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Beyond Medical Negligence as a Tort; Introduction and Plausibility of No-fault Liability Scheme in India

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Abstract

Medical Negligence law is primarily based on tort and the liability that arises therein. This system is riddled with many problems like the lengthy claim resolution process, the delays in payments etc. No-fault compensation schemes can provide an alternative redressal method for claims resulting from medical negligence. This paper aims to explore the viability of introducing no fault compensation scheme for medical negligence and its implementation in India. A comparative analysis of no fault scheme which is in operation in different legal jurisdictions is undertaken. The paper concludes that no- fault compensation can be introduced in a phase to phase manner to deal with medical negligence cases especially in injuries relating to vaccines, birth related injuries etc. The ultimate aim of the article is to initiate and foster a discussion between academics, policy makers and key stakeholders for formulation of a scheme and its effective implementation.

I. Introduction

The nobility and sacredness of medical profession has been lauded since time immemorial. With the rapid scientific innovations and inculcation of medicine to everyday health care infrastructure, the reputation, responsibilities and sanctity accompanying the profession

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has increased manifold. Among these increasing responsibilities is the one of utmost importance " '*Primum non nocere*' which means First, do no harm". When a harm is done by the acts of medical professional resulting in damage to the treated, then medical negligence law is set in motion. Medical negligence begin with occurrence of an injury during provision of medical care and resultantly, the patients or their families seek compensation for such treatment injury. Adverse events due to medical care represent a major source of morbidity and mortality globally.[1] In fact, many claims based on ' tortious conduct –defendant's violation of a duty owed to the plaintiff' either never reach the courts or, if litigated successfully, results in recovery of damages which is not rationally related to the nature and scope of the wrong.[2]

In the early 1990's, a seminal piece of empirical research which examined the intend of injured patients in terms of their redressal was published and it was found that the patients who had suffered a medical injury wanted an explanation and an apology for what went wrong, financial compensation and for their treating doctors to be held accountable for what happened to them. Further the study established that the patients wanted to implement reforms and lessons to be taught from their experiences so that such mishaps did not happen to other patients in future.[3]

With passage of time the sanctity of the profession has made miles long journey to the imbibing of principles of accountability, patient autonomy and legislations and statutory legislative set up aimed at regulating the medical profession. With this the number of medico-legal

1 JhaAshish K*et. Al,* " The global burden of unsafe medical care: an observational study,", 22 *British medical Journal Quality & Safety* 809-815 (2013).

2 Josephine Y King, " No fault Compensation for Medical Injuries", 8 *Journal of Contemporary Health Law and Policy,* 227-236 (1992).

3 Vincent C, *et al,* A "Why do people sue Doctors? A Study of Patients and relatives taking legal action ", 343 *Lancet* 1609-13 (1994).

cases is on the rise. Motivation for medico-legal action fit into four themes of i) restoration ii) correction iii) communication and iv) sanction[4]. Deterioration of the doctor-patient relationship has also contributed to the increase in medical negligence litigation[5]. Doctors view every patient as a prospective litigant while patients complaint that their doctors are driven by financial incentives. From the injured patient's perspective the trial typically lasts several years. The litigation process is extremely stressful for doctors and their families. The threat of a law suit increases medical costs by promoting defensive practice. Health economists agree that, from the society's point of view if even average doctors perform medically unwarranted diagnostic tests or treatments to reduce their exposure to malpractice liability, the cure is worse than the disease[6].

II. Medical negligence in India: The current situation

In 1998, the Supreme Court in *M/S. Spring Meadows Hospital* v.*Harjol Ahluwalia*[7] had held that

> *" ...It is a great mistake to think that doctors and hospitals are easy targets for the dissatisfied patient. It is indeed very difficult to raise an action of negligence. Not only there are practical difficulties in linking the injury sustained with the medical treatment but also it is still more difficult to establish the standard of care in medical negligence of which a complaint can be made.*[8]*"*

The cardinal question to be pondered over is whether the same situation exists even today and the same is analysed in the following.

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4 Marie Bismark, "Motivation for Medico-legal action, Lessons from New Zealand", 27 *Journal of Legal Medicine* 55-70 (2006).

5 SagitMor*et al*, "Relational Malpractice", 42 *Seton Hall Law Review* 601-642 (2012).

6 H.Scherz*et al*, "Defensive Medicine: A curse worse than the Disease", *Forbes Magazine*, August 27, 2013.

7 (1998) 4 SCC 39.

8. Id.

II. A Lack of unbiased Expert evidence and its evidentiary value in proving medical negligence

Medical negligence as a civil wrong can be brought before the civil courts and to succeed, the Patient has to establish duty of care, breach of duty and consequent damage.[9] Consumer fora is also another competent mechanism to decide Deficiency of medical service[10]. The fundamental goal of tortious liability is to compensate victims of accidental loss which is shown/proved to have been caused by the doctor's negligence. Adverse events include post operative infections[11], allergic reaction to drugs[12], hospital accidents[13] and foreign objects left in the body[14].

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9 *Laxman Balkrishna Joshi* v.*TrimbakBapu Godbole,* AIR 1969 SC 128 a young man, who had met with an accident fractured his femur on his left leg and during an operation on his injured leg, he died. The trial court held that the death was caused due to cerebral embolism or shock which was caused due to the use of excessive force applied by the appellant and his attendants without giving anaesthesia. The Supreme Court on special leave appeal affirmed the findings of trial court and upheld the decree for damages.

10 *V.Kishan Rao* v. *Nikhil Super Speciality Hospital*, (2010) 5 SCC 513 (a) There may be simple cases of medical negligence where expert evidence is not required.(b) Those cases should be decided by the Consumer forums under the Consumer Protection Act on the basis of the procedure which has been prescribed under the said Act.(c) In complicated cases where expert evidence is required the parties have a right to go to the Civil Court.(d) That right of the parties to go to Civil Court is preserved under Section 3 of the Consumer Protection Act, 1986

11 In *Joint Director of Health Services Sivagangai* v. *Sonai* AIR 2000 Mad. 305, Family planning operation was performed on a woman in Government hospital and the patient was discharged without giving proper post-operative treatment. Doctor allowed someone (not qualified even as a nurse) to remove the stitches at the patient's house who was not qualified to do such work and did not take preliminary precautions resulting in the death of the patient.

12 *Dr.Balram Prasad* v .*Dr.KunalSaha,* (2014) 1 SCC 384.

13 *Supra* note 9.

14 *Achutrao H. Khodwa*v. *State of Maharashtra* (1996) 2 SCC 634,Chandrika Bai was admitted to the Govt. Hospital where she delivered a child on 10th July, 1963 and another operation for sterilization was performed on 13th July, 1963. But she died on 14th July, 1963 and cause of death was stated as peritonitis. It was found that a mop (towel) was left under her peritoneal cavity. The court held that the negligence is writ large and that the doctrine of *res ipsa loquitur* clearly applies.

Lack of Professional etiquette existing among the medical professional, technical restraint in proving medical negligence cases, the loyalty to another peer of the profession etc are the hurdles which are counter – productive in awarding compensation. The same can be illustrated from the case of *INS.Malhotra*v *Dr. A Kriplani*[15] *of which* during the course of the proceedings before the National Consumer Dispute Redressal Commission, the appellant was granted opportunity to produce written opinion of expert doctors in support of her allegations made in the complaint against the named doctors and Bombay Hospital for their medical negligence or lack of proper medical treatment to deceased. The appellant could not lead the evidence of any expert doctor in support of her complaint and she pleaded before the Commission that no expert doctor was willing to give an opinion against the doctors of Bombay Hospital though, according to her, unofficially some doctors had expressed an opinion that injustice had been done to deceased. Ultimately the Supreme Court dismissed the appeal of the relatives of the deceased and found no case of medical negligence. All these cases point to the obvious unwritten professional etiquette existing in any professional field of not betraying a peer which in cases of medical negligence acts as a further technical restraint in proving medical negligence cases.

II B. Tests of Medical Negligence – Bolam and Bolitho

Indian courts at first followed Bolam test with regard to medical negligence. As per Bolam test" a doctor is said to be not negligent if he is acting in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who

15 (2009) 4 SCC 705.

would take a contrary view[16]". After Bolam came the test of Bolitho[17] which narrowed the scope of Bolam and laid down that the body of opinion relied on must have a logical basis. After Bolitho, the position of law as far as standard of care has become Bolamplus Bolitho. This is a two staged exercise. The first step requires that the court must ask whether the doctor acted in accordance with responsible medical opinion which might be established using expert medical testimony. The second step requires that the claimant establishes that the body of medical opinion is not capable of withstanding logical analysis. Both these tests have proved to be the cornerstones on which the degree of reasonable care, negligence and consequentially the quantum of damages are fixed by adjudicating bodies.

II C Proof of Medical Negligence in Criminal cases.

As a rule of evidence, the apex court have applied the principle of *Res ipsa loquitur*('let the things speak for itself') in suitable cases[18]. Supreme Court in *V.Krishna Raov. Nikil Super speciality Hospital*[19] has opined that the Bolam test requires re- consideration. In India medical negligence as a crime is dealt with under Sec. 304 A IPC. It is difficult to prosecute a Medical Practitioner for negligence in India after the Supreme Court decision in *Jacob Mathew* v. *State of Punjab*[20]. There is no reported

16 *Bolam*v. *Friern Hospital management Committee*, [1957] 1 WLR 582.

17 *Bolitho* v. *City and Hackney Health Authority*, [1997] 4 All ER 771.

18 *Supra* note 14.

19 *Supra* note 10.

20 (2005) 6 SCC 1 Supreme Court held that the concept of liability for negligence in civil and criminal cases are different. The court held that nnegligence, which is neither gross nor of a higher degree may provide a ground for action in civil law, but cannot form the basis of prosecution. The Supreme Court further clarifying on the negligent act under Section 304-A, IPC held that the expression rash or negligent act as occurring under the section has to be read as qualified by the word 'grossly'. Further, the court held that to prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary sense or prudence would have done or

Supreme Court judgment imposing penal liability on a Registered Medical Practitioner prior to *Jacob Mathew*'s case.

III. Tortious liability and the lacunas of the existing system

Over the years, the doctor-patient relationship have changed, with patients gaining increased power *vis-a vis* doctors. This change can be attributed to the legal recognition of consumer rights.[21] The Supreme Court decisions pertaining to (i) a patient has the right to make informed medical decisions[22] (ii) the warning of self regulation as a privilege and not as of a right[23] (iii) Recognition of Patient's right to access to medical records[24] *etc.* have all done away with traditional paternalism in doctor-patient relationship and have contributed to the shift in power of the doctor – patient relationship. These judgments have rendered the much needed push to make the patient's right to adequate medical care primary; establishing its supremacy over the rights of Medical Practitioners.

Patient's right to seek redressal for their grievance is recognised by Charter of Patient's rights in India[25]. The patients are granted with

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failed to do. The judgment categorically stated that the investigating officer should not proceed against the doctor without obtaining an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice. Similarly, the court directed that a private complaint is not to be entertained unless the complainant has produced a credible opinion by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The judgment also entails that arrest of the medical practitioner should only be as to secure his presence for his prosecution and not in any other circumstances.

21 *Indian Medical Association* v. *V.P.Shantha,* AIR 1996 SC 550, Medical Service was brought within the purview of Consumer Protection Act,1986.

22 *Samira Kohli*v.*PrabhaManchanda,* (2008) 2 SCC 1.

23 *State of Punjab* v. *Shivram,* (2005) 7 SCC 1.

24 *Federation of Obstetrics & Gynaecological Societies of India* v. *Union of India,* (2019) 6 SCC 283; It was held that "considering the nature of services rendered by medical professionals, proper maintenance of records is an integral part of the medical services."

25 National Commission for Human Rights, "The Charter of Patient Rights for adoption by NHRC: Patient's Rights are Human Rights! ", (Ministry of Health , 2018)

absolute rights of autonomy and the legal structure of the country envisages and appliestortious liability in medical negligence cases. There is no uniform method or standards envisaged, rules of evidence made applicable or any set of directions for grant of compensation or evaluation criterion for a fair and just compensation in medico-legal cases. The main Problems that have been identified with the current system of tortious liability includesi) Delay in disposal of cases, ii) difficulty to obtain expert evidence:- iii)method of determining just compensation.

III.A. Long delay in disposal of Medical Negligence Cases.

The redressal mechanism in negligence cases are either before the civil courts or before the consumer protection courts. The backlog of cases pending before the civil courts of the country and the clubbing of medico legal cases into this vast ocean, only adds on to the long delay in disposal making true the saying of '*Delayed justice is Justice Denied*'. The long and cumbersome appeal process from the lower tier of judiciary till the supreme court adds more hay to the already broken camel's back[26]. The case of consumer redressal mechanism which specifically provides for speedy disposal of appeals within days is no different than the civil court system a clear demonstration of which is the plight of a family who have been prosecuting the wrongful death of their only daughter and their 11 years wait for justice [27].

III B. No uniform rule for computation of compensation or rules of evidence applicable.

There is no uniform rule either framed by any law or declared as law by the Apex court governing computation of compensation in

26 SamshikaPattanaik, " Delay, Harassment, Uncertainty : The Rocky road to justice against Medical Negligence", *NEWS 18* (January 7, 2020).

27 "Endless Delay in Consumer Courts in " Medical Negligence" Cases : Hapless Father waiting for justice 11 years even after Remand from Supreme Court" *People for Better Treatment,* (October2, 2012).

medical negligence cases, which has prompted the civil courts and various consumer for a to grant any amount of compensation and whether such compensation awarded is restorative or curative for the damages suffered by the patient or relatives are often left in the grey area.

III.B.i No Uniform method for computation of compensation

The use of multiplier method as formulated in accidental death cases involving motor accidents and its application to medical negligence cases was rejected by the Supreme Court in in Nizam's case.[28] In Dr. Balram *Prasad* v *Dr.KunalSaha*[29] Supreme Court was of the view that the multiplier method was not suitable for determining the quantum of compensation for medical negligence. The fundamental argument is that loss of human life in a no-fault motor vehicle accident and due to medical negligence of hospitals and doctors is not similar and practically are two very different issues deserving to be dealt in different manner and therefore the same method –the multiplier method cannot be used for determining the compensation to be paid in medical negligence cases. No amount can be just and adequate in an absolute sense. It all depends on the circumstances and the context and the courts must be open to treat each case in a different manner so that the decisions are just, equitable, reasonable and prudent.[30]

III.B.ii No uniform rule for appreciation of evidence.

Recently Supreme Court had made it clear it is for the court to decide whether to accept Expert Evidence or not. Rejecting the opinion of medical board constituted by AIIMS, the court held that

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28 *Nizam Institute of Medical Sciences*v.*PrasanthS.Dhanaka* AIR 2009 SC 1503.

29 (2014) 1 SCC 384.

30 AnuragK.Agarwal, *Medical Negligence and Compensation in India, how much is just and effective?*, Working paper Research and Publication IIM Ahmedabad, (March 27, 2014) .

"It is well –settled that a court is not bound by the evidence of an expert, which is advisory in nature. The court must derive its own conclusion after carefully sifting through the medical records, and whether the standard protocol was followed in the treatment of the Patient. The duty of an expert witness is to furnish the court with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the court to form an independent opinion by the application of this criteria to the facts proved by the evidence of the case. Whether such evidence could be accepted or how much weight should be attached to it is for the court to decide." [31]

III.C Lack of reporting and statistical data on medico – legal cases

In India no data is available regarding the number of cases of medical negligence in a year. There is no official error-reporting and analysis-system has been established in India which means there is no database of information which tracks the status, number and viability of medical negligence cases either on a state level basis or across the country. The assessment of the nature and total financial burden of medical negligence is difficult and cannot be accurately approached due to the lack of data from an organized information system. It is understood that the source of most injuries are in the system-in the service, in the hospital or even in the general health system- and not in the individual. Thus when a no fault system for medical negligence cases are introduced the patient will be compensated regardless of whether or not there is any fault. The best working examples are that of Worker's compensation and motor vehicle accident compensation which operate on the no - fault scheme.

IV. No fault liability – The need, common features and the like across the globe

It is essential to shift towards a no-fault system because of the following reasons.

31 *Maharaja Agrasen Hospital .v Master Rishabh Sharma2019SCConline1658.*

i) Patient's right to get redressal of their grievance is accepted in India. But majority of injured patients cannot access the compensation system in India due to financial stringency. The system enables those with financial and emotional stamina to pursue medical negligence claims.

ii) The judges who have not received special training are technically unequipped to resolve medical negligence cases and they rely on expert testimony. Patient becomes vulnerable in a system in which doctors support members of their clan. In such circumstances, there is a need for a remediation system to address these issue.

iii) Once the fault based liability is removed, doctors will be ready to report medical errors and this will give an opportunity to learn from errors and enhance patient safety.

iv) The present litigation based system give justice to only those who can afford to pay. Compared to this no-fault system will give remedy to all who have suffered medical accidents.

v) The tort system has been proved ineffective in protecting future patients by deterring substandard medical practices.

vi) Timely compensation will be given to aggrieved party and there is no need to wait for complete disposal of a case in the hierarchy of courts.

vii) Open, mutual and honest communication is essential to strengthen doctor-patient relationship.

Thus no-fault compensation schemes can provide an alternative method to redress claim resulting from medical negligence. Tort law approaches medical errors from a punitive, individualistic, adversarial point of view, while the patient safety movement adopts non-punitive, system-oriented, cooperative approach. An unintended ramification of the tort system is that it inspires concealment of significant information

necessary to enhance the health system's safety. In the Indian context the challenge is regarding the issue of lack of affordability to cater the needs of large population.

IV.A Common features of No-fault scheme

No-fault scheme exist in New Zealand, Sweden, Finland, Norway, Denmark, France and in America the no –fault scheme are available for birth related neurological injuries in the States of Virginia and Florida. In the states of Virginia and Florida birth related neurological injury is covered by no-fault scheme by way of statute considering the cost of insurance premium for the practice of obstetrics. The 2011 report of the Productivity Commission recommended the establishment of a no-fault National Injury Insurance Scheme limited to catastrophic injury including medical injury in Australia. A no-fault scheme has the potential to be fairer, quicker and less costly and to contribute to patient safety.[32] There is no need to prove negligence in order to be eligible for payment of financial compensation. There may be caps on certain categories of compensation. Levels of financial compensation tend to be lower than tort based system. There is broader access to justice. Access to courts may be restricted.[33] The administration of no-fault compensation schemes is less expensive than the tort system, and there is much quicker resolution of claims than under the tort system.

IV B Advantages and disadvantages of no fault scheme

The advantages of a no fault liability system are that of i) additional potential advantages of assisting in changing the mindset of doctors around the issues of patient safety, learning from mistakes and preventing error. ii) Greater scope to collect data and learn from medical error with

32 David Welsbrot, KerryJ Breen, "A no-fault compensation system for medical injury is long overdue",197*Medical Journal of Australia* 296-298(2012).

33 Dr.Anne Maree Farrell *et al* , *No-fault compensation schemes for medical injury: A Review*, (Scottish Government Social Research, UK, 2010).

a view to enhancing patient safety. iii) promotion of better relationship between patients and health practitioners iv) Reduction or elimination of the right to take legal action in the courts for medical injury.v) Access to justice-They are accessible to all eligible parties not confined to those who can afford legal representation and consistency is maintained. (vi) No-fault system would reduce the need for lawyers. Whereas the main disadvantages of the scheme are -i) lack of affordability, particularly in the context of large national populations- ii) Failure to promote professional accountability iii) the scheme will work in the context of a well-funded national social security system iv) No-fault schemes do not guarantee that key elements of redress desired by injured patients ,such as explanation, apologies and accountability of health professionals are provided.

IV C Comparative analysis of No-fault scheme in different legal jurisdictions.

IV.C. i New Zealand

NZ's health care system is primarily a centrally- funded, tax-based system. New Zealand's compensation scheme was introduced in 1974 following recommendations from the Woodhouse report.[34] The scheme is based on the founding principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency. The key goals of the scheme are injury prevention, complete and timely rehabilitation, fair compensation and a code of Accident compensation Corporation Claimant's rights (ACC code and rights established under section 42 to 44 of Injury Prevention, Rehabilitation, and Compensation Act 2001 of New Zealand). The 1992 reforms introduced fault (medical error) into the otherwise no-fault scheme and as Accident Compensation Corporation (ACC) was obliged

34 New Zealand Royal Commission of Inquiry, " Compensation for Personal Injury in New Zealand"(Justice Woodhouse Report) 1967.

to report all findings of medical error to the Medical Council, the compensation claims process would result in discipline for doctors. This made some doctors and patients unwilling to participate in the compensation claims process. It also led some doctors to contest findings of medical error. This situation was reversed in 2005 under the no-fault compensation reforms.[35] Doctors were made accountable under Health and Disability Commission Patient Complaints system, Medical competence and fitness to practice processes and the Health Practitioners Disciplinary Tribunal disciplinary process.

There are also in-house hospital and clinic accountability processes. There are a number of treatment injury exclusions: i) a treatment injury does not include a personal injury that is wholly or substantially caused by a person's underlying health condition. ii)it does not include a personal injury resulting from a person unreasonably withholding or delaying their consent to undergo treatment.

The process of obtaining compensation begins with the submission of an application to the ACC, usually prepared only with the help of a health care professional. There will be a deadline for filing and processing claims. If a claimant disagrees with the ACC decision, then they can ask for a review. The time limit for lodging an appeal is 3 months from the date upon which the claimant receives the ACC decision.

There are three cost-control mechanisms in New Zealand: no legal fees, caps on lump-sum monetary awards for permanent disability, and a 12-month filing deadline. In addition the scheme does not provide compensation for pain and suffering, only for permanent disability. In New Zealand the fund for no fault compensation is raised from tax payers.

35 Katherine wallis, " New Zealand's 2005 ' no-fault' compensation reforms and medical professional accountability for harm",126 *New Zealand Medical Journal* 33-44, (2013).

IV. C. ii No-fault scheme in Nordic Countries

In the four Nordic countries – Denmark, Finland, Norway, and Sweden no-fault mechanism is covered by money raised through insurance paid by health providers

The removal of negligence or fault from the schemes has greatly contributed to keeping costs low (by removing legal costs) and improving access to compensation. All four schemes employ a more relaxed standard of proof based on the principle of preponderance of probability (or the principle that the medicine more likely than not caused the injury) is more favourable for claimants than the rigorous causation requirements that would pertain in the courts. A characteristic which is common to the Nordic model is that the bodies that examine application for compensation of patients do not deal with disciplinary issues and information gathered by them is not even communicated to the disciplinary bodies.[36]

The Nordic countries all operate on no-fault schemes in relation to injuries caused by medicines (drug injuries) which run alongside the no-fault schemes for medical injury. In Sweden and Finland pharmaceutical companies and importers voluntarily pay contributions to enable the schemes to operate. Contributions from the pharmaceutical industry in the form of a percentage levy is set annually based on individual companies, turnover of national sales etc.

IV.C.iii No-fault scheme in European countries

Since 2002, French law also allows compensation of serious harm that is inherent to certain medical procedures, without fault of the practitioner and could not be controlled[37]. Until 2002, Administrative

36 Vera Lucia Raposo, "The unbearable lightness of culpability: the compensation for damages in the practice of medicine", 25 *Saudesociedade*, (2016).

37 Cornel Oros, LydieAncelot, " Physician-Patient relationship and medical accident victim compensation: some insights into the French regulatory system", 16 *European Journal of Health Economics* 529 – 542 (2015).

courts handled claims for injuries in state-run public hospitals while the civil courts judged cases involving private practitioners or institutions. Disparities in their handling of similar claims were common. In 2002 the French Parliament enacted Patient's Rights and Quality of Health System Act which imposes the same liability basis for health care professionals in the public and private sector[38]. To start a procedure under the no-fault scheme a seriously injured patient must submit his case to a Regional Conciliation and Compensation Commission. In case of fault the insurer has to pay compensation and in case of no-fault the National Office for the Compensation of Medical Accidents takes over the case. Since the decision is not legally binding, aggrieved party can approach the court afterwards.[39] In 2010 Belgium introduced a similar dual track liability system for medical malpractice.[40] In Spain Administrative Law applies for medical accidents in the Public health system.[41]

IV. C.iv. No Fault Compensation Scheme in the United States and Health Courts

In the United States idea is mooted for the creation of Health courts. Health court architects have specifically seized on four problems with the current system of i) the negligence standard ii) victim's low rate of claiming iii) the inaccuracy and inconsistency of judgments and iv) the system's sometimes interminable delays. [42] ADR mechanism is also

38 S. Taylor, *Medical Accident Liability and Redress in English and French law* (Cambridge University Press, UK, 2015), See Chapters 2 and 5.

39 Kenneth Watson, "Patient's Rights, Medical Error and Harmonisation of Compensation Mechanisms in Europe," 25 *European Journal of Health Law* 1-23 (2017).

40 T.Vandesteegen, Essays on the Medical Malpractice Reform in Belgium. A law and Economics analysis (University of Hasselt, Hassel,2016).

41 S.AmaralGracia*et al,* "Do Administrative courts favour the government? Evidence from Medical Malpractice in Spain", 6 *Journal of European Tort Law* 246-248 (2015).

42 Nora Freeman Engstorm, "A dose of reality for specialized courts: Lessons from the VICP", 163 *University of Pennsylvania Law Review*1631-1717 (2015); See also A.B.Kachalia*et al*, "Beyond negligence: Avoidability and Medical Injury Compensation", 66 *SocialScience&Medicine* 387 – 402 (2008).

advocated by Scholars.[43] Health courts would alter the traditional tort system in seven fundamental respects. Firstly, Health courts would substitute a new Avoidability standard for negligence. Avoidability standard would render compensable all injuries that would not have occurred but not for the physician's failure to follow best practice or the hospital's failure to impose an optimal system of care. This differs from the negligence standard, which turns on whether a physician's care fell below the customary rather than the best standard within the profession. Secondly, health courts would compel hospitals to determine whether each patients iatrogenic injury (injury arising out of medical treatment) was avoidable and if it was, to notify the patient of his or her possible entitlement to relief. Thirdly, health courts would limit damage awards .Fourthly, health courts would create a new layer of pre-adjudication expert review and Fifthly, Health courts would remove medical malpractice cases from generalized courts and locate them in specialized tribunal. Sixthly, health courts would take steps to expedite proceedings and Lastly, health courts would limit appeals and regulate payments to petitioner's counsel

IV.D No fault scheme : An overview with reflexion

Changing to a no-fault system will bring benefits to patients, the health care system and doctors. In England a review was commissioned to inform considerations around the potential to develop an administrative compensation scheme for medically acquired birth injury.[44] The schemes must offer payment and a broader eligibility criteria is provided under the scheme with equality of access, transparency of process and separation between compensation and disciplinary

43 Charity Scott, " Foreword to the Symposium:Therapeutic Approaches to ADR in Health Care Settings",21*Georgia State University Law Review* 797 (2005).

44 Dickson K, Hinds K *et al*,*No-fault compensation schemes: A rapid realist review to develop a context mechanism, outcomes framework*. (EPPI-Centre, Social Science Research Unit, UCL Institute of Education, University College, London, 2016).

procedure[45]. The existence of a well-funded and comprehensive national security system, as well as a predominantly publicly-funded health system, also appear to be complementary elements which contribute to the success of no-fault schemes. The core objective of a redressal scheme must be effectiveness, enhancement of patient safety and quality of care, openness, transparency and systems approach to error.

Eligibility criteria for compensation-In New Zealand and US no-fault standard is used. In Nordic countries Avoidability rule[46] is used instead of negligence to determine which injuries are eligible for compensation. This alternative standard raised is in between standards of negligence and strict liability. The scheme compensates patients who have experienced injuries that could have been avoided under optimal circumstances, in that injury would not have been occurred of the best health practitioner or health system,(known as the experienced specialist rule), Injuries due to a defect in, or improper use of, medical products or hospital equipment, injuries from accident or fire that occurs on health care provider's premises where patient is receiving treatment etc. In Denmark, two main group of damages are eligible for compensation *viz.* the avoidable injuries which are the injuries that could have been avoided if the experienced specialist had acted differently (the specialist rule) ; the defects in or failure of technical equipment had not occurred (the equipment rule) and for the second group of unavoidable injuries which are rare and more extensive than the patient must reasonably endure (the Endurability Rule). In Endurability rule, there are a range of factors to be considered before applying this rule, including the severity of underlying disease, the need for treatment and the severity and likelihood of the injury sustained. In addition, compensation can be paid

45 *Ibid*

46 Anne Farrell, " No-fault Compensation for medical injury:Principles Practice and Prospects for reform" in P.Ferguson and G.Laurie (eds), *Inspiring a Medico-Legal Revolution: Essays in Honour of Sheila Mc Lean,* 155-170(Ashgate, 2015).

if a patient is injured in an accident at a hospital and the hospital was at fault[47]. Establishing eligibility criteria based on the degree of disability suffered would be fairer as they would be based on need. In India the question is whether the injury suffered from treatment by quacks can be included.

Access to courts- Access to courts is restricted in US and NZ whereas it is allowed in France and Nordic countries. It raises constitutional issue of access to courts in India.

Funding schemes- In NZ funding is through taxation. In US, annual financial contribution are made by participating doctors and hospitals. In Nordic countries, patient insurance schemes are funded by a range of public and private health care providers. The Norwegian system of compensation to patients is funded by contributions from hospitals and municipal authorities.

Financial entitlements - The compensation schemes under no fault schemes for medical negligence provides for financial entitlements comprising of both Economic and non-economic damages except in New Zealand where it is just economic damage.

Costs and affordability -It is generally accepted that administration costs associated with no-fault schemes are much lower than the legal and other costs of medical negligence claims brought under tort-based systems.

Independent patient complaint process- In NZ, the establishment of an independent patient complaints process through the Health and Disability Commissioner and the creation of a Code of Rights has played an important role in dealing with a range of concerns that patients may have, but which are not appropriate to be dealt with through no-fault schemes.

47 Ulf Hellbacher et al, " Patient Injury Compensation for Healthcare-related injuries",*Stockholm: The patient Claims Panel* 20-21 (2007).

Access to Justice-One of the positive aspect of no fault scheme is the removal of the requirement to prove substandard care in relation to medical negligence. This is said to facilitate greater access to justice for those who have suffered medical negligence.

Professional accountability-Facilitation of professional accountability in the context of no-fault schemes is relevant and different across jurisdictions. In the Nordic countries the issue of professional accountability is considered to be entirely separated from the operation of their no-fault schemes. Democratic societies demand public accountability, and the relative weakness of other social structures regulating medicine has made the criminal system (together with the media) into accountable mechanism of last resort in countries like japan. Involvement of the criminal justice system in the medical arena offers Japan unqualified benefits. First, it has helped motivate the medical profession to undertake internal system improvements. Second, the entrenched practice of systematic deception of patient about medical harm has not endured for long. Whistle blowers within hospitals have uncovered these deceptions.[48]

Medical error and patient safety-Mandatory disclosure of medical errors would increase patient safety.[49] In 1999, the Institute of Medicinereport, *"To Err is Human: Building a safer Health System*[50]*"* documented that in practice, most medical errors are simply caused by unavoidable human error in a context of system failure. Patient safety improves when health care providers facilitate blame-free reporting and organisational learning. One of the advantages of no-fault schemes is that the removal of a fault-

48 Robert B Leflar, "Medical Error as Reportable Event, as Tort, as Crime: A Transpacific Comparison", 12 *Widener Law Review* 189-225(2005).

49 Nathan Wheeler, *The systemic faults of medical negligence litigation in Ireland: origins, causes and reform*, (2014) (Unpublished BCL dissertation,Dublin City University)

50 Institute of Medicine (US) Committee on Quality of Health Care in America, Kohn, L. T, Corrigan, J. M *et al, To Err is Human: Building a Safer Health System*.(National Academies Press,US, 2000).).

based approach offers the opportunity to collect valuable data on medical error, learning to facilitate error prevention and therefore enhance patient safety.

Procedural aspects of claim adjudication **-** A separate introduction of no fault scheme would factor in place detailed procedures for claim adjudication in medical negligence cases. A composition similar to that of the Swedish Patient claims Panel would serve the specific approach effectively.

V. Limited implementation of No fault scheme of medical negligence in vaccine and birth related injuries and its feasibility in India.

Article 41 of the Indian Constitution provides for framing policies for social security measures[51].A no fault scheme can be introduced as a social measure to deal with negligence cases arising out of vaccine related injuries, birth related injury etc. Vaccine injury and birth injury are areas in which children are affected. At present, the compensation for birth related injury is based on rights based justice.[52]

V.A Vaccine injury compensation

Vaccination is the act of giving a person or an animal a vaccine in order to protect them against a disease. A vaccine injury, is an adverse event caused by vaccination. In China, a highly structured three-stage claims handling and adjudication process, which involves cumbersome and repetitive procedures, delays timely access to compensation for

51 Article 41, Constitution of India: " Right to work, to education and to public assistance in certain cases The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".

52 AthanasoisPanagiotou, "Liability for severe birth related injuries in Greece the issue of Tort Law and the possibility of introducing a no-fault compensation system" 8 297-326 (2016).

claimants. The scheme employs a strict standard of proof which normally requires the claimant to demonstrate that a vaccine has caused the injury claimed for by drawing on evidence from rigorous epidemiological studies. The programmes in both China and Japan distinguish between Class I and Class II vaccines; Class I vaccines are routine and encouraged by the Government, and Class II vaccines are advised and non-routine. In Japan, injuries incurred by claimants in receipt of Class I vaccines receive higher amounts of compensation for their contribution to protecting society (known as 'herd immunity') than their Class II vaccine counterparts. In Korea, claims are approved for compensation if the injuries claimed for are a) definitely related, b) probably related, or c) possibly related to a vaccine, and almost 68% of vaccine compensation claims are successful. In Taiwan, the level of causal relationship is categorised into three classes: an injury is related, an injury is possibly related, or an injury is unrelated. The first two classes of injury are compensated and, over a 15-year period, 40% of claims were successful. The scheme in Taiwan has a good record of resolving claims in a timely fashion, and it appears that the consistent efforts of the expert working group are primarily responsible for speeding up the processing of claims in a timely manner.[53]

In all four Asian countries that operate a VICP(Vaccine Injury Compensation Program), there are a variety of direct cost-control mechanisms implemented to contain costs. For example, in China, there is cost controls imposed via the maximum amount of compensation allowable in some provinces. In Japan, there are time limits for healthcare and bereavement payments, as well as payment guides for the different injuries, which are likely to control costs. In addition, the class to which the vaccine is assigned may affect the amount of compensation. In Korea, claimants must file a complaint within five years of the adverse event

53 Martin Keane *et.al*, "Vaccine injury redress programmes :An evidence review" *Health Research Board,* March 2019.

and have spent more than US$300 on healthcare. In Taiwan, there is alimitation of two years from the onset of the injury and five years from the receipt of the vaccine. In addition, there are maximum amounts that can be paid for a specific injury.

In UK, the Vaccine Damages Payment Scheme (VDPS) was created under the Vaccine Damage Payments Act 1979. Since 1 May 2014, the VDPS has been the joint responsibility of the Department for Work and Pensions and the Department of Health. The Department of Health is responsible for policy, for example, changes to the list of vaccines covered by the Act. The Department for Work and Pensions is responsible for assessing claims for damages.

India's Universal Immunization Programme (UIP), targets around 27 million newborns and about 30 million pregnant women each year. During March, 2010, media reported about the death of some female children in Khamman district of Andhra Pradeshafter being administered Human Papilloma viruses (HPV) vaccines. The vaccine trials were carried out in Andhra Pradesh and Gujarat in association with Indian council of Medical Research (ICMR) and an American agency, Programme for appropriate technology in health (PATH). PATH had selected India, Uganda, Peru and Vietnam for their project. 72nd Parliamentary Standing Committee on Health & Family Welfare carried out an enquiry into the project.[54] Parliamentary Standing Committee found the entire matter very intriguing and fishy. PATH had used the terminology Observational Studies or Demonstration Project though it is clinical trial so as to evade

54 Department-Related Parliamentary Standing committee on Health and Family Welfare, 72nd Report on Alleged irregularities in the conduct of studies using Human Papilloma Virus(HPV) vaccine by Path in India(Department of Health Research, Ministry of Health and Family welfare) (August, 2013); See also SarojiniNadimpally et.al, "Why relying on Parliamentary panel reports is important in litigation", *The Wire,* May 18th, 2018 *available at* https://thewire.in/law/why-relying-on-parliamentary-panel-reports-is-important-in-litigation last visited on 01.07.2020.

the laws in India relating to clinical trial. The Committee found that ICMR by signing the MOU in 2007 even before the vaccine was approved for use in the country in 2008 had completely failed to perform their mandated role and responsibility as the apex body for medical research in the country. It also decided to promote the drug for inclusion in the Universal Immunization Programme(UIP) even before any independent study about its utility and rationale of inclusion in UIP was undertaken. Drug Controller General, India had also played a questionable role in the entire matter. There is a gross violation of the legal requirement of consent, wrongful use of the NRHM logo. There is a clear dereliction of duty on the part of Ethics Committee. The Committee recommends that the Ministry should investigate into the above acts of omission and commission and take necessary action against those who were found responsible for breach of rules and regulations.

Vaccine –injury compensation programmes have been used for the past 50 years to ensure that individuals who are adversely affected during the process of ensuring the interest of protecting the whole community; are adequately compensated and cared for.[55] After the thalidomide disaster in the early 1960s, the international pharmaceutical industry, operating in Sweden, collaborated with the insurance industry and government to establish a Swedish vaccine-injury compensation scheme to which pharmaceutical companies and importers voluntarily pay contribution.19 countries have implemented vaccine compensation schemes. There are six elements common to all schemes i) administration and funding:- Most compensation schemes are government enacted and run. In Scandinavian countries, vaccine-injury compensation is part of broad no-fault compensation schemes. ii) eligibility:- Four broad categories of benefits are provided by schemes. These are medical costs,

55 Looker C, Kelly H, " No fault compensation following adverse events attributed to vaccination: a review of international programmes" 89 *Bulletin of World Health Organisation 371-8 (*2011).

disability pensions, coverage for noneconomic loss and death benefits. iii) Process and decision-making :- All countries except Finland and Sweden, have passed legislation to enact their compensation schemes and government departments operate the programmes in most countries. iv) Standard of proof :-In general, most compensation schemes offer a more liberal approach to standard of proof than the legal standard. v) elements of compensation and (vi) litigation rights. Most countries legislate that claimants can seek either damages through the courts or compensation scheme but not for both.

In US, The National childhood vaccine injury Act, 1986 covers injury or death due to the administration of compulsory childhood vaccination. It grants U.S. district courts authority to determine eligibility and compensation. The Vaccine Act established the office of Special Masters to resolve injury claims without requiring formal judicial action against the vaccine manufacturer. Compensation awarded under the Vaccine Act includes past and future expenses, loss of earnings and pain& suffering. Under the Act, only two questions must be addressed i) Did this vaccine caused the injury and ii) damages. Vaccine injury table lists all covered vaccines, as well as injuries widely recognised as caused thereby, alongside a specific time frame for each injury's onset. In 2011, the Supreme Court ruling in *Bruesewitz v. Wyeth LLC*[56] held that the Vaccine Act pre-empts all design defect claims against vaccine manufacturers, thus, since 2011, the litigation possibility is largely closed.

In India the urgent need for a compensation policy for those affected by adverse events following immunisation in India is envisaged and is in urgent need .[57] Cases relating to vaccine related injury were being decided by Consumer forms. In *Dr. Durga Nursing home v.*

56 562 U.S 223 (2011).

57 SarojiniNadimpallly*et.al*, "An idea whose time has come: compensation for vaccine- related injuries and death in India", 2 *Indian Journal of Medical Ethics* 2017.

Dhanasekharan[58] Tamil Nadu State Consumer Disputes Redressal Commission held that there is deficiency of service in administering the vaccination to the complainant's 42 days old new born child. Doctor administered DPT (diptheria, tetanus toxoids and pertussis) injection to the baby which was not preserved in the proper manner and the baby instantly died. In *State of Gujarat* v. *ShahenazbanuAshrafali*[59] the trial court has passed a decree for damages of Rupees one lakh on the ground that the respondent had negligently administered triple vaccine and the child suffered from poliomyelitis and permanent deformity and disability. High Court on the basis of medical evidence found that the disease of poliomyelitis by virus cannot be caused from the triple vaccine injection.

Adverse event following immunization (AEFI) programmes was initiated in India in 1988. It monitors immunization safety, detects and responds to any adverse events and improves the quality of immunization in India. In 2015, The ministry of Health and family welfare had issued guidelines for surveillance and operation in adverse events following immunization[60].

V.B Birth related injury and compensation scheme

Disability in children during birth is caused by nature and by man. In most western legal systems three sets of cases have been tried in civil liability procedures. First, complications can arise in the delicate delivery process in which the Physician does not act or react with the required competence, second during pregnancy the Physician can err in diagnosing correctly and fail to detect abnormalities, Third after correct

58 FA no 1070 of 2011, Tamil Nadu State Consumer Dispute Redressal Forum decided on March 18th, 2014.

59 AIR1996 Guj136.

60 Government of India, Ministry of Health and Family Welfare, " Adverse Events Following Immunization – Surveillance and Response Operational Guidelines," (2015) available at http://itsu.org.in/repository-resources/AEFI-Surveillance and-Response-Operational-Guidelin es-2015 accessed on 01.07.2020.

diagnosis of a defect, the physician fails to properly terminate the pregnancy as requested by the parents and, therefore leads to the birth of an unwanted handicapped child.[61] Examples of birth-related injuries are brain-related injuries, cerebral palsy, physical injuries such as shoulder dystocia. Severe birth-related injury had a devastating effect on child's future quality of life. It involves an economic burden beyond the financial means of the average family. The needs for both infants and families are diverse, including specialized medical care, aids to daily living, special educational support, transport, nursing care etc.

Birth related neurological injury is compensated in Florida and Virginia. The reason for legislation is the recognition of public's responsibility in providing economic assistance in cases of a particular kind of injury. Another reason is raise in malpractice premium had resulted in shortage of obstetricians .In the 1980s the medical profession in Virginia faced increasing liability insurance premiums, refusal of the three insurance companies operating the market for obstetricians and gynaecology liability insurance to underwrite new policies, and subsequently the withdrawal of one of the insurers. At that time, the rural areas of the state were experiencing a sharp decrease in the availability of obstetric care. As a result the Medical Society of Virginia proposed a shift from negligence to a no-fault compensation scheme. This resulted in the 1987 Virginia birth related Neurological Injury Compensation Program. If the child suffers neurological injury during birth, the Program applies. The program offers reimbursement of all medical expenses, care and nursing of the handicapped child, special accommodation if necessary, as well as periodical compensation of loss of earnings from the age of 18 to 65. Instead of compensation by means of a lump sum, the agency responsible for executing the program

61 W.H.Van Boom, A. Pinna, "Shifts from Liability to Solidarity: The Example of Compensation of Birth Defects" in :W.H.Van Boom, M.G. Faure(ed.),*Shifts in compensation between Private and Public systems*, 143-180 (Springer, 2007).

compensates on a periodical basis. The Program is funded by annual assessments paid by Physicians and hospitals.[62]

In 1988, the State of Florida enacted the Birth Related Neurological Injury Compensation Act (NICA). Florida law defines a birth- related neurological injury as an injury to the brain or spinal cord of a live infant weighing at least 2500 grams at birth, caused by oxygen deprivation or mechanical injury occurring during labor, delivery, or resuscitation in the immediate postpartum period, which leaves the infant permanently and substantially mentally and physically impaired. Disabilities or death caused by genetic or congenital abnormality are excluded. Also excluded are temporary and minor birth-related injuries, injuries attributable to care rendered before or after labor and delivery, still births, preterm infants and injuries to mothers. Indeed, the NICA is more restrictive than the Virginia Program. The latter could cover still birth and premature deliveries while the former excludes these cases.

In the United Kingdom, the 1961 withdrawal of Thalidomide from the British market gave cause for rethinking the compensation system for birth defects. The 1974 Report of Law Commission advised on legal aspects of injuries caused to unborn children and it implemented the Congenital Disabilities (Civil liability) Act. 1976. The act aimed at making provisions as to civil liability in cases of children born disabled on consequences of some persons fault, so that such children born in consequence of a breach of duty under the act may claim compensation. In *Rance* v. *Mid-Downs Health Authority* [63] it was held that the parents of a genetically disabled child can claim compensation from the health care provider for negligent misdiagnosis provided that they can show that they would have terminated the pregnancy if the diagnosis has been correct.

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62 *Supra note 46.*

63 [1991] AllER801.

In *Mckay*v. *Essex Health Authority*[64] Court of Appeal did not allow the child's claim on the grounds that it would constitute a violation of the sanctity of human life, the child had suffered from the mother's rubella and it would have been aborted if the mother suspicious of having contacted rubella had been confirmed by the blood tests she had asked for. Department of Health, Making Amends-A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS (2003) the Chief Medical Officer recommends that a specific redress scheme for newborns with neurological birth defects be put in place[65].

In India Consumer forums deal with this issue. In Master *Vatsal Aniket Verma & Ors* v. *Gupta Nursing Home &Ors*[66] the question before the National Commission was whether the child suffered shoulder dystocia when the Gynaecologist applied forceps during delivery. Complainant failed to prove medical negligence. In *Dr.(Mrs) Indu Sharma* v. *Indraprastha Appollo Hospital*[67] National Commission found that excessive use of syntocinin and delay in decision to perform C-section ,caused birth asphyxia to baby. In the Indian context it is to be decided that whether an unplanned pregnancy resulting in the birth of a child as a result of failed sterilisation could constitute a personal injury.

In V *Krishnakumar v. State of Tamil Nadu*[68], a premature female baby was born in the 29th week of pregnancy. The infant weighed only 1.25 kgs at birth. The doctors failed to examine the baby for ROP, or

64 [1982] QB1166.

65 Fenn P, Gray A et al, "Making amends for negligence" , 328 *British Medical Journal,* 417-418 (2004).

66 OP 308 of 2001, National Consumer Dispute Redressal Commission decided on January 25th 2016 (*Sub Judice*, before Supreme Court of India, CA No 3398 of 2017).

67 CC 104 of 2002, National Consumer Dispute Redressal Commission decided on April 22nd2015; See also MukeshYadav,PoojaRastogi, "Medico-legal aspect of pregnancy and delivery: A critical case review" 37 *Journal of Indian Academy of Forensic Medicine* 415-421 (September, 2015).

68 (2015) 9 SCC 388.

advise the parents that the baby was required to be seen by a paediatric ophthalmologist since there was a possibility of occurrence of Retinopathy of Prematurity (ROP) , so as to avert permanent blindness. The discharge summary neither disclosed a warning to the infant's parents of the possibility that the infant might develop ROP for which certain precautions must be taken, nor any signs that the doctors were themselves cautious of the dangers of development of ROP. The doctors attempted to cover up their gross negligence of not having examined the infant for the onset of ROP, which is a standard precaution for a well-known condition in such a case. The court granted damages for the agony caused to the parents. In *Maharaja Agrasen Hospital vs Master Rishabh Sharma*[69] Court held the hospital and doctors negligent, since they failed to carry out the mandatory check up of Retinopathy of prematurity on a pre-term baby which led to his total blindness.

VI. Conclusion

Apparently, adverse events do occur and will probably continue to occur, since they constitute an integral part of practice of medicine. The no-fault reform proposals have the potential to reduce some of the animosity and tensions that currently characterize doctor-patient relations because of the removal of individual blame component. As a first step a public consultation should be undertaken to explore ways of operationalizing the no-fault model with the constraint of available limited resources. An open dialogue between various stake holders for a comprehensive legislation introducing no fault scheme in medical negligence cases must be initiated by academicians, legislators and professionals alike.

69 2019 SCC Online SC 1658.

Law of Abortion In India –An Analysis

Dr. Bindu S.*

Abstract

Abortion is the termination of a pregnancy followed by death of foetus. It has its implications on diverse aspects of the social life including religious beliefs, ethics, female foeticide etc. Right to abortion is a concept that directly affects the most important human right that is right to life. Right undergo abortion which is a matter of individual choice and concern directly emanates from right to life and personal liberty. Earlier, abortion was criminalized under Section 312 of the Indian Penal Code but not punishable if it was done for saving the life of woman. As per the MTP Act a child may be aborted legally between the period of 12 weeks to 20 weeks. However, the period recognised for legal abortion is rather confusing in the changing circumstances. This article tries to analyse whether the prescribed time limit for abortion is sufficient to protect the interest of women.

Introduction

*No woman can call herself free until she can choose consciously whether she will or will not be a mother."—Margaret Sanger***

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** Margaret Sanger was an American birth control activist. This quote is taken from Margaret*Sanger*, "Birth Control A Parents' Problem or Woman's?" Birth Control Review, March, 1919, 6-7 available at https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=226268.xml(last visited on 18/06/2020).

According to Encyclopedia Britannica abortion is the expulsion of foetus from the uterus before it has attained the stage of viability, usually up to the 20th week of gestation.[1] But some other definition shows that abortion is the termination of pregnancy due to spontaneous expulsion of foetus during the first twelve weeks of gestation which results in the death of that embryo or foetus.[2] In other words, it is the termination of foetus at the initial stage of pregnancy.

The definition of abortion itself is an evidence that the foetus may be aborted legally between the period of 12 weeks to 20 weeks i.e. the stage of viability of the foetus. However, the period recognised for legal abortion is rather confusing in the changing circumstances. It is also necessary to analyse whether the prescribed time limit for abortion is sufficient to protect the interest of women. This study is mainly centered on this particular aspect.

