://www2.ohchr.org/english/law/cescr.htm> last visited on April 04, 2015

⁴ WHO, Factsheet No. 31 'The Right to Health' prepared by Office of the United Nations High Commissioner for Human Rights, WHO press, available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> last visited on April 04, 2015

⁵ Available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_810.pdf last visited on April 04, 2015

⁶ The Constitution of India, 1950, Part III

intellectual and political leadership in the field of health and human rights. The measures adopted by WHO in this regard are (i) to support governments to integrate a human rights based approach in health development, (ii) to strengthen WHO's capacity to incorporate human rights-based approach in its work, and (iii) to accelerate the right to health concept in International law and International development process.⁷ A landmark declaration is adopted by the Ministerial Conference of the World Trade Organization (WTO) in 2001 in Doha,⁸ on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and public health which is discussed in the next segment.

2. Discussion on Public Health in DOHA 2001

The grim significance of public health issues, mainly life threatening diseases like HIV/AIDS, tuberculosis, malaria and other epidemics affecting developing and least developed countries became concern for WTO Ministerial Committee⁹ since Fourth Session of Ministerial Conference in Doha on 2001. The Committee stressed for "WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems".¹⁰

2.1 Article 8 of TRIPS

Article 8 of TRIPS authorizes member States to amend their legal regimes and regulations to incorporate essential measures for protection of public health and promotion of technological development as per the need of the State according to the socio-economic status. It further contemplates that Member States are permitted to make amendments in their legal regime "to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology".¹¹

2.2 Article 7 of TRIPS

Article 7 of TRIPS is on pursuing the 'promotion of technological innovation' and 'transfer and dissemination of technology' for the benefit of both users and producers,

for the social and economic welfare and 'to balance the rights and obligations'.¹² It is mentioned in the Doha Declaration that "the TRIPS Agreement does not and should not prevent members from taking measures to protect public health", it is affirmed "that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all".¹³ It provides the right to member State to use the TRIPS flexibilities like 'compulsory licensing' and 'exhaustion principle of IPR' (for parallel importation) with its full implementation according to the individual necessity of the respective State.¹⁴ The Committee also encouraged the Member states to promote technology transfer to the least-developed country Members pursuant to Article 66.2. The Committee also recognized the impact of intellectual property protection on the hike of prices of medicine along with development of new medicines.¹⁵ This is discussed in detail further with the practical examples.

3. Impact of Price of Medicine on its Accessibility

There are many obstacles in the way of access to medicine for patients of developing countries and price of medicine is one of the important factors. HIV/AIDS is one of the most deadly diseases of the century and a real threat to almost all countries. Arrangement of the drugs (anti-retroviral drugs, hereinafter ARV) for treatment of HIV/AIDS is a serious concern, more so for the economically compromised developing and least developed countries.

3.1 Situation in Sub-Saharan Countries

Countries in sub-Saharan Africa are the most affected one, about 34 million people of those countries are affected by HIV/AIDS and of them approximately 11.5 million have died.¹⁶ 44 million children in 34 developing countries are estimated to have lost one of their parents due to that disease by the end of 2010.¹⁷ Though access to ARV has increased rapidly in recent years, still only less than 50% (about 4 million) of patients needing ARV (about

⁷ The WHO report on 'The Work Of WHO On Health And Human Rights' prepared by Health and Human Rights Team Department of Ethics, Equity, Trade & Human Rights/Information, Evidence and Research (IER/ETH) available at http://www.who.int/hhr/hhr_activities_eng.pdf last visited on April 04, 2015

⁸ Doha 9-14 November 2001 "Declaration on the TRIPS Agreement and Public health" WT/MIN(01)DEC/W/2, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm last visited on April 05, 2015

⁹ *Ibid.* Para 1

¹⁰ *Ibid.* Para 2

¹¹ Article 8 of TRIPS Agreement available at http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm last visited on April 05, 2015

¹² Article 7 of TRIPS Agreement available at http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm last visited on April 05, 2015

¹³ *Ibid.* Para 4

¹⁴ *Ibid.* Para 5

¹⁵ *Ibid.* Para 3

¹⁶ See Congressional Research Service, *AIDS in Africa: Issue Brief*, by Copson, Raymond W., CRS Issue Brief IB10050, May 14, 2001.

¹⁷ Stephens, Angela, "AIDS Becomes a National Security Issue," *National Journal* (Nov. 18, 2000).

9.5 million) are actually getting the treatment.¹⁸ Overall negative impact of the disease is largely affecting the poor and stability & social infrastructure of the economy. Currently ARV drugs are available in the market and if used properly these can decrease the mortality and morbidity of the disease. In the US, the death rate due to AIDS has started decreasing since 1998, and the simple reason for the same is accessibility and affordability to the costly ARV medicines.¹⁹ The patients in the developing and least developed countries are not in a situation to afford the costly treatment for AIDS with the patented ARV drugs.

4. Intellectual Property Protection for Drugs

4.1 Patent

It is obligatory for all the TRIPS signatory countries to make amendment in the national legal regime for IPR to include the strict TRIPS provisions especially for pharmaceutical patents. In India, for example, The Patents (Amendment) Act, 2005 includes product patent for pharmaceuticals which were not available beforehand. The new law came into effect on January 1, 2005.

4.2 Data Exclusivity

Patent Protection provides exclusive rights and market monopoly for a limited period of time (20 years) which is good time period to get market return for most industries. For pharmaceutical industry the situation is a little different, as pharmaceutical products have to undergo rigorous evaluation for quality, efficacy and safety (formally known as 'clinical trial') which usually takes 6-7 years and sometimes it takes even 15 years. Then, the 'test data' has to be submitted to the national regulatory authorities, who will do the safety and efficacy assessment and provide market authorisation. Such data is very essential as it contains all relevant details of clinical trials; originator companies thus want to protect these data under 'data exclusivity' to prevent third parties from using it for commercial exploitation.

Article 39 of TRIPS Agreement is related to the 'protection of undisclosed information' and according to view of certain countries' it provides obligation to Member States to create legal provision to respect trade secret, particularly when such trade secret data are submitted to

governments or government agencies as a qualification for acquiring market approval.²⁰ But interpretation of Article 39(3) of TRIPS clarifies that it is related with 'data protection' and does not necessarily create a new intellectual property right.

In India there is no provision for data exclusivity. The domestic sector including the Indian Pharmaceutical Alliance ("IPA") does not believe that the Indian Government should concede to any demand for data exclusivity. But the Indian government is currently considering the addition of data exclusivity provisions in an amendment to the Indian Drugs and Cosmetics Act, 1940. In *Syngenta India Ltd vs. Union of India*²¹ case Delhi High Court held that Syngenta's argument that Article 39(3) mandates that data exclusivity is inherently flawed and they are wrong in assuming that the Reddy Committee²² recommended "data exclusivity" as the only way to comply with Article 39(3). The court has observed that, in fact, preventing data from "unfair commercial use" is not the same thing as preventing "reliance" on the data. Interestingly, although the Reddy Committee does not recommend "data exclusivity" for pharmaceuticals, at least for the time being, they do so for agro-chemicals and traditional medicines.

4.3 Incremental Innovation

The pharmaceutical industry produces thousands of new drugs which are based on many smaller incremental innovations like other technological and value-added industries. Incremental innovation can be defined as production of newer version of existing drugs which will give more therapeutic effect and/or produce fewer side effects and overall provide better patient compliance. In USA, general patent term for drug is twenty years, but that can be extended maximum up to five years by showing incremental innovation.²³ Under the Hatch-Waxman Act, the government has a system of patent term 'restorations' under which monopoly of the original patentee can be extended for a maximum period of 5 years in addition to the initial patent term. In the European Union, there exists a system of supplementary protection for drugs but supplementary protection certificate (SPC) is not only related with incremental innovation. Aim of the extension of protection is to extend the market exclusivity and to

¹⁸ UNITAID Factsheet on HIV/AIDS published on July 2010 available at http://www.unitaid.eu/images/Factsheets/hivaidsfactsheet_july2010_en.pdf last visited on April 07, 2015

¹⁹ "Impact of HAART on AIDS-Related Death Examined," *AIDS Weekly* (24 July 2000).

²⁰ Article 39(2) and Article 39(3) of TRIPS Agreement.

²¹ MANU/DE/1756/2009

²² Reddy Committee (comprised of Mrs. Satwant Reddy & Mr. Gurdial Singh Sandhu) Report on 'Steps to be taken by Government of India in the context of Data Protection Provisions of Article 39.3 of TRIPS Agreement' May 31, 2007 available at <http://chemicals.nic.in/DPBooklet.pdf> last visited on April 07, 2015

²³ Denise Dunlap-Hinkler (2010) "Astory of Breakthrough vs. Incremental Innovation: Corporate Entrepreneurship in Global Pharmaceutical Industry" *Fox School of Business Discussion Paper 1105-10* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554123 last visited on April 07, 2015

delay the market entry of generic versions.

4.4 Patent Linkage

Patent linkage is a process of linking the patent of the original product with the market approval and essentially does not allow any third party to enter into market before expiration of the patent term.²⁴ It is particularly important in case of pharmaceutical products as it is having direct impact on generic product to enter into the market whereby reducing the competition and increasing drug cost. In USA, patent linkage is provided by legal regime under the Hatch-Waxman Act 1984. Food and Drug Authority (FDA) maintains a list of patented drugs with therapeutic equivalents in the Orange Book.²⁵ Any generic version of a drug which is listed in the Orange Book will not be provided with authorization of marketing approval.²⁶ Other developed countries like Australia, Canada and Singapore have similar provisions like USA.²⁷ In European Union, patent linkage system is not accepted legally. In India, patent linkage system is not available in legal regime. Marketing approval in India is provided by the Drug Controller General of India under Drugs and Cosmetics Act 1940. If the Drugs Controller has to check the patent linkage of each and every drug applying for marketing approval, it will be an extra burden for it; especially when there is no existing database similar to 'Orange Book' of US. Relevant legal provisions have been discussed in two recent cases of *Bristol-Mayers Squibb vs. Hetero Drugs Ltd*²⁸ and *Bayer Corporation and Ors vs. Cipla, Union of India (UOI) and Ors*.²⁹

5. Effect of Intellectual Property Protection on Drug Pricing

Markets are morally neutral and they operate on the principle of scarcity, so, scarce products cost more than widely available products. Lack of therapeutically equivalent medicine and limited competition is one of the causes of high price of drugs. Patent and allied protection provide limited period of protection from competition in the market and during that limited time period manufacturer company tries to earn maximum return for its financial investment. To gain maximum profit, patent

holder companies usually put the unusually high price on their patented product. United States' Government Accountability Office (GAO) has done a study in 2009³⁰ to ascertain the causes of high price of brand name drugs, by interviewing the representatives from the manufacturer and distributor companies and it was found that intellectual property protection and market exclusivity provisions are the key factors behind high price rise of the medicines. Some interesting facts about drug price hike which were unveiled by that study are as follows:

- Overall spending on the drugs increased on an average upto 10% per year since 2000.
- Extraordinary price rise in each year is more than double during 2000-2008.
- Most extraordinary price increase range is between 100% - 499%.

6. Exceptions/Limitation Provided by TRIPS

In the fourth Ministerial Conference held in Doha, Qatar in 2001, Members adopted a Declaration on Public Health affirming the right of Member States to take legal measures for protection of public health.³¹

6.1 Compulsory Licensing

It discussed the availability of compulsory licensing exception to patent protection provided by TRIPS Article 31(f) for the developing and least developed countries who are having insufficient or no pharmaceutical manufacturing capacity and suffering from intractable public health crisis. Compulsory licensing provision in TRIPS actually allows national governments to issue permit to a company other than the patent holder to supply generic version of patented medicine in case of national emergency or public health crisis without patent owner's consent. Condition for issuing the compulsory license according to Article 31(f) is being "predominantly for the supply of the domestic market of the Member authorizing such use"; so the national government can order the generic version of drugs from the domestic producers and then only the valid patent can be by-passed.

Numerous countries, including a number of African

²⁴ Galantucci, R. (2007) "Data protection in a US-Malaysia free trade agreements: New barriers to market access for generic drug manufacturers" *Fordham Intellectual Property, Media, and Entertainment Law Journal*, 17:1083

²⁵ Orange Book: Approved Drug Products with Therapeutic Equivalence Evaluation available at: <http://www.accessdata.fda.gov/scripts/cder/ob/default.cfm> last visited on April 07, 2015

²⁶ Finston Consulting, (2006) "Overview of Patent Linkage" available online at <http://www.finstonconsulting.com/version03/files/Overview.pdf> last visited on April 07, 2015

²⁷ *Ibid.*

²⁸ CS(OS) No. 2680/2008

²⁹ WP(C) Number 7833/2008

³⁰ Report to Congressional Requesters on "Brand-Name Prescription Drug Pricing: Lack of Therapeutically Equivalent Drugs and Limited Competition may contribute to Extraordinary Price Increases" December 2009. GAO-10-201

³¹ See WTO Ministerial Conference, Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (Novs. 20, 2001) [hereinafter Doha Declaration].

countries sent an emotional appeal to TRIPS Council to reconsider this issue.³² Afterwards, in August 2003, the negotiation regarding Implementation of Paragraph 6 of the Doha Declaration on TRIPS Agreement and Public Health (Implementation Agreement) was achieved³³ and finally a solution to Paragraph 6 Mandate is made by creation of an exception to Article 31(f) according to which the nations with less or no drug manufacturing infrastructure can override the patent protection for essentially needed medicine and can import generic versions of patented medicines by using compulsory licensing to tackle public health crisis.³⁴

In India, compulsory license can be granted any time after three years of the grant of patent.³⁵ For exporting the generic drug to a country, the procedure has been simplified.

6.2 Bolar Provision

The 'Bolar provision' is another well known exception granted by Article 30 of TRIPS Agreement, according to which countries may provide limited exception to the exclusive rights given by the patent but that exception should not unreasonably prejudice the legitimate interest of the patent owner.³⁶ It is an exception especially for the research provisions and its role in respect of access to medicine needs analysis and comprehension. In India, Amended Patent Act, 2005 provides Bolar exemption as per Section 107A; which allows generic drug manufacturing companies to make or import patented medicine and to submit the information for trials before expiry of patents.³⁷

6.3 Parallel Imports

Parallel importation is the production or selling abroad of patented medicine with the consent of patent owner and subsequent importation of same medicine in the domestic market at a cheaper price without consent of the owner.

TRIPS Article 28³⁸ supports the parallel import concept; as it is interpreted that patent owner cannot legally prevent the importation of the product from another country. This is subject to 'exhaustion principle' of Article 6,³⁹ according to which the exclusive rights are exhausted after the first sale of the patented product.⁴⁰ At the DOHA Declaration it is clarified that interpretation of Article 6 will be such that the Members are free to establish the national legal regime for exhaustion of rights without challenge.⁴¹ Indian Patent Act, 1970 contained the provisions of parallel import in Section 107A (b) which is further amended in 2005 Amendment.⁴²

7. Analysis of Practical Implementation of TRIPS Exceptions

Theoretically, the provisions of compulsory licensing and the parallel import sounds relatively good options to cope up with the problems related to access to medicine, especially those associated with the patent protection. But, in reality, the situation is different. Thailand and Brazil are two developing countries which tried to use these provisions but some legal problems have come across. Following are the examples of such cases which elaborate the flaws in these provisions during their practical implementation.

Brazil was using 'Efavirenz' as the main ARV in 2007, originator Company of this drug was Merck under the brand name 'Stocrin' and cost was US\$580 per person per year. Brazil Government provides free medicines to all HIV/AIDS patients under National STD/AIDS Program. In April 2007, 'efavirenz' was declared as a drug of public interest. Government held several meetings with the original company, Merck, for negotiation of the reduction of price; but Merck proposed for the technology transfer and only 2% price reduction of the drug. Finally, later in the year,

³² Naomi Koppel, WTO Lets Poor Nations Import Cheap Drugs, ASSOCIATED PRESS, Aug. 30 2003, available at <http://www.aegis.com/news/ap/2003/AP030847.html> last visited on April 07, 2015

³³ Council for TRIPS, Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (Aug. 30, 2003)

³⁴ See Council of TRIPS, The General Council Chairperson's Statement (Aug. 30, 2003), available at: http://www.wto.org/english/news_e/news03_e/trips_stat_28aug03_e.htm last visited on April 07, 2015

³⁵ Section 84(1)(c) of Indian Patent Act (as Amended in 2005).

³⁶ TRIPS Annex 1C, Art. 30 available at http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm last visited on April 07, 2015

³⁷ Section 107A(a) of Patents (Amendment) Act: any act of making, constructing, using, selling or importing a patented invention solely for uses reasonably related to development and submission of information required under any law for the time being in force, in India, or in a country other than India, that regulates the manufacture, construction, use, sale or import of any product.

³⁸ TRIPS Annex 1C, Art. 28 available at http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm last visited on April 07, 2015

³⁹ TRIPS Annex 1C, Art. 6 available at http://www.wto.org/english/tratop_e/trips_e/t_agm2_e.htm last visited on April 07, 2015

⁴⁰ See Chiapatta, VS. (2000) "The desirability of agreeing to disagree: The WTO, TRIPS, International IPR exhaustion and a few other things" *Michigan Journal of International Law* 21:333.

⁴¹ See Kuanpoth, J. (2008) "Appropriate Patent Rules in Developing Countries – Some deliberations based on Thai Legislation" *Journal of Intellectual Property Rights* 13:447-455.

⁴² Section 107A(b) of the amended Act: Importation of patented products by any person from a person who is duly authorised under the law to produce and sell or distribute the product, shall not be considered as an infringement of patent rights.

Brazil issued the compulsory license for five years with 1.5% royalty payment to Merck. Pharmaceutical manufacturer Farmanguinhos, part of the Oswaldo Cruz Foundation of the Government of Brazil, used the patent specification. But that was not sufficient. It had to perform fresh research activities and in 2009 generic version came in the market. That reduced the price of efavirenz by 93%. Merck tried to stop the generic production by filing a preliminary injunction but that was refused by Brazilian court.⁴³

South Africa introduced a legal framework regarding the national drug policy in 1997. This was The Medicines and Related Substances Control Amendment Act Number 90. According to this Act, government can issue the permit of parallel import and/or compulsory licensing for public interest by overriding patent rights. After enactment of this regime, consequences were: (i) South Africa had been included in Section 301 Watch List by US and a complaint filed against it in WTO, and (ii) about 40 pharmaceutical companies took legal action against South Africa on the ground that this law was contrary to the South African constitution and WTO patent rule. South African Government reaffirmed its commitment for TRIPS Agreement. Finally, in 1999, US stopped its action against South Africa and in 2001 the drug companies took off their cases.⁴⁴

One important ARV drug Didanosine (ddl) was manufactured by Thailand in a powder form as patent applied to ddl only for tablets so there was no infringement of patent. Not only that, the ddl patent was only valid for tablets containing 5-100 gm ddl. But Thailand produced ddl tablets outside the dosage range i.e. 125gm ddl. In November 26, Thailand first issued compulsory licensing and imported generic 'efavirenz' from India at half of the original price. But in January 2007, Thailand issued two more compulsory licenses for cardiovascular drugs. As a result of that US Trade representative referred to these compulsory licenses and added Thailand to its 'priority watch list'.⁴⁵

European customs authorities were trying to stop the shipments of legitimate generic versions of medicines while being shipped from India or China to the destination countries in Latin America or Africa. Drugs are seized mainly in airports of Netherland or Germany. According to the view of some reports, the big pharmaceutical companies putting pressure on customs to stop these

shipments alleging that those medicines are 'counterfeit' and thus violating the intellectual property law. Afterwards the producer company Ind-swift was compelled to send all the shipments via Malaysia and Singapore which costed them two times. In February 2009, one ARV shipment (abacavir) had been seized in the same airport. But later on United Nations (the recipient for patients in Nigeria) lodged an official complaint against this.⁴⁶

8. Competition Law Intervention

Intellectual property is subjected to exclusive control of the owners by virtue of intellectual property rights; but competition law encourages the competition by avoiding market barriers and thus provides consumer benefits. The correlation between expanding IPR and competition law is particularly multifaceted in case of any developing country as strong IPR protection is enforced by TRIPS as an obligatory criteria and competition law operative body is frequently missing there. A strong incentive to the new technologies can be provided by competition policies in a particular market and particularly can tackle the situations where costs of IP protected pharmaceutical products are extremely high.

8.1 Case Study

In the US, courts have considered that extending patent rights beyond the scope of the grant violates the antitrust laws. The FTC has intervened in some cases of fraudulently obtained patents. In the 1960s, it challenged agreements between Pfizer and American Cyanamid relating to tetracycline patents and ordered the compulsory licensing of the patent in question at a fixed royalty.⁴⁷ Pfizer and American Cyanamid were found to have made misrepresentations to and withheld essential information from the patent examiner, thereby deceiving him into granting a patent that otherwise would not have been approved (Azcuena, 1995).

In a more recent case, the FTC also found and condemned practices aimed at deceiving the US patent office to unduly obtain patent protection: *"Through Bristol's [Bristol-Myers Squibb Company] decade-long pattern of alleged anticompetitive acts, Bristol avoided competition by abusing federal regulations in order to block generic entry; deceived the US Patent and Trademark Office (PTO) to obtain unwarranted patent protection; paid a would-be generic rival over USD 70 million not to bring any*

⁴³ Summary of the presentation of J.M. do Nascimento Júnior, "Compulsory Licensing of Efavirenz in Brazil" Prepared by Ministry of Health, Brazil on Access to Pharmaceuticals in Rio meeting February 23, 2010

⁴⁴ *Ibid.*

⁴⁵ 'Country experiences in using TRIPS safeguards' WHO Briefing Note on Access to Medicine, February 2008

⁴⁶ Prepared by Martin Khor 'Row over European seizures of low-cost drugs' *Third World Network*, August 10, 2009 available at <http://www.twinside.org.sg/title2/gtrends/gtrends262.htm> last visited on April 08, 2015

⁴⁷ The decision was confirmed by the court in *Charles Pfizer & Co. vs. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), cert. denied, 394 U.S. 920 (1969).

competing products to market; and filed baseless patent infringement lawsuits to deter entry by generics" (FTC, 2003b).

Similar abuses were found and condemned in Europe. Thus, the European Commission determined that AstraZeneca misused government procedures in order to exclude generic firms and parallel traders from competing against its product Losec. The abuses consisted, in particular, in the misuse of the patent system by knowingly making misrepresentations to patent offices with a view to extending the basic patent protection for Losec. The misleading information "was initially provided by AstraZeneca in the context of its applications to several patent offices in June 1993 and December 1994 within the EEA for extra protection for omeprazole (the active substance in AstraZeneca's product Losec) in the form of so called supplementary protection certificates."⁴⁸

Case of refusal of Merck to grant Dobfar a license for production of an active ingredient for production of the antibiotic 'carbapenem'⁴⁹ can be cited as an example of abuse of a dominant position. In this case, the Italian Competition Authority (ICA) decided to grant a compulsory license.⁵⁰ The ICA considered that Merck's refusal to license its product, which was covered by a Certificate of Complementary Protection, was an abuse of its dominant position; since it prevented Dobfar from producing the active ingredient and enabled Merck to maintain its dominance over the pertinent pharmaceutical markets, cutting out potential competitors. That ingredient was a necessary resource for the production of generics by Merck's potential competitors, whereas Dobfar was an indispensable supplier for such competitors (Coco and Nebbia, 2007, p. 452).

8.2 Anti-competitive Effects of Patent

Following are some anti-competitive effects of patent

- The lenient standards of patentability applied by some patent offices have encouraged applications on trivial developments, generally known in the pharmaceutical industry as "ever-greening". They are the result of various patenting policies, such as "blanketing", "flooding", "fencing", "surrounding" (Granstrand, 1999, p. 221-222), under which firms search for patent protection to block or delay competition in either innovation, technology or product markets.

- Low standard of patentability and faulty patent examination process can provide 'poor quality' patents which impede competition and the expectation of acquiring patent rights in order to harass competitors, increase the likelihood of "sham petitioning";
- Applying patent for 'frivolous inventions' is always anti-competitive;
- Overbroad' patent claims can disturb market stability;
- Package patent' i.e. accumulation of patents may produce anti-competitive effects by extending market power on genuine patent to the illegitimate one;
- Patent thickets' may give rise to concern for consumers as competitors may come into some form of agreement or co-operation (including cross-licensing). It may also raise competition law concerns. When an overlapping set of patent rights (belonging to various companies) exists, those seeking to commercialize new technology need to obtain licenses from multiple patentees. Co-operation among competitors in different forms (including cross-licensing) may be necessary to navigate the patent thicket, ultimately limiting competition (Shapiro, 2001).

8.3 Compulsory Licensing from Competition Perspective

Compulsory licensing can be used to reduce the anti-competitive practices. In the US, the grounds for granting compulsory licenses under competition law have included the use of patents as a basis for price-fixing or entry restricting cartels, the consummation of market-concentrating mergers in which patents played an important role and practices that extended the scope of patent limitations beyond the bounds of the patented subject matter. Compulsory licenses may be used in cases of cross licensing that unduly limit competition. The courts can also play a pro-competition role. In some countries (e.g. Germany) they are in charge of granting compulsory licenses. In other cases, they can take an active role in avoiding anti-competitive behaviour by limiting the rights conferred by IPRs. In some cases, a decision may effectively amount to granting a compulsory license on "equity" grounds.

There are many examples of abusive requests of interlocutory injunctions in Latin America. In Argentina, for

⁴⁸ Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 — AstraZeneca), Official Journal of the European Union 30.11.2006.

⁴⁹ ICA also granted an interim measure, which was confirmed by the Italian Regional Administrative Tribunal (TAR) of Lazio (TAR Lazio 7 March 2006, n 1713).

⁵⁰ Decision A364 Merck—*Principi Attivi in Boll.* 11/2007 available at www.agcm.it last visited on April 07, 2015

instance, Bristol Myers Squibb obtained such an injunction against a local firm on the basis of a patent (AR 017747B1) protecting a formulation of didanosine, a drug administered to HIV patients that was not developed by Bristol Myers Squibb and which is in the public domain.⁵¹

In Venezuela, the competition authority found that Laboratories WYETH S.A. had abused a patent on a pharmaceutical formulation of venlafaxine to threaten a local company and block its entry into the market with a competing medicinal product, thereby violating Article 6 of the Venezuelan competition law.⁵²

8.4 Parallel Importation

Parallel trade may also be impeded by private arrangements that unduly distort competition. In a number of cases, the anti-competitive effects of restraints on parallel imports have been considered. Thus, the European Commission applied Article 81 of the EC Treaty in cases relating to the parallel trade of pharmaceutical products within the Community. In Sandoz (1987) and Bayer (1996), also known as the Adalat case, the Commission fined the pharmaceutical companies for having agreed on an export ban with their wholesalers.⁵³ The Commission considered that national price control regulations were insufficient justification for impeding parallel trade. Banning of parallel trade was also found to be anti-competitive in the already mentioned case relating to Astra Zeneca's anti-acid product, Losec.⁵⁴ The Peruvian competition law enforcing authority, INDECOPI, which is also competent in industrial property matters, denied a trademark owner, the right to exclude parallel imports, based on Article 157 of Decision 486 ("Common Regime on Industrial Property").

9. The Way Forward

From the moral and ethical point of view and from the legal perspective, it is essential to find out a solution to the problem of accessibility and affordability of drugs. Some sincere efforts from governments, non-government organizations and even from multinational pharmaceutical companies are worth mentioning here, which would be the path-finder for future.

9.1 Legal Challenges Against Pharma Giants

It is not possible to challenge a company legally for charging high price for the brand name drugs, but drug

manufacturing companies are subject to antitrust enforcement. Price fixing agreements, certain monopolistic attitudes and anti-competitive practices are subject to review and enforcement action. Any anti-competitive agreement between patent holder companies and generic manufacturer can be challenged by the respective authority. In USA, for example, the Federal Trade Commission (FTC) officials have filed cases challenging 'pay-to-delay' agreement in which a patent holder company promised to share a percentage of profit with a potential generic competitor for delaying the marketing of the generic version.

9.2 Price Reduction Measures by India

India, being a leading producer of generic version of drugs, is now engaged in increasing research and development to produce brand name drugs. Indian government is supporting the pharmaceutical industry by several measures: (i) permitting 100 % Foreign Direct Investment (FDI) for manufacture of drugs and pharmaceuticals provided the activity does not attract compulsory licensing or involve use of recombinant DNA technology and specific cell / tissue targeted formulations, (ii) tax incentives under the Income Tax Act, 1961 for in-house R&D, (iii) life saving vaccines have been exempted from excise duty, (iv) clinical trial of new drugs exempted from service tax to make India a preferred destination for drug testing, (v) anti-AIDS drugs and life saving vaccines exempted from excise duty to encourage companies for production, (vi) all drugs and materials used in clinical trials will be provided customs and excise duty exemption, (vii) companies in knowledge-based pharmaceutical business to be provided equity support, (viii) customs duty decreased to 5% on 10 anti-AIDS and 14 anti-cancer drugs, and (ix) Duty on certain life saving drugs, kits and equipment reduced and such drugs are also exempted from excise duty and countervailing duty. Other price control measures by India are also important, such as (i) expansion of price controls to every medicine on India's Essential Drug List, (ii) for price monitoring system of patented medicines, India has established National Pharmaceutical Pricing Authority (NPPA) to fix or revise the prices of controlled bulk drugs and formulations and also to enforce prices and availability of the medicines under the Drugs (Prices Control) Order, 1995, and (iii) US and India have started co-operating and synergizing their efforts to prevent HIV/AIDS and also provide the required

⁵¹ *Bristol Myers Squibb Company s/medidas cautelares*, 22 February 2007.

⁵² Superintendencia para la Promoción y Protección de la Libre Competencia, Resolución N° SPPLC/0076-06, Caracas, 26 de Diciembre de 2006.

⁵³ See online at http://www.hllaw.com/files/Publication/937ed0df-08d0-4722-9cae-914d168747b8/Presentation/PublicationAttachment/1429ab35-1c2b-440f-a59adef47e41c464/1701_EPC_Summer_2004_p30-31.pdf last visited on April 08, 2015

⁵⁴ Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 — AstraZeneca), Official Journal of the European Union 30.11.2006.

relief measures in mitigating the sufferings of the victims, mostly comprising of the deprived and depressed sections of society identified on the basis of socio-economic conditions.⁵⁵

9.3 Pharma Giants as Ice-Breakers

GlaxoSmithKline has taken few bold and appreciable steps to reduce the barrier of accessibility and affordability. Their efforts are specifically in following four areas: (i) "preferential pricing of our antiretrovirals, anti-malarials and vaccines, (ii) investing in research and development (R&D) that targets diseases particularly affecting the developing world, (iii) community investment activities and partnerships that foster effective healthcare, and (iv) innovative partnerships and solutions, such as voluntary licensing."⁵⁶ Roche, another multinational pharmaceutical company, has undertaken similar approach, for example, it follows differential business model for different countries according to their socio-economic status and provides essential medicines for the people in urgent need without any charges through their Patient Assistance Programmes (PAPs). In partnership with governments, it helps to establish projects for supply of medicine for a specific country and for a specific disease. For example, "in Egypt, a lower-middle-income country, hepatitis C prevalence is amongst the highest in the world, affecting up to 12% of the country's population, Roche has worked with the Egyptian government to initiate the National Ministry of Health (MOH) Project for Treating Chronic Hepatitis C (CHC), resulting in a vast increase of patients who now have access to treatment".⁵⁷ In least developed countries, there are no patents for any Roche medicines and no enforcement of ARV patents.⁵⁸

9.4 Efforts of Non-Government Organizations

Since 2003, NGO Clinton Health Access Initiative (CHAI) is trying hard for pricing agreements and has successfully negotiated for 40 formulations of antiretrovirals (ARVs) with eight companies. Presently, more than 70 countries have access to reduced pricing for these medicines. In 2006, CHAI entered into a partnership with the international funding organization UNITAID to merge the purchasing control of UNITAID with CHAI's model of price negotiations in order to amplify the availability of pediatric

and second-line drugs. Since then, CHAI and UNITAID have accomplished collective price reductions of 30 percent for second-line ARVs and 60 percent for pediatric ARVs. In addition, CHAI and UNITAID made new pediatric fixed-dose combinations (FDCs), priced at just \$60 per child per year, available to more than two dozen countries in 2007. Access to CHAI pricing agreements has become widespread as the users can access prices under the original ceilings set by CHAI. In the early 2008, about 2 million people living with HIV, globally, benefitted from ARVs purchased under CHAI agreements.⁵⁹

These are few examples of the way forward to the world of better accessibility and affordability of essential medicines. Though it has to be remembered that the actual quantum of the problem is much greater and need more comprehensive and global efforts to minimize it in a precise manner

10. Conclusion and Suggestions

During earlier era when no antibiotic was available, many people used to die without treatment. With the invention of penicillin, antibiotic has emerged. This is one example of many such success stories. Medicine is a product meant for survival, it is not a luxury. The advancement of technology has made the chances of combating a disease easier. But, there is a need for continuous supply of medicine for all probable illnesses to reduce overall mortality and morbidity, globally. One issue here is availability and affordability, as there is divergence in socio-economic structure and cultural aspect among the countries. With increasing global trade, transportation facilities, knowledge and technology sharing, access to medicine has improved, culminating an increase in survival rate of human beings. But, at the same time, it created a very complex situation of balancing the public interest and human rights concern, and investment from pharmaceutical companies with their incentive and profit. Accordingly, the study focuses on all the factors related with access to medicine, like patent protection specifically product patent regime, transactional IPR issues like data exclusivity, incremental innovation, impact of generic medicine, available flexibilities like compulsory licensing and parallel import and whether constitution of different countries and human rights has addressed this issue. Discussion of all these factors was done to find a balanced

⁵⁵ Aditi Singhai, "Indian pharma and new patent regime" on 9th October 2009

⁵⁶ A Publication of GlaxoSmithKline Government Affairs, Europe and Corporate, "Intellectual Property and Access to Medicine in developing Countries" available online at <http://www.gsk.com/responsibility/cr-review-2006/access-to-medicines.htm>

⁵⁷ A Report of Roche on "Access to medicines and Diagnostics: Focused on Developing Countries"

⁵⁸ A Report by Prof. Joseph Straus "Promoting Access to Medicines Through Balancing Patent Rights and responsibilities" in WIPO Conference on Intellectual Property and Public Policy Issues, Geneva, July 14, 2009

⁵⁹ Facts on 'Access Program' of CHAI, available at <http://www.clintonfoundation.org/what-we-do/clinton-health-access-initiative/our-approach/access-programs> last visited on April 09, 2015

pathway to get proper access to medicine. It makes some suggestions to enunciate more flexible or easy way to achieve access to medicine. The goal of achieving access to medicine for all is still far reaching and difficult. The suggestions contemplated below, if implemented properly, would go in long way in ensuring accessibility to all the medicines at affordable rates.

10.1 Use of Generic Medicine

The cost of medicine is the main cause of hindrance of availability of drugs for the patients in time of need. This concern is the backbone of this research. Medicines are innovated for treatment of patients. If due to unbearable cost patients become unable to purchase them and remain untreated, then the avowed object of the huge course of pharmaceutical research and marketing become meaningless. Incentive theory of patent protection for pharmaceutical research and development can be accepted unless it completely endangers the principal focus of patient care behind this whole process. There are several facts to support the view that generic competition has brought down the cost of medicine (both original as well as generic version) drastically. As such, it seems that production of generic medicine is the solution for the problem of accessibility and affordability of medicine. It has to be noted that generic medicine cannot be the only answer for this problem, as it cannot be generated unless there is an original invention. So the generic pharmaceutical manufacturing industry somehow directly or indirectly is dependent on the innovator companies. On the one hand, it is projected that growth of generic industry has a role in bringing down the price of medicine and hence medicine can reach millions of patients worldwide. But, on the other hand, if originator companies withdraw from pharmaceutical R&D, the generic industry also has to retreat from their business. Thus, all developing and least developed countries need to think on improving their own research and development units for pharmaceutical manufacturing.

10.2 Improvement of Domestic Research and Development

All the countries starting with their current level of development need to make efforts to support their pharmaceutical industry to focus on research and development so that through improved scope of innovation, availability and accessibility can be improved for the larger benefit of society, particularly the less developed and developing countries. For boosting investment into R&D, Public-private-partnership (PPP) model may be considered.

10.3 Pricing Policy

The companies should follow differential drug pricing policy for different countries according to their per capita

income and affordability of medicines. They may provide voluntary license to the domestic generic producers of developing countries, and avoid infringement action against ARV producing generic companies. Further, differential pricing usually leads to parallel importation of medicine within or between the countries and benefits in better accessibility of affordable medicine. State governments also can try to negotiate the pricing with manufacturing companies taking into consideration domestic legislation regarding drug pricing.

10.4 Data Exclusivity

The reason for many developing countries opting for not providing the data exclusivity is their concern for the probability of increase in the price of medicine in domestic market. There is no specific obligation in TRIPS to provide any separate exclusive right of data exclusivity for the scientific data submitted for market approval. Many developing countries relying on this position have not yet provided protection under data exclusivity in their national legislation. Protection of clinical data is related directly to the early entrance of generic medicine into the market. But, it has to be kept in mind that generic medicine seems to be only a temporary solution. So, along with generic manufacturing units, the state needs to concentrate on basic research of pharmaceutical products to get the original molecules. In that case, if the clinical trial data can be used for market approval of bio-similar products, the cost of medicine can come down and there can be better availability of affordable medicine to the poor patients.

10.5 Implementation of Compulsory Licensing

TRIPS Agreement and Doha Declaration have laid down clarification regarding the rights of government to use the compulsory license as a means of resolving the issue of access to and affordability of medicine. Developing countries may try to provide the reasonable provisions in their legislation to accommodate the TRIPS flexibility of compulsory licensing, with the aim of facilitating the availability of cheaper medicine through local production or import from other countries. At the same time developed countries and few developing countries with established pharmaceutical manufacturing capacity may take initiative to reform their legal provision to conform to, the facility to export the required medicine at affordable price under this mechanism. An inherent flaws in the system of compulsory licensing is that TRIPS Agreement and subsequently the Doha Declaration affirmed that the Member states are allowed to utilize the option of compulsory licensing to protect the public health concern of the general mass only when the crisis arises. That means, there is no provision of using this system for prevention and precautionary action, prior to the disease taking the shape of an epidemic or endemic. This inherent

drawback in the system of compulsory licensing has made it less useful. Some amendments need to be made in this system to make it more useful to get better access to medicine.

10.6 Promotion of Traditional Medicine

As a substitute to the available allopathic treatment, the countries rich in traditional medicinal resources and knowledge (like India, China, Thailand, Latin American or African countries) can think of proper utilization of those alternative medicines as well. Countries rich in traditional medicine can make sincere attempt to promote them, to achieve an alternative treatment modality for patients. Before the popularization of allopathic medicine, Indians were relying heavily on traditional medicine. It is observed that, traditional community people still rely more on traditional medicine because of their easy accessibility, affordability and age old practice of dependency on traditional healers. Reliance on particular mode of treatment is associated with positive psychological impact which helps in easy recovery from any disease, and access to medicine for all can be achieved much easily.

10.7 WIPO Development Agenda

WIPO adopted the "Development Agenda" (hereinafter, the Agenda) in 2007, with the aim of introduction of development as the core issue. A set of 45 recommendations is adopted with the suggestion of Committee on Development and Intellectual Property (CDIP). A wide range of actions are enlisted in the recommendation, such actions range from the development oriented projects to application of principles and objectives to proper guidance for practical implementation. In recent years, the attempt by WIPO is to ensure the paradigm shift in intellectual property aspects from the profit making practice to development driven practice. If WIPO can pursue each and every country to implement the recommendations mentioned in this Agenda then most of the barriers in access to medicine will be automatically removed. But it is essential that the recommendations must be implemented worldwide irrespective of the socio-economic condition. It must materialise not only in developing and least developed countries but also in developed countries.

Social Stigma Surrounding Surrogacy and Prostitution in Indian Society: A Critique

Ms. Sonali Kusum*

ABSTRACT

The debate on prostitution and surrogacy needs to be revisited in the light of the proposal by the National Women's Commission seeking to legalize prostitution in India. Another twin development is the recent revision of the draft law on surrogacy namely the Assisted Reproductive Technologies (ART) Bill in the year 2013 which is reinforcing the legalization of commercial surrogacy in India. It may be pertinent to note that surrogacy and prostitution share inherent similarity as both involve payment for the use of female's body and for the same reason both are held as unethical and stigmatized in the Indian society. These developments signify that both commercial surrogacy and prostitution are sought to be legalized in India. In the light of this, an important issue to be considered is the identification of similarities between commercial surrogacy and prostitution and assessing the nature of changes that may be required in the socio legal attitude for greater acceptability of commercial surrogate motherhood in India. With the legalization of both surrogacy and prostitution, the social stigma emanating from the commercial use of the female body involving her private organs (for third party) need to undergo a change to minimize social resistance. In this context, this study focuses on the issues surrounding legality and illegality of surrogacy and prostitution in India.

Key Words: Social stigma, Surrogacy, Prostitution, Surrogate mother, Human trafficking.

1. Introduction

Prostitution is defined as "the sexual exploitation or abuse of persons for commercial purposes or for consideration in money or in any other kind,"¹ or in simple words prostitution is "the exchange of sexual services for money"². Similarly, surrogacy or surrogate motherhood is defined as "an arrangement in which a woman agrees to a gestate or undergo pregnancy, achieved through assisted reproductive technology and to hand over the child to the person or persons for whom she is acting as a surrogate, usually in return for monetary payment"³ or in simple words "surrogacy is use of gestational services of woman in exchange for money"⁴. Prostitution as well as surrogacy both are permitted and regulated in India under respective laws and regulations. The Suppression of Immoral Traffic in Women and Girls Act regulates prostitution by declaring certain acts as living on the earnings of the prostitution, keeping a brothel or allowing premises to be used as a

brothel and such other acts as illegal and punishable offence. Where as in case of surrogacy, there is no binding statutory law on surrogacy in India. At present surrogacy in commercial form is permitted in India by the Supreme court's pronouncement in the case of Baby Manji vs. Union of India and regulated by the ICMR Medical guidelines and the Draft ART Bill awaiting enforcement.

Commercial surrogacy and prostitution involve temporal use of body of or hiring of private body organ as womb by third person in return for monetary payment. One of the common attribute in commercial surrogacy and prostitution is the element of commerce, trade, financial transaction in relation to human body, bodily organs, biological process of reproduction, procreation⁵. Due to this reason "surrogacy is held as a form of prostitution or slavery whereby a woman exchanges the use of her body for money."⁶ This has resulted in a thriving industry based on the renting, hiring of gestational, sexual capacity of

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¹ Sec 2 (f) of the Suppression of Immoral Traffic in Women and Girls Act, 1956

² Wikipedia, the free encyclopedia, Prostitution in India, Wikipedia, available at (last visited February 25, 2015)

³ Farlex, the Free Dictionary, Surrogate Motherhood, thefreedictionary, available at <http://legal-dictionary.thefreedictionary.com/Surrogate+Motherhood>(Last visited Feb. 25, 2015).

⁴ Dictionary merriam-webster, surrogate mother, merriam-webster, available at <http://www.merriam-webster.com/dictionary/surrogate%20mother> (Last visited Feb. 25, 2015)

⁵ Sugato Mukherjee, Legal and Ethical Issues of Commercial Surrogacy in India , Academia Edu, available at http://www.academia.edu/1955503/Legal_and_Ethical_Issues_of_Commercial_Surrogacy_in_India_an_Overview (Last visited Feb. 25, 2015)

women to be let on hire leading to her bodily exploitation. Surrogacy in particular generates greater scope for exploitation for two reasons; firstly due to rampant practice of surrogacy as a part of reproductive tourism policy seeking to offer the gestational services of Indian women to be availed for monetary returns by nationals or foreigners, and secondly due to absence of any binding law imposing check and control on the same. There is likelihood of misuse of the technology for unfair commercial gains and illegalities. Under such circumstances women are vulnerable to trafficking or buying or selling, and abduction of women for the purpose of being surrogate mothers or prostitutes for vested interests.⁷ This raises fears of marketing of human body, organs and many other socio legal evils in our society. Thus, there is a necessity to bring stringent legal provisions to protect women from such social evils.

At this juncture, it may be reiterated that in the wake of recent proposal by National Commission for Women (NCW) seeking to legalize prostitution in India⁸ by amendment to Immoral Traffic (Prevention) Act, 1956 (ITPA)⁹ in the after math of public interest litigation before Supreme Court of India involving right of sex workers to live with dignity in accordance with Article 21 of the constitution of India, coupled with legalization of surrogacy under the revised ART Bill 2013. Thus, both surrogacy and prostitution are subject to changes which may have significant implications on the legal recognition and social acceptability of the same including better status of these women in the society. It may be rightfully said that with the proposed changes in the legalization of both these illegalities, misuses associated with these may cease.

India is one of the first country in the world to legalize

commercial surrogacy since the year 2002 under reproductive tourism policy aimed at earning foreign exchange. Subsequently, the Supreme Court of India in the epoch making case of *Baby Manji vs. Union of India*¹⁰ formally legalized commercial surrogacy in the year 2008. In the same case, the apex court defined commercial surrogacy as "a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb"¹¹. Having defined commercial surrogacy, the apex court acknowledged the name calling and the social stigma surrounding commercial surrogacy. Further, the court reiterated the popular euphemism associated with commercial surrogacy, namely, "womb renting", "baby farm" and "outsourced pregnancies"¹² as prevalent in the society. This judicial pronouncement led to the formulation of the Assisted Reproductive Technologies (ART) (Regulation) Bill 2008¹³. This ART Bill 2008 was subject to necessary change and revised as ART Bill 2010¹⁴, this Bill provides for commercial surrogacy by permitting monetary compensation to women in return for their gestational services.¹⁵ At present ART Bill 2010 is being modified and relooked as ART Bill 2013 which is awaiting enactment. Therefore, surrogacy in India is without any binding regulatory law.

2. Surrogate Mother & Derogatory Social Status

The surrogate mothers are given very derogatory status by equating their position with that of a prostitute in the Indian society. The social attitude towards surrogate motherhood is expressed by name calling as "baby breeders", "baby factory", "incubator" and "carrier or vessel" among others.¹⁶ The surrogate mother has to face a social stigma of offering bodily services for commercial returns similar to a prostitute. There is a misconception in the society that the

⁶ Denise E. Lascarides, A Plea for the Enforceability of Gestational Surrogacy Contracts Hofstra Law Review Volume 25 | Issue 4 Article 4 1997 available at <http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1980&context=hlr> (Last visited Feb. 25, 2015).

⁷ Bureau of the Dutch National Rapporteur on Trafficking in Human Beings, Human trafficking, *For the purpose of the removal of organs and forced commercial surrogacy*, The Hague: BNRM, National Rapporteur on Trafficking in Human Beings (2012) available at www.bnrm.nl (Last visited Feb. 25, 2015)

⁸ IANS |, Proposal to legalize prostitution to be placed before SC panel: NCW Oct 29, 2014, available at <http://timesofindia.indiatimes.com/india/Proposal-to-legalize-prostitution-to-be-placed-before-SC-panel-NCW/articleshow/44973994.cms> (Last visited Feb. 25, 2015).

⁹ The Immoral Traffic (Prevention) Act, 1956 [NO.104 of 1956], [30th. December, 1956].

¹⁰ (2008) 13 S.C.C. 518).

¹¹ Ibid, 5.

¹² Ibid, 9.

¹³ Indian Council of Medical Research. The Assisted Reproductive Technology (Regulation) Bill– 2008(Draft) Ministry of Health and Family Welfare, Government of India, available at [http://icmr.nic.in/art/Draft%20ART%20\(Regulation\)%20Bill%20&%20Rules%20-%202008-1.PDF](http://icmr.nic.in/art/Draft%20ART%20(Regulation)%20Bill%20&%20Rules%20-%202008-1.PDF) (Last visited Feb. 25, 2015) [hereinafter Draft Bill 2008].

¹⁴ The Assisted Reproductive Technologies (Regulation) Bill - 2010 (Draft), Ministry of Health & Family Welfare Govt. Of India, New Delhi & Indian Council of Medical Research New Delhi, available at <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf> (Last visited Feb.25, 2015) [hereinafter ART Bill 2010].

¹⁵ Ibid, ART Bill 2010 § 34 (1) (2).

¹⁶ Christopher White, Surrogacy: The Twenty-First Century's New Baby-Making thefederalist. October 13, 2014 available at <http://thefederalist.com/2014/10/13/surrogacy-the-twenty-first-centurys-new-baby-making/> (Last visited Feb. 25, 2015).

role of surrogate mother may involve immoral acts like that of a prostitute including sexual intercourse with the male partner of the couple or the intending father in order to conceive and gestate the surrogate child, such misconceived notion exists due to lack of information on the medical process of artificial insemination resulting in "stigmatization and¹⁷ social exclusion¹⁸ of surrogate mothers. The surrogate mothers are alleged to be "maligning motherhood"¹⁹ by making the reproductive labour or gestational labour available on hire for money in market like any other market or commercial service at the cost of suppressing and alienating feelings of motherhood accruing during the course of gestation or pregnancy and by undertaking compulsory handing over the custody of child onto others immediately after birth for monetary sum despite all or any intrinsic emotional attachment²⁰ thereby defeating the very notion of motherhood. The surrogate mothers are also called "disposable mothers" for the reason that surrogate motherhood requires women to undergo pregnancy for the sole purpose of surrender or disposing of the custody of child to others immediately at birth and thereafter severing all ties in return for a fixed sum of money.²¹ Surrogate mothers are also viewed as "dirty workers" due to inherent servile behavior implicit in the nature of the act²² of gestational labour undertaken for others where in the conduct and functioning of surrogate mother is controlled as per the terms and conditions of surrogacy arrangement at the instance of the couple to suit their interest.²³

On the other side, surrogate mothers defend their position by denying any comparison with prostitutes or paid sex workers, and these women or surrogate mothers contend

that "surrogacy is more like a "calling," "a blessing from God"²⁴ that enables a woman to perform a charitable or noble act of providing child to infertile and help them build their family.²⁵ Surrogate mothers fight back the stigma of surrogacy by construing a sense of self-worth by recounting the instance from Mahabharata where Lord Sri Krishna and other deities were born in similar ways. Thus, surrogates seek to perform a glorious act as enumerated in religious texts. The surrogates state that "it's in our religion. It's something like what Yashoda Ma did for God Krishna"²⁶. Thus, it is evident that the surrogate mothers resent and fight back such comparisons. In the light of such comparisons and contradictions between surrogacy and prostitution, and the consequent social stigma there is a felt need to identify the similarities and dissimilarities between surrogacy and prostitution.

3. Similarities between Surrogacy and Prostitution

Leading feminist schools of thought and scholars have sought to establish similarities between surrogacy and prostitution. It is significant to take into consideration these feminist perspectives who call surrogacy as reproductive prostitution as "it is the womb, not the vagina, that is being bought; this is not sex, it is reproduction that is being bought".²⁷ Gena Corea, a leading radical American feminist opines that "Surrogacy, like prostitution, involves payment of a fee for the use of the body but the nature of service provided is very different "while prostitutes sell the use of the vagina, rectum or mouths, surrogates sell the use of other body parts such as wombs, ovaries, and eggs."²⁸ Thus, it is said that "prostitution is sex without reproduction and surrogacy is reproduction without sex"²⁹.

¹⁷ Sayantani Das Gupta, Shamita Das Dasgupta, *Globalization and Transnational Surrogacy in India: Outsourcing Life* (Google eBook), Lexington Books, Feb-2014.

¹⁸ Kajsa Ekis Ekman, *Being and Being Bought: Prostitution, Surrogacy and the Split Self* spinifexpress, available at <http://www.spinifexpress.com.au/bookstore/book/id=246/> (Last visited Feb. 25, 2015).

¹⁹ Chaz Kangas, Paul Anka's "Having My Baby": Disgustingly Misogynist or Unfairly Maligned?, *VILLAGE VOICE*, available at http://blogs.villagevoice.com/music/2013/05/paul_anka_having_my_baby.php (Last visited Feb. 25, 2015).

²⁰ Kellye Y. Testy, Foreword: Compensated Surrogacy in the Age of Windsor, *Washington Law Review* [Vol. 89:1169], available at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1410/89wlr1069.pdf?sequence=1> (Last visited Feb. 25, 2015).

²¹ Amrita Pande, "At Least I Am Not Sleeping with Anyone": Resisting the Stigma of Commercial Surrogacy in India, *Feminist Studies* 36, no. (Summer 2010). © 2010 by Feminist Studies, available at <http://claradoc.gpa.free.fr/doc/420.pdf> (Last visited Feb. 25, 2015).

²² *Ibid.*

²³ Amrita Pande, Not an 'Angel', not a 'Whore': Surrogates as 'Dirty' Workers in India, *Indian Journal of Gender Studies* 2009 16: 141, available at <https://intersektionalitet.files.wordpress.com/2011/03/notanangel2.pdf> (Last visited Feb. 25, 2015).

²⁴ *Supra Note at 23.*

²⁵ Amrita Pande, Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker, *SIGNS* Summer 2010? 971.

²⁶ *Ibid.*

²⁷ Dion Farquhar, *The Other Machine: Discourse and Reproductive Technologies* Psychology Press, 1996.

²⁸ Katherine B. Lieber, Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered? *Indiana University School of Law*, Volume 68 | Issue 1 available at <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1466&context=ilj> (Last visited Feb. 25, 2015).

²⁹ Vandana Apte, Commercial surrogacy presents priceless opportunities Under the Microscope, *dailytargum*. 09/17/14, available at <http://www.dailytargum.com/article/2014/09/commercial-surrogacy-presents-priceless-opportunities> (Last visited Feb. 25, 2015).

As per the radical feminists, surrogacy and prostitution have similarities some of which are identified and discussed here briefly.

3.1 Commoditization or Objectification of Female Body & Commercial Gain from Use of Body

Surrogacy and prostitution both commodify women's body by offering women's gestational, sexual labour in market for remunerative sum. Radical feminist Margaret Radin argues that there is commoditization due to commercial hiring of women's private body.³⁰ That results in unfair exploitation of women.³¹

3.2 Bodily Exploitation & Denial of Human Rights Guarantees as Bodily Dignity and Integrity

Both surrogacy and prostitution, by making women's body into a commodity of commercial gain and monetary return, devoid women's body of human dignity and integrity, and go against the basic human right to dignity. As per the established theory of the Idea of Human Dignity laid down by the German philosopher Immanuel Kant, "Human beings have "an intrinsic worth, i.e., dignity," which makes them valuable' "above all price", therefore human beings are end in themselves and not merely means to an end"³². So, it is apparent that both surrogacy and prostitution are inconsistent to the basic tenet of human dignity, right to person as conceptualized under the Kantian Theory. Based on this foundational principle of human dignity and integrity, many European nations, for instance, namely, Germany, France, Italy and other nations, strictly prohibit surrogacy and make it an offence violating the human rights. It may be pertinent to mention that as per the German constitution human dignity is inviolable. Therefore, to make a human being the subject of a contract and use of a third party's body for the purposes of reproduction is impermissible under German

constitution.³³ In keeping with this, in the case of *Jan Balaz vs. Anand Municipality and Ors*,³⁴ the German Government authorities denied any legal recognition to such surrogacy commissioned by German nationals in Anand, Gujarat, India, leading to the birth of German twins, who were biologically related to the couple. Similarly, France under its Civil Code prohibits surrogacy, being contrary to the principle of the inviolability and integrity of the human body, which states that only things of a commercial nature can be the object of contract.³⁵ Therefore on this rationale, prostitution and commercial surrogacy is viewed as breach of the established human rights guarantee.

3.3 Absence of Choice & Compulsions as Economic Necessity

Both surrogacy and prostitution are marked by absence of free choice. Surrogacy or prostitution is not an option in which a woman can enter into by her own free will. This analogy is supported by the testimony of a surrogate, a poor Indian surrogate mother named "S" who states her reason to be surrogate is a "majboori" or compulsion or necessity for survival.³⁶

3.4 Stay Arrangements Away from Homes as Brothel or Surrogate Hostel

Both the surrogate and prostitutes are made to stay away from their family, in secluded accommodation. Surrogates are kept together as a class of breeders, just as prostitutes are kept together in brothels. While the surrogates stay in a make shift "surrogate hostel" the prostitutes stay in a "brothel", and in both the cases women are made to share usually a common big room or dormitory with as many as ten to fifteen women, with common washrooms.³⁷ Their life style and day to day movements are brought under necessary supervision or monitored by third party agency or the so called care takers or middle men.

³⁰ Jean M. Sera, Surrogacy And Prostitution: A Comparative Analysis, Journal of Gender & the Law, Spring 1997] [Vol. 5:315, At pg no 327].

³¹ Accord Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life* 13 HARVS. J. L. & PUB. POL'Y 139, 141-46 (1990). See Margaret Jane Radin, *Market Inalienability*, 100 HARVS. L. REVS. 1849, 1859-60 (1987).

³² Immanuel Kant (1724–1804) Lecture on Ethics (1779), Kant's Moral Philosophy, Stanford encyclopedia of ethics, Feb 23, 2004, available at <http://plato.stanford.edu/entries/kant-moral/> (Last visited Feb. 25, 2015).

³³ Michael Edwards, Colin Rogerson, Dawson Cornwell, family law week, Surrogacy: National Approaches and International Regulation, proceedings at the Workshop on National Approaches to Surrogacy, University of Aberdeen between 30 August 2011 and 1 September 2011 Articles > 2011 archive available at <http://www.familylawweek.co.uk/site.aspx?i=ed87773> (Last visited Feb. 25, 2015).

³⁴ AIR 2010 Guj 21.

³⁵ French civil code, Code Civil [C. CIVS.] Article 1128, See also, John Weltman & Brian Manning, Information Regarding the April 2011 Cour de Cassation Decision, CIRCLE SURROGACY (Apr. 14, 2011), available at <http://www.circlesurrogacy.com/en/component/k2/item/174-memo-menesson-decision>. (Last visited Feb. 25, 2015).

³⁶ Amrita Pande, Wombs in Labor, Transnational Commercial Surrogacy in India, Columbia University Press, SEPTEMBER 2014.