Abortion- Outcome

The act of abortion has its implications on diverse aspects of the social life including religious beliefs, ethics, medicine, female foeticide etc. It also affects the right to life and personal liberty, right to privacy, bodily autonomy, reproductive freedoms etc. These different factors are balanced to a certain extent by incorporating specific legislation in this

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1 Available at https://www.britannica.com/science/abortion-pregnancy (last visited on 29/01/2020) An abortion may occur spontaneously, in such case it is known as miscarriage, but when it may be brought on purposefully, it is an induced abortion.

2 Available at https://www.merriam-webster.com/dictionary/abortion (last visited on 24/08/2019). There are different ways of abortion, which are spontaneous abortion, surgical abortion, and medical abortion. Available at https://www.merriam-webster.com/dictionary/abortion (last visited on 24/08/2019). There are different ways of abortion, which are spontaneous abortion, surgical abortion, and medical abortion.

regard. This legislation recognise the rights of women and provide them power to make their own decisions. At the same time, law of abortion not only helps emancipation of women but assists in balancing the rights of the unborn child as against rights of mothers to abort the foetus.

Right to abortion is a concept that directly affects the most important human right that is right to life and be alive. Accordingly, this has been a debatable issue [3]for a long time as the right to life of the foetus and the right to independence or privacy of the human beings are always conflicting issues.

For many religious believers, it is not just a matter that concerns human beings and their conscience, but something that concerns their relationship with God[4]. The termination of the foetus constitutes a moral evil as it has the right to live and develop into an adult human being. According to them abortion is gravely contrary to the moral law. However, the supporters of right to life believes that life should be protected from its beginning to in all circumstances and opposes legalisation of abortion.

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3 The states in U.S Like Texas and Arizona supports family values and are completely against abortion under any circumstances, including abortifacients that is by using drugs. On the other hand, some supports the rights for women to make choices about their own bodies. They support abortifacients and a person's right to have an abortion. A large percentage of people also believe abortion as legal but should be restricted. These two opposing groups are pro-life and pro-choice. One recognises the right to life of the foetus and the other support a woman's choice to have an abortion. Pro-life believe that human foetus becomes a person upon conception and the woman is committing murder by terminating the foetus.

4 The Church of England has strong opposition to abortion but recognizes it on certain limited conditions. For example, it is justifiable, where the continuation of pregnancy threatens the life of the mother. The Roman Catholic Church also expressed their opinion that deliberately causing an abortion was a grave moral wrong and they base this doctrine on natural law and on the written word of God.Available at http://www.bbc.co.uk/religion/religions/christianity/christianethics/abortion_1.shtml(last visited on29-11-2019).

With respect to those who favours legalisation of abortion, it is part of the reproductive freedom, which is the basic human right of every woman and includes, right to prefer the birth of a child, when and with whom to have a child, right to continue or abort the child in the womb etc. Therefore, validation of abortion may help the women to choose her bodily autonomy including her sexual health and reproductive freedom.

Right to Abortion- The fundamental Human right under Article 21

Article 21 of Indian Constitution provides right to life and personal liberty which includes within its ambit the right to privacy and bodily autonomy.5 International community also has acknowledged reproductive rights of the woman which ensures availability of their basic human rights to advance development[6]

Almost all the countries have recognized and accredited reproductive rights to women. To fulfill its promise governments enacted formal laws and policies that are most important pointer in promoting reproductive rights. Consequent to this women community as a whole have unobjected freedom to control her bodily independence. This implies the dominance of her reproductive rights including the right to decide and choose about sexual and reproductive matters.

The Courts in India has categorically established that reproductive freedom is essentially the basic freedom of bodily integrity and bodily

5 Supreme court of India specifically recognised the constitutionalright of women to make reproductive choices, as a part of personal liberty under Article 21 of the Indian Constitution. *Suchita Srivastava and Another* v. *Chandigarh Administration See Infra* n 7.

6 Article 6(1) of ICCPR prohibits arbitrary deprivation of life. Right to life is protected from the moment of conception, Article 1 of American Declaration of Rights and Duties of Man, Article 2 of European Convention of Human Rights 'Article 4 of African Charter of Human and people's Rights. But these documents are silent on the topic when does the life begins.

autonomy that comes under the right to dignity and right to privacy, which forms part of the larger freedom of right to life and personal liberty under Article 21 of our Constitution. In the opinion of the Supreme Court,[7]right of the women to make reproductive choice is the facet of right to life and personal liberty under Article 21 of the Constitution of India. Recognition of reproductive rights confers them the right to procreate as well as the right to refrain from procreation. Whatever may be their choice, the important consideration should be to give respect to women's right to privacy, dignity and bodily autonomy. There should not be any restriction on the act of reproductive choices like refusing to participate in sexual activity or insisting the use of contraceptive methods. Women are also the freedom to use birth control methods like sterlisation processes. A common understanding of the reproductive rights implies the right of the women to carry pregnancy to its entirety, to give birth to the child and to raise that child to its full extent.Thus, the fundamental right to undergo abortion which is a matter of individual choice and concern directly emanates from right to life and personal liberty.

If reproductive freedoms are the fundamental human right, then trying to legislate the exact conditions under which one can or cannot give birth to a child, use contraception, have an abortion or any other personal choice forms component parts of this basic freedom. Hence, it would be as problematic as trying to legislate the exact conditions under which other fundamental rights are exercised[8].This is same with respect to law relating to abortion also. Law of abortion must attempt to balance the autonomy of women and the rights of the unborn.

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7 See Suchita Srivastava and Another v. Chandigarh Administration MANU/SC/1580/2009: (2009) 9 SCC 1.

8 S. N Misra, Abortion Law in Today's World 7 (Cyber Tech publications, new Delh,1st edn,2007).

Need for Legislation

World Health Organisation reports that globally approximately 42 million pregnancies are voluntarily terminated each year, of which 22 million are performed within legal system and 20 million by unskilled providers or in unhygienic conditions, or both. It is estimated that 19 of every 20 unsafe abortions take place in less developed regions of world and this is where 98% of abortion-related deaths occur in these regions. An estimated 6.8 million abortions occur every year in South Central Asia (including India) at a rate of 17 unsafe abortions per 1000 women.[9]

A study revealed that around 6.4 million abortions are performed in India annually, of which 3.6 million (56%) were unsafe.[10] In India, around 10000- 12000 women die each year as a consequence of unsafe abortion while many women suffer from long term morbidity with abortion-related complications. Estimates for contribution of unsafe abortions to maternal death in India vary from 8-20%. Recent data suggest that 3-9% of all pregnancies in India are terminated through induced abortion, and 18% of maternal mortality can be attributed to this[11].In India,insecure termination of pregnancy is one of the largest causes of maternal mortality.

Induced abortions take place due to the presence of various factors. Some of the prominent factors include, failure or deficiency of contraceptive methods, desire of the women or her family members for a baby of specific sex,[12] postponement of child bearing, sexual violence,

9 Naina Kumar, 'Current abortion practices in India: a review of literature'*I J RC O G. 2014 Jun;3(2):293-300* available atwww.ijrcog.org(last visited on 17/01/2020).

10 *Ibid*.

11 *Ibid.*

12 When prenatal sex identification techniques are commonly accessible to all, abortion may be used for sex selection. This is an important reason to include provision in Pre-Natal Diagnostic Technique Act 1994 which prohibits individual and genetic clinics from determining the sex of foetus.

often single mother wants to abort the baby, early mother hood may be another reason. Apart from this there are some other social and economic factors like poverty, insecure job, poor health conditions of the mother, disability in taking care of the baby, absence of support from partners etc. Abortions are also performed when the child is conceived because of rape. Abortion is also opted to reduce the size of the family or to space next pregnancy.

Abortion law in India- The MTPAct 1971

Before passing the MTP Act in 1971, abortion was an offence under Section 312 [13]of the Indian Penal Code. However, it was allowed to save the life of pregnant woman and was not punishable in that sense. According to Section 312 whoever voluntarily causes a woman with child to miscarryis liable to three years imprisonment and or a fine, and if the woman be quick with child, shall be punished with imprisonment which may extend to seven years or with fine or both.

Some jurists are of the opinion that the framers of the Penal Code have deliberately avoided the term abortion in section 312 and instead they used the word miscarriage for unlawful termination of pregnancy. This might be done for avoiding the sentiments of the traditional Indian religious community that considered abortion as a sin.[14] Miscarriage denotes spontaneous abortion while voluntarily causing miscarriage is termed as an offence under section 312.

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13 Section 312 reads: Causing miscarriage — Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.Explanation — A woman who causes herself to miscarry, is within the meaning of this section.

14 K. D. Gaur, Abortion and the Law in India, Cochin University Law Review Vol. XV, 1991 p. 123-143 available at http://dspace.cusat.ac.in/jspui/bitstream/123456789/11161/1/Abortion%20and%20the%20Law%20in%20 India .PDF (last visited on 12—09-2019).

Many countries have liberalised their abortion laws since 1970s.After the decision in *Roe* v. *Wade*[15]the European and American countries started to legalise abortion. In *Roe* v. *Wade,* the US Supreme Court took the view that state cannot control a woman's right to abortion during the first trimester, the state can regulate the abortion procedure during the second and third trimester on certain grounds especially relating to the mental health of woman and the viability of the foetus. In this case, the decision of the court established a system of trimesters, which in effect attempted to balance the state's legitimate interest and individual's constitutional rights.[16]

Roe case has been subsequently modified by the US Supreme Court in Planned *Parenthood* v. *Case*[17] According to this decision, the legality of abortion law is now linked to the viability of the foetus. Thus, the rigid third trimester test laid down in *Roe* case was modified by the Court.

In India, the Central Family Planning Board on August 25, 1964 recommended the Ministry of Health to constitute a committee to study the need of legislation on abortion. A committee was constituted for this purpose including members from various public and private agencies in India.[18]The Committee submitted its report on December 30,1966. In order to draw a conclusion, the committee had taken into account various

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15 410 U.S. 113 (1973). Here the US Supreme court held that an expecting woman has absolute right to privacy in respect of her body till the first twelve weeks of pregnancy.

16 Rathin Bandhyopadhyay, SanjaykumarSingh, et.al. (eds.), Women and HumanRights 462(R. Cambray & Co (p) Ltd, Kolkatta,1st edn., 2010).

17 505 U.S. 833 (1992). *Roe.v.* Wade, *supra* n 15 isnow in trouble because some states in the United States has passed most restrictive abortion Act. If these laws would be challenged before the Supreme court, the reproductive rights advocates worry that the newly empowered conservative majority, entrenched by President Trump in the judiciary, will use the opportunity to strike down *Roe v. Wade*. Available at https://www.vox.com/2019/5 /15/18623073/roe-wade-abortion-Georgia-Alabama-supreme-court (last visited 30/01/2020).

18 The committee appointed for this purpose was the Shantilal Shah Committee.

statistical data relating to abortion available at that time. The MTP Act was enacted based on the recommendation of this report.[19]This Act was modelled on the Abortion Act of 1967 of the United Kingdom.

Termination of Pregnancy

MTP Act modified the provisions of Indian Penal Code 1860 relating to abortion. This Act was considered as one which was 'much ahead of the conditions in India' but some others condemned it as a 'blind adoption by an over enthusiastic elite group of foreign models not necessarily good to this country'[20]

As per this Act, pregnancy may be terminated by registered medical practitioners where the length of pregnancy does not exceed twelve weeks[21] but it may be extended to twenty weeks[22] when continuance of pregnancy involves risk to the life of the mother or it causes injury to her physical or mental health. Pregnancy may be terminated beyond twelve weeks when it also causes risks to the physical or mental health of the child in the womb.

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19 The Act was implemented in 1972 and revised in 1975. The Act was again amended in the year 2002 and 2005. The Act intends to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.

20 Sushma Pradhan, 'Medical Termination of Pregnancy Act: Emancipation of women or Death before Birth' *Supra* n 16 at 473.

21 Sec. 5, where the length of pregnancy exceeds twelve weeks but does not exceed twenty weeks, the opinion of two medical practitioners is necessary for terminating it. If the pregnancy does not exceed twelve weeks the opinion of one doctor is necessary. But this will not apply to the termination of a pregnancy by a registered medical practitioner in a case where the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. But in *Chandrakant Jayantilal Suthar and Ors*.v. *State of Gujarat* it was held that in any case, even under these situations, an opinion to terminate the pregnancy can only be formed if the length of the pregnancy does not exceed twenty weeks. *See Infra* n 27 See Sec. 5, MTP Act.

22 Sec.3(a) ibid.

Pregnancies caused by rape or due to failure of any device or method used by any married woman or her husband for limiting the number of children, is presumed to constitute grave injury to the mental health of the pregnant woman. In such circumstances, the termination of pregnancy is valid.

Consent of the women alone is enough for terminating pregnancy. However, in the case of woman below the age of 18 years or mentally ill person[23]though beyond 18 years, consent in writing of the guardian is essential for termination of pregnancy[24]

In *Suchita Srivastava and Ors*. v. *Chandigarh Administration*[25] the High Court directed termination of the pregnancy though the Expert Body informed that the victim, a mentally retarded woman, had expressed her readiness tobear a child. The question before the Supreme Court was whether it was correct on part of the High Court to direct the termination of pregnancy without the consent of the woman. The Act specifies consent as an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any 'mental illness'. Here the victim's condition was that of 'mild mental retardation'. The Medical Board submitted its opinion recommending the termination of pregnancy. Since there was no clear statutory basis for proceeding with abortion, the Chandigarh Administration moved the High Court seeking judicial opinion on the

23 Mentally ill person means a person who is in need of treatment by reason of any mental disorder other than mental retardation. Substituted by Medical Termination of Pregnancy (Amendment) Act, 2002.

24 See Sec. 4(a) ibid.

25 MANU/SC/1580/2009, AIR 2010 SC 235, There are also instance where MTP was denied due to wrong interpretation by the hospital authorities that the consent of the spouse or parent is necessary to terminate pregnancy. But Supreme court denied the decision of lower court agreeing with the hospital authorities as completely erroneous decision. But when the matter reached before the SC, she was nearly 26 weeks pregnant and MTP was denied by the SC. See Ms. Z v. The State of Bihar and Others 2017, S.C.C.

said matter. The High Court constituted another expert body to ascertain the 'best interests' of the woman. Even though the Expert Body's findings were in favor of continuation of pregnancy, the High Court decided to direct the termination of the same in its order.

On appeal, the Hon'ble Supreme Court emphasized the need to respect the victim's reproductive choice.The Court observed, in spite of other factors such as the lack of understanding of the sexual act, apprehensions about her capacity to carry the pregnancy to its full term and the supposition of maternal responsibilities thereafter, the statute clearly contemplates that even a woman who is found to be 'mentally retarded' should give her consent for the termination of pregnancy.[26]

The Court discussed the scope of consent of the women to terminate pregnancy and the implications of this when there is refusal to recognise the right to give consent. According to the Court, mild mental retardation of person is different from mentally ill person as contemplated by Sec. 3(4) (a) of the MTP Act. The term mentally ill person has been inserted by the 2002 Amendment to MTP Act by replacing the word lunatic. Further Sec.2(b) of the MTP Act inserted definition of the expression 'mentally ill person' and as per Sec. 2(b) 'mentally ill person' means a person who is in need of treatment by reason of any mental disorder other than mental retardation. The amendment shows the intention of the legislature to limit the classes of persons on behalf of whom their guardians could make decisions about the termination of pregnancy. Persons who are in a condition of 'mental retardation' should ordinarily be treated differently from those who are found to be 'mentally ill'. While a guardian can make decisions on behalf a 'mentally ill person' as per Sec. 3(4)(a) of MTP Act, the same cannot be done on behalf of a person who is in a condition of 'mental retardation'. If it is permitted to dilute the law the requirement of consent contemplated by Sec. 3(4)(b) of MTP

26 See para 10.

Act is liable to be misused in a society where sex selective abortion is a pervasive social evil. The Supreme Court in this case as well recognized the personal autonomy of a mentally retarded woman with regard to decisions about her pregnancy especially her readiness to bear the child.

The Court also held that the termination of pregnancy as directed by the High Court was not in the best interest of the victim. Performing an abortion at such a late-stage could have endangered the victims' physical health and the same could have caused further mental anguish to the victim since she had not consented to such a procedure. Here the Supreme Court's decision was also in favour of protecting the bodily autonomy of the woman.

In *Chandrakant Jayantilal Suthar and Ors*. v. *State of Gujarat*[27]here the parents sought the permission to terminate the pregnancy of a minor victim as the said pregnancy was the result of rape and the victim was not ready to accept the pregnancy. Taking into consideration the aspect that the pregnancy of the victim was twenty-four weeks, the Sessions Court declined permission for the termination as the period permissible under the Act for termination is 20 weeks. This was challenged before the High Court. It was contented that in the present case, the pregnancy having been caused by an act of rape, the victim is in anguish, which constitutes a grave injury to her mental health and is a ground for the termination of her pregnancy. Here the Court observed,

There is nothing in Section 3 of the MTP Act which provides for the termination of a pregnancy, the length of which exceeds twenty weeks. If the Legislature had intended so, it would have been so enacted. The function of the Court is only to expound the law and not to legislate. It cannot read into the law what has not been either enacted, or intended. Section 3 of the MTP Act is a clear-cut provision of law which specifically

27 MANU/GJ/0375/2015 Equivalent Citation:2016(4) RC R(Criminal)876(High Court of Gujrat).

provides for the termination of a pregnancy, clearly specifying the length of such pregnancy, not exceeding twenty weeks.[28]

In the opinion of the Court, the clear and unambiguous provisions of a statute are to be followed as they are, being the law of the land. The court here directed the government to extent full support the victim and her parents and issued certain directions in this regard including compensation.

In 2018 the Gujarat High Court again took the view that the pregnancy of 30 weeks and 1 day could not be terminated as per the Medical Termination of Pregnancy Act-1971.[29]In *Z.*v. *The State of Bihar and Ors*[30]a 35-year old woman who was HIVpositive, became pregnant as a consequence of rape,approached the HC for termination of pregnancy.

The medical report does not specify any abnormality of the foetus or the presence of HIV positive but states that any specific opinion can be given only when the child attains the age of 18 months, the writ application has been filed after 20 weeks of pregnancy. In the best interest of the victim the Court finds no reason to terminate the pregnancy in its 23-24 weeks, especially when such termination of pregnancy as per the report of Medical Board would be hazardous to the life of the victim.

Sec. 3 the MTP Act, 1971 which allow termination of pregnancy only up to 20 weeks was again a matter ofcontention before the Allahabad High court in X v. *State of U.P. and Ors.*[31]

In this case for determining the existing conditions of the petitioner the Court constituted a Medical Board comprising Heads of the

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28 See *Ibid*. para 33.

29 *Surjibhai Badaji Kalasva* v. *State of Gujarat* MANU/GJ/0118/2018see also *Sheetal Shankar Salvi and Anr. v. Union of India* MANU/SC/0393/2017: 2017(5) SCALE 428.

30 MANU/SC/1011/2017, AIR 2017 SC 3908.

31 MANU/UP/2113/2019.

Department of Gynecology, Pediatrics', Radio-diagnostics and Psychologist or Psychiatrist. Apart from the physical condition of the mother and the foetus, examination of the foetus from various medical angles, the Board opined about the Psychological trauma, if any, which the petitioner may undergo if she were to give birth to the child. The Medical Board also ascertained the petitioner's willingness to get the pregnancy terminated. The Hon'ble Court perused the report of each member of the Medical Board especially that of the gynecologist and psychiatrist. As per the report, continuation of pregnancy will definitely cause mental trauma to the minor girl, as the girl isin advanced pregnancy of 22+weeks, and that pregnancy can be terminated on the directives of the court. Termination may be attempted medically, initially using medications and the procedure may take around 2-3 days for completion. At times if pregnancy is not terminated medically, then surgical termination will be done, which involves the risk ofanesthesia and surgery as any other surgical procedure. According to the psychiatrist, the patient is troubled by the fact that she is pregnant and that teenage pregnancy has lot of psychological effects on the girl andis not mature enough to physically and mentally handle the stress of pregnancy, child birth and later on taking care of offspring especially which is unwanted.

The Court in this peculiar situation thought about what would serve the best interest of a minor, who is obviously suffering from 'Rape Trauma Syndrome' not only at present but would suffer in her future life as well. The Court analysed Sec. 3 of the MTP Act in the light of its explanation provided in the section itself. In the opinion of the Court,

Section 3 of the Act permits termination of pregnancy on the opinion of a registered medical practitioner, where length of pregnancy does not exceed 12 weeks, or if continuance of pregnancy would not involve a risk to the life of pregnant woman or causes grave injury to

her physical or mental health.But the opinion of two registered medical practitioners is necessary if the gestation period exceeds 12 weeks but does not exceed 20 weeks.Section 3 contains an Explanation which provides for statutory presumption of grave injury to mental health of the pregnant woman. According to Explanation-1 appended to Section 3, in such a situation suffering caused by such pregnancy due to rape is presumed to constitute grave injury to the mental health of the pregnant woman.The statutory prescription thus available in Section 3 of MTP Act maximum emphasis on involvement of risk to life of the pregnant woman or risk of grave injury to her physical or mental health, apart from emphasis on the risk that if child was born, it would suffer from such physical or mental abnormalities which would render the child to be seriously handicapped.[32]

That is Sec. 3 does not limit itself to injury to physical health of a pregnant woman on account of continuance of pregnancy, it also includes injury to mental health as well. Explanation 1 to Sec. 3 of the MTP Act contains a presumption regarding pregnancy caused by rape to constitute in itself a grave injury to the mental health of the pregnant woman. The Court had given due weight to Sec. 3 and 5 which permitted termination of pregnancy, if its continuance involves grave injury to physical health of the woman but injury to mental health as well. The court held,

> *Giving birth to a child by victim of rape that too at such a tender age, may make the future life of the victim more miserable. The environment which the petitioner in this case would be landing herself in, if she gives birth to the child, can very well be foreseen as completely non-conducive to the future growth of the petitioner as a human being hampering all chances of a normal and happy life.*[33]

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32 See Para 11.

33 *Ibid*. Para 22.

In the light of these analysis the Court gave permission to terminate the pregnancy at an advanced stage of 22 + weeks i.e. beyond the period of 20 weeks prescribed by law. Here the Court gave an extensive interpretation to the provisions of MTPAct to serve the best interest of the victim especially when the victim is a minor girl.

Places for termination of pregnancy

Termination of pregnancy can be conducted only in certain specified places; this includes hospitals established or maintained by the government or other approved places.[34] Such places may be approved either by the government or a district level committee[35] constituted by the government. The number of members of the committee shall be fixed by the government from time to time. The chief medical officer or district health officer is the chairperson of the committee.

Power to make rules

The Central Government may, by notification in the official gazette, make rules[36] to carry out the provisions of this Act. The State Governments can also on certain matters, make regulations.

MTP Act –Implementation and its Repercussions

Right to terminate the pregnancy of a woman is only a qualified right under this Act. Termination is possible only on the satisfaction of certain conditions. In this way, the Act tries to make a balance between the rights of the mother and that of the unborn. But due to the passage of time and advancement of medical science and also in the light of

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34 See Sec. 4 of MTP Act.

35 The composition and tenure of committee shall be prescribed by the MTP Rules 2003. These rules increase access for women, especially in the private health sector.

36 The government first made the Medical Termination of Pregnancy Rules, 1975 but repealed by MTP Rules 2003.

increasing violations against women and children especially girl child, the provisions of the Act limiting the period of pregnancy within which law allows termination causes some difficulty to women.

It is a fact that certain health complications of pregnant woman and that of deformities of the foetus may be detectable only after 20 weeks. This is because the development of foetus is necessary for diagnosing various conditions of it. But at the same time medical science is so advanced to conduct MTP beyond 20 weeks.

Number of petitions were filed before the Supreme Court and High Courts seeking the approval of courts to terminate pregnancy. Though the decisions of the courts may vary taking into account the different circumstances, these cases reveal the plight of pregnant woman to abort the child whenever it becomes necessary. These decisions examined the severe physical and mental injuries suffered by pregnant mothers and recognized their reproductive freedom. The courts often took the stand that the denial of medical termination of pregnancy after the prescribed time limit of 20weeks was the denial of their basic right to life and personal liberty, but still India has not yet amended the MTP Act to address this problem. In the absence of a specific legislations, the courts often adopted a case by case appraisal and the women are forced to approach the court to have their case reviewed by a medical board appointed for that purpose by the government. This has resulted in an extra-legal third-party authorization requirement that disempowers women and girls and leads to unnecessary delays, denials, and inconsistencies in the application of the law, as well as a chilling effect on access to MTPs even at earlier stages of pregnancy.[37]

Legal and practical barriers are a serious impediment to women's and girls' ability to access safe abortion services without delays. In spite

37 Available at https://reproductiverights.org/sites/default/files/documents/Post-20-Week-Access-to-Abortion-India-0218.pdf (last visited 30-01-2020).

of being legal, approximately 50 percent of abortions in India are estimated to be unsafe,and unsafe abortion is estimated to account for nine to 20 percent of all maternal deaths.This percentage is similar to the incidence in countries where abortion is completely illegal.[38]

The Act specifies that beyond the period of 12 months, for termination of pregnancy, reports by two medical practitioners is necessary. This requirement also causes some problems to the people living in remote areas where such facility of more than one doctor is not alwaysavailable. Another drawback of this law is that, termination of pregnancy due to failure of contraceptive device isallowed to married couple alone. This may cause difficulty at this point of time as the concept of marriage itself has changed and the courts are now recognizing the rights of persons even in the relationship of a 'living together'. Government should also pay attention to the rights of unmarried woman to terminate her pregnancy.

While analysing the cases before the courts requesting to terminate pregnancy, we can see that most 'women' approaching the court for terminating her pregnancy was either a rape victim or a victim in POCSO cases. In such cases law should be amended in such a way as to give more weight to the best interest of these minor victims. In the absence of a clear and unambiguous provisions in law, often these victims have to approach the court for permission to terminate pregnancy.

We have in front so many instances where the court has decided whether to terminate pregnancy or to allow it to continue. If this can be done through the supervision of an expert body to be provided in the Act, it would be beneficial to the women and can save the valuable time of judiciary.

Considering these factors especially with respect to increasing the gestation period, which allows termination, certain amendments were

38 *Ibid.*

proposed in the Parliament. In 2014[39], based on the recommendationof National Commission for Women,the Union Ministry of Health and Family Welfare proposed a draft bill to amend the existing Act. The Ministry recommended that the 20-week gestation limit for abortion be raised to 24 weeks and that women, irrespective of their marital status should be given abortion rights. Government also tried to increase the provider base by including AYUSH doctors. The MTP amendment bill, 2017, was introduced in the Rajya Sabha with intent to raise the gestation period of abortions to 24 weeks.MTP amendment bill, 2018, was introduced in the Lok Sabha also to substitute the 20-week duration with 24 weeks and further raising it to 27 weeks in case of a rape survivor.[40]

A petition was filed before the Supreme Court by certainactivists challenged the 20-week gestation limit saying that advancements in science, technology and medicine has made it possible to terminate pregnancies at later stages and that it would be violative of article 14 and 21 of the Constitution. Various High Courts also issued notice to the Central government seeking their response in extending the period for termination of pregnancy, stating that it is a matter of urgency.

Finally, the Union Cabinet approved a bill that proposes to permit the termination of pregnancy up to 24 weeks from the existing 20 weeks. The Medical Termination of Pregnancy (Amendment) Bill, 2020 intends toincrease access of women to safe and legal abortion services on therapeutic, eugenic, humanitarian or social grounds. The proposed amendments are included with a view to increase the gestation limit for termination of pregnancy under certain conditions and to strengthen

39 Medical Termination of Pregnancy Amendment Bill 2014.

40 Available at https://www.downtoearth.org.in/news/health/abortion-in-india-experts-call-for-changes-663 69 (last visited 0n 30-01-2020).

access to comprehensive abortion care, under strict conditions, without compromising service and quality of safe abortion.[41]

Conclusion

MTP Act 1971 has been conceived as a measure to protect the women from unsafe and illegal abortions and to save the women from injury to physical and mental health. The Act also makes provision to protect the child from the risk of physical or mental abnormality and thereby ensuring a new generation free from deformities and diseases. By limiting the gestation period within which pregnancy can be terminated legally, the Act tries to make a balance between the rights of woman and that of the unborn.

Though the Act does not makethe termination of pregnancy from the stand point of women's right in its fullest sense, this is one of the oldest laws recognising the reproductive rights of woman and empower women by allowing them to make their own choice with respect to continuance of pregnancy. The proposed amendments to this Act increasing the period of gestation in conformity with the development of science and technology may help to attain the intrinsic objectives of this Act.

41 Available at https://www.livemint.com/news/india/cabinet-approves-mtp-amendment-bill-11580292 6066 60 .html (last visited on 30-01-2020).

Definition Of Child Under Indian Laws- An Analysis

Aruna B.K*

Abstract

This article analyses the definition of child and the problems in defining child. An attempt to understand the universal standard of defining child and the role of the United Nations Convention on the Rights of Child in attaining a universal standard is made. Social, psychological and legal aspects of definition of child and the reflection of these factors in various definitions given in different Indian legislations forms part of the study. A brief analysis will show that different statutes define child differently for different legal purposes. Most of these definitions give emphasis to age of the person. The reason for this is found in the discussions relating to social, psychological and cultural understandings of who is a child and what are his rights.

Introduction

Children are considered as the wealth of a nation. It is the duty of the parents and the state to take care of children until they attain the age of majority. They should be taken care of in a special and tender manner suitable to their age and development. In this regard the most important question is how long should they be kept in parental care and when should they be free to do things as a fully grown human being. This article attempts an analysis of the definitions of child and the problems of defining child on the basis of age and purpose. For any

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study relating to child an analysis of the theoretical foundations of right based approach is important for establishing children as right holders. This points to more pertinent questions such as whether childhood should be regulated so that children's rights are better protected. 'Whether there is a duty to protect children'? And 'if yes, when should they be taken out of the compulsory legal protection'? And finally 'What is the need of establishing children as right holders'?This article tries to find out answers to these questions.

Why definition matters?

Defining child in a statute is important since the protection offered to child varydepending on the purpose of specific legislations. Some statutes may define child as a person who has not completed a specified age and limit the beneficial provisions of the statute only to such persons. Child as used in common language denotes a progeny or offspring of young age. The Black's Law Dictionary defines child as a progeny, offspring of parentage[1]. Child is an unborn or recently born human being.Setting up an internationally accepted definition, the Convention on the Rights of the Child defines child as every human being below the age of eighteen years unless under the law applicable to the child majority is attained earlier[2]. While it could be seen that the dictionary meaning of child as society understands it connects child with parentage, the legal definition gives stress to age.But these definitions are not conclusive for all legal purposes as statutes fix legal rights and liabilities of children and their caretakers in differing terms for different purposes. For example under Indian Penal Code a child is absolutely immune from criminal liability if he is below the age of seven years and limited immunity is given if he is below the age of twelve years depending on his maturity of

1 Henry Campbell, Black Law Dictionary 217 (West Publishing Company, Minnesota, USA,5th ed 1979).

2 U.N. Convention on the Rights of the Child (1989), UN General Assembly Document A/RES/44/25.

understanding[3]. In such cases the general definition of child as any person below the age of eighteen is not sufficient.Likewise the age for giving consent, for entering into marital relations, for being employed in industries and factories etc. vary as per the age of the child. The question who is a child is most poignant when faced with child abuse, child prostitution and child sex tourism.

A close analysis will show that varying definitions on the basis of age for different purposes are closely linked with psychological, social, health and developmental factors. Therefore a study of the legal definition of child leads to the social and psychological understanding of the term child and also to the journey of development of child to an adult.The following discussion intend to detail the notions of childhood as understood in social,psychological and legal levels, analyze legislative provisions in India defining child and understand the problems in defining child on the basis of age. This article also attempts to find out the importance of right based approach on studies relating to child.

Definition of child- social, psychological and legal implications

Understanding the concept of child is a complex process which should be approached from three different levels. Firstly the society's understanding of child should be considered, then the internal or psychological aspects of childhood should be studied and finally the legal definition should be analyzed.

From a sociological point of view the question who is a child often carries with it different implications. For example it conveys the questions why should a person not be treated as an adult, when should a person not be treated as an adult and how to distinct an adult from a child and in what circumstances such a distinction should be drawn. The following words of Tamar Schapiro explain the situation.

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3 The Indian Penal Code, 1860(Act 45 of 1860) S. 82 and 83.

> We have conventional norms for applying the concepts ''adult'' and ''child,'' but they do not always match our intuitions about how to treat people. Positive laws may stipulate, for example, that anyone under the age of seventeen counts as a child from the point of view of the state. But we can ask in any particular case whether this stipulation is reasonable from a moral point of view. Questions about when to treat children as adults, and when to treat adults as children, bring out the fact that there can be a gap between our conventional applications of these terms and their proper application for moral purposes[4].

Though through legislations law makers try to define child on the basis of age, there are circumstances which warrant a different attitude. At times law takes the societal notions into consideration. Society's basic concept is that child is a person who in some fundamental way is not yet developed, but who is in the process of developing[5]. It is this aspect that children are not yet fully developed which demands special treatment to them at times. This feeling creates a sense of special obligation of paternalistic nature in adults from which sprouts the duty to protect, nurture, discipline and educate children. Associated with this feeling there is yet another social intuition that what children opine do not matter including their consent and dissent in matters affecting their own welfare and that they should not be made responsible for their actions in the same way the society hold an adult responsible[6]. This aspect is evident in violent crimes where the accused is a juvenile[7]. Arguments that the juvenile accused may be given the consideration of

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4 Tamar Schapiro, "What Is a Child?" 109 ETHICS 715-738(1999).

5 *Ibid.*

6 *Ibid.*

7 For example in the Delhi rape case and Mumbai terror attack case different opinion were rendered from different parts of the country as to the punishment to be awarded to the juvenile accused.

tender age and that he was not aware of the seriousness of the offence he committed etc. are raised in such circumstances. Further there is a belief that the general welfare is best promoted if older people take control of the lives of younger people since older people generally have greater knowledge and skill than younger people. Equally strong is the belief that children will go wayward if they are given the freedom to make decisions. One simple example of this is the concept of *best interest of the child*. The best interest of the child is decided by others since the child is not capable of really understanding what is good for him. Also some systems recognized marriages if done with parental consent even if either of the party to the marriage is a child. So the society's understanding of who is a child,what is good for him and who should take actions on his behalf depends on social intuitions and social intuitions vary from place to place as no society is similar to one another in all respects. And we can see that these social intuitions are usually based upon the psychological development of child and are reflected in legal definitions.

In both social and legal definitions of child much importance is given to the psychological development than biological development. It is therefore necessary to understand the psychological development of child to construe the legal definition clearly because conceptualization, investigation, and treatment of behavioral and emotional problems in children, the concepts of competence, efficacy, resilience, and protective factors depend directly on the psychological development. Studies show that competence requires the organization and coordination of multiple mental and physical processes, that there are multiple pathways to good developmental outcomes and that complex internal and social processes are involved in achieving competence[8]. Distinct dimensions of academic,

8 Ann S. Masten, J. Douglas Coatsworth, Jennifer Neemann, Scott D. Gest, Auke Tellegen and Norman Garmezy, "The Structure and Coherence of Competence from Childhood Through Adolescence", 66 CHILD DEVELOPMENT, 1636-1652 (1995).

social, and conduct-related competence is developed in middle childhood and several additional dimensions including dating or romantic and job competence is developed in adolescence. Other developments in a child, like classroom behavior, home behavior, or general adjustment also relate to competence which can be understood by age related developmental patterns[9].

Thus it could be seen that age- relevant developmental problems are often attached with competence and anti-social behavior. Therefore in psychological analysis of definition of child too, age becomes a relevant factor. There are various other factors that influence the development of child at different stages of childhood from infant to adolescence like parental care, peer acceptance or rejection, poverty, education, social status, education and employment of parents, family problems etc. Child's conception of social relations and institutions depend on its psychological development and psychological developments on the other hand depend on the social perceptions of childhood. So it is not possible to understand child and childhood without analyzing the sociological and psychological factors together.

The legal definition of child often conjoins these sociological and psychological factors and therefore adopts different definitions for different purposes based on age related development of child. For example by taking into consideration the principle of *doliincapase* absolute immunity of child from criminal liability is accepted by almost all legal systems. Likewise different age is specified for employment, marriage, compulsory education and for rendering consent. A new trend in this area was the adoption of eighteen years as the age on attaining which a person may be treated as major. This approach was accepted in both international and national documents. For example, the United Nations here in alter referred as (CRC) convention on the Right of the Child,

9 *Ibid.*

which has been adopted by the General Assembly of UN on 20th November 1989 and also acceded by the Government of India in the convention dated 11th December 1992.The convention defines child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.It is extremely interesting to note that the CRC defines child in qualifying terms even though the convention aims to set a uniform standard. The adoption of definition of child as every human being below the age of eighteen is not compulsory for the signatories. The convention gives the signatories freedom to keep their legislations even if majority is attained at an earlier age[10]. The only requirement under CRC in this regard is that the state parties should provide the information regarding the definition of the child under national laws, age of attainment of majority, minimum age for various legal purposes like medical and legal counsel without parental consent, compulsory education, part- time and full time employment, sexual consent, marriage, voluntary enlistment in the armed forces, voluntarily giving testimony in the courts, criminal liability, deprivation of liberty, imprisonment and consumption of alcoholic and other controlled substances.

When it came up for ratification, it could be seen that many nations signed and ratified the convention with reservations[11]. Islamic nations like Iran, Iraq, Kuwait, Saudi Arabia etc.have signed the convention with the reservation that the irrespective Governments reserve the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect. India signed the Convention with a declaration that the nation understands and recognizes the principles of the Convention and that she undertakes to subscribe to the principles of the Convention subject

10 The UN convention on the Rights of the Child, 1989, art. 1.

11 https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec (Last visted on 25/07/2020).

to the extent of availability of resources.The declaration recognizes that for several reasons children of different ages do work in India and it is not practical immediately to prescribe minimum age for admission to each and every area of employment in India. Likewise the United Kingdom also made a declaration in respect of each of its dependent territories except Hong Kong and Pitcairnthat it reserves the right to apply article 32 subject to the laws of those territories which treat certain persons under 18 not as children but as 'young people'[12]. This shows that though the UN CRC tries to set a universal standard in defining child, because of the relaxation within the international frame work, attaining an international standard is still a goal to achieve. Though the convention defines child as every human being below the age of eighteen years, this is not a strict definition and the state parties can easily escape implementation of the universal standard by enacting a national legislation. For example in Singapore, the Children and Young Persons Act, 1993 defines child as a person who is below the age of 14 years[13]. So it cannot be absolutely true that the CRC has done a standard setting role by fixing the age of the child. Neither can the influential role of the CRC in creating an international consensus be disputed. Though the CRC is not strict in terms of implementation the influence it has on signatories is significant. The Convention changed the way children are viewed and treated – i.e., as human beings with a distinct set of rights instead of as passive objects of care and charity[14].

Indian legislations defining child- A Critical analysis

In India there are legislations dealing with different purposes like fixing of criminal liability, giving valid consent, child marriage, custody

12 *Supra*note 11.

13 Children and Young Persons Act, 1993 Section 2.

14 A World of Difference: 25 CRC achievements available at http://www.unicef.org/crc/index_73549.html(last visitedon April 4, 2019.

of children, employment of children etc.[15] which define children as per the specific requirement of these legislations. There are many pieces of legislations which provide different laws for older adolescents (usually above fourteen years of age), technically treating them differently from younger children. Criminal law and employment law clearly make a distinction between children of different age group, although the age range for each is different in different spheres of law. A brief analysis is attempted below.

a. For fixing criminal liability and to give valid consent - The Indian Penal Code, 1860

The Code define child for two different purposes, one for exempting from criminal liability and the other for giving valid consent in relation to offences affecting dignity.

The majority of serious criminal offences require in addition to *actus reus*, a specific state of mind on the part of the accused, usually referred to as the *mens rea*[16]. Such offences require proof of some blameworthy state of mind, for example that the defendant intended or foresaw a particular result[17]. That is, a guilty state of mind is necessary for such offences. But some exceptions from liability are there which are generally recognized by common law systems and are incorporated into the Indian Penal Code, 1860. Section 82[18] of IPC grants complete exemption from criminal liability to a child below seven years of age, on presumption of "*doliincapase*" i.e., not endowed with any discretion as to distinguish right from wrong and good from bad[19]. In short he lacks the necessary *mens rea* to commit any offence. This is an irrefutable

15 S. K. Pachauri, Children and Human Rights1 (APH Pub. Corp. New Delhi, 1999).

16 Jonathan Herring, CriminalLaw, 83(Palgrave Macmillan, London 5thedn. 2007).

17 *Ibid*.

18 *Supra* note 3.

19 B. M. Gandhi,Indian Penal Code110(EBC, Lucknow, 3rd edn., 2012).

presumption which means once the age of child is proved below seven years there is a presumption of innocence which cannot be negated by evidence. In Hiralal*v.* State of Bihar[20], the honorable Supreme Court held that proof of age of a child that he is under seven years of age would absolve the child from criminal liability. This principle is the best example of inclusion of the psychological factors in defining child.

Another exception from criminal liability is given to child above seven years of age but below twelve years[21]. A child in this age group is exempted from criminal liability if he has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct. This exemption is not applicable if it is proved that the child has attained sufficient understanding of the nature of the offence[22]. This is based on the maxim *malitiasuppletoetatem* which means malice supplies defect of age[23]. If he circumstances disclose such a degree of malice it would be justified that a child between seven and twelve is liable for his acts. In such cases two things are to be proved, firstly that the child is below twelve years and above seven years of age and secondly that he lacked sufficient maturity of understanding the nature of the act he did.

Yet another area where age of child is specifically stated in the IPC is offences against dignity, particularly rape. Before the Criminal Law Amendment Act, 2013 was enacted Section 375 of IPC defined rape as an offence of intercourse with a woman committed with or without her consent if she was less than sixteen years of age. Now the amended section fixes the age for consent as eighteen years[24]. But

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20 Hiralal v. State of Bihar *(*1977) 4 SCC 44.

21 The Indian Penal Code, 1860(Act 45 of 1860), S. 83.

22 Ulla Mahapatra v. The KingAIR 1950 Ori. 261, in this case a boy of eleven threatened to kill a person and actually did kill him with a knife. Here the court held that he actually had the necessary understanding of the nature of his acts as he actually did what he said.

23 *Supra* note 18.

24 The Indian Penal Code, 1860 (Act 45 of 1860), S. 375.

exception to section 375 states that sexual intercourse or sexual acts by a man with his wife is not rape if she is not under fifteen years of age. That is in case of marital rape, i.e., rape by husband the sexual act will be considered as an offence only if the child is below fifteen years of age. Section 376 (2) provides that whoever commits rape on a woman who is under sixteen years of age shall be punished with imprisonment for a term not less than ten years but which may extend to imprisonment for life. Thus it could be seen that three different parameters are adopted for the same offence without any scientific explanation as to the criteria adopted for fixing age in this manner.

b. For entering into marital relation- (The Child Marriage Restraint Act, 1928 and Prohibition of Child Marriage Act, 2006)

For the purpose of setting the minimum age limit for entering in to marital relationships, Child Marriage Restraint Act was enacted, which sets out the minimum age of a male and a female child separately. The Act defines child as a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age[25]. This definition has been incorporated considering the sociological and psychological factors and the health of the contracting parties. The Act defines child marriage as one, to which either of the contracting parties is a child[26]. To prevent child marriages the Act provided for punishment of the male party for contracting a child marriage for a period of fifteen days or fine which may extend to one thousand rupees, or both, if he is less than twenty one years of age. The punishment is simple imprisonment for a period of three months and fine if the male contracting party is above twenty one years of age. These provisions were criticized because the Act contained provisions only to punish the adult male participant of a child marriage, and do not render the child

25 The Child Marriage Restraint Act, 1929, (Act 19 of 1929), S. 2 (a).

26 The Child Marriage Restraint Act, 1929, (Act 19 of 1929), S. 2 (b).

marriage invalid or illegal. Thus the marriage will remain valid creating legal rights, duties and obligations if it was performed under any recognized form of law and is not otherwise invalid. Further the Act punishes a male contracting party who himself is a victim of child marriage. Thus if the male contracting party is of very young age and was compelled to the marriage by his parents he has no remedy under this Act.

The Parliament of India enacted Prohibition of Child Marriage Act in the year 2006 to overcome these shortcomings. The new Act define child[27] and child marriage[28] in the same lines of the Child Marriage Restraint Act, 1929 but every child marriage, solemnized before or after the commencement of this Act, is made voidable at the option of the party who was a child at the time of the marriage[29] provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage. The Act not just renders the marriage of a minor voidable at the option of the minor but also punishes any adult member who in any manner contributes to such marriage under S.11 of the Act. The proviso to the section however exempts women from punishment. The Act further renders a forceful marriage or marriage as a result of coercion of a child null and void[30]. One problem that arises in the application of this act is that the marriage is only voidable at the instance of the minor either by himself / herself after the completion of majority or if he/she is a minor through a guardian or next friend along with the Child Marriage Prohibition Officer. The practical trouble in such cases includes the fact that in most of the cases it will be the guardian or the relatives that compel a child to enter in to

27 The Prohibition of Child Marriage Act, 2006, (Act 6 of 2007), S. 2(a).

28 The Prohibition of Child Marriage Act, 2006, (Act 6 of 2007), S. 2(b).

29 The Prohibition of Child Marriage Act, 2006, (Act 6 of 2007), S. 3(I).

30 The Prohibition of Child Marriage Act, 2006, (Act 6 of 2007), S. 12.

a child marriage. Further it is difficult for the child especially the girl child to withdraw from the marital relationship once she is married off and things get complicated if there is any child born out of such relationship.

An analysis of the provisions of Prohibition of Child Marriage Act shows that age of persons for entering into a valid marriage as twenty one for males and eighteen for females is fixed because of various reasons.A young girl does not have much understanding of what is happening in her life when she is married off[31]. She has to face a number of adverse consequences – physical, psychological, financial and developmental[32]. Though a girl child attains puberty before she reaches eighteen years, her reproductive health remain considerably week at such early age and there are dare consequences which can be better understood from the following report of the World Health Organization.

> First pregnancy at an early age is risky. Complications of pregnancy and childbirth are the leading cause of death in women aged 15–19 years. Adolescent pregnancy is also dangerous for the child in the womb. In low- and middle-income countries stillbirths and death in the first week and first month of life are 50% higher among babies born to mothers younger than 20 years than those born to mothers aged 20–29 years, and the younger the mother, the higher the risk. The rates of preterm birth, low birth weight and asphyxia are higher among the children of adolescent girls, all these conditions increase the chance of death or future health problems for the baby[33].

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31 Jaya Sagade, Child Marriage in India Socio Legal and Human Rights Dimensions, 35(OUP, London 2012).

32 *Ibid*.

33 WHO, Report by the Secretariat on Early Marriages, Adolescent and Young Pregnancies (1st December 2011).

Apart from affecting reproductive health, child marriage has other consequences too.It usually takes away educational opportunities of adolescent girls. As a consequence it limits their opportunities of employment and income generation, sowing the seeds of a lifetime of dependency. It also takes away their personality development as they hardly get any exposure to the outside world. Lack of education limits women's ability to make informed choices. The denial of socio economic advancements and improvement in social status result in strengthening the age old patriarchal values in present generation. Even though these remains the facts, providing different age on the basis of gender is not reasonable.

Age of consent, Child Marriage and the Indian Penal Code- a conflicting situation

Criminal law recognizes the distinction between children and adults in a number of ways. It is one of the most complex areas of law in distinguishing between children of different ages. The issue of child marriage was first addressed in the IPC under provisions relating to rape. Rape is an act of sexual intercourse by a man with a woman without her consent. Sexual intercourse with a woman even with consent is rape if she is below the age of giving valid consent. In 1860 the age of consent for marital rape was fixed as ten which was subsequently raised to twelve in 1891 and to thirteen in 1925 and again to fifteen under the Amendment of 1949. This age is not changed even after the Criminal Law Amendment, 2013 has been passed. So when the Prohibition of Child Marriage Act, 2006 prescribe the minimum age of marriage for women as eighteen years, the age of consent for marital sexual relation remain fifteen years as per the Penal Code. This is a conflicting situation as interpretation of these two sections gives an impression that even though one cannot marry a girl below the age of eighteen years, he won't be punished for marital rape if she has completed fifteen years of age.

That is once the punishment under Prohibition of Child Marriage, 2006 is over the accused is free to rape his wife until she turns eighteen and renounce the marriage. This provision in IPC in practice destroys the purpose of the Prohibition of Child Marriage, 2006. Therefore it is suggested that the age of consent for marital rape should be raised to eighteen years to match the minimum age of marriage provided in the Prohibition of Child Marriage, 2006.

c. For the purpose of engaging in employment

(Aricle 24 of the Constitution of India, The Child and Adolescent Labour(Prohibition and Regulation) Act 1986, Factories Act, 1948, The Mines Act, 1952, Merchant Shipping Act, 1958, Motor transport Workers Act, 1951, plantation Labour Act, 1951, Bidi and Cigar Workers Act, 1966 and Apprentices Act, 1961)

The definition of child for the purpose of engaging in employment has its roots in Article 24 of the Constitution of India, which prohibits the employment of a child below the age of fourteen years in any factory, mine or any other hazardous employment[34]. This provision will operate even though the Parliament has not enacted any legislation for this purpose[35]. However the legislature has enacted several legislations like the Child and Adolescent Labour(Prohibition and Regulation) Act 1986, Factories Act, 1948, The Mines Act, 1952, Merchant Shipping Act, 1958, Motor transport Workers Act, 1951, plantation Labour Act, 1951, Bidi and Cigar Workers Act, 1966 and Apprentices Act, 1961 prohibiting child labour[36].