³⁷ Gena Corea, The Mother Machine: Reproductive Technologies From Artificial Insemination to Artificial Wombs. Journal of Nurse-Midwifery, Volume 32, Issue 1, page 55, January-February 1987.

3.5 Non-disclosure & Secrecy

Majority of the surrogate mothers do not disclose, rather hide, the fact of their being surrogate mothers, from their neighbors, in laws and even their parents. Some of the surrogate mothers lie about their long absence from their homes by making false excuses such as they are visiting their maternal home or they are on pilgrimage.³⁸ Thus there is similar confidentiality associated with the sex workers as well as surrogates who never disclose about their profession.

4. Differences Between Surrogacy and Prostitution

After establishing the common grounds between surrogacy and prostitution, it is equally significant to identify the differences for better conceptualization of the issues evolved. Some of these key differences are discussed below.

4.1 Criminal & Punishable Nature

Prostitution being the sale of sexual services for a fee is held to be per se unethical, immoral and soliciting, and is legally prohibited and held as a punishable offence³⁹ under the Indian penal law⁴⁰ as well as under the Suppression of Immoral Traffic in Women and Girls Act, 1956.⁴¹ On the other hand, surrogacy as an act of substitution of gestation and consequent child bearing without any sexual intercourse is neither held as an illegal act or criminal act nor a punishable offense. It may be noted that surrogacy could be of two forms, namely, altruistic surrogacy or commercial surrogacy. The altruistic surrogacy is held as charitable act of helping the infertile couple and held legal in almost all legal jurisdictions. There are many instance of altruistic surrogacy in the old testament of Bible⁴² as well as in Hindu religious epics as Mahabharata⁴³ which has been received with reverence and social acceptance. Rather it is usually in the case of latter, the commercial surrogacy which is held illegal in certain legal jurisdictions as already mentioned by enumerating instances of some of the European nations.

Thus, unlike prostitution, surrogacy is not per se necessarily illegal.

4.2 Purpose & Intent

Surrogacy can be distinguished from prostitution based on its respective purposes. The main purpose behind the surrogacy is birth of child, family formation for an infertile couple. Thus, surrogacy may be beneficial to individuals as well as the society. Whereas the main purpose of prostitution is mere temporal physical pleasure or sexual gratification.⁴⁴ Thus, in case of the surrogacy the ends justify the means owing to its very noble and laudable objective, and the same is absent in the case of prostitution.

4.3 Potential & Incidental Harms

There are many potential harms associated with or incidental to prostitution owing to the involvement of sexual intercourse with a man which is absent in the case of surrogacy. In the case of prostitution, there is scope for misuse of minor girls for trafficking or selling or kidnapping for induction into prostitution even at the cost of risking their lives. These risks are less prominent in surrogacy.

5. Legal Issues & Nexus Among Surrogacy, Prostitution & Human Trafficking

Considering the shared similarity of bodily exploitation implicit in surrogacy, prostitution and human trafficking, all the three fall under the broad ambit of offence against human dignity & integrity, and are violative of human rights under national laws as well as International laws and conventions. Some of these issues and legal instruments are elucidated below.

5.1 Human Rights Issues

Surrogacy, prostitution and trafficking have common shared elements namely bodily exploitation for commercial gain. "While the prostitution makes commercial use of vagina, surrogacy makes commercial use of uterus. Both expose the female body to market transaction for financial gain. The commercial gains so

³⁸ Nita Bhalla and Mansi Thapliyal, Foreigners Are Flocking To India To Rent Wombs And Grow Surrogate Babies, businessinsider, Reuters, Sep. 30, 2013, available at <http://www.businessinsider.com/india-surrogate-mother-industry-2013-9?IR=T> (Last visited Feb. 25, 2015).

³⁹ Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in *The Sexual Liberals and the Attack on Feminism* 67-69 (Dorchen Leidholdt & Janice G. Raymond eds., 1990).

⁴⁰ Indian Penal Code, 1860, Act No. 45 of Year 1860, (6th October 1860), § 373

⁴¹ Supra note at 2.

⁴² Bible Verses about Surrogate Motherhood, Genesis 16:1-16, Genesis 30:1-24, openbible available at http://www.openbible.info/topics/surrogate_motherhood (Last visited Feb. 25, 2015).

⁴³ M Naushad Ansari, Surrogacy in the mirror of Hinduism and Islam, 11 October 2011, available at http://twocircles.net/2011oct11/surrogacy_mirror_hinduism_and_islam.html (Last visited Feb. 25, 2015).

⁴⁴ Denise E. Lascarides, A Plea for the Enforceability of Gestational Surrogacy Contracts Hofstra Law Review Volume 25 | Issue 4 Article 4 available at <http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1980&context=hlr> (Last visited Feb. 25, 2015).

derived are primarily unfair and unethical. For the same reason, surrogacy and prostitution are inherently intrinsically violative of human right to dignity and integrity,⁴⁵ concurrent with the offence of human trafficking. In commercial surrogacy as well as prostitution there are common socio economic determinants or reasons such as poverty, debt, illiteracy which act as a compelling force for women to become surrogate mothers or prostitutes as the present societal order fails to provide them gainful employment. The recruiting process in prostitution, surrogacy is notably similar to the recruitment process used by human traffickers. In both there is involvement of third parties as middle-men, (brokers, agency, local surrogacy agents or corporate surrogacy consultants to recruit surrogate mothers). It is also found that both prostitution and commercial surrogacy are essentially chief motives for human trafficking. While surrogacy represents reproductive trafficking, prostitution represents sexual trafficking. In this regard, it is pertinent to mention a landmark case on the point which distinguishes between the two forms of trafficking namely sexual and non-sexual trafficking. These forms of human trafficking are brought forth in the case of *Bachpan Bachao & Ors. vs Union Of India & Others*⁴⁶ wherein the Delhi High Court acknowledges that "there is no concrete definition of human trafficking and the court identified two major categories of trafficking namely sexual and non-sexual forms of trafficking. The former category includes sex based trafficking including prostitution, pedophilia, pornography and the latter category non-sex based trafficking includes surrogacy and servitude like domestic labour, organ transplant etc. Thus it may be rightfully stated that Commercial surrogacy, prostitution and human trafficking are intertwined, and share indispensable nexus.

In addition to these, it is well established under various national laws, international conventions that trafficking is

primarily "an offense to the dignity and integrity of the human being thereby violation of human rights"⁴⁷. Accordingly, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplements the United Nations Convention against Transnational Organized Crime⁴⁸ as well as the Council of Europe Convention on Action against Trafficking in Human Beings⁴⁹ which prohibit trafficking as it is primarily breach of human dignity and right to person. Similar provisions are found in the international human right convention or treaty namely UDHR,⁵⁰ ICCPR,⁵¹ UNCEDAW⁵² which establish the right to human dignity, integrity and respect for person as the most fundamental human right safeguard. Thus, the right to human dignity besides being a human right guarantee is also an established fundamental and legal right which is a facet of right to life, liberty under article 21 of Indian constitution. Right to human dignity is interpreted as the inalienable fact of right to life in the epoch making case of *Bandhua Mukti Morcha vs. Union of India*⁵³ and a host of other cases. In surrogacy and prostitution, these legal human right safeguards are denied. This violation of dignity and integrity of person is subject to criticism not only from conventional or treaty law but also from philosophical and ethical perspectives as well.

5.2 National Legal Instrument

Human trafficking is prohibited in all or any form under national as well as international laws. Laws related to trafficking are mostly confined to and associated with trafficking for the purpose of prostitution, sexual exploitation but laws related to trafficking for the purpose of surrogacy are not similarly established as yet. Firstly the IPC provides for penal offences against trafficking of females, girls for prostitution. Similarly, the statutory Act namely Immoral Traffic (Prevention) Act, 1956 (ITPA)⁵⁴

⁴⁵ European Centre for Law and Justice, Surrogate Motherhood: A Violation of Human Rights the Council of Europe, Strasbourg, 26 April 2012, available at <http://www.culturavietii.ro/wp-content/uploads/2015/01/Surrogacy-Motherhood-ECLJ-Report.pdf> (Last visited Feb. 25, 2015).

⁴⁶ WP(Cr.) No.82 of 2009.

⁴⁷ Anne T. Gallagher, *The International Law of Human Trafficking*, Cambridge University Press, 30-Sep-2010.

⁴⁸ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, available at: <http://www.refworld.org/docid/4720706c0.html> (Last visited Feb. 25, 2015).

⁴⁹ European Union, Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Warsaw, 16.VS.2005, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm> (Last visited Feb. 25, 2015).

⁵⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (Last visited Feb. 25, 2015).

⁵¹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (Last visited Feb. 25, 2015).

⁵² UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> (Last visited Feb. 25, 2015).

⁵³ *Bandhua Mukti Morcha vs. Union of India*, 1984 (3) SCC 161.

⁵⁴ The Immoral Traffic (Prevention) Act, 1956 [NO.104 of 1956], [30th. December, 1956].

prohibits trafficking for immoral purposes including prostitution and sex trade. Commercial surrogacy, being an advanced reproductive technology, has been given legal permit in India, only a few years back, and the legislation on the same is still pending. Therefore there is a legal void to address the issues related to surrogacy and related human trafficking. It is well understood that the drafter of IPC at the time of formulation had not envisioned this medical technique of surrogacy or any such similar technology. Hence, the law makers did not have this technology in their consideration, let alone its misuse leading to trafficking in women for making them gestational carriers. Therefore, this technology has not been taken into account while conceptualizing law on trafficking. However, in the recent past there has been initiation on these lines under the international legal instruments. Some of these are discussed below.

5.3 International Legal Instruments

There are certain contemporary international legal instruments that identify "forced prostitution" and "forced pregnancy" as emerging forms of human trafficking under their relevant provisions. One such International Criminal Court Statute includes enslavement, "forced prostitution" and "forced pregnancy" amongst crimes against humanity.⁵⁵ The United Nations Office on Drugs and Crime ("UNODC") "Model Law against Trafficking in Persons", seeking the implementation of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, specifically mentions "forced pregnancy" and the "use of women as surrogate mothers" as forms of human trafficking. The draft Council of Europe convention against trafficking urges the state parties to formulate protocol against trafficking in body parts, human tissues and cells either through gestation carrier or as gamete donors.⁵⁶ This convention envisions commercial surrogate motherhood as a form of human trafficking. Thus, it may be inferred that "exploitation" for

the purpose of "trafficking" may include surrogate pregnancy which may be read under the category of forced pregnancy. These are some of the progressive legal developments which focus on the nexus between commercial surrogacy and human trafficking.

6. Concluding Remarks

The analogy between commercial surrogacy and prostitution cannot be refuted due to the common shared ground of bodily exploitation of women with the common motive of commercial gain. Both receive criticism from ethical, legal and human right advocacy groups for being largely unethical and stigmatized, among others. The issue of social stigma continues to degrade the status of surrogate mothers and prostitutes, but with the possible legalization of prostitution as mooted by the NCW, this attitude of social stigma may undergo a change. As more and more surrogate mothers are voicing about the nature of such pregnancy as well as the process of legalization, ART Bill has brought more emphasis on the medical technique of artificial insemination and nature of such pregnancy.

It is established, however, that commercial surrogacy and prostitution are different in effect and practice. Surrogacy leads to family formation and fulfillment of right to life, right to privacy which brings welfare for the individual and family thereby greater good for the society. Further, surrogacy is not per se criminal and punishable act unlike prostitution. However, the legal issue common in both is the inconsistency with the established human rights standards and the possibility of lurking crimes of human trafficking in the garb of same. Thus, there is felt need to address the same through legalization and necessary amendment whereby the differentiation is well established as well as the positive aspect of surrogacy is further emphasized. The present proposals of enactment of laws seek to strike a balance with the personal needs of individuals with the welfare of society.

⁵⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, Article 7, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> Article 7.

⁵⁶ Parliamentary Assembly of The Council of Europe 1st Part of 2013 Parliamentary Assembly Session, Recommendation 2009 (2013)1 Towards A Council Of Europe Convention To Combat Trafficking In Organs, Tissues And Cells Of Human Origin, available at: [http://www.coe.int/t/dg3/healthbioethic/Texts_and_documents/INF_2014_5_vol_II_textes_%20CoE_%20bio%C3%A9thique_E%20\(2\).pdf](http://www.coe.int/t/dg3/healthbioethic/Texts_and_documents/INF_2014_5_vol_II_textes_%20CoE_%20bio%C3%A9thique_E%20(2).pdf) Article 7.

Role of Panchayati Raj Institutions in the Decentralization of Governance: A Critique

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ABSTRACT

Since ancient times, Panchayati Raj Institutions have been embedded in the ancient sociological structure of the country, and have been widely accepted in the Indian society since times immemorial. These institutions have always functioned according to their own beliefs and traditions thus leading to ambiguity and non-uniformity in the system. In the due course of the rise and fall of empires, panchayats have suffered the domination of many rulers, who moulded these institutions according to their exigencies.

The main objective of any democracy is to create a welfare state based on the principles of social justice, freedom and equality. The democracy needs to step down from the parliament to the lowest rungs of the society. Since independence, the Indian government has sought to infuse these ancient traditional governing bodies with modern trends of governance and administration, simultaneously protecting them by conferring them a constitutional status.

Despite all developments sought to be introduced by the government to provide benefits of efficient administration of the Panchayats to its citizens, the system faces many challenges. The threat of extra constitutional authorities has also gained momentum which tends to subvert the very foundation of these institutions.

After a thorough assessment of the functioning of the Panchayats in the country, this paper ventures with a detailed analysis of the evolution of the Panchayati Raj Institutions in the country. The following areas of importance have been dealt with: Background, Constitutional Status, Challenges and Suggestions for Reform.

Key Words: Panchayati raj institutions, Democracy, Constitutional status, Challenges, Administration, Extra constitutional authorities.

1. Introduction

Since independence, India adopted the policy of creating a welfare state. According to the Ministry of Rural Development (Government of India), "Rural Development implies both the economic betterment of people as well as greater social transformation. In order to provide the rural people with better prospects for economic development, increased participation of people in the rural development programmes, decentralization of planning, better enforcement of land reforms and greater access to credit are envisaged."¹

A nation which disregards the plight of half of its population can never be triumphant on its road to development, to quote Mahatma Gandhi "economics is untrue which ignores and disregards moral values". In the 22nd July, 1946 issue of Harijan, Gandhi stated that 'Independence must begin at the bottom'.²

Realising the importance and necessity of rural self-government in a developing nation, Panchayati Raj Institutions were conferred a new dimension by the 73rd Amendment Act, 1992.

Panchayat is an Indian political institution and is a part of our ancient civilization which has been in existence since times immemorial, in one form or the other. Panchayats have developed gradually with the growth of the country. Panchayats can be said to be, popularly elected village councils which deal with the local affairs at the village level including economy, health, administration and distribution of resources and also functions as a local judicial body in a traditional or customary fashion. In literal sense, the word panchayat is a combination of two words i.e. panch (five) and ayat (assembly). Although, panchayats lack uniformity in their functions due to lack of a specified constitutional mandate yet, it is conceived as an instrument for bringing about the comprehensive development of the country. It

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¹ A.K. Mishra, Naved Akhtar, Sakshi Tarika "Role of the Panchayati Raj Institutions in Rural Development(An analytical study of Uttar Pradesh)", SMS Varanasi, Vol VII, No. 1; 44, June 2011.

² Anil Dutta Mishra "Introduction" in Anil Dutta Mishra, Mahadev Shivappa Dadage, "Panchayati Raj (Gandhian Perspective)", p 1 (A Mittal Publication, 1st Ed., 2002).

also ensures the exercise of the people's authority for the good of the people, which is the ultimate goal of any democracy. Providing proper representation to the lakhs of people living in the villages will take India much further towards its goal.

Panchayats are an integral part of the Indian social system, where 60% of the population lives in villages. Mahatma Gandhi held that by serving the villages, swaraj could be established. In the July 26, 1942 issue of Harijan, he gave an outline of his idea about Village Swaraj. He wrote: *"My idea of Village Swaraj is that it is a complete republic, independent of its neighbours for its own vital wants, and yet interdependent for many others in which dependence is a necessity. The government of the village will be conducted by the Panchayat of five persons, annually elected by the adult villagers, male and female, possessing minimum prescribed qualifications. These will have all the authority and jurisdiction required. Since there will be no system of punishments in the accepted sense, this Panchayat will be the legislature, judiciary and executive combined to operate for its year of office. Here there is perfect democracy based upon individual freedom. The individual is the architect of his own government."*³

The cardinal objective of the Indian government, since independence, has always been the welfare and betterment of its citizens. To fulfil this objective, the government has undertaken innumerable steps towards provision of rudimentary facilities like education, healthcare, public works etc. In recent times, it was realised that increased momentum could be given to the process of development by including the people in providing governance at the grass root level. Keeping this in mind, rural development through evolution of Panchayati Raj Institutions has been one of the central objectives of the government since independence.

Mahatma Gandhi's vision of villages being a self-dependent unit can be seen coming true. The evolution of the Panchayats has been a boon for the millions of impoverished villagers, as they have a platform to bring their issues to the forefront and get them addressed adequately. However, a lot requires to be done. This is where, the law comes into play. By enacting more efficient laws for better functioning of the Panchayats the process of development of villages can be given velocity.

Presently, India has adopted a three tier Panchayat system - Gram Panchayat at the village level, Panchayat Samiti at the Block level and Zila Parishad at the district level. Gram panchayats operate at the village level with a Sarpanch as its head who is in-charge of all matters. Panchayat Samiti is

the replication of same style of governance at the Block level and is headed by a Chairman. Block Development Officer (BDO) is the administrative head who keeps all the records pertaining to the working of Panchayat Samiti. Zila Parishad or the district level panchayat is also headed by a Chairman, and an IAS or a State Civil Service Officer is its administrative head. Its governing body is composed of MPs and MLAs of the area besides other elected members.

Panchayati Raj Institutions are an integral part of the system, aiming at social and economic development of the rural people. Autonomy of the village as the basic unit of the national economy has to be provided in order that it may plan production, fully develop the resources and produce its own leaders who may work for the people and be accountable to them. As Panchayats have been a part of the Indian society since ancient times and have acclaimed social acceptance from the people, it can be a tool for development of the weakest sections of our society. It also leads to direct participation and self-accountability of the people in making policy and execution of matters directly related to their well-being, thereby creating real democracy at the basic level. This system envisions, endorsing the responsibility for its success on the people themselves and garners necessary enthusiasm of the village community for creative works.⁴

2. Historical Background

The tradition of local governance in India dates back to the Vedic age which is evident from their references in the Rig Veda, the origin of which can be traced back to 1200 BC. Over a period of time many empires and dynasties rose to power and fell. But the villages survived and panchayats have always emerged as effective agencies of social control as a gathering of five wise respected elders elected by the community, whose verdict is traditionally accepted. The head of a Panchayat is called 'Mukhiya' or 'Sarpanch'. This concept of local governance was embedded in our system since ages in one form or the other and has helped village communities to develop, decide and preserve their way of living. Panchayats were also responsible for the settlement of disputes on religious and social matters within the village in accordance with age old customs and traditions. These assemblies also served as a link between the villagers and the higher authorities i.e. the king and his chieftains as has been gathered from historical sources of the Mauryan and Gupta periods.⁵ Although some judicial powers of these bodies had been curtailed during the Mughal era yet, their position seems to have remained unchanged as the state's power, always remained behind these village councils?

³ Ibid

⁴ M Maharajan "Panchayati Raj" in Anil Dutta Mishra, Mahadev Shivappa Dadage "Panchayati Raj (Gandhian Perspective)", p. 177 (A Mittal Publication, 1st Ed., 2002).

⁵ Panchayati Raj And The Weaker Sections, U Gurusurthy, 1987, Ashish Publishing House New Delhi.

The Panchayats had however witnessed drastic abatement in their authority and autonomy on the eve of the colonial rule. Every village was governed by their own traditions and customary laws which only created impediments in the British zeal to implement their reforms in India. The British Government had to perform stringent experiments in order to impose their land revenue schemes and develop a sound administrative system. Also, the introduction of British system of justice through legislations and regular courts simply obliterated these indigenous bodies as they did not recognise the panchayat decisions. Therefore, the British, in fact, wanted to create a centralized control in order to consolidate and implement their functions and transfigure the villages into state controlled agencies.

The British realised the inadequacy of their centralized system only after the Revolt of 1857 which heavily strained the imperial finances. They felt the need for an institutional arrangement at the local level to raise finances for replenishing the colonial exchequer and bear with the nationwide antagonism against the colonial rule. Lord Mayo's resolution of 1874 provided the much needed impetus for the development of local institutions in villages to harness the local interests and care for the management of funds devoted to education, sanitation, health and public works, thereby enlarging their powers and responsibilities. The main aim however was to finance local services out of local taxes.⁶ Following his footsteps, Lord Ripon in 1882 provided the much needed democratic framework to these indigenous institutions. All the existing boards were to have a 2/3 majority of the non-officials, who had to be elected; the chairman of these bodies had to be from the elected non-officials. Although it was a welcomed reform yet he was unsuccessful in the implementation of this scheme as the board and landlord members seldom met due to the unfamiliarity of such procedure.

The Royal Commission on Decentralization of 1907 suggested the government to start from village level rather than the district level for the administration of village affairs. Further, with the introduction of Montague-Chelmsford Reforms Act of 1919, Village Panchayats were established in a number of provinces recognising the corporate character of village and allowing it a wider jurisdiction in terms of civic matters. The government made local self government a transferred subject under the scheme of diarchy and put it in the hands of Indian provincial ministers.⁷ It enjoined an obligation on 8 provinces to pass Panchayat Act by 1925. However this scheme collapsed due to organisational and financial

constraints and its democratization was circumscribed as its franchise suffered nepotism between the local tycoons and their cronies.⁸

Superficially the reforms brought in by the British were commendable but on deeper analysis it is to be found that the very spirit of decentralizing the administration was negated by the dependence of village officials upon the government superiors. India achieved its independence in 1947 after many nationalist struggles and movements and the crusade for revival of Panchayats gained momentum which is reflected under various reports, reforms and amendments since then.

3. Post Independence Scenario and Constitutional Status

The partition of 1947 created an abysmal state of affairs in the whole nation which raised concerns for national integrity and unity. Nationalists suggested the Quasi Federal model for governing the country which meant that decentralization of power to the village Panchayats was again curtailed. The drafting committee nowhere mentioned about the Panchayati Raj in any resolution presented before the Constituent Assembly. Gandhi on the other hand vehemently supported the idea of delegating administrative authority to Panchayats for proper utilization of resources and representation of Indian population, most of which (80%) resided in the villages. He insisted that such delegation would better reflect the people's voice in the nation's democracy, making them self-reliant from grassroots level. Imbued by his idea of 'village swaraj', Article 40 of Indian Constitution was inserted in the Directive Principles of State Policy, entrusting the state governments with the responsibility to organise Village Panchayats and endowing them with such powers and authorities as may be necessary to enable them to function as units of self governance. Further, Article 246 of Indian Constitution empowers the state legislatures to enact any law regarding any aspect of local self-government.

Since the Indian population was mostly rural, the Planning Commission of 1950 emphasized its social, economic and political development through village Panchayats and sought to develop them as agencies of local planning, administration and developmental affairs. In pursuance of the aforesaid emphasis of the planning commission, the government launched the Community Development Plan in 1952 with the main objective of attracting active participation of rural masses in their self-upliftment.

⁶ Prabhat Kumar Datta, 'Making Local Self-Government in Rural India Work: Old Tradition And New Challenges, Indian Journal of Public Administration Vol. Lix No. 1, January-March 2013, Pg.93

⁷ Ibid.

⁸ Panchayati Raj in India – Status Report 1999.

Accordingly, community development blocks were created consisting of a group of villages under the control of a Block Development Officer. He was assisted by a team of experts in the fields of agriculture, public works, animal husbandry, etc. To supplement this scheme, National Extension Service was launched in 1953 to gain co-operation of the villagers and secure their participation in modern agricultural techniques which were sought to be introduced.⁹

In the year 1956, Balwantrai Mehta Committee was constituted to review community development projects and critically examine the level of success achieved in the implementation of these schemes. The committee suggested the creation of a three tier structure of statutory local self governing bodies, at the village, block and district level which shall have all the required authority and resources to discharge their responsibilities. These recommendations were endorsed by the National Development Council in 1958 which directed the states to adopt the new Panchayati Raj with feasible modifications, as the existing structures and state exigencies also had to be considered revering the constitutional provisions of the 7th Schedule.¹⁰

In 1967, the Administrative Reforms Commission recommended the contrivance of district level plans with detailed guidelines and also suggested proper devolution of resources and funds that might seem appropriate according to the established procedures existing beforehand. A similar opinion was shared by Ashok Mehta Committee which suggested that these Zila Parishads be equipped with professionally qualified teams. Many states such as Maharashtra, Gujarat and Karnataka tried to implement this arrangement but suffered due to vastness of the geographical area in which it was sought to be dispensed. However, L.M. Singhvi Committee of 1986 recognised the Gram Sabhas as the epitome of direct democracy sought by the government which was indeed being neglected. Sarkaria Committee 1988 noted that due to the diversity of state laws with regard to Panchayati raj, the system faced several intricacies in the attainment of their objectives. It suggested the adoption of a uniformly applicable parliamentary law, to be established with the consensus of all state legislatures.

During the government of Narsimha Rao two constitutional amendments i.e. 73rd and 74th amendments were passed in 1992 and 1993 respectively, with ratification by the state assemblies of more than half of the total states. The states had an year's time to revamp their existing legislations and bring them in conformity with the structural provisions of the new amendments. These amendments are the fundamental structure of our

contemporary Panchayati Raj system which aim at ensuring democratisation of governing process through panchayats and municipalities. They contain both mandatory and discretionary provisions regarding formulation of legislations pertaining to design and functionality of these local bodies at rural and urban level.

With the enactment of 73rd amendment, the government envisages the creation of a three tier system at village, intermediate and district level in all states where the population is above 20 lacs. The panchayat seats are to be filled through direct election at all levels (Article 243C); however the chairpersons at each level are to be elected according to the state laws. Article 243D provides for the reservation of seats for SCs/STs in proportion to their population which shall cease to operate on the expiry of the tenure mentioned in Article 334. It further provides for a mandatory reservation of one-third of the total seats for women also applicable to seats reserved for SCs/STs at all levels. According to Article 243E, elections are to be conducted every five years and before the end of the term of the incumbent Panchayat. Article 243K provides for the creation of a State Election Commission to ensure unbiased elections, whose commissioner shall be appointed by the Governor of the state. He may be removed only in the same manner as the judge of any High court. Article 243(1) features the creation of a Finance Commission to scrutinize the financial position of the local bodies and make recommendations regarding the allocation of budgetary funds.

Therefore, the government has been working diligently since independence, to strengthen and revitalise these institutions which had lost their significance in our socio-legal system. Many attempts have been made to scrutinize the status and efficiency of these local bodies and to provide for decentralization of administrative authority. The 73rd amendment has indeed set an impulse to the prospect of consolidating them under a single constitutional mandate. In spite of that the system has encountered many challenges.

4. Challenges

Although the 73rd constitutional amendment conferred an obligation upon the states to implement the reforms in their respective village panchayats, yet, significant clashes are observed between the panchayati raj institutions and the local bureaucrats due to the absence of any defined role of political parties in this context. Interestingly, the nitty-gritty details regarding implementation procedures have not been specified clearly and every state seems to manipulate them to their advantage. Since, no MLA would ever compromise his authority and vote banks in his

⁹ Dr. S.L. Goel and Dr. Shalini Rajneesh, Panchayati Raj In India, 2009, Deep & Deep Publications, New Delhi , p.34

¹⁰ The Panchayat Tradition, Mario D Zamora, 1990, Reliance Publishing House, New Delhi, p.12

constituency; they do not intend to delegate much of their powers to the Panchayat Pradhans. Therefore, the whole system suffers from lack of faith thus creating impediments in the administrative scenario. Moreover, the respective state governments do not formulate rules on proper distribution of funds to PRIs directly, thus, creating a lot of confusion regarding proper allocation of state funds among the three tiers of the system.¹¹

The PRIs are overburdened with the performance of multiple functions. However, they simply do not have sufficient finances to source the same. The state governments have entrusted them with the task of collecting land revenue which indeed fills up their exchequer, but only with meagre sums. Such finances are hardly adequate to supplement the developmental activities sought to be brought through them.

Since the constitution does not mention any educational qualifications for being elected as a Panchayat member, the uneducated ones are unable to understand the complex rules, paperwork and proformas for managing finances. This paves a way for the officials to look down upon them with contempt and indulge in corrupt practices. Moreover, the officers working at grassroot levels are not answerable to the elected members of Panchayat and intend to remain in their own administrative hierarchy, therefore, the demands of these elected panchayat members are often dodged nonchalantly.

Recently, Rajasthan became the first state in the country to fix a minimum educational qualification for contesting to the PRIs. Rajasthan Panchayati Raj (Amendment) Bill, 2015 makes Class VIII pass mandatory for the post of Sarpanch – except in tribal areas (where minimum qualification is Class V) and Class X for Zila Parishads or Panchayat Samiti elections.¹² Simultaneously, this move has drawn sharp criticism from many quarters which assert that every person has a right to participate in democracy, even the illiterate. The constitution does not debar the illiterates from contesting any election even for an MP or MLA.

Despite all efforts of the Legislature to involve active participation of the weaker sections by providing for their reservation in panchayat seats, they are unable to take active part in Panchayat activities due to the unequal social structure and rigid caste system prevalent in the Indian society. This creates hurdles in the path of efficient administration which cannot be ignored. It is noted that the general house meetings in Gram Panchayats often witness poor attendance of local villagers as the panchayat

decisions are tempered by the influence of covetous local magnates. Hence, the voice of the weaker sections of our society is often suppressed. Veil system is another stumbling block which prevents the ladies of rural community from attending the Gram Sabha meetings as they do not tend to controvert with the male and senior members of their society. Even when elected, the male members of their families seem to express their personal accords through them in panchayat decisions.

All these factors have a negative impact on the reforms sought to improve decentralization.

5. The Threat of Extra-Judicial Authorities

In some states, the 'kangaroo courts' (also known as KHAPS) pose an imminent threat to the administrative system mainly in north India (Rajasthan, Haryana and western Uttar Pradesh). These Panchayats are a peculiar feature of the Jat community. They are extra-constitutional institutions and are not approved by our constitution in any form. Nevertheless, they indeed enjoy the social recognition of local communities due to their age old importance within the region and dealing in the local affairs in customary fashion. For instance, the invasion of the furious invader Timur was triumphed by the Khaps who was further killed in the battle in 1398 A.D.¹³ However, the Khaps have recently emerged as Quasi-judicial bodies comprising of local magnates, who due to their influence in the society often pronounce judgements which exhibit least regard for life and liberty and are not deterred from moving away from the processes of administration of justice according to the constitutional provisions.

Many cases regarding 'honour killing' have been reported due to the fact that hindu customs strictly forbid intra-gotra marriage as the parties to such marriage are deemed as cousins and any such union between them would be incestuous. They project that such acts purport to desecrate community honour. The Hindu Marriage Act, 1955, does not prohibit inter-caste and intra-gotra marriage and it has been persistently stressed upon by the Supreme Court of India that these community heads have no right to declare such marriages void which have been permitted by law.

In the case of *Arumugam Servai vs. State of Tamil Nadu*¹⁴ the Supreme Court came heavily on the practice of khap/katta panchayats taking law into their own hands and indulging in offensive activities which endanger the personal lives of the persons marrying according to their choice.

¹¹ Interview with PCS officer Sh. NS Choudhary (Himachal Pradesh Cadre, Batch of 1988) date: March 20, 2015

¹² The Hindu – Newspaper of March 28, 2015.

¹³ Mangal Sen Jindal "History of Origin of Some Clans in India (with special reference to Jats)", 48 (Sarup and Sons, 1992).

¹⁴ *Arumugam Servai vs. State of Tamil Nadu* (2011) 6 SCC 405.

*Bhagwan Das vs. State (NCT) of Delhi*¹⁵ is another interesting case where the daughter of the accused left her husband Raju and decided to reside with her uncle. This instance infuriated the accused who considered it to have brought shame and dishonour to his family. The accused strangled his daughter to death with an electric wire. The Supreme Court while affirming the decisions of both the trial court and the High Court concluded that the conviction of the accused was justified that there was no reason to disagree with their verdicts.

Recently a 20 year old girl was gang raped in Bhirbhum district of West Bengal on the orders of Salishi Sabha (equivalent to Khap panchayats in the region). Initially, the Panchayat imposed a fine of Rs. 50,000 on the girl for marrying a man outside her community. When her father expressed his inability to pay such fine, the kangaroo court ordered for the girl's rape. Allegedly, 12 persons are suspected to have been a part of this gang rape including the sabha's head Sunil Soren.¹⁶

Since, their reasoning is based on age old customs, people fear that defying their decrees would invite social boycott that thing simply yield to their authority. As a matter of fact, even the local officials have to cohabit in the same community. Hence even they do not meddle with their functioning. To make this scenario worse, sheer indifference of politicians and vote bank politics allow these extra-constitutional institutions to run unfettered.

6. Critical Evaluation and Remarks

Although the Panchayati Raj Institutions have undergone a tremendous amount of development and India is very close to accomplishing the Gandhian ideal of "swaraj" through self-government in the villages, yet lot more needs to be achieved. The dream of successful and efficient functioning of Panchayati Raj Institutions in India is yet to be achieved. Without making reforms in the system, the Indian government will not be able to foster the growth of lakhs of people who live in rural India.

The need of the hour is decentralisation of power by minimising the role of the intermediary bureaucracy and formulating such a framework for the rural government which is democratic in the true sense. Education plays an extremely important role in the success of the Panchayati Raj System that it needs to be ensured that only people, who have undergone some basic educational training the

limit of which may be set by the government, are elected to the positions. This education can be impacted by independent bodies devoid of any exterior influence. Educating people would again prove to be useful as consciousness levels among the people rise. In effect, they would be less liable to be wooed by political parties.

It is an apt criticism that these institutions are "grass" without "roots". To provide roots to the Panchayati Raj Institutions, there is a need to activate the institution of Gram Sabha or Village Assembly.¹⁷ They must be entrusted with real powers to eliminate the influence of bureaucracy. Construction of an outward structure of Panchayati Raj and to give it no substance would be like a body without a soul dead from the start, a still born child.¹⁸ Most of the powers in the present system are exercised by the Block District Officers and the District Magistrates.¹⁹ This power needs to be conferred upon all the tiers of the Panchayat institutions. When real responsibility is discharged at the local level then only the vision of development can be realised. Moreover, effective legislation needs to be enacted and enforced to keep away political parties from interfering with the functioning of these bodies.

Besides giving these bodies more power, they should be given their share of financial resources, which would make them less dependent on external sources of finance. State should not become an intermediary for the devolution of funds, or, even if state is an intermediary, it should be subject to some conditions. Initiatives like the Rajiv Gandhi Panchayat Sashaktikaran Abhiyan, could prove to be useful for the provision of sufficient funds to the Panchayats. Under this scheme, for accessing the Panchayat funds, the state would need to fulfil some basic criteria which included regular elections to Panchayats or local bodies under the superintendence and control of the State Election Commission (SEC). There should be at least one third reservation for women in Panchayats or other local bodies. Moreover, unless the state fulfils these basic elements, it should not be eligible for accessing the funds. Twenty percent scheme funds are linked to action taken by the States for implementation of the provisions of the 73rd Amendment to the Constitution of India in the following areas - Articulating an appropriate policy framework for providing administrative and technical support to Panchayats; strengthening the financial base of Panchayats by assigning appropriate taxes, fees, etc.; provision of untied funds to Panchayats and timely release

¹⁵ *Bhagwan Das vs. State (NCT of Delhi)*, (2011) 6 SCC 396.

¹⁶ Hindustan Times, English Daily, 24th January, 2014.

¹⁷ Ramjee Singh "Panchayati Raj, Grass-roots of Democracy" 16, Ibid.

¹⁸ M Maharajan "Panchayati Raj" in Anil Dutta Mishra, Mahadev Shivappa Dadage, "Panchayati Raj (Gandhian Perspective)", p 1 (A Mittal Publication, 1st Ed., 2002).

¹⁹ Supra Note 17.

of State Finance Corporation and Central Finance Commission (CFC) grants; ensuring devolution of funds, functions and functionaries; ensuring free and fair elections, strengthening the institutional structure for capacity building of Panchayats, selecting suitable partners for capacity building, and improving outreach and quality of capacity building; putting in place a system of performance assessment of Panchayats; strengthening Gram Sabhas, promoting Mahila Sabhas/Ward Sabhas etc.²⁰ More of such initiatives are needed for efficient functioning of these institutions.

Recently, Prime Minister Narendra Modi took an initiative under which the 14th Finance Commission recommended an increase in the share of states, from 32% to 42%. Moreover, an amount of Rs. 200,292 crore was allocated for the panchayats for the next five years from April 2015.²¹ However, the downside of the system is that, the states have complete autonomy as to how to transfer this fund to the panchayats. Such a dependence of the local bodies on the state authorities should be done away with as it undermines the spirit of local governance and democracy of the people, by the people and for the people that becomes democracy of the government, by the government and for the government.

The impregnability of Khap panchayats or the extra jurisdictional authorities as we call them cannot be underestimated because they have been a part of these societies since times immemorial. It must be contemplated that they have indeed formed a socio-legal system in itself for those societies. This is a battle between universalism and cultural relativism where the constitution seeks to provide basic liberties to every citizen but on the contrary, these institutions seek to preserve their traditional thought. The social acceptance they enjoy cannot be challenged straightaway as it would undeniably be dealt as an encroachment upon their cultural values no matter how direful their decrees may be.

However, no entity is above the law of the land and what is constitutionally guaranteed cannot be denied imperiously

by such institutions. The only solution to this problem is limiting the powers of Khaps through effective embellishment of Nyaya Panchayats, which can be made responsible for settling trivial conflicts within the village level and awarding minor punishments in civil and criminal cases. This will instil a sense of self-reliance in the locals and would also enable the government to scrutinize the activities of these Panchayats.

Thus, all these reforms suggested above have to be brought in by the government by way of enacting appropriate legislations. Having a strong local representation at the village level would strengthen the democracy and fulfil the dream of constructing a welfare state.

7. Conclusion

Democracy should percolate from the parliament to the panchayats.²² Strengthening the institution of panchayats would go a long way in fortifying and sustaining the democracy even in the remotest areas, thus increasing the rural participation in their self development. In the words of S. K. Dey, *"If we want to rebuild India, work must start from the villages."*²³

Successful development of a democracy can take place only when the interests of the weakest sections of the society are taken into cognizance by the government. And the most ideal way of doing that is to create a self-sufficient government at the local level. Complete autonomy needs to be given to the Panchayats and effective legislations must be enacted and implemented by the government in order to properly define the role of various government organs in relation to the PRIs avoiding any equivocation. The development of Panchayats would lead to greater representation of the lowest rungs of the society. Only when these institutions are democratised and given priority by the government in legislation schemes, only then can India aspire to nourish its development. Pandit Nehru fairly emphasised, the goal for establishing Panchayati Raj, is "to give to the millions of our people, the chance to share responsibility, do good work, and grow in the process."²⁴

²⁰ Rajiv Gandhi Panchayat Sashaktikaran Abhiyan, available at <http://pib.nic.in/newsite/efeatures.aspx?relid=98266>. Last visited on April 22, 2015

²¹ Richard Mahapatra "RIP Panchayati Raj Ministry" in Millenium Post Newspaper, 17th March, 2015.

²² Supra Note 17, p 180.

²³ S.K. Dey, 1986. "Panchayati Raj in Independent India: Some Personal Reflections", In George Mathew (Ed), Panchayati Raj in Karnataka Today (New Delhi Institute of Social Science), pp.32- 46.

²⁴ Supra Note 21.

Alienating the Contours of Restorative Theory: A Re-Examination of Punishments in Indian Criminal Justice System

Ms. Tishta Tandon*

ABSTRACT

Broadly, theories of punishment are classified into five categories: deterrence, retribution, incapacitation, reformation and restoration. In deterrent and reformatory theories of punishments, criminals are considered to be threatening outsiders and there is a need to punish or rehabilitate them for protection of society. The issues that remain unresolved are whether punishment is essential to defuse public anger and does punishment act as a deterrent? In response to such questions, this paper traces an alternative theory of punishment, that is, Restoration, which is a normative theory and an evolving reform movement. Literally, restorative theory involves the process of returning all parties involved in or affected by the misconduct (offenders, victims, community) to their previous conditions. The goal of restorative justice is inclusion and reconciliation among the offender and the society, rather than promotion of guilt, retribution or punishment. The paper begins by undertaking a detailed study of the aspects of Restorative justice, looks at restoration in practice and attempts to distinguish it from other theories of punishment. Subsequently, advantages accruing from Restorative theory are analyzed and juxtaposed with the limitations of the same. The paper finally concludes with the observation that the Indian criminal justice system embodies limited traces of restorative principles and there is a need to act upon the recommendations of various committees on reforms of criminal justice system, so as to incorporate more restorative principles in India.

Key Words: Restorative theory, Punishment, Indian criminal justice system, Evolving reform movement, Reconciliation

1. Introduction

Various theories of punishment have been developed over centuries to provide an ethical rationale for punishment or to justify its imposition. Traditional concept of crime and punishment underwent a radical transformation in the 20th century. Focus shifted from crime to criminal, and then to community. This transformation led to the birth of a new or alternative theory of punishment, now known as restorative theory. It is a relatively new invention as a theory of punishment and the term restoration came to be recognized in 1970s for victim-offender mediation and reconciliation efforts, which were taking place in Northern America. Restorative justice measures have primarily been used in dealing with minor offences and juvenile offenders in many countries across the world. In fact, restorative justice policy, which has been employed by some countries, has been successful to such an extent that the future of criminal justice cannot be anticipated without understanding what restorative theory is.

Restorative justice theory is often touted as a new “lens”¹ or a long overdue third model.² It has been hailed as a system that can deter, incapacitate and rehabilitate more effectively than a punitive system³. The attempt to make a coercive process more conversational, consensual and constructive is what sets restorative theory apart from other theories of punishment and makes it appealing as a progressive alternative to control crime.⁴ Nils Christie, John Braithwaite and Howard Zehr are some of the early proponents of restorative theory who called for reform in criminal justice system by shifting the focus from punishing or reforming the criminal (both offender centric), to restoring what was lost by the victim and the community.⁵

The aim of restorative theory is to restore all those affected by the crime, i.e., offenders, victims and community. They are known as the “three clients” of restorative justice.⁶ The premise is that a relationship between all these stakeholders has been damaged and so it now requires a process to reconcile and restore the feeling of association

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¹ Zehr Howard, *Changing Lenses: A New Focus for Criminal Justice* 41 (Herald Press, Scottsdale, 1990).

² Gerry Johnstone (ed.), *A Restorative Justice Reader* 83 (Routledge, London, 2003).

³ John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, 25 *Crime And Justice* 4, 104 (1999).

⁴ Albur W. Dzur, “Restorative Justice and Civic Accountability for Punishment”, 36 *Polity* 3(2003).

⁵ Id. at p. 5

⁶ Bazemore and Gordon, “Evaluating Community Youth Sanction Models: Neighbourhood Dimensions and Beyond” in NIJ, *Crime and Place: Plenary papers of the 1997 Conference*

that has been affected, through mutual communication, and not imprisonment.⁷ The approach of restorative theory is in this sense, quite radical.

The need for restorative theory arose from the widely accepted belief held in the 20th century that the courts and criminal justice system do not enable an offender to perceive the human costs of what he has done.⁸ Offenders get entangled in the legal process and their main concern becomes to minimize their penalties. Moreover, the offenders are also alienated from the society, as a consequence of the crime they commit.⁹ Restorative theory addresses all such concerns related to offenders. In restoration, offenders are reintegrated into the community and transformed from criminals to law-abiding citizens, who acknowledge their guilt.

The second client of restorative justice, i.e., victim is displaced in the current criminal justice systems by the state as the state prosecutes for the public wrong, which was actually committed against the victim.¹⁰ Crime can be traumatic for a victim as it shakes his belief in the prevailing social order. Unlike other theories that usually neglect the victims¹¹ or treat them as bystanders, restorative theory gives a greater voice to victims in the proceedings. It helps the victims heal, both in monetary and emotional sense. This is achieved by awarding compensation and costs to the victim for the loss suffered and in addition to that, restoration practices give the victims a chance to voice their anger and sorrow and experience a sense of justice, when the person who caused them harm pleads guilty or apologizes. The restoration process also tends to reaffirm their faith in social order.¹²

Restorative justice empowers communities. The importance of community in this theory can be gauged from the fact that restorative justice has sometimes been called as community justice.¹³ This is because community members or organizations play a more active role in reforming criminals through restoration. Many supporters

of restorative theory have also emphasized community's role in "norm clarification" and building social values through restorative process.¹⁴

The objective of the current study is to critically evaluate application of restorative theory of punishment in the Indian Criminal Justice System.

2. Comparative Analysis of Restorative Theory

Retribution is a 'just deserts model'. The basic principle is that the guilty deserve to suffer pain and punishment, corresponding to the harm they have inflicted on their victims. Both retributive and restorative theories strive to achieve justice, as opposed to curbing crime, which is the goal of incapacitation, deterrence and rehabilitation. However, the difference between the two is that retributivists seek to achieve this end by imposing pain, while restorativists see recognition and repair of harms as the means to achieve this end.¹⁵ Retribution forces the offender to take responsibility for his crime whereas restoration is voluntary acknowledgement of culpability.¹⁶

Deterrence aims at prevention of further crime by fear and threat of punishment. Utilitarian philosophers first proposed it as a means to deter crimes by both actual and potential offenders. Punishments are imposed not only for the criminal himself, but for the deterrent effect such measures will have on the community. The wrongdoers discharge the 'debt' owed to the society, but not to the victim particularly. Restorative theory, on the other hand, recognizes the criminals' debt being owed to the actual victim and not the potential victims or the society.¹⁷

The rationale of Incapacitation is that "Wicked people exist. Nothing avails except to set them apart from innocent people."¹⁸ It underscores the inability of victims to harm people outside prison walls during incarceration.¹⁹ So incapacitation focuses on risk control, unlike reconciliation of offenders, victim and the community,

⁷ Thom Brooks, Punishment 64-65 (Routledge, London, 2012).

⁸ Supra note 1 at p. 41

⁹ Supra note 2 at p. 17

¹⁰ Supra note 7 at p. 70

¹¹ D.P. Kelly and E. Erez, "Victim Participation in the Criminal Justice System" in Robert C. Davis, Arthur J. Lurigio, et.al. (eds.) Victims of Crime 232 (SAGE Publications, USA, 6th edn. 1997).

¹² Supra note 1 at p. 21

¹³ T.R. Clear and D.R. Karp, The Community Justice Ideal: Preventing Crime and Achieving (Westview Press, Boulder, 1999).

¹⁴ Nils Christie, Limits to Pain: The Role of Punishment in Penal Policy 8 (Wipf & Stock, 2007).

¹⁵ Mary Maguire and Dan Okada (eds.), Critical Issues in Crime and Justice 323 (SAGE Publications, USA, 2011).

¹⁶ G. Bazemore and M. Schiff, Restorative Community Justice: Repairing Harms and Transforming Communities (Anderson Publishing, Cincinnati, 2013).

¹⁷ Gerry Johnstone (ed.), A Restorative Justice Reader 40 (Routledge, London, 2nd edn., 2013).

¹⁸ James Q. Wilson, Thinking About Crime 391 (Basic Books, 1975).

¹⁹ Supra note 15 at p. 302

which is the aim of restoration. Victims are ignored in incapacitation and society in abstract is the main stakeholder. On the other hand, victims are central to the restorative process.

Rehabilitative theory is a lot like restoration, in the sense that both aim at reforming the criminal's attitude and equipping him with professional skills or education to prevent recidivism, instead of deterring future crimes merely by punishment. Rehabilitative theory justifies punishment and use of prisons to reform prisoners. On the other hand, main focus of restorative theory is to find non-prison ways of reformation. Moreover, restoration encourages offenders to accept culpability and take moral responsibility for their acts. However, rehabilitation fails to do so as it merely seeks to treat or cure a criminal.²⁰

3. Working of Restorative Justice

Restorative justice has been practiced in two forms, pure and punitive. Advocates of pure restorative theory primarily aim at abolition of prisons and justice system controlled by the state. The proponents of this theory believe that trials are merely about winners and losers and the primary objective is to defeat the other party.²¹ As opposed to this, pure restorative theory supports mutual understanding and satisfaction of all parties concerned through restorative conferences.

Restorative conferences include victim-offender mediation, family group conferences and community conferencing. Participants of the conference or the parties that have a stake in implications of the crime, try to address the after-effects of the crime.²² So, in that sense, restorative conferences can be called as a stakeholder society in miniature.²³ There is a constructive dialogue to promote mutual understanding among the parties. These conferences require consent of both parties and acceptance of guilt by the offender. John Braithwaite has named this process as reintegrative shaming theory. The offence and not the criminal is shamed or condemned. The basic idea is to evoke a sense of remorse and responsibility in the wrongdoer for his conduct. This is a unique element of pure restorative theory, as we don't have to necessarily admit our guilt during imprisonment or payment of fines, for instance.²⁴ Through mediation and communication, a

contract is agreed upon that the offender must fulfill in order to get restored. Terms of the contract usually include community service, treatment for drugs and alcohol addiction and so on. The aim is to avoid the cold and harsh atmosphere of the courts wherein the offenders might not feel comfortable in accepting guilt or in repenting their actions.

Restoration also encompasses measures that reform the criminal, like education, training, compulsory employability in prisons, social reintegration through monitoring (probation) and so on. These are constitutive elements of punitive restoration theory. Restorative theory does not necessarily seek abolishment of prisons, as is generally perceived. What advocates of punitive restorative justice argue is that the goal of imprisonment is not only penal, but also restorative; it is to make an offender a non-offender. They say that custody cannot lead to real rehabilitation and character can't be changed in artificial environments under strict scrutiny by officers. Restorativists base their argument on the presumption that behavior patterns that a person learns in a cage just help him to survive in that cage and do not make him capable of living in a community.²⁵ This view is also reflected in the declaration of the American Correctional Association (1960) which reiterated that for "restoration of an economically self sustaining member of the community, the correctional program must make available to each inmate every opportunity to raise his educational level, improve his vocational competence and skills."²⁶

Amnesty International formed certain rules for treatment of prisoners in 1955, which clearly explain the necessity of restorative justice even in prisons. This document is not obligatory but it is a part of basic rules of law in many democratic countries. According to rule 60(2), punishment should not aim at exclusion of prisoners from the community but their reintegration into it. It mentions the role of community agencies in assisting prison staff in reforming the prisoners.²⁷

Therefore, restorative justice practices can be seen as forums for negotiation of multiple values and goals of punishment.²⁸ It is a mode of finding legitimate punishment and not just abolishing the system of imprisonment. Norms of restorative justice may be very difficult to achieve but, by

²⁰ Supra note 17 at p. 247

²¹ Thom Brooks, *Right to a Free Trial* (Ashgate, UK, 2009).

²² Supra note 7 at p. 65

²³ Bruce Ackermann and Anne Alstott, *The Stakeholder Society* (Yale University Press 2000).

²⁴ Jakob Von Holderstein Holtermann, "Outlining the Shadow of the Axe on Restorative Justice and the use of Trial and Punishment", 3 *Criminal Law And Philosophy* 198 (2009).

²⁵ Nitai Roy Chowdhary, *Indian Prison Laws and Correction of Prisoners* 149 (Deep & Deep Publications, New Delhi 2002).

²⁶ Id. at p. 242

²⁷ Supra note 25 at p. 60

²⁸ Supra note 4 at p. 17

integrating these norms with the rehabilitative justice mechanisms, we may be able to achieve a more democratic, humane and effective criminal justice system. In the light of this argument, there is a need to critically assess the principles of restorative justice and their application thereof.

4. Restorative Theory: Virtues and Vices

The foremost advantage of restorative justice is the assistance provided to victims of crime who have suffered an emotional, physical and (or) fiduciary loss. The losses to the victims are repaired through compensation and by giving them a pivotal role in the proceedings, victims are empowered and their faith in justice is restored. Restoration can make the situation better not only for the victim, but for the criminal as well. "Restitution is something an inmate does, not something done for or to him... Being reparative, restitution can alleviate guilt and anxiety, which can otherwise precipitate further offences."²⁹

Punitive Restoration can also contribute to curbing recidivism as criminals acquire professional or employable skills, rather than being hardened with other grave offenders in jails. It encourages useful, productive activity and instills good behavior and hard work.³⁰ Moreover, through compulsory work in prisons, productivity is increased and cost borne by taxpayers in incarceration of criminals can be reduced. Even the idea of pure restoration to avoid prisons through mediation and reconciliation is also far more economical than keeping under trial accused in prisons, more so in a situation where there is already overcrowding of prisons by convicts.

Community service, which is a part of restoration, enhances feeling of citizenship and belongingness in the convicts. They are reintegrated into the community through participation of multiple stakeholders and this in turn strengthens the bonds among members of the community and the norms they abide by.

The proponents also argue that moral advantages of pure Restorative theory outweigh its efficiency criticisms. Majority of the offenders do not perceive the reconciliation conferences they attend as punishment. Rather, they see restorative justice as a strategy aimed at offender rehabilitation. Similarly, most victims felt that the conferences were not punishment. They either saw them as

a measure designed to rehabilitate offenders, or an opportunity for offenders to apologize to their victims, or an opportunity for participants to express their feelings, or some combination of the above.³¹

There are a number of pluses incidentals to the restorative process like flexibility in dealing with cases on an individual basis, humanitarian treatment of offenders by the public, and the like. In the midst of all these benefits that have been attributed to restorative theory, it is important to note that some theorists or administrators of justice have perceived restorative theory of punishment with considerable skepticism or concern.

Critics tout restoration as an incomplete theory of punishment. They advocate that restorative theory doesn't offer strategies applicable to all crimes, especially heinous crimes. It is advocated mainly for minor felonies, committed by juvenile offenders. Hence, it is limited in scope and application. A major reason for this lack of wide application is the concern that non-punitive nature of restorative justice and its assertion for abolition of prisons hamper its public acceptance and effectiveness.³²

Skeptics ascribe this lack of public confidence to perception of restorative justice as a soft approach on criminals. It is said that restorative justice terms are easy to serve and do not act as a deterrent to many hardened criminals or serious offenders. For critics, restoration remains a utopian idea, as they believe that victims and offenders can never fully reconcile their differences or feel satisfied, solely through dialogue.

Shame punishments such as re-integrative shaming, which are a part of restorative process, and are used to instill a sense of guilt in convicts have also been criticized on various grounds. One such cause for censure is that offenders become susceptible to violence and community members may become averse to communicating with them.³³ Critics also emphasize that offenders must not be humiliated and they should endure punishments with their dignity intact.³⁴ Proponents of restorative theory argue that shame is already a part and parcel of our justice system as identity of a criminal is disclosed publically, which leads to humiliation of the offender and his family, in the community.

Due to the central role played by victims in restorative

²⁹ Supra note 24

³⁰ Supra note 17 at p. 53

³¹ Margarita Zernova, "Aspirations of Proponents and Experiences of Participants in Family Group Conferences" *The British Journal of Criminology* 5 (2006).

³² Supra note 7 at p. 212

³³ *Ibid.* at p. 75

³⁴ Andrew Von Hirsch, *Censure and Sanctions*, 82 (Oxford University Press, New York, 1994).

process, it becomes ineffective when victims are not willing or encouraged to be a part of restoration.³⁵ Some people have also alleged that restorative programs become offender focused and victims are treated only as 'agents of offender rehabilitation' in the process, in a way that their needs are ignored.³⁶ Several victims and their supporters have mentioned that they felt uncomfortable because of what they perceived as a non-punitive and non-blaming approach adopted by conference organizers towards offenders.³⁷

High caseloads, limited resources and lack of training of criminal justice agents and officers also pose difficulty in implementation of restorative theory.³⁸ Some say that application of restorative justice with hierarchical and coercive structures of criminal justice system actually distorts the ideas of restoration and results in something very different from what had been envisaged.³⁹ Another concern includes lack of consistency in how similar crimes are redressed in restorative theory. The voluntary claim of restorative theory has also been questioned. Participation in restorative processes is often driven by fear of punishment or orders of the court. Most of the offenders are not very keen on attending the conferences.⁴⁰

There is a need to employ restorative theory in the criminal justice system, in a manner that minimizes its shortcomings and utilizes its potential merits. Especially in developing countries like India, restorative theory can be a solution to increasing incarceration expenses, recidivism and abysmal prison conditions that harden the criminal, instead of reforming him. So, it is essential to examine whether Indian criminal justice system embodies restorative ideals or not.

5. Traces of Restorative Principles in India

The courts in India have been reflecting upon the detrimental effects of prisons on offenders and questioning the success or credibility of rehabilitative justice for a few decades now. The Honorable Supreme Court observed:

"Prison is an arena of tension, trauma, tantrums and crimes of violence, vulgarity and corruption. And to cap it all, there occurs the contamination of pre trial or accused with habitual and injurious prisoners of international gang. There is a large network of criminals, officials, and non-officials in the house of correction; drug, racket, alcoholism, smuggling, violence, theft, and unconstitutional punishment by way of solitary cellular life are not uncommon. Hence, a need arises to look beyond prisons to curb crime in India."⁴¹ The Law Commission of India also remarked in its report that jails are over crowded and the public exchequer has to bear the resultant economic burden.⁴²

With a view to addressing concerns of judiciary, police and the society in general, related to the shortcomings of incarceration, All India Jail Reforms Committee was appointed in 1983 with Justice A.M. Mulia as its chairman. It recommended alternatives to imprisonment such as community service, payment of compensation to victims, public censure etc. and especially advocated implementation of Probation of Offenders Act, 1958.⁴³

Probation means avoidance of a prison term through a contract, which includes certain conditions that the offender must meet to evade imprisonment. Probation prevents severance of family ties and stigma associated with punishment. It seeks to protect society and simultaneously, helps the offender become responsible and return to his normal livelihood.⁴⁴ Empirical studies have shown that the critics' opinion about probation's ineffectiveness is unfounded. Recidivism in probation cases has been observed to be merely 3% in West Bengal.⁴⁵ This is not a yearly rate but it spans for about 15 years. In addition to this, probation is economical. Average expenses for maintenance of jails and their administration was Rs.579.58 whereas, the expenditure on probation was only Rs.105.46 per probationer, per year.⁴⁶

Probation of Offenders Act, 1958 was a huge step by the Indian parliament in making the justice system more

³⁵ Supra note 7 at p. 80

³⁶ Supra note 17 at p. 348

³⁷ Supra note 31 at p. 20

³⁸ Byrnes M., Macallair D. et.al., *Aftercare as Afterthought: Reentry and the California Youth Authority* (Center on Juvenile and Crime Justice, San Francisco, 2002).