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34 The Constitution of India, Article 24.

35 People's Union for Democratic Rights v. Union of India, AIR 1982SC1473.

36 The Child and Adolescent Labour (Prohibition and Regulation) Act 1986, Factories Act, 1948, The Mines Act, 1952, Merchant Shipping Act, 1958, Motor transport Workers Act, 1951, plantation Labour Act, 1951, Bidi and Cigar Workers Act, 1966 and Apprentices Act, 1961.

For the purpose of engaging in employment The Child Labour (Prohibition and Regulation) Act 1986 defines child as a person who has not completed the age of fourteen years.[37] The Child Labour (Prohibition and Regulation) Amendment Act, 2016 defines adolescent as a person who has completed his fourteenth year of age but has not completed his eighteenth year and child as a person who has not completed his fourteenth year of age or such age as specified in the Right of Children to Free and Compulsory Education Act, 2009 whichever is more[38].

The Factories Act, 1948 however defines a child for the purpose of enrollment in employment in factories as any person who has not attained the age of fifteen years[39]. The Act gives the definition of adolescent as a person who has not completed the age of eighteen years[40], for the purpose permitting him to be employed in factories. The Act does not allow a child below fourteen years of age to work in a factory.

The Mines Act, 1952 also defines child as a person who has not completed the age of fifteen years[41]. Analyses of these provisions indicate that there is no uniformity among the laws defining child for the purpose of employment.

The above mentioned legislations place restriction on employment of children by creating specific criminal offences in relation to the employment of children. Such legislations confirm to the society's view that children should have an opportunity to be educated and that they should be given an opportunity to flourish to fully developed human beings.

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37 The Child and Adolescent Labour (Prohibition and Regulation) Act 1986, (Act 61 of1986), S.2(11).

38 The Child Labour (Prohibition and Regulation) Amendment Act, 2016 (Act 3 of 2016) S.4.

39 The Factories Act, 1948, (Act 63of1948), S. 2(c).

40 The Factories Act, 1948, (Act 63of1948), S. 2(b).

41 TheMines Act, 1952(Act 35of), S. 2(e).

To ensure that this goal is achieved it is necessary to see that those liberated from child labour are rehabilitated and are provided proper education. Primary education as a fundamental right of every child below the age of fourteen has been made mandatory under Act 21 A of the Constitution of India to secure this goal. Conferring rights without imposing duties upon corresponding persons is of no use and understanding this proposition Part IV Constitution of India containing fundamental duties is amended to impose duty upon parents to provide free and compulsory education to children below the age of fourteen.[42] Similarly the Directive Principles of State Policy has also been amended to make it obligatory on the State to provide compulsory education to children of this age group. On an analysis it could be stated this constitutional scheme has helped to attain the goals aimed through those legislations which define child as person below fourteen years of age for the purpose of engagement in employment.

d. Immoral Traffic (Prevention) Act, 1956 for the purpose of offences affecting dignity of individual

Under the Immoral Suppression (Prevention) Act, 1956, amended by the Immoral Traffic (Prevention) Act, 1986 a child means a person who has not completed the age of sixteen years[43], and a minor means a person who has attained the age of sixteen years, but has not completed the age of eighteen years[44]. The definition in this Act serves the purpose of determining the age of the child for the purposes of voluntarily entering into sexual relationships. This classification based on age as child and minor is unscientific. Physical and mental growth of a sixteen year old and a seventeen year would be considerably same. And there may not be much difference in the capability of understanding and taking decisions in matters covered under the Act.

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42 The Constitution of India, art. 51A.

43 TheImmoral Traffic (Prevention) Act, 1956, (Act 104 of1956), S. 2(aa).

44 TheImmoral Traffic (Prevention) Act, 1956, (Act 104 of 1956), S. 2(b).

e. For entering into contractual obligations

Prohibition of children to enter in to contract is based on the fact that children are believed to be under a disability so far as law is concerned and are not responsible for their debts until they reach eighteen years of age. Behind this basic principle is a desire to protect adults from founding that they cannot enforce a contract they have entered into with a child.

f. For general purposes -The Juvenile Justice Act

The Juvenile Justice Act, 1986 defines juvenile as a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. Thus the definition in the Juvenile Justice Act of 1986 was not comprehensive and it set forth a gender based definition of juvenile. And this definition was not in lines with the CRC. Therefore in the year 2000, the Juvenile Justice Act was amended in lines with the Convention on the Rights of the Child, accepting the definition of the Child as any person below the age of 18 years.The Juvenile Justice Act, 2000 was enacted by the Parliament of India to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment[45]. The Act defines the term Juvenile or child as a person who has not completed eighteenth year of age[46]. Thus the Act for the first time gives a clear definition of the

45 Preamble to the Juvenile Justice (Care and Protection of Children Act) 2000 reads "An Act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment"

46 The, Juvenile Justice (Care and Protection Act) 2000 (Act 56 of 2000), S. 2.k.

term "child" in tune with Convention on the Rights of Child. The Juvenile Justice (Care and Protection of Children) Act, 2015 also defines child as a person who has not completed eighteen years of age[47].

But the problem still remains as in cases of specific purposes like criminal liability, employment in factories etc. age is specifically set out in the concerned legislation and the special legislation will override the general law. Thus it could be stated from the above analysis that the definition is not uniform in India.

Conclusion

The law both civil and criminal, recognizes that children should be treated differently from adults. Childhood should be regulated so that children's rights are better protected. They may be guided, protected against abuse and allowed to fully develop their potential. And to achieve this it is necessary that they may be treated as separate right holders. They must be legally capable of holding rights and it must be the duty of the state to see that their rights are protected.Children should have a say in decisions affecting their lives and parents, state and court shall take children's views into account. They should not be treated as the chattel of their parents anymore. Role of parents as guardian should cease when they are incapable of performing their obligations towards the child and the state should take up the role of *parens patriae*when the best interests of the child are at stake.States should stop treating children of the age group of 17-18 years as adults as there is no scientific evidence to prove that there is sufficient difference between the understanding and capabilities of a sixteen year old and a seventeen year or eighteen year old and such classification seems erroneous. As discussed above in India, only a person below fourteen is a child for the purpose of employment which means a child can be employed if he/she has completed the age of fourteen years. Likewise a girl can legally enter into sexual relation with someone she marries even if she has not attained

47 The, Juvenile Justice (Care and Protection of Children) Act, 2015(Act 2of 2016), S.2 (12).

eighteen years of age.Therefore it is high time to unify the definition of child under different laws in lines of the CRC so that a person will not be treated like child for one purpose and likean adult for other.The state should recognize every person below the age of eighteen as child for the purpose of beneficial legislations.

Various Facets Of Social Security: A Glimpse of Employees' Provident Funds Amendment Act Of 2018

Dr. Money Veena. V.R*

Abstract

The birth of industrial jurisprudence was an impact of workers movement since industrialisation. Labour legislations throughout the world are based upon certain common principles namely social justice, social insurance, social security and international uniformity. The term social security has different dimensions varying from equality, economic security, security from ill effects of employment etc. It is in fact the security that is furnished by the state to the workers or the employees. This may include the required medical facilities, insurance against various risks in his or her life, and also the kind of savings of their own income for future. These various kinds of benefits are ensured to the workers as a matter of right under various enactments. In case of denial, they can approach appropriate mechanisms for redressal of their grievances. Some of the social security legislations in India include Employees State Insurance Act 1948, Employees Compensation Act 1923, Employees Provident Funds and Miscellaneous Provisions Act 1952 etc. The Employees Compensation Act provides compensations to employees who suffers accident during the course of employment. Employees State Insurance Act guarantees different kinds of benefits to the employees. The Employees Provident Funds and Miscellaneous Provisions Act

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was enacted to inculcate the habit saving mentality among the employees. This paper is an attempt to analyse the concept of social security, various social security measures in different countries, the proposed Social Security Code in India and also the Amendment made in 2018 to the EPF Act which protect the women workforce in India.

Introduction

The labour legislations in India are based on the principles of social justice, social security, social equity and international uniformity. The craving for social security and a relief from economic distress was felt by the working class even from the start of industrialisation. The term social security was originated in the United States and the concept was being supported by the social reformers, political leaders and economists. The basic idea underlying the principle of social security is the dignity and protection of workers who are being exposed to all kinds of dangers in industrial establishments. In course of time, the concept of social security started assuming the characteristics such as provisions for cash incentives, medical benefits, compensation in various causalities, savings for future, share of profits, retirement benefits etc. The present work is an attempt to analyse the meaning of social security, the legislative framework for social security in some other countries and at the international scenario, the legislations for providing social security in India, beneficial schemes in the Employees Provident Funds and Miscellaneous Provisions Act 1952 especially the provisions added by the PF Amendment Act of 2018.

Social Security-Meaning and Scope

Social security is the security which the society furnishes to its members against certain economic and social risks.[1] The concept of social

1 Dr.N. Maheswara Swamy, Impact of ILO Standards on Indian Labour Laws 225 (Asia Law house, Hyderabad, 1st edn., 2007).

security varies from country to country and person to person. William Beveridge[2] has defined social security as "a means of securing an income to take the place of earnings when they are interrupted by unemployment, sickness or accident to provide for the retirement through old age, to provide against loss of support by death of another person or to meet exceptional expenditure connected with birth, death, or marriage. The purpose of social security is to provide an income up to a minimum and also medical treatment to bring the interruption of earnings to an end as soon as possible.[3]

The Encyclopaedia Britannica defines Social Security as 'the main purpose of any plan for Social Security is insurance against interruption and destruction of earning power and for special expenditure arising at birth, marriage or death'[4]. Social security is defined as a system, the state by means of legislation, allocates some of the scarce resources to those who satisfy certain conditions, typically assumed or demonstrated of need.[5] Social security consists of public programmes intended to protect workers and their families from income losses associated with old age, illness, unemployment or death.[6]

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2 He was a British economist who was a noted progressive and social reformer. He is best known for his 1942 report Social Insurance and Allied Services which served as the basis for the post-World War II welfare state put in place by the Labour government elected in 1945.

3 Smriti Chand, Social Security: Concept, Objective and Other Details, available at http://www.yourarticlelibrary.com/employee-management/social-security-concept-objective-and-other-details/35405 (Last visited on 22/10/2018).

4 Encyclopaedia Britannica 891, Vol.20, Chicago, London, Toranto, Geneva, Sydney (1963 edn.,).

5 N J Wikely, The Law of Social Security (OXFORD UNIVERSITY PRESS, New York, 5th edn., 2008).

6 Lexicon Universal Encyclopaedia 14 (Vol 18, 1983).

Social Security Laws at International Scenario

USA

The Social Security Act 1935, passed by the Roosevelt administration in the USA was the first official use of the term 'social security'.7 According to President Roosevelt, the Act represents the cornerstone in a structure which is being built but is by no means a complete structure intended to lessen the force of possible future depressions, to act as protection to future administrations of the government against the necessity of going deeply into debt to furnish relief to the needy, a law to flatten out the peaks and valleys of deflation and of inflation, in other words, a law that will take careof human needs and at the same time provide for the US, an economic structure of vastly greater soundness. [8]

New Zealand

Social Security Act 1938 passed by the Labour Government in New Zealand also provides most comprehensive interpretation of social security9. The comprehensive social security planning was a result of two international events. The 26th Session of the International Labour Conference in Philadelphia in 1944 adopted two recommendations dealing with social security viz, income security and medical care. The second event was the change in 1947 of the name of the International Social Insurance Conference to the International Social Security Association.[10]

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7 The Act provided federal grants to the States for three forms of public assistance to the needy, aged, blind, and dependent children.

8 Dr. V.G.Goswami, Labour & Industrial Laws 2, (Central Law Agency, Allahabad,10th edn., 2015).

9 The Act provided for unemployment insurance which established New Zealand as a welfare state. The Act combined the introduction of a free-at-the-point-of-use health system with a comprehensive array of welfare benefits.

10 *Id.*

ILO

The constituents of social security are social insurance and social assistance. The I.L.O[11] defines social insurance as a scheme that provides benefits for persons of small earnings granted as of right, in amounts which combine the contribution of the insured with subsidies from the employer and the State. The purpose of social insurance is to render the wage earner as independent as possible on the principle that his wage should include an insurance premium the risk of its involuntary loss, the inability of the State being merely subsidiary.12 On the subject of social security, ILO has adopted 22 Conventions and 12 Recommendations under various social security branches namely medical care and sickness benefit, old age, invalidity and survivor benefit, employment injury benefit, unemployment benefit and maternity benefit.[13] India has ratified ILO Conventions on social security including Workmen's Compensation (Occupational Diseases) Convention No 18,1925, Equality of Treatment (Accident Compensation) Convention No 19,1925, Workmen's Compensation (Occupational Diseases) Convention Revised No 42,1934, Equality of Treatment (Social Security) Convention No 118,1964 and Employment and Social Policy Convention No 122, 1998.[14]

UK

In Great Britain, the National Insurance Act 1911 provides for benefits based on contributions of both the employer and the employees.[15]

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11 The International Labour Organization, founded in 1919, is a United Nations agency dealing with labour issues, particularly international labour standards, social protection, and work opportunities for all.

12 VB Singh, Industrial Labour in India 81.

13 *Supra* note 1.

14 Jeet Singn Mann, Comprehensive Social Security Scheme for Workers 56 (Deep and Deep Publications Pvt Ltd, New Delhi 2010 edn.).

15 The National Insurance Act 1911 created National Insurance, originally a system of health insurance for industrial workers in Great Britain based on contributions from employers, the government, and the workers themselves. It was one of the foundations of the modern welfare state.

It also provided unemployment insurance for designated cyclical industries. It formed part of the wider social welfare reforms of the Liberal Government of 1906–1915. The National Insurance Scheme of UK provides protection against sickness, maternity, unemployment, old age, employment injuries, invalidity and survivorship under a single comprehensive system.

In other jurisdictions, social security is sometimes given an extended definition so as to embrace not only income provision schemes, and some compensation schemes but also some schemes such as health services, providing services rather than cash. On the other hand, in popular usage in UK, social security is used much more restrictively as synonymous with supplementary benefits.[16]

China

The People 's Republic of China's economy is determined by state sector enterprises. The national social security programmes provide varieties of protection to its working population as well as to its other residents. Social security provisions cover approximately 15 % working population in China. The social security include Old age, Invalidity and Survivor Scheme 1951,1995,1997 and 2005, Cash Sickness and Maternity Scheme 1951,2000,2002 and 2006, Workers Compensation Scheme 1995,1996,2003 and 2004 etc. [17]

International Social Security Association

The International Social Security Association (ISSA) is an international organization bringing together national social security administrations and agencies. It was founded in 1927, and ISSA

16 Professor Harry Calvert, Social Security Law 2 (Sweet and Maxwell Ltd,2nd edn., 1978).

17 Lillian Lie, Recent Social Security Development –I, People's Republic of China, s Social Security Bulletin 75, April 1987 Vol 5 Number 4.

has more than 330 member organizations in 158 countries. It has its headquarters in Geneva, Switzerland, in the International Labour Office (ILO). ISSA Constitution defines the term "social security" as any scheme or programme established by legislation, or any other mandatory arrangement, which provides protection, whether in cash or in kind, in the event of employment accidents, occupational diseases, unemployment, maternity, sickness, invalidity, old age, retirement, survivorship, or death, and encompasses, among others, benefits for children and other family members, health care benefits, prevention, rehabilitation, and long-term care. It can include social insurance, social assistance, mutual benefit schemes, provident funds, and other arrangements which, in accordance with national law or practice, form part of a country's social security system. The ISSA promotes social security in every form throughout the world and encourages its adaptation to national, regional and international economies and social realities in order to respond to the genuine needs of populations while taking due account of diversity of cultural and historic contexts.[18]

Social Security in India-Ancient and Medieval Periods

The concept of social security was prevalent in India even in the ancient period. Kautilya has mentioned a number of pension schemes in his works, such as educational pension, public poor relief etc. Emperor Ashoka (reigned 273 B.C - 246 B.C.) was famous for his humanitarian and administrative activities that contributed largely to the welfare of the people. He encouraged various acts of charity for the relief of the poor and he also employed officers of superior ranks to organise and supervise public acts of charity.[19] During medieval period as well, charity was being followed by the rulers. Social security measures were being

18 *Supra* note 13 at 83.

19 N K Sinha and Nitish R. Ray, 'A History of India 83(Orient Langman Ltd: Calcutta 2nd edn , 1986).

implemented as social services as a matter of religious principle or unintentionally and incidentally.[20]

India have borrowed social security concept from Anglo Saxon system of law which prevails in England where it denotes a much wider sphere of operation and is not confined to industrial force alone. The concept of social security envisages that the members of a community shall be protected by collective action against social risks causing undue hardship and privation to individuals whose private resources can seldom be adequate to meet them. The social security system is also found in various religious communities and their personal laws in India, like maintenance of wife and children and the old age parents etc., which are the best examples of primitive genesis of the Social Security system in India.[21]

First National Commission on Labour 1966

The Commission[22] defined that the concept of social security is based on ideals of human dignity and social justice. The underlying idea behind social security measures is that social welfare reforms of the Liberal Government of 1906–1915. The National Insurance Scheme of UK provides protection against sickness, maternity, unemployment, old age, employment injuries, invalidity and survivorship under a single comprehensive system.

In other jurisdictions, social security is sometimes given an extended definition so as to embrace not only income provision schemes, and some

20 Shankar Pathak, Social Welfare, an Evolutionary and Developmental Perspective 43-49(Macmillan Limited; New Delhi,1981).

21 Professor Ahmedullah Khan, Law relating to Social Security in India 3(Asia Law house, Hyderabad 2014 edn.).

22 The First National Commission on Labour was set up on 24 December 1966 under the Chairmanship of Justice P. B. Gajendragadkar. The Commissionsubmitted its report in August, 1969 after detailed examination of all aspects oflabour problems, both in the organised and unorganised sectors.

compensation schemes but also some schemes such as health services, providing services rather than cash. On the other hand, in popular usage in UK, social security is used much more restrictively as synonymous with supplementary benefits.[23]

Developed Country v. Developing Country

Both developed and developing countries focus on the principle of social security while enacting labour legislations. But in economically advanced countries, industrial labour is well educated and more disciplined and quite awake to social responsibilities while in developing countries, there is not much awakening among the industrial classes. In industrially advanced countries, the problem is not only to provide basic social security benefits to industrial workers, rather they think in terms of supplementary or incidental benefits. But in country like India, basic problem is of providing basic minimum social security benefits to industrial workers who outnumber the demand. Hence taking into consideration the economic system and limitations on resources, the state cannot be expected to introduce all social security schemes as prevalent in industrially advanced countries.[24]

Social Security Code 2018

Recently the Central government had brought an initiative Draft Labour Code on Social Security to rectify the defects in the present social security system. Labour Code aims to simplify, rationalize and consolidate multiple statutes into one consolidated law, which will be easier in terms of understanding, implementation and enforcement. The Code finds its genesis in the Report of the Second National Commission on Labour (2002)[25] and many other subsequent studies and reports on social security

23 Professor Harry Calvert, Social Security Law 2 (Sweet and Maxwell Ltd,2nd edn., 1978).
24 *Supra* note 28 at 10.
25 See *Supra* note 24.

policies including UN 2030 Sustainable Development Goals Agenda[26] along with expert technical assistance from the International Labour Organization on the policy framework.[27] The draft code would subsume 15 social security laws including Unorganised Workers' Social Security Act, 2008; Employees' State Insurance Act, 1948; Employees' Provident Funds and Miscellaneous Provisions Act, 1952; Maternity Benefit Act, 1961; Payment of Gratuity Act, 1972 and Building and Other Construction Workers Cess Act, 1996, among others. The draft law is at consultation stage now.[28]

EPF Act; Beneficial Piece of Legislation

In *Balbir Kaur* v.*Steel Authority of India*[29], the Hon'ble Supreme Court had held that EPF Act is a beneficial price of legislation. The Court also held that it can be described as a social security legislation, its object is to ensure the employees a better future on his retirement and of his dependents on his death. The Hon'ble Supreme Court had observed in *Employees Provident Fund Commissioner* v. *Official Liquidator*[30] that EPF

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26 Sustainable Development Goals are a collection of 17 global goals set by the United Nations General Assembly in 2015. The SDGs are part of Resolution 70/1 of the United Nations General Assembly: "Transforming our World: the 2030 Agenda for Sustainable Development.

27. Harsimran Singh, India: The (Draft) Labour Code On Social Security 2018http://www.mondaq.com/india/x/702902/Employee+Benefits+Compensation/The+Draft+Labour+Code+On+Social+Security+2018 (Last visited 21/05/2018).

27 Social Security Code Provides for Linking Fine with Inflation:https://economictimes.indiatimes.com/news/economy/policy/social-security-code-provides-for-linking-fine-with-inflation/articleshow/64096951.cms (Last Visited 23/10/2018).

28 (2000) 2 Lab LJ 1.

29 (2011) 10 SCC 727.

30 H L Kumar, Labour and Industrial Laws 1309(Universal Law Publishing, Haryana, 10th edn., 2017).

Act is a social welfare legislation intended to protect the interest of a weaker section of the society i.e. the workers employed in factories and other establishments.

EPF Act: A Social Security Legislation

With industrial growth, some employers had introduced schemes of provident funds for the welfare of their workers. But all these schemes were private and voluntary. Workers of small employer remained deprived of benefits provided by big employers.[31] The most appropriate course of action was enactment of a legislation for instilling a saving mentality to the workers. Employees' Provident Fund and Miscellaneous Provisions Act, 1952 through the Employees' Provident Fund Scheme 1952, Employees' Deposit Linked Insurance Scheme 1976 and Employees' Pension Scheme 1995 are certain major steps towards providing social security against risks or contingencies to employees after retirement. [32] This is a piece of social security legislation designed to insure the workmen against old age and infirmity. [33] The Act seeks to encourage the habits of thrift and savings among the working class so as to enable them to have resources accumulated for their future needs in times of old age, sickness, disability or other imponderables of life.[34]

Schemes under the Act

Employees' Provident Funds Scheme, 1952: Every employee is required to pay Contribution to the provident fund @ 12% of the Basic

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31 Dr.S R Myneni, Labour Laws II 249 (Asia Law house, Hyderabad,1st edn., 2013).

32 R.R.DE, Commentaries on Employees Provident Funds and Miscellaneous Provisions Act 1952, 9 (Kamal Law House, Kolkata,5th edn., 2004).

33 Dr.R.G Chaturvedi, Law of Employees Provident Fund 22(Bharat law Publications, Jaipur, 1st edn., 2002).

34 *Employees' Provident Funds and Miscellaneous Provisions Act1952*,https://taxguru.in/corporate-law/legal-provision-of-employees-provident-funds-miscellaneous-provisions-act-1952.html (Last Visited 21/10/2018).

Wages, Dearness Allowance and cash value of food concession. The Employer will also pay an equal amount of contribution. The Provident Fund members can avail advances / partial withdrawals for Housing, Marriage, Illness, etc., through application in Form 31 which provides details and documents to be submitted. On retirement or on leaving service, the Provident Fund accumulations can be withdrawn in full by submitting application in Form 19.[35]

Employees' Pension Scheme 1995: An Employee is eligible for Pension after a minimum of 10 years of pensionable service. The Pension is payable on attaining the age of 58 years, whether he is in service or superannuated. Early Pension at reduced rate can be availed on leaving the employment, after attaining the age of 50 years.[36] All employees covered under Provident Fund become members of Pension Scheme. 8.33% of Basic Salary up to Rs.15,000/- is contributed to Pension Scheme from employer's share of contribution.[37]

Employees' Deposit Linked Insurance Scheme, 1976: A member of Provident Fund will automatically become a member of Employees Deposit Linked Insurance Scheme. Under this EDLI scheme, in case of death of an employee, while he is in service, insurance benefit up to Rs.6.00,000/- is payable to the Nominee / family members. But there is no contribution required to be paid by the employee for the insurance benefit. The employer alone is required to pay the contribution.[38] The

35 https://www.epfindia.gov.in/site_docs/PDFs/Downloads_PDFs/EPFAct1952.pdf(Last visited 22/10/2018).

36 https://neerajbhagat.com/pdf/EPF%20Scheme.pdf(Last visited 20/10/2018).

37 http://www.sriganga.com/pf-consultant-delhi-noida-gurgaon/employees-provident-funds-and-miscellaneous-provisions-act-1952.html (Last visited 23/10/2018).

38 Dr Avtar Singh & Dr Harpreet Kaur, Introduction to Labour and Industrial Law (Lexis Nexis, Haryana, 3rd edn., 2014).

Act also provides for constituting of an Employees Provident Funds Appellate Tribunal for discharging functions under the Act.[39]

Employees Provident Fund and Miscellaneous Provisions Act, 1952 - Amendments 2018

The governments from time to time had brought in force many measures to support the female workforce and the recent amendment of 2018 is one of that kind. In India, the labour force of female workers is much lower than that in other developed countries. With this in mind, the Central Government proposed to effect amendments in the Employees Provident Fund and Miscellaneous Provisions Act, 1952 as regards employee contributions. Before this amendment, every employee required to contribute 12% of his or her basic salary towards EPF as per the statute. Similar contribution was made by the employer also.

But in the union budget 2018, the EPF contribution rate for the newly recruited female employees has been reduced from 12% to 8%. This privilege is made available to the new female employees for the first three years of employment. This benefitted the female employee's higher take-home pay in their initial years in the workforce.[40] The contribution from the employer's side for EPF will continue to be at the rate of 12%. In addition to this, the government has proposed to contribute 12% of the wages of new employees towards EPF; this is applicable to all the sectors of the economy for the next three years.

The rationale behind this move is to lessen the payroll cost of the employers. The government shares the burden of provident fund facility

39 Shaikh Zoaib Saleem,Budget 2018: Govt to bear 12% employer contribution in EPF for new workforce for 3 years,https://www.livemint.com/Politics/BWX0QGQqcVOrxeUFlKSfNK/Budget-2018-Govt-to-bear-12-employer-contribution-in-EPF-f.html, (Last published 01/02/2018).

40 https://cleartax.in/s/epf-act-amendments-2018, (Last updated 20/07/2018).

as regards to new employees. Moreover, this move is also aimed at creating fresh job openings across sectors.[41]

Conclusion

The relevance and role of social security in a democracy cannot be ignored. In almost all countries of the world, the concept of social security has got prominent place especially in case of labour legislations. It is also true that these principles of social justice, social equity, and social security has necessitated the enactment of almost all labour legislations in our country like all other welfare countries. It cannot be ignored that the economic condition of the workers has progressed only because of the social insurance, compensation, and other welfare policies guaranteed by the government from time to time. The labour class, who had the status of a servant during the initial years of industrialisation had got the status of a worker or an employee only after the enactment of these kinds of legislations. It should also be taken into consideration that lack of social security in a country will surely affect the morale and destroy the confidence of workers, and thereby will lead to industrial conflicts and will ultimately result in loss of production. From the analysis of the various social security measures also, it is clear that the governments of almost all developed or developing country is trying to provide as much as protection as possible to the workers through various policies and programmes. The very recent amendment in the Provident Funds Act 2018, in India also shows that the government is keen to protect the workforce.

Right To Safe And Standard Food: An Appraisal of The Indian Legal System

Jayamol P.S.*

Abstract

It is a common belief that we are what we eat. Our food decides the quality of our minds and health of our bodies. The right to food is an essential element for all human beings to live in dignity. Globalization has brought drastic changes in the field of food industry. The use and consumption of unsafe food have short term and long-term impacts. It causes many health hazards and other related difficulties. The Food Safety and Standards Act, 2006 (FSS Act, 2006) is enacted to rejuvenate and revamp the food industry in India. This paper is an attempt to highlight the issues of food safety and standards as a violation of human right to food ,to analyse the FSS Act, 2006, and also to trace out the challenges for the proper enforcement of the provisions of this enactment.

INTRODUCTION

Food is an essential constituent of life. Food can be anything which is consumed to provide nutritional support for the body. Usually plants or animals are used as a means of food. It contains essential nutrients, such as carbohydrates, fats, proteins, vitamins or minerals[1]. Food is something that gives the energy to function and keep the living beings alive and active. It is consisted of proteins, vitamins and minerals which

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1. B.Sivasankar, Food Processing and Preservation,15(PHI Learning pvt.ltd.-Delhi,2014).

are essential for the nourishment and growth of the body.[2]. The consequences of food adulteration or unsafe food have short term and long-term adverse effects. Unsafe food causes many acute and life-long diseases. The World Health Organization (WHO) estimates that food borne and waterborne diseases taken together cause more than 200 diseases[3]. It includes diarrhea to cancer. Access to adequate food and denial of safe and nutritious food is one of the most important human right issues faced by the countries all over the globe. In India even after the enactment of the *FSS Act, 2006,* food borne diseases and issues of food safety continue to be a growing public health concern. This paper is an attempt to highlight the issues of food safety as a violation of human right to food and also to trace out the existing legal framework in India with regard to food safety and the challenges before the authorities for the proper enforcement of this legislation. This paper also tries to shed light on the measures to be adopted by the authorities to rejuvenate and revamp the food industry.

RIGHT TO FOOD – FROM HUMAN RIGHTS PERSPECTIVE

Right to food is a core inalienable right. It has widely been recognized under international human rights jurisprudence. It is documented under the Constitutions of several countries.[4] It is one of

2. Food is defined as edible or portable substance made up of or originated from plant or animals, consisting of nourishing and nutritive components such as carbohydrates, fats, proteins, essential mineral and vitamins which sustains life, generates energy, and provides growth, maintenance, and health of the body .*See* www.businessdictionary.com/definition/food.html(last visited on 12.4.2019).

3. *See* https://www.who.int/news-room/fact-sheets/detail/food-safety, (last visited on 8.4.2019). It is estimated that almost 1 in 10 people in the world fall ill after eating contaminated food and 42000 die every year.

4. *See* Section 27 of the *South African Constitution* provides that everyone has the right to have access to sufficient food and water. Article 44 of the *Colombian Constitution*, Article 227 of the *Brazilian Constitution* and Article. 8 of the *Cuban Constitution* recognize the right to food, especially for children. Article.19 of the *Constitution of Ecuador* also provides for "the right to standard of living that

the basic human rights, closely related to the right to life.[5] The right to food upholds the right of everyone to live in dignity.[6] Even after the enactment and implementation of plethora of International Conventions and Municipal laws, it is paradoxical note that right to food is still remained as a distant dream for considerable population of the country. In a recent report published by the United Nations says that there is a rapid growth of number of hungry people across the world[7] which shows that the development and progress of eradication of poverty and malnutrition is on an ascending rate. It also warns that in this state of affairs it is difficult to achieve the Sustainable Development Goal of Zero Hunger[8] that is to be achieved by 2030. When analysing the right to food as a basic Human Right, there are International Covenants and

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ensures the necessary health, food, clothing, housing ,medical care and social services".Article.16 of *Nigeria,* and Article.27 of the *Sri Lankan Constitution* also provided for the right to food.

5. *See* Article.6 of the *International Covenant on Civil and Political Rights* recognizes the inherent right to life of every human being. It says that "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life" See also, Article.3 of the *Universal Declaration of Human Rights*- Right to life, liberty and security of person.

6. Human dignity forms the conceptual basis of human rights.

7. The state of food security and nutrition in the world 2018 has been prepared by the FAO Agricultural Development Economics Division in collaboration with the Statistics Division of the Economic and Social Development Department and a team of technical experts from FAO,IFAD, UNICEF, WFP and WHO. *See* Global hunger continues to rise, new UN report says,http://www.who.int/news-room/detail/11-09-2018-global-hunger-continues-to-rise—new-un-report-says (last visited on 11.4.2019).

8. End hunger, achieve food security and improved nutrition and promote sustainable agriculture. The Sustainable Development Goals (SDGs) aim to end all forms of hunger and malnutrition by 2030, making sure all people – especially children and the more vulnerable – have access to sufficient and nutritious food all year round. This involves promoting sustainable agricultural practices: improving the livelihoods and capacities of small scale famers, allowing equal access to land, technology and markets. It also requires international cooperation to ensure investment in infrastructure and technology to improve agricultural productivity. *See,* Sustainable Development Goals, SDG 2,http://www.sdgfund.org/goal-2-zero-hunger (last visited on 11.8.2018).

Constitutional provisions which deal with the mankind's right to be free from hunger.

Right to food in the international and national sphere

A number of international instruments materialized by the UNO have exhibited their commitment to uphold the right to food as a basic human right. The first notion of right to food under International law is found in the *Universal Declaration of Human Right*, 1948,[9] which was unanimously proclaimed by the UN General Assembly as a common standard for all humanity.[10] This premier soft law of the international community substantially changed the perceptions of the country towards food. Every human being has the right to a standard and dignified life. That right is extended even to his family members and that is inclusive of food, clothing and everything for the improvement of living conditions.[11] Similarly, the *United Nations Convention on the Rights of the Child*, 1989 also directed the State parties to take appropriate action to

9 Here in after referred as UDHR, 1948. *See* Article.25(1) of the UDHR-Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment , sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

10 *See* ,*United Nations General Assembly Resolution* 217 A(III)A, New York.

11 . The Preamble of the *Constitution of the Food and Agricultural Organization of the United Nations*, 1965-*See* the Preamble –The nations accepting this Constitution , being determined to promote the common welfare by furthering separate and collective action on their part for the purpose of raising levels of nutrition and standards of living and securing improvements in the efficiency of the production and distribution of all food and agricultural products. and the *International Covenant on Economic, Social and Cultural Rights*, 1966 asserted the right of everyone to a standard and dignified life for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions and also insist the State parties to take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

combat malnutrition[12]. The World Food Summit Plan of Action, 1996[13] as its objective's states about the right to food. All these international instruments speak about food as an essential right to survival. So, the basic idea behind the safe and standard food is to ensure the safety and well-being of the people who consumes food. All these International Conventions postulates this idea by ensuring and directing the State parties a dignified life to its subjects.

Being a signatory to many of the international instruments involving right to food. India has a commitment to respect, protect and ensure the right to food for citizens of India.[14] There is no express guarantee of right to food in the constitution of India. It can be interpreted through the provisions of Preamble, Fundamental Rights[15], as well as Directive Principles of State Policy. The State has the duty to direct its policies to secure adequate means of livelihood to the people[16]. Moreover,

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12 Here in after referred as (UNCRC), 1989, *See* Article.10 of the UNCRC. It requires the State Parties to take appropriate measures to combat disease and malnutrition through the provisions of adequate nutritious food.

13 Adopted by the *World Food Summit*, Rome, 13 to17 November 1996. *See*, Objective 7.4. "to clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger, as stated in the *International Covenant on Economic, Social and Cultural* Rights and other relevant International and regional instruments, and to give particular attention to implementation and full and progressive realization of this right as a means of achieving food security for all."

14. India joined the UN on October 30, 1945 and was involved with the UDHR proclaimed on December 12, 1948. The framers of the Indian Constitution were influenced by the concept of human rights and guaranteed most of the human rights contained in the UDHR. The Civil and Political rights have been incorporated in part III of *Indian Constitution*. India ratified the ICESCR on April 10,1979.

15. *See* Article. 21 of the *Indian Constitution*: No person shall be deprived of his life and personal liberty except according to procedure established by law. It guarantees the right to live with human dignity.

16. Article.39 (a) of the Directive Principles of State Policy requires the State to direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means to livelihood.

it is the duty of the State to raise the level of nutrition and standard of living.[17] Therefore it is clear that the specific right to food is nowhere mentioned in the Constitution. It has to be interpreted from the provisions mentioned above.

INDIAN JUDICIAL APPROACH TO ENSURE RIGHT TO FOOD

In a democracy, Legal action is the way in which State can be accountable to its responsibilities. The apex court has explicitly stated in many cases that the right to life should be interpreted as a right to "live with human dignity"[18], which includes the right to food[19] and other basic necessities. The leading case in this aspect is *Kishen Pattanaik* v. *State of Orissa*[20]. *In* this case the Petitioners wrote a letter to the Supreme Court explaining the miserable condition of the inhabitants of the districts of Kalahandi and Koraput in the State of Orissa on account of extreme poverty which went up to the extent of selling their children. The Petitioners prayed that the State Government should be directed to initiate some action for the purpose of helping out the people in the district of Kalahandi. The Hon'ble Supreme Court assessed the problem in detail. The Court allowed the writ petition and directed the Government of

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17. Article 47 of the Constitution-"the duty of the state to raise the level of nutrition and the standard of living and to improve public health-the state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the state shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health".

18. In*Maneka Gandhi* v. *Union of india*, AIR 1978 SC 597; *Francis Coralie Mullin* v. *Administrator, Union Territory, Delhi,* (1981)1 SCC,608; *Olga Tellis&Orsv.BombayMuncipal Corporation*(1985) 3 SCC 545; *Santistar Builders* v. *Narayan KhimlalTotame*, (1990)1 SCC 527 and in many other similar cases the Court held that right to life means the right to live with basic human dignity.

19. In *State of Maharashtra* v.*Hanrahan,*(!983)3 SCC 387he Hon'ble Supreme Court held that the right to food is a component of the right to life guaranteed under Article 21 of the Constitution of India.

20. 1989 Supp(1) SCC 258.

Orissa that it shall, within a month from the date of order, nominate the names of at least five persons belonging to the recognized voluntary organizations as the members of the Natural Calamities Committee of the district. The function of the Committee will not be confined only to the cases of starvation deaths, but it shall be responsible for looking after the welfare of the people of the district. The higher judiciary has well understood the meaning of dignified life and pronounced the judgment in this regard. In *C.E.S.C Ltd* v. *Subhash Chandra Bose,*[21], the Hon'ble Supreme Court has taken in to consideration the *Universal Declaration of Human Right* and the *International Covenant on Economic Social and Cultural Rights* , 1966 and extended the meaning of the right to life to include the right to food in its ambit[22]. In another case *P.G.Gupta* v. *State of Gujarat*,[23] the Hon'ble Supreme Court again held that food, shelter and clothing make life meaningful and the protection of life assured under Article 21 has given an expanded meaning of the right to life. In *People's Union for Civil Liberties* v. *Union of India and other*[24] a land mark judgment was pronounced on right to food. In this case the Court reiterated that the right to food is guaranteed under the right to life.

A close perusal of these decisions shows that the judiciary has included right to food in the ambit of fundamental rights. Right to food has two essential elements, i.e., right to have availability and the right to have access.[25] The Parliament of India enacted the *FSS Act,* 2006 and

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21. (1992)1 SCC 695.

22. In this case the Hon'ble Supreme Court referred to the UDHR, the ICESCR which recognize the right to food, clothing, housing, education, the right to work, leisure, fair wages, decent working conditions, social security, and the right to physical or mental health, and protection of their families as an integral part of the right to life.

23 (1995) 2 Supp.SCC 184.

24 AIR 2014 SC 49, p.20.

25 B.K..Mahakul, "The Right to Food as a Human Right: Some Thematic Reflections," *Social Action*, Jan-March-2014, Vol.64, Issue no.1, p.23.

National Food Security Act, 2013 with a view to ensure people's right to have adequate food that includes safe food. The judiciary also made it clear that right to life includes right to adequate food.

FOOD ADULTERATION -VIOLATION OF HUMAN RIGHT

Food Adulteration is one of the major concerns of the world community. Food is adulterated to add the quantity and make more money. The term "adulterant" is defined in the *FSSAct* as "any material which is or could be employed for making the food unsafe or sub-standard or containing extraneous matter"[26]. In today's world, almost every food items like - rice, vegetables, meat, fish, milk, fruits which are easily available in the market are adulterated with pesticides or insecticides, beyond the tolerable limits causing serious health issues. Milk is adulterated with water and detergent, rice is with red oxide. To give freshness to meat and fish, phenol is used which causes cancer and other serious health problems. Another alarming situation is caused by the consumption of the fruit based soft drinks available in various fruit stalls, "which contain such pesticides residues beyond tolerable limits, but no attention is made to examine its contents. Children and infants are often exposed to the effects of pesticides because of their physiological immaturity and greater exposure to soft drinks"[27]. There are legislations to prevent adulteration and to ensure the safety and standards of food. Still adulteration of food is on an ascending range.

FOOD SAFETY AND STANDARDS

Food safety is nothing but, the scientific handling, preparation and storage of food through ways that prevent food borne disease. The chemicals used in the growing or processing of food are frequently alleged to cause adverse effects in humans and animals. It is concerned with

26. Sec.3 (1)(a) of the *FSS Act*, 2006.

27. *Centre for Public Interest Litigation* v. *Union of India* ,AIR 2014 SC 49.

acute and chronic hazards that make food injurious to the health of the consumer[28]. Consumers should have confidence in the food they are consuming. Moreover quality and hygiene of the food supply is an important requirement and consumers are demanding protection for the whole food supply chain from primary producers to the end consumer[29]. Foods Standards have been formulated in the interest of the general public to protect them from consuming improperly handled food and thereby prevent food-borne illnesses from spreading[30]. Standards are yardsticks established by an authority for measuring quantity, weight or quality[31]. The Food Standards ensures that each food stuff is what it claims it to be and its label exhibits and assures that standards. Food Safety is not simply a matter of concern to consumers and food industry. Right to food and food safety are fundamental rights that are emanated from other well-established fundamental rights like right to life, human dignity, right to health etc.

FSS ACT, 2006

The *FSS Act*, 2006 is the cardinal law for ensuring the safety and standards of food products in India. This enactment prescribes the strict standards and enforcement of those safety standards in India. The *FSS Act* repealed Prevention *of Food Adulteration Act*, 1954, (*PFA Act*, 1954) along with six other food related legislations[32]. As per these laws there

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28 Federation of Hotel & Restaurant Association of India,Food Safety & HACCP Manual for Hotels& Restaurants in India,(Federation of Hotel & Restaurant Association of India, Bombay,2005)p.8.

29 . *ibid*.

30. SunetraRoday, Food Hygiene and Sanitation with case studies, 311(McGraw Hill Education India, 2nd ed; New Delhi, ,2011).

31. *Supra* n.30at p.313.

32. *The Fruit Product Order*, 1955, the *Meat Food Products Order* of 1973, The *Vegetable Oil Products (Control) Order* of 1947, the *Edible Oil Packaging (Regulation) Order* of 1998, *The Solvent Extracted Oil, De Oiled Meal and Edible Flour (Control) Order* of 1967 and the *Milk and Milk Products Order* of 1992.

was separate enforcement agencies were prevailed in respect of different areas of food. Ultimately as a result of lot of research and deliberations over the subject, to cope up with the changing requirement of the food industry, the *FSS Act* was enacted in the year 2006. This law repealed all other previous laws. The Act was introduced to bring a single regulatory mechanism for all matters relating to food safety and standards. Instead of concentrating in different departments all food related matters it united in to a single body. The implementation of the provisions of this Act was entrusted with a statutory authority i.e., Food Safety and Standards Authority of India in the Centre and State Food Safety Authority in the States.

HIGHLIGHTS OF *FSS ACT*, 2006

The *FSS Act, 2006,* is a comprehensive and elaborate legislation which provides a single window to guide and regulate persons engaged in production, distribution, processing, transportation, export, import and sale of food articles. It incorporated salient provisions of the *PFA Act, 1954* and also took into account provisions of various international laws, instrumentalities and Codex Alimentaries Commission as far as it related to food safety norms. The Act has come up with various features and objectives to provide safe and wholesome food to the consumers and also to take care of international practices and envisaged a policy framework. The Act has brought some drastic changes in certain areas of food safety. That includes:

Definition of the term Food

Major change has brought in the definition of the term food. It is defined as "any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food, genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink,

chewing gum, and any substance, including water used in to the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or Processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances"[33]. As per the definition food includes everything which is used for human consumption and also includes bottled drinking water. It is interesting to note that according to section 2 of the *PFA Act*, 1954[34], the term food has given a restricted meaning. Bottled drinking water was not an object of food as per that. The *FSS Act*, 2006 has widened the scope and meaning of the term food and it covers each and every process from farm to the plate. The definition given under this Act can be divided in to two parts. First part is inclusive and second part excludes certain items from the purview of the Act. As per the inclusive part, substances that are processed and partially processed or not processed if it is intended for human consumption includes food. All cooked and non-cooked foods come under this. The definition also covers primary food[35], genetically modified food or engineered food or food containing genetically modified ingredients, infant food, packaged drinking water or all types of bottled water and alcoholic drink, chewing gum and all things which are added in to the food for its preparation or manufacture. So that water and other things added at the time of preparation will also include the term food.

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33. Section 3(1)(j) of the *FSS Act*,2006.

34 Food is defined as any article used as food or drink for human consumption other than drugs and water and included any article which ordinarily enters in to or is used in the composition or preparation of human food, any flavoring matter or any other matter the Central government may declare as food.

35. Primary food is the article of food being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form, resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman.

The definition excludes animal foods, live animals. Unless it is processed for selling in the market it will not be treated as food. Plants, before harvesting is not food. Drugs and medicinal products, cosmetics, narcotic or psychotropic substances are not coming under the Act.

Establishment of FSSAI

A separate body was created for the enforcement of the Act. The Food Safety and Standards Authority of India[36] as a regulatory body have been established in New Delhi. FSSAI has to regulate, control and verify that the provisions of the FSS Act are complied by Food Business Operators at all stages of food business from farm to the table[37]**.** The *FSS Act, 2006* prescribes the qualifications, the mode of selection of Chairperson and members of food authority, term of their office and removal from their post[38]. It is the duty of the Food Authority to ensure safe and wholesome food to the consumers and for that purpose they have to regulate and monitor the manufacture, processing, distribution, sale and import of food[39]. It also regulates the standards and guidelines in relation to articles of food, the limits of food additives, crop contaminants, pesticide residues, residues of vetenary drugs, irradiation of food, accreditation of certification bodies, the quality control of imported food, procedure for the accreditation of laboratories, the method of sampling, food labeling standards and the manner and subject to which the risk analysis, risk assessment, risk communication and risk management shall be undertaken etc. All these functions have to be undertaken by the FSSAI as a key regulator of food industry in India. Everything relating to food, its additives, contaminants, residues,

36. Section 4 of the *FSS Act*, 2006.

37. The Food Authority consists of a Chairperson and members, representing the ministries or departments of the Central Government dealing with agriculture, commerce, consumer Affairs, Food Processing, Health, Legislative Affairs, and small Scale Industries.

38. *ibid* Section 6 ,7 and 8.

39. Section 16 of the *FSS Act*,2006.

pesticides limits, licensing, registration and certification which were undertaken by different bodies before the advent of this Act has been shouldered by FSSAI after the enactment of this Act. That is a welcome move from the part of the government to avoid complications and to encourage food trade.

International Standards of food industry

The *FSS Act, 2006* prescribed an international standard for the food articles. This is to protect people from health hazards arising from food adulteration. The standards impose control and check over the quality of food available to consumers. As per the Act, it is the duty vested with the FSSAI to set standards of food articles[40]. The standards have to conform to the International standards of food safety i.e. the Codex Alimentarius Commission[41]. It was established to develop food standards, guidelines and codes of practice under the Joint FAO/WHO Food Standards Programme[42]. This is the main international body responsible for developing international food standards. Moreover it also insists for ethical practices in food trade which every food trader has to follow. The Codex Commission has published a Code of Ethics for International Trade in Food[43]. Most of the Code of Ethics have got place

40. *ibid* .

41. Meaning food code or food book in Latin. It is a collection of internationally recognized standards, guidelines and recommendations pertaining to food and its safety.

42. *See* https://www.who.int/foodsafety/areas_work/food-standard/en/(Last visited on 10.12.2018).

43. The main objective of the code of Ethics is to stop exporting poor quality and unsafe food and dumping it in the International market .It contains certain principles like –International trade should be on a principle that all consumers are entitled to get safe and wholesome food and they have to be protected from unfair trade practices., no food has any substance in an amount which renders it poisonous, harmful, or otherwise injurious to health, or consists in whole or in part of any filthy, rotten , decomposed or diseased substance or foreign matter, or is otherwise unfit for human consumption, or, is adulterated, or, is labelled or presented in a manner that is false , misleading or is deceptive, or is sold , prepared ,packaged, stored or transported for sale under insanitary conditions.

in the *FSS Act*, 2006. One of the main obstacles in the International food trade is that in this globalized era national governments are very much concerned about the safety of the food which is imported in to their country. The national measures and regulations which are being taken by these countries are sometimes creates barriers to free trade. The Sanitary and Phytosanitary Agreement (SPS)[44] and Technical Barriers to Trade Agreement (TBT)[45] acknowledge the importance of harmonizing standards internationally to prevent trade barriers.

Food Business Operator (FBO)

The Act has laid emphasis on the responsibilities of the Food Business Operators (FBO). It is the duty of the FBO to ensure that the article satisfies the requirements of the *FSS Act*, 2006 and the Rules and Regulations made under this Act, at all stages of production, processing, distribution and sale[46]. The FBO's are strictly prohibited from manufacturing, storing, selling or distributing any article of food which is unsafe or which is mis-branded or sub-standard or contains extraneous matter[47]. They are also prohibited from doing any food activity for which license is required or which is prohibited by the Food Authority or the Central Government or the State Government in the interest of the public health, or in contravention of any other provisions of the *FSS Act*, Rules or Regulations. It shall be the duty of the FBO to give guarantee in writing in the prescribed form about the nature and quality of such article to the

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44. It covers food safety and animal and plant health standards. In order to harmonise sanitary and phytosanitary measures, members are encouraged to apply international standards, guidelines and recommendations where they exist. Member countries are allowed to introduce higher standards if there is scientific justification or as a consequence of risk assessment.

45. It aims to ensure that technical negotiations and standards, as well as testing and certification procedures do not create unnecessary barriers to trade. The Agreement covers all types of products, including industrial, agricultural and food products.

46. Section 26 of the *FSS Act*,2006.

47. Section24 (2)(a) of the *FSS Act*,2006.

vendor. FBO's shall see that persons with infectious or contagious disease are not employed by them.

Regulation of imports of food articles

The Import of unsafe or misbranded or sub-standard food or food containing extraneous matter is prohibited by the *FSS Act*, 2006[48]. It also insists for the license for the import of food which a license is required. The objective is to prohibit certain food items imported from foreign countries without complying with any safety or standards as if our country is a waste basket to dump all those unwanted things.

Regulation of Genetically Modified Food

The threat raised by the Genetically Modified Food[49] (GM Food) is alarming. There are debates all over the world about the pros and cons of GM Foods. The *FSS Act, 2006* prohibits the manufacture, distribution, sell or import of any novel food, genetically modified articles of food, irradiated food, organic food, foods for special dietary uses, functional foods, nutraceuticals, health supplements, proprietary food and such other articles of food which the Central Government may notify[50]. Theoretically, 'Genetically Modified Organisms' (GMOs) are the advanced technological development in the field of agriculture.[51] Recently a study conducted by the researchers of Centre for Science and

48. Section 25 of the *FSS Act*,2006.

49. As per the *FSS Act*,2006 Genetically Engineered or Modified Food means food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and od ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology.

50. Section 22 of the *FSS Act*,2006.

51. For historical accounts of the Genetically Modified Foods, *See*, B.M.Chassy. "The History and Future of GOMs in Food and Agriculture." *Cereal World Food Perspective*, Vol.52, No.4, July-August 2017: 169-172, available at https://www.aaccnet.org/publications/plexus/cfw/pastissues/2007/Documents/CFW-52-4-0169.pdf (last visited on 10/09/2019).

Environment (CSE), Delhi found out ingredients of GM even in infant foods.[52] FSSAI has initiated the work on framing Regulations for genetically modified food.[53] It is better that the proposed Regulation would include the procedures for the safety assessment and approval of foods, derived from genetic modification processes, before it is available in the open market.

Food Recall Procedure

The Act has also prescribed for the Food Recall Procedures[54]. It gives a FBO an opportunity to recall food when it is not in compliance with the FSS Act, Rules and Regulations. FBO has to take immediate steps to withdraw the food in question from the market. He has to inform consumer about the reasons for the withdrawal of the food and inform the competent authorities thereof. It is a provision which will make far reaching effects in the food industry and also it should be welcomed.

Improvement notice

This is another novel feature of the *FSS Act, 2006.* The notice has to be issued by the designated officer.[55] In that notice he must state the grounds for believing that the FBO has failed to comply with the regulations and also specify the matter which constitute the FBO's failure

52. As per the report of CSE, overall 32% of the food product samples tested were GM positive. 46% of imported food products were also proved positive. These were made of soya, corn and rapeseed and were imported from Canada, United States , Thailand etc. About 17% of the samples manufactured in India tested positive which were made up of Cotton seed oil. In some of the samples they did not mention the use of GM ingredients on their labels. Some brands claimed that they had not used GM ingredients but were found to be GM positive. *See*, https://www.cseindia.org/genetically-modified-processed-food-in -india-8877 (last visited on 25/8/2019).

53. Ashwani Maindola , FSSAI commences framing of Regulations for genetically modified foods, *See*www.fnbnews.com/topnews/fssai-commences-framing -of-regulations-for-geneticallymodified -foods-43543 (last visited on 2/12/2019).

54. Section28 of the *FSS Act*, 2006.

55. Section 32 of the *FSS Act*, 2006.

so to comply. The notice must also direct the measures which the FBO must take in order to secure compliance. If FBO fails to comply with the notice his license may be cancelled.

Packaging and Labeling of food

The *FSS Act, 2006* prohibits any packaged food products which are not marked and labeled in the manner as may be specified by regulations for the manufacture, sell, distribution dispatch or deliver to any agent or broker for the purpose of sale[56]. The labels should disclose quantity and nutritive value of the food product. It shall not deceive the consumers.

Restrictions of advertisement and prohibition of unfair trade practices.

In order to protect the consumer from misleading advertisements and deceptive practices, the *FSS Act, 2006* prohibits such practices[57]. It prohibits the false representation of the standard, quality, quantity or grade composition of food, false or misleading representation concerning the need, or usefulness, and the guarantee of the efficacy of the food without scientific justification.

Enforcement machinery

The State Government has to appoint the Commissioner of Food Safety for the State for efficient implementation of Food Safety and Standards and other requirements laid down under the *FSS Act* and the rules and regulations[58]. The Act creates two tier machinery, one administrative and another judicial, to ensure strict and efficient implementation of the Act. For the proper enforcement of the provisions, a designated officer and a Food Safety Officer also has to be appointed in the local level.

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56. Section 23 of the *FSS Act*,2006.
57. Section 24 of the *FSS Act*,2006.
58. Section 30 of the *FSS Act*,2006.

Licensing and Registration of food business

The food business cannot be carried on except under a license[59]. The provisions for license are not applicable to small vendors[60]. But they have to register themselves with such authority as may be prescribed by the regulations. The Designated officer has been invested with the power to issue license. Where an application of license is rejected, an appeal shall lie to the Commissioner of Food Safety[61].

Penalties and procedures

Stringent penalties are prescribed in the Act for the violations of the provisions of the Act. A person can be punished for any act which may render any article of food injurious to health by adding any article or substance to the food, or by using any article or substance as an ingredient in the preparation of the food or subjecting the food to any other process or treatment, with the knowledge that it may be sold or offered for sale or distributed for human consumption[62]. The Adjudicating officer shall have due regard to the amount of gain or the amount of loss caused, the repetitive nature of contravention etc.[63]; Punishment of imprisonment and penalties are prescribed for various offences coming under food safety. It may vary from offences to offences. In case of death of the consumer, not less than five lakh rupees to the legal representatives have to be paid[64].

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59. Section 31 of the *FSS Act*,2006.

60 To petty manufacturer who himself manufactures or sells any article of food or petty retailer, hawker, itinerant vendor or temporary stall holder or small scale or cottage or such other industry relating to food business or tiny 'FBO'.

61. Sec. 31(4-10) of the *FSS Act*,2006.

62. Section 48 (1) of the *FSS Act*,2006.

63. Section 49 of the *FSS Act*,2006.

64. Section 65 of the *FSS Act*,2006.

Defense of Due Diligence

A very significant defense of, due diligence is introduced for the first time for food offences in India[65]. It means that once the criminal offence is proven, the defendant must prove on the balance of probabilities that they did everything possible to prevent the act from happening. As per this principle, instead of taking the normal standard of care in their industry-they must show that they took every reasonable precaution.

Judicial Approach Towards Food Safety and Standards

While analyzing the decision of the courts after the implementation of the *FSS Act*, 2006 it can be seen that Judiciary is keen to implement the provisions of the Act. In Centre *for Public Interest Litigation* v. *Union of India and Others*[66] the Hon'ble Supreme Court has directed to strictly follow the provisions of the *FSS Act,* 2006 as well as the Rules and Regulations framed there under. The Court observed that:

"Enjoyment of life and its attainment, including right to life and human dignity encompasses, with its ambit availability of articles of food, without insecticides or pesticides residues, antibiotic residues solvent residues etc. The Court also emphasized that any food article which is hazardous or injurious to public health is a potential danger to the right to life guaranteed under Article 21 of the Constitution of India. The States and its authorities are vested with the duty to achieve an appropriate level of protection to human life and health which is a fundamental right ensured to the citizens under Article 21 read with Article 47 of the Indian Constitution".

In *Amrut Distilleries Limited* v. *The Authorized Officer, Chennai Seaport & Airport, Food Safety and Standards Authority of India and Ors*[67] *the*

65. Section 80(B) of the *FSS Act*,2006.
66. AIR 2014 SC 49.
67. W.P. No.33478 of 2014.

petition was filed against the order made by the authorized officer for not taking samples for NOC purposes on the ground that one of the items imported by the petitioner does not meet labeling guidelines. The Hon'ble High Court of Madras held, by referring the provisions of section 23 of the *FSS Act* that label should contain with specific information by which, consumer should not be misled. Therefore, Authorized officer was fully justified in not taking samples of articles of food for NOC purpose. It can be rightly said that the decision of the Madras High Court is in accordance with the letter and spirit of the *FSS Act,* 2006. In *Nestle India* v. *Union of India, Maggie*, a product of international brand Nestle, and also a favorite dish of kids and youths all over the world, is caught for adding more than the permitted levels of lead. The quantity of lead found was over 1,000 times more than what Nestle India Ltd. had claimed. It also contained Monosodium Glutamate (MSG) even though the pack said it didn't. The result was that Nestle forced to recall and collected 27,000 tons of Maggie noodles from retail stores, and destroyed it. The judiciary has taken a firm stand to uphold the provisions of the Act and thus to protect the right to life of the masses.

The Impediments in the Enforcement of the *Fss Act*, 2006

The FSS Act, 2006 was the result of constant deliberations and discussions done by the Central Government to ensure a unique safe and wholesome food to the consumers. Whereas when it comes to the application of the provisions there are many pitfalls and deficiencies noticed. Even though the Act has come up with novel features and international standards, it is sad to say that in India, still the food safety Act is in its infant stage. There are many factors contribute to that:

- Improper implementation of the Act: The main lacuna is with regard to the implementation. The well drafted legislation with all its forces remains in paper only. The vastness of the country and

the diverse cultural and other factors make it difficult to bring about uniformity in implementation.

- Still confusion exists with regard to many of its provisions: The FSS Act has repealed all other previous laws of food adulteration and has come in to effect after a wide gap. The provisions of the Act were implemented step by step. Therefore, still there are confusions with regard to many provisions of the Act.
- Lack of awareness among people: adulteration is the result of a greedy mind. But sometimes ignorance and lack of awareness also constitute the same. Still common people are not well informed about the hygiene and safety measures to be adopted in the manufacture of the food items till it reaches to the dining table.
- Shortage of labs: It is another problem with regard to the implementation of the Act. The shortage of accredited labs has to be rectified for the timely analysis and testing of food articles.
- Deficiency with regard to the enforcement mechanism: The number of Food Safety Officers and Designated Officers are very less all over India. That makes the existing officers over burdened with work by doing additional duties of neighboring districts. They have been provided with fewer amenities. In certain areas they don't have even departmental vehicles to inspect the hotels and other food manufacturing and selling places.
- Food Labeling has to be made more stringent: By labeling, manufactures are compelled to disclose the contents of the food items. Then it would be easy to find out GM content and other articles which are injurious to health.

CONCLUSION

Recently the report published by the Parliament Committee with regard to the functioning of FSSAI strongly recommended for the mobile

food labs. That is a suggestion to be welcomed and implemented soon. The *FSS Act* is a well drafted enactment with stringent punishment prescribed for the violators. Still there are certain confusions with regard to its implementation stage. The Ministry or FSSAI may take steps to expeditiously notify the recruitment regulations and fill up vacancies. The Ministry is also required to ensure accreditation of all State food laboratories, and ensure that State food laboratories and referral laboratories are fully equipped and functional. The provisions of the Act have to be implemented in letter and spirit. Consumer has the right to obtain safe and nutritious food.

Juvenile Justice An Overview On International Standards

Aswathy S.S*

Abstract

A child is born innocent and if nourished with tender care and attention he will flourish with all the qualities physical, mental, moral and spiritual and be a person of excellence. Children are the most valuable assets of a nation and so it is the duty of the State to look after, protect and care. Every effort should be made to provide them equal opportunities for development so that they become physically fit, mentally alert and morally healthy endowed with the skills and motivations needed by society. The tender age of a child is always at the risk of their life. Proper guidance is an essential factor at this period, for a numerous reasons young people are at menace. Since they are easily attracted to the temptations of life and the lack of proper guidance lend into criminalities. Misbehaviour or deviation from the accepted norms of conduct in the society makes them delinquents. Juvenile delinquency is a global phenomenon. Every nation has its own juvenile laws to tackle the delinquents. This paper is about the international standards of juvenile justice system.

"Your children are not your children,
They are the sons and daughters of Life's longing for itself.
They come through you but not from you,
And they are with you yet they belong not to you.

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You may give them your love but not your thoughts,
For they have their own thoughts,
You may house their bodies but not their souls,
For their souls dwell in the house of tomorrow,
Which you cannot visit,
not even in your dreams.
You may strive to be like them, but seek not
To make them like you."

Kahiil Gibran[1]

Child, the future, the next generation! The future of world is with the children. They are the most valuable assets of a nation. State has the duty to look after, protect and safeguard them to ensure to be great personalities to the world. For this purpose they need special care and protection at their tender age. The tender age or youth, the young people are always at the risk of their life. The acts done by a child or juvenile delinquency[2] has been a topic of discussion over decades. Juvenile delinquency is a form of behaviour or rather misbehaviour or deviation from the generally accepted norms of conduct in the society.[3]

The society has interpreted juvenile delinquency differently. For some they are offenders and so they are criminals and unwanted to the society, for others they are immature to assess the depth of their acts because of their age. According to W.E Daniel," To most parents, juvenile delinquents are other people's children who behave objectionably. To lawyers, they are minors who are accused of offences from which they are immune to the punishments that are youngsters whose social behaviour patterns show deviations from acceptable norms. To judges,

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1 Kahlil Gibran, The Prophet, 23 (Mapel Press, Nehru place New Delhi, Script Edn., 2008)

2 The term delinquency derived fromlatin word *delinquer*meaning omit.

3 N.V Paranjape, Criminology and Penology including victimology,572(Central Law Publications,Prayagraj, Uttar Pradesh, 12th edn.,2011).

they are simply neglected children who have been brought into the world by parents who have turned their backs on their offspring and left them to shift for themselves."[4] There are plenty of causes like socio economic and health problems which lead a child to delinquency. State has always given prime importance to delinquent children and their problem. Juvenile delinquency is a growing concern at national and global level. Starting from minor offences of abuses, assaults, theft children are involved in major serious offences like robbery, grievous hurt, armed rebellions, rape, and murder. So to hold back the issue a well settled law is obligatory.

The Indian juvenile justice system followed the British pattern which is in tune with the international standards of United Nations Organisation. Hence the origin, growth and development of Indian juvenile justice system can be traced back from the international standards. The relevant international instruments are cited here with discussions which influence the Indian juvenile justice system.

International covenants and juvenile

International community articulated its desire to do much more than what was being done for children world over. In the year 1902, the third international congress for the welfare and protection of children was held in London[5]. The congress meticulously consider the neglected children issues and how they en route the path of delinquency.[6]

The congress paves way to discussion of neglected children and delinquency globally. In the year 1919, the Covenant of League of Nations obliges the members to endeavour to secure and maintain fair and

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4 W.G Daniel,Juvenile Delinquency in Roucek Sociology of Crime ,35, (London, Owen, 1962)

5 From 15-18th July 1902 under the patronage of his majesty king Edward VII

6 A.D Attar ,Juvenile delinquency: A comparative study, (Popular Prakashan, Bombay, 1stedn., 1964)

humane conditions of labour for men, women and children[7] in their own countries and the countries where their commercial and industrial relations are.

In 1924, the Geneva Declaration of the Rights of the Child was adopted by the League of Nations. It provides that the child who is hungry must be fed, the child who is sick must be helped, the child who is backward must be helped and the delinquent must be reclaimed.[8] This declaration paves way to the development of the principle of rehabilitation of delinquent child. By the year 1948, the key stone of human rights, Universal Declaration of Human Rights impliedly gave more emphasis to delinquent child. Article 16 implicitly relates to the rehabilitation and social reintegration of juvenile delinquents[9]. It says about the role of parents and need of care for children. It was followed by the General Assembly Declaration of the Rights of the Child in 1959, which was unanimously adopted by 78 member states of the UN General Assembly[10]. Declaration laid down ten principles which include the right to protection against all forms of neglect, cruelty and exploitation[11].

Later the International Covenant on Civil and Political Rights 1966 (hereinafter referred to as ICCPR) which contains various provisions for the protection juveniles. It prohibits the execution of child offenders[12] and mandates the member state not to make any legislation which awards death sentence for the offence committed by juvenile offender who is below eighteen years of age.[13] Accused juvenile shall not be punished in

7 Article 23 of the Covenant of League of Nations,available at https://avalon.law.yale.edu/20th_century/leagcov.asp (last visited on February 11, 2019)

8 Geneva Declaration of the Rights of the Child , available at http://hrlibrary.umn.edu/instree/childrights.html (last visited on February 11,2019)

9 Article 16 of UDHR

10 United Nations General Assembly in resolution 1386 (XIV)

11 *Id*

12 Article 6of ICCPR

13 *Id*

an inhumane or degrading manner[14]; in addition to that no torture or cruelty can be meted out during the custody or detention. The covenant provides that juvenile should be separated from adults and brought as speedily as possible for adjudication and should treat appropriately to their age and legal status.[15]

The media and public have to exclude from all or part of trial for reasons of morals, public or national security in a democratic society. The International Covenant on Economic Social and Cultural Rights 1966 (hereinafter referred to as ICESCR) says about the protection and assistance, which should be accorded to the family for the care and education of dependent children.[16] Special measures of protection and assistance should be taken on behalf of all young children without any discrimination for reasons of parentage or other conditions[17]. Children and young should be protected from economic and social exploitation.[18]

The United Nations persistently makes efforts to secure the best interest of children. In 1985, The United Nation Standard Minimum Rules for Administration of Juvenile Justice[19] (popularly known as Beijing Rules) is a legal instrument that provides a detailed framework for the operation of national juvenile justice systems. Rules were framed at aiming the endorsement of the youngster's welfare and the assurance that each response towards juvenile delinquents will always be in proportion to circumstances of the youngster as well as the crime.

Beijing Rules played an imperative part in framing legislations of juvenile justice. The Rules comprise specific measures on juvenile justice

14 *Id* Article 7

15 *Id* Article 10

16 Article 10 of ICESCR

17 *Id*Article 10 (3)

18 *Id*

19 UNO general assembly 40/33, 1985,

which provides that a child or young person who under the respective legal system, may be dealt with for an offence in a manner which is different from an adult[20], which indeed provides for specific system for juveniles. It defines a juvenile offender as a child or young person who is alleged to have committed or who has been found to be committed of an offence[21]. Further says that the minimum age should not be fixed at too low age level, bearing in mind the facts of emotional, mental and intellectual maturity[22]. Juvenile justice system should always lay emphasis on the well being of the juvenile.[23] The rules particularly emphasis on the rights of juvenile which includes principles of fair trail, presumption of innocence, right to be notified of the charges, right to remain silent, right to counsel, right to the presence of parent or guardian, the right to confront, and the right to appeal to a higher authority[24]. Privacy of child at all stages of proceedings is mentioned in rules to avoid harm by labelling and publicity[25]. It says that no information may lead to the identification of a juvenile offender shall be published. Right to notify the parents or guardians about the apprehension of a juvenile are included in Beijing rules. They shall be notified immediately, and if not possible, they shall be notified within the shortest possible time thereafter[26]. In order to facilitate the discretionary disposition of juvenile cases, diversions, community programmes, like temporary supervision, guidance, restitution, and compensation of victims shall be taken.[27] In case of custody and detention pending trial, it shall be scarcely used and for the shortest possible period of time[28]. Even when the juvenile is in

20 Rule2 of Beijing Rules
21 *Id.,*Rule 2.2(a)
22 *Id.,*Rule 4
23 *Id.,*Rule 5
24 *Id.,*Rule 7
25 *Id.,* Rule 8
26 *Id.,* Rule 10
27 *Id .,* Rule 11
28 *Id.,* Rule 13

custody they shall receive care, protection and all necessary assistance which includes social, educational, vocational, psychological, medical and physical that they may require in view of their age, sex and personality.[29] The best interest of child has to be kept in mind during juvenile proceedings, which should be beneficial to the best interests of the juvenile and so the conduct in an atmosphere of understanding, allowing the juvenile to participate therein and to express freely[30]. The importance of free legal aid has been mentioned in rules, which allows the juvenile's right to be represented by a legal adviser or to apply for free legal aid, where there is provision for such aid in the country[31].

The background and circumstances of juvenile has a major role for the crime, so that in all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority[32]. The guiding factor of considering case shall be the well being of the juvenile.[33] Hence it prohibits death sentence[34] and corporal punishment to juvenile offenders. Besides all these reformative theory has to be applied in juvenile justice system, providing various alternatives or diversionary programmes in substitute to institutional method of treatment[35] like care, guidance and supervision orders, probation, community service orders, financial penalties, compensation and restitution, intermediate treatment and other treatment orders, like orders to participate in group counselling and

29 *Id.,*Rule 13 (1)

30 *Id.,* Rule 14(2)

31 *Id.,*Rule 15(1)

32 *Id.,* Rule 16(1)

33 *Id.,* Rule 17(1)(d)

34 *Id.,*Rule 17(2)

35 *Id.,*Rule 18(1)

similar activities, foster care, living communities or other educational settings has to be implemented which actually reform the character a juvenile. As a part of human rights protection speedy trail is necessary, to avoid unnecessary delay it provides for expeditious disposal of cases of juvenile offenders[36].

Records of juvenile offenders have to be kept confidential. Access to such records has to be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons[37] so as to maintain the confidentiality. Moreover they are not supposed to be not be used in adult proceedings in subsequent cases involving the same offender[38].

Moreover rehabilitation of juveniles is of much more importance; Beijing Rules obliges the States to make efforts to provide juveniles, at all stages of the proceedings, with necessary assistance of rehabilitation such as lodging, education or vocational training, employment or any other assistance[39]. This includes volunteering services in local institutions and other community resources to contribute effectively to the rehabilitation of the juvenile in a community setting and, as far as possible within the family unit[40]. Juveniles in institutions have to be kept separate from adults. And have to be detained in a separate institution or in a separate part of an institution[41]. Where ever they are institutionalised proper care, protection and necessary assistance has to be given to them.[42] One of the major weaknesses of Beijing rule is its lack of binding nature. However, the broad fundamental principles contained in the Beijing Rules

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36 *Id.,*Rule 20(1)

37 *Id.,* Rule 21(1)

38 *Id.,*Rule 21(2)

39 *Id* .,Rule 24(1)

40 *Id* .,Rule 25(1)

41 *Id* .,Rule 26(3)

42 *Id* .,Rule 26(2)

are aimed at promoting juvenile welfare to the greatest possible extent, minimizing the necessity of intervention by the juvenile justice system and, reducing the harm that may be caused by any intervention that is required. The Beijing Rules are formulated to apply within different legal systems, regardless of the definition of juvenile under those systems are different. The rules contain some of the provisions agreed by the countries with respect to the objectives of juvenile justice. It aims to establish an ideal juvenile justice system dealing with the different stages of a process involving children who have committed crimes.

Some Other United Nation resolutions on juvenile justice

1) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[43].
2) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[44].
3) United Nations Guidelines for the Prevention of Juvenile Delinquents (the Riyadh Guidelines)[45].
4) United Nations Rules for the Protection of Juveniles Deprived of their Liberty[46].
5) Convention on the rights of the child[47].
6) United Nations Standard Minimum Rules for Noncustodial Measures (The Tokyo Rules)[48].

The United Nations Convention on the Rights of the Child (1989)

Among all the convention of children, United Nations Convention on the Rights of the Child 1989 (hereinafter referred to as UNCRC)[49], is

43 General Assembly Resolution 40/33, 1985.

44 Economic and Social Council Resolution 1989/66, December 14, 1990.

45 General Assembly Resolution 45/112.

46 General Assembly Resolution 40/113. 8 1990

47 General Assembly Resolution 44/25.

48 Adopted on 14th December 1990.

49 Adopted by the United Nations General Assembly on 30 November 1989,

the most ratified human rights treaty in the history. UNCRC is considered as the Magna carta of child rights since it an inclusive covenant which contemplated all relevant international standards like UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), The UN Standard Minimum Rules for the Administration of juvenile justice (the Beijing Rules) and the UN Rules for the Protection of juveniles Deprived of their Liberty. It recognizes the children's socio, economic, political civil and cultural roles. Convention guarantees and sets a minimum standard for protecting the children's rights. Being the principal instrument in relation to juvenile justice it is legally binding on all members. State parties are obliged to recognize the rights of every child who is alleged as accused or recognized as who infringed the penal law to be treated in a manner inconsistent with the promotion of the child's sense of dignity. UNCRC defines children as those less than 18 years of age[50] and is designed to look at children as complete human beings. It says that the best interests of the child shall be given primary consideration[51] and while ensuring protection and care to a child, the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her shall be taken into account by the State[52]. Though the convention defines children as those who are under 18 years old, it allows State to fix the minimum age of criminal responsibility which children shall be presumed not to have the capacity to infringe the penal law[53]. The convention provides that every child alleged as or accused of having infringed the penal law shall ensure the basic rights like. The principle of presumption of innocence, that is to consider him as innocent until proven guilty[54], principle of reasonable

50 Article 1 of UNCRC

51 *Id.,*Article 3(1)

52 *Id.,*Article 3(2)

53 *Id.,*Article 40(3)(a)

54 *Id.,*Article 40(2)(b)(i)

opportunity to be heard[55]. To be informed the charges against him promptly either directly or through his parents or legal guardians, and to be provide legal or other appropriate assistance in the preparation and presentation of his defence, right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians[56]; prohibition on compulsive testimony against himself[57]. And on final an order passed by the competent authority has the right to appeal or revision against the order before the higher competent authority[58]. Moreover the child's identity has to be kept confidentially throughout the proceedings[59] to keep safe guard his right to privacy. Mandates the State to fix the minimum age of criminal responsibility below which children shall be presumed not to have the capacity to infringe the penal law[60]. Punishments on juveniles also have some guide lines which has to be strictly followed by the state parties. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age[61]. Besides that, the aftercare treatment UNCRC specifies that it shall be in accordance with their national laws.[62] After care home or institutions like Shelter homes, foster care placements, adoption or if

55 *Id.,* Article 40(2)(b)(ii)
56 *Id.,*Article 40(2)(b)(iii)
57 *Id.,*Article 40(2)(b)(iv)
58 *Id.,*Article 40(2)(b)(v)
59 *Id.,*Article 40(2)(b)(vii)
60 *Id.,*Article 40(3)(a)
61 *Id.,*Article 37
62 *Id.,* Article 20(2)

necessary placement in suitable institutions for the care of children should consider interest of continuity in a child's nurture, cultural, religious, and linguistic background.

United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)

The UN Rules for the protection of juveniles deprived of their Liberty. The UN Guidelines for the Prevention of Juvenile Delinquency, referred to as Riyadh Guidelines and the UN rules for the protection of Juveniles Deprived of their Liberty were adopted at the Eight UN congress.[63] The Riyadh Guidelines and UN Rules for the Protection of Juvenile Deprived of their Liberty complement the Beijing Rules. The guidelines constitute a comprehensive legal document promoting a proactive approach to preventing juvenile delinquency and considering children to be fully fledged participants in society. It addresses the issue of general prevention and lay emphasis on those preventive plans to be instituted at every level of government. It provides to enact and enforce specific laws and procedure to promote and protect the rights and well being of all young persons. State parties should enact laws like to prevent victimization, abuse, exploitation and the use of children and young person's for criminal activities, laws to control the accessibility of weapons to children, and to protect young children from drug abuse and traffickers. Though this document is not legally binding it encourage state governments to consider this as guiding principles while they make juvenile laws. The guidelines specifically provides for diversionary programmes outside the juvenile system[64] like various rehabilitating schemes and programmes. In order to prevent further criminalization of juveniles proper legislations should be enacted[65] which also involves the participation of community.

63 Held in Havana in 1990 on the prevention of Crime and the Treatment of Offenders

64 Riyadh Guidelines Guideline 58

65 *Id.,* Guideline 56

The UN Rules for the Protection of Juveniles deprived of their Liberty establish minimum standards for the protection of juveniles who are deprived of their liberty, which is more in tune with human rights and fundamental freedoms. The ultimate aim of this rule is to neutralize the inhuman and brutal effects caused by all types of detentions. It promotes and regulates the entire foster system its physical environment and accommodation requirements for juveniles deprived of their liberty. The rules more focus on the liberty, well being, education, right to have free exercise, right to practice his religious and spiritual life, right to adequate medical care. It specifically mentioned that physical restraint and force shall be used only as last resort where all the other controlling methods have been failed to control[66]. The foster care and other institutions where these juveniles are detained are subjected to inspection, and he must have the opportunity to complaints and requests to the director of the detention facility and his authorized representatives[67].

To strengthen the above instruments and to assist the States in the implementation of the provisions of the Convention on Rights of the Child, Beijing Rules, United Nations Guidelines for the Prevention of Juvenile Delinquency and The UN Rules for the Protection of Liberty, a meeting of experts was held in Vienna in 1997, in which an expert group drafted another guidelines for the action on Children in the Criminal Justice System. This guidelines stress the importance of the principle of non discrimination, including gender sensitivity, upholding the best interest of the child, right to life, survival and the duty of states to respect the views of the child. This document mentioned the need of partnership

66 Kei Somed, Internstional Instruments in the field of Juvenile Justice, Available at www.unafei.or.jpRules for the /english/pdf/PDF-kenya//sessions5.pdf (last visited on February 15 2019)

67 Rule 72 of UN Rules for the Protection of Juveniles Deprived of their Liberty , also available at https://www.un.org/ruleoflaw/blog/document/united-nations-rules-for-the-protection-of-juveniles-deprived-of-their-liberty/, https://www.un.org/ruleoflaw/files/TH007.PDF (last visited on February 15 2019)

between Governments, United Nations bodies, nongovernmental organizations, professional groups, media, academic institutions, children and other members of civil society[68].

United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 -Havana Guidelines

United Nations Rules for the Protection of Juveniles Deprived of their Liberty either called as Havana Guidelines. UNCRC was the first international instrument which provides a rational Child Rights approach to the legal regulation of the deprivation of liberty for children; this principle instrument operates as an umbrella for Riyadh Guidelines, Beijing Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty. But none of the documents refers juvenile justice or the deprivation of liberty of children. This Rule for the Protection of Juveniles Deprived of their Liberty is applicable to juvenile justice institutions and to deprivations of liberty on the basis of the children's welfare and health. This rules sets out standards applicable when a child is confined to any institution for penal correctional, educational or protective or detained of conviction, suspicion of having committed of an offence or a child is at risk or by order of any judicial, administrative or other public authority. Moreover the Rules universally defines the specific circumstances under which children can be deprived of their liberty, emphasising that deprivation of liberty must be a last resort and for the shortest period of time and only to exceptional cases. The Rules apply to all juveniles. JDLs serve as an internationally accepted framework intended to counteract the detrimental effects of derivation of liberty by ensuring respect for the human rights of children. It applies to all juvenile deprived of their liberty as a result of the penal law and also those who are deprived of liberty in health and welfare placements. The rules mainly focused

68 K.P Pandey, Children's Right Laws, Policies and Practice,81, Regal Publications,NewDelhi, 1st ed.,2014.

on some basic principles like the deprivation of liberty shall be disposed as a last resort and for shortest period of time in exceptional cases only, juveniles should be deprived of their liberty in accordance with the principles and the procedures of international law, to establish small open facilities to enable individualised treatment and to avoid the additional negative effects of deprivations of liberty, deprivation of liberty should facilities programmes and activities promoting health, self respect, responsibilities which facilitates their skill, facilitates access and contact with family members and to allow for integration into community, they should be helped to understand their rights and obligations during detention and be informed of the goals of care provided, the juvenile justice personnel should receive appropriate training including child welfare and Human Rights.

The rules mainly focussed on juveniles under arrest or awaiting trail, management of juvenile facilities like admission, registration, movement and transfer of juveniles where they are detaining, the classification of placement, physical environment and accommodation of foster places, education, vocational training and work, recreation, religion, medical care available, notifications of illness, injury and death, communication with families, limitations if physical restraint and the use of force, disciplinary procedures, frequent inspections[69] etc.

Juvenile justice system in India

The concept of juvenile justice system in India began as subsidiary system of criminal justice system. The first reformatory institution in India was established in 1843 at East Bombay which serves as an asylum and reformation. The Apprentices Act 1850 was the first legislation dealing with children in conflict with law applied to the children under the age of 15 years. In 1876, the Reformatory School Act made a milestone

69 Dr Nuzhat Parveen Khan Child rights and the law, 317, 2nd ed., 2016.

to Juvenile Justices system providing reformatory schools in accordance with Indian Penal Code 1860. Subsequently the Reformatory Schools Act 1897 provided that children up to the age of 15 years sentenced to imprisonment may be sent to reformatory schools for reformation. The separation of all children from the criminal justice system was introduced by the Madras Act 1920 with establishment of separate juvenile court and residential institutions. During this period Children Act was passed and in pursuant to that Juvenile courts and other juvenile institutions were established throughout the country. The 1920's Madras Act pattern was followed by other states within the country. Children were kept in separate residential institutions during the pendency of court proceedings, even after the after trial and convicted may sent to institution. In 1950 as a result of partition in India there was an increase in neglected and delinquent children, to address them Children Acts 1960 was passed as model legislation. This was applicable to Union Territories and so other states passed their own Children Act. In 1974, India declared a national policy for children, it includes training, rehabilitation, destitute, neglected and exploited children. Being different acts on each states central government passed a specific Act Juvenile Justice Act 1986. This Act provides special provisions for care, protection, treatment development and rehabilitation for neglected and delinquent juveniles. Subsequently International developments with regard to children forced the Indian Parliament to passed new act on Juvenile Justice (herein after referred as JS) and in 2000 Juvenile Justice Act (Care and Protection Act). This Act was quite different from all the other versions as it includes sort of all international instruments. It prescribes uniform age for juveniles to treat as children. The act directs the juvenile cases should be completed within a periods of four month, a separate juvenile justice Board, Child Welfare Committee, foster care, after cares were implemented. In order to strengthen the implementation of this act the central government framed Rules in 2007. In 2012 new bill was introduced to amend the JJ

act owing to the outcry of public evoked by the Nirbhaya case, in which the Delhi Police disclose the fact that the most brutal attack on victim was from juvenile offender, who got all the benefits of juveniles and escape from death sentence. Subsequently in 2015 a new act was passed, The Juvenile Justice (Care and Protection of Children) Act, 2015" in which it distinguishes crimes as petty offences, serious offences and heinous offences. And special provision for juveniles in conflict with law Indian Constitution, Criminal Procedure Code, Indian Penal Code and other penal laws dealing with children were applicable to children.

To conclude

Juvenile justice laws are the only legislations which solely pact with children those who are in conflict with existing laws These laws has been designed to apply the principle of reformation and rehabilitate. Though there are numerous international treaties and resolution, the predicament of the next generations are too dreadful. Preclusion of juvenile delinquency from the society is indispensable. It requires maximum efforts from the side of societies and authorities. There are numerous provisions at international and national level for dealing with juveniles in conflict with law. International has addressed this issue in various instruments which focus on prevention, rehabilitation, and reintegration. Though the national laws of state parties infuse international standard in their juvenile justice system juvenile crime rates are getting higher and recidivism on juvenile offenders are increasing.

The Floating Federalism In The Current Indian Scenario

Aravind. S*

Abstract

Federalism in India is at an important juncture. In the last five years, India has witnessed significant changes in its political, fiscal and institutional landscape that have substantially influenced the dynamic of Centre-state relations. The ambit of federalism has become so enlarged due to the commencement of globalization and it is floating towards the shore of centralization. This has created an impact in the overarching nature of India's federal bargain and has raised a challenge to the diverse aspects of the nation. Currently it took a pandemic to bring forth the floating ship back to the cooperative federalism. It has given a wonderful opportunity for the true display of the cooperative nature of federalism. Federalism stands as an existential reality by having its presence in entire diverse aspects of our nation. Thus, the unity in diversity of the entire nation's fabric is determined by the federal scheme of the nation.

INTRODUCTION

The desire to have equal liberties and welfare of all resulted into the formation of a State. Federalism, as a type of state, is an enduring expression of the principle of constitutionalism that balances the unity of federal units of the state by accommodating diversities and by executing constitutional goals through mutual cooperation and

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coordination amidst centre and regional governments. Analysing the Constitutions of democratic nations, there are two principal centres of government power – State and Federal or Centre and Regional units. As a matter of practice, local self-governments, by delegation of state authority under the principle of decentralization is a third level in such key centre of power. The federal idea then, is above all an idea of a shared sovereignty at all times responsive to the needs and will of the people in whom sovereignty ultimately resides. The federal concept also embraces pluralistic ideas. It gives scope to many cultures, energies, beliefs initiatives and enlists them for the welfare of the people. It encourages diversity of thought, of culture, and of beliefs. It gives adverse opportunity for the development of private institutions which may be social, political and economic. But a tightly centralized government tends by its disproportionate weight and power, to stifle diversity and creativity in public and private sectors, a federal system provides room for both infinite variety and creativity in all sectors of national life. This is equally true for political organizations philanthropic associations, social institutions or economic enterprises.

This reflected in the idea of unity in diversity which was the main theme in the minds of the framers of the Constitution. So it embraces the diversity together in a national unity the framers emphasized for the formula of composite culture. They have reflected to the words of the legendary poet Rabindranath Tagore to highlight its importance. He says: "We can see that the aim of Bharatvarsha has always been to establish unity amidst differences, to bring to convergence different paths, and to internalise within her soul the unity of the severalty. You cannot legislate unity into existence. Bharatavarsha knew the secret of this mode of unification. Bharatvarsha limited the conflict between opposing and competing elements in society by keeping them separate and at the same time engaged in a Common task that brought diverse elements

together."[1] Recognition of regional autonomy and individuality in terms of language, culture etc. was the tool. This approach of the framers of constitution for preserving the unity in diversity adopted a federal style. The idea reflected two ways of federalist style. One is the inclusion of federal features and rules in the Constitution and the other way is to create a political culture which accommodates pluralism. When the Assembly turned on in choosing between federalization and centralization regarding the Constitution, the tendency to lean towards centralization was visible among the framers. The Union Powers Committee of the Constituent Assembly observed: "We are unanimously of the view that it would be injurious to the interest of the country to provide a weak central authority which would be incapable of ensuring peace of coordinating vital matters of common concern and of speaking effectively for the whole country in the international space.[2] The Union Constitution Committee decided that there should be three legislative lists and that residual matters should go to the union and not the States. This paradox remained ambiguous in the minds of most of the members of the Constituent Assembly. Mostly the common answer was that it has been unitary with some federal features, or that it has been federal with unitary characteristics. So we can identify conflicting cultures forming the basis of federalism in India.

In the words of K.C Wheare, "India's system of governance is quasi federal in nature[3], which indicates a constitution that is federal in form and unitary in spirit. D.D Basu, an eminent constitutional expert observed that "the Constitution of India is neither completely federal nor unitary; rather it is a mixture of both."

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1 Sabhyasachi Chatterjee, "Federalism and Alternative", FRONTLINE(DEC 2018).

2 CONSTITUENT ASSEMBLY DEBATES, Vol II 657.

3 KennethC.Wheare, Federal Government, ,Oxford University Press4th Edn., (1964),

TRACES OF RECENT CENTRALISATION

The constitution also enhances the Indian model of federalism as asymmetrical federalism. The constitution contains two forms of asymmetry. Firstly the provisions of high degree of autonomy of the states including self-governance [4] and secondly, provisions that mandate certain states to conduct positive discriminatory measures to neutralise inter/intra state inequality.[5] The judiciary also through their declarations has preserved the asymmetrical aspects of federalism. A ruling by the constitutional bench in *R C Poudyal v. Union of India* in 1994[6] held that the asymmetrical features of the Constitution are part of single legal order, which permits differential treatment of regions and groups. They are not representative of legal pluralism.[7] Although these terms and conditions must be compatible with the basic features of the Constitution, this does not mean that the conditions need to be the same as those that govern all other states.

Jammu Kashmir is the current issue of discussion on the centralizing dominance in asymmetric federalism. A certain super imposition of Central legislative powers over the states can evidently be seen in the issue of Jammu and Kashmir. The Central government in a first single handily bifurcated a State into two, that too into union territories.. It was the only state in union which negotiated special terms of entry to the union at the point of accession and had its own constitution. Except Kashmir, every other Princely states had accepted the uniform provisions for governance of formerly Princely states under part B of the Constitution of India under the Indian Independence Act, 1947. The debate relating to special status for Jammu and Kashmir went on for months in the

4 Fifth and sixth schedules; Article 370 relating to Jammu and Kashmir(which is now abrogated);371A relating to Nagaland and 371G relating to Mizoram.

5 Some provisions of Art.371.

6 1994 supp (i) SCC 324 [5].

7 Pu MyllaiHlychho v. State of Mizoram,(2005) 2 SCC 92.

constituent Assembly and also between the leaders like Jawaharlal Nehru and Sheikh Abdullah and finally got approval from the constituent Assembly in 1949[8]. The Parliament legislative power over Jammu and Kashmir were restricted to the areas of defence, foreign affairs and Communications.[9] So Jammu and Kashmir was under the rule of their own Constitution[10] [by virtue of the Constitution (Application to Jammu and Kashmir) Order 1954] with minimal interference in the affairs of the state by the Parliament.

But 40 years later after 1954, however as many as ninety-four of ninety seven entries in the Union list, and 260 of 395 Articles of the Constitution, were extended to Jammu and Kashmir under Presidential orders [11]which included replacement of the elected Head of State- the

8 MaulanaHasratMohani, asked in the Constituent Assembly on October 17, 1949: "Why this discrimination please?" The answer was given by Nehru's confidant; the wise but misunderstood Thanjavur Brahmin, GopalaswamiAyyangar (Minister without portfolio in the first Union Cabinet, a former Diwan to Maharajah Hari Singh of Jammu and Kashmir, and the principal drafter of Article 370). Ayyangar argued that for a variety of reasons, Kashmir, unlike other princely states, was not yet ripe for integration. India had been at war with Pakistan over Jammu and Kashmir and while there was a ceasefire, the conditions were still "unusual and abnormal". Part of the State's territory was in the hands of "rebels and enemies. Constituent Assembly Debates.

9 Legal scholar Paras Diwan observed: "*The picture of new Kashmir which is unfolding itself gradually and slowly is of a Kashmir possessing wide autonomy, a member of the Indian Union, a Republic within the Indian Republic: and a Kashmir whose defence, foreign affairs and communication will be ruled by the Indian Union, and for the rest it would be sovereign of its own fate, builder of its own destiny.*"

10 Sheikh Abdullah's statement in the State's constituent assembly on Article 370 is pertinent: "The Constitution does not mean that it [Article 370] is capable of being abrogated, modified or replaced unilaterally. In actual effect, the temporary nature of this Article arises merely from the fact that the power to finalize the constitutional relationship between the State and the Union of India has been specifically vested in the Jammu and Kashmir Constituent Assembly. It follows that whatever modifications, amendments or exceptions that may become necessary either to Article 370 or any other Article in the Constitution of India in their application to Jammu and Kashmir are subject to decisions of this sovereign body."[Sheikh Abdullah, , Vol. I Jammu & Kashmir Constituent Assembly Debates (11August 1952)].

11 RekhaChowdhary, "Autonomy Demand: Kashmir at Crossroads," Vol. 35 No. 30, ECONOMIC AND POLITICAL WEEKLY, 2599-2600 (2000).

Sadar-i-Riyasat- by a Governor appointed by the Centre, and a Chief Minister- in line with other states.[12] The main legal question then aroused on the mandate of Article 370. It has been emptied of its substantive content as a result of Presidential Orders. Article 370 and further it does not display any special or unique status for Jammu and Kashmir within the framework of the Constitution of India. The Article did only acted as temporary and interim measures for Jammu and Kashmir within the ambit of the Constitution of India.

Erosion of special status and gradual use of article 370 towards application of central laws and powers have been the features that have watered down the rigour of asymmetric federalism and promotion of equal rights. The Sarkaria Commission also did not find any limitation for use of the power of extension and consensus based extension of the Indian Constitution and laws for the mutual advantage of the Union and States.

Through the Supreme Court Judgments too, we can see the declination of self-autonomy under the Article 370. The initial ruling relating to Article 370 was the case of *Prem Nath Kaul v. State of Jammu Kashmir*,[13] upheld the interpretation of temporary provisions on the basis of assumption that the relationship between India and the state should be finally determined by the Constituent Assembly of the State itself', further the exercise of power conferred on Parliament and the President by the provisions under Article 370(1) is conditional and should be approved by the Constituent Assembly of the State.

But a major break has been witnessed through subsequent judgments on constitutional bench through *Sampat Prakash* v. *State of*

12 This took place under the Constitution (Application to Jammu and Kashmir), Second Amendment Order 1965, and the Constitution of Jammu and Kashmir (Sixth Amendment Act, which amended the State's Constitution:

A GNoorani, Article 370 : A Constitutional History Of Jammu And Kashmir, Oxford University Press (2011).

13 AIR 1959 749.

Jammu and Kashmir,[14] and followed by *Mohammed Maqbool Damnoo*v. *State of Jammu and Kashmir*[15] where in the former the bench found that the president's discretionary power of President remained operative, since the Constituent assembly had not recommended the cessation of Article 370 and the material circumstances that had given rise to the Article has not been altered. Later case was regarding the constitutionality in replacement of *Sadar-i-Riyasat* with a governor. Here also similar line of reasoning has been observed by the judiciary. The court held that the Governor is the successor to the Sadar-i-Riyasat and is able to give the State Governments concurrence to any amendments under article 370.

Recently, In *State Bank of India* v. *Santhosh Gupta*[16] through a path breaking judgment by Rohinton Nariman and Kurian Joseph, the supreme court of India has unequivocally has expressed that the constitution of India is a mosaic drawn from the experience of nations worldwide. "…The State of Jammu and Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution which is subordinate to Indian Constitution. It is therefore wholly incorrect to describe it as being sovereign sense in the sense of its residents constituting a separate and distinct class in themselves. The residents of Jammu and Kashmir, we need to remind the High Court, are first and foremost citizens of India. Indeed, this is recognized by Section 6 of the Jammu and Kashmir Constitution". Further the Court declared," the federal structure of this Constitution is reflected in part XI. The State of Jammu Kashmir is a part of federal structure."

Presently, the Article 370 has been abrogated and the state has been bifurcated into two Union territories, through a presidential order and this action is been pending before the Supreme Court. It will be too

14 1969 SCR (3) 574.

15 1972 SCR (2)1014.

16 (2017) 2 SCC 538.

early to guess on how the dispute will turn out. Since the decision in Santhosh Gupta already settles the question of sovereignty of the state and also by the amendments brought in Article 367 and 370 by the Central government when the Jammu and Kashmir Assembly stands dissolved have tried to legally fire-fence the legislative route it has taken. The Centre's decision to transform the state into an Union territory and the subsequent abrogation of Article 370 will be of unknown consequences in Kashmir, and have wider implications for Indian federalism.

The Citizenship (Amendment) Act 2019[17] is the recent emerging issue of centralizing tendency witnessed in the nation. The merits of the Act are yet to be clarified by the Court regarding the violation of Article 14 of the Constitution in selective granting of citizenship as alleged by the opposition. And in the context of Union-State Relations, the way Union Government is trying to enact a law on citizenship opposed by the States is a matter of grave concern. It becomes another tension area in Union-State Relations. In the northeast, the protest is against the Act's implementation in their areas. Most of them fear that if implemented, the Act will cause a rush of immigrants that may alter their demographic and linguistic uniqueness. Issue of ethnic federalism and culturalism is the concern in the North East. In the rest of India, like in Kerala, West Bengal and in Delhi, people are protesting against the exclusion of Muslims, alleging it to be against the ethos of the Constitution.

17 THE CITIZENSHIP (AMENDMENT) ACT, 2019, NO. 47 OF 2019. Reads In the Citizenship Act, 1955 (hereinafter referred to as the principal Act), in section 2, in sub-section (1), in clause (b), the following proviso shall be inserted, namely:— "Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;".

The third week of January 2020 has witnessed two suits being filed in the Supreme Court against two different central government legislations on charges of violating both the federal structure of the Indian constitution as well as the fundamental rights. While the one filed by the Kerala government was against the controversial Citizenship Amendment Act 2019, the other was filed by the state government of Chhattisgarh against the National Investigation Agency Act of 2018 citing that it ultra vires the constitution and is in fact against the federal structure of Indian democracy and against state sovereignty.

Therefore, in the case of CAA, the Central government has again enforced its legislative capacities, legally binding the state governments to comply despite mounting protests against the Act. And finally, the NIA Act which empowers the Central government to further enhance its policing capabilities undermines both the territorial and policing jurisdictions of the state. In the long run, this poses a threat of the slow demise of a quasi-federal Indian state into a Centralized unitary regime.

Analyzing the nature of Indian democracy or how power is being shared among the governments at both the Centre and the state, we can see that India is a quasi-federal state. Though a federal form of government is essentially prescribed in the constitution, ours is rather a Union of States instead of being a federation. This is because of India's complicated history as well as our complex socio-political dynamics. Here we have a federal state with features of a unitary government. As power is decentralized in federalism by dual machinery or two levels of government or governance this power decentralized here will be according to certain demarcations of jurisdictions each level of government would have.