³⁹ Supra note 31 at p. 2

⁴⁰ Id. at p. 13

⁴¹ Sunil Batra vs. Delhi Administration, AIR 1980 SC 1579 at p. 1586

⁴² Law Commission of India, 142nd Report on Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any bargaining (1991).

⁴³ Government of India, Report: All India Jail Reforms Committee Report (Ministry of Home Affairs, 1991).

⁴⁴ Jyotsna H. Shah, *Studies in Criminology- Probation Services in India* 118 (N. M. Tripathi Pvt Ltd, Bombay 1973).

⁴⁵ N. K. Chakrabarty, *Probation System in the Administration of Criminal Justice* 36 (Deep & Deep Publications, New Delhi, 2007).

⁴⁶ Id. at p. 37

efficient and humane, especially for offenders who are below 21 years of age. Provisions of the Act include admonition,⁴⁷ release on probation for good conduct⁴⁸ and payment of costs or compensation by the offender for loss or injury caused to any person by the offence.⁴⁹ All these can be seen as a gradual shift of courts and legislature in India towards restorative principles. Even the system of open prisons, which is found in some states in India, marks a transition from traditional prison settings to more liberal and community oriented reformative facilities. Dr. C.P. Tandon, former Inspector General of Prisons, U.P. defined open-peno-correctional institutions as being "characterized by:

- Degree of freedom from physical precautions, such as walls, locks, bars and special guards
- The extent to which the fagging is based on self-discipline and the inmates' responsibility towards this group."⁵⁰

Conditions in open prisons resemble closely the real life situations. Open prison helps an offender in being holistically reformed and reintegrated into the community by inculcating a sense of freedom and responsibility in him, without stringent prison rules. Open prisons are more flexible and group talks, mediation sessions, which are restorative techniques, can be easily organized in open prisons in India.⁵¹

Apart from this, there has also been an effort to mandate training and education in jails in India. The National Expert Committee on Women Prisoners with Justice Krishna Iyer as chairman, suggested compulsory employment, training and work for women prisoners.⁵² They argued, "Training of women prisoners is an area of great relevance to correctional work and to the process of restoration of dignity of the women offenders."⁵³ The report also recommended probation and other non-institutional mechanisms of corrective treatment to be widely used for women prisoners.⁵⁴

Committee on reforms of criminal justice system was formed to analyze opinions of various stakeholders like police, judges, state governments, etc. so as to introduce required reforms. The report of the committee has

recognized the pain of victims who "feel ignored and are crying for attention and justice."⁵⁵ In response to a question asked about alternate forms of punishment, findings show that compensation to victim, public apology, rendering social service and labour work are some of the suggested measures that can be included under section 53 of the Indian Penal Code, 1860. Majority was in favour of extending the benefit of Probation of Offenders Act to accused persons of all ages. Payment of a part of income to the victims, accruing from work done by the offenders in prisons is also a novel measure that was proposed. All these suggestions have not been accepted or implemented by the Parliament yet. However, the response received by the Committee clearly illustrates the opinion of the people in India with regard to such restorative measures. Reforms must be introduced in accordance with popular sentiment and in the interest of justice in India.

Meeting of Priyanka Gandhi with Nalini, the infamous killer of Rajiv Gandhi can be stipulated as the arrival of restorative justice in India, in its truest form. Such victim-offender conferences or meetings are yet to find a place in the Indian criminal justice system. It is hoped that taking cue from success of restorative justice in other countries, India will recognize and incorporate such measures to make the process of justice more inclusive, harmonious and effective for offenders, victims and the community.

6. Concluding Remarks

Restorative justice theory has been formulated as an alternative theory of punishment that restores the offenders, victims and the communities. Restoration has proved to be very promising as a developing and evolving justice mechanism. Indian justice system has incorporated some elements of punitive restoration theory. Though the punishments mentioned in section 53 of the Indian Penal Code, 1860, do not embody restorative principles substantively (except fine which is an aspect of punitive restoration), still restorative justice exists in India and can be discerned in probation, open prisons, compulsory employment in jails, development of vocational skills of inmates, payment of compensation to victims and so on. Therefore, it can be concluded that limited traces of restorative theory can be found in the Indian criminal

⁴⁷ Probation of Offenders Act, 1958 (Sec. 3 of 1958).

⁴⁸ Id., sec. 4

⁴⁹ Id., sec. 5

⁵⁰ N. K. Chakrabarty, Administration of Criminal Justice- The Correctional Services 43 (Deep & Deep Publications, New Delhi, 1997).

⁵¹ Supra note 25 at p. 252

⁵² Government of India, Report: Report on National Expert Committee on Women Prisoners 153 (Ministry of Home Affairs, 1987).

⁵³ Id. at p. 152

⁵⁴ Id. at p. 325

⁵⁵ Government of India, Report: Committee on Reforms of Criminal Justice System 1 (Ministry of Home Affairs, 2003).

justice system. However, a lot remains to be done in India to categorize our penal system as purely restorative. Moreover, in the light of the discussion on pros and cons of restorative theory, it can be concluded that restorative justice has great potential to humanize prisons, improve

safety, enhance social order and make the experience less hostile for all concerned. There is a need for the parliament to act upon the reports drawn out by various committees on reforms of criminal justice system of India from time to time and enact laws on the basis of their recommendations, so as to absorb more restorative principles in Indian penal justice system.

Extra- Judicial Killings: Law and Practice

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ABSTRACT

Viewed by proponents as a necessary measure to combat the threat of crime and terrorism, extra judicial-killings have become increasingly controversial in India. Extra-judicial killings refer to the practice of killing and executing political opponents or suspected offenders, carried out by armed forces, law enforcement or other governmental agencies or by paramilitary or political groups acting with the support, tacit or otherwise, of official forces or agencies. Since the late 1960s, extra-judicial killings have been euphemistically referred to as 'encounter killings'. The phrase 'encounter killing' has originated from the term 'encounter' as employed by the Indian Police Service, along with the Indian military and paramilitary force to describe a specific kind of contact whereby an alleged criminal or person of interest is killed in a spontaneous, unplanned "shootout". The nature of encounter killings, which are generally conducted in areas away from crowds, and the ease with which police and security forces can claim a legitimate justification for their killings, make it difficult to correctly estimate the number of fake encounter killings in India. The Coordination of Democratic Rights Organisations (CDRO) believed that the 2007 figures for "Police Firing" in "Anti-dacoity Operations" and "Anti-extremists and Terrorist Operations", are 334 and 183 respectively. The current legislative and judicial framework has not yet done anything to prevent the use of encounter killings or hold accountable those who perpetrate them.

Key Words: Extra-judicial killings, Encounter killings, Legitimate justification, Fake encounter, Judicial framework.

1. Introduction

The prevalence of encounter killings raises important questions about what policies and factors have allowed these gross human rights abuses to reach problematic levels in India. This prevalence has led human rights activists to conclude that encounter killings have been adopted as institutionalized policy within the Indian police and security forces. Despite recent media attention surrounding some prominent encounter killings, many human rights bodies consider the media to be largely indifferent to such incidents. Moreover, the favorable depiction of police encounters in Indian cinema is representative of a wider cultural perception that encounter killings are a positive and perhaps even necessary measure to ensure security. Such a positive depiction suggests that maintenance of order is more important than adhering to the rule of law. Moreover, it neglects the damage that encounter killings inflict on the foundations of the criminal justice system and increases the likelihood of State or its agents abusing its power.

It demonstrates that the prevalence of encounter killings is linked to official and unofficial policies both within the Indian police and security forces and within the government and judiciary. The first part of this paper examines the historical backdrop behind today's

encounter killings, along with the broader media and cultural response. The second part of this paper analyses the factors within the judicial system that allow for and potentially encourage encounter killings. The third part of this paper considers the legality of encounter killings in relation to Indian domestic law.

2. Historical Overview: Understanding the Problem

Encounter killings have been used throughout India's history and continue to be widely employed, particularly in areas where criminal or militia activity is high. The public and media seem to take no particular stand on encounter killings.

2.1 The Use of Encounters

Extra-judicial killings are not a modern phenomenon in India. Evidence of extra-judicial killings in Andhra Pradesh, for example, dates as far back as the Telangana peasants' struggle of the late 1940s.¹ Police forces, empowered by the Madras Suppression of Disturbances Act, 1948, are estimated to have shot at least 2,500 individuals under the guise of 'police action'. The use of 'encounters' to kill political activists was increasingly prevalent in the late 1960s.

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Encounter killings have been particularly prevalent in volatile regions such as Jammu and Kashmir, Punjab, areas with a Maoist presence, the Northeast, and crime infested areas of Mumbai.² With respect to Jammu and Kashmir, the US Department of State estimated, for example, that Indian security forces killed 1,520 alleged militants in 2000 and 1,082 in 1999, all in encounters. The report noted that many human rights monitors alleged that a number of these encounters were fake. Amnesty International has also expressed serious concerns over the high number of encounter killings, particularly in Chittisinghpura. Similarly, Kashmir Bar Association President Mian Abdul Qayoom has claimed that fake encounters account for most of the 10,000 people that have gone missing in that region in the past twenty years. Further, Qayoom has asserted that only a few fake encounters have been publicized and punishment has been given only in the Ganderbal encounter.

With respect to Punjab, encounter killings were prominent in the counter-insurgency campaign waged by Indian security forces in the state between 1984 and 1995.³ According to Human Rights Watch, most of the estimated 10,000 people killed during the counter-insurgency in Punjab from the early 1980s to early 1990s were victims of fake encounters.⁴ The US Department of State, in its 1993 report on human rights in India listed specific examples of possible fake encounter killings in which no legal action was taken against the police personnel involved.⁵

Encounter killings have also been employed in efforts by Indian police and security forces to quash the Maoist/Naxalite armed rebellion. For instance, estimates indicate that more than 2,000 people were killed in encounters in Andhra Pradesh between 1968 and 1999, with more than 1,500 of those deaths occurring during the 1990s.⁶ A number of Naxal-linked encounter killings have also taken place in the neighboring state of Karnataka, with allegations that a significant number of such killings happened during fake encounters by the state's Anti-Naxalite squad.

Some researchers have estimated that hundreds of encounter killings took place during the police crackdown on organized crime in Mumbai during the 1990s.⁷ The crackdown was sparked by the 1993 serial bomb blasts in the city, allegedly orchestrated by organized crime figure Dawood Ibrahim.⁸ The devastation of these blasts, which resulted in 257 fatalities, prompted the creation of an elite group of 'encounter specialists', who were responsible for gunning about 350 alleged criminals in Mumbai over the course of the decade.⁹ The number of encounters has slowly diminished in Mumbai since the 1990s, with State government records indicating that ninety-four gangsters were killed in 2001, forty-seven in 2002 and eight in 2006.¹⁰ Still, approximately 600 encounter deaths are known to have occurred between 2003 and 2009.

In short, the use of encounter killings is not new in India. The apparent institutionalization of encounter killings as an official or unofficial form of policing has been going on for decades¹¹ and is only becoming more entrenched at all levels.¹² Findings by Human Rights Watch suggest that while mostly low-ranking police personnel including station officers, sub-inspectors and constables carry out the majority of fake encounters, senior officials likely play a role in planning or ordering encounters. Indeed, according to an Uttar Pradesh sub-inspector quoted in the report, a successfully executed encounter killing has evolved into a badge of honor for high ranking police officials.

2.2 Encounter Killings and the Indian Media

While it is difficult to definitively categorize the media's response to encounter killings, some human rights activists consider the media to be supportive or at least insufficiently critical of encounters. A fundamental criticism directed against the media is the use of the words 'encounter specialists' to glorify those who carry out encounters. According to the Asian Human Rights Commission, the mere use of the term 'encounter specialist' bestows unwarranted glory on those responsible.¹³

² US Department of State, '2000 Human Rights Reports" India', February 23, 2001, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/sa/717.htm> accessed on 02.04.2015 at 2.15 pm

³ Human Rights Watch/Asian Physicians for Human Rights, 'Dead Silence: The Legacy of Abuses in Punjab', May 1994, pp. 16-40.

⁴ Ibid., p. 1.

⁵ US Department of State, '2003 Human Rights Reports'.

⁶ Sankaran, 'A Note to the National Human Rights Commission on Human Rights Violations in the State', para 8.

⁷ SudhaRamachandran, 'India Can't Keep a Good Don Down', Asia Times, 23 June 2007, available at http://www.atimes/South_Asia/IF23Df01.html accessed on 02.04.2015 at 3.25 pm

⁸ ibid

⁹ Ramachandran, 'India Can't Keep a Good Don Down'.

¹⁰ Katakam, 'Fake Justice- Maharashtra'.

¹¹ Sankaran, 'A Note to the National Human Rights Commission on Human Rights Violations in the State', para 13.

¹² Human Rights Watch, 'Broken System', p. 93.

¹³ Asian Human Rights Commission, 'India: Encounter Killing and Custodial Torture'.

A survey of thirty-eight Mumbai police officers consisting of thirty-three men and five women, of various ranks from sub-inspectors to senior personnel reflected and corroborated the view that the Indian media is for the most part uncritical of encounter killings. Of the thirty-eight officers interviewed, eight felt that the media unconditionally approved encounters, while the remaining thirty felt that the media's attitude ranged from approval, if the encounter was 'genuine', to occasional criticism, if the victim was not a 'hardcore' criminal. One of the sub-inspectors interviewed suggested that the media's response often hinged on who executed the encounter killing, with certain officials receiving consistently favorable coverage. The press has mixed reactions. They are against it in some cases and in favour of it in other cases. But it depends on the officers who did it, how they 'managed' it. There is a group of officers, if they do it [encounters] then there is always a positive coverage for it.

The publicity brought about by the media can have a significant impact on how the government and judiciary respond to cases of encounter killings. The outcomes of several prominent encounter killings that received significant media attention and criticism highlight the important role they play. For example, the Connaught Place encounter, in which members of the Delhi Police Crime branch shot and killed two Haryana based businessmen and injured another, was covered widely in the Indian media.¹⁴ Despite claims by the Delhi Police that the two businessmen were Uttar Pradesh based gangsters, ten policemen involved in the shooting, including Assistant Commissioner of Police (ACP) S.S. Rathi, were charged with murder,¹⁵ attempt to murder¹⁶ and criminal conspiracy.¹⁷ On October 16, 2007, all ten were convicted of murder and sentenced to life imprisonment. The Delhi High Court subsequently upheld the conviction despite an appeal by the police. This conviction, in the face of widely reported police impunity, demonstrates the important role media can play in the judiciary's response to such encounters.

Another encounter killing that received significant media attention was the Ansal Plaza encounter on November 3, 2002, in which two alleged Pakistani terrorists were killed under circumstances that raised numerous elements of doubt as to the police's official version of events. While the police claimed that they acted in self-defense, H. Krishna,

an eyewitness to the shooting, claimed that the encounter was fake. He said that the 'men were unarmed and were shot by police', and they looked as though they 'had not slept for several days or had taken a heavy dose of sleeping pills'. Despite questions regarding the reliability of Krishna's testimony, the media response was largely skeptical of the official version, with numerous newspaper articles raising doubts about the official police recount. One article, for example, asserted that 'the Delhi Police version of the Ansal Plaza encounter was full of loopholes and based on questionable procedures'.¹⁸

The media's reporting of these encounters, particularly in the Batla House encounter, demonstrates potential willingness and efficacy of media in challenging legitimacy of encounter killings. The Batla House encounter, occurred in September of 2008 in New Delhi's Batla House area following a string of bombings in New Delhi by the Indian Mujahideen. The Delhi police raided the Batla House area of Jamia Nagar, killing two alleged terrorists, Atif Amin and Sajid. The encounter also resulted in the death of police inspector Mohan Chand Sharma.¹⁹ The Jamia Teacher's Solidarity Group disputed the authenticity of the encounter, prompting the Delhi High Court to launch a magisterial inquiry. The police officers involved were vindicated in an inquiry conducted by the National Human Rights Commission, prompting the NGO, Act for Harmony and Democracy to initiate yet another plea for a judicial inquiry. Their petition was ultimately rejected by the Supreme Court. Despite the final outcome, the layers of scrutiny imposed on the encounter by both the media and NGO ensured that the case received a serious degree of judicial attention.

2.3 Public Acceptance of Encounter Killings

Akin to the lacklustre criticism of encounter killings by the media, the public generally seems to accept encounter killings as a positive or necessary part of policing. Indicative of and fuelling this public acceptance, the positive portrayal of encounter killings in Bollywood and South Indian cinema has become increasingly common. Some movies, such as Risk, Shootout at Lokhandwala and AbTak 56, have focused on encounter specialists, often lionising them as Dirty Harry-style vigilance cops.²⁰ The popularity of these movies probably stems from the general public approval of encounter killings. Notably,

¹⁴ 'Timeline: Delhi Soot-out Case', *The Times of India*, October 24, 2007, available at <http://timesofindia.com/home/specials/Timeline-Delhi-shoot-out-case/articleshow/2486908.cms> accessed on 02.04.2015

¹⁵ Indian Penal Code, 1860, Section 300.

¹⁶ Ibid at 307.

¹⁷ Ibid at 120B.

¹⁸ Bidwai, 'The Delhi "Encounter"'.
¹⁹ Swami, 'Behind the Batla House Shootout'.

²⁰ Suresh Nair, 'Bollywood Catches Cop Fever', *The Times of India*, March 13, 2003, available at, <http://timesofindia.indiatimes.com/articleshow/40112592.cms> accessed on April 05, 2015

among the thirty-eight Mumbai police officers surveyed in the study described above, nearly all believed that the public approved encounter killings.²¹ The surveyed officers felt that the public support for encounter killings was motivated by frustration with the ineffectiveness of the judiciary in dealing with organized crime and security issues, a sentiment shared by the police officers themselves.

The views of these officers are echoed in the media. For example, Chaturvedi posits that even human rights groups are less vocal when the victim of an encounter killing is a prominent organized crime figure. The article, however, affirms that members of the public only accept encounter killings when the victim is either involved in organized crime or an alleged terrorist, choosing in other cases to express their outrage against such killings. For example, the death of Ranbir Singh, an innocent Ghaziabad based student, at the hands of Dehradun police elicited a vocal public outcry. Moreover, public apathy or sympathy for encounter killings has often been ruptured by the killing of a number of people of a particular community or religious minority. For example, a recent encounter killing involving two Muslim men, alleged by the police to be linked with a bombing in New Delhi, sparked protests from members of the Muslim community.²²

3. Factors Affecting the use of Encounter Killings

A number of factors have been posited as contributing the prevalence of encounter killings in India. These factors are largely reflective of police practices, some of which appear to represent unofficial police policy.

3.1 Rewards

Human rights observers have noted that practice of rewarding police officers involved in encounter killings has spurred the use of fake encounters. Lenin Raghuvanshi of the Varanasi-based People's Vigilance Committee on Human Rights is of the view that Government's rewarding of policemen or paramilitary personnel actually encourages such encounter killing.²³

The rewards bestowed on police or security forces involved in encounter killings can take the form of monetary benefits and out-of-turn promotions. Monetary

bounties are often given for the killing of dacoits. While the bounties are officially meant to reward the collection of information about the dacoit, in practice, they are effectively bounties on the dacoit's head.²⁴ For example, in the Chambal region, where dacoit killings have been relatively frequent, Sajid Farid Shapu, the police superintendent of Shivpuri, stated in 2007 that when dacoit Pratap Gadaria was gunned down, they won over Rs 14,00,000 in bounty (reward money) for wiping out his dreaded gang of dacoits over the previous year. Reward of over Rs100,000, or even comparatively small bounties of no more than Rs15,000 have triggered killings. Moreover, some human rights activists have alleged that the police refuse to allow dacoits to surrender and deliberately delay killing dacoits in order to allow the bounty to grow. Monetary rewards have also been used to catalyse the killing of Naxals, as shown by the recent killing of Patel Sudhakar Reddy, who allegedly spearheaded Maoist activities in Karnataka and whose capture carried a reward of Rs 12 lakhs.

Among the Indian military and security forces, the use of fake encounters to garner military medals is also prevalent. While several middle-ranking Army officers have been caught faking encounters to gain gallantry medals, higher ranking officers, such as Brigadier Suresh Rao and Colonel H.S. Kohli, have also been reprimanded for encouraging such conduct.²⁵ Indeed, this practice has allegedly been approved by certain generals who believe that having a high number of killings in their area of command increases their likelihood of receiving further promotions. It is evident that the current system, which rewards encounter killings without investigating them, has been instrumental in perpetuating fake encounters across India.

3.2 Harassment and Intimidation

Harassment and intimidation of a victim's family members and eye witnesses is a tactic often employed by police officers in the wake of an encounter death which further aggravated the situation. Such intimidation aims to deter the families or the witnesses from pursuing any kind of independent inquiry into the death, for the fear that the encounter may be termed as not fake. Human Rights Watch has noted that there is a high potential for police intimidation, since the registration of a First Information

²¹ Belur, 'Why Do the Police Use Deadly Force?', p. 12.

²² Madhur Singh, 'Rights Groups Probe India's Shoot-Out Cops', Time, February 14, 2009, available at <http://www.time.com/time/world/article/0,8599,1878946,00.html> accessed on April 05, 2015

²³ Ramakrishnan, 'Political Patronage', available at <http://www.frontline.in/static/html/fl2620/stories/20091009262002700.htm>, last visited on April 05, 2015

²⁴ 'Kill a Dacoit, Get a Promotion' *The Times of India*, October 19, 2008, available at <http://timesofindia.indiatimes.com/articleshow/msid-3613626,prtpage-1.cms> accessed on April 05, 2015

²⁵ Rajat Pandit, 'Brigadier in Dock for "Trophy Kills"', *The Times of India*, April 16, 2006.

Report (FIR) may require a visit to the very station where the abuse occurred, or interaction with the offending officer.' It is likely that most police intimidation escapes media or judicial attention, for which there are several prominent examples in recent years.

One such incident occurred after Raj Narain, a physically challenged farmer, was killed in a fake police encounter in which the police claimed that Raj was an active member of the Ram Kumar gang. Raj Narain's father Buddha Singh and his family pursued the case for fifteen years and, during that time, suffered intense harassment and intimidation. The harassment extended beyond the victim's family, with Buddha Singh reporting that 'the police wouldn't let people leave the village without checks, so that no one could take documents or letters or any paperwork related to the encounter.' Moreover, the police pressured other members of the community to try to convince Buddha Singh to drop his case. On September 12, 2007, fifteen years after the encounter were the police personnel involved in the encounter sentenced to life imprisonment.

3.3 Fabrication of Evidence

The fabrication or manipulation of evidence has served to legitimize fake encounter killings that, for the most part, are not thoroughly investigated. The Connaught Place encounter in 1997 provides a prominent example, with all nine policemen involved and ACP S.S. Rathi found guilty, inter alia, of fabricating false evidence under Section 193 of the Indian Penal Code, 1860, (IPC).²⁶ The police personnel involved were found to have planned to plant evidence in a car after the shooting and arrived at the encounter location with a pistol and bullets to use as evidence that they had shot the suspects in retaliation. Thus, encounter also highlights the manipulation of evidence by forensic scientists employed by the police. Roop Singh, the former Principal Scientific officer at the Central Forensic Science Laboratory, was found to have knowingly and willingly given false testimony and to have fabricated false evidence to support his statement and exonerate the police officers involved, introducing and exhibiting a doctored bullet head. Singh has also been accused of tampering with evidence in the Jessica Lal murder case. Such tampering raises the possibility that forensic scientists like Roop Singh may indeed be broadly complicit in the fabrication of evidence intended to legitimize fake encounters.

The Pathribal encounter similarly illustrates the use of such methods, as well as the lack of accountability of those responsible. Five days after the massacre of 36 Sikhs in

Chittisinghpura on March 20, 2000, police reported that they had killed five terrorists involved in an encounter, and that, during the encounter, the hut housing the alleged terrorists caught fire, burning the bodies beyond recognition. While locals claimed to positively identify the bodies and asserted that they were innocent villagers who had been abducted the day before the encounter, DNA tests initially proved inconclusive. These were later discovered to have been the result of tampering.

In a similar manner, a more recent investigation by Tehelka journalists into the Sameer Khan encounter killing has revealed that the manipulation of evidence was officially sanctioned from as far up as the Chief Minister's office.²⁷

The fabrication of evidence appears to be a regular feature of fake encounter killings. Moreover, it reflects a wider culture of corruption that extends to even high-ranking officers and forensic scientists. Investigations that assume a higher level of rigour are critical in effectively addressing the problem.

3.4 Internal Investigation and the Judicial System

Police and security force impunity, symptomatic of a lack of internal investigation and failure of judicial system are significant factors behind the prevalence of encounter killings. Human Rights Watch has found that of the 282,384 complaints filed against the police between 2003 and 2007, only 28 per cent resulted in a police department, magisterial, or judicial inquiry.²⁸ Moreover, of the 8,736 police officers prosecuted during this period, only 1,070 completed trials and fewer than 270 were convicted. Indeed, even where the judiciary does intervene, there is often disconnect between the court order and the ensuing police response. For example, when the Supreme Court mandated in 2006 that all states create Police Complaints Authorities (PCAs) to handle complaints against the police, only a small fraction of the states did so, and even those failed to comply with a number of the procedural requirements mandated by the Court.

While the precise number of complaints relating to encounter killings is unknown, human rights organizations have recorded numerous cases in which an alleged fake encounter has not been investigated or has been inadequately investigated. This failure to investigate occurs despite the recommendation of the National Human Rights Commission that all police encounter deaths be subjected to a magisterial inquiry.

²⁶ Indian Penal Code, Section 193.

²⁷ Ketan and Bawej, 'Fake Killings: Unwritten State Policy.'

²⁸ Human Rights Watch, 'Broken System: Dysfunction, Abuse and Impunity in the Indian Police', p. 100.

This absence of internal or external investigation is compounded by the difficulty families of encounter victims experience in accessing justice. The dependents of victims of encounters are generally disproportionately poor and consequently ill-poised to receive legal assistance. Their predicament renders them even more vulnerable to police intimidation aimed at suppressing a potential investigation.

As Human Rights Watch has pointed out, disciplinary measures typically have not followed internal investigations conducted by the Indian police.²⁹ Additional safeguards and layers of measures are necessary to shore up both internal and external accountability mechanisms. These measures should include reforms that are designed to protect police officers who wish to report instances of abuse, and make courts more accessible to the families of victims.

4. Legal Framework

The current legislative and judicial framework has not yet done enough to prevent the use of encounter killings or hold accountable those who perpetrate them. This section looks at three principal prongs of the Indian domestic legal framework related to encounter killings: (i) the guidelines issued by the National Human Rights Commission (NHRC), most recently in December of 2003; (ii) the provisions set out in the Indian Penal Code and the Code of Criminal Procedure (Cr.PC); and (iii) the repository of judicial precedent on the issue.

4.1 The Guidelines issued by the National Human Rights Commission (NHRC)

On December 2, 2003, the National Human Rights Commission (NHRC) issued a series of revised guidelines on the procedure to be followed by State Governments in all cases of deaths in the course of police action.³⁰ According to justice A.S. Anand, the then Chairperson of the NHRC, the prior set of guidelines issued in 1997 had been adhered to unsatisfactorily, prompting the Commission to issue a new menu of guidelines with a heightened degree of specificity. The elements of this revised procedural rubric include:

Documentation: All known police encounters must be documented. When the police officer-in-charge of a Police Station receives information about the deaths in an encounter between the police party and others, he shall enter that information in the appropriate register.

Referrals: To avoid a conflict of interest, police stations should not handle cases that concern officers working in the same station. These cases should instead be referred to

some other independent investigating agency, such as the CBI or COD.

First information Reports (FIRs): All complaints levelled against the police officers for the 'commission of a criminal act on their part' must be followed by an FIR 'registered under appropriate sections of the IPC [Indian Penal Code].' The Commission states that 'such [a] case shall invariably be investigated by CBI or COD.'

Mandatory Investigations/Magisterial Inquiries: In case of a complaint by the victim 'A magisterial inquiry must be held in all cases of death which occur in the course of police action. The next of kin of the deceased must invariably be associated in such an inquiry.'

Prosecution and Punishment of offending officers: 'Prompt prosecution and disciplinary action must be initiated against all delinquent officers found guilty in the magisterial enquiry/police investigation.'

Compensation for Dependents of the Deceased: This procedural modification stipulates that dependents of the deceased may be entitled to compensation, based 'upon the facts and circumstances of each case.'