EMERGING COOPERATIVE PANDEMIC FEDERALISM

As the Centralisation slowly shaded the federal features of the nation, the unprecedented unfortunate pandemic manifested in the form

of Covid-19 has brought forth the cooperative nature of federalism in the fore front. Since the consequences created by this extra ordinary circumstance poses threat to basic human rights to life, safety, health, it invites the federal responsibility of the Central government and the state governments to jointly undertake response and relief measures. The close cooperation and collaboration between the Centre and the State has been the key feature of nation's response towards fighting the pandemic. It has become a necessity for strengthening the cooperative federalism as the crisis cannot be fought on its own by the state or by single jurisdiction. The constitution also paves the way to lead in coordinating and supporting the states in extraordinary circumstances. The Disaster Management Act 2005 and the Epidemic Diseases Act 1897 provided the legal grounding for the coordinated response to this outbreak of corona virus.

The Epidemic Diseases Act 1897 contains a provision which empowers both the Central and State government to regulate and curtail the spread of epidemic diseases. The Central government is vested with power to take preventive measures[18] and at the same time it also empowers the State government to take regulatory and preventive measures to curb the spread on its jurisdiction. By virtue of this, the Central and the state governments are empowered to impose ban on public gatherings, closing of educational institutions including schools, universities. Karnataka was the first state to do so.

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18 Section 2A. of the Epidemic Disease Act: Powers of Central Government.—When the Central Government is satisfied that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of such disease or the spread thereof, the Central Government may take measures and prescribe regulations for the inspection of any ship or vessel leaving or arriving at any port in [the territories to which this Act extends] and for such detention thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary.

Subsequently the Central Government asked the State government to invoke Section 2[19] of the Act as it relates to the enforceable character of advisories released by both the Union health department and State governments. It is pertinent to note that despite health being a subject under State list, there is no conflict of interest between the Central and the State Government regarding the implementation of this Act. Since disaster management competences are nowhere enumerated in the Indian Constitution, such matters come under the residual power allocated to the Union.

However, the Disaster Management Act, 2005 is rooted in Entry 23 of the concurrent list, which enumerated as 'Social security and social insurance, employment and unemployment", empowers all tiers of government to effectively contribute to disaster management. By virtue of this Act both the central and the state governments imposed lockdown measures and thereby regulating movement of people. The central government along with the State government took measures even by adopting innovative ways to tackle the pandemic and signified the spirits of cooperative federalism by advancing economic support package, arrangement of quarantine institutions, providing free food grains , facilitating tracing and health screening measures by registering in an online portals for all people entering the states etc.

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19 Section 2 of the Act states that the Power to take special measures and prescribe regulations as to dangerous epidemic disease.

(1) When at any time the [State Government] is satisfied that [the State] or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the [State Government], if [it] thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as [it] shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

It is worth mentioning the activities done by the Local self-government and their fight against the pandemic. From the instances of Kerala and Odisha we can see that the local self-governments as part of the decentralised system in the federal scheme addressed the pandemic strongly through being proactive in readying the infrastructure for the treatment, arrangement of community kitchens, maintaining of crucial hygiene and social distancing at the village level. They have emerged as the bridge between the community and the decision makers for the strict implementation necessary actions inorder to fight the pandemic. . Even though there are constitutional mandates hoped to strengthen local government in India, strictly speaking, local government bodies remain within the competence of the state's devolution of powers and functions.. For this reason they have not yet been able to develop an effective third tier government and are therefore, not of much interest from the point of view of the federal scheme. But in the context of effective functioning of a decentralised system It is the need of the hour to fully transfer the right funds and functionaries to the local self-governments so as to function effectively like an elected government.

Since nothing is absolute or ideal in this politicalscenario, disagreements were visible and were heard from some states and believe to violate the spirit of federalism. States like West Bengal criticised the selective application of the Act serves to concentrate all decision making powers with the Centre by deploying Inter Ministerial Central Teams and also ambiguousness in the basis of selection of districts which are especially serious. The state demanded more autonomy in zone classification as the primary classification made by the Centre into orange, red and green zones invited criticisms from several states, The suspension of MPLADS (Members of Parliament Local Area Development Scheme) and its diversion to the Consolidated Fund of India has also triggered disappointment. It discourages locally tailored solution by the MPs. This decision was hailed not to be in concurrence with cooperative federalism.

Further by virtue of Section 11[20] of the Disaster Management Act 2005, a national plan has to be made and by virtue of Section 11(2) of this Act a mandate consultation with the states along with binding guidelines pertaining to its enforcement mechanism. However, the National plan was not made by the Centre and instead it has chosen an issuance of ad-hoc binding rules and issued the said rules to the states as a guideline to respond to the challenges put forth by the pandemic. This has successfully circumvented the legislative mandate of State consultations. This serves to concentrate all decision making powers to the Centre and this approach, apart from leading to undesirable outcomes, may not be strictly legal. A reflection of the Disaster Management Act, 2005 in terms with the relevant provisions of the Constitution makes it clear that the practice of issuing ad hoc guidelines and other directions to the States itself is unconstitutional.

The state governments are also seeking additional financial supports their revenues are affected and have dried up because of liquor sale ban; negligible sale of petroleum/diesel; no land dealings and registrations of

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20 Section 11 in the Disaster Management Act, 2005 enumerates as follows:

11 National Plan. —

(1) There shall be drawn up a plan for disaster management for the whole of the country to be called the National Plan.

(2) The National Plan shall be prepared by the National Executive Committee having regard to the National Policy and in consultation with the State Governments and expert bodies or organisations in the field of disaster management to be approved by the National Authority.

(3) The National Plan shall include—

(a) measures to be taken for the prevention of disasters, or the mitigation of their effects;

(b) measures to be taken for the integration of mitigation measures in the development plans;

(c) measures to be taken for preparedness and capacity building to effectively respond to any threatening disaster situations or disaster;

(d) roles and responsibilities of different Ministries or Departments of the Government of India in respect of measures specified in clauses (a), (b) and (c).

agreements etc. Further the GST collections have also been severely affected with their dues still not disbursed by the Centre. The chief Ministers of the states have made certain requests towards the Centre to mitigate their revenue loss which included: To declare Corporate Social Responsibility (CSR) exemptions for the corporations who donates towards any Chief Minister's Disaster Relief Fund since similar exemptions are given to corporations for donating to PM-Cares fund; To provide greater accessibility of testing kits and Personal Protection Equipment (PPE) for health workers; Larger economic packages and fiscal sustenance for states and relaxations in fiscal deficit norms in relation to the payment of compensations under the Goods and Services Tax regime.

It is the State governments which act as first line warriors to the pandemic, supplying them with adequate funds becomes a pre-requisite in effectively tackling the crisis. As the testing of Covid cases rises day by day, the crisis also expands. The main challenge is to make sure that the infections should not grow out of control and at the same time the economic activities should be conducted in a phased manner. Therefore, it is a muchneeded requirement that the Centre to view the States as equals, and strengthen their capabilities, so as to keep the spirit of Cooperative federalism high.

CONCLUSION

Being a large federal country known for its unique diversity, India's response towards Covid -19 pandemic largely vests on how well the harmony in Centre-State relations is maintained. When compared with other larger federal countries like United States, India has done immensely well to mitigate the friction and Centre has also played a better role of a mentor in collaborating and coordinating the fight against the pandemic and also provided resources support to the State Governments. But the shades of centralisation are still present and we

can observe how it appears and disappears in midst of cooperation in fighting the pandemic.

As far as our nation is concerned, we have a strong Union at the Centre and yet power is decentralized through the state governments and the local governments. And this power decentralized is demarcated and distributed among the union, state and local governments though the Union, State and Concurrent lists. Nevertheless, despite having their own spheres of jurisdiction, the Central government and its legislative powers are often more powerful and binding than the state governments and have been the reason for contestations between the two since independence It has resulted in a process of loss of autonomy of regional governments and affected the pluralistic aspects of nations This is not what the constitution of our nation expects from a federal system

It would be proper to say that the governments must work in a manner to respect the Fundamental principles of the Constitution of India instead of misusing their powers given by this revered text framed in 1950 The constitution has innovated and adopted a list system of power distribution, where the degree of autonomous competence varies contextually and circumstantially. The reason for the adoption of a federal polity was to create a stability and transparency in their respective fields. The framers avoided making the Constitution a Unitary one in order to avoid the possibility of despotism which may have resulted in creating hurdles for the democracy. It is necessary for the Centre as well as the state government to think of national interest primarily, and that national interest is the upholding the principles of constitutional morality in harmony with the ethnic and pluralistic diversity our nation. Federalism as a tool of constitutionalism has immense potentiality. The collaboration of the Centre and the state governments in mitigating epidemic and anti-social activities are the contribution of federalism to preserve rule of law thereby restore human rights and liberty. Therefore such collaboration should be void of conflicts.

Keeping the spirit of cooperative federalism high, it must be realised that the war against the pandemic can be won only when there is unity and sharing responsibilities effectively among the Central government and the State government.

Human Rights Background of the Right of Children to Free And Compulsory Education Act, 2009

Reeja J. A.*

Abstract

Human rights are the most fundamental of all rights that people have because of the simple reason that they are human beings. Every single person: man, woman and child have these rights. They are the right to live with human dignity. Human rights functions in the international arena to underline the worth of all human life. They give individual interests a central place in international relations, and have become a distinctive ingredient in the emerging world order. The right to education is a fundamental right under Article 21A of the constitution of India. In compliance of the mandate laid in Article 21A, the Parliament has passed the Right of Children to Free and Compulsory Education Act, 2009. India became one of the 135 countries to make education as a fundamental right with effect from April 1, 2010.Right to education achieved its fundamental right status due to its human right content. The various international instruments concluded for different purposes recognize right to education as a human right. This means that education is important in the case of prisoners, refugees, migrant workers etc. The paper illustrates human right under RTE Act with respect to international human rights instruments.

Key words: Human rights, Right to education, Free and Compulsory Education, RTE Act.

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INTRODUCTION

Human rights are the most fundamental of all rights that people have because of the simple reason that they are human beings. Every single person: man, woman and child have these rights. It means that human beings have the right to live with human dignity, liberty comprising all the political, civil, social, economic and cultural rights. Human rights are those rights without which there can be no human dignity.[1]Human rights are generally defined as the right which every human being is entitled to enjoy and to have protected. The struggle for the recognition of human rights have been an integral part of the history of all human societies. Education is one of the crucial factors responsible for individual and social development. Also, it is one of the important child rights. Child rights can be properly understood only in the context of the wider human rights framework.

HISTORIC DEVELOPMENT OF HUMAN RIGHTS

The devastating impact of the Second world war and the founding of the United Nations was the inspiration behind the human rights movement in the 20th century. Early legal codes in medieval time, which appear to include 'rights'on closer inspection turn out merely to reflect how powerful groups in that society at that time were realigning themselves. The Magna Carta[2] (1215)[3] in England is concerned more with the privileges of the barons and church-state relationships than

1 John P. Humphrey,No Distant Millennium: The International Law of Human Rights20(UNESCO Publication, France,1st edn.,1989).

2 Magna Carta, English Great Charter, charter of English liberties granted by King John on June 15, 1215, under threat of civil war and reissued with alterations in 1216, 1217, and 1225. By declaring the sovereign to be subject to the rule of law and documenting the liberties held by "free men," the Magna Carta would provide the foundation for individual rights in Anglo-American jurisprudence,available at https://www.britannica.com/topic/Magna-Carta (last visited on 4 August 2018).

3 Confirmed and reissued in the reign of King Edward 1, Magna Carta 1297.

with matters of common humanity. Similarly, the English Bill of rights in the 17th century set out the ground rules for a new constitutional settlement between the Crown and Parliament. Philosophers in the 18th and 19th centuries generated thinking about 'natural rights 'and natural law; that is, the rights attached to a human by virtue of nature, rather than by status or any other classification.

The American (1776) and French (1789) Revolutions drew on such ideas for their inspiration. The US Declaration of Independence [4] famously stated that: 'we hold these truths to be self -evident ;..... that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness. John Locke (1632-1704), the English philosopher, believed there was a natural -law rights to life, liberty and property. The French Republic produced its Declaration of the Rights of Man and of Citizens[5] and the US Constitution and Bill of Rights[6]followed shortly after.

In the 19th century a number of recognizable human rights issues were becoming increasingly controversial. They are slaveries, bad working conditions, child labour etc. Social movements sprang up in response to such human rights issues. Labour unions, racial and religious minority groups, women's rights and national liberation movements were the results of such responses. The idea that every human being was

4 In U.S. history, document that was approved by the Continental Congress on July 4, 1776, and that announced the separation of 13 North American British colonies from Great Britain. It explained why the Congress on July 2 "unanimously" by the votes of 12 colonies (with New York abstaining) had resolved that "these United Colonies are, and of right ought to be Free and Independent States." Accordingly, the day on which final separation was officially voted was July 2, although the 4th, the day on which the Declaration of Independence was adopted, has always been celebrated in the United States as the great national holiday—the Fourth of July, or Independence Day,available at https://www.britannica.com/topic/Declaration-of-Independence (last visited on 5 August 2018).

5 It was on 26 August 1789.

6 It was on 15 December 1791.

equally deserving of respect and dignity and hold be regarded as a right holder was emerging. Individuals were recognized as capable of asserting rights against other individuals and the state and governments had a duty to respect, promote and protect such rights.[7]

The political consensus achieved by the allies in the immediate postwar period allowed the conditions necessary for a synthesis of these ideas to emerge. There are several reference in the United Nations Charter of 1945[8] to human rights, in particular in the preamble, where it is stated that the peoples of the United Nations are determined ' to reaffirm faith in fundamental human rights, in the dignity and worth of the human persons, in the equal rights of men and women and of nations large and small'.

Article 68 of the Charter requires the UN's Economic and Social Council (ECOSOC)to set up a UN Commission on Human Rights (UNCHR)[9] .Its first task, through the chairmanship of Eleanor Roosevelt, was to produce an International Bill of Human Rights. It was decided that this should be in the form of a Declaration rather than a binding Treaty. It was envisaged that the document should be short, inspirational and accessible, and would be followed at a later date with more detailed treaty provisions. The result was the Universal Declaration of Human Rights of 1948 (UDHR)[10] Article I stated that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood' Eighteen years later the binding treaty provisions appeared

7 Trevor Buck, International Child Law,18(Routledge, Newyork,3 rd. edn.2013).

8 CHARTER OF THE United Nations (24 October 1945).

9 The UNCHR was replaced by a United Human rights council (UNHRC) in 2006: section 2.5.1.1.

10 UN General Assembly, Universal Declaration of Human Rights (10 December 1948)217A(III). The UDHR was adopted by the then 56 members of the United Nations, the vote was unanimous, although eight nations chose to abstain.

in the form of the International Covenant on Civil and Political Rights of 1966 (ICCPR)[11]and the International Covenant on Economic, Social and Cultural Rights of 1966(ICESCR)[12]. The ICCPR and the ICESCR, together with the UDHR, are now collectively referred to as the International Bill of Human Rights. The two International Covenants reflect respectively the so-called 'first generation'[13] and 'second generation'[14] rights. Human rights scholars have questioned the justiciability of the latter type of rights as they necessarily vary according to the resources available to state authorities.

Following the adoption of an Optional Protocol that established a communication/complaints procedure under ICESCR[15]in 2008 'it became more difficult to sustain objections to the justiciability of economic, social and cultural rights' .This approach is consistent with the general view that human rights are: interdependent; that is, the full range of rights constitutes a complementary framework in which the exercise of one rights affects the exercise of others; and ' indivisible' that is each individual rights is equally important- there should be no hierarchy' of rights[16].

Despite its formal on binding status, the UDHR has become the accepted universal standard of International human rights. It has almost certainly become part of what is termed 'International customary law'. It has inspired similar human rights instruments to be produced at the

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11 International Covenant on civil and Political Rights, opened for signature 16 December 1966, (entered into force 23 March 1976).

12 International covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, (entered into force 3 January 1976).

13 The civil and political rights are called first generation rights.

14 The economic, social and cultural rights are second generation rights.

15 Optional Protocol of the International covenant on Economic, Social and Cultural Rights, opened for signature 10 December 2008, UN Doc A/RES/63/117(entered into force 5 may 2013).

16 Supra n. 7.

regional level.These human rights instruments provides the required human rights standard. Nowadays the individual countries incorporate these well-known human rights standards into their own domestic law.

This is the outline of the historical development of human rights. The notion that human capital is an important feature in economic growth was very important for post-World War II reconstruction and then as a tenet of development in general. Therefore, 'manpower' forecasting as a way of organizing the post-primary levels of education systems became an accepted and influential technique used by governments with an interventionist economic tradition[17]. Thus, education became an important human right.

EDUCATION AS A HUMAN RIGHT

Every system of law focuses on right of a citizen to live in a healthy environment, peace and security which forms the basis of enjoyment of human rights and it is a primary mission of the global community to eliminate human sufferings. The diffusion of knowledge among the people is necessary to eliminate human sufferings. Education based knowledge learning is one of the greatest gifts of mankind to its progeny. Today's store of knowledge is the collection of ideas and innovations since time immemorial. Every human being has the right to access and use this knowledge for the betterment of their lives. Education provides the foundations for individual autonomy, liberty and human dignity. The amount of education obtained represents the primary measure for an assessment of their worth, capabilities and potential to succeed in numerous areas of daily life.[18] So education is essential to the realization of basic civil and political rights. In other words, all other rights realized

17 Gilles Carbonnier, Michel Carton, et.al. (eds.), Education, Learning, Training, 41 (Martinus Nijhoff Publishers,2014).

18 Daphne Barak Erez,AeyalM. Gross, Exploring Social Rights Between Theory and Practice,268(Hart Publishing,USA,2007).

through education. So, it should be from elementary level. In any civilized society preservation of human rights are fostered through application of law to see that the maximum benefits are available to the society at large and particularly to the weaker section.

Education is a basic human right, and it is central to unlocking human capabilities. It also has tremendous instrumental value. Education raises human capital, productivity, incomes, employability, and economic growth. But its benefits go far beyond these monetary gains: education also makes people healthier and gives them more control over their lives. And it generates trust, boosts social capital, and creates institutions that promote inclusion and shared prosperity.[19] Education expands freedom through many channels, both raising aspirations and increasing the potential to reach them. These benefits are both monetary and non-monetary for individuals, families, communities, and society as a whole.

Education has been formally recognized as a human right since the adoption of the Universal Declaration of Human Rights in 1948. This has since been affirmed in numerous global human rights treaties, Covenants, Declarations and Protocols. These treaties establish an entitlement to free, compulsory primary education for all children; an obligation to develop secondary education, supported by measures to render it accessible to all children, as well as equitable access to higher education; and a responsibility to provide basic education for individuals who have not completed primary education. Furthermore, they affirm that the aim of education is to promote personal development, strengthen respect for human rights and freedoms, enable individuals to participate effectively in a free society, and promote understanding, friendship and

19 WorldDevelopment Report 2018, p 38 available at http://www.indiaenvironmentportal.org.in/files/file/World%20Development%20Report%202018.pdf(lastvisited on April 5, 2018).

tolerance. There are some regional arrangements which recognize the importance of right to education.

INTERNATIONAL INSTRUMENTS ON RIGHT TO EDUCATION

The international community recognizes education as the human rights. It expresses the importance of education through United Nation frame work, UNESCO frame work, ILO frame work, international Humanitarian law and Regional frame work. There are about 25 international instrument which identify right to education as one of the basic human rights[20].For instance, Article 26 [21]expressly provide the provisions for free and compulsory education at least in the elementary stages. This provision also expresses its general vision regarding education. Likewise, International Covenant on Economic, Social and Cultural Rights, 1966 also stated under its Article 13[22] and Article 14[23] the importance of right to education. Meanwhile, The Convention on the Rights of the Child (1989) further strengthens and broadens the concept of the right to education. Article 28 and 29[24] prescribe right to

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20 Arjun Jayadev and Sudheer Krishnaswamy,"Healthcare law in US and the RTE in India-steps towards universal provisions of social good", EPW 31(2012).

21 Article 26 reads: "(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children".

22 Article 13 provides right of everyone to free and compulsory education.

23 Article 14 provides compulsory education is free of charge.

24 Article 28 and 29, to protect the human dignity of child and to provide education to child.

education. Similarly UNESCO Convention Against Discrimination In Education, 1960 laid down the provisions regarding education under Article 1[25],Article 3[26],Article 4[27], and Article 5[28].In 1999, the General Conference of the International Labour Organization to complement the Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973.It was came into force on 19 Nov 2000.[29]Article 7[30] and Article 8[31] deals with the provisions regarding education.

There are some regional arrangements which recognize right to education. African Charter on Human and People's Rights, 1981Provides every individual shall have the right to education. Article 12 of Protocol to The African Charter on Human and People's Rights on The Rights of Women in Africa ,2003[32] provides right to access education. According to Article 7[33] and Article 17[34] of Revised European Social Charter ,1996 [35] right to education is a human right. There are charters namely The

25 Article 1 provides right to equality of treatment in education.

26 Article 3 provides right to prohibition of discrimination in educational institution.

27 Article 4 provides right to free and compulsory primary education.

28 Article 5 provides aims of education.

29 The Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973,availableathttps://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182 (last visited on 14 August 2018).

30 Article 7 provides right to free basic education.

31 Article 8 provides right to universal education.

32 Protocol to The African Charter on Human and People's Rights on The Rights of Women in Africa ,2003,available at http://www.achpr.org/instruments/women-protocol/ (last visited on 17 th September 2018).

33 Article 7 provides that persons who are still subject to compulsory education shall not be employed in work as would deprive them of the full benefit of their education.

34 Article 17 provides right to free primary education.

35 Revised European Social Charter ,1996,available at https://www.coe.int/en/web/turin-european-social-charter/the-revised-european-social-charter (last visited on 14 September 2018).

Arab Charter on Human Rights,2004 [36]and ASEAN Human Rights Declaration,2012[37]. The Arab Charter inserted an important Article 41 to provide every citizen with the right to education. Similarly, the ASEAN Human Right Declaration in its Article 31 provides that every person has the right to education.

PRIMARY EDUCATION AS A HUMAN RIGHTS IN INDIA

India opted for economic liberalization policy in the beginning of 1991 and realized the need for mass education. The connection between education and development including the crucially important role of public services in bringing out an educational transformation was very clearly seen towards the end of 1980.With globalization, the skills and knowledge were considered as the driving forces of economic growth and social development. International agreements and policy debates increasingly focused on the concept and imperatives for pro-poor growth. In these debates, Human Resource Development is seen as playing a key role. Education and training are explicitly becoming part of the' pro-poor growth'[38] frame work. This includes explicit attention to the needs of particularly excluded and disadvantaged people including women, the extremely poor, the disabled and ethnic minorities[39]. Inclusive growth

36 TheArabCharteronHumanRights,2004,availableathttps://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/1ArabCharteronHumanRights(2004).aspx(last visited on 19 th October 2018).

37 ASEANHumanRightsDeclaration,2012,availableat(https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf(last visited on 19 th October 2018.

38 Pro-poor growth is a term used for primarily national policies to stimulate economic growth for the benefit of poor people (primarily in the economic sense of poverty). Pro-poor growth can be defined as absolute, where the poor benefits from overall growth in the economy, or relative - which refers to targeted efforts to increase the growth specifically among poor people. Available at http://www.grida.no/resources/7948(last visited May 31,2018).

39 Joseph A Gathiaand Sanjay V Gathia, Children's Rights and Wellbeing in India492(Concept Publishing Co., New Delhi, Vol.2, First edn.,2015).

presupposes inclusive education - good quality education that is accessible to all. The role of education in ensuring inclusive growth is very critical.[40]

CONSTITUTION OF INDIA AND RIGHT TO EDUCATION

The Constitution of India makes provisions regarding the right to education. The members of the Constituent Assembly of India were aware that vast majority at the time of independence was illiterate, uneducated, poor and therefore, exploited.[41] Education improves the prosperity of the people and the nation. Therefore, elaborate provisions for education were made under both Fundamental rights and Directive Principles of State Policy.

Right to Education as a Directive

Originally, the right to education occurs in three articles under Part IV of the Constitution of India. They are Article 41[42], 45[43] and 46[44]. The provisions of part IV dealing with Directive Principles of State Policy are not enforceable by any court. The duty is cast upon the state to fulfill the objectives laid down in this part by making laws. The main barrier to implement the provisions of free and compulsory education was financial constraints to the state. The task of providing education to

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40 Jandhyala B. G. Tilak, "Inclusive Growth and Education: On the Approach to the Eleventh Plan"42 Economic and Political Weekly 3872 (2007).

41 Dr. J.S. Singh, "Education as a human right – Legislative policy and judicial response in India", JCPS(2011).

42 Article 41 reads: "the state shall, within the limits of its economic capacity and development make effective provisions for securing the right to work and to education and to public assistance in certain cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want".

43 Article 45 reads: "the state shall endeavor to provide, within a period of ten years from the commencement of this Constitution for free and compulsory education for all children until they complete the age of fourteen years".

44 Article 46 reads:" the state shall provide with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation".

all children up to the age of fourteen years gained momentum after National Policy of Education (NPE) was announced in 1986. Later it became the accepted principle that financial constraint is not an answer for Constitutional duty.[45] The status of right to education elevated from Directive Principles of State Policy to fundamental right due to judicial intervention.

Judicial interventions on right to education

In India, the judiciary has shown an activist approach in ensuring and protecting the right to education of the children. The Judiciary recognized right to education as a fundamental right. The two famous Public Interest Litigation Cases that shaped the destiny of education in India are *Mohini Jain* v. *State of Karnataka* [46] and *Unnikrishnan J.P.* v. *State of A. P*[47]. The both of these cases were decided prior to the enactment of 86th Amendment Act, 2002 and hence, right to education was justified under Article 14 and 21 as a part of the fundamental right guaranteed to all citizens. One of the fascinating aspects of the Unnikrishnan case is that the court traced the source of the right to education not only from Article 41, 45 and 46 of the DPSP but also from the International

45 State of H.P. v. H.P State. Recognized and Aided Schools Managing Committee, (1995) 4 SCC 507.

46 AIR 1992 SC 1858. In this case, the court held that the state has an obligation to discharge its duty of providing educational institutions so that the citizens can enjoy their right to education. The court further held that the state can discharge its duty either by establishing state educational institutions or by recognizing private education institutions. Therefore, in these circumstances, if the private institutions charge capitation fees in consideration of admission, it amounts to patent denial of the right to education and is violative under Article 14 of the Constitution.

47 AIR 1993 SC 2178.In this case the court reprimanded the government institutions for being reluctant with the enforcement of article 45 and held that every child who is deprived of the right to education can issue a writ of mandamus against the appropriate authority for the enforcement of their deprived right. Though the issue in both the cases were related to higher education, the end result of these cases was that free and compulsory primary education was held to be a fundamental right flowing from Article 21 of the Constitution.

Covenant for Economic Social and Cultural Rights. In the case of Society of Unaided Private Schools of Rajasthan v. Union of India[48] the Supreme Court upheld the constitutional validity of the Act[49].

Right to Education as a Fundamental Right

Among three pillars of democracy, judiciary took initiatives to place right to education in array of fundamental rights. In 1996, the Saikia Committee was constituted to consider the financial administrative and legal implications of amending the constitution to make elementary education as a fundamental right. Based on this committee's recommendations, the Constitution (83rd. Amendment) Bill was introduced in the Rajya Sabha in 1997, which proposed to introduce Article 21A stating that the state would provide free and compulsory education to all children between the age of six to fourteen years. This subject was also dealt with its 165th report by the Law Commission of India[50]. Now right to education is a fundamental right under Art.21A.[51]

ANALYSIS OF HUMAN RIGHTS BACKGROUND OF RTE ACT

The analysis of human rights background of RTE Act is due to the presence of international human rights law. The Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights law. It represents the universal recognition that basic rights

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48 (2012) 6 SCC 1.

49 In this case, the Right of Children to Free and Compulsory Education (RTE) Act, 2009was challenged before the Supreme Court of India by the private schools owners on the ground of violation of their fundamental right under Article 19(1)(g), which gives all the citizens a right to practice any profession, or to carry on any occupation, trade or business. The court reasoned that the RTE Act is child centric and not institution centric.

50 Free and Compulsory Education for Children, p.43.

51 Article 21A reads: "the state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine".

and fundamental freedoms are inherent to all human beings which is inalienable and equally applicable to everyone. The UDHR has inspired more than 80 international human rights treaties and declarations, a great number of regional human rights conventions, domestic human rights bills, and constitutional provisions, which together constitute a comprehensive legally binding system for the promotion and protection of human rights[52]. This paper analysis various provisions of international instruments and regional frame works which deals with education as a human right. This analysis shows that right to elementary education is important at any circumstances of the life. It is unavoidable in the case of refugees, migrant families, civilians at the time of war, indigenous and tribal people, prisoners, and persons with disabilities. There are some regional human rights protection mechanism based on the fact that human right protection can be best advanced through regional cooperation. They give special preference to weaker sections like women and children. India has signed and ratified the ICCPR, ICESCR, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of racial Discrimination, as well as several other human rights treaties. All these human rights treaties mandate right to elementary education is a basic human right. In accordance with these human rights instruments Article 21A was incorporated into the Constitution. Subsequently, the parliament of India enacted the RTE Act and incorporate these basic human rights standards into the said Act[53]. Thus, this analysis helps to understand the influence of international human rights instruments over the RTE Act.

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52 The Universal Declaration of Human Rights,1948,available at http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html(last visited on 4 th January 2019).

53 For example, this Act ensure the elementary education of weaker section and children of migrant families.

RTE ACT AND ITS HUMAN RIGHTS ASPECTS

In compliance of the mandate laid in Article 21A, the Parliament has passed the Right of Children to Free and Compulsory Education Act, 2009. India became one of the 135 countries to make education a fundamental right of every child with effect from April 1, 2010.This Act consists of consists of 38 sections divided into 7 chapters and one schedule. This is the historical legislation for the people of India, from this day right to education has been accorded legal status.

The various provisions of RTE Act contains human rights elements. The Act recognize the disadvantaged children[54] and children belonging to the weaker section[55] .Also their parents have right to representation in School Management committees[56].The special trainings are imparted to those children who could not completed the elementary education within prescribed age limit[57].The State government and local authorities having duty to ensure the prohibition of discrimination with respect to children belonging to disadvantaged group and weaker sections[58]. It is the duty of the local authority to ensure the admission of children of migrant families[59]. As part of inclusive education, 25% reservation shall be given to children belonging to weaker section and disadvantaged group in aided and school belonging to specified category[60]. This Act Prohibit receiving capitation fee and any kind of screening procedure during admission[61]. Likewise no child shall deny the admission for lack of age proof[62]. To ensure the representation of women in SMC's,the Act

54 Section 2(4) of RTE Act,2009.
55 Section 2(5).
56 Section 21.
57 Section 4.
58 Section 8(4) and Section 9(3).
59 Section 9(11).
60 Section 12.
61 Section 13.
62 Section 14.

provides 50% reservation for them[63]. These provisions reflect the human rights values.

CONCLUSION

The international instruments concerning the rights of children gives primary importance and paramount consideration for the welfare of child in a human rights perspective. All the principles enshrined under various treaty provisions of international law generalized the rights of child as human rights. The right to education is one of such important human right of the child. There are two perspectives on the nature of human rights.[64] One is Political or practical perspective on human rights and other is humanist or naturalistic perspective. According to the political or practical perspective, human rights are claims that individuals have against certain institutional structures, in particular modern states, in virtue of interests they have in contexts that include them. In naturalistic perspective, human rights are pre-institutional claims that individual have against all other individuals in virtue of interest's characteristic of their common humanity. Most of the country adopted the naturalistic nature of the human rights in the case of right to education of the child by enacting legislation for the realization of this precious right. It is because education has always been seen as providing individual, social and economic benefits[65]. For the individual, education is supposed to provide opportunities for personal development and growth, scope to realize potential, and hence the basis for progress into work and careers. On a more social level, education is characterized as a civilizing force, the potential to reduce social inequality and contribute to social unit. A traditional liberal view of education has tended to stress

63 Section 21.

64 Brian H Bix, Horacio Spector(eds.), Rights: Conceptsand Context440(Ashgate Publishing Ltd, England,2012).

65 John Baldock, NickManning, et.al.(eds.) ,Social Policy,381(Oxford University Press,Newyork,2007).

the value of education for its own sake, eschewing the idea that the education should perform an explicitly preparatory function for employment. However, it has always employment, by inculcating habits of time-keeping and discipline and providing abilities and skills relevant for the world of work.

The analysis of the international documents shows that right to education has significant place in every document. The international Conventions, Declarations, Covenants and Protocols have provisions for education. The UDHR is the starting document which recommended free and compulsory elementary education. The elementary education is crucial because without elementary education none can enjoy other rights especially the right to life.

The RTE Act, 2009[66] was enacted to realize the right to education because it is a human right. The provisions of the Act reflect human rights elements. The Act originated directly from Article 21 of the Constitution. The wordings of Article 21A states that free and compulsory education shall be provided 'in such a manner as the state may, by law, determine' which means that the meaning of the fundamental right may be entirely defined by the state through regular legislation. Thus, state has wide discretionary power to implement this fundamental right. In other words, once the state would have created legislation implementing Art.21A, the fundamental right would cease to have a meaning of its own. To prevent this negative effect, meaningful implementation of the Act is necessary. Each state enacted the rules and orders to implement the RTE Act. There are numerous rules and orders exist under this Act. Actually, these rules and orders are carriers of human rights under RTE Act. The people can enjoy it only through effective implementation of

66 The Right of Children to Free and Compulsory Education Act ,2009 available at http://mhrd.gov.in/sites/upload_files/mhrd/files/upload_document/rte.pdf (lastvisited on October 2,2018).

these rules and orders. In order to understand the effectiveness in in implementation, there should be an Educational Impact Assessment. By this mechanism, we can analyze the positive and negative sides of enactments and can reduce the defects. Also, there should be a development in content of Article 21A like Article 21. Therefore, the educationalists, NGO's and interested person should questions the irregularities and illegalities in implementation of RTE Act before the proper forum. This approach develops the jurisprudence of Article 21A which helps the realization of human rights under RTE Act.

Identification Of OBCs In Kerala: A Sequential Analysis

Dr. Sheema S. Dhar*

Abstract

The identification of the beneficiaries of reservation policy has always been a herculeantask for the government whether union or state. It became more confounding when significant changes happen in the traditional social structure where the system become more open with greater mobility. Since identification demand actual beneficiaries, all those changes that are having impact over the social, educational and economic condition of the class need to be taken consideration. The reason is that reservation based on caste has been motivated by socio-historical reasons and that it will stay until society reaches a state of equilibrium especially in the matter of educational and life opportunities irrespective of birth. When it happens castes will automatically wither away. Changes are inevitable and essential and can and should be facilitated harmoniously. The governments therefore should devise a periodic review of the conditions so as to avoid the undue advantage of the policy. The initiatives of State of Kerala in better identification of beneficiaries of reservation are discussed in this article. The significance of the measures is that their endeavor has always been for adequate representation of every sections of the society in public employment accommodating the shifting state of affairs. However issues like merit, duration, quantum, extent etc., has imposed the need of devising alternative models for

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identification and representation of beneficiaries in the state's affirmative action policy. The article concludes by asserting that affirmative action should no longer remain benevolence instead it should be a commitment that the State has to adequately reward.

Reservation 'should target' and 'should be seen targeting' 'the most disadvantaged'.

INTRODUCTION

Caste[1] is a major parametric variable of the social, cultural and political structure of India. This is true to Kerala where the complexity of religious, regional and also caste differentiation led Swami Vivekanda call Kerala "a mad house of communalism"[2]. However unlike the rest of India though the state is also modelled in the four folded division of society, except the nambudiri[3] or priestly class all the others were treated as subject to different degrees of untouchability. This caste system had become more complex in 19th century where the concept of ritual pollution extended to not merely untouchability but to un-approachability or even un-seeability. The system was gradually reformed

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1 M.N.Srinivas, Caste in Modern India, XVI JOURNAL OF ASIAN STUDIES, 548(1957).

2 Of the total population of the State Hindus constitute 56 per cent, Muslims 25 per cent and Christians 19 per centKerala Population 2018 available at http://worldpopulationreview.com/territories/kerala-population/ accessed on 20/10/2018 at 12.15pm.

3 Caste system was not prevalent in Kerala during initial of history. Sri. Elamkulam Kunjan Pillai had recorded that in olden times when people lived in the Western Ghats, categorization on the basis of work done by them was in practice. There were seven such categories. Thudiyan (one who beats "thudi", a musical instrument), Parayan (one who beats "para", a kind of drum),Panar (singer), Kadambar (agriculturist), Valayar (fishermen), Vanikar (traders) and Uzhavar (workers) are these seven categories. Though Brahmin migration to Kerala took place during three or four centuries B.C., they became powerful only during eighth century. Caste system began in Kerala only after this period. E.M.S.Namboodiripad - Caste, Clan and Parties in Modern Political Development to Kerala, NAIRS ACADEMY OF INFORMATION RESEARCH AND SERVICE Available at www.nairs.in (last visited on 20th October 2018).

by social reformers like Swami Vivkananda, Sree Narayana Guru, Ayyankali etc., which later overtaken by the events of 1947 and legally culminated with the Constitution of India. But despite the legal demise of caste ideology or orthodoxy, in social reality it is very much alive due to the gap between the practices and belief. Therefore even after the outlawing of caste the government still recognises communal distinctions in classifying as Forward Classes, Other Backward Classes, Scheduled Castes, and the Scheduled Tribes to determine the type of assistance a caste or community deserve in a given area. The article is an attempt to evaluate the initiatives of state of Kerala in identification of OBCs and scope for alternative proposal in the identification of OBCs.

State Commissions on Identification of Backward Classes in Kerala

Backwardness[4] - social, economic, occupational and educational is in fact the social evils associated with communities based on their position and rank in the caste hierarchy. Soon after the commencement of the Constitution the Union Government had therefore appointed commissions to formulate a criterion to identify the deserving classes in the country[5]. Since the commissions failed to suggest uniform criteria for determining the social and economic backwardness, the State Governments were authorised to render assistance, until the determination of more satisfactory tests, to identify those classes of backward people whom the State Government might consider "Socially and Educationally Backward" in the existing state of affairs.

The south Indian states especially Kerala are having a major role in formulation of the reservation policy of the country. Many committees were constituted for the effective implementation of the policy in the state even prior to the independence under different regimes of the

4 Report of the Backward Classes Commission and Kaka Kalelkar Commission (March 30, 1955) Bhanje N.P. Tribal Commissions and Committees in India (1994).

5 REPORT OF THE BACKWARD CLASSES COMMISSION 41 (1955), Vol.1.

province. But rather than an attempt to uplift the socially backward classes it was adopted by the British as a means to maintain the caste equilibrium in public recruitments. This was in fact the beginning of the annihilation of the rigidness of the Brahmin dominated caste system. The executive measures adopted by the regimes bring to light the certain significant features of the communal representation in the State at that time[6] like non impairment of efficiency, grievance centred approach, equilibrium in bringing justice and fairness, data based policy formulation, proportional representation to the population of each community than reservation etc.

SUBBA IYER COMMITTEE

The significances of the recommendations in the report of 1933[7] were measures to ensure best available recruits to public service, balancing

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6 Report of the travancore public service recruitment committee (1933) p. 22 – 24

1915 – Confidential circular directing Head of the departments to consider the claims of such under represented communities which are educationally backward consistent with efficiency.

1921 – Government issued stringent departmental instructions that equal opportunities be assured to all communities in public service.

1925 – Broad principles of recruitment was enunciated and as part of it scrutiny into the appointments made by the Head of the Departments were called for and published the results based on which the entire communities were divided into 7 categories for recruitment.

1925 – Regular quarterly report of appointments made by the Head of the Departments was called for to exercise greater control and closer watch over the appointments. For this purpose an elaborate further classification of the communities was made.

7 G.O.ROC. No. 7159/31/General dated 22/12/1931 The Travancore Legislative Council in 1931 appointed an eleven member committee to study and prescribe guidelines on the appointment in civil services of the state. In the report submitted in 1933 the committee recommended appointment in proportion to the population of each community in the region. Additional or special treatment measures be undertaken to ensure the representation of the unrepresented communities in the service. Special reservation may be given to women belonging to all communities. On the basis of these recommendations the government in 1934 appointed as special officer G.D.Nokes, the High Court Judge to ascertain the scope of implementing the report.

of efficiency and communal consideration, educational advancement was made the criteria for fixing educational qualifications etc. The major recommendation however was the classification of service for recruitment purpose. In the four levels of service inferior, superior, ministerial and non ministerial public service the recruitment shall be as follows: a. Inferior service – In accordance with the numerical strength of the community subject to the order of reservation mentioned b. Superior service – The communities were divided into Hindus (7 Sub groups), Muslims and Christians (6 Subgroups) and distribution of 18, 2 and 9 posts respectively based on their numerical strength c. Ministerial service and Non Ministerial services – Based on merit 10% appointments and remaining 90% shall be filled according to the communal representation.

JUSTICE DR. G. D. NOKES COMMITTEE

On the basis of this report various governmental schemes were[8] implemented. The method of direct appointment made by superior officers was put to an end. A Public Service Commissioner was appointed to make appointment in the government service without any caste preferences. Appointments were made based on the caste reservation proportionate to the population of each community. Reservation was permissible only in the lowest grade of service with greater representation to the poorly represented castes. All other was based on merit only. All appointment whether open or reservation be based on marks obtained in a common exam by the PSC. The age limit was being 28. The proportion was 50:40 for open and reservation category considering 55 candidates a unit. The entire population was divided into Hindu, Muslim, and Christian and were further divided into 8,1 and 6 communities respectively. Bonus marks were decided to be given to backward communities. Rotation system was introduced in the lower division appointments.

8 In 1934 itself the committee has submitted its report. It took nine months to get the report accepted by the government. A.ABBAS SAIT, SAMVARANAM CHARITHRAVUM PORATTAVUM 66-67 (1st ed., 2012).

A few more committees were constituted prior to the formation of State of Kerala that also commenced on the premise of caste and communal reservation. The notable feature of those committees was that rather than on identifying the backward class they recommended for accountability and transparency in the implementation of the policy.

T.S.NARAYANA IYER COMMITTEE

The report submitted by the committee in 1936 was systematic in its suggestion.. The Travancore Public Service recruitment rules[9] was recommended to be followed in Cochin also. The committee fixed the percentage of seats for each caste in the service[10] which shall be reviewed every 3 year. The report avoided the general classification of entire population on the basis of religion as adopted by the earlier committees.

P.A. KASIM COMMITTEE

The committee constituted in 1951 to codify all the prevailing rules regarding the caste reservation in services of the state. The highlights of the report were: it identified and declared eight classes of natives as backward based on caste and religion[11]. The public service was divided into three based on pay scale and the dignity attached to it[12]. Reservation was recommended to be made in the intermediate and lower level of service in the ratio of 55:45. The percentage of posts each caste or community was fixed proportionate to the population[13]. Non availability

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9 Travancore Public Service Recruitment Rules 1111 M E.

10 Nairs 16% ; Tamil Brahmins 4%; Ezhavas 20%; Pulaya 4%; Other Hindus 10%; Latin Catholics 6%; other Christians 6%; Muslims 6%; Jews 2% and Backward and Depressed classes 16%.

11 Ezhavas, Muslims, Kammalas, Hindu Nadar, SIUC, LC, Other Hindus and Other Christians.

12 Higher Division with pay scale above 175 rs; Intermediate Division with pay between 75 and 175 and Lower Division with pay below 75 rs.

13 Ezhava 13%; Muslim 5%; Kammalas 3%; Nadars 3%; SIUC 1%; LC 6% (later on inclusion of Anglo Indians as a Seperate group 1% from LC was allotted to them); OH 2%; OX 2% ; SC/ST 10%.

of qualified candidate in a group was made to be met by passing it over to other groups in the list[14]. Reservation was made applicable to all the direct appointments to all the services irrespective of grade or scale of pay.

ADMINISTRATIVE REFORMS COMMITTEE

The first Administrative Reforms Committee under the Chairmanship of the Chief Minister E.M.S. Namboodiripad identifying three defects in the caste based reservation system in Kerala namely — permanence of caste system as an aftermath; demand from more and more communities in the long run; compromising of efficiency of the administration and civil service, recommended for reservation based on economic conditions only. The committee recommended for appointment based on merit in higher and intermediate division and no reservation in both these levels. Because of the large scale protest from different parts of the state the government had to give away with its first ever suggestion in whole India ie., reservation based on economic condition and had to continue with the caste based reservation. To the contrast this very government had for the first time introduced the 50:50[15] limit of reservation in public recruitments giving away the bonus marks system. With the commencement of Kerala State Subordinate Services Rules 1957 all these rules governing reservation got incorporated in it vide Rule 14 to Rule 17.

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14 The year 1956 necessitated the redetermination of the policy with the accession Malabar to Travancore and Cochin State to form the State of Kerala. A new list of 70 communities as other backward classes entitled for reservation in public service has come into force in the period substituting 8 communities list prevalent till then G.O.(P) No. S (D2) 41489/56/P D dated 06/02/1957 vide Section 5(2) of State Reorganisation Act 1956.

15 Ezhava/ Thiyya 14%; Muslim 10%; LC 5%; OX 1%; OBC 10%.

K.K.VISHWANATHAN COMMITTEE

The committed on its report submitted in 1963 has made the certain prominent recommendations[16]. All government and aided institutions and appointments made through employment exchanges should follow the reservation rules. It identified 91 communities as Backward. A 40% reservation for OBC in technical and professional colleges; The above reservations should be made applicable to all fresh appointments or posts under the state government. An expert committee should be appointed to dwell into the question of reclassification of backward communities till then no community should be removed from the list.

JUSTICE G.KUMARA PILLAI COMMISSION

The Kumar Pillai Commission[17] recommended a means-cum-caste or community test, or what was described as a "blended approach"[18] The highlights of the commission's identifications are: If caste had to be taken as one of the criteria for classification the nature of disabilities should be similar to the disabilities of the SC and ST like untouchability or near untouchability which led to something like segregation and

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16 The Evaluation Committee on Backward Classes was appointed in 1961 to identify the backward classes and suggest measures to improve their conditions of life and work. Supra n.40 at 120. The state government accepted the recommendation but restricted the reservation limit to 35% to OBC which was challenged in State of Kerala v. Jacob Mathew.

17. The court finding fault in assessing the social backwardness of the Ezhava caste identified the need of fact findings and thus constituted the G.KumaraPillai Commission in 1964. In its findings the court rightly mentioned that mere subjective satisfaction of the government about the grounds of classification is not enough. There should be an objective approach with due regard after a proper examination of the data relevant for the identification.

18 The commission observed "we have only to add that there was also reliable evidence before the commission that although caste is still a potent factor in the social life of the people of the state and large sections of many of the listed communities still labour under caste or communal disabilities which have caused them to be socially backward, the upper or wealthier sections among them do not at present suffer any such disability, worth mentioning and are in no way socially backward". Infra n.51 at 29.

constituted a hindrance to free social intercourse or association with the advanced classes. The test for classification must be such that only the poor and deserving sections should get the benefit and exclude the wealthier sections. In fixing the economic limit the family was the basis. The factors to be taken include the average monthly income for a middle class family, lowest taxable income, minimum wages, value of money and the like. Economic backwardness alone as a criterion would be fraud on the constitution. The occupational criteria did not mean an occupation with fewer wages or in the lowest grade but the caste stigma attached to the occupation that matters. Again this caste stigma should also be considered along with the other two tests for classification. Unlike education as a qualification, educational backwardness need to be ascertained on the composite attainment in primary both lower and upper and high school or the minimum qualification for appointment in public service, assessment starting from the last. Social backwardness though to a considerable extent dependent on economic factors, it also to a large extent was influenced by popular conceptions of the status of a caste or community in the State.

The Kumara Pillai Commission was on reservation of seats in educational institutions in Kerala. Therefore it need not take into account the adequacy of representation in public services of the government which was one of the criterion for reserving posts and appointments in government services. For the purpose of Art 16(4) classes that are socially, economically, educationally and occupationally backward and inadequately represented in the public service were considered to be the other backward classes.

N.P. DAMODARAN COMMISSION:

In the report submitted in 1970, the Commission has identified four main factors, which according to it, lead to backwardness of

citizens[19]. In devising the different tests of backwardness the commission had identified the following rationale. All communities whether big or small should be grouped on the basis of some likeness or common traits or occupation or ability for competition etc., Regional variations in the treatment of same community as SC/ST and OBC were accepted subject to union law in this regard. Scientific perfection or logical corrections was not necessary for satisfying the conditions of homogeneity and combination of all the attributes was not necessary for identification. It is enough if a considerable number of the above attributes was present for grouping as a class. The Committee further suggested that factors that form the basis of their application for classification should have rational relation or rational nexus to the gaining of appointments or posts in the services under the state. Backwardness due to historical reasons shall not cease to be reasonable when those historical reasons disappear[20]. Occupation of people of Kerala was subject to substantial change so occupation wise identification of people was practically difficult on account of which it cannot be taken as a unitary or independent factor[21]. The system of caste was though bodily killed by the constitution and statutory provisions it has not yet completely disappeared. It has left its vestiges in many a positive form and acting as

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19 G. Kumara Pillai Commission Report for Reservation of Seats in Educational Institutions Kerala(1965) P. 29.

20 They are

(1) lack of requisite educational attainment (test of education),

(2) lack of money or wealth (economic test),

(3) lack of ability to appropriate and adequate number of appointments (Test of appropriation of appointments), and

(4) caste disability, occupational stigma and social taboos acting as depressants in the field of education.

21 The rationale adopted in rejecting the test of habitation as criteria for backwardness. Nettoor P. Damodaran Commission Report of the Backward Class Reservation Commission of Kerala 1970 Vol.1 P. 66.

social and educational depressants[22]. Education is the direct door for gaining appointment and had therefore proximate and more rationale relation than money to the object of the article[23]. What is necessary for the attainment of education of the merited order was identified as a home atmosphere congenial to education. As home atmosphere with educated parents, brothers or sister were lacking money or wealth was relevant to provide the same[24]. Apportionment of adequate number of appointments in the services under the State by the members of a class was considered as a sign of ability to stand on their own, a sign of non-backwardness of that class of citizens[25]. The all-round retardation due to practice of caste till the recent past, the backwardness due to the pranks of the vestiges of caste in the present, the backwardness due to occupational stigma, purdha, aversion of muslims to education and other social taboos resulting in social backwardness will be the constituents of social backwardness due to historical reasons[26]. If reservation was taken away on having a slight increase in the ability of the backward class to compete in open merit pool it would go against the finding of the state regarding inadequacy and the said backward class would have relapsed into inadequacy. Reservation of appointment by promotion was required but with sufficient deviation from the income limit in the direct recruitments. Since by the time the officer in the feeder category reaches the promotion level his income combined with annual family income may raise the prescribed limit the economic limit for promotion should be raised to different levels as required by the selection[27]. To bring authorities under the purview of articles 12 and 16 sufficient amendments need to be made in the laws under which such authorities

22 Ibid at 67.
23 Ibid at 72.
24 Ibid at 74.
25 Ibid.
26 Ibid at 75.
27 Ibid at 81.

were created whereby they may be conferred power to make rules and regulations and byelaws so as to bring them under "other authorities"[28].

The commission had suggested the level at which each of this test shall be applied to classify the backward classes'[29] As far as the caste factor or test was concerned, the Damodaran Commission has unequivocally declared[30] and adopted the "blended approach" to determine the social and educational backwardness of the citizens.

Narayana Pillai Committee and Sundaresan Committee

Both these committees[31] were constituted in the 1985 to study into the caste based reservation and on the complaints with respect to the rules of rotation followed by PSC. Both these commissions' reports were rejected by the government and did not publish or discussed. These committees were in favour of giving away with the caste based reservation and adherence to social, economic and educational criteria for special treatment in public service.

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28 Ibid at 129.

29 Ibid at 137.

30 Test of Education: SSLC or graduate courses: The ultimate object of the test is to find out the capacity of each group of citizens to gain appointments, the level of education at which the test should be applied , should be those which are the minimum educational qualifications for the majority of appointments in the service under the State ibid at 87.

Economic Test: Rupees 8000 and below total annual family income: It is based on the reasonable expenditure required for an average family and the cost of living index. The commission has identified that to have a tangible and practical content of the reservation these neglected class shall first of all be capacitated to avail it. Ibid at 93.

Test of appropriation of Appointments: The last grade, gazetted and non gazetted level of appointments in the job: The qualitative analysis is constitutionally necessary for assessing adequacy of representation and also for classification. Ibid at 88.

The comparison of attainment of each of the test shall be with that group itself except in case of social backwardness Ibid at 73,108-109.

31 Ibid at 73.

Kerala State Commission for Backward Classes

The Kerala State Commission for Backward Classes is a statutory Commission constituted by the Government of Kerala under the Kerala State Commission for Backward Classes Act, 1993 for the purpose of entertaining, examining periodic evaluation as to the degree of backwardness and recommending upon requests for inclusion and complaints of over-inclusion and under-inclusion in the list of OBCs.

The Commission has given considerable thought to the evolution of criteria for identifying "backward classes" and has kept in view the important observations made on the aspect by Supreme Court. The criteria so evolved have taken into consideration the social, economic and educational backwardness of the caste.

In deciding the social backwardness of the caste it has relied on the general opinion on the caste's backwardness depending on its nature of occupation, male and female involvement in work, pollution and associated discriminatory treatment in public accessories and meagre opportunity for the total development. The educational backwardness is made depended on the attainment in all levels of education from high school to professional education as against the state average. Drop outs, indifference to education and denial of access do become elements of backwardness in the sphere. The economic backwardness is associated with the deprivation from sources of respectable income so as to provide future generation the capacity to compete with the general category for positions and posts. The greatest weightage is being given to social backwardness and lesser to both educational and economic backwardness.

After determining whether a particular caste or community mentioned in a request or complaint is backward as per the above criteria, the Commission proposes to apply the test of adequacy of representation

in services to the castes and communities identified as backward. The adequacy of representation will be determined not only in terms of numbers but also the quality of representation. Only those classes which pass the twin tests of backwardness and adequacy of representation can be considered as "backward" in terms of Article 16(4) of the Constitution of India. The basic features of the criteria fixed for identification are: i) Social backwardness does not end with the caste based disadvantages[32]. ii) Secular criteria like involvement of women and children in manual work, less or no participation in elected bodies of the State, lack of ability or motivation to secure adequate representation in public employment are also considered. iii) In educational backwardness[33] also along with traditional caste based inaccessibility factors like graduates, professionals, judicial officers in a community are also taken into account. iv) In economic criteria[34] proportional participation in not only work force but also at managerial and ownership level is also considered. v) The Commission has decided to fix the weightage of the above groups of criteria, ie., social, educational and economic as 80%, 10% and 10% respectively.

The history[35] of identification of creamy layer in Kerala indicates the reluctance of the state towards the idea, even then it has been constituting committees to decide and fix the creamy layer limit periodically. Even with respect to creamy layer commissions, whenever the recommendation for excluding any group from the benefit prop up it will ultimately result in either rejection of the report itself or obtaining a favourable judgement from the Judiciary. This was evident even from the High Level Committee appointed by the Judiciary itself under Justice K.J.Joseph as the first creamy layer commission, where against the

32 A. Abbas Sait, Samvaranam Charithravum Porattavum 140 (1st Ed., 2012)140.

33 Available at http://www.kscbc.kerala.gov.in (last visited on 20th October 2018).

34 Ibid.

35 Ibid.

committee suggestions for excluding 17 castes from the OBC list, the Government obtained a judgement from the Honourable Supreme Court to reinstate them in the list. The identification of creamy layer in Kerala was always been a tug of war between legislature and judiciary.

JUSTICE K.K. NARENDRAN COMMISSION

The commission constituted in the year 2000 in pursuance of the judgement in *Indra Sawhney II* has submitted its report in the year 2001. The central feature of the report was that it starts with the premise of caste itself and no attempt has been made in suggesting any other criteria for OBC inclusion. The report was based purely on empirical data as to the representation of the OBC in different category of public services in the State. The findings of the commission are:

1. The Public Service Commission is doing a commendable job in following reservation policy in their recruitments scrupulously compared to the substantial number of posts that are away from their province.
2. Adequacy or representation need to be identified with respect to the population of the community in the State and any other criteria would render injustice.
3. Increased access in political power does not mean that the time to negate the helping hand has reached.
4. Educational advancement is the major factor in determining the level of presence in public services.
5. Excess representation by itself is not sufficient unless that excess ie., those attained on merit cross the marginal level.
6. Attaining jobs in excess of reservation quota only indicates the success of the policy in its move towards adequacy of representation.

7. Though the system of reservation ensures a minimum level of representation in public service the thrust should be to increase their share in open competition.
8. A qualitative judgment as to the institutions and category wherein the representation is faded need to be undertaken.
9. There needed a departmental repository in their respective office regarding details of employees to make it easy to ascertain the adequacy of representation in future.
10. Indicating the non-permanent nature of reservation but acknowledging the progress made in the representation, the commission found that no net addition into the existing percentage of reservation.
11. The role of leaders and voluntary organisation of different communities in ensuring their representation was elucidated with the instance of Ezhava community which made considerable progress.
12. Though adequacy of representation is determinable on the basis of population this shall not be stretched too far so that it will weaken its validity. It shall also not be disproportionately low.
13. The annual income limit to identify creamy layer must be 3.5 lakhs[36].

However this one man committee could not survive the scrutiny of the Supreme Court and was shelved.

JUSTICE RAJENDRA BABU COMMISSION

On setting aside the report of the Narendran Commission by the Supreme Court[37] the state government has appointed this commission

36 See Indra Sawhney II.

37 The creamy layer limit has been fixed as against the one lakh limit as fixed by the first creamy layer committee constituted under the direction of Supreme Court. Justice K.K. Narendran Commission Report on Protection of Rights and Representation of Backward Communities in Govt. Service 2001.

in the year 2007 to study on all aspects of creamy layer. It has submitted its interim report on creamy layer limit pending the final recommendation in the same year itself fixing the income limit to 2.5 lakhs which later changed to 4.5 lakhs[38] in tune with the Central Government limit. The final report was submitted in the year 2009. The recommendations of the commission in the identification of the deserving OBC are:

1. Creamy layer means person who are at par with the forward classes in matters of social and economic development or advancement.
2. Income limit fixed has to be modified every three years or even in a lesser interval if situation demands.
3. The status and income of the parents alone will be considered in determining the creamy layer.
4. The nobility of the occupation determines the superiority and inferiority of a caste.
5. Education made the communities free from the shackles of hereditary occupations and associated social evils.
6. Some minor communities (minor in population) still downtrodden and in the lower strata of the society and not getting appointments in their reservation quota.
7. A detailed socioeconomic survey to ascertain the present social and economic conditions of the backward classes is required.
8. The general principle of creamy layer is subject to the exception of exclusion[39] of certain socially very backward communities.
9. Till the report of socioeconomic survey is available it would be proper and fair to continue the existing system.

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38 N.S.S. V. State of Kerala 2007(2) KLT 77(SC).

39 The income limit has now been fixed to 6 lakhs after the recommendations of the Justice G. Sivarajan Committee on Creamy Layer in the report submitted in the year 2014 page 128.

10. In ascertaining creamy layer in service category the criteria enumerated to apply shall be applicable in public and private sector.
11. A detailed entry of the caste and sub castes of the employees in the service book shall be made so as to ascertain the representation.
12. Income limit for creamy layer shall be based on change in money value, cost of living index, per capita national and state income, consumer price index etc.,
13. Identification of backward communities on the basis of hereditary occupations has to be on the basis of their hereditary community.
14. Candidates selected from OBC on merit basis shall not be adjusted towards reservation category.
15. There are 5 category wise test of exclusion of creamy layer: 1. Constitutional posts 2. Service Category[40] 3. Armed forces[41] 4. Property Owners[42] 5. Professionals[43].

This report has however overcome the wrath of being eclipsed which as it appears not because of the justness in its recommendations but because of the union creamy layer limit much higher to what its interim report provided for. Further it has provided for elaborate procedure in excluding the creams from the benefit.

Implications of the Recommendations of The Committees on Identification of OBC

The study by various committees and their recommendations has brings to light the following facts as to identification of OBC in the State since the beginning of the measure in Kerala:

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40 To persons traditionally engaged in the hereditary occupation of the community; persons belonging to all backward classes who are illiterate.

41 Available at http://www.kscbc.kerala.gov.in(last visited on 20th October 2018)

42 Either or both of the parents are in the rank of a Colonel in army and equivalent in other services and above.

43 Holding agricultural land or 5 hectares or above.

- Started as a pure executive arrangement the identification and proportional treatment of OBC later turned to the policy matter of the government. This is due to the transformation of the policy from being a political agenda of the British government to a constitutional commitment of independent India.
- The identification and appropriation of backward classes were more decentralised earlier ie., each departments were executively instructed to accommodate the inadequacy claims.
- No preferential treatment for women or differently abled. They were clubbed with the class.
- Regular, periodic and short term review of appointments by head of the departments was conducted for better implementation of the policy.
- The policy implementation has always been in lowest grades of appointments.
- The more the committees based their identification on caste the less they receive the public protest.
- Expressed the need of necessary facilities to be afforded equally to all to equip themselves with the attainments needed for the public service.
- The efficiency at the highest available need to be ensured in all levels of appointments.
- In the initial years the backward or depressed classes were considered as minorities.
- Realised that unless the different communities are duly represented the administration may turn to tyranny.
- No preference was given initially for communities, the criteria for the appointment was adequacy of representation in the concerned

post and that was also if all the other things ie., the qualification and merit being equal.

- It was not reservation but proportional representation of all communities that was the beginning of the policy.
- The communal representation was suggested to remain in the initial appointments only.
- The communal representation and allotment thereto was inclusive of both better represented and inadequately represented.
- One of the reasons for fixing percentage of seats for each community was the system of competitive examination introduced in the public service appointments where unless such an allocation is ensured the backward may suffer. Another reason is that rather than leaving the community unrepresented the option is to intake the best available among them.
- No one can hope for appointment in public service unless adequately qualified for rendering the duty of the post.
- The criteria adopted for fixing the proportion were population, availability of qualified candidates, adequacy of representation, literacy, general advancement of the community and the relative importance in the polity of the state.
- Depressed and backward classes were meant to include those who are not adequately represented in the service.
- Social and educational backwardness is a dynamic concept or process that needs reconsideration periodically. It is determinable on the basis of the minimum requirement of the public service.
- As year's passes and reports of various committees came the list of depressed communities goes on increasing and none has made an attempt to remove any caste group from the list till date.

- Initially reservation was intended not only in the government services but also in the private or aided institutions and even quotas were allotted for private sphere.

ALTERNATIVE PROPOSAL FOR IDENTIFICATION OF OBC

Identification of beneficiaries and creamy layer, impact on merit and efficiency of administration, the duration and extent or quantum of reservation has always remain the burning issues in reservation. Other than constitutional commitment many vested interests have crept into the system that leads to the questioning of the very rationale of the policy. Added to it are the reducing glamour of the government job and the considerable influx of the private jobs with its all-time vigour of merit, competency and accountability. However the implementation of the alternative methods shall be with the following preliminary procedures:

Population Census: A detailed census among other things as to caste, religion, type of occupation, educational qualifications of the last three generations of the family and their corresponding occupation[44].

Adequacy of Representation: A decentralised data collection on the total current working force including differently able of each institution or departments on the basis of caste, religion, grade of service, nature of appointment ie., open or reservation, male and female ratio in both central and state level[45].

The List: The Backward Class Commission subject to any guidelines or standards fixed by government shall undertake the listing of the Backward Class based on the data obtained from census and departments. The criteria adopted should not be restricted to caste based

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44 Having income above 4.5 lakhs per annum or wealth above the exemption limit under Wealth Tax Act.

45 The duty of compilation and sorting of data be conferred with the Backward Class Commissions.

social and educational backwardness instead backwardness that resulted in inadequacy of representation in public and also private employment[46].

Sub Classification: The further division of the class shall preferable be on backwardness resulting inadequacy of representation subject to any other such relevant criteria as decided by the government. The category shall be Backward, More Backward and Most Backward[47].

Periodic Review: A periodic review of department and institution wise representation of the classes is required to be undertaken by the Backward Class Commission.

The Deficit: The deficiency of representation shall be ascertained in proportion to the actual strength of work force in different grades of service and actually qualified persons in each class based on the census details[48].

Backwardness: The interpretation of the term shall not restrict to caste backwardness only but also all those factors or grounds responsible to discriminations in the society that leads to backwardness of the class to include differently abled persons and third genders. If a forward class also has all those attributes of backwardness then certainly they need inclusion in the list and they could not be considered forward anymore.

Creamy Layer: The creamy layer criteria may be as fixed timely by the respective governments. But while fixing the limit it shall be based on the generation of beneficiary as regard already benefitted and for others economic variable as fixed periodically by the government.

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46 A periodic collection, compilation and reporting in this regard may be conferred with an officer preferable the superior of the institution with sufficient delegating authority.

47 Homogeneity shall be maintained as far as possible and for that sub classification of backward classes is advisable.

48 Classes that are sufficiently represented in all levels except the higher grades of service, classes that are showing deficit in all or the majority of service levels and classes that shows nil representation in any of the levels respectively.

Deprivation Points: A backward class candidate who secured a cut off mark prescribed shall only avail the deprivation point benefit. The heads of the points shall be (a) Class[49] (b) Educational background[50] (c) Economic background[51] (d) Gender[52] (e) Differently Abled[53] (f) Generation[54] The allocation of points shall be for all the six indices each. As none of the reasons for deprivation is ignorable and none is above the other in the sense of gravity the deprivations points are to be equally divided among the six. Since the status of a class is not absolute and the deprivation points always depends on the status quo of the class. Since no sanctions can be imposed on non-implementation incentives can to a greater extent help in adoption of the policy by even the private sectors. The more diverse a concern is with respect to the intake of employees belonging to all classes the more its value in diversity index result in more incentives from government as against their counterpart that is placed lower in diversity index. The entire success of the policy depends on other positive action towards capacity building in the class. The administrative work load in the alternative suggested is high. A detailed and reliable ground work is essential for the implementation of the alternative. But if implemented in the right way it could surely set at knot the issues pertaining to merit and efficiency.

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49 The qualification wise categorisation of available work force shall be undertaken by the above said census cataloguing authority.

50 — as it depicts the backwardness in terms of adequacy of representation;

51 —as the capacity of a candidate to a great extent influenced by the education of the family;

52 —even if the candidate is the first generation beneficiary if the economic condition based on occupation, wealth and income of the family is sufficiently good to provide him necessary facilities it could certainly influence his competency;

53 —general disadvantageous position of female in the society;

54 —physical disadvantage if added with other socioeconomic difficulties aggravate their position;

CONCLUSION

The idea of caste-based reservations is justified by the logic of social justice. It has to be seen as a means of achieving social justice and not an end in itself. By the same logic, it must be assessed and audited from time to time like any other social policy and economic strategy. Therefore it is necessary to take a holistic and non-partisan view of the issues involved. There arises the relevance of the alternative models[55] of reservation that are being in application in certain spheres of Indian society already and a few of them later got substituted by the present quota system in the country. Inspired by the judicial pressure on policy makers to consider the multifaceted notions of disadvantages rather than caste alone, and a quest for the best policy to solve India's continuing conundrum of inequality, scholars have proposed alternatives to reservations including diversity indices. The alternatives proposed are rooted in the recognition that there is a need to go beyond a simple-minded reduction of 'merit' and 'social justice' to singular and mutually exclusive categories. The proposals seek to operate a policy that claims to be morally justified, intellectually sound, politically defensible, and administratively viable.

55 —as there should be an end to the preferential treatment.

56 See Purushottam Agrawal, The Concept Note on MIRAA, available at http://www.purushottamagrawal.com (last visited on September2010).

Sathish Deshpande and Yogendra Yadav, Reservation An Alternative Proposal, The Hindu May 23 2006. Sachar Committtee Report on Social, Economic and Educational Status of Muslim Community of India Government of India 2006 P. 246.

Ruddar Dutt, Growth, Poverty and Equity 347- 348 (1st Ed., 2008).

Amitabh Kundu Report of the Expert Group on Diversity Index Government of India, 2008.

Gender Justice: A Forgotten Aspect in Guardianship and Custody Laws of India

Thaji. G.B*

Abstract

Article 44 of the Indian Constitution directs towards the implementation of a uniform civil code, and it includes uniform standards in guardianship and custody of children belonging to all religions. The patriarchal bias insociety is well reflected in different personal laws of the country. They deprive the women of her basic right of guardianship and custody of children. The term custody of children can be implicit in two senses; custody of person and care of the property. The guiding principle for appointing a guardian is the doctrine of the "welfare of the child." In such instances, the mother, who is the epitome of love, gets preference until a particular age. In contrast, the natural guardianship and the custodianship of the property of the child and his person is his father.[1] The recent amendment of Guardianship and wards act in 2010, which empowers the court in appointing guardian can be viewed as a step to ensure equality between both parents. Still, again the courts are bound to comply with the personal law of the child, which is prejudiced. Moreover, the dormant attitude of courts towards gender discrimination on the ground of non-interference with religious practices forces these issues out of the constitutional review. It hinders the implementation

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1 Law Commission of India, 133rd Report, 1989 4.1, available at: http://lawcommissionofindia.nic.in/101-169/Report133.pdf (last visited on November 29,2018).

of gender justice. The guardianship of mother" in the absence of father" is a welcome step in the path of reaching gender justice in the law of guardianship. The discussion on gender injustices was outweighed by the protest against the obtrusion of religious fundamentalists. The introduction of gender justice within the religion is preferable to make the people adapt to the change in their way of life. It makes them flexible to embrace uniform, personal laws, and thereby gender justice can easily be incorporated.

INTROSPECTION

"…there is no rational basis for according an inferior position in the order of preference to the mother vis à vis the father, the proposition is vulnerable to challenge on several grounds. In the first place, it discloses an anti-feminine bias. It reveals age-old distrust for women and feeling of superiority for men and inferiority for women. whatever may have been the justification for the same in the past, assuming there was some, there is no warrant for persisting with this ancient prejudice, at least after the ushering in of the Constitution of India "[2]

India is a country with an enriched heritage of religious beliefs and cultures. In order to protect and preserve the cultural and religious identities of the people, the Constitution of India guarantees the right to profess, practice, and propagate religion as a fundamental right[3]. Moreover, religious minorities have an exclusive right to conserve their religious practices[4]. These customs and traditions greatly influence the role of each member of the family and their duties and powers.

2 Article25(1) of IND CONST. Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

3 *Id* at Article 29 and 30.

4 Vivek Swaroop Sharma, Secularism and Religious Violence in Hinduism and Islam, E.P.W, available at: https://www.researchgate.net/publication/299526439 (last visited on December 21,2016).

Accordingly, the family laws in India differ from religion to religion, and the norms of governing personal relations and social usage of these communities in their own lives depend tremendously upon the religion they were born[5]. Obviously, different personal laws are recognized in the spheres of marriage, divorce, maintenance, inheritance, succession, guardianship, and adoption.

Even though we have traversed from the stone age to the age of the internet, the societal status of women still remains subservient to patriarchy[6]. The international as well as national initiatives erased the inequality of women in letters but not in actual practice. The Constitution of India has taken a step forward by guaranteeing equality to women and also directs the State to adopt measures of positive discrimination for neutralizing the cumulative socio-economic, educational, and political disparities. Moreover, the Constitution of India endeavors the introduction of the Uniform Civil Code[7] to secularize personal laws.

Indeed, personal law plays a predominant role in keeping society in civil bonds. But it is to be noted that there has been an apparent encroachment upon woman's rights leading to gender injustices in the domain of personal laws[8]. But here the primary concern is with the gender injustices in guardianship and custody under different personal laws. Laws governing guardianship and custody are interrelated. Guardianship is a broad concept that includes a plethora of powers

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5 Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end. The Law Commission of India, 174th Report on Property Rights of Women: Proposed the Hindu Law, 2000, para. 1.1.

6 Article 44 of Constitution of India. The State shall endeavor to secure for the citizens, a uniform civil code throughout the territory of India.

7 Dr. Subash Chandra (ed.), Social Justice and Human Rights in India 110-113 (Serials Reforms under Publications, New Delhi, 2006).

8 Black's Law Dictionary 400, 4th edition.

vested with the parent who can exercise it on the minor, over his person or property. In contrast, custody is a narrow concept dealing with the immediate keeping, guarding, care, watch, inspection, preservation, or security of a thing being in the direct personal care of the person who is its custodian.[9] Just like in any other society, India's patriarchal social norms and traditions considered the father as the sole guardian of the person and property. Despite the codification of several personal laws relating to guardianship and custody, the power of the father continued to be supreme. This paper focuses on whether the legislation provides gender justice in guardianship and custody rights.

The concept of the "need for care and protection of children" evolved in different legal systems, and it developed through the doctrine of the" welfare of the child." [10] This change helps the system to cope up with changes in the role of state as a protector of the child. Many countries conferred equal status to father and mother in determining guardianship and custody[11]. But in India, no such initiative has been

9 Section 1(1) of the Children Act, 1989 of UK. "when a court determines any question with respect to (a) the upbringing of a child; or(b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration. The Adoption Assistance and Child Welfare Act of 1980 of USA. provided major federal initiatives to reform the state child welfare system.

10 English courts adopted the parenspatriae jurisdiction i.e. higher parental authority of the state to supplant the natural guardianship of the father and award custody depending on what promoted the welfare of the child In re O'hara Case, 1990 2IR p 232, See also in M Sornarajah, "Custody and Adoption: a Comparative Study, *The Comparative and International Law Journal of Southern Africa"*Vol.7, No.2 186-197 (1974).

11 State of Bombay v. Narsuappa Mali (1951) ILR Bom 775. The constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged on the basis of Article 14, 15 & 25 of the Constitution of India. The High Court of Bombay held that personal law was not included in the "law" referred to in Article 13(3) and was not the "law in force" saved by Article 372(3).It was also declared that Bombay Prevention of Hindu Bigamous Marriage Act, 1946 is not violative of Article 14 as the State was free to embark on social reforms in stages. The court also held that Personal laws are not 'laws in force' under Article 13 of the Constitution as they are based on religious and customary practices and Fundamental Right cannot be applied to the personal laws.

undertaken by the legislature, and the courts are also disinclined to interfere. Due to the sleeping attitude of the court towards its reasoning in 1951[12] that personal law is not a law under Art.13(3) but only customs or religious practices, we cannot check the constitutional validity of personal laws on the ground of violation of fundamental rights. In Shayara Bhano v Union of India and Others,[13] the court observed that Article 25 obliges all Constitutional Courts to protect 'personal laws' and not to find fault therein. Interference in matters of 'personal law' is clearly beyond any judicial examination. The judiciary, therefore, always exercises absolute restraint on the issues of how compelling and attractive the opportunity of imposing gender justice in parenting is. Also, The Law Commission of India[14] concluded that the law on custody in India has evolved to a point where it is appropriate to initiate a discussion on the idea of shared parenting.

In this scenario, the question to be posed is how far the existing personal laws of guardianship and custody, discriminating women can withstand, or can they be promoted under the guise of religion? Infact, the right which is protected under Article 25 is applicable only to essential religious practices[15]. Does the personal law form a necessary part of the religion, especially when it is against the goodness of the people? Indeed, gender equality and women empowerment are the need of the hour

12 MANU/SC/1031/2017, The Supreme Court considered the constitutional validity of the practice of triple talaq on the basis of a petition filed by a 35-year-old woman, Shayara Bano, who was divorced by a letter by her husband when she was in her parent's house. The court observed the need of legislation in reforming Muslim Personal Law and issued an injunction to Muslim husbands from pronouncing 'talaq-e-biddat' for a period of six months.

13 The Law Commission of India issued a Consultation Paper on Adopting a Shared Parenting (2014), available at: http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf. (last visited on October 12,2018).

14 Robert D. Baird, Religion and Law in Independent India: Adjusting to the Sacred as Secular 17-34 (Manohar, New Delhi,1stedn., 2005).

15 See s*upra* note 14.

and the demand for change in personal laws is emerging from different corners of society as it is imperative to ensure women's fundamental right to equality and dignity. Whereas, certain undemocratic patriarchal religious representatives always get an opportunity to resist even a slight change in the existing personal laws by claiming these changes to be an invasion of religion. Recently the question which came up before the Honorable Supreme Court of India regarding the validity of triple talaq[16] added fuel to the fire, and the debate on it sidelined the gender issues in personal laws over the impact of UCC on religious and minority rights. Unfortunately, even the women activists or media failed to bring forth the debate towards the realm of gender justice, which is the desired horizon.

In this scenario, the paper poses a question "is it high time to think of taking the initiative in adopting the Uniform Civil Code? If not, any alternative relief can be provided at large for reforming the existing personal laws to secure gender justice".

GENDER EQUALITY-INTERNATIONAL PERSPECTIVE

Recognition of women's human rights has been a focus of international activism for the past thirty years[17]. UDHR[18], the basic framework of Human Rights, sets general principles of achievement for all, and nations have declared that all human beings are equal in dignity and rights[19] and forbid discrimination based on sex, language, and religion[20]. The ICCPR[21] and International Covenant on Social Economic

16 Ann Stewart, Gender Justice and Law in a Global Market, (Cambridge University Press, 2011).

17 The Universal Declaration of Human Rights is a declaration adopted by the United Nations General Assembly on December 10, 1948 at the Palais de Chaillot, Paris.

18 *Id* at Article 1.

19 *Id* at Article 2.

20 International Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations on December 19,1966.

21 The ICESCR was adopted by the United Nations General Assembly on December 16,1966 and entered into force on January 3,1976.

and Cultural Rights[22] underwrite the equal enjoyment of all human rights to both men and women[23].

The Convention on the Elimination of all Forms of Discrimination Against Women,[24] an international treaty by the United Nations General Assembly, urged the member states to share the rights equally between man and woman in matters of Civil laws. State Parties shall take all appropriate measures, including law-making, to modify the social and cultural patterns of conduct of both man and woman. It is to eliminate prejudices and all other practices, including customary practices based on the idea of inferiority or superiority of either of the sexes or stereotyped roles of man and woman.[25] The Second World Conference on Human Rights held at Vienna in 1993, called for full and equal participation of women in all aspects of public life. The Third and the Fourth Conferences on Women Action for Equality[26] not only emphasize the need to ensure woman equality in social, economic, and cultural spheres of life but also its appositeness in the development and peace of every society.

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22 *Id* at Article 3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

23 Described as an" International Bill of Rights for Women", it was adopted in 1979 and has been ratified by 189 states.

24 *Id* at Article 5.There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

25 The Third World Conference was held at Nairobi, from July 15 to 26, 1985, to review and appraise the achievements in the U.N. Declarations for the protection of women. The Fourth World Conference was held at Beijing, China, from September 4 to 15, 1995 with a caption: Look at the world through Women's eyes. More over a special session "Beijing Plus Five" was also held by General Assembly in New York from June 5 to 10, 2000.

26 Article 15(1) of IND. CONST. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Gender Justice in the Context of Indian Constitution

The Constitution of India guarantees gender equality[27] and fosters state to make separate laws for women through protective discrimination[28] to fortify their socio-cultural empowerment. The Justice Verma Committee[29] is of the opinion that substantive equality and other concomitant rightsof women has to be considered as human rights both in domestic and international legal regimes[30].

Even though the British inserted several legislations for introducing social reforms in India, it was observed that the British interfered not much on the Personal Indian laws. In reality, the need for Uniform Civil Code is inscribed in Article 44 of the Constitution of India.[31] This provision is included in Part IV of the Constitution as non-judicial rights, but these principles are in the form of instructions to the state for governing the country. UCC generally refers to the framing of a standardized law that provides a uniform law in civil matters, including family affairs of an individual, irrespective of the religion, caste or tribe. Moreover, it broaches to the integration of India by bringing different communities into a common platform which is governed by laws that actually do not form the essence of any religion.

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27 Article 15(3)of IND. CONST. Nothing in this article shall prevent the State from making any special provision for women and children.

28 para 11, Chapter-1, The Committee was constituted by GOI Notification No. SO (3003) E dated December 23, 2012 to look into the possible Amendment of Criminal Law.

29 *Id* at para12.

30 See *supra* note 4.

31 CIT v. Seth Govindram Sugar Mills (1965) 57 ITR 510.But in *Mrs. Sujata Sharma v. Shri Manu Gupta &Ors* [CS (OS) 2011/2006], it was held that the eldest woman member of a Mitakshara Hindu Undivided Family can be its "Karta / Manager". This ruling was only after the Amendment in 2005 of the of the Hindu Succession Act, 1956.

Personal Laws of Guardianship and Custody-relevance

Historically, different roles of parents in the family affairs were clearly defined in the religious customs and traditions. Still, in fact, they recognized the physical advantage of man and posed him as the provider of material comforts. Even though we praise the role of woman as a mother, the law, in essence, kept her aside from casting her the duty of fostering the child. Over the years, appropriate family customs and social mores were developed in our society that recognized the need of both parents for the overall development of a child.

Indian laws have not conferred equal legal status to both the parents in guardianship and custody of children. Traditionally, the father was considered as the sole guardian of the person and property of the child. The authority of the father in every aspect of the child's life, including education, religion, maintenance, and protection, was considered absolute. Since women did not have independent personality and legal status, their identities were forged with that of their husbands upon marriage. Hence, mothers did not have any authority over children, and even the courts were reluctant to interfere with them.

HINDU LAW

Joint family is the way of life of Hindus, and the control and management of the whole affairs of the family members and their property were under the indisputable control of the Kartha, who is the manager of the family. Moreover, only a man could be a Kartha[32]; a woman had no legal control over the person and property of the child in a joint family. Over the years, the concept of their subordinate position

32 Mrs. Sujatha Sharma v. Sri. Manu Gupta, MANU/DE/4372/2015. The High Court of held that held that the eldest woman of Hindu Undivided Family can be karthaJustice Waziri observed that Section 6 of the Hindu Succession Act is a socially beneficial legislation; it gives equal rights of inheritance to Hindu males and females.

has been changed[33], but even then, the statute itself incorporated gender discrimination in guardianship and custody.

The Hindu Minority and Guardianship Act, 1956, is the law relating to custody and guardianship among Hindus, Buddhists, Sikhs, and Jains. A guardian[34] is a person having the capacity to provide care and protection of the person of a minor or of his property or both. It includes natural guardian, the guardian appointed by the will and guardian appointed or declared by a court or a person empowered to act as such under a statute. A person can also act based on the order of any Court of Wards[35]. The natural guardian is the legal guardian of a minor and is presumed to be authorized to make all decisions on behalf of the minor. Though the custody of a Hindu minor under the age of five years ordinarily goes to them other, the natural guardianship of a boy or an unmarried girl (both in person and property) goes first to the father and then to the mother[36]. Similarly, guardianship of an adopted minor goes to the father and the mother afterward. But in case of an illegitimate boy or unmarried girl, the mother is the natural guardian and after whom comes the father.

It can be noted that the role of the father and the mother are not equally prescribed in the law of Hindu guardianship. During the lifetime of the father, the position of the mother is entirely subordinate to that of the father. This means that the mother of a minor child has no right to

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33 Section 4(2) of The Guardians and Wards Act, 1890.

34 Section4(b) of Hindu Minority and Guardianship Act,1956.

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

36 Paras Diwan, Law of Adoption, Minority, Guardianship & Custody 734(4thedn., 2010).

natural guardianship as long as the father is alive. However, the mother has a right to custody of minor children up to the age of 5, but it is such an inferior right when compared to guardianship. Even if the child is in custody of the mother during the permitted statutory period, the father will be entitled to exercise control over the child as it is entrusted in the statute.[37] Therefore, even during the period of mother's custody, the father can exercise his right to guardianship over child's person and property. Above all, gender discrimination may be seen even among the minors who are under the guardianship of the father. Boys, once they attain majority, are no longer under guardianship of the father, but for girls, guardianship is transferred from the father to the husband after her marriage.

The discrimination of women in guardianship law is evident in the appointment of a natural guardian. Indeed, it is the court to determine the custody of the child when there is divorce or separation of parents. When the question of guardianship of minor arises, the court must prioritize the welfare of the child[38]. Still, even then, the court puts the burden on the mother to prove her suitability to facilitate the welfare of the child. Also though the Act provides explicitly the custody of a minor who has not completed the age of five years to be with the mother[39], in several occasions, the courts granted custody of infant below five years of age to father by placing the burden of proof on mother to prove her ability to provide financial and other necessary requirements to the child. Whereas, in *Jajabhai v Pathankhan*[40] the court has given guardianship to the mother by recognizing the fact that mother's care and protection are indispensable for the development of a minor daughter than that of

37 After the evolution of "welfare of the child" gets primacy of over the parental right.

38 See *supra* note 3.

39 AIR 1971 SC315.

40 MausamiMoitraGanguli v. Jayanti Ganguli, AIR 2008 SC 2262.

the father. After that, in 2008, the Honorable Supreme Court[41] changed its earlier position and placed the onus of on father to prove that the mother was not in a position to ensure the welfare of the child and granted the custody of a two-year-old child to the mother.

And in *Roxann Sharma v Arun Sharma*[42] , the Supreme Court unequivocally held that the objective of The Hindu Minority and Guardianship Act, 1956, allows the father to be the guardian of the property of the minor child but not the guardian of his or her person. This protection is permitted only if the child is less than five years old. In this case, the court reversed its earlier position of not allowing the mother to be a guardian for her failure in proving suitability. The court has taken a welcome step by declaring the unwed mother as the natural guardian. Hence the right of the mother is protected, even without forcing her to disclose the name of the father[43]. But it is remarkable to note that whatever the courts have decided is only to protect" the welfare of the child"[44] and not to protect the right to equality (of the mother) guaranteed in the Constitution[45].

It was the first step from the Honorable Supreme Court in *Gita Hariharan v Reserve Bank of India* [46] wherein the court has taken the view that the inability of the mother to act as a natural guardian during the

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41 AIR 2015 SC 2232.

42 ABC v. State (NCT of Delhi), AIR 2015 SC 2569.The plaintiff, a government official, approached the Supreme Court in 2011 after a trial court and the Delhi High Court ruled that she needed to disclose the father's name to get his consent while filing a guardianship petition.

43 Section 13of the Hindu Minority and Guardianship Act, 1956. 'It specifies the paramount consideration of the welfare of the child in guardianship and custody'.

44 Archana and Parashar, "Welfare of the Child in Family Laws- India and Australia"1 N.L.R.49,49-72 (2003).

45 (1999) 2 SCC 228.The constitutional validity of Section6(a) of The Hindu Minority and Guardianship Act,1956 was challenged on the ground of violation of Article 14 of the Constitution of India.

46 See *supra* note 38.

lifetime of the father is hostility to the Constitutional mandate of equality between both man and woman. Hence mother can be the natural guardian during the lifetime of the father. Therefore, the statutory restriction of mother in acting as the natural guardian of a child during the lifetime of the father is eliminated. The court held:

"If the father is wholly indifferent to the matters of the minor or if by virtue of mutual understanding between the parents, the mother is put exclusively in charge of the minor or if the father is physically unable to take care of minor for any reason whatsoever, the father can be considered to be absent and mother, being a recognized natural guardian can act validly on behalf of the minor as the guardian"

But it is noteworthy that even if the mother has the legal custody and responsibility to take care of the child since birth, the father can claim custody of children, at any point in time, as a natural guardian. Even in *Gita Hariharan's* case,[47] the court tried to guard mothers right only "in the absence" of the father. Thus, the father always has a pre-emption right of guardianship and custody of children. In natural guardianship, preference is assigned to father under s. 6 (a) of the Hindu Minority, and Guardianship Act and the Law Commission suggested to amend the law to constitute "both the father and the mother as being natural guardians jointly and severally, having equal rights in respect of a minor and his property".[48]

Importantly, the Supreme Court[49] emphasised the responsibility of the mother to give maintenance to the child and equalizes the duties of mother in par with the father. But the court was hesitant in removing the gender inequality in natural guardianship. Of course, the court considers the financial ability of each of the parents to decide the custody

47 See *supra* note 1, Para.4.3.

48 Padmaja Sharma v. Ratan Lal Sharma, AIR 2000 SC 1398.

49 Kumar v. Jahgirdar v. Chethana Ramatheertha, MANU/SC/0194/2004, para 17.

of the child. Usually, the financial instability of the mother incapacitates her from obtaining an order of custody of the child. Hence, she is excluded not only from providing care and protection but also from making any decision in favour of her child. The court equalises the parental duty of maintaining the child but failed in its effort of equalising the right to custody of the minor child. If the liability to pay maintenance is equal in both parents, the right to custody and natural guardianship shall be equalised between father and mother. But the Supreme Court was not ready to maintain equality in the rights and liabilities of parents. Hence the court vehemently criticized the statements and observations of the lower court, which supported preferential custody right to the mother. The court underlined that the approach of giving preference to the mother in custody order is discriminatory towards the father but failed to concentrate on the inequality in the law of natural guardianship.[50]

GUARDIANSHIP AND CUSTODY IN MUSLIM LAW

The law of guardianship in cases where the parties are Muslims shall be governed by the Muslim personal law[51]. The custody and guardianship of minors is clearly distinguished in Muslim laws, and the father is recognized as the sole and supreme guardian of his minor, natural or otherwise, but the mother in all schools of Muslim law is not recognized as a guardian, even after the death of the father.[52] But the concept of Hizanat provides that, of all persons, the mother is the most suited to have the custody of her children up to a certain age[53], both

50 Section 2 of The Shariat Act, 1973.

51 Imambandi v. Sheikh Haji Mutsaddi (1918) 45 Cal 887.

52 The mother is entitled to the custody of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child.

53 See *supra* note 29.

during the marriage and after its dissolution[54]. The mother is entitled to the custody of her male child until he has completed the age of seven years, and her female child until she has attained puberty. The right of the mother continues even after being divorced by the father of the child. She is disqualified only based on apostasy or misconduct or when her custody is found to be unfavorable to the welfare of the child. In Shia Law, the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. The mother is entitled to the custody of a girl who is married but has not attained puberty, and she can claim it even against the husband of the girl.[55]

The Kerala High Court upheld mother's right to have custody of a one-and-a-half-year-old daughter in Suharabi *v D. Mohammed*[56], where the father objected to the mother's custody on the ground of her poverty. But *inMd. Jameel Ahmed Ansari v Ishrath Sajeeda*[57], the Andhra Pradesh High Court, was of the view that Muslim law allowed the mother to have exclusive custody only until the age of seven in case of male children unless father was unfit to be a guardian. But the mother shall be deprived of this right when she remarries, and the court in *Ulfat Bibi v Bafati*[58] observed that

"We are of opinion that a woman who has been divorced, if this appellant has been divorced and has married a second, husband, is not a person either herself better suited than the father, however, unsuitable the, father may be, and not a person "who ought to be heard ,to say that the father is unsuitable.

54 Nurkadir v. Zuleikhabibi, AIR1885Cal. 649.

55 AIR 1988Ker 36.

56 AIR1983 AP 106.

57 AIR 1927 All 581

58 The Order of preference to the custody of minor: failing the mother, mother's mother, how high so ever; father's mother, how high so ever; full sister; uterine sister; consanguine sister and so on.

She has abandoned her home and husband either by her own free will, or as the result of her conduct, and in the eyes of the law she has lost the right to assert a claim against the father for the child and probably the right to assert this appeal."

The court strengthened its patriarchal approach even by ignoring the consideration of the welfare of the child with the appoint of the father as the natural guardian, however unsuitable the father may be, in comparison with the mother, as she cannot pay much attention to the upkeep and well-being of the child. The court glorified her duty towards the second husband and presumed that whatever attention she may bestow on the child could only[59] be after she has been of such service. It failed to consider the position and time to be spent on the child by the father. Moreover, the court reiterated the order of preference of both man and woman in the familial matters and failed to acknowledge even the righteous role of woman as a mother. Paradoxically, the court actually praised her assured service in the family as a wife by ignoring her relation to the minor child. The verdict actually showcases the denial of equality in guardianship of the minor child in Muslim law. Moreover, the Allahabad High Court[60] observed that even the court is not authorised to appoint or declare a guardian of the person of a minor unless the father is, in the opinion of the Court, unfit to be a guardian of the ward.

But in *Mohdyunus v Shamshadbano*[61] Justice A. Varma observed that *"keeping in view the welfare of the minor, considers that the mother should be appointed a guardian in preference to any other natural guardian under the Mohammedan Law, Though, as I have already stated, the Court should make an attempt, so far as possible, to follow the line of guardianship fixed under the personal law of a minor, I am not prepared to hold that they must*

59 Hafiz-ur-Rahman v. Mst. ShakilaKhatoon (1983) All WC 572.

60 AIR 1985 All 217, para 6.

61 Asha Bajpai, "Custody and Guardianship of Children in India".39.2 F L Q 441, 447 (2005).

subordinate the welfare of the minor and must, whatever the consequence, appoint the natural guardian under the person allow."

The court also held that where the dictates of personal law indicate one course of action and considerations of the welfare of the minor indicate another, the former must be subordinate to the latter. In other words, if there is a conflict between the personal law to which the minor is subjected and considerations of his or her welfare, the latter must prevail. Truly, the decision recognised and removed some religious and cultural boundaries on women from employing all of her rights as a mother. Even though the welfare principle is comprehensively exploited by the courts in deciding the custody of the child, they did not give any information regarding the factors that they considered or the reasons for awarding custody[62].

Though the Muslim law recognised the need of women to look after the child, it failed to acknowledge the mother as guardian, natural or otherwise, even of her minor illegitimate child. No such power is conferred on mother even after the death of the father of the child. In the Sunni law, after the death of the father, the guardianship passes on to the paternal grandfather if the father has appointed no executor. It is also pertinent to note that she has no right to appoint a guardian to her minor child by executing a will. Among the Shias, after the father, the guardianship belongs to the grandfather and not the executor. In grandfather's absence, the guardianship belongs to the grandfather's executor, if any.[63]

It is the father who can appoint a mother as a testamentary guardian or keep her away from guardianship. Moreover, the mother has no power to alienate the property of her minor children.[64] But the

62 Syed Shah v. Syed Shah, AIR1971 SC 2184.

63 Gurubax Singh Corowara v. Smt. Begum Rafiya Khurshid, AIR 1979 MP 66.

64 Section 49 of Parsi Marriage and Divorce Act, 1936.

father or father's father or executor of the will made by them are capable of doing so as they are the de jure guardians of the property of minors.

CHRISTIAN AND PARSI LAW

Under Section 49 of the Parsi Marriage and Divorce Act, 1936[65] and Section 41 of the Indian Divorce Act, 1869[66], courts are authorized to issue interim orders for custody, maintenance and education of minor children in any matrimonial proceedings. Christians and Parsis follow The Guardians and Wards Act, 1890 as they have no separate personal laws for the custody and guardianship. The Court in India equated the welfare of the child with the economic conditions of the parent and decided the custody of child accordingly. Financial capacity may help the mother of a child in some instances to regain custody of the child. The Supreme Court gave custody of the child to the mother because she was economically well off and hence would be able to take care of the children[67].

The Guardian and Wards Act, 1890 is a secular law regulating questions of guardianship and custody for all children within the territory of India, irrespective of their religion. In appointing a guardian the court shall be guided by the personal law of the minor,[68] but the procedure to be applicable is what is laid down in the Guardians and Wards Act.[69] It authorizes the District Courts to appoint a guardian, when the natural guardian, as per the minor's personal law or the testamentary guardian appointed under a Will, fails to discharge duties towards the minor[70]. Besides, the court had no power to appoint a guardian to the person of

65 Section 10 of The Indian Divorce Act,1869.

66 Rosy Jacob v. Jacob A Chakramakkak, AIR 1973 SC 2090.

67 Section17 of The Guardians and Wards Act, 1890.

68 Id at Section 6.

69 Id at Section 7.

70 Section19(b) of The Guardians and Wards Act, 1890.

minor during the lifetime of the father.[71] But in Vegesina *Venkata Narasiah v Chintalpati*[72], the court rejected father's right to be the natural guardian over the welfare of the child under the GWA. It gave the custody of the child to the mother.

The following points are noted after the analysis of judicial decisions of guardianship and custody.

1. Whenever the court awarded custody of minor to the mother the court has only done its duty of considering the welfare principle.
2. The court also considered the economic criteria for bringing the child to custody and woman who is generally not well off may be thrown out from the custody of children.[73] This attitude of the court really keeps away the mother from her children.

Hence, the Law Commission of India had suggested in its 133rd Report[74] that

It is indeed strange that in the face of the said constitutional provision, the discrimination against women has been tolerated for nearly four decades.

But only in 2010[75], state realized its commitment to ensuring gender equality by amending the provisions in such a way to include and

71 AIR 1971 AP 134.

72 Rosy Jacob v. Jacob A Chakramakkak, AIR 1973 SC 2090.

73 Available at: http://lawcommissionofindia.nic.in/101-169/Report133.pdf (last visited on January 4, 2017).

74 The Personal Laws (Amendment) Act, 2010 inserted changes in Section 19(b) of The Guardians and Wards Act, 1890. Section 19(b) is substituted like this:"(b) of a minor, other than a married female, whose father or mother is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or"

75 Article 18 of The United Nations Convention on the Rights of the Child,1989. In J v. C, 1970 AC 668, the House of Lords applied the principle of welfare of the child in disputes between parents and non-parents. In this case, Lord MacDermott explained that when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. The Family Court of

safeguard mother's right not to avoid the appointment of another guardian for her child when she is alive. But even then, the order of preference to the father vis-à-vis the mother in custody and guardianship exists in other personal laws. In this context, it is pertinent that The United Nations Convention on the Rights of the Child, directs the state parties to ensure that both parents have common responsibilities for the upbringing and development of the child and is crucial for the "*best interests of the child*"[76] Therefore, the whole idea of guardianship is based on the principle of the welfare of children and if that is true, no purpose of vesting the right of guardianship primarily on the father and not on the mother. If so, the law of guardianship will be effective and justified only by considering both the parent as the natural guardians of their minor children. It is essential to impart them with equal responsibilities, liabilities, and rights. The need for a change in the existing law is very crucial for a healthy family, and if this change is affected, the law will succeed in protecting both children and parents.

WHAT OUGHT TO DO

The Constitution declares India to be a secular state[77], but the Indian version of Secularism has its own peculiar features.[78] It really protects the very "right to practice" of religion under Article 25 of the Constitution and is evident in the decision of the Supreme Court of India in The Commissioner Hindu Religious Endowments (HRE), Madras v

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Australia in Rice v. Miller (1993) FLC 92-415 and *Re Evelyn* [1998] FamCA 55 opined that" *the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child*. Such fact does not, however, establish a presumption in favour of the natural parent, nor generate a preferential position in favour of the natural parent from which the Court commences its decision-making process."