Rewards: 'No out-of-turn promotion or instant gallantry rewards' are to be bestowed on officers 'soon after the occurrence' of an encounter death. The Commission maintains that 'it must be ensured that such rewards are given/recommended only when the gallantry of the concerned officer is established beyond doubt.'

Reporting to the Commission: The director general of police of the concerned state must submit 'a six-monthly statement of all cases of deaths in police action in the State' to the Commission, on a biannual basis. For every case, the pertinent details required include: the date and place of the occurrence, the police station and district, the circumstances surrounding the death(s) in each encounter, a brief summary of the facts surrounding the case, the criminal case number, the investigating agency and the findings of the investigation or magisterial inquiry.

The revised guidelines described here, if followed, could be a progressive step towards ending impunity for encounter killings. They require the police to register a complaint (and if alleged criminal activity, also an FIR), conduct an impartial investigation using police from a different station, and if found to be a fake or otherwise an illegal encounter, seek prosecution. The guidelines also demand compensation for encounter killings and a limit on the potential rewards for such killings. If implemented, these requirements would not only remove at least some of the incentive for encounter killings, for example, impunity

²⁹ Human Rights Watch, 'Broken System', p. 100.

³⁰ National Human Rights Commission, 'Revised Guidelines.'

and rewards, but review of such deaths would create a strong disincentive. Unfortunately, these guidelines are not mandatory and are rarely followed.³¹

4.2 The Indian Penal Code, 1860 (IPC) and the Code of Criminal Procedure, 1973 (Cr.PC)

Section 300 of the Indian Penal Code (IPC) and Sections 149 and 197 of the Code of Criminal Procedure (Cr.PC) offer public servants and police officers a layer of extra protection for those who perpetrate encounter killings. While the IPC spells out the circumstances under which 'culpable homicide' may not be construed as 'murder', the Cr.PC-Section 197 in particular sets up an extra hurdle to be surmounted before public servants can be prosecuted.

Section 300 of the IPC establishes the offence of 'culpable homicide and the circumstances under which such an act may constitute 'murder'. Exception 2 of the provision concerns the right of self-defense, a defense often invoked by police officers complicit in encounter killings. The exception reads as follows:

*'Culpable homicide is not murder if the offender, in the exercise in good faith of the rights of private defense of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defense without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defense.'*³²

This definition provides three requirements that must be met for the exception to hold: (i) The offender must have exercised his right of self-defense in 'good faith', (ii) the offence must not have been premeditated and (iii) the offender's response needs to be proportionate to the risk faced and cannot do 'more harm than is necessary' for the purposes of self-defense.

Exception 3 of Section 300 directly concerns public servants and police officers in discharge of their duty. This exception which is particularly open to abuse, reads as follows:

*Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.'*³³

The extenuating criteria that need to be met for this exception to hold are: (i) The offender acts 'in good faith', (ii) believing that his conduct is both 'lawful and necessary for the due discharge of his duty' and (iii) The offender bears no 'ill-will' toward the victim. These criteria are open to argumentative manipulation where encounter killings are concerned.

Similarly, under the Code of Criminal Procedure (Cr.PC), Section 149 is problematically broad. 'Every police officer', the provision reads, 'may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.'³⁴ While providing such a broad power to prevent a 'cognizable offence', the provision does not delimit the proper scope of such police activity or impose any discernable check on an officer's preventive measures.

Section 197 of the Cr.PC goes even further, exempting police officers and other public servants from criminal prosecution unless sanctioned by the government. The provision reads as follows: 'When any person who is or was a Judge or Magistrate or a public servant not removable from his office... is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty no court shall take cognizance of such offence except with the previous sanction... of the State Government'.³⁵

This provision effectively presents the dependents of a deceased victim with an extra procedural hurdle, preventing them from obtaining redress without the official sanction of the government. This obstacle would appear particularly difficult to surmount in cases in which government officials have an interest in shielding members of the local police stations from accountability, namely, when their successful prosecution would undermine the perceived character or competence of the State-Government.

4.3 Judicial Precedent

The judiciary has yet to take effective action against the prevalence of encounter killings. Recently, the Andhra Pradesh High Court attempted to respond to the dangerous nature of extra-judicial killings.

*In Andhra Pradesh Civil Liberties Committee vs. Union of India,*³⁶ which concerned an alleged encounter between police personnel and eight Maoist Naxalites at Nallamala Forest, the Andhra Pradesh High Court issued a significant verdict that reaffirmed key components of the NHRC's

³¹ South Asia Human Rights Documentation Centre, 'India: Extra-Judicial Killings under the Spotlight.'

³² Indian Penal Code, Section 300, Exception 2.

³³ Ibid.

³⁴ Code of Criminal Procedure (Cr.PC) 1973, Section 149.

³⁵ Ibid.

³⁶ AIR 2007 (5) ALT 639

guidelines on extra-judicial killings noted above.

The High Court established three key elements of procedure that must be followed in the wake of an encounter death: (i) If a complaint is filed against a police officer, police personnel are obligated to register an FIR and names of the officers allegedly involved in the encounter need not be divulged in the report,³⁷ (ii) after an FIR is filed, an investigation must be initiated, and the investigation should yield one of three conclusions: that no killing took place, or that the offending officer was justifiably exercising his right of self defense, or that the killing was inexcusable and illegal, and (iii) if unconvinced by the investigative report specifically, that the offending officer was legitimately exercising his right of self-defense- the Judicial Magistrate tasked with the case is empowered to take cognizance of the case under Section 190 of the Code of Criminal Procedure. If the Supreme Court upholds the High Court's ruling it could set a clear and substantive precedent on the proper handling of extra-judicial killings. However, the Supreme Court is yet to hear the case.

In response to a petition filed by the Andhra Pradesh Police Association, the Supreme Court issued an ex-parte stay on the High Court's ruling in March 2009, citing police morale and a possible surge in Naxalite activity.³⁸

Unfortunately, the Supreme Court's decision to impose a stay on the High Court's ruling is not an aberration. The Court has recently demonstrated a pronounced interest in the idea of preserving police morale. This rationale was offered not only in defense of the decision to impose a stay

on the High Court's ruling, but also in support of the decision to suppress a judicial inquiry into the Batla House Encounter later in the year.³⁹ In Batla House Encounter Case dismissing the appeal Chief Justice K.G. Balakrishnan observed, 'There are thousands of police officials who are being killed. It will adversely affect the morale of the police.'⁴⁰

Thus, despite the positive judgment articulated by the Andhra Pradesh High Court, the Supreme Court's initial stay of the High Court judgment and the Court's track record regarding deference to the police provides little confidence that the Supreme Court will uphold the decision or otherwise provide effective safeguards against encounter killings.

5. Conclusion

The longstanding practice of encounter killings in India marks a clear violation of international law, fundamental rights and the most basic conceptions of justice. Yet the overarching emphasis in public debate on security, coupled with the failure of proper investigative forces and judicial functioning to efficiently and justly implement an appropriate criminal justice system has left the legislature, the judiciary, security forces, the media and the general public often acquiescing to, if not promoting the use of fake encounters. It is submitted that the Supreme Court must hear and conclude the 2009 judgment of the Andhra Pradesh High Court. Intensive judicial scrutiny and investigation must take place in all encounter killings. Police, army and other security forces must effectively

³⁷ Ibid

³⁸ People's Union for Democratic Rights, "Encounter Killings and the Question of Justice": Two Days of Protest in Delhi, 3-4 Sept. 2009, available at http://www.Pudr.org/index.php?option=com_content&task=view&id=187&Itemid=60 accessed on April 04, 2015

³⁹ 'Batla House Encounter', The Times of India.

⁴⁰ <http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/plea-for-probe-dismissed/article172954.ece> last visited on May 23, 2015.

Justiciable Right to Food Security in India: A Critique

Mr. Balwinder Singh*

ABSTRACT

Improving food security is an issue of considerable importance for a developing country like India where millions of people suffer from hunger and malnutrition. It is now widely recognised that food security is not confined only to production, availability and demand for food. Ultimately, the key question is that of the ability of the people to access food and utilize it effectively at all times, to lead a healthy life. The access to food can be maintained by providing the people the legal right to food. The right to food is operational in India on the basis of India's Constitution and of her obligations under International human rights law. Under these International obligations a framework law has been developed and brought into force in India in the year 2013. No doubt through various policies and programs the government is trying to be food secure at household level. Regardless of these measures, food insecurity is a gigantic problem in India. Moreover the legal framework and the means of producing sufficient food does not imply that food is actually secured for everyone, what it requires is the political and societal will of various stakeholders to overcome the discriminatory situation in order to give the right to food a real meaning.

Key Words: Access, Availability, Food security, Legal framework, Policies, Programs.

"Earth provides enough to satisfy every man's need, but not every man's greed"

Mahatma Gandhi

1. Introduction

Food security is a condition related to the ongoing availability and accessibility of food. Concerns over food security have existed throughout history. There are evidences of granaries being in use over 10,000 years ago with central authorities in civilizations (including Ancient China and Ancient Egypt) known to release food from storage in times of famine. Yet it was only in the year 1974 that the term 'food security' was invented as a formal concept in the World Food Conference. Originally, food security was understood to apply at the national level, with a state of being food secure when there was sufficient food to "sustain a steady expansion of food consumption and to offset fluctuations in production and prices". A new definition emerged at the World Food Summit (1996), this time with the emphasis being on individuals enjoying food security, rather than the nation. According to the Food and Agriculture Organization (FAO), food security "exists when

all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."¹ Individuals who are food secure do not live in hunger or fear of starvation.² Food security incorporates a measure of resilience to future disruption or unavailability of critical food supply due to various risk factors including droughts, shipping disruptions, fuel shortages, economic instability, and wars. Food insecurity, on the other hand, according to the United States Department of Agriculture (USDA) is a situation of "limited or uncertain availability of nutritionally adequate and safe foods or limited or uncertain ability to acquire acceptable foods in socially acceptable ways."³ In the years 2011-2013, an estimated 842 million people were suffering from chronic hunger.⁴ The Food and Agriculture Organization (FAO) identified the four pillars of food security as availability, access, utilization, and stability.⁵

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¹ FAO, World Food Summit: Rome Declaration on World Food Security and World Food Summit Plan of Action (Nov. 13-17, 1996), available at <http://www.fao.org/docrep/003/W3613E/W3613E00.htm>. (Visited on March 31, 2014). The right to food and the right to be free from hunger, and incorporating "free" and "freedom" several times throughout the declaration's discussion of the right to food. One of the major obstacles to the realization of the right to food is the distorted and ideologically informed assumption that if the hungry have the right to food then someone must have the obligation to provide that food.

² Food and Agriculture Organisation, *Food Security: Policy Brief 2* (FAO Agricultural and Development Economics Division, Rome, 2006).

³ Gary Bickel, Mark Nord et. al., "Guide to Measuring Household Food Security," USDA 21 (2000).

⁴ Food and Agriculture Organisation, *The State of Food Insecurity in the World 2013* 26 (FAO, Rome, 2013) According to the United Nations Food and Agriculture Organization (FAO), the "average minimum energy requirement per person is 1800 kcal per day."

⁵ *Declaration of the World Food Summit on Food Security* 16-18 November 2009.

The Special Rapporteur on the right to food defines food security as a corollary of the right to food. The right to food is a human right recognised under international law⁶ which protects the rights of all human beings to feed themselves in dignity, either by producing their food or by purchasing it. The modern human rights framework for a specific right essentially consists of a legal framework in a country that establishes something as a right, including an effective procedure for enforcing the right, a process for adjudicating individual rights cases (which can involve different interpretations of the legal framework), and resources provided to address the outcome of rights decisions.⁷ The right to food therefore requires States to provide an enabling environment in which people can use their full potential to produce or procure adequate food for themselves and their families. The right to food creates a human rights obligation on the Nation State and cannot be restricted to matter of policy or an inspirational goal.⁸ The recent years have witnessed increased interest in the adoption of framework laws on the right to food. Such laws are often known as food security laws rather than right to food but the effect is similar, as long as the right to food is clearly spelled out.

2. Food Security Scenario in India

As far as Right to food in India is concerned, some of the worst violation of the right to food can be seen in India today. India is suffering from alarming hunger and is home to about 217 million undernourished persons.⁹ The Supreme Court in *People Union for Civil Liberties vs. Union of India & Ors*¹⁰ popularly known as the right to food case, recognized the right to food under the right to life stipulated in Article 21 of the Indian Constitution, and Article 47, a Directive Principle of State Policy which imposes a duty on the State on raising the level of nutrition. The court noted the paradox that plenty of food was available in granaries, but that the poor were still starving. The petition filed by NGO assumed the special significance not only because it brought up the issue of starvation deaths before the Supreme Court for the third time in two decades, but also because it brought to the fore starvation on the face of surplus food grains in the

Government stocks. The court further held that the poor, the destitute and the weaker sections of the society must not suffer from hunger and starvation and the prevention of the same was one of the prime responsibilities of the government whether Central or State. Further it was observed that how this was to be ensured would be a matter of policy which was best left to the Government.

Indian Government has time and again realised that, in order to achieve food security and right to food, the poor should have sufficient means to purchase it. Poor people cannot afford to purchase the food they need at market prices and therefore, social protection programs are needed. Adequate purchasing power for the poor to buy food can be ensured in two ways. One is to have an employment intensive pattern of growth which can provide remunerative work to poor and enhance their power to purchase food. The other is to increase incomes and subsidize food through social protection programs.

2.1 Production of Different Food Crops in India

The total production of different crops during the last more than 60 years is presented in Table 1, which shows that the positive impact of Green revolution continued for over 30 years till the 1990s. In the 1990s, the growth in the agricultural sector started facing stagnancy. The increase during the first 30 years of Green Revolution was mainly due to increase in the area under crop production and introduction of improved varieties with recommended cultivation practices. The increase in food production during 1990 to 2012 can be attributed to improved efficiency and increased use of inputs, particularly agrochemicals which also enhanced the cost of production. India has the capacity to achieve food security by promoting food production nationally. However, others, especially poor food deficit countries, are not well gifted in terms of resources, institutions and technology and will always need to import food, unless new research findings and technology enables them to mobilize their resources to achieve food security in the long run.

⁶ The Universal Declaration of Human Rights, 1948 asserts in Article 25(1) that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food; and International Covenant on Economic, Social and Cultural Rights namely Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966 says that "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing" and also recognizes "The fundamental right of everyone to be free from hunger."

⁷ FAO Special Report: *The Right to Food is a Basic Human Right* (Feb. 8, 2009), available at <http://www.worldhunger.org/articles/global/foodashumrgt/special.htm>. (Visited on Feb 20, 2014)

⁸ United Nations General Assembly, *Report of the Special Rapporteur on the Right to Food* (E/CN.4/2003/54) Geneva (2003).

⁹ FAO, *Hunger Report-State of food Insecurity in the World*, 8 (Food and Agriculture Organization, Rome, 2011).

¹⁰ 2004 (12) SCC 104

Table 1: Production of Different Food Crops in India (In million tonnes)

S. No.	Year	Rice	Wheat	Coarse Cereals	Pulses	Total Food Grains
1	1950-51	20.58	6.46	15.38	8.41	50.82
2	1960-61	34.58	11.00	23.74	12.70	82.02
3	1970-71	42.22	23.83	30.55	11.82	108.43
4	1980-81	53.63	36.31	29.02	10.63	129.59
5	1990-91	74.29	55.14	32.70	14.26	176.39
6	2000-01	84.98	69.68	31.08	11.80	196.81
7	2010-11	95.98	86.87	43.40	18.24	244.49
8	2011-12	105.30	94.88	42.01	17.09	259.29
9	2012-13	105.24	93.51	40.04	18.34	257.13
10	2013-14	106.54	95.91	43.05	19.27	264.77

Source: State of Indian Agriculture 2012-2013 and Department of Agriculture & Cooperation, GOI, Ministry of Agriculture, Annual Report 2014-15

2.2 Net Availability of Food Grains Per Capita Per Day in India

Table 2 illustrates the net availability of food grains per capita per day in India from 1951 to 2013. The per capita net availability of food grains was 394.9 grams per day in 1951, 510.1 grams per day in 1991, 462.9 grams per day in 2011 and 449.9 grams in 2012. Similar trend can be seen from the table in case of rice and wheat. Whereas pulses, gram, cereals and other cereals shown the declining trends for the same periods. Thus, it can be seen that Post liberalization period in India witnessed a decline in the per capita net availability of cereals and pulses.

It is irony that at present India has the largest programs: Food Subsidy Programs (Public Distribution System from

year 1951, now Targeted Public Distributed System from 1997, Antodaya Anna Yojana in year 2000, Annapurna Yojana in year 1999), Feeding Entitlement Programs (Mid Day Meal Scheme in year 2007, Integrated Child Development Services Schemes in year 1975, National Food Security Mission in year 2007, Applied Nutritional Programme in year 1973), and Employment Programs (National Rural Employment Guarantee Scheme which has now been changed into Mahatma Gandhi National Rural Employment Guarantee Act, 2005, Sampoorna Grameen Rozgar Yojana in 1999) and many social security programs but despite that hunger, malnutrition and food insecurity continue to be high. Economic survey of year 2013 has called for an urgent attention to efficient food stocks management, timely offloading of stocks and a stable and predictable trade policy. A recent analysis

Table 2: Net Availability of Food Grain Per-Capita Per Day in India (In grams)

S. No.	Year	Rice	Wheat	Other cereals	Cereals	Gram	Pulses	Food grains Average (grams per capita per day)
1	1951	158.9	65.7	109.6	334.2	22.5	60.7	394.9
2	1961	201.1	79.1	119.5	399.7	30.2	69.0	468.7
3	1971	192.6	103.6	121.4	417.5	20.0	51.2	468.8
4	1981	197.8	129.6	89.9	417.3	13.4	37.5	454.8
5	1991	221.7	166.8	80.0	468.5	13.4	41.6	510.1
6	2001	190.5	135.8	56.2	386.2	8.0	30.0	416.2
7	2011	188.8	164.6	70.0	423.5	14.6	39.4	462.9
8	2012	190.1	158.1	60.0	408.2	13.5	41.6	449.9
9	2013	232.4	183.3	53.2	468.9	15.3	41.9	510.8

Source: Agricultural statistics at a glance 2014 as on March 6, 2014

showed that on an average the costs of maintaining buffer stocks of rice and wheat are higher than procurement costs in domestic or international markets.¹¹ So, the need to hold stocks has a fiscal cost. Heavy input subsidies and technological change coupled with farm price support policies have led to heavy accumulation of food grain stocks with the government and the internal carry-over costs have increased, while at the same time the hard core poor continue to suffer from food insecurity.

3. Law Relating to Food Security in India

The National Food Security Act, 2013 extends to the whole of India and makes right to food a legal entitlement. In the current scenario and given the way poverty is measured, this law will benefit approximately 800 million people which are about 67 percent of India's population. The preamble of the Act clearly states that it is an Act to provide for food and nutritional security in human cycle approach, by ensuring access to adequate quantity of quality food at affordable price to people to live a life with dignity and for matters connected therewith or incidental thereto. The National Food Security Act gives statutory backing to the Targeted Public Distribution System (TPDS). This legislation marks a shift in the right to food as a legal right rather than a general entitlement. The Act classifies the population into three categories: excluded (i.e., no entitlement), priority (entitlement), and Antyodaya Anna Yojana (AAY; higher entitlement). It contemplates responsibilities for the

Centre and States to implement the very object of the Act and a grievance redressal mechanism to address non-delivery of entitlements. Though the motive behind National Food Security Act is very noble, but it seems difficult for the government to implement this Act without overcoming the governance issues and challenges prevailing in the system.

Chapter II of the Act makes provisions for the food security. Section 3 provides a right to receive food grains at subsidised prices by persons belonging to eligible households under Targeted Public Distribution System.¹² The legal entitlement to receive food grains by persons will give them the constitutional rights to minimum food security. After this landmark legislation, the State on the other hand, is under legal obligation to ensure the availability of entitled grains to eligible persons. The Act also makes special provisions for pregnant women and lactating mothers¹³ and Nutritional support to children.¹⁴ Unlike the previous schemes of the Government, the National Food Security Act, 2013 adopts the life cycle approach, in the sense; it is an integrated effort to address the food requirement of every phase of human life cycle starting from the infancy to the adult and the parenthood. The take home rations and maternity benefits to pregnant and lactating mothers is a welcome initiative considering the country's poor record in the infant mortality rate and the maternal mortality rate. In order to address the problem of malnutrition among children, any child below

¹¹ Tilak Raj, "Food Security Scenario in India: New Challenges and Policies," 2(2) *HJCR* 454 (July- December 2013).

¹² The National Food Security Act, 2013, Section 3 (1) Every person belonging to priority households, identified under sub-section (1) of section 10, shall be entitled to receive five kilograms of food grains per person per month at subsidised prices specified in Schedule I from the State Government under the Targeted Public Distribution System: Provided that the households covered under *Antyodaya Anna Yojana* shall, to such extent as may be specified by the Central Government for each State in the said scheme, be entitled to thirty-five kilograms of food grains per household per month at the prices specified in Schedule I: Provided further that if annual allocation of food grains to any State under the Act is less than the average annual off take of food grains for last three years under normal Targeted Public Distribution System, the same shall be protected at prices as may be determined by the Central Government and the State shall be allocated food grains as specified in Schedule IVS. *Explanation*— For the purpose of this section, the "*Antyodaya Anna Yojana*" means, the scheme by the said name launched by the Central Government on the 25th day of December, 2000; and as modified from time to time. (2) The entitlements of the persons belonging to the eligible households referred to in sub-section (1) at subsidised prices shall extend up to seventy-five per cent of the rural population and up to fifty per cent of the urban population. (3) Subject to sub-section (1), the State Government may provide to the persons belonging to eligible households, wheat flour in lieu of the entitled quantity of food grains in accordance with such guidelines as may be specified by the Central Government.

¹³ *Id.* Section 4-Nutritional support to pregnant women and lactating mothers-Subject to such schemes as may be framed by the Central Government, every pregnant woman and lactating mother shall be entitled to— (a) meal, free of charge, during pregnancy and six months after the child birth, through the local *anganwadi*, so as to meet the nutritional standards specified in Schedule II; and (b) maternity benefit of not less than rupees six thousand, in such installments as may be prescribed by the Central Government: Provided that all pregnant women and lactating mothers in regular employment with the Central Government or State Governments or Public Sector Undertakings or those who are in receipt of similar benefits under any law for the time being in force shall not be entitled to benefits specified in clause (b).

¹⁴ *Id.* Section 5-Nutritional support to children (1) Subject to the provisions contained in clause (b), every child up to the age of fourteen years shall have the following entitlements for his nutritional needs, namely:— (a) in the case of children in the age group of six months to six years, age appropriate meal, free of charge, through the local *anganwadi* so as to meet the nutritional standards specified in Schedule II: Provided that for children below the age of six months, exclusive breast feeding shall be promoted; (b) in the case of children, up to class VIII or within the age group of six to fourteen years, whichever is applicable, one mid-day meal, free of charge, everyday, except on school holidays, in all schools run by local bodies, Government and Government aided schools, so as to meet the nutritional standards specified in Schedule II. (2) Every school, referred to in clause (b) of sub-section (1), and *anganwadi* shall have facilities for cooking meals, drinking water and sanitation: Provided that in urban areas facilities of centralized kitchens for cooking meals may be used, wherever required, as per the guidelines issued by the Central Government.

the age of 14, including those out-of-schools, may approach any feeding facility such as anganwadi centre, school mid-day meals centres for midday meal. The Act ensures the access to food grains through doorstep delivery of food grains by reforming Targeted Public Distribution System. The Act provides for Central and State Governments to endeavour to progressively undertake necessary reforms in the Targeted Public Distribution System in consonance with the role envisaged for them in this Act. Some of the reforms mentioned in the Act include, doorstep delivery of food grains to the Targeted Public Distribution System outlets, application of information and communication technology tools for end-to-end computerization, transparency in maintenance of records of transactions at all levels and to prevent diversion, leveraging "adhaar", progressive preference in allotment of Fair Price Shops, diversification of commodities distributed, introducing schemes such as cash transfer, food coupons to the targeted beneficiaries in order to ensure their food grain entitlements, provisions for food security allowance by cash transfer in case of non-supply of food grains.

Chapter VI of the Act provides for women empowerment and thus in a major shift from the past, the eldest woman in every eligible household who is not less than eighteen years of age, shall be head of the household for the purpose of issue of ration cards. This is done with a rationale of helping the feeding hands to have first right to food grains rather than male member who on many occasions is presumed to divert the grains to black market or liquor shops in villages. Chapter VII of the Act provides for the grievance redressal Mechanism. Every state government shall put in place an internal grievance redressal mechanism which may include call centers, help lines, designation of nodal officers, or such other mechanism as may be prescribed. The District Grievance Redressal Officer will look after and address the grievances of the public at every district. The State Food Commission will be established under the Act to oversee the effective implementation of the Act. According to the provisions of the Act, the State Government shall be responsible for implementation and monitoring of the schemes of various Ministries and Departments of the Central Government in accordance with guidelines issued by the Central Government for each scheme, and their own schemes, for ensuring food security to the targeted beneficiaries in their State. Moreover, under the Targeted Public Distribution System, it shall be the duty of the State Government to take delivery of food grains from the designated depots of the Central Government in the State, at the prices specified in Schedule I, organise intra-State allocations for delivery of the allocated food grains through their authorized agencies at the door-step of each fair price shop; and ensure actual delivery or supply of the

food grains to the entitled persons at the prices specified in Schedule I. For efficient operations of the Targeted Public Distribution System, every State Government shall create and maintain scientific storage facilities at the State, District and Block levels, being sufficient to accommodate food grains required under the Targeted Public Distribution System and other food based welfare schemes and suitably strengthen the capacities of their Food and Civil Supplies Corporations and other designated agencies.

All Targeted Public Distribution System related records shall be placed in the public domain and kept open for inspection to the public, in such manner as may be prescribed by the State Government. Every local authority, or any other authority or body, as may be authorized by the State Government, shall conduct or cause to be conducted, periodic social audits on the functioning of fair price shops, Targeted Public Distribution System and other welfare schemes, and cause to publicize its findings and take necessary action, in such manner as may be prescribed by the State Government. The social audit can also be given to independent agencies having experience in conducting such audits. To ensure transparency and proper functioning of the Targeted Public Distribution System and accountability of the functionaries in such a system, every State Government shall set up Vigilance Committees who can regularly supervise the implementation of all schemes under this Act. Chapter XII provides for the food security for people living in remote, hilly and tribal areas, and for that end, steps would be taken to further advance food and nutritional security. Last but not the least, the Central Government, or as the case may be, the State Government, shall be liable for a claim by any person entitled under this Act, except in the case of war, flood, drought, fire, cyclone or earthquake affecting the regular supply of food grains or meals to such person under this Act.

Thus, this Act is a positive step towards providing legal protection to right to food and making it an enforceable right. There had been some criticism given the wide scope of this Act and previous bad experiences in poor implementation of different government schemes. Questions have been raised regarding the possibilities of making the scheme universal instead of targeting a certain percentage of the population, since the definition and measurement of poverty are disputed and have changed many people's status overnight, on paper. The current Act has also been criticized by several economists and media professionals on the grounds that it would be very difficult for the government to provide sufficient finances for the implementation of this Act as food grain requirement for implementing this Act is 612.3 lakhs tons and total Food Subsidy will reach to Rs.124747 crores. There are several challenges this Act will have to face in order to feed such a large percentage of the population. Effective

implementation will also depend on pro-activeness of the States. However, if well implemented, its impact on poverty will be vast and visible.

4. Critical Appraisal of the Food Security Law

The Act establishes a durable food security system leading to eradication of hunger and malnutrition and it has been asserted that this Act will be the first step in ensuring a hunger free India. The provisions concerning justiciability of certain entitlements relating to expectant mothers, children below six years, mid-day meals for school children up to class 8 and persons living in starvation appear to be unique. The provisions relating to enforceable duties, accountability and transparency and the mechanism put in for redressal of grievances in the National Food Security Act, 2013 are in a positive direction for providing food security to people.