76 Included in the Preamble of the Constitution by the 42nd Constitutional Amendment in 1976.

77 India recognized the concept of the State protection of values of the faith-based communities has been forgotten by the western countries like US and France.

78 AIR 1954 SC 282.

Sri Lakshmindrathirthaswamiar of Sri Shirur Mutt.[79] The court is of the view that the "practice of religion" guaranteed in Art. 25 protect not only the freedom of religious opinion but also the acts done in pursuance of religion. When the society is on the verge of development, the legislature tried to modify or codify the personal laws to fortify the Constitutional Goals. But the task is arduous since often religious beliefs and faith become an obstacle for state in changing personal laws, thereby the development of the society.[80] In fact, personal law finds its foundation in the right to practice religion, which is a constitutionally guaranteed right. Since the protection of personal law is constitutional, it has been subjected to restrictions enlisted in it, including non-discrimination of women. Also, what is protected under the right to religion is only essential religious practices, and the question to be addressed is whether the compliance of personal law is essential for following a religious practice.

In this context, it is important to note that the "personal law" is a misnomer because Gajendragadkar. J held that[81] Part III of the Constitution of India cannot be applied to personal laws. But the court approved the power of state in interfering with the personal laws to embark on social reforms[82]. It was established that judicial review is the basic feature of the Constitution[83], and the court has to ensure that the Constitutional principles, especially gender equality, are protected in the legislative or executive act. In this context, it is the court to put a balance between personal laws, either codified or not, amid the right to religion. It becomes very delicate when the court tries to intervene in the

79 DD Acevedo, "Secularism in the Indian Context" 38 JABF.138-167 (2013).

80 See *supra* note 7.

81 Srinivasaiyer v. Saraswathiammal (1953) Mad. 78, (52) 193.

82 Kesavanandabharati v. State of Kerala, AIR 1973 SC 1461.

83 Mohd. Ahmed Khan v. Shah Bano Begum and Ors, AIR 1985SC 945. In this case a Muslim woman demanded maintenance, after divorce, from her former husband under the Section 125CrPC.The court allowed maintenance to her even after the iddat period.

religious freedom of minorities. Of course, the court has taken some positive steps in the Shah Bano decision[84] by equalizing the Muslim husband with that of husbands from other religions under s.125 Cr.PC. Yet the judgment invited controversy from religious fundamentalists as the judicial opinion was against the traditions of Muslims. But unfortunately, to satisfy the minority community, the parliament enacted The Muslim Women (Protection of rights) on Divorce Act, 1986 overthrew the decision. In Ammini *E. J. And Etc.v Union of India*[85], the court held Section 10 of the Indian Divorce Act as unconstitutional. After that, the legislature amended[86] the provision and removed the discrimination and provides common grounds to both the parties.[87] Discriminatory Christian property inheritance laws were removed from the legal system, but it was done without testing its correctness based on sex discrimination. Even [88] *Gita Hariharan* 's case,[89] the court adopted only a gender-sensitive interpretation of the personal laws and used the interpretative tool of 'reading down' the law to include the mother also as the 'natural' guardian of a child[90]. What the court strives to impart is that it is the legislature to make reforms in the personal law and not the judiciary to introduce changes in the law, which is in the exclusive domain of legislature[91]. Moreover, in all these cases, the court was reluctant to consider the Constitutional validity of personal laws based on gender equality.

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84 AIR 1995 Ker 252.

85 Indian Divorce (Amendment) Act, 2001.

86 Section 10 becomes similar to Section 13 of Hindu Marriage Act, 1955 and Section 27 of Special Marriage Act, 1954.

87 Travancore Christian Succession Act, 1910 (Declared as repealed by and Cochin Christian Succession Act, 1922.

88 See *supra* note 38.

89 Flavia Agnes, "Women's Movement within a Secular Framework: Redefining the Agenda" (2016) available at: httpstable4401166.

90 Ahmedabad Women's Action Group(Awag) v. Union of India, AIR 1997 SC 3614.

91 (1995) 2 SCC 635.

The demand for introducing the Uniform Civil Code resurfaced and emphasized in Sarla Mudgal And Ors. *v Union of India*[92]. In this case, Kuldip Singh, J. held that a Hindu husband could not use conversion to Islam as a means of enabling a second marriage during the continuance of the first marriage.[93] The court took a very controversial step of directing the Central Govt. to file an affidavit for not taking steps to introduce UCC. The idea of the Uniform Civil Code is not an invention of the 21st century but rather a severely debated issue in the Constituent Assembly. Dr. Ambedkar supported UCC and clarified that[94] state could regulate secular affairs surrounding the religion such as social welfare and reform, and hence the interference of the personal law would come within Art.25(2) of the Constitution of India.

But, in the 1950s, when the Union Government took positive steps to reform the regressive Hindu personal laws, it faced strong opposition[95] from the majority community. If these changes are included in making Uniform Civil Code in the name of uniformity, the minorities will oppose these changes by raising the argument that it would reflect majoritarian beliefs and leads to 'discrimination' of minority interests. In contrast, the question of challenging the personal law of minority groups such as Muslims, Christians, Parsees, and Jews will make the issue more problematic.

NEED OF UNIFORM PERSONAL LAW

In diverse Indian Society, we need a change in the existing personal law to make it a gender-sensitive society. Unfortunately, the Uniform

92 The decision was made in response to the routinely documented trend of Hindu men converting and marrying again since Islam permits a man to keep four wives at a time.

93 Shimon Shetreet and Hiram E.Chodosh, Uniform Civil Code 34(1stedn.,2015).

94 AIR 1985 SC 945.

95 Sarkar, Sumit, Sarkar, Tanik, et.al.,Women and Social Reform in Modern India: A Reader 130(Indiana University Press,2008).

Civil Code is not an answer at this point. We need reforms in existing statutes and uniform legal provisions for both men and women to make the current system work like an egalitarian society. If people are allowed to regulate their relations in divergent ways, it will hinder the development of the country. Hence the constitutional forefathers recognized the need for the Uniform Civil law for national unity and integrity. But, as far as personal laws are concerned still, the desired object has not been achieved.

There is a sense of apprehension among the minority communities in our country[96] about the protection of their customs and personal laws. At this juncture,[97] it is not possible to introduce UCC forcibly. Moreover, the religious fundamentalists succeeded in diverting the questionnaire circulated by the Law Commission, seeking a public view on triple talaq is a threat to Muslims, which in turn caused polarization of communities[98]. It is evident that apprehensions about religious freedom will lead to communal disharmony[99] or that it may lead to communalism. In the current scenario, most of the Muslim leaders have posed the action of the Union Government to be an attack on their religious freedom. It is clear that we cannot introduce UCC through a single stroke action. Hence it is essential to remove inequalities[100] within the personal laws and make a uniform code within the same religion in such a way as both men and women in the same religion enjoy equal guardianship and custody rights. In the second step, it can introduce a uniform, personal law among different religions. The need for the hour is to launcha series of progressive

96 Mansfield, John H. The Personal Laws or a Uniform Civil Code? in Robert D. Baird, (ed.), Religion and Law in Independent India 139-177 (1993).

97 See *supra* note 80.

98 Saxena and Saumya, "The Political Dilemma of Indian Women's Movement", available at: http://www.lokniti.org/women_indian_politics_for_csds.php (March 6,2017).

99 *Id.*

100 See *supra* note 46.

reforms in society and empower the public to accept the Common Civil Code and finally bring about the Uniform Civil Code in the country.

CONCLUSION

It is the universal truth that motherhood is honored, but in actual practice, they are subjected to various forms of discrimination in different arena of life. Even while doing the glorified role of motherhood, she is subjected to gender injustices. This is an antithesis of what we really expect. The personal laws in India consist of discriminative gender provisions, and the courts in India, which are supposed to be the protectors of human rights, were reluctant to interfere. The traditional Hindu law did not recognize strict principles of custody and guardianship due to the fortification guaranteed to a child in the joint family. The Hindu Minority and Guardianship Act, 1956, provides that the mother cannot be the guardian of a minor during the lifetime of the father. But the court in *Gita Hariharan's* case,[101]observed that in the absence of the father, the mother could be the natural guardian, and the decision is because of the principle of welfare of the child. Hence it is evident that father's preferential right to guardianship can be used for claiming custody of the child even if mother's right to custody and care of the child is secured in the statute. The personal law in which the child belongs is decisive even in the so-called secular law-Guardianship and Wards Act. Hence it is apparent that father's natural guardianship generally supersedes the welfare principle in the dispute of guardianship of non – Hindus. Unfortunately, deep routed patriarchy & social customs make it difficult for the legislature to interfere with the personal laws. But the need of the hour is to introduce Uniform Personal Law for ensuring gender justice, and finally let us hope the introduction of the Uniform Civil Code in all civil matters. This paper concludes with the remarks made by the Honorable Supreme Court in *Sarala Mudgal*[102] case:

"It is a matter of regret that Article 44 of our constitution provides that the state shall endeavor to secure a uniform territory of India. There is no evidence of any official activity country. A belief seems to have gained ground that it is for matter of reforms of their personal law. A common Civil by removing disparate loyalties to laws, which have conflict bell the cat by making gratuitous concessions on this issue."

Understanding The Concept of Abuse of Dominance in Copyright

Vishnu S[*]

Abstract

Competition law in India follows the philosophy of contemporary competition laws and targets at nurturing competition and at protecting the relevant Indian markets to counter the anticompetitive practices by enterprises. The Competition Act, 2002 prohibits anticompetitive agreements, abuse of dominant position by enterprises, and regulates combinations with a view to ensure that there is no appreciable adverse effect on competition in the relevant Indian market. Section 4 of the Act deals with the abuse of dominant position by an enterprise. Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result, that competition is prevented or lessened substantially. Dominant position of a business entity or a group in its relevant market is determined by its capability to act independently of its competitors. In a perfectly competitive market, no enterprise has control over the market, especially in the determination of price of the product. In this article author attempts to identify the conditions under which there will be an abuse of copyright under the Competition Act, 2002. Under an economic analysis of copyright, author attempts to identify the

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conditions of abuse of a dominant position through a refusal to licence copyright. This article, serves to elucidate the muddle prevailing in this area of the law. Article also intends to clarify the circumstances under which holder of a copyright abuses its dominant position.

Introduction

Dominance is a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to operate independently of the competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour[1]. Dominance is not considered per se illegal. Its abuse is. Abuse is stated to take place when an enterprise or a group of enterprises practices its dominant position in the relevant market in an exclusionary or/and an exploitative or manipulative manner[2].

Intellectual Property Rights (IPR) involve grant of exclusive rights to the right holders to exploit the results of their innovation so as to provide incentive to innovate. Competition Act, 2002 exempts the reasonable use of such rights by right holders from the provisions of Section 3 related to agreements. However, the actions by enterprises that shall be treated, as abuse[3] shall stand applicable equally to IPR holders provided such rights are considered by the Competition Commission of India (Commission) to render the holder a dominant player in the relevant market.

As with all verticals of Intellectual Property, copyright is concerned with securing the effort of the human intellect. The domain of copyright is the protection of literary and artistic works. Apart from these, it may

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1 Section 4, The Competition Act, 2002.

2 *Jupiter Gaming Solutions Private Limited v. Government of Goa & Anr.*, Case No. 15 of 2010 decided on 12.05.2011 (CCI).

3 Section 4(2), The Competition Act, 2002.

also include technology – based works such as, computer programs, electronic database etc. Copyright[4] is a legal term describing rights given to creators for their literary and artistic works[5]. TRIPS agreement has enlarged the scope of copyrights by including computer programs, broadcasting, performances and designs under its umbrella. This has brought in a number of new problems, along with the benefits promised.

Further, the protection available under the copyright law has been greatly expanded to respond to the challenges posed by the latest technologies in the field of communications as well as other copyrightable subject matter. Competition Act, 2002 provides[6] express exception to copyrights, as long as they are exercised in reasonable manner, well within the boundaries of rights guaranteed under the Copyright Act. However, no such exception is given under Section 4.

Competition Law and Copyright

Prima facie, competition law might seem to have diminutive, role if any, to play in the outcome of a copyright litigation. In its various appearances, competition law seeks to ensure full and fair competition in the sale of goods and services[7]. Copyright law do serve a procompetitive role; not in the market for the particular book, painting, or film, but in the larger market for ideas.

Author of a copyright possess an elite right, where he or she can sell his or her own expression as a *commodity* in the relevant market.

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4 The kinds of works covered by copyright include: literary works such as novels, poems, plays, reference works, newspapers and computer programs; databases; films, musical compositions, and choreography; artistic works such as paintings, drawings, photographs and sculpture; architecture; and advertisements, maps and technical drawings.

5 What is Copyright? available at http://www.wipo.int/about-ip/en/copyright.html last accessed on April 8, 2020.

6 Section 3(5), The Competion Act, 2002.

7 Thomas F. Cotter, "The Procompetitive Interest in Intellectual Property Law", 48 WM. & MARY L. Rev. 483 (2006).

The author's own expression, together with the expressions created by others, will compete in this broader market for the underlying idea. Once we distinguishes the significance of copyright for this larger market, it becomes clear that competition law can play a vital role in the result of a copyright suit. In some cases, it is possible that a copyright owner's dominant position, or acts taken by the owner to protect its rights, will restrict or destroy competition in other markets, possibly even the market for ideas.

Under the right conditions, competition law may intervene to preserve some degree of competition in these other markets. The immediate effect of the copyright law is to secure a fair return for an author's creativity. However, the ultimate objective is to stimulate artistic creativity for the general public good[8]. The emergence of new communications technologies and the proliferation of new copyrightable subject matters have led to the gradual expansion of copyright protection. The widespread use of mass-market contracts and alternative technological protection measures, along with the newly instituted protection against the circumvention of those measures, has also greatly enhanced the market power of copyright owners[9]. Regrettably, this mounting power has tempted some copyright owners to exercise their exclusive rights outside what is allowable under the grant or beyond what is in the public interest.

Economic analysis of Copyright

Copyright relates to literary and artistic creations, such as books, music, paintings and sculptures, films and technology-based works (such as computer programs and electronic databases). In certain jurisdiction,

8 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

9 Peter K. Yu, "Five Disharmonizing Trends in the International Intellectual Property Regime", in 4 Intellectual Property And Information Wealth: Issues and Practices in the Digital Age 73, 91-94 (2006).

copyright is referred to as authors' rights. For the purposes of copyright protection, "the expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression".[10]

Copyright protects works, which embody information. Information is intangible, generally costly to create, but cheap to copy. Information is a public good. Public goods are non-rivalrous. "Non-rivalness in consumption is usually defined by saying that the consumption possibilities of one individual do not depend on the quantities consumed by others[11]." Being non-rivalrous, intangible goods are also generally non-excludable; this means that one person cannot exclude other persons from consuming the good in question. This non-excludability arises because reproduction costs are also generally very low for anybody other than the author of the copyrighted works.

Since the cost of production of the original copyrighted work is high as compared to the reproduction costs (for the free rider), if the copyright holder does not have a means to stop the free riders, he will not have the chance to recoup his investment, and the same will discourage the people to come up with creative works. Hence, the State must remedy by the creation of copyright law, which grants a limited monopoly for the copyright holder in excluding others from infringing his rights and thereby enabling him to have a chance to recoup his investment.

However, the copyright *per se* do not create monopoly. It all depends on the substitutability of the copyrighted material available in the relevant market. Therefore, if there is sufficient substitutability in

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10 Article 2, The Berne Convention for the Protection of Literary and Artistic Works, 1886 (usually known Berne Convention, 1886).

11 P. Belleflamme, "Pricing information goods in the presence of copying", (2002) paper presented at the SERCIAC Madrid, p. 2.

the relevant market, then the question of monopoly does not arise[12]. As for copyright, it is because the original expression of the idea in the work cannot be copied without permission of the copyright holder.

However, everyone is free to copy ideas and creative ways around the copyright in a work are generally easy to find. Hence, monopolies are bound to arise quite rarely in copyright law. Thus, the major issue while considering cases in connection with abuse of dominance in copyright is what is an abuse of copyright. The question is so far left unanswered by the authorities, at least in connection with the *refusal to license* a copyrighted work.

Therefore, under an economic analysis of copyright, author attempts to identify the notion of abuse, conditions of abuse of a dominant position through a refusal to licence copyright. This article, aids to illuminate the existing issue of identifying the *abuse* in this area of the law.

Abuse of Dominance

Section 4 of the Competition Act, 2002 is similar to Chapter II of the UK Competition Act, 1998 and Article 82 of the European Community Treaty. The standards to be satisfied to justify initiating any action with respect to the abuse of dominance primarily are;

- Whether an enterprise in question holds a "dominant position" in the relevant product and or geographic market in India.
- Whether, said enterprise has abused such dominant position

The factors constituting the "abuse", "relevant product or geographic market", "predatory pricing" and what constitute "dominant position" are detailed in the Competition Act, 2002. By virtue of Section

12 E. Kitch, "Patents: monopolies or property rights?", 8 Research in Law and Economics 31(1987).

4(1), of the said Act, no enterprise or group shall abuse its dominant position. The Act only restricts the abuse of dominant position by an enterprise or a group and not from achieving such dominant position.

Dominant position is a "position of economic strength enjoyed by the enterprise which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately the consumers".[13] It is interesting to note that, the Act did not define the term dominant position based on any arithmetical parameters or any particular share of the market as is the case in the MRTP Act, 1969. On the other hand, the dominant position of an enterprise is to be judged by its strength to operate independently of its competitors or to affect its consumers or competitors in its favour.

The said definition is similar to that in the competition laws of various jurisdictions including the European Union. An organisation having dominant position *per se* is not illegal, but abuse of such dominance is illegal. Dominance is said to be abused when there is an appreciable adverse effect on competition due to the actions of the dominant enterprise.

Under the Act, 2002[14], an abuse of dominance includes following practices;

- Directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of goods and services;
- Restricting technical or scientific development relating to goods or services to the prejudice of the consumers;
- Indulging in practices resulting in denial of market access;

13 Explanation (a) Section 4(2)(e) of the Competition Act, 2002; See also *United Brands Company and United Brands Continental BV v. Commission of the European Communities*, [1978] EUECJ C-27/76 (February 14, 1976).

14 Section 4(2), The Competition Act, 2002.

- Making conclusions of the contracts subject to acceptance by other parties, which have no connection with the subject of such contracts;
- Using dominant position in one relevant market in order to enter into another market.

The Act lays down the number of factors which the Commission needs to take into consideration in determining whether an enterprise enjoys a dominant position or not, such as the market size, share and resources of the enterprise, size and importance of the competitors, economic power of the enterprise, vertical integration of the enterprises, entry barriers etc. which would involve a fair amount of economic analysis[15].

Under the provisions of the MRTP Act, 1969 dominance was defined only in terms of market share, i.e. 25% or more. However, under the Competition Act, 2002 though the market share remains an important factor, other factors such as entry barriers, size, resources, economic power etc. were also given due weightage. Therefore, even if an enterprise's share is 30% or 40%, it may not be considered as dominant in the market. On the other side, an enterprise with mere 10% market share may be adjudged as dominant player in its relevant market.

However, the Act does not prevent an enterprise from coming into or acquiring a dominant position in the market. All that, the Act condemns is the abuse of such dominant position. Therefore, the Act targets the abuse of dominance and not the dominance *per se.* It is also significant to note that, the provisions under Section 4 does not provide any protection to the IPR holders from the hardships?? of the Competition law. Hence, if an enterprise or an association abuses its dominant

15 Patel, B. N., Nagar, R., & Thakkar, H. (Eds.). Law and Economics in India: Understanding and practice. Routledge. (2016).

position, then the Commission irrespective of any intellectual property rights acquired by such enterprise or association may enquire such an act.

Copyright and Refusal to license

The immediate effect of our copyright law is to secure a fair return for an 'authors' creative labour[16]. However, the ultimate aim by this incentive is, to stimulate artistic creativity for the general public good[17]. One of the characteristics of copyright is the right to curb the development of a derivative market by "refusing to license copyright". Although it is likely that unilateral refusal to license copyright may give rise to misuse of claim, the broad assumption is that the desire to exclude is a presumptively valid business justification[18].

Nothing in the copyright statutes would prohibit an author from hoarding all of his works during the tenure of the copyright. Indeed, a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work[19]. As a copyright owner, a film producer can, at his sole discretion, determine the manner of communicating his film to the public and this includes commercial terms on which the film is permitted to be communicated to the public[20]. Likewise, unilateral refusal to license diagnostic software is not an antitrust violation[21].

Just as the owner of real property, or a material object is entitled to legitimately assert his domain over it, and protect it from unfair appropriation by another, the intellectual property owner is, by these

16 Groves, P. Sourcebook on intellectual property law. Routledge p. 309 (1997).

17 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

18 A&M Records, Inc. v. Napster, Inc. 4239 F.3d 1004.

19 Stewart v. Abend, 495 U.S. 207, 228-29 (1990).

20 Warner Bros. Entertainment Inc. v. Santosh V.G. (MANU/DE/0406/2009).

21 A&M Records, Inc. v. Napster, Inc. 4239 F.3d 1004.

laws, enabled to protect unwarranted exploitation or unauthorized use of what are his property right. There is no public interest in insisting that such copies should be permitted, on the ground that the cinematograph films are not made available in the country. If that is the position, the defendant is always free to negotiate the terms of a license, if such of the films as are not available, for the purpose of their publication or performance in India[22].

It is well established principle that, mere refusal to license a copyrighted work will not attract the provisions of competition law as it may not confer a dominant position or such an act may constitute an abuse of dominance[23]. Thus, the question to be addressed here is under what condition, a refusal to license by a copyright holder constitute an abuse of dominance within the meaning of the competition law? Or under what circumstances, a compulsory licensing of a copyright can be made?

Conditions constituting the abuse of dominance in copyright

As everyone is free to copy ideas and creative ways around the copyright in a work and are generally easy to find????. Therefore, monopolies are bound to arise quite rarely in copyright law. Thus, the major issue while considering cases in connection with abuse of dominance in copyright is, what is an abuse of copyright. Though there has been large number of cases came up before the authorities???? in connection with the abuse of copyright, courts in India has not strictly defined under what circumstances, copyright is abused. Hence, in this article author is relying on following few foreign judgments in identifying the conditions on which a refusal to license a copyright will become an abusive practice.

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22 Warner Bros. Entertainment Inc. v. Santosh V.G. (MANU/DE/0406/2009).

23 Parke Davis & Co v Probel, [1968] C.M.L.R. 47.

Magill[24] constitutes the first case in which the authorities elaborates the conditions under which a refusal to license will become an abusive practice. It stated that, a *refusal to license* to be considered as an abusive practice, the circumstances must remain exceptional viz.

a. The prevention of the appearance of the new product which the copyright holder did not offer and for which there was a potential consumer demand.

b. The refusal is not justified and/or;

c. The copyright holder reserves himself a secondary market by excluding all competition on that market.

That means, a refusal to license will infringe the provisions of Article 82, if it is a new product whose introduction might be prevented, despite specific consent and regular potential demand on the part of the consumers. Similarly, it will also infringe the provisions of Article 82 if it concerns a product or service, which is essential for the exercise of the activity in question in that, there was no potential substitute available.

An obligation imposed upon the proprietor of the protected design to grant third parties even in return for a reasonable royalty, a license for the supply of products incorporating the design would lead the proprietor thereof being deprived of the substance of his exclusive right and that a refusal to grant such a license cannot itself constitute an abuse

24 Joined cases C-241/91P and C-242/91P RTE and ITP v. Commission (1995) ECR I-743. Magill, a Dublin company was the compiler of comprehensive weekly television guide combining the listing of three television companies broadcasting in UK and Ireland. Since, these listings were protected under the provisions of the copyright, Magill invariably required a license, the grant of which was refused by these companies. The ECJ affirmed the grant of compulsory license by the Commission on the ground of Article 82 and held that, the copyright itself do not justify a refusal to license in the "exceptional circumstances", where there was a consumer demand for the new product, where the TV companies had a de facto monopoly over the listings by virtue of the scheduling of their programs, where a license of the listing was an indispensable input for the comprehensive TV Guide and where they were not themselves supplying the product to the consumers.

of dominant position. Therefore, the significance of this case lies in determining the boundaries of *compulsory licensing*. It is pertinent that, merely a refusal to grant license may not be anti-competitive in nature. Such refusal should be arbitrary, to compel involuntary compulsory licensing in order to mitigate the rigors of abusive conduct[25].

Further, on a referral from the Germen Court[26], the ECJ emphatically reiterated that, the criteria of the exceptional circumstances as stated in *Magill* must be fulfilled in order for a compulsory license to be granted. In the absence of such exceptional circumstances, the copyright holder has the exclusive right to reproduction and a refusal to grant a license even by a dominant undertaking cannot of itself constitute an abuse of Article 82. Court reasserted that, the three cumulative criteria must be met for a refusal to be regarded as abusive;

a. The undertaking, which requested the license, must intend to offer new product or service not offered by the owner of the copyright and for which there is a potential consumer demand.
b. The refusal cannot be objectively justified.
c. The refusal must be such as to exclude competition on a secondary market.

Conclusion

If a copyright is granted, it is for a good reason to allow the creation of works. Promoting the creation of works is in the general public interest. If there were no copyright, no works would be created and therefore the public would be worse off. The most important quality of copyright, which allows it to deserve a different treatment to tangible property, is the fact that it is non-rivalrous. In short, intangible property deserves more protection because it is inherently fragile, in other words, subject

25 AB Volvo v. Erik Veng, [1989] 4 CMLR 122.

26 IMS Health GmbH & Co. v. NDC Health GmbH & Co., KG (2002).

to free riding. Since copyright is created to remedy a problem in the public interest, copyright is prevalent in comparison to competition. Not only the potential dominant position or monopoly, which a copyright can generate, is justified by the public interest but also because copyright is of limited length, the dominant position or monopoly is by nature limited in time. There will only be an abuse if the dominant position made possible by copyright is used against the public interest. Under economics of copyright, it is the maximisation of the public's welfare. The public's welfare is fulfilled when there are as many works as possible in the market. Thus, abuses will be situations when the copyright holder restricts the availability of new works on the market. This brings us to what the conditions of abuse of copyright is.

A Review Of Cloud Forensics & Identifying The Legal And Ethical Challenges

Parvathi S. Shaji*

Abstract

The internet has travelled from the concept of parallel computing to distributed computing, grid and recently to cloud computing. Cloud computing has become one of the most controversial issues in information technology field that cause to shift many organizations towards transferring their data to the cloud as it presents many promising technical and economic benefits. With the increasing use of cloud computing, there is an increasing emphasis on providing trust worthy cloud forensics schemes. In cloud rather than procuring, deploying and managing a physical IT infrastructure to host their software applications, organizations are increasingly deploying their infrastructure into remote, virtualized environments, often hosted and managed by third parties. This development has significant implications for digital forensic investigator, equipment vendors, law enforcement, as well as corporate compliance and audit departments. It is a question of huge concern to the cyber investigators with a series of challenges at the fore front. Researchers have traced down the challenges at hand and proposed some solutions to tackle the challenges. In this article, I have tried to summarize the existing legal and ethical challenges at different levels and practical solutions of cloud forensics to answer the question, where does cloud forensics stand now? Is it true to the fact laid down by the current research efforts that cloud forensics is still in its infancy?

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Introduction

Cloud computing is a new paradigm in the world of advancing field of information technology. Considerable amount of cloud computing technology is already being used and developed in various flavours. Cloud computing involves people, process and technology of the enterprise[1]. The technology proves to be a key enabling for realizing the latent power of big data, and for supporting the deployment of mobile devices and applications on a very large scale.[2] Thus, the idea of cloud computing emphasizes evolution of the network and of service infrastructure. Indeed, users can theoretically access an infinite quantity of resources and almost unlimited processing power for a given period, without having to acquire and finance the necessary infrastructure.[3]

In cloud computing, users connect to the cloud, which appears as a single entity as opposed to the traditional way of connecting to multiple servers located on company premises.[4] The whole technology of cloud computing stand backed by the steady increase in the technological advancement in its full fledge. For instance, when plugging an electronic appliance to an outlet we care neither how electric power is generated nor how it gets to that outlet. This is possible because electricity is virtualized; that is, it is readily available from a wall socket that hides power generation stations and a huge distribution grid. When extended to information technologies, this concept means delivering useful functions while hiding how their internals work.[5] To one sect of people

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1 Dr. Mohammed A. T. AlSudiari& Dr. TGK Vasista, "Cloud Computing and Privacy Regulations: An explanatory study on Issues and Implications" 3 ACIJ 1 (2012).

2 David Linthicum, Understanding the Symbiosis of Cloud Computing, Big Data and Mobile, http://pro.gigaom.com/blog/understanding -the-symbiosis-of cloud-computing-big -data-and-mobile/, (last modified May 13, 2013).

3 Solange Ghernaouti, Cyber Power –Crime, Conflict And Security In Cyber Space 367 (EPFL Press, 2013).

4 Dr. Mohammed A. T. AlSudiari& Dr. TGK Vasista, *supra* note 1 , at 1.

5 I. Foster, "The grid: Computing without bounds", 88 SCIENTIFIC AMAZON 78-85 (2003).

cloud computing refers to accessing software and storing data in the cloud representation of the Internet or a network and using associated services. To others, it is seen as nothing new, but just a modernization of the time sharing model that was widely employed in the 1960s before the advent of relatively lower cost computing platforms.[6] To put in simple terms, cloud computing allows people to perform computing tasks using infrastructure in remote locations. For instance, the familiar cloud computing application is email services like Google's Gmail, which allows users to access email from any location.[7]

On the other phase of the story, cloud forensics is a cross discipline of cloud computing and digital forensics. Digital forensics can be defined as the application of computer science principles to recover evidence for presentation in a court of law. Thus, cloud forensics is a subset of network forensics[8] and a cloud computing is based on broad network access. Therefore, cloud forensics follows the main network forensics with techniques tailored to cloud computing environments.[9] To ensure service availability and cost effectiveness, Cloud Service Providers (hereinafter referred as CSP's) maintain data centers around the world. Data stored in one data center is replicated at multiple locations to ensure abundance and reduce the risk of failure. Also, the segregation of duties between CSP's and customers with regard to forensic responsibilities differ according to the service models being used. Adding to it, multiple jurisdictional concern for cloud forensics, creating additional legal challenges. Further, sophisticated interactions between CSP's and

6 Ronald L.Krutz&Russell Dean Vines, Cloud security- AComprehensive Guide to Secure Cloud Computing 1 (Wiley India Pvt. Ltd., 2010).

7 Ivana Deyrup& Shane Matthew, "Cloud Computing & National Security law",2 THE HARVARD LAW NATIONAL SECURITY RESEARCH GROUP 3 (2010).

8 Network Forensics deals with forensic investigation of networks.

9 Ruan, Keyun, Joe Carthy, TaharKechadi& Mark Crosbie, *Cloud Forensics* in ADVANCES IN DIGITAL FORENSICS 361 (Peterson, Gilbert & Sujeet Shenoi eds., 2011).

customers, resource sharing by multiple tenants and collaboration between international law and enforcement agencies are required in most cloud forensics investigations.

There are many areas of concern pertaining to cloud computing and cloud forensics challenges which include is he control, security and risk issues in the cloud. Another facet is in relation to protection of personal data in clouds and the aspect of consumer protection in cloud. Attributes like leakage and unauthorized access of data among virtual machines running on the same server, failure of a cloud provider to properly handle and protect sensitive information, release of critical and sensitive data to law enforcement or government agencies without the approval and or knowledge of the client, ability to meet compliance and regulatory requirements, system crashes and failure that make cloud services unavailable for extended periods of time. Hackers breaking into client applications hosted on the cloud and acquiring and distributing sensitive information, the robustness of the security protections instituted by the cloud provider.[10]

Defining cloud computing & cloud forensics:

In the last one to two decades, computing[11] applications have increasingly used applications that are not on the user's computer but that are located somewhere with application service providers, which offer services via the Internet. Increasingly, these providers do not merely store data on a local server, but in a distributed way across several servers

10 Ronald L. Krutz and Russell Dean Vines, *supra* note 6, at 153.

11 Computing refers to any goal-oriented activity requiring, benefiting from, or creating algorithmic processes through computers. Computing includes designing, developing and building hardware and software systems; processing structuring, and managing various kinds of information; doing scientific research on and with computers; making computer systems behave intelligently; and creating and using communications and entertainment media, also see David Evans, Introduction to Computing- Explorations in Language, Logic & Machines 1-16(2011).

or server parks. At some point, this model was termed cloud computing, in which the term cloud is based on the custom, in pictures of computing models, of using a cloud to graphically represent the network in which data processing takes place. Cloud computing to put it simply means Internet Computing. The internet is commonly visualized as clouds; hence the term cloud computing for computation done through the Internet.[12] Although the model of remote and distributed services is not new, the combination of characteristics of present-day cloud computing causes new challenges in many fields. The special combination of characteristics is captured in the US standardisation institute NIST's[13] (hereinafter referred as NIST) definition of cloud computing as,

> "a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."[14]

In simpler terms, cloud computing can be described as 'a way of delivering computing resources as a utility service via a network, typically the Internet, scalable up and down according to user requirements'.[15]

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12 Gurmeet Singh & Vineet Kumar Sachdeva, "Impact & challenges of Cloud Computing in Current Scenario", 1 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE & INTERDISCIPLINARY RESEARCH 131 (2012).

13 The National Institute of Standards and Technology (NIST), known between 1901 and 1988 as the National Bureau of Standards (NBS), is a measurement standards laboratory, also known as a National Metrological Institute (NMI), which is a non-regulatory agency of the United States Department of Commerce. The institute's official mission is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life.

14 Peter Mell and Timothy Grance, "The NIST Definition of Cloud Computing",http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf (last modified 6 September, 2011).

15 Wuhan Hon & Christopher Millard, *Cloud technologies and Services,* in CLOUD COMPUTING LAW 3 (Christopher Millard ed., 2013).

NIST also took the responsibility of defining digital forensics as an applied science for

> "the identification, collection, examination, and analysis of data while preserving the integrity of the information and maintaining a strict chain of custody for the data".[16]

Cloud computing forensic science is the application of scientific principles, technological practices which is derived and proven methods to reconstruct past cloud computing events through identification, collection, organization and reporting of digital evidence. In each step there are tools and techniques available. Traditional methods and tools of forensics cannot cope up with the cloud forensics because of the fact that the retrieval of the information, the major lead of any case, is diversely located and hence difficult to reach. Cloud computing is based on extensive network access, and network forensics handles forensic investigation in private and public networks. However, cloud forensics also includes investigating file systems, process, cash, and registry history. Every data is important for the investigation. So, in the collection phase, goal is to collect as much as data which is relevant to the -investigation.[17]

Understanding the Legal and Ethical threats entailed with cloud forensics

The whole process involved in the forensics including the discovery and acquisition of evidence in remote, elastic, provider-controlled cloud computing platforms differ from that in traditional digital forensics, and examiners lack appropriate tools for these tasks.[18] Before making further study we need to understand some core principles of digital forensic practice.

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16 Brian Carrier, "Defining Digital Forensic examination and Analysis Tools using Abstraction layers", 1 International Journal of Digital Evidence 2 (2003).

17 Prasad Purnayae," Cloud Forensics: Volatile Data Preservation",4 IJCSE 42 (2015).

18 Josiah Dykstra & Alan T Sherman, "Digital Investigation", 9 The International Journal of Digital Forensics & Incident Response 13 (2013).

As enunciated by the Association of Chief Police officers (Association of Chief Police Officers & 7 Safe, 2007)[19] there exists four principles of digital forensic practice:

i. No action taken by Law Enforcement Agencies (hereinafter referred as LEAs) or their agents should change data held on a computer or storage media, which may subsequently be relied upon in court.

ii. In circumstances where a person finds it necessary to access original data held on a computer or on storage media, that person must be competent to do so and be able to give evidence explaining the relevance and the implications of their actions.

iii. Other record of all processes applied to computer- based electronic evidence should be created and preserved. An independent third party should be able to examine that the law and these principles are adhered to.[20]

iv. The person in charge of the investigation (the case officer) has overall responsibility for ensuring that the law and these principles are adhered to.

The rise of cloud computing has not only aggravated the problem for digital forensic activities, but also created a set of multifarious challenges for cyber crime investigation.[21] In the public cloud delivery

19 The Association of Chief Police Officers (ACPO), provided a forum for chief police officers to share ideas and coordinate their strategic operational responses, and advise government in matters such as terrorist attacks and civil emergencies. ACPO coordinated national police operations, major investigations, cross-border policing, and joint law enforcement, 7 Safe is a PA group company, helps your organisation to develop, maintain and grow cyber security and information investigation capabilities increasing your overall trust in the systems that you operate, the information that you hold and the people who have access to it, also see ACPO GOOD PRACTICE GUIDE FOR DIGITAL EVIENCE, VERSION 5 (2011).

20 *Ibid*.

21 KeyunRuan, Cloud Forensics: An overview, Centre for Cybercrime Investigation, http://cloudforensics research .org/publication/ Cloud forensics An overview 7th IFIP.pdf (last modified 24 May, 2011).

model for instance, there is possibility that a transaction initiated on a web based accounting system of an Indian company may be processed in a foreign jurisdiction. The same transaction may be validated in a second foreign jurisdiction and the data may finally be stored in a third foreign jurisdiction. This becomes problematic for a digital forensic expert, as the transaction could be transacted in jurisdictions with limited desire to aid in such investigations, thus making it difficult to capture the digital footprint.[22]

Issues in the course of digital investigation in cloud:

The switching over to cloud environment and computing systems has raised myriad of challenges in the application of digital forensics in cloud environment. The following are the various encounters while a cyber investigation process is carried out in a cloud environment with reference to the Digital Forensic Research Conference Investigative Process (DIP) Model[23] and the ACPO digital forensic principles and guidelines.

A**. Challenges in the Process of Identification**:

The process of identification may result from complaints made by individuals, anomalies detected by Intrusion Detection System (IDS), monitoring and profiling. Although the identification phase is not just concerned with digital forensics, it does have an impact on how the

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22 Rhea Mathew, *Chasing the Clouds: Determining the Legal Issues Surrounding Cloud Computing,* Directive 2009/24/EC of the European Parliament thegiga.in/Link Click.aspx?fileticket=UmlVCmRhLOk%3D&tabid=589 (last modified April 12, 2009).

23 The First Digital Forensics Research Conference (DFRW) defined the term digital forensics and proposed the DFRW Investigative Process (DIP) Model, which they deemed could be applied to all investigations in both research and practitioners. This was the first attempt to define how a digital forensics investigation should be conducted. The model identifies a linear process, which includes stages ofidentification, preservation, collection, examination, analysis and presentation. Also see Palmer, G, "A Road Map for Digital Forensic Research", REPORT FROM THE FIRST DIGITAL FORENSIC RESEARCH WORKSHOP (DFRWS) (2001).

investigation is conducted as well as defining the purpose for conducting the investigation. In cloud environment there exist two types of infrastructure, private cloud and public cloud. In the case of private cloud infrastructure, the cloud service providers may be placed to tune the IDS for the particular suite of services deployed which meets the organization's needs. For public clouds, a multi layered strategy may be necessary. Users can monitor for suspicious events occurring with the services they are using. Providers can monitor the underlying infrastructure used to host the cloud, and therefore detect much larger attacks that could affect a much larger audience. Therefore, there exists lack of framework for identifying an illicit event.[24]

B. Challenges in the Process of Preservation and Collection of Evidence:

The preservation phase defines activities prior to data collection to ensure the integrity of data throughout the investigation life cycle. Several aspects of the preservation phase are affected by the use of a cloud environment as far as conventional investigations are concerned.[25] On the other phase, the use of the cloud environments will likely intensify the problem of data storage. An investigator may be fixed with gathering an extremely large amount of data placed in a cloud by a user. The existing solution as far law enforcement agencies are concerned is that they could resort to is the use of public clouds to store evidence. This too will bring its own challenges, from both legal and technical perspective. Indeed, the investigators need to address the rules and regulations for data protection and privacy issues, and their impact on evidence stored in the cloud. Thus, the major challenges with respect to preservation

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24 G. Grispos, T. Storer &W.B.Gilsson, "Calm before the Storm: The Challenges of Cloud Computing in Digital forensics", 4 INTERNATIONAL JOURNAL OF DIGITAL CRIME AND FORENSICS 28 (2012).

25 Richard & Roussev, "Next Generation Digital Forensics", 49 Communications of the ACM 76 (2006).

includes lack of specialist tools as in software tools and the encounter with regard to the storing of cloud derived evidence as it is distributed, virtualized and volatile in nature. Another crisis is in the chain of custody as there arise cross jurisdictional standards, procedures and proprietary technology challenges. Yet another crunch is with respect to media imaging since the imaging of all physical media in a cloud is impractical and adding to its partial imaging may face legal challenges. Further there exist more complex issues such as time synchronization as in evidence from multiple time zones.

Similarly, another issue is data stored in multiple jurisdictions and limited access to physical media by the LEA. Likewise there involves the crisis of lack of evaluation, certification generally, but particularly in cloud context. Adding to it with regard to acquisition of physical media from providers is cumbersome, onerous and time-consuming data is inherently volatile. Further there exist challenges as to data integrity as in lack of write blocking or enforced persistence mechanisms for cloud services and data.[26]

The following are some of the problems that could be faced in a cloud environment while collecting or analyzing evidence:[27]

i. Evidence needs to be collected in a manner that maintains the integrity of the data. In a cloud computing environment, this would translate to preserving the metadata.[28]

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26 G. Grispos, T. Storer &W.B.Gilsson, *supra* note7, at 7.

27 Donalee Moulton, "Legal Issues Reign in the Cloud",http:// www.nortonrose.com/files/legal-issues-reign-in-the-clouds-69688.pdf , (last modified July 5, 2004).

28 A metadata describes other data which provides information about a certain item's content. For instance, an image may include metadata that describes how large the picture is, the color depth, the image resolution, when the image was created, and other data. A text document's metadata contain information about how long the document is, who the author is, when the document was written, and a short summary of the document. Web pages often include metadata in the form of meta tag. Description and keywords meta tags are commonly used to describe the Web page's content.

ii. Consumers have decreased access to forensic data, which means that the cloud customer generally has no control or knowledge over the exact physical location of their data, and may only be able to specify location as an object or container identified. Thus, forensics investigators will not always be able to procure a physical device or media with relevant information as evidence.

iii. The sheer volume of documents in the cloud, makes narrowing down on the relevant document.

iv. The multiple tenancy models make extraction of one particular user's information very difficult. Confiscation of the hardware which has the information of unrelated users also complicates matters further as the investigation needs to be carried on without breaching the confidentiality of other tenants sharing the same infrastructure and ensure the admissibility of the evidence.

v. Fragmentation also makes it difficult to piece together a sequence of events and develop a time line, which are crucial for digital evidence.

vi. While analyzing evidence in the cloud, time synchronization is crucial that are used as source of evidence in the investigation. The cloud environment aggravates the issue of accurate time synchronization as time stamps must be synchronized across multiple physical machines spread in multiple spread in multiple geographical regions, between cloud infrastructure and remote web clients including numerous end points.[29]

vii. In digital forensic investigations, recovered deleted data is an important source of evidence. In a cloud environment however, deletion of an item and attribute data within a domain, causes removal of the mapping immediately and this is completed in a

29 G. Grispos, T. Storer &W.B.Gilsson, *supra* note7, at 10.

few seconds. Once the mapping is removed, remote access to the deleted data is also lost. Data elements are decided to create storage for future operations and it is likely that storage space will be overwritten by newly stored data. For instance, Amazon Web Service explicitly reserves the right to alter or delete the original snapshot for the account that created the volume.

C. Challenges in the Process of Analysis:

During the analysis phase of an investigation, the significance of information artifacts as evidence is evaluated. A narrative is developed, supported by the evidence and a time line to explain how a crime was committed. The evidence produced during the analysis may also be subject to validation, either through comparison with complementary sources, or with precious versions, to gain assurance that the evidence was not to be altered as a consequence of some analysis technique. There pertains the crisis with regard to privacy regulation and mechanisms implemented by providers as far as recovery of deleted data are concerned. Further the traceability and event reconstruction are another challenge as it involves events which may occur on many different platforms.[30]

D. Challenges in the Process of Presentation:

The evidence gathered during a digital forensics investigation can be summarized to explain the conclusions in the form of a report or briefing and these may then be submitted to a court and an investigator could be asked to provide expert testimony and be subject to cross-examination.[31] The standard places responsibility for assessing the reliability of testimony with the trial judge. The extent to which the

30 *Id* at p.8.

31 Carrier & Spafford, "Getting Physical with the Digital Investigation Process", 2 INTERNATIONAL JOURNAL OF DIGITAL EVIDENCE 2(2003).

method employed to produce evidence conforms to the principles of scientific method is used to guide judgments of acceptability. Expert witnesses could be faced with the additional challenge of having to explain the concept of cloud computing to a jury. The documentation of evidence is a challenging task as far as cloud environment is concerned as there occurs integration of multiple evidence sources in record. And similarly, there exists complexity of explaining cloud technology to jury.[32]

Cloud forensics challenges cannot be solved by technology, law, or organizational principles alone. Many of the challenges need solutions in all the three areas.[33] Several design and specifications and operational practices of cloud repositories may contribute to inaccuracies, evidence turn out to be tainted by forgery, falsification or other tampering leads to injustice. The security breaches in cloud data raises injustice and the imbalance with the existing digital forensics and laws paving way for adopting a proactive planning and developing techniques for tackling the same.

Issues with respect to unstable cloud architecture and forensic challenges:

The cloud repositories experience unstable system states. In a cloud system, files are constantly updated, moved to backup locations, and are repeatedly imaged, often at alternative locations. The creation of duplicates may enable here difficult forensic analysis of files at different levels. However, such multiple redundant copies may exist only for transitory times at which forensic analysis is not active. Therefore, cloud-based files, logs and associated metadata experience frequent changes. While some of this may be predictable and well documented, while others

32 G. Grispos, T. Storer &W.B.Gilsson, *supra* note 7 at 13.

33 DRAFT NISTIR 8006, NIST CLOUD COMPUTING FORENSIC SCIENCE CHALLENGES, csrc.nist.gov/publications/drafts/nistir-8006/draft_nistir_8006.pdf (last modifiedJune 28, 2014).

are random and unpredictable. These unstable system states undermine the credibility and forensic quality of evidence. Furthermore, such deficiencies manifest throughout the range of evidentiary disqualification authenticity, custodial integrity, best evidence, hearsay, exclusionary incompetence and relevance. The subpoenas[34] used by investigators as well as the document production demands made in civil litigation generally require accurate physical location data for targeted files, backups, responsible custodians, and knowledgeable supervisors[35]. Accurate and stable physical location data enables an understanding of a discovery target's system design and practices that informs all other discovery needs.

Justice concerns arise for cloud repositories that are physically located offshore, in faraway jurisdictions. Furthermore, the CSPs likely move data frequently to take advantage of cost savings, to permit rapid scalability, and to locate data in jurisdiction with lower regulatory burdens like privacy, security, record retention, disclosure duties. In the case of International Shoe Co. v Washington[36], it was observed that the migration of considerable information to the cloud raises opacity and imposes information accessibility challenges that may weaken traditional notions of fair play and substantial justice. The physical location of records has always been a challenge for judicial or regulatory authorities as they extend their reach to the physical location of information storage.

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34 A subpoena is a writ issued by a government agency, most often a court, to compel testimony by a witness or production of evidence under a penalty for failure.

35 Interrogatories frequently seek brand model, location and custodian information about computer and information processing systems to aid requesting parties in civil discovery in sharpening their identification of deposition targets and drafting deposition examination questions, as well as the refinement of production of documents.

36 International Shoe Co. v Washington, 326 U.S. 310 (1945).

Aspect of Multi-jurisdictional conflicts and forensic challenges

The networking of servers and applications in a cloud model causes data to be stored in many jurisdictions around the world, causing users to face the possibility that the laws of the land of different territories in which data are stored could enable local governments or other third parties to obtain access to the data, in contravention of the contravention of the contract between the cloud user and provider. The jurisdictional question is an important one because of the disparity in data protection laws in prevalence.[37]

In the case of Zippo Manufacturing Co. v Zippo Dot Com, Inc.,[38] the court formulated a sliding scale that stated that jurisdiction depended on the level of interactivity built into the website. Thus, passive websites[39] would not subject to jurisdiction merely because they were visible in the forum state, but that contracts involving knowing and repeated transmission of files to and from the forum state would support jurisdiction. The Zippo formula, while incomplete, provided the key for the convergence on a set of principles generally followed in hundreds of cases.[40]

In the decision of Clader v Jones[41], the US Supreme Court upheld that jurisdiction in California over out-of-state journalists based on a defamatory article they wrote about a California resident that was published in the National Enquirer. The court thus propounded the effects theory and found jurisdiction to be proper because California to be the place where the harm was suffered.

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37 Rhea Mathew, *supra* note 3, at 16.

38 Zippo Manufacturing Co. v Zippo Dot Com, Inc.,952 F Supp. 1119 (W.D. Pa. 1997).

39 Passive websites only provide information, do not solicit information and is not usually subject to personal jurisdiction in a foreign country.

40 GERALD FERRERA, CYBER LAW: TEXT AND CASES, 26 (2004).

41 465 US. 783, 789 (1984).