Nevertheless there are certain shortcomings in the 2013 Act. The Act proposes to provide food and nutritional security to people. However, the Act falls short in keeping promise with its own provision as the foods covered are only rice and wheat. To meet nutritional security, the Act should focus on complete dietary requirement to include the pulses, vegetables, milk, meat etc. in the food basket.¹⁵ One of the central concerns with regard to procurement of food grains has been the quality of the grains procured. In spite of the mandate under the Revised Model Citizen's Charter, the Supreme Court directive to ensure Fair Average Quality (FAQ) while implementing mid-day meal schemes and the Food Corporation of India's own commitment to these standards, instances of poor quality grains being distributed are plenty.¹⁶ While poor quality may not always be a result of not adhering to quality norms, and may often be a result of inadequate storage facilities, instances of non-adherence to quality norms at the procurement stage are not few.¹⁷ The reason for this predicament is the lack of clarity caused by the presence of multiple government orders and circulars enumerating the quality standards. It is disappointing that the Act does not make any attempt to harmonise these standards. The preamble to the Act states that its aim is to provide for food and nutritional security by ensuring access to adequate quantity of quality food. But the Act falls short of addressing what constitutes 'quality food' and how it will be ensured. It does not prescribe any minimum standard, nor does it equate the required standards to the FAQ standards. It is not/nor suggested that there should be an

annexure specifying the quality of each food grain procured under the PDS. However, a mention should have been made of the need to adhere to the minimum standards, which would be FAQ standards under the present scheme. A related schedule drawing upon the guidelines for FAQ could also have been included, but instead, the present Act leaves this issue at the mercy of seasonal circulars.¹⁸

The biggest challenge for the food security in India is poverty. For identification of the poor class of the society, poverty line is the threshold. Based on the poverty line, Government of India declares the poverty ratio at some interval of time. No doubt that it is difficult to survey entire population frequently, but the poverty line can be related with inflation data declared by RBI so that every year, new priority households can be included. Poverty ratio by the year 2011-12 was 21.9 per cent and number of poor according to this ratio was 269.30 million but when these figures were compared with the world statistics, it was altogether a different picture. As per the Government of India, 21.90 per cent population was poor whereas the World Bank estimates poverty ratio at 25.93 per cent, which was higher by 4.03 per cent as compared to national poverty line. This shows the vast difference between these statistics. As per World Bank, the number of poor people should be 311.11 million instead to 269.30 million (here the Government database shows the gap of 41.81 million number of poor). The Section 3(2)¹⁹ of the National Food Security Act, 2013 claims that the Act will cover 75 per cent of the rural population and 50 per cent of the urban population which is two third population (67 per cent) of India. As per national poverty line 22 % population and as per international poverty line 26 per cent population is poor. Here a question arises as to why government has proposed to cover unnecessary extra population of 41% cent (67 % – 26 %). Moreover the National Food Security Act's provision of giving too many grains at too cheap rate to too many people is criticized by many. It is argued that it will bounce back in the long run as it develops 'dependency syndrome' among the people and they lose motivation to work hard to earn their living.

Moreover the Act's framework for the public distribution system rests on a complicated division of the population into priority household and the non-priority household. There is no clarity as to how the priority households have to be identified. The criterion provided by the Central

¹⁵ Dr. K. R. Aithal, "Towards Justiciable Right to Food," in Dr. Bimal. N. Patel and Dr. Ranita Nagar (eds.), *Food Security Law-Interdisciplinary Perspectives* 29 (2014).

¹⁶ Editorial, "Brimming Granaries and Begging Bowls," *The Hindu*, (June 17, 2001).

¹⁷ Editorial, "PDS Rot," *The Tribune*, (July 27, 2011).

¹⁸ Balu G. Nair, "The National Food Security Bill, 2011: An Opportunity Lost?," 3 *JLS* 308 (2012).

¹⁹ *Supra* note 12.

Government appears to be inadequate and not perfect and therefore many eligible householders may be out of safety net. As per Section 10, of the Act,²⁰ the State government is responsible to identify the priority household. For this purpose the State government can prepare guidelines. As per this section, the targeted population is to be identified by the State government and Section 9 of the Act claims to cover 67 % of the population.²¹ When Central government is not having the data of targeted priority households, how can they claim to give benefit to 67 % of the population? It is clear that Central Government has just mentioned the targeted population without any proper calculation. As per planning commission, 22 % population of India is poor, whereas ration card data reveals that there are almost 46 %²² who are falling either in BPL category or in AAY category. This clearly indicates that either the poverty line is not properly defined or the ration card holders are taking undue advantage of the scheme. This clearly reveals that around 24 % of the beneficiaries are fake.

Lack of proper scientific storage facilities and the resultant rotting of food grains has been the most widely debated topic in the area of TPDS during the last few years.²³ The present Act has tried to remedy this situation by including provisions for the creation of scientific storage facilities at various levels. However, the provisions seem to be nothing more than a vision statement in the light of losses suffered due to unscientific storage facilities, and the need for establishment of these facilities in a time bound manner has been ignored. There should have been unambiguous guidelines on a time frame for the completion of the construction of storage facilities to ensure that the rotting of food grain is avoided at the earliest. Enforcement mechanisms such as imposing fines on the states failing to comply with these deadlines should also have been put in place.

The implementation of this Act and supply of food grains to poor is to be done by the existing Public Distribution System. The analysis which was based on the ration card data of December 2013 and poverty line clearly reveals that, there was a leakage of 24 per cent in the Public Distribution System whereas as according to the Commission for Agricultural Costs and Prices, Department of Agriculture & Cooperation, Ministry of Agriculture, Government of India, New Delhi, December 2012²⁴ there is a leakage of 40.4 per cent in the Public Distribution System. Though one fourth of the money is not reaching to targeted beneficiaries under Public Distribution System, still the Act aims at granting differential legal entitlement of food grains to nearly 800 million people through Targeted Public Distribution System network only. Instead of increasing food subsidy the government should have reduced leakage to achieve better results.

The Food Corporation of India has the responsibility of ensuring proper storage of the grains after procurement. However, there are major issues concerned with the storage capacity and the way the food grains are stored by the Food Corporation of India. At present, the Food Corporation of India godowns has food grain stocks more than twice the storage capacity available within them. This is one major reason causing their wastage by reason of fungus, rodents and subjecting for pilferage. The quantum of food grains being wasted at Food Corporation of India because of improper storage and unscientific management is a major challenge in making the National Food Security Act successful. Computerization of all Fair Price Shops (FPS) for implementation of communication technology is itself a big challenge because there are 515108 Fair Price Shops. Many of those might be in remote areas where electricity and internet facilities will be required. The Act provides for door step delivery of food grains. This will require well established delivery system

²⁰ *Id.*, Section 10: *State Government to prepare guidelines and to identify priority households* (1) The State Government shall, within the number of persons determined under section 9 for the rural and urban areas, identify—(a) the households to be covered under the Antyodaya Anna Yojana to the extent specified under sub-section (1) of section 3, in accordance with the guidelines applicable to the said scheme; (b) the remaining households as priority households to be covered under the Targeted Public Distribution System, in accordance with such guidelines as the State Government may specify: Provided that the State Government may, as soon as possible, but within such period not exceeding three hundred and sixty-five days, after the commencement of the Act, identify the eligible households in accordance with the guidelines framed under this sub-section: Provided further that the State Government shall continue to receive the allocation of food grains from the Central Government under the existing Targeted Public Distribution System, till the identification of such households is complete. (2) The State Government shall update the list of eligible households, within the number of persons determined under section 9 for the rural and urban areas, in accordance with the guidelines framed under sub-section (1).

²¹ *Id.* Section 9: *Coverage of population under Targeted Public Distribution System*- The percentage coverage under the Targeted Public Distribution System in rural and urban areas for each State shall, subject to sub-section (2) of section 3, be determined by the Central Government and the total number of persons to be covered in such rural and urban areas of the State shall be calculated on the basis of the population estimates as per the census of which the relevant figures have been published.

²² Category wise ration cards as on 31st December 2013, APL 54 per cent, BPL 36 per cent and AAY 10 per cent.

²³ Editorial, "Let Not Grains Rot in Godowns while Millions Cry for Food," *The Hindu*, (Aug. 9, 2010).

²⁴ Ashok Gulati, Jyoti Gujral *et al.*, *National Food Security Bill: Challenges and Options*, Discussion Paper-2, Commission for Agricultural Costs and Prices, 13 (2012), available at: <http://cacp.dacnet.nic.in/ViewQuestionare.aspx?Input=2&DocId=1&PageId=42&KeyId=470>. (Visited

having proper database of every ration card holder with their addresses. This type of mechanism requires highly secure and transparent delivery system.

The grievance redressal mechanisms envisaged in the Act commenced at the district level. The State Food Commission is the grievance redressal forums at the state and national levels. However, the Act does not provide for any such mechanisms at the village or taluk levels. Since a large section of the beneficiaries of the legislation reside in rural areas, they will be hard pressed to approach forums even at the district level due to financial reasons. The only body at village/taluk level is the Vigilance Committee, which lack any real decision making powers. They are neither empowered to impose penalties on the violators, nor to take remedial measures for the improvement of the schemes they are mandated to oversee. The lack of an effective and approachable forum to resolve and plug implementation gaps points to the superfluous approach adopted under the Act. Under the Act, a public servant who has failed to comply with the relief recommended by any of the grievance redressal officers is liable to pay a paltry sum of Rs. 5000. It is shocking that even after the poor implementation history of Public Distribution System the Act has decided to let off potential culprits lightly. The inclusion of provisions which will act as a serious deterring factor is non-negotiable if one is to tide over the problems of the earlier food regime.

5. Conclusion

Law makes little difference unless it can be implemented in practice, and conference documents remain mere rhetoric

sans political will to implement the same. There is enough food on the planet to adequately feed everyone alive today. But the rules governing national agricultural policy and international trade, along with the economic incentives in the global food production system, do not currently result in fulfillment of access to adequate food for all. While India has made significant progress in the areas of science and technology and industrial development, food security for the rural poor continues to be a cause of concern. Food insecure people neither consistently produce enough food for themselves nor have they the purchasing power to buy food from markets. It is a complex issue which would have far reaching and serious implications like threat to national security, disturbance of peace, human rights violations and decline in the quality of human resources. In addition to the domestic causes, imperfect market practices of multinational groups in controlling production, usage, transport and trading practices are causing food insecurity in India. Small producers and people working in unorganised sectors are the ultimate sufferers both in rural and urban areas due to neo-liberal policies. There is no dearth of availability of food grain in the country still a large section of the poor population does not have adequate access to food. The government needs to review policy from time to time and take corrective measures for effective implementation of different schemes and programs, establish effective mechanisms of accountability and ensure the right to food for all. We hope, in a world of globalization and rapid transmission of information, the knowledge will also move more quickly in order to reduce the suffering of those exposed to the hardship of food insecurity.

National Refugee Law on the Lines of International Law: The Need of the Hour

Dr. R. Seyon^{*}

ABSTRACT

India is a traditional country known for welcoming refugees from all over the world. Ancient India is well known for welcome of refugees with open arms and their honour and dignity in our society. The history of Refugee is five thousand years old in India. India is not a signatory to the United Nations Convention Relating to the Status of Refugees, 1951 and the Protocol Relating to the status of Refugees, 1967. The Legal Regime relating to the Refugee Protection in India includes: the Constitution of India, 1950, the Foreigners Act, 1956, Registration of Foreigners Act, 1939, the Foreigners Order, 1948 and the Indian Citizenship Act, 2003. India has no legal framework for determining Refugee status. India being a leader in South Asia plays an important role in the treatment of refugees and it shelter one of the largest refugee populations in the world. The Indian Judiciary evolved a wider and humane approach in dealing the matters of refugees and gave a liberal interpretation in *National Human Rights Commission vs. State of Arunachal Pradesh*. The need of the hour is for a stable and secure guarantee of refugee protection in India. The UN Convention relating to the Status of Refugees, 1951 is the Foundation of International Refugee Law and it is the most comprehensive codification of the rights of refugees at the International level. The Protocol Relating to the Status of Refugees, 1967 further codified and protected the rights of the refugees at the International Level. India is a country which does not discriminate between refugees on the basis of race, political affiliation or religion. The Indian Courts widely interprets the provisions of International Instruments such as Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, the Convention on Elimination of All Forms of Discrimination against Women etc., into the provisions of Articles 14, 21 and 25 of the Constitution. The endeavor of Indian Courts to protect the right of refugees is commendable. But, there is an urgent need for a legal framework to provide for the protection, rehabilitation and repatriation of refugees. The decisions of the Indian Courts had minimized the rigours of the refugees, but for effective and permanent solution to the problems of refugees, legislation alone can lend a helping hand. In India, at present, there are nearly five lakh refugees and every day the inflow of refugee's increases. The provisions of the Foreigners Act provide for unfettered and unlimited powers to the Government to expel foreigners. In order to fulfill its Commitment to uphold the principles of International Human Rights, the Indian Government needs to enact a comprehensive National Refugee Law on the lines of International law and it is the need of the hour.

Key Words: Refugee, Foreigners, Protection, Rehabilitation, Repatriation.

1. Introduction

India is a traditional country known for welcoming refugees from all over the world. Ancient India is well known for welcome of refugees with open arm and their honour and dignity in our society. The history of Refugees is five thousand years old in India. India is not a signatory to the United Nations Convention Relating to the Status of Refugees, 1951 and the Protocol Relating to the status of Refugees 1967. The Legal Regime relating to the Refugee Protection in India includes: the Constitution of India, 1950, the Foreigners Act, 1956, Registration of Foreigners Act, 1939, the Foreigners Order, 1948 and the Indian Citizenship Act, 2003. India has no legal framework for determining Refugee status. India being a leader in South Asia plays an important role in the treatment of refugees and it shelters one of the largest refugee populations in the world. The Indian Judiciary evolved a wider and humane

approach in dealing with the matters of refugees and gave a liberal interpretation in various cases. The need of the hour is for a stable and secure guarantee of refugee protection in India. The UN Convention relating to the Status of Refugees, 1951 is the Foundation of International Refugee Law and it is the most comprehensive codification of the rights of refugees at the International level. The Protocol Relating to the Status of Refugees, 1967 further codified and protected the rights of the refugees at the International Level. India is a country which does not discriminate between refugees on the basis of race, political affiliation or religion. The Indian Courts widely interpret the provisions of International Instruments such as Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, the Convention on Elimination of All Forms of Discrimination against Women etc., into the provisions of

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Articles 14, 21 and 25 of the Constitution of India. The endeavour of Indian Courts to protect the right of refugees is commendable. But, there is an urgent need for a legal framework to provide for the protection, rehabilitation and repatriation of refugees. The decisions of the Indian Courts had minimized the rigours of the refugees, but for effective and permanent solution to the problems of refugees, legislation alone can lend a helping hand. In India, at present, there are nearly five lakhs refugees and every day the inflow of refugees is increasing. The provisions of the Foreigners Act provide for unfettered and unlimited powers to the Government to expel foreigners. In order to fulfill its commitment to uphold the principles of International Human Rights, the Indian Government needs to enact a comprehensive National Refugee Law on the lines of International Law and it is the need of the hour. This paper discusses in detail the existing International Instruments on Refugee Law, Indian Laws on Refugees, Judicial Initiatives towards Protection of Refugees and the need for a comprehensive National Refugee Law.

2. Definition of Refugee

The term refugee is defined under Article 1 (A) 2 of the International Convention Relating to the Status of Refugees, 1951 as "the term Refugee shall apply to any person who:.. "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." A Refugee is a person who flees for shelter to another country or has left his home land or place of residence due to unavoidable and oppressive circumstances and not prepared to go back to his original place. Sometimes a refugee is also called Saranartha who takes shelter in another country as a fugitive¹. Refugees are defined by three basic characteristics:

- they are outside their country of origin or outside the country of their former habitual residence,
- they are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted, and
- the persecution feared is based on at least one of five grounds: race, religion, nationality, membership of a particular social group, or political opinion².

In Oxford Dictionary, refugee is defined as a "A person who has been forced to leave his country in order to escape war, persecution, or natural disaster."

West's Encyclopedia of American Law defines refugees as Individuals who leave their native country for social, political, or religious reasons, or who are forced to leave as a result of any type of disaster, including war, political upheaval, and famine.

In Black's Law Dictionary, refugee is defined as "any person who owing to well founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country."

In Cambridge Advanced Learners Dictionary & Thesaurus defines refugee as "a person who has escaped from their own country for political, religious, or economic reasons or because of a war." In Free Dictionary, refugee is defined as "One who flees in search of refuge, as in times of war, political oppression, or religious persecution". In the Macmillan Dictionary, refugee is defined as "someone who leaves his country, especially during a war or other threatening event."

In Oxford English Dictionary Online, refugee is defined as a person who is outside his home country because he has suffered (or feared) persecution on account of race, religion, nationality, political opinion, or because he is a member of a persecuted social category of persons or because he is fleeing a war. Such a person may be called an 'asylum seeker' until recognized by the state where he makes a claim.

The definition of refugee was further expended by the Convention's 1967 Protocol and by Regional Convention in Africa and Latin America to include persons who had feared war or other violence in their home country³. In short, refugees mean persons who are internally displaced and war – affected populations, asylum seekers, stateless people and others whose nationality are disputed and displaced people who have not been able to go back to their homes.

3. International Instruments on Refugee Protection

The right to seek refuge has been incorporated in the Universal Declaration of Human Rights, 1948. Article 14 (1) of UDHR states that everyone has the right to seek and

¹ Prafulla Kumar Nayak, Protection of Refugees : A Humanitarian Crisis in India, Voice of Research, Vol. 2 Issue 3, December 2013, p.95.

² Rule of Law in Armed Conflicts Project RULAC International Refugee Law Untitled Document, <http://www.geneva-academy.ch/RULAC/>. Last visited on April 25, 2015

³ Wikipedia on Refugee, http://en.wikipedia.org/wiki/Refugee#cite_note-1 Last visited on April 25, 2015

to enjoy in other countries, asylum from persecution. The Convention Relating to the Status of Refugees, 1951 is the basic International Document on Refugee Law. It consolidated various International Instruments relating to refugees and provided the most comprehensive codification of the rights of refugees at the International level⁴. The 1951 Convention guaranteed various rights for refugees under Articles 14 to 16. Article 14 deals with artistic rights and industrial property. Article 15 deals with rights of association and Article 16 deals about access to courts and legal assistance. The Protocol Relating to Status of Refugees, 1967 is independent and integrally related to the 1951 Convention. The main features of the Protocol, 1967 are: (i) the basic refugee definition (ii) the legal status of refugees, and (iii) States' obligations.

The OAU Convention Governing the Specific Aspects Refugee Problems in Africa, 1969 is a Regional Refugee Law framed to deal with region specific problems of refugees in Africa. It provided for a well defined definition of refugee under Article 1. The Cartagena Declaration, 1984 is the gathering of Government representatives, and distinguished Latin American Jurists recommended for the inclusion of definition of refugee mentioned in the 1951 Refugee Convention, and also include persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order to be followed by Latin American Countries. The Declaration is not legally binding on States. But, has been endorsed by the Organisation of American States, the UN General Assembly and UNHCR's Advisory Executive Committee. The Asian African Legal Consultative Committee Principles, 1996 concerning the treatment of refugees were adopted in Bangkok. The office of United Nations High Commissioner for Refugees (UNHCR) was established in 1950 by the UN General Assembly through Adoption of UNHCR statute. The aim of the agency is to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well beings of refugees. The UNHCR encouraged the states to take part in the 1951 Refugee Convention. It also emphasized the states to enact National Refugees Law. It provided expert advice, analysis and command and draft laws.

4. Indian Legal Regime on Refugees

India is not a party to the 1951 Refugee Convention or its 1967 Protocol nor does it have a national refugee protection framework. India hosts a large number of refugees and continues to grant asylum from neighbouring states. India's legal obligation to protect

refugees can be traced mainly in customary international law. India ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR). India also voted to adopt the UN Declaration of Territorial Asylum, 1967. In 1995, India became a member of Executive Committee of the High Commissioner's Programme (EXCOM). India adopted the principle of Non-refoulement which was envisaged in the 1966 Bangkok principles.

The legal regime of Indian Refugee Laws include the Foreigner's Act, 1946, the Emigration Act, 1983, the Passport Act, 1967, the Indian Constitution Act, 1950, the Registration of Foreigners Act, 1939, the Foreigners Order, 1948 and the Indian Citizenship Act, 2003. Earlier there were a number of ad hoc legislation passed by the Government for refugees, evacuees and displaced persons. They are East Punjab Evacuees (Administration of Property) Act, 1947, UP Land Acquisition (Rehabilitation of Refugees) Act, 1948, the East Punjab Refugees (Registration of Land Claims) Act, 1948, the Mysore Administration of Evacuee Property (Emergency) Act, 1949, the Mysore Administration of Evacuee Property (Second Emergency) Act, 1949, the Immigrants (Expulsion from Assam) Act, 1950, the Administration of Evacuee Property Act, 1950, the Evacuee Interest (Separation) Act, 1951, the Displaced Persons (Debts Adjustment) Act, 1951, the Influx from Pakistan (Control) Repelling Act, 1952, the Displaced Persons (Claims) Supplementary Act, 1954 and the Refugee Relief Taxes (Abolition) Act, 1973. Refugees entering India are also subjected to the provisions of the Indian Penal Code, 1860, the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973. Refugees are treated and tried in the same manner as ordinary Indian citizen in criminal cases.

The Constitution of India under Part III provides for Fundamental Rights for refugees also. Articles 14, 20 and 21 of the Indian Constitutions are equally applicable to refugees on Indian soil in the same way as applicable to Indian citizens. The Right to life and personal liberty guaranteed under Article 21 of the Indian Constitution is applicable to all irrespective of the status whether they are citizens or aliens. Right to equality under Article 14, right to life and personal liberty under Article 21, right to protection under arbitrary arrest under Article 22, right to protection in respect of conviction of offences under Article 20, freedom of religion under Article 25 and right to approach Supreme Court for enforcement of Fundamental Rights under Article 32 are available to refugees in India. Indian Constitution guarantees the refugees to live with human dignity. Right against solitary confinement, right against custodial violence and right to

⁴ Sofiabambri, Home Sweet Home: A Review of International Refugee Law, <http://www.sofia.com>, p.4 Last visited on April 27, 2015

medical assistance and shelter are also guaranteed.

The Protection of Human Rights Act, 1993 provides for the establishment of National Human Rights Commission. The National Human Rights Commission plays an active role in protecting human rights of refugees. The National Human Rights Commission knocked the doors of the apex court seeking justice for Chakma refugees in *National Human Rights Commission vs. State of Arunachal Pradesh and others*⁵. The Supreme Court in that case directed the State of Arunachal Pradesh to protect and safeguard the life, health and well being of Chakmas. It also held that Chakmas cannot be sent back to Bangladesh and directed the Union and State Governments to respect International Treaties on Humanitarian Law.

Though plethora of legislations exist in India which deal with refugee problem, there is no comprehensive refugee law for granting statutory protection to refugees and the need of the hour is a comprehensive refugee law guaranteeing status, rights and fair treatment to refugees.

5. Judicial Activism towards Protection of Refugees

Courts in India adopted a liberal approach in taking into account the International Covenants while interpreting the statute law. The role played by the Indian Judiciary in the matters of refugees has minimized their rigours. The Indian Judiciary has ruled in favour of harmonious construction of International and Domestic Law when it is consistent with the fundamental rights. The Indian Judiciary through progressive judicial interpretation extended the scope and ambit of Articles 14 and 21 of the Indian Constitution to non citizens including refugees. In *National Human Rights Commission vs. Arunachal Pradesh and another*,⁶ the Supreme Court held that the State was under a Constitutional obligation to protect refugees. It was a Public Interest Litigation filed by the National Human Rights Commission seeking to enforce the rights of Chakmas under Article 21 of the Constitution. The Chakmas settled in Arunachal Pradesh complained that there was threat to the life of Chakmas and steps were taken to expel the Chakmas from the State of Arunachal Pradesh. Complaints were sent to National Human Rights Commission from various quarters of Chakmas. The National Human Rights Commission decided to approach the Supreme Court to seek appropriate reliefs for the protection of Chakmas. On 02.11.1995, the Supreme Court issued an interim order directing the State of

Arunachal Pradesh to ensure that the Chakmas situated in territory are not ousted by any coercive action. After full hearing, the Supreme Court held that "We are a country governed by the Rule of Law. Our Constitution confers rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well-being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, Constitutional and statutory, to be considered for being registered as citizens of India". The Supreme Court further directed the State of Arunachal Pradesh to ensure the life and personal liberty of each and every Chakma residing within the State shall be protected. Any attempt to forcibly evict or drive them out of the State shall be repelled. The Court further directed the Union of India to provide additional force to protect the lives and liberty of the Chakmas and they shall not be evicted from their homes and shall not be denied domestic life and comfort. The Court also directed for registration of Chakmas as citizens of India under section 5 of the Citizenship Act. It is a landmark judgment of the Supreme Court which paved the way for protection of refugees in Indian jurisprudence. The Supreme Court in *Louis De Raedt vs. Union of India*⁷ and *State of Arunachal Pradesh vs. Khudiram Chakmas*⁸ held that foreigners are entitled to the protection of Article 21 of the Constitution. In *Gurunathan and others vs. Government of India*⁹, the Madras High Court expressed its unwillingness to let any Sri Lankan Refugees to be forced to return Sri Lanka against their will. The same was reiterated by the *Madras High Court in A.C.Mohamed Siddique vs. Government of India and others*¹⁰. In *Syed Ata Mohammadi vs. Union of India*¹¹, the Bombay High Court held that there is no

⁵ (1996) 1 SCC 742

⁶ AIR 1996 SC 1234

⁷ (1991) 3 SCC 554

⁸ (1994) Supp. (1) SCC 615

⁹ WP Nos. 6708 and 7916 of 1992, Madras High Court

¹⁰ 1998 (47) DRJ (DB) p. 74

¹¹ WP No. 7504/1994, Bombay High Court

question of deporting the Iranian Refugee to Iran, since he has been recognized as a refugee by the UNHCR. The Court further permitted the refugee to travel to whichever country he desired. In *Malavika vs. Union of India*¹², *Maiwand's Trust of Afghan Human Freedom vs. State of Punjab*¹³ and *N.D. Pancholi vs. State of Punjab and Others*¹⁴, the Supreme Court of India stayed deportation of refugees. In *Revs.Mons Sebastiao Francisco Xavier dos Remedios Monterio vs. State of Goa*¹⁵, the Supreme Court examined the scope of Geneva Convention Act, 1960, and observed the efficiency of the Act. A careful analysis of the above judgments of the Superior Courts will go to show the tendency of the Indian Judiciary in extending the helping hands for the refugees by liberally interpreting various provisions of the Constitution.

6. Conclusion and Suggestions

India is not a signatory of the 1951 Convention on Refugees or the 1967 Protocol on Refugees. But, it is a signatory to Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, the International Covenant on International Convention on Economic, Social and Cultural Rights (ICESCR), UN Declaration of Territorial Asylum, 1967, the International Convention on the Elimination of All Forms of Racial Discrimination, 1966, and the Convention for Elimination All Forms of Discrimination Against Women, 1980. India has a wide range of legislations dealing indirectly with refugees but there is no comprehensive National Refugee Law. A comprehensive National Refugee Law is the need of the hour. Earlier attempts have been made to enact National Refugee Law but ended in vain. The foremost requirement is a legislation making provisions for the protection of the refugees. The Eminent Persons Group chaired by Justice P.N. Bhagwati suggested a model law for refugee protection but, could not end in practice.

The National Refugee Law should make provisions for the following:

- Definition of "Refugee" should be broadened inclusive of victims of economic, social and cultural rights violations ahead of sufferers of political and civil rights violation.
- A refugee shall be excluded from his status if he is convicted for a crime against peace, a war crime or a crime against humanity.
- The principles relating to refugees in International Law should be incorporated in the Indian Refugee Law.

- The principle of non-refoulement must find a prominent place in the National Refugee Law. Non-Refoulement must be a right given to the refugee, subject to threat to national security, sovereignty and integrity of the nation.
- Special provisions for women and children refugees should be provided.
- Right to employment, right to free access of Courts, rights of association, right of public assistance, right to elementary education, right to public health, right to shelter, right to protection, right against arbitrary arrest, right to personal liberty, right to life shall be guaranteed in the national refugee law.
- There must be a provision for supply of essential commodities for refugees under Public Distribution System.
- The committee for determining the status of refugee shall be provided in the new statute headed by a retired judge of the Supreme Court. The refugees shall have a right of appearance before the refugee committee either personally or by a pleader.
- Right to free legal aid for all refugees must be provided in the new enactment.
- There must be a provision that no refugee shall be expelled to a place where his life or freedom will be threatened.
- National Refugee Rights Commission on the lines of National Human Rights Commission must be established to protect the rights of the refugees.
- Right of acquisition of movable and immovable properties must be provided to the refugees.
- Right to move freely throughout the territory of India subject to certain exceptions must be provided for the refugees.
- A judicious, fair and proper procedure must be followed in determining the status of refugees.
- Refugees are to be treated only on humanitarian grounds and not on any political considerations.
- All refugees shall have the right to complete freedom to practice their own religion.
- Refugees should not be discriminated on the basis of race, political affiliation and religion.

India receives lakhs of refugees from neighbouring countries every year and will continue to receive more in the near future. In South Asia, India is the only country to have stable democracy and vibrant economy and a country with a human face and hence it is a welcome point for all refugees in South Asia. So, a National Refugee Law for dealing with the refugees is the need of the hour.

¹² Cri.WP.No. 243/1988, Supreme Court of India

¹³ Cri.WP.No. 125 & 126/1986, Supreme Court of India

¹⁴ WP(Civil) No. 1294/1987, Supreme Court of India

¹⁵ AIR 1970 SC 329

Residential Status and Taxability under the Indian Income Tax Act, 1961

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ABSTRACT

Collection of tax is indeed an inevitable need of the government of any country. A country can only survive when it has sufficient and powerful sources of income and tax is considered as one of the major and essential sources of Income. In India, Government (both Central as well as States) imposes number of taxes which are categorically divided as direct and indirect Taxes. In this research article, the authors have covered only the aspect of direct tax focusing on Income Tax Act, 1961. The purpose of this article is to understand the proposition of residential status which play a significant role in determining the tax liability of a person including company and HUF. The authors will initiate the discussion by showing the importance of residence and residential status as a factor to determine the tax liability of a person. Subsequently the authors move on to determine how residential status is calculated as per Section 6 of the Income Tax Act, 1961 so as to impose or not to impose tax liability on different persons such as Individual, Company, HUF, a firm, Association of Persons and other persons. The paper will also explore the 'control and management' test as per section 6 of the Income Tax Act, 1961 so as to determine the tax liability of a person.

Key Words: Residential status, Control and management, Hindu undivided family, Company, Not ordinary resident.

1. Introduction

The determination of the residential status of a person is essential in order to determine his tax liability. This is an important factor to be determined as to know whether the income of the person accrued to him outside India is taxable or not in India as it depends on his residential status in India. It also helps in determining when the income of the foreign national earned in or outside India is taxable or not as it depends upon his residential status rather his citizenship. The expression 'residence' is an ambiguous word and different meanings may be attributed to this expression according to the position in which it is found.¹

In *Re Calcutta Stock Exchange Association Ltd.*,² the learned judge observed the word 'residence' in its simple and ordinary meaning as the place where a human being eats, drinks and sleeps or where his family and servants eat, drink and sleep and where there is permanence of such activities being followed. Residence indicates a personal quality and it is not descriptive of a person's property.³ A person may be a resident in one year and a non-resident in the next.⁴ There has been an introduction of a uniform

previous year for all the assesseees and all sources. A person resident in a previous year relevant to an assessment year in respect of any source of income, he shall be deemed to be resident in India in respect of each of his other sources of income in the previous year relevant to the same assessment year.⁵ The importance of determining the residential status of an assessee is essential for income tax purposes because it is important to be sure that the person being assessed belongs to that particular category only and should not be able to evade paying taxes at any cost. Most importantly, tax burden on an assessee depends on his residential status itself.

2. Residential Status of a Person and its Tax Implications

The residential status of an assessee is to be determined in each previous year i.e. the accounting year⁶ as it might vary each year. Essential is his status during the 'previous year' and not during the assessment year.⁷ There are two types of taxpayers- resident in India and non-resident in India. It is to be always remembered that the Indian income is always taxable in India no matter whether the person earning it is an Indian resident or a non-resident. A foreign person's

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¹ Bowie, In re, Ex parte Breull (1880) 16 Ch D 848 (CA).

² See also Aishwarya Padmanabhan, Concept of "Residence" under Income Tax Act, 1961, available at <http://manupatra.com/roundup/367/Articles/Concept%20of%20Residence.pdf> (Last visited October 9, 2014).

³ CIT vs. Amarchand N Shroff, (1963) 48 ITR 59 (SC).

⁴ Kinlock vs. IRC, (1929) 14 TC 736.

⁵ The Income Tax Act, 1961 Sec. 6(5).

⁶ Wallace Bros & Co Ltd vs. CIT, (1945) 13 ITR 39, 44 (FC).

⁷ Rai Bahadur Seth Teomal vs. CIT, (1963) 48 ITR 170 (Cal).

income shall also be taxable in India provided the person is resident in India during the previous year. In *Rai Bahadur Seth Teomal vs. CIT*,⁸ it has been held that whether an assessee is a resident or a non-resident is a question of fact and it is the duty of the assessee to place all relevant facts before the income-tax authorities, thus the onus of proof lies on the assessee.

A person who is a resident in India for an assessment year can also become a resident in any other country for the same assessment year. A person cannot have two domiciles but for tax purposes he can be a resident in more than one country at the same time for tax purposes.⁹

Residential status: There are three kinds of residential status envisaged for an assessee under the Income Tax Act, 1961, which are as follows:¹⁰

- (a) Resident (also known as resident and ordinarily resident)
- (b) Non-resident or not resident
- (c) Resident but not ordinarily resident (a category of residential status) only applicable to individuals and Hindu undivided families.

Section 6 of the Income Tax Act, 1961 lays down the test of residence for the following taxable entities:

- (a) *An individual*
- (b) *A Hindu undivided family*
- (c) *A firm or other association of persons*
- (d) *A company*
- (e) *Every other person.*

2.1 Residential Status and Taxability of an Individual

An individual is said to be resident in India in any previous year if he¹¹

- (a) Is in India in that period for a period or periods amounting in all to one hundred and eighty-two days or more; or
- (b) Having within the four years preceding that year been in India for a period or periods amounting in all to

three hundred and sixty-five days or more, and is in India for a period or periods amounting in all to sixty days or more in that year.

The two *special cases* when only the first 6 (a) condition needs to be fulfilled are:¹²

Special case one- it covers an Indian citizen who leaves India during the previous year for the purpose of employment outside India or an Indian citizen who leaves India during the previous year as a member of the crew of an Indian ship.¹³ The individual need not be an unemployed person.¹⁴ The individual may be employed in India and leave India during the previous year on a foreign assignment of his employer company.

Special case two- it covers an Indian citizen or a person of Indian origin who comes on a visit to India during the previous year.

Now for the above two mentioned special cases, an individual shall be resident in India only if he is in India during the relevant previous year for at least 182 days.

The *first test* is applicable with regard to stay in India for 182 days or more- the prescribed period may not be a continuous one.¹⁵ If an individual stays in India on an aggregate for 182 days is enough to determine his residential status for the purpose of determining his tax liability in India.¹⁶ A part of the day spent shall be considered as full day, so that both the dates of entry into India and exit from India shall be considered for ascertaining 182 days.¹⁷

The onus is on the assessee to establish as to whether he stayed or not in India for a total period of 182 days or more depending upon whether the assessee wishes his income tax to be assessed with his status as a resident, or a non-resident or not ordinarily resident in the previous year.¹⁸ It is not necessary that the stay must have been in connection with the purpose of earning income for the purpose of taxation. The intention and the purpose of stay are not relevant. Even a stay consequent on detention against one's will can be taken into account.¹⁹ 'Domicile' is different from residence. In law, a person may be a resident of more than one place, though he cannot have domicile of more than two places simultaneously.

⁸ Id.

⁹ Id.

¹⁰ The Income Tax Act, 1961 Sec. 6.

¹¹ The Income Tax Act, 1961 Sec. 6(1).

¹² Sampathlyengar, Law of Income Tax 1386 Vol. 1 (New Delhi Bharat Law House, 11thedn., 2011).

¹³ In re, British Gas India (P)Ltd., [2006] 155 Taxmann 326.

¹⁴ Id.

¹⁵ Supra note 11.

¹⁶ Vispi T Patel, "How Expatriates are Taxed in India" 15 International Tax Review 42 (2003-04).

¹⁷ Id.

¹⁸ Wilkie vs. IRC, (1951) 32 TC 395.

¹⁹ In re, Mackenzie, (1941) Ch 69.

The second test is with regard to Stay in four preceding years- this test is for the physical presence of an individual for a minimum aggregate period of 365 days during the four years preceding the previous year coupled with a physical presence for not less than sixty days during the previous year.²⁰ The four years preceding the accounting year are not the British calendar years as defined in the General Clauses Act, 1897 but the four consecutive accounting years of the assessee immediately preceding the commencement of the relevant accounting year, without any gap in between each of such years being taken as a period of any twelve calendar months and not necessarily the calendar year (i.e. 1st January- 31st December).²¹

The nature, quality or purpose of the 365 days' stay in the four years preceding the previous year is of no relevance. Similarly the purpose or the object of the visit to India during the previous year in question is also not relevant. The individual may come for business purpose²² or to obtain medical advice²³ or to meet his relatives or to take part in religious observances²⁴ or may be to make arrangements for the purposes of education for his children.²⁵ The individual may also visit India just for pleasure, the country being just merely on the itinerary during his usual travels.²⁶

In *Syed Abdul Cader (AMM) vs. CIT*,²⁷ it has been held that reasons which may compel a visitor to leave his country with a view to seeking refuge in India (the reasons may be beyond his control) have also likewise, no relevance. In this particular case, the assessee fearing Japanese invasion, left Ceylon where he had permanently settled. He lived with his father in India for the duration from 1st January, 1942- 1st July, 1942. The assessee's visit could not have been said to make a casual or occasional visit.

Resident but not ordinarily resident

A person is said to be "not ordinarily resident" in India in any previous year if such person is an individual who has been a non-resident in India in nine out of ten previous

years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to seven hundred and twenty-nine days or less.²⁸

For an individual to be treated as an 'ordinarily resident' in India in any previous year, he must not come within the mischief of either of the two conditions mentioned above.²⁹ If the individual's status turns out to be of a 'resident' then it is to the assessee individual to prove that he is 'not ordinarily resident'. On proof of his fulfilling either of the two tests mentioned above he can avail the advantages of not ordinarily resident.³⁰ From his total income all the foreign income except such income which arises from a (foreign) business controlled in India or a (foreign) profession set up in India shall be excluded, which advantage he shall lose if he is assessed as 'ordinarily resident'.³¹

2.2 Residential Status and Taxability of a Company

A company is said to be resident in India in any previous year, if-

- (i) it is an Indian Company; or
- (ii) during that year, the control and management of its affairs is situated wholly in India.³²

A company is said to 'reside' within the meaning of the word 'reside' as used in the Income Tax Act and other statutes also. It is said to reside for purposes of income-tax where its real business is carried on.³³ An Indian company is always resident in India. A foreign company is resident in India only if, during the previous year, control and management of its affairs is situated wholly in India.³⁴ Thus a foreign company is treated as non-resident if, during the previous year, control and management of its affairs is either wholly or partly situated outside India.³⁵

A company shall be regarded as an Indian company if (i) the company is formed and registered under any law

²⁰ Supra note 11.

²¹ CIT vs. Savumiamurthy, (1946) 14 ITR 185 (Mad).

²² Lysaght vs. IRC, 13 TC 511 (HL).

²³ ShamnathMushran vs. CIT, (1950) 18 ITR 840 (All)

²⁴ Levene vs. IRC, 13 TC 486, 496 (HL).

²⁵ Kinloch vs. IRC, (1929) 14 TC 736.

²⁶ IRC vs. Zorab, 11 TC 289.

²⁷ A.M.M. Sayed Abdul Cader vs. CIT, (1950) 18 ITR 310 (Mad).

²⁸ The Income Tax Act, 1961 Sec. 6(6).

²⁹ Townsend (CN) vs. CIT, (1974) 97 ITR 185 (Pat).

³⁰ Supra note 12.

³¹ Supra note 12.

³² The Income Tax Act, 1961 Sec. 6(3).

³³ Calcutta Jute Mills Co.Ltd. vs. Nicholson, (1876) 1 TC 83 (Ex D).

³⁴ M.K. Pithisaria and MukeshPithisaria, Chaturvedi&Pithisaria's Landmark Judgments on Income Tax 188 Vol. 1 (Lexis Nexis, 2014).

³⁵ Id.

relating to companies which was or is in force in any part of India, and (ii) if the registered office of the company is in India.

A company shall be regarded as a resident in India, if its affairs are managed and controlled wholly from within India.³⁶ The expression 'control and management' means de facto control and management and not merely the right or power to control and manage.

The term "control and management" refers to head and brain which directs the affairs of policy, finance, disposal of profits and vital things concerning the management of a company. Control is not necessarily situated in the country in which the company is registered. Under the tax laws a company may have more than one residence.³⁷ The mere fact of a company being resident in a foreign country does not necessarily displace its residence in India.³⁸

In *Vodafone International Holdings B.V. vs. Union of India*,³⁹ it has been seen that a mere fact that a parent company exercises shareholders' influence on its subsidiaries does not generally imply that subsidiaries are to be deemed as residents of the State in which the parent company resides. The Board of Directors- usually control and manage the affairs of company at the place where meetings of board of directors are held. In *Narottam & Pereira Ltd. vs. CIT*,⁴⁰ it has been held that the control and management is central control and management, and not carrying on of day to day business by servants, employees or agents. Control and management is situated where the central management and control actually exists i.e. where the supreme command over the company's affairs rests. The word 'affairs' means affairs which are relevant for the purposes of the Income Tax Act, 1961 and which have some relation to the income sought to be assessed.⁴¹

'Control' does not mean a shareholding control and so he has no advantage where he himself or by his nominees holding practically all the shares in a company may exercise it in the sense that he may by exercising his voting powers, turn out the directors and enforce his own views as to policy because such shareholding control will not in any way diminish the rights or powers of the directors or make

the assets of the company his individual's, as distinct from the company's.⁴²

Possibility of Dual Residence

A company can have a dual residence.⁴³ According to the Income Tax Act, a situation where it is found that there is division in the central control and management between India and another country, the company shall have to be considered as non-resident, since the Income Tax Act, 1961, demands that the status of residence of a company requires management and control of its affairs wholly in India.⁴⁴ Even a partial control of the company outside India is sufficient to hold a foreign company as a non-resident.⁴⁵

A company may be a 'resident' in India in a year and in the other year a 'non-resident.' The status of the company may also change during the course of the previous year itself.⁴⁶

Foreign company in liquidation

Under the provisions of the Companies Act, 1956, foreign companies are treated as unregistered companies for the purpose of winding-up. Upon winding-up of a foreign company, the board of directors cease to exist and the control and management vests with the official liquidator.⁴⁷

Where the foreign company went into liquidation and the company had income from interest and rent in India and the affairs relating to the earning of such income were being controlled and managed in India by the official liquidator, it was held that the assessee - company in liquidation must be deemed to be resident in the country.⁴⁸

2.3 Residential Status and Taxability of a Hindu Undivided Family and a Firm or Other Association of Persons

In India, one of the unique features of Hindu religion which has been continuing from time immortal is the concept of joint family or Hindu Undivided Family (hereinafter called as 'HUF') where all the members of a family like grandfather, fathers, all mothers, brothers, sisters their respective spouses live together and share a single roof.⁴⁹ In recent times, the HUF has emerged as a new way of

³⁶ *Bhimji R Naik vs. CIT*, (1946) 14 ITR 334 (Bom).

³⁷ *Unit Construction Co. Ltd. vs. Bullock*, (1961) 42 ITR 340 (HL).

³⁸ B.B. Lal, *Income Tax 2.6* (Pearson India, 2010).

³⁹ *Vodafone International Holding B.V.S. vs. Union of India*, [2012] 204 Taxmann 408 SC: (2012) 6 SCC 613.

⁴⁰ *Narottam & Pereira Ltd. vs. CIT*, (1953) 23 ITR 454 (Bom).

⁴¹ *CIT vs. Bank of China*, (1985) 154 ITR 617 (Cal).

⁴² *Supra* note 12 at 1386..

⁴³ *Mitchel vs. Egyptian Hotels Ltd.*, (1951) 6 TC 542.

⁴⁴ The Income Tax Act, 1961 Sec. 6(3) (ii).

⁴⁵ *Radha Rani Holdings (P) Ltd. vs. DIT*, [2007] 16 SOT 495 (Del).

⁴⁶ *Id.*

⁴⁷ Kaushal Kumar Agrawal, *Insight into Income Tax 32* (Atlantic Publishers, 9thedn. 2007).

⁴⁸ *CIT vs. Bank of China*, (1985) 154 ITR 617 (Cal); See also HarGovind, "India: Taxation of Multinational Companies" 14 (6) *International Tax Review* 149-150 (1986).

⁴⁹ Jyoti Dialani, *Hindu Undivided Family: Tool for Tax Planning for Non-resident Indians*, 4 *Legal views* 1 available at <http://www.singhania.com/Publication/HUF.pdf> (Last visited October 11, 2014).

escaping from the tax liability. As per the Indian Incomes Tax law, the income of the HUF will be taxed and not the individual's income.⁵⁰ This gives more benefit and advantage, in monetary form, to the HUF because the tax on the HUF's income and property will be much less than that of individual's incomes and property.

Section 6 (2) of the Income Tax Act, 1961 contemplates the residential status of the HUF, firm or other association. This section provides that HUF, firm or other association

will be considered as a resident in India if the '*control and management*' of the affairs of such entities are wholly or partly situated in India.⁵¹ If the control and management of the affairs of HUF are situated wholly outside, it will be considered as non-resident in India.⁵² The Table 1 presents the different criteria about control or management of affairs and residential status of HUF, firm or other association.

Table 1 : Residential Status of HUF, firm or other Associations according to control or management of affairs

Control or Management of Affairs	Residential Status of HUF, firm or other Associations
Wholly in India	Resident
Partly in India and Partly Outside India	Resident
Wholly Outside India	Non-Resident

Under section 6 (2) of Income Tax Act 1961, the phrase 'is said to be resident... in every case except where...' has the effect of ascribing to these classes of assessee a very definite status of resident; the resident status, so to speak has been made a standard status for these group of assessee.⁵³ Thus, if an assessee, falling under any of the three categories enumerated above, desires to get out of this status, it is up to it to prove that, during the previous year in question, the control and management of its affairs was situated wholly outside India.⁵⁴ Control and management can be exercised only by or through a human agency and if no individual concerned in or with the management or control of the business came to India during the previous year, obviously, the control and management should have been exclusively outside India, from whichever place abroad it was exercised.⁵⁵

Test of Control and Management

For the purpose of taxation, it is required to show that a particular HUF, firm or other association of person are resident of India. For that reason one has to prove that the affairs of such HUF, firm or association of person are controlled and managed in India. The control and management of a business remains in the hand of a person or a group of persons, and the question to be

asked is wherefrom the person or group of persons control or directs business.⁵⁶ The courts in India have given wider meaning to the term control and management. The courts have adopted the meaning of control and management from usage prevalent in the commercial laws and practices. The courts have stated that the expression 'control and management' signifies controlling and directive power, 'the head and brain' as it is sometimes called.⁵⁷ The 'head' and 'brain' would mean that the person who is looking after the affairs of such entities is situated from where he/she can take decisions relating to the policies of the institution like expansion of its business or looking for new ventures, raising finances and their utilisation for appropriate purpose etc.⁵⁸ Such decision can be taken by the karta in case of HUF, senior partner(s) in case of a firm and in case of an association of persons, the principal officer.⁵⁹ If these people are outside India and they are taking decision from that place, it would obviously mean that the control and management is outside India.⁶⁰ This does not mean that if any of the persons viz Karta, Senior partner(s) or Principal Officer is in India during the previous year, ipso facto the control and management of affairs ceases to be outside India.⁶¹ Hence the control and management is situated at a place where the head, seat and directing mind and power are placed.⁶²

⁵⁰ Danish Sheikh and Raadhika Gupta, "Gendering Tax" 4 (2) NUJS Law Review 253 (2011).

⁵¹ The Income Tax Act, 1961 Sec. 6 (2).

⁵² Dhirajlal Haridas vs. CIT, (1982) 138 ITR 570 (Bom).

⁵³ Supra note 12 at 1376.

⁵⁴ Id.

⁵⁵ Narasimha Rao Bahadur vs. CIT, (1950) 18 ITR 181 (Mad).

⁵⁶ VS. VR. N. M. Subbaya Chettiar vs. CIT, (1951) 19 ITR 168 (SC).

⁵⁷ B.R. Naik vs. CIT, (1945) 13 ITR 124 (Bom).

⁵⁸ San Paulo (Brazilian) Railway Co Ltd vs. Carter, (1896) AC 31.

⁵⁹ Sampathyengar, Law of Income Tax 1386 Vol. 1 (New Delhi Bharat Law House, 11th edn., 2011).

⁶⁰ Dr. Vinod Singhania and Kapil Singhania, Direct Tax: Law and Practice 46 (Taxmann, 51st edn. 2013).

⁶¹ Supra note 12 at 1386.

⁶² Supra note 12 at 1386.

Defacto Control

The test of control and management is sine quo non for the purpose of determining the residential status of HUF, a firm and association of persons. The major issue which is raised before the court of law, many times, is that whether the word control mentioned under section 6 (2) of Income Tax Act, 1961 is de facto control or it also includes de jure control? The Hon'ble Supreme Court as well as Hon'ble High Courts have clarified in many judgements that the control provided under section 6 (2) of the Income Tax Act should be given liberal interpretation but not in terms of theoretical aspects but practical one.⁶³ The control and management mentioned under section 6 (2) of Income Tax Act is not the theoretical control or power which exists in the karta or senior partner of a firm or the principal officer of association of persons, but a de facto control and management actually exercised in the course of the conduct and management of the affairs of the family or the firm or the association of persons.⁶⁴ The Supreme Court has held that control of a business does not necessarily mean the carrying on of the business, and therefore, the place where trading activities or physical operations are carried on is not necessarily the place of control and management.⁶⁵ Furthermore, it is settled, that the expression 'control and management' means de facto control and management and not merely the right or power to control and manage.⁶⁶

The Hon'ble Supreme Court has established certain propositions with respect to residential status of Hindu Undivided family;⁶⁷

- Normally a HUF is presumed to be resident in India unless the assessee proves that the control and management of its affairs is situated wholly outside India. The 'control and management' specifies the controlling and directive power whereas 'situated' specifies the functioning of such power at a particular place with some degree of performance.
- The expression mentioned under section 6 (2) implies the affairs which are relevant for the purpose of Income Tax Act, 1961 and which have some relation to the income sought to be assessed.

- The seat of control and management of the affairs of the family may be divided, and if so, the family may have more than one residence.
- If the seat of management and control is abroad, it would need much more than bare activities in India to support a finding that the seat of management and control had shifted or that a second centre for such management and control had been started in India.⁶⁸
- Occasional visit of non-resident Karta of HUF to the place where the family business is carried on in India, or casual directions given in respect of the business while on such visits, would be insufficient to make the family resident in India.⁶⁹

The Courts of India has specified that even though the Karta of a HUF or senior partners of a firm or principal officer of Association of persons is absent from India for long time in a year does not by itself lead to the conclusion that such entities are non-resident in that year because the business of such entities during that time was controlled and managed by some other persons.⁷⁰

Section 6 (6) (b) provides specific provision for 'not ordinary resident' in case of HUF. If the manager of HUF is not ordinary resident then the HUF will be considered as 'not ordinary resident.'⁷¹

- If he has been resident in India in at least 2 out of 10 previous years immediately preceding the relevant previous year.
- If he has been in India for a period of 730 days or more during the seven years immediately preceding the relevant previous year.

The Courts in India have interpreted the meaning of word 'wholly' mentioned under section 6 (2) of Income Tax Act and suggested that there might be a situation when the control and management of a HUF, firm or association of persons is both from India and outside India simultaneously. In such a scenario, the courts have held that it is purposeless to enquire into the extent and control in either place, for, anyhow, the affairs of the assessee will not be 'controlled and managed wholly from outside India.'⁷²

⁶³ CIT vs. ChitraPalayakat Co., (1985) 156 ITR 730 (Mad).

⁶⁴ B.R. Naik vs. CIT, (1945) 13 ITR 124 (Bom).

⁶⁵ Erin Estate vs. CIT, (1958) 34 ITR 1 (SC).

⁶⁶ Id.

⁶⁷ SubbayyaChettiar vs. CIT, (1951) 19 ITR 168 (SC); See also Arvind P. Datar, Kanga &Palkhiwala's The Law and Practice of Income Tax 317 Vol. 1 (Lexis Nexis Publication, 10thedn. 2013).

⁶⁸ Id. The Supreme Court said that mere facts that family maintained dwelling house in India, that Karta stayed in India for 101 days in accounting year, that during this stay in India he attended to litigation with regard to family property and to proceedings connected with assessment of family and also commenced two partnership businesses, were held insufficient to justify finding that management and control was partially situate in India during relevant year.

⁶⁹ Narasimha Rao Bahadur vs. CIT, (1950) 18 ITR 181 (Mad).

⁷⁰ Annamalaivs. ITO, 34 ITR 88.

⁷¹ N. Hariharan, Income Tax: Law and Practices 2.7-2.9 (Tata-McGraw Hill Publications, 4thedn. 2008).

⁷² Subbayya Chettiar vs. CIT, (1951) 19 ITR 168 (SC).

The courts have given strict interpretation to the expression 'wholly' by removing the doubt that wholly would be read completely in light of control and management.⁷³ If the affairs of the entities which are mentioned under section 6 (2) of Income Tax Act 1961, are controlled and managed from wholly outside, then it will be non-resident. There should be absence of controlling and managing of affairs from India, and if the firm is controlled and managed from both in India and outside India, then the word 'wholly' will have no application and the entities would be considered as a resident in India.⁷⁴

2.4 Residential Status of Other Assesseees under Section 6 (4) and 6(5) of Income Tax Act, 1961

Section 6 (4) provides provision with respect to the residential status of the other class of assesseees. Section 6 (4) uses the expression 'person' which is defined under section 2 (31) of the Income Tax Act, 1961. The definition of 'person' is inclusive and it includes an individual, a HUF, a company, a firm, an association of persons or body of individuals, a local authority and every artificial juridical person. Hence section 6 (4) deals with the last three classes of assesseees viz, a body of individual, a local authority and an artificial juridical person.⁷⁵ The reading of section 6 (4) provides that the test of determining the

residential status of these three classes is the same as that is prescribed for HUF, a firm and associations of persons under section 6 (2) of the Income Tax Act, 1961.⁷⁶

A situation may arise when an assessee has different sources of income in different previous years how to determine his residential status.⁷⁷ Section 6 (5) of the Income Tax Act solves this issue.⁷⁸ Earlier, the position was that if an assessee had several sources of income outside India, he could escape tax in respect of one or more of those sources by claiming to be non-resident in respect of such source or sources on the principle that an assessee is entitled to have separate accounting periods of his choice in respect of each source of his income.⁷⁹

Section 6 (5) provides that there will be same residential status for all source of income the table 2 presents the nature of income and its effects on residential Status . If an assessee is resident in a previous relevant to any one source of income, he is to be treated as resident for all sources of income for that assessment year. In other words, to be non-resident, the assessee must be non-resident in each of the previous years in respect of all source of income.⁸⁰ The Table 2 presents all categories of residential status according to nature of income in relation to provision of Income tax Act, 1961 .

Table 2: Residential Status according to nature of Income in Relation to Section 6 (4) and 6 ((5)of Income Tax Act, 1961

Nature of Income	Residential Status		
	Ordinary Resident (ROR)	Not Ordinary Resident (RNOR)	Non Resident (NR)
Income accrued in India	Taxed	Taxed	Taxed
Income deemed to be accrued in India	Taxed	Taxed	Taxed
Income received in India	Taxed	Taxed	Taxed
Income deemed to be received in India	Taxed	Taxed	Taxed
Income other than above but from a business controlled from India	Taxed	Taxed	Not Taxed
Income other than above (i.e. Income which has no relation with India)	Taxed	Not Taxed	Not Taxed

⁷³ Id.

⁷⁴ ITO vs. Raza Textiles Ltd., (1977) 106 ITR 408 (All).

⁷⁵ Supra note 12.

⁷⁶ Supra note 12.

⁷⁷ Arvind P. Datar, Kanga & Palkhiwala's The Law and Practice of Income Tax 319 Vol. 1 (Lexis Nexis Publication, 10th edn. 2013).

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ CWT vs. Shanmugam, (1985) 153 ITR 330 (Mad); See also Anil Kumar Jain, "Concept of Income under the Indian Income Tax Act" 27 International Tax Review 307-08 (1999).

3. Conclusion

Determining the residential status is sine quo non for the purpose of taxation. There are two types of taxpayer's viz. one who is resident in India and the other who is non-resident in India. However, if they are earning income in India, then their income will be taxed as per the provisions of the Income Tax Act, 1961.⁸¹ As discussed above, different tests are contemplated under this Act to determine the residential status of companies, individuals, HUF, firms or associations of persons for the purpose of computing their tax liability.

Tax liability can be determined by determining the residential status of an individual. It is an important determinant since residence of an individual does not forever remain permanent.⁸² The term 'residence' has no correlation with citizenship. It is not necessary that a person cannot be a resident in more than one country for the same assessment year. Thus, a person is a resident or a non-resident is a question of fact and it is the duty of the assessee to place all relevant facts before the income-tax authorities, thus the onus of proof lies on the assessee. In order for a person to acquire the residential status in India, he has to fulfil certain conditions and the onus is on the assessee to prove those conditions to the income-tax

authorities.

The tax liability is also imposed on a company which is taxed depending upon its residential status. The first test is simply fulfilled depending on the mere fact of its registered office being in India. The other test required to be fulfilled needs to be established by proving de-facto control and management of the company in the Indian Territory to establish its tax liability. Each entity is made liable for taxation depending upon its own established set rules and regulations.

Section 6 (2) of the Income Tax Act, 1961 involves two crucial expressions 'control and management.' The residential status of the entities mentioned under section 6 (2) will be determined by the test of control and management of the affairs. The article has discussed the meaning and ambit of control by mostly relying upon the precedents of Indian Courts. However, the ambit of control will be determined with respect to the de facto control and not the de jure control. Indeed there is requirement to construe the word control in strict sense for purposes of taxation because of the involvement of financial aspect i.e. payment of money in the form of tax. The tax authority cannot levy tax on the person who is not actually controlling the affairs in stricter sense.

⁸¹ Ankita Gupta, "The Trends and Responsiveness of Personal Income Tax in India" IGIDR Proceedings 4 (2009).

⁸² Girish Ahuja and Ravi Gupta, Concise Commentary on Income Tax 60 (Bharat Law House, 6thedn. 2005).

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