In another judgement, Himalayan Drug Company v Sumit[42], the plaintiff's website had a database of ayurvedic concepts and the whole range of products and herbs listing out the herbs, their properties and the medicines they were used in. The entire database had been copied by the defendant based out of Italy. The court exercised jurisdiction in this case notwithstanding the fact that defendants belonged to Italy. With the persisting issues at hand, cloud computing doesn't help to simplify any further by the constant movement of data. This makes it difficult for cloud providers and LEA to ascertain which regulations apply to them.[43]

Multi-jurisdictional or cross border law is intensifying the challenge of cloud forensics. The cloud service centers of the service providers are distributed worldwide. However, the privacy preservation or information sharing laws are not in harmony throughout the world, even it may be same in different states of a country. The muti-jurisdictional cross border issues came faced in several cloud forensics research works indeed is adding to the complexity and thus making the evidence collection process challenging.[44] In particular, such a process should not violate the laws of a particular jurisdiction. Furthermore, the guidelines of admissible evidence, or the guidance for preserving chain of custody can vary among different regions. It may happen that the attacker is accessing the cloud computing service from one jurisdiction, whereas the data he is accessing reside in different jurisdiction. Differences in laws between these two locations can affect the whole investigation procedure, from evidence collection, presenting proofs to capture the attacker. Moreover, for multi tenancy case, we need to preserve the privacy of the tenants

42 Himalayan Drug Company v Sumit , 126(2006) DLT 23, 2006 (32) PTC 112 Del.

43 William Denny, "Survey of Recent Developments in the Law of Cloud Computing and Software as a Service Agreement", 66 BUS. LAW 237 (2011).

44 S. Biggs and S.Vidalis, ".33Cloud Computing: The Impact on Digital Forensic Investigation", 4 ICITST 1 (2009).

when we collect data of other tenant, sharing the same resources. However, the privacy and privilege rights may vary among different countries or states.

In general, the powers exercised by LEA are expressly conferred by statute, and may be exercised either in the course of carrying out duties conferred upon the LEA, or require further and specific authorization, granted under judicial, executive, or administrative procedures. In urgent circumstances, such as those involving an imminent danger to life, an LEA may be permitted to exercise coercive powers without prior authorization or subject to special procedures, particularly where there is a risk that forensic material could be deleted by a suspect or the equipment on which it resides is vulnerable. Jurisdictions also often distinguish between standard LEA procedure and those applicable in cases involving 'national security' issues or agencies tasked with related duties.[45]

Jurisdictions can vary significantly in granting LEAs access to similar data types under different authorization procedures. In the UK, for instance, stored data is generally accessed under a judicial warrant[46], the interception of communications data occurs under an administrative authorization. By contrast, in the US, access to communication data requires a judicial warrant, while interception of foreign communications can be authorized by the executive. Where the LEA exercises conferred powers, the legislation granting such powers is usually expressly stated to be, or presumed to be, limited to the territorial jurisdiction of the domestic state as held in the case of R (Al- Skeini) v Secretary of State of Defence[47]. While the LEA would be acting unlawfully if it exercised powers outside the jurisdiction, a domestic exercise of powers may have

45 The concern as to what comprises an issue of national security is generally left to a state to determine.

46 For instance, Sec 9 of Police and Criminal Evidence Act 1984.

47 R (Al- Skeini) v Secretary of State of Defence, [2008]1 AC 153 (45).

an extraterritorial effect, which would not be considered unlawful Conversely, any domestic 'conditions and safeguards' controlling an exercise of LEA powers would also be generally limited to acts carried out within the domestic jurisdiction. In the decision of Zheng v Yahoo! Inc[48], where representatives of China Democracy Party tried unsuccessfully to bring an action for violation of the Electronic Communications Privacy Act (ECPA) of 1986; although whether such protections are available to 'any person' within the jurisdiction, or only nationals, can vary. In the case of Suzlon Energy Ltd v Microsoft Corp.[49], the court held that the ECPA protected the domestic communications of any person, not just US citizens.

Only two significant court cases were mentioned, the Yahoo! Case in Belgium[50] and the Rackspace case[51] in the UK, both are concerning law enforcement authorities directly contacting a foreign based provider. Although cloud computing was generally expected, both by the - international experts and the interviewees in the Netherlands, to create considerable challenges for investigation in the foreseeable future, there was thus a scarcity of actual cases that could illustrate the challenges of cloud computing for criminal investigation.

In the typical case of Belgian Yahoo! Case, in which Belgian law enforcement directly served an order on US- based Yahoo! to disclose webmail data of a Belgian user, which Yahoo! refused claiming that Belgium should use the formal MLATroute.[52] The case has ping-ponged

48 Zheng v Yahoo! Inc, 2009 WL 4430297.

49 Suzlon Energy Ltd v Microsoft Corp, 2011 US App 9th Circuit.

50 Openbaar Ministerial v Yahoo! Inc., Court of Appeal Antwerp 20 November 2013.

51 Orgoo, Inc. v. Rackspace US, Inc., 341 S.W.3d 34, 41.

52 MLAT route is a navigation technique based on the measurement of the difference in distance to two stations at known locations that broadcast signals at known times.

back and forth between the Supreme Court and three Courts of Appeal Antwerp decided that Yahoo! should comply with the order as it offers its webmail services also in Belgium. The fact that it does not have an office or residence in Belgian Supreme Court, which claimed that the fact that the order was sent from Belgium to an addressed abroad did not make the order unlawful.[53] The argument for this decision has been criticized, however, as arguments relating to substantive jurisdiction seem to have been confused with arguments relating to procedural jurisdiction. Yahoo!'s place of residence was not relevant for the decision as to whether a material obligation existed for Yahoo! to cooperate with an order to provide data[54]. However, the place of residence is relevant for the decision how the order can be served on Yahoo! in relation to procedural question of how compliance by Yahoo! with an order can be enforced.

The second interesting case is the Rackspace case, in which Italian law enforcement ordered, through a Mutual Legal Assistance (hereinafter referred as MLA) procedure[55], the US based hosting and cloud company Rackspace to produce data concerning Indymella, a media organization. Relevant for the purpose the requested files were not stored in the US but in the UK, and the pursuant to the other order Rackspace shut down the entire host server in the UK and delivered the drives to the FBI. UK authorities were not involved in the process at all, implying that the

53 The Supreme Court although seemed to leave open the question of whether the order was legally binding- a question that the Court of Appeal now has answered affirmatively.

54 As in with respect to substantive question of whether Yahoo! 's refusal violated the Belgian provision on not cooperating with a lawful order- the order was lawful, as Yahoo! provided services in Belgium and could therefore be addressed to provide relevant data in Belgian proceeding.

55 A MLA is an agreement between two or more countries for the purpose of gathering and exchanging information in an effort to enforce public laws or criminal laws .Also see Andrew K. Woods, *Data Beyond Borders- Mutual Legal Assistance in the Internet Age* ,www.globalnetworkintiative.org , (last modified January 6, 2015).

legality of this action under English law was not considered. Although such extraterritorial effects of lawfully given orders are considered by some as a potential infringement of sovereignty of the state on whose territory the data are stored, others consider it an acceptable practice that providers can give data stored in another state but under their control to law enforcement authorities without resorting to MLAT or seeking approval from the foreign state.[56]

The menace in relation to cloud security & privacy

As the cloud computing architecture becomes more prevalent, unless users are confident their data will be secure, used only for limited purposes, and often remaining anonymous, they will resist cloud computing. In the United States, end user privacy within cloud computing is currently dependent upon self -regulated company specific privacy policies implemented within a legal structure geared towards protecting involuntary disclosures of private information. While users of cloud computing applications are technically making public information they regard as private, be it social network expected to be only be read by friends or the content of e-mail messages, pages of books browsed, or the content of searches they are unwittingly abandoning their right to privacy for that information. The backlash against cloud computing providers is only beginning. Those who initially considered Facebook to be private, gated community of trusted friends now see it as becoming increasingly open, public commons of curious strangers.

The end user privacy within cloud computing dependent upon self- regulated company specific privacy policies implemented within a legal structure geared towards protecting involuntary disclosure of private information.[57]

56 Koops & Goodwin, Cyberspace, The Cloud, And The Cross- Border Criminal Investigation 40 (2014).

57 In 2009, anothertwo-incident occurred: In Twitter, 2009, several Twitter corporate and personal documents were ex- filtered to technological website TechCrunch

In the famous Sony Play Station, 2011, a hacker used Amazon's Elastic Computer Cloud, or EC2 service to attack Sony's online entertainment systems. Over a 100 million customer account files containing credit and debit card information were compromised when the hackers infiltrated the cloud site and improperly accused the sensitive account information. This case stands as unique because the hackers had set up a legitimate account with the cloud computing site, although with phony identifying information and fraudulent intentions, as opposed to hackers who anonymously hack into other networks or systems. This attack cost Sony over more than $1 Billion.

In yet another case, Epsilon, 2011, another cloud- security breach involved Epsilon, a company that provides e-mail services to other businesses and handles more than 40 billion e-mails annually for more than 2000 global brands. Epsilon indicated that though clients' customer data were exposed by an unauthorized entry into the company's email system, the information that was obtained was limited to email addresses and customer names only, and no other personally identifiable information associated with those names was at risk.[58] Among the

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and customer's accounts, including the account of U.S President Barack Obama, were hacked into. The attacker used a Twitter administrator's password to gain access to Twitter's corporate documents hosted on Google's infrastructure as Google Docs, causing significant damage to Twitter and its customers. Also see, Salcotore J. Stofio, "Fog Computing: Mitigating Insider Data Theft Attacks in the Cloud",http://www.cs.columbia.edu/angelos/Papers/2012/FogComputing Position Paer WRIT 2012.pdf , (last modified October 12, 2012).

In another case Google FTC complaint, 2009, the Electronic Privacy Information Center (EPIC) filed a complaint with the Federal Trade Commission (FTC) regarding the cloud computing services offered by Google, Inc. The complaint alleges that Google does not adequately safeguard the confidential information it obtains from its users. EPIC's complaint pointed out several known flaws with Google's cloud-based services. These include disclosure of documents to users who lacked permission to view them; security flaws in Gmail that exposed usernames and passwords to theft, the exposure of user's personal data to malicious Internet sites; flaws that could allow malicious sites to gain control over users' systems.

58 Jorgen Wouters, *Massive Hack of Top E- marketer may Leave Million Open to Phishing Attacks,*http://www.dailyfinance.com/2011/04/04/massive-hack-of-top-e-marketer-may-leave-millions-open-to-phish/ , (last modified on April 3, 2011).

company's customers are three of the top ten US banks, as well as other financial institutions. So, while most saw Epsilon only as an email provider or customer complier, it was essentially a cloud provider, which meant that a breach of its systems meant a breach of the information of all its customers.

In the well-known Gmail issue, 2011, over a 1, 60,000 Gmail users had their accounts deleted. The data was restored, but accounts remained unavailable for days. With loss of data on one hand may not be that catastrophic but when it leads to security breach and privacy invasion then it is a matter of drastic consequence.

Cloud derived evidence in conflict with the Laws of Evidence

Rules of evidence and the attitude of the courts operate so as to either deter or tolerate inappropriate conduct by LEAs. Data obtained from a cloud- based service may be excluded from use in criminal proceedings on a number of grounds.[59]

For instance, in UK, evidence obtained through interception of communications is generally inadmissible if carried out by UK LEAs, while admissible if obtained by foreign LEAs.[60] In addition, courts generally have jurisdiction, granted by statute for instance Criminal Procedure Code or inherent to the court to exclude evidence in certain circumstances if that evidence is considered to undermine or cause real prejudice to the defendant's right to a fair trial. The cloud derived evidence if obtained on breach of law, evidence gathered by an LEA may be excluded, either as a matter of law or at a discretion of the court. Such a breach may result from the conduct of an LEA investigator exceeding the jurisdiction granted to the LEA, or the conduct itself being

59 Daniel Buller & Mark Whittow, "Cloud computing: Emerging Legal Issues, Data Flows and the Mobile User", 2 LANDSLIDE 54 (2010).

60 R v P et al., (2001) 2 All ER 58.

illegal under the relevant criminal code. In terms of the former, considerations of exclusion will often depend on whether the conduct was an intentional flaunting of the applicable rules or simply a mistake made in good faith.[61] The legality of conduct may of course differ between different jurisdiction where the evidence was obtained, and the domestic jurisdiction where the evidence is being adduced, and this may impact on the domestic court's treatment of such evidence. In UK, for instance, a breach of foreign legal procedures would only lead to the exclusion of real evidence if the nature of the breach was considered to amount to an act of bad faith on behalf of the domestic LEA.[62] On the other hand, in the US, a request for evidence obtained from a foreign computer system to be supposed on the grounds that it breached constitutional protections and was denied by the court on the ground that the protection was not applicable to property outside the US.[63]

Therefore, as a general rule, evidence gathered under the formal MLA procedures will subject to the same rules of admissibility in the requesting state as evidence obtained domestically. As a consequence, defendant is generally only protected by the lowest threshold of admissibility threshold; with evidence rules of the foreign state generally being ignored in the requesting states. Even if they impose a higher admissibility threshold; while evidence obtained by unlawful means abroad, which would be inadmissible if the conduct occurred domestically, is admissible before the domestic courts.[64] In addition through MLA procedures are available both to the prosecution and defense, mechanisms designed to streamline the efficiency of these

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61 Herring v US ,555 US 135 (2009).

62 R Loof, *Obtaining Adducing and Contesting Evidence from Abroad: A Defense Perspective on Cross- border Evidence*, 1 CrimLR 40 (2011).

63 US v Gorshkov, 2001 WL 1024026 (WD Wash 2001).

64 C Gane and M Mackarel, *the admissibility of Evidence Obtained from Abroad into Criminal Proceedings- The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained,* 4 EUR J CRIME, CRIM L & CRIM JUST 98(1996).

procedures are generally put in place to assist the prosecution, potentially undermining the 'equality of arms' required the right of fair trial.[65]

Even if admissible in court, the evidential weight given cloud-derived evidence will often depend on the ability of the party adducing the evidence to show that the material is authentic, has integrity, and an appropriate account can be rendered of how the material was handled, from the moment it was obtained until its presentation in court. All computer- derived evidence is vulnerable to alteration and, in a cloud environment, service providers may be required to verify the provenance of data purportedly obtained from their services.[66]

In United States, where data of social networking sites is stored using a cloud computing service, courts have ordered that such data be disclosed if it is relevant to the proceedings. In National Economic Research Associates, Inc. v Evans[67] email communications exchanged between an employee and his lawyer sent over a laptop computer owned by the business via the employee's personal web-based email account and protected by a password were the subject of privilege. In Romano v Steelcase, Inc.[68], where, in an action for injuries sustained as a result of a motoring accident, the defendant obtained an order to obtain relevant personal information uploaded by the claimant on the social networking websites Facebook and My Space to counter the claim by the claimant that she had suffered permanent injuries.

Cloud computing technology Benefits and grey shdes of:

The rationale for switching over from traditional IT to the cloud can be justified by many reasons. It indeed increases the capacity or

65 Jespers v Belgium,(1981) 27 DR 61.

66 Ian Walden, *Law Enforcement Access to Data in Clouds* in CLOUD COMPUTING LAW 285 (Christopher Millard ed., 2013).

67 No. 04-2618-BLS2, 2006 WL2440008,

68 907 N.Y.S.2d 650.

capabilities without inventing in new infrastructure, training a new personal, or licensing or software. The advantages includes the removal or reduction of capital expenditure, reduced administrative costs, improved resource utilization, scalability of demand, quick and ease in implementation, aids smaller business compete, quality of service, guaranteed uptime, ease of access from any part of the globe, technical support by CSP's round the clock and most importantly disaster recovery or backup. And on the other side of the coin, the demerits associated with the cloud includes cyber security and privacy concern[69], conflicts with existing data protection and evidential laws, instability with respect to cloud architecture, a more serious concern of multi-jurisdictional challenges, the regulatory and compliance restrictions, governance and management issues and whole technology is continuously evolving.

Therefore, cloud computing technologies have significant potential to revolutionize the way organization's provision their information technology infrastructure. As to my analysis, despite its growing influence, the benefits outweigh the drawbacks and the model is worth exploring, even though some of the demerits cause a slowdown when delivering more services in the cloud.

Cloud forensics, as a separate discipline: A necessity

As the cloud technology is rapidly advancing and cloud computing and its security concerns is becoming one of the most controversial issues in the information technology field. The reason behind its specific safeguard is the shift of many organizations towards transferring their data to the cloud as it presents many promising technical and economic benefits. And there necessitates to build up investigative techniques exclusively for cloud owing to its novelty. Certainly, cloud computing is

69 Gellman D, *Who has Legal Jurisdiction in the Cloud?*, available at http://www.gplus.com/legal-issues/insight/who-has-legal jurisdiction-in-the -cloud-50084 , (last modified 12th October 2014).

posing critical risk and challenges to digital investigators, but at the same time it provides plenty of opportunities to investigators for improving the digital forensics. The distinctive challenges which are just unique for cloud forensics includes data replication, location transparency, multi tenants, collection of trustworthy evidences etc. There are undeniably alerting the institutional frameworks to advance the efficacy and speed of forensic investigations.

Technology is a double edged sword that can be used in economic sustainability, to assist in the arrest of cyber criminals etc., and there are various tools that can assist LEA's in investigating cybercrime cases and in cybercrime evidence collection, drafting and creating hard evidence. However the same technology maybe used by cyber criminals to commit offences. The forensic tools may be used by these cyber criminals to conceal their tracks. For instance, a criminal may use the disk wipers to clean the hard disks rendering forensic tools immobilized to recover evidence.

Conclusion

Cloud computing, a leading and widely adopted technology in industry, unveils some unprecedented challenges to myriad of aspects. Rather than procuring, deploying and managing a physical IT infrastructure to host their software applications, organizations are increasingly deploying their infrastructure into remote, virtualized environments, often hosted and managed by third parties. This development has significant implications for digital forensic investigator, equipment vendors, law enforcement, as well as corporate compliance and audit departments. It is a question of huge concern to the cyber investigators with a series of challenges at the fore front.

On a brief note, as in with regard to the legal challenges, there exists a lack of framework during the course of digital investigation during

the process of identification, preservation and collection of evidence. Adding to it, the instability in the cloud architecture and networking of servers being spread across the globe; there arises transborder multi jurisdiction issues. More importantly as in with respect to ethical controversy the security and privacy issue in a cloud. Another legal threat is the conflict of the existing framework with the conventional evidential laws. There are multitude of challenges and complexities of problems which persist. By analyzing the challenges and existing solutions, we can make a conclusion that CSPs need to put their heads up to resolve most of the issues. There is very little to be done from the customer's side other than application logging.

All other solutions are dependent on CSPs and the policy makers. For forensics data acquisition, CSPs can shift their responsibility by providing robust API or management plane to acquire evidence. Legal issues also hinder the smooth execution of forensic investigation. We need a collaborative attempt from public and private organizations as well as research and academia to overcome this issue. Solving all the challenges of cloud forensics will clear the way for making a forensics-enabled cloud and allow more customers to take the advantages of cloud computing.

Protection Rohingyas through International Adjudication – Decoding Provisional Measures of International Court of Justice in The Gambia vs. Myanmar.

Swargodeep Sarkar*

Abstract

United Nations Secretary-General Antonio Guterres acknowledged Rohingya, "one of, if not the, most discriminated people in the world". In Myanmar, a country with a Buddhist majority, around a million Rohingya who are the minority having their language and culture, have been persecuted for decades. In the year 2014 census, Myanmar excluded Rohingya by denying basic citizenship. Thousands of Rohingya have fled to neighbouring States after facing persecution orchestrated by Myanmar security forces with the help of local Buddhist mobs. In this background, the Gambia with the help of Organisation of Islamic Cooperation filed the case in the International Court of Justice, alleging that the actions perpetrated by Myanmar violated the provisions of Genocide Convention 1948 to which both States are the parties. Myanmar rightly questioned the standing of Gambia as the interest of Gambia was not threatened or at stake. So, in the absence of a cause of action or rights of Gambia not affected even remotely, the International Court of Justice should not entertain the case. One of the major issues before the Court whether Gambia has stood without being affected directly from the violations alleged to have been committed on the Rohingya. The present author will discuss the provisional measures rendered by the ICJ on 23rd

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January 2020 and the challenges such as jurisdiction, admissibility, urgency or irreparable prejudice condition, faced by the Court with a special focus on the "Plausibility requirement" in provisional measures.

Introduction

The International Court of Justice (ICJ/Court) on 23rd January 2020, had delivered its order on the request for provisional measures in the case The *Gambia* v. Myanmar.[1] The decision was rendered in response to the proceedings initiated on 11th November 2019 by the Gambia concerning alleged violations of the Genocide Convention 1948[2] (herein after referred a Convention) by Myanmar. The application was also contained a request for the indication of provisional measures which was submitted under Article 41 of the Statute[3], and Articles 73, 74, and 75 of the Rules of the Court[4] seeking to preserving the rights of the claimant under the Convention till Court decides the disputes amicably. The applicant is required to satisfy the court on the following aspects for the indication of interim relief *pendent lite*; first, the Court has prima facie jurisdiction in respect of claims; second, imminent risk of being harmed irreparably; third, the rights must be plausible; fourth, chance that prejudice could take place prior to final determination of the dispute. In this case analysis, critically examine whether granting provisional measures order the court satisfied all the above-mentioned requirements and will point out, how and to what extent the dimension of the provisional measures is changing in the present context of international law.

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1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), the Request for the Indication of Provisional Measures, 23rd January, International Court of Justice.

2 Convention on the Prevention and Punishment of the Crime of Genocide of 9th December 1948.

3 Statute of International Court of Justice 1945.

4 Rules of the Court, adopted on 14th April 1978 and entered into force on 1st July 1978.

A. Invoking the ICJ jurisdiction –

The Gambia besought jurisdiction of the Court pursuant to Article 36(1) of the Statute and Article IX of the Convention. Article IX of the Convention provides that disputes relating to interpretation, application or fulfillment of the Convention between Contracting parties shall be submitted to the ICJ by any disputant parties.[5] Thus the jurisdiction of the Court is preconditioned with that there must be an existing dispute at the time of triggering the ICJ jurisdiction.[6] It is to be noted that both Gambia and Myanmar are the parties to the Genocide Convention. While Gambia acceded to the Convention without making any reservations on 20th December 1978, Myanmar deposited its instrument of ratification with reservations to Articles VI and VIII on 14th March 1956.

According to Gambia there is a dispute exists with Myanmar as to the interpretation and application of the Convention. It contends, during "clearance operation", Myanmar military and security forces committed mass murder, rape, and other forms of sexual violence on the Rohingya group and systematically burned Rohingya villages in the Rakhine State. Although Myanmar had prior knowledge about the disputes as the Rohingya crisis in Rakhine state was pondered upon in the international fora, it rejected and opposed the violations of the Genocide Convention. Gambia communicated a Note Verbale on 11th October 2019 reminding Myanmar its obligations under the Genocide Convention but Myanmar kept silent on the issue. Even Myanmar rejected the IIFFMM's[7] report on Rohingya catastrophe.[8]

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5 Supra note 1. Paras 17 and 18.

6 *ibid* para. 20.

7 In March 2017, Independent International Fact-Finding Mission was established by the Human Rights Council of the UN to enquire and make reports on facts and circumstances of the alleged human rights violations by military and security forces of Myanmar.

8 Supra note 1. Para. 22.

In response, Myanmar argued that the Gambia instituted the proceeding as a proxy of the Organisation of Islamic Cooperation in circumvention of Article 34 of the ICJ Statute. According to Myanmar the OIC documents relied on by Gambia to make a case of alleged genocide did not violate the Convention as such there is no dispute arises between the parties. Regarding the Note Verbale, it contended that Myanmar was not obliged to respond as the same did not specifically alleged violations of the Convention. Thus, the Court cannot deduce the existence of dispute from its silence, Myanmar opined.[9] So, the Court manifestly lacked jurisdiction in the absence of a dispute and should not entertain the case.

The ICJ noted the case is filed by Gambia in its own name and sought to protect rights under the Convention and obtained help of any State or organization, may not take away existence of disputes between them. It is held that existence of a dispute is a matter for objective determination and a matter of substance. To ascertain the existence of the dispute at the time of filing the application, the Court had taken into account and weighed the statements, documents exchanged between the disputants and at multilateral level. Myanmar characterized the report of Fact-Finding Mission as flawed and biased in the General Assembly just a couple of days later when the Gambia expressed willingness to lead the Rohingya crisis to the ICJ. This clearly points out the divergence of views between the disputants concerning the events which allegedly took place in the Rakhine State. In this respect the Court said, "*a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated expressisverbis . . . the position or the attitude of a party can be established by inference, whatever the professed view of that party*".

9 *ibid* para 23.

The Court inferred the existence of dispute due to Myanmar's denial to respond over alleged severe breach of the obligations under the Convention and customary international law. The Court held in Marshall Islands vs. India (Jurisdiction and Admissibility) 2016,[10] "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".

In response to Myanmar's argument that in the absence of genocidal intent, it cannot be said that Myanmar has breached obligations owed under Convention, the Court held that to indicate provisional measure it is enough if alleged acts complained are capable of falling within the provisions of genocide convention. A few acts complained are capable of falling under the Convention, the Court noted.[11] After discussing the above-stated points, the ICJ concluded the prima facie, there is existence of dispute relating to the interpretation and application of the Convention.[12]

ICJ rejected Myanmar's contention that the case cannot be brought to the court under article IX, but only through article VIII the disputant State may bring the dispute the to the Court. Since there is a reservation on article VIII by Myanmar, Gambia cannot validly use the provision. The Court held that both articles have distinct application and the present case was brought under article IX of the Convention to which Myanmar did not make any reservation.[13] The Court concludes that it has prima facie jurisdiction over the dispute pursuant to article IX of the Convention.

B. *Obligatio Erga Omnes Partes* and Gambia's Standing –

Myanmar argued since it is the right of inured State to decide how to invoke responsibility, Gambia being not specifically affected by the

10 *supra* note 1. Para.28.

11 *ibid* para. 30.

12 *ibid* para. 31.

13 *ibid* para. 35.

alleged acts, it lacked capacity to bring the dispute to the ICJ. It further contends that Bangladesh could invoke jurisdiction of the ICJ as being affected directly by the alleged violations but prevented as it has made reservations on article IX of the Convention.[14]

Gambia relied on the case Belgium v. Senegal[15] where the Court recognized the capacity of Belgium to trigger ICJ jurisdiction for alleged violations of *obligatioergaomnespartes* of Convention against Torture by Senegal without going into to decide whether Belgium specifically affected by the alleged breaches. It further opined that obligations under the Genocide Convention are *ergaomnespartes* in nature and any State party to the Convention is entitled to protect interest and invoke responsibility of another State party.[16]

Recalling its earlier advisory opinion[17], the Court held that States parties to the Convention have a common interest to ensure acts of genocide are prevented and the wrongdoers should not go unpunished. It further noted, the obligations under the Convention are *ergaomnespartes*. Thus, not only the specifically affected States but also any State party to the Convention may bring the case by invoking responsibility of another State party for alleged breaches of the obligations *ergaomnespartes* in nature.[18] Keeping this in mind of shared values to protect the same interest, the ICJ held that prima facie, Gambia has standing to submit the dispute to the Court.[19]

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14 *ibid* Para. 39.

15 Obligation to Prosecute or Extradite (Belgium v Senegal), Provisional Measures 2009, ICJ.

16 *supra* note.1, Para. 40.

17 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951.

18 *ibid* para. 41.

19 *ibid* para. 42.

C. The Irreparable Prejudice and Urgency Condition –

The Court shall only indicate provisional measures when there is an urgency; that means there is an imminent risk of irreparable prejudice will be caused to the applicant. Thus, it is important to meet this condition before the Court and the Court shall weigh whether such risks prevail at this stage of proceedings.[20]

According to Gambia the Rohinya group is subjected to acts of genocide and anytime they will again be subjected to the genocidal acts since Myanmar has not stopped harboring such acts. Thus, the rights of Rohingya and its own rights under the Convention are in serious risk of being prejudiced irreparably.[21]

Myanmar submitted there is no such urgency on two counts. First, they are engaging in repatriation initiative with Bangladesh for the returning of displaced Rohingyas taking refuge in the territory of Bangladesh, second, if there is a grave danger, it would not receive international support in the reconciliation process. It assured the Court that the perpetrators of the genocide would not go unpunished and at last the indication of provisional measures might ignite the internal armed conflict in Rakhine State and demoralize the current efforts being taken.[22]

The rights in question before the Court such as right to be protected from killings and other acts which threatened the very existence of the Rohinya group, are capable of being irreparably harmed. The Court observed the Fact-Finding Mission's report which revealed as a protected group Rohinyas are subjected to mass killings, widespread rape, and other sexual violence, denial of food and shelter.[23] The Court noted

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20 *ibid* para. 55.

21 *supra* note. 1, para 67.

22 *Ibid* para. 68.

23 *Ibid* para 71.

Rohingya in Myanmar are extremely vulnerable and substantiated its views by UNGA Resolution 74/246 of 27 December 2019.[24] Although the Court took a note that Myanmar is engaging in repatriation and reconciliation process with displaced Rohingyas for bringing them back and holding perpetrators guilty for their alleged misdeeds, it appeared insufficient for the Court. Still the Court found that there is a chance of being irreparably prejudiced of the rights invoked by Gambia for protection of Rohingya. The ICJ expressed its dissatisfaction with Myanmar's measures taken in respect to protecting the rights of Rohingya as a protected group.[25] As such, the Court reached the conclusion that there is a real and imminent risk of irreparable prejudice to the rights invoked by Gambia.[26]

D. Plausibility of rights or Plausibility of Claims – The Changing Dimension of The ICJ Jurisprudence –

Since the LaGrand Case[27] where the Court affirmed that its provisional measures are binding in nature[28], the jurisprudence of the Court relating to interim measures has developed and enriched significantly. One of the aspects the Court has been engaged utmost vigorously in recent past is that of plausibility requirement.[29] A test comparable to plausibility was introduced for the first time when ICJ declared that provisional measures will be indicated only when the Court satisfied that rights claimed are at least plausible.[30] Although the Court

24 *Ibid* para 72.

25 *Ibid* 73.

26 *Ibid* 75.

27 Germany vs. US 2001, ICJ.

28 *Ibid* para. 102.

29 Cameron Miles, Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice, British Yearbook of International Law, bry011.

30 *supra* 15. Para. 57.

categorically held that at this stage it need not to establish the existence of rights definitively and also refrained from determining the capacity of Belgium to invoke those rights.[31] As early as 1991, in the Separate Opinon, Judge Shahabuddeen opined, a prima facie case has to be established and exhibit the existence of possibility of rights.[32] This requirement was originated in the separate opinion of Judge Abraham appended to the Pulp Mills case.[33] According to Judge Abraham, the Court carry some minimum review on merits to determine the existence of rights and possibility of being violated irreparably.[34] The Court reiterated its earlier position again in Timor-Lestevs. Australia[35], the Court is not required to establish definitively, that the rights which are sought for protection exist. The rights are plausible if the Court shows, there is a link between the rights claimed on merits and for which it seeks protection.[36] The court went on a minimal review on merits and held that at least some rights for which the Timor-Leste seeking protection are plausible.[37]

Thus, mere claiming of rights is no sufficient for invoking provisional measures. The rights in reality must exist in international law and the applicant must be capable of possessing them. The threshold of proving at this stage is lower compared to the merits phase. It does

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31 *ibid* para. 60.

32 Separate Opinion, Judge Shahabuddeen, Case Concerning Passage through Great Belt (Finland vs. Denmark) 1991, Provisional Measures, ICJ.

33 Massimo Lando, Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice Leiden Journal of International Law (2018), 31, pp. 641–668.

34 Separate Opinion, Judge Abraham, Para. 8. Pulp Mills on the River of Uruguay (Argentina vs. Uruguay) 2006, Provisional Measures.

35 Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Australia), Provisional Measures, 2014.

36 *supra* note. 35, para. 26.

37 *ibid* para. 27, 28.

not depend upon success of the applicant in the merit stage. As Judge Greenwood aptly pointed out, "*What is required is something more than assertion but less than proof; in other words, the party must show that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be adjudged to apply to that party's case*".[38]

A new development had been observed in Court's plausibility jurisprudence in *Ukraine* v. Russia.[39] In this case, ICJ shifted from legal plausibility; i.e. legal evaluation of existence of rights sought to the plausibility of claims; i.e. a factual calculation of facts and circumstances which could possibly breach the rights asserted. Although the Court insisted that it would indicate provisional measures if the rights claimed are at least plausible and must not be in existence definitively, the ICJ went on to examine the evidence at length whether the conducts of respondent could violate the rights.[40] In this case, the Court held that Ukraine had failed in plausibility test, not because of its rights does not exist in international law but because it failed to provide sufficient evidence before the Court.[41] Thus, it is well be witnessed that the Court, in this case, has raised the threshold for the applicant for proving a before it could ask for interim relief.

i. Gambia's Assertion based on Plausibility of Rights –

Gambia contended, its claims are plausible and there is a link between the object and purpose of the Convention and the right sought

38 Declaration of Judge Greenwood, para. 4, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica *v.* Nicaragua), Provisional Measures, 2011.

39 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order 2017, I.C.J.

40 *Ibid* para. 63.

41 *Ibid* para. 74 and 75.

for protection. According to Gambia, genocidal intent and the acts of genocide can be deduced from the sufficient evidence and material it produced before the Court. Gambia rested the case on lower threshold or the minimal review of evidence and material. Gambia stated, the Court shall not refuse jurisdiction if there is another possibility other than genocidal intent as this is the matter of merit stage.[42]

ii. Myanmar's Assertion based on Plausibility of Claims –

Contention of Myanmar was not based on plausibility of rights. It argued that the Court shall grant provisional measures only if the claims of Gambia based on alleged facts are plausible. Myanmar contended that there must be a link between the plausible claim and genocidal intent. This specific subjective element distinguishes genocide from other crimes under international law. A higher threshold is maintained by Myanmar, it contended that the Court should take into account the exceptional gravity of the alleged violations in assessing whether the required level of plausibility is met. Myanmar claimed, in the absence of sufficient material and evidence, the applicant failed to establish the acts plausibly committed with the specific genocidal intent.[43]

iii. Court's Reasoning on the Plausibility –

Court conditioned its power to exercise granting provisional measures only if the rights for which applicant seeking protection are at least plausible.[44] ICJ held that it should not inquire into the existence of rights definitively. Gambia only has to show the rights sought on the merits are at least plausible and a link exists between the rights and the provisional measures requested.[45] After a thorough review of the

42 *supra* note 1, para. 46.

43 *supra* note 1, para. 48.

44 Ibid para. 43. ICJ referred to the case, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, 2018, I.C.J.

45 *ibid* para. 44.

Convention, the ICJ declared – Convention protects members of national, ethnical, religious, and racial from the acts of genocide; rights of group members protected, the obligations imposed on the contracting parties, and the rights of any State party to seek compliance are correlated.[46] Then, ICJ went on to review the documents and reports of General Assembly and Fact-Finding Mission on the situations of Rohingya in the Rakhine State submitted by Gambia. In this sense, the Court tried to establish whether the facts and circumstances enumerated in the UNGA Resolutions and Reports of IIFFM could possibly violate the rights protected under the Convention.[47] The Court rejected the Myanmar's argument that the more is the gravity of the allegations, i.e. Genocidal intent; higher is the threshold of proving the same. It was held, the evidence produced before the Court was sufficient for the granting of provisional measures. The ICJ found that rights for which Gambia seeking protection; the obligation of Myanmar to which Gambia seeking compliance are correlated and as such "plausible".[48]

E. What the ICJ Ordered –

After having been satisfied with all the prerequisites of granting interim relief, the Court agreed to indicate provisional measures.[49] After analyzing the facts and circumstances, the Court declared the measures requested and the measures to be indicated are not required to be identical.[50] The ICJ indicated following measures to be followed by Myanmar – a) Myanmar, in complying the obligations under the Convention, must take all measures within its power to prevent genocide of Rohingya group;[51] b) Myanmar must ensure that military, any irregular

46 *ibid* para. 49 – 52.

47 *ibid* para. 53 – 55.

48 *ibid* 56.

49 *supra* note 1, para. 76

50 *ibid* para. 78.

51 *ibid* para. 79.

armed forces under its control do not commit any acts of genocide, incitement or attempt to commit genocide, conspiracy to commit genocide;[52] c) It also has to take measures not to destroy evidence and preserve the same;[53] d) Myanmar is required to submit a report within four months on the steps taken by it in compliance of the order.[54] The Court gives Gambia opportunity to comment upon the Myanmar's reports on measures taken.

F. Conclusion –

The compliance of the decisions of the Court is largely based on the willingness and the goodwill of the disputant States. However, UNSC as a guardian of the world peace, has been endowed with a central role to play in enforcing the Court ruling under Article 94 (2) of the UN Charter. Article 94 (1) incumbents an obligation upon disputant parties to comply with the decisions of the Court. In the circumstances of noncompliance with the decision of the ICJ, the aggrieved State may approach to the UNSC for the enforcement of the judgment. Conspicuously, the UN Charter is silent on the measures which could be appropriate for the enforcement of the ICJ decision. Thus, UNSC enjoys the widest possible discretion on recommending or asking measures which should be taken by the disputant party to comply with the decision. The UNSC receives provisional order under Article 41 (2) of the ICJ Statute once the Court declared ruling. It is apparent that Myanmar government was not pleased with the Court decision. In a press release Myanmar revealed, an Independent Commission of Enquiry found that war crimes took place and not genocide in the Rakhine State and the national courts of Myanmar are investigating the crimes. It also mistrusted the veracity of reports of international agencies which assisted

52 *ibid* para. 80.

53 *ibid* para. 81.

54 *ibid* para. 82.

the Court in the case.[55] Thus, the time will tell that how and to what extent unwilling Myanmar complies with the Order. On the other hand, Gambia welcomed the Court's ruling and called UN Security Council to take steps to ensure that the Order is complied with. The implementation becomes more puzzling, when any P-5-member State is involved or any State who receives backing from P-5 member States. China, being a friend of Myanmar could well veto, as it did previously[56], in the enforcement proceeding of the UNSC. By 23rd May 2020, Myanmar is required to submit the first report to the Court on the measures it has taken to implement the Order and every six months afterwards till the Court reaches final decision. As the international community keeping eyes on Myanmar and international agencies are scrutinizing every step Myanmar's taking, it is to be seen whether Myanmar acts in conformity with the Court ruling or defy the same, to what extent?

55 Press Statement on the decision by the ICJ on 'provisional measures' in the case brought by The Gambia against Myanmar, 24th January, 2020. Available at: https://www.moi.gov.mm/moi:eng/?q=announcement/23/01/2020/id-20583

56 US Institute of Peace Senior Study Group Final Report, China's Role on Myanmar's Internal Conflict, 2018.

Jawaharlal Nehru University Vs B.N. Narwal

Lakshay Kumar*

Abstract

Principles of Natural Justice although should be applied to all cases where an administrative authority exercises its power, however there are certain exceptions where the principles of natural justice are not applied. The article presented by the author will emphasise on the exclusion of principles natural of justice in case of purely administrative actions. The paper presented deals with the case of Jawaharlal Nehru University vs BN Narwal wherein the Supreme Court held that in case of purely administrative action the principles of natural justice would not apply. Through this case the author would like explain as to how by not observing the principles of natural justice in purely administrative actions no injustice or harm is caused.

Introduction

Principles of natural justice form the basis of judicial activism which are developed by the courts in order to prevent the administrative authority from exercising their power in an arbitrary manner. Generally, the administrative authority exercises their power from the statute, the statute mentions the powers including judicial power conferred upon them. However, the procedure for exercising this power is left on the administrative authority in itself. The Supreme Court has always insisted that the procedure adopted by the administrative authority must be a

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fair procedure. This fair procedure is referred as PNJ. Every administrative authority is duty bound to follow the PNJ. The two principles of natural justice are as follows

1) **Rule against bias** – Bias means an operative prejudice, whether conscious or unconscious. In every legal proceeding it is expected that the judge must act impartially without keeping a preconceived notion on the subject matter of the case, but when he does keep a preconceived opinion then it is highly possible that the judgement rendered will be a reflection of that preconceived notion, therefore rule against bias strikes against those factors which may improperly influence a judge in arriving at a decision in any particular case. The requirement of this principle is that the judge must be impartial and must decide the case objectively on the basis of the evidence on record.

2) **Audi Alterum Partem** – The basic meaning of this maxim is that no party should be left unheard. This means that the judges have to give a fair chance to every party to represent their case before reaching to a conclusion. This principle of natural justice forms the basic concept of natural justice.

In *Maneka Gandhi vs Union Of India,*[1] *the SC was of the opinion that in cases where the rule of Audi Alterum Partem is not followed, the reasoning given for not following this principle is not that fair action was taken but the exclusion of this principle means that nothing unfair can be concurred by not giving an opportunity to present a case.*

One of the exceptions to principle of Natural Justice is the exception in case of purely administrative action. We would study this exception through the case of *Jawaharlal Nehru University (JNU) vs BN Narwal*[2].

1 (1978) 1 SCC 248.

2 AIR 1980 SC 1666.

Facts of the case

The respondent in this case was a student named BN Narwal who was enrolled in a 5-year course of MA degree in Russian Language, the course was separated in 10 semesters. For the first 2 semesters BN Narwal did not gave the "seasonal test" neither he appeared in the examination for any of the "core subjects", although during the same course of time he gave the exam for all the "optional courses" for the first 2 semesters. BN Narwal in the third semester applied for permission from the University to reappear in the subjects for which he has not given the exams so that he could pass all of them. The university for the student's benefit granted him permission for the same. However, BN Narwal was not able to pass any of the exams of the first two semester. By looking at the poor performance of the student the University was left with no other choice but to struck down the name of the student from the roll and for that, Centre of Russian studies recommended the Board of studies to do the same. BN Narwal approached the High Court contending that he was not given any opportunity to present his case and thus is a violation of principles of natural justice. He demanded that the order of the university should be set aside and he should be given an opportunity to explain his case. The High Court observations are as follows

1) Firstly, BN Narwal was neither given any notice nor any chance to present his side of the case.

2) Secondly the Court said that the University did not apply their intelligence in looking as to whether the student's performance was unsatisfactory or not

Issues Involved in the Case

When the case came to the SC the following Issue was taken up into consideration.

1) Whether the principle of Natural Justice is violated by not giving an opportunity to BN Narwal to present his case?

2) Whether principles of natural justice is mandatory to follow in case of purely administrative action?

Decision given by the SC

"In *the absence of allegation of bias or mala fides, the declaration by an academic body that a student's academic performance is unsatisfactory is not liable to be questioned in a court on the ground that the student was not given an opportunity of being heard."*

The supreme court while giving the decision noted that the expulsion of the student was not based on his discipline or any other discretion which the university reserves as a right for themselves, and thus it is not a case where this discretion when applied denied the expelled student his freedom and justice. The decision to analyse the academic performance of the student should be left on the academic authority and not the court.

Analysis of the Judgement

The Decision of the court is significant in many aspects firstly the court in this judgement went on to describe the role of academic authorities, secondly the court answered whether the decision of academic authority can be challenged on the ground of Audi Alterum Partem. Thirdly the court went on saying that principles of natural justice although is expanding its scope yet it has certain limitation and in case of academic assessment the limitation comes in. The court observed that when the academic authorities over a period of time observe the performance of the candidate and then take appropriate action then those action can not be brought before the court of law if those actions were taken while taking into consideration the academic performance.

In the present case the court observed that the University did run classes for the core subjects but the student was not regular to the classes itself. The court also observed that the University for the sake of one student can not arrange the whole classes when the student himself was at fault because of his low attendance. The respondent relied on the judgement of *Regine vs Aston University*[3] wherein the University withdraw the admission of the student because he failed in the examination. Judge Donaldson in this case observed that the student should be given an opportunity to be heard, however this view of judge Donaldson was taken into consideration in the case of *Herring vs Templeman*[4] where the court of appeal was not satisfied with his observation and demanded that this should be reconsidered. The court in the present case also highlighted when can the decision of the Academic authority be questioned and be brought before the court of law. As per the court there are only two situations where the decision of an administrative authority can be challenged, first, when the authority while taking the decision has considered the personal details of the candidate like his health or family conditions and second when the decision taken by the authority revels some kind of malafide intention. Apart from that no other decision can be questioned before the court of law saying that Principles of Natural Justice were not observed. Thus in this case the court recognised that the functions of an academic authority to assess the performance of the student based on there academic performance is purely administrative action for which the teachers are best qualified and the judges of court least qualified and hence in all such case the decision of the academic authority can not be challenged on the grounds that the respondent was not given a chance to be heard. The author believes that the rational given by the supreme court is correct and logical in two senses, firstly while assessing the academic performance of a

3 1969 (2) All E. R.

4 1973 (3) All E. R.

student, it is the teachers who are well qualified and trained to decide whether the student has performed well or not, secondly when a student receives his or her grade it is natural that he may not be satisfied with his marks but that doesn't mean that he was marked in a discriminatory manner, certain kind of discretion must be given to teachers while they are performing their duties as assesses. Most importantly if these kind of petitions are entertained on regular basis then every second student will approach the court seeking remedy and this will not only increase unnecessary burden of litigation but also hamper the freedom of academicians as they will be under a constant fear, that if they award less marks or fail the student then legal action can be initiated against them . To avoid these kinds of situations the Supreme Court gave this judgement wherein it reversed the decision of the high court and said that in matters which are purely administrative in nature no petition can be entertained claiming that principles of natural justice are violated.

THE PRINCIPLES OF LAW OF CONTRACT

Prof. (Retd.) R.C Srivastava & Ashutosh Pathak, Bloomsbury Publishing India Pvt Ltd. (2018)

G.S Devisree*

The Principles of Law of Contract is a book written by Prof. (Retd.) R.C Srivastava along with Ashutosh Pathak. This was first published in India in 2018 by Bloomsbury Publishing India Pvt Ltd. R.C. Srivastava is a retired professor of law of Deen Dayal Upadhyay University, Gorakhpur having taught for more than 30 years. He holds a Master's degree in Law and has the authority on Mercantile Law Ashuthosh Pathak, the co-author has more than 17 years of experience in legal practice and is presently a lawyer in the honorable Supreme Court of India. [1]

The book focuses on both the theoretical and practical aspects of the Contract law and the underlying principles. All the possible concepts of the Law of Contract have been dealt with in reference to the provisions of the Indian Contract Act; 1872. The book address all the fundamental questions related to law of contract in an easy and understanding manner. The interpretations of the legal provisions of the Law have been provided in a concise manner in this book.

It is clearly a lucid book easily understood by the law students covering the objective, subjective and interview questions asked in any examination. The author has organized the chapters of the book

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systematically topic – wise, consolidating all the relevant provision of law on a topic at one place to avoid troubles and confusions.

Case laws has been discussed including leading English cases which are of basic importance and which lay down the principles of law applicable, instead of quoting numerous cases. Each and every phrase and sentence used in Indian Contract ACT, 1872 has been explained wit examples, case law, rationale and easy concepts. This book is expected to give a one stop solution and is sufficient for self study without much references.

BOOK REVIEW

3D PRINTING AND INTELLECTUAL PROPERTY
Lucas S. Osborn, Cambridge University Press, 2019

Aswathy G. Krishnan*

This book is on 3D printing technology which is one of the most revolutionizing design, manufacturing and innovation process and is considered as the second fastest growing technology. The most important impact the technology causes is whereby the objects can move back and forth between digital and physical embodiments for which the author uses the term "physization". Here the economic value also spreads from tangible to virtual embodiments.

It challenges the assumptions of tangibility and law constructed with physical objects in mind. The disruption caused by 3D printing cut across many fields especially Intellectual Property. The intervention between IP law and 3D technology is discussed in detail by the author.

The book not only aims lawyers, it is open to a wide audience. Hence the detailing in the books is also as such. The various kinds of 3D printers and complementary technologies are also discussed. The key technical concept in the technology is the digital manufacturing files and thus the different file formats and their interaction with law are also discussed. Even it introduces the reader to the various concepts of IP law, their scope and infringement. And the jurisprudence is applied to the 3D printable files so that the reader could analyze whether it is a subject matter or not. The book reviews all the concepts from both the

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angle of a patent holder as well as the good faith users. A comparative analysis of the American, European and Japanese IP regime is made.

Many aspects of IP law are not designed for a world where digital information and physical goods are increasingly interchangeable. If this interaction is not well addressed IP may overprotect or under protect 3D technology. Certain novel issues pertaining to this is raised in the book and for which IP law under various jurisdictions is considered. As far as Patent law is considered, there is weakening of effective protection because patents do not directly protect the DMF's holding the most economic value. 3D printing can lead to patent infringement by 3D print shops when they print patented objects. Book also explores the doctrine of indirect patent infringement and how is it interpreted in different jurisdiction. The author suggests that the legal interpretation under each jurisdiction should depend upon the overall effect of the 3D printing technology on innovation incentives.

In the field of Trademarks, though it accepts the importance of trademarks for DMF's of utilitarian objects, it points out that it disrupts the assumptions about consumer perceptions of manufacturing and brands. Digital copying can also undermine some of trademarks benefits. Copyright law is faced with the question of whether and how to protect the digital version of functional objects. The book takes us to a broader perspective of the topic, as to how far the proper IP protection of 3D technology lowers the cost of innovation and imitation for 3D printable goods.

This timely work discus with clarity all the novel issues pertaining to this cutting edge technology and is a good read for anyone interested irrespective of his basic knowledge on the IP law and 3D printing technology.

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