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ARTICLES

CASE CRITIQUE

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EDITORIAL NOTE

The idea behind the inception of Human Rights Law Journal was to provide a platform for contemporary and relevant discourse on human rights issues. The journal is a part of our endeavour to facilitate contextualized debates on pressing and emerging issues in the human rights paradigm. In this context, the third issue of the journal has focussed on a diverse range of topics that extend to non-traditional sample spaces of human rights research such as Independent Judiciary, Gene Patenting, Role of international institutions in gender mainstreaming etc., which have a strong undercurrent of coeval human rights issues.

The third volume is published in consultation with the Editorial committee consisting of the faculties of National Law University Odisha, Editorial Advisory Board consisting of distinguished experts on the subject of Human Rights and the Student Editorial Board. The board strives to maintain highest echelons of jurisprudential and normative research, coupled with a vision to encourage scholarly and informed discussions and debates on the subject of Human Rights.

The article by Rangin Pallav Tripathy surges into the aspect of the relevance of Independence of Judiciary with respect to protection of Human Rights. This is premised on the idea that structural issues of institutional identities are as important to the human rights discourse as normative values of rights in the forms of entitlements and protections.

Isha Jain, in her submission, commendably articulates the concept of gender mainstreaming and the role of International Institutions in the same with a focus on studying the *Security Council Regulation 1325* and the extent to which it has been successful in its objectives.

Another Article by Pallab Das and Akash Gupta provides a distinctive analysis that attempts to capture and study the root causes that culminate into human trafficking for purposes primarily like slavery and forced labour.

Nayantara Bhattacharyya's submission focuses on restitution of conjugal rights in a marriage, a hotly debated subject. The article analyses the issue with reference to the analysis of the landmark *T.Sareetha v T. Venkatasubbaiah*.

Nidhi Chauhan and Rajat Solanki's paper addresses the prevailing problem of environmental degradation as a result of human activities and, through an intriguing analysis, suggests that the focus must be on strengthening the constitutional safeguards for conservation of nature and protection of environment, and comments that realisation of sustainable development can be made by ensuring ecological security.

K. Shaanthi's article intrigues our way into understanding of the concept of gender justice and human rights from the perspective of various conventions and statutes relating to different kinds of violence against women. The article indeed is a riveting read.

Priya Kumari in her article *Gene Patenting: Common Heritage Versus Recognition of Human Effort* delves into the discussion of the conflicts between gene patenting and right to health in light of patentable subject matter under the (Indian) Patents Act, 1970.

Manashi Neog in her submission studies NGO responses to child trafficking in Kamrup District of Assam. The article is based on a structured empirical research that identifies initiatives undertaken by the NGOs to prevent child trafficking in Assam's Kamrup district and the limitations of the NGOs in undertaking the preventive activities in the district.

The article by Zakiyyu Muhammad and Pradeep Kulshreshtha analyses the powers of police in the administration of criminal justice in the Nigerian context. The fact based research report critically examines, through a doctrinal methodology, the police powers in Nigeria and its current implementation and whether the actions of the police are in breach of the United Nation International Covenant on Civil and Political Rights.

Besides research articles, our board received some insightful case commentaries, two of which are included in this edition of the journal.

Sohini Mohapatra through a constructive commentary on *Narayan Dutt Bhatt v. Union of India* reflects on the flexibility of 'Human Rights' and ponders on how the subject can very relevantly be extended to encompass the issues of animal rights and similar ethical jurisprudential discussions.

Rudra Roshan and Aika Soni case commentary on *Mr. X v. Hospital Z* analyses the rationale behind the judgement and impact of the ruling. The analysis shows how the ruling establishes a paradigm for how judiciary and legislature can dynamically contribute to the development of law.

The Editorial Board is honoured by the response received from the contributors to the third volume. With writings par excellence, the editorial board has strived through this volume to fill the vacuum in academic jurisprudence regarding contemporary human rights issues. We hope to continue in our endeavours to engage with legal scholars in strengthening the existing framework of human rights law and policy under the ambit of National Law University's Human Rights Law Journal in days to come.

Dr. Ananya Chakraborty
Editor in Chief

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INDEPENDENT JUDICIARY AS A HUMAN RIGHT- AN OVERVIEW OF INTERNATIONAL COMMITMENT

Rangin Pallav Tripathy[*]

Abstract:

This article is premised on the proposition that structural issues of institutional identities are as important to the human rights discourse as normative values of rights in the forms of entitlements and protections. In this context, I have highlighted the significance of the right to have an independent judiciary as a human right as recognised under important human rights instruments such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights etc. I provide an overview of how different international instruments conceptualise the dimensions of judicial independence. It provides an insight into how the idea of judicial independence has been crystallized in terms of specific principles across a variety of international instruments. In conclusion, I find that glorification of such principles is futile without first creating a robust monitoring and enforcement mechanism.

INTRODUCTION

Much of the traditional discourse on human rights centres primarily on the entitlements and protections that ought to be guaranteed to individuals vis-à-vis the governmental authorities and in appropriate cases, also in relation to non-governmental entities. In this sense, human rights are articulated in terms of inherence in individuals. These rights deal with a personal sphere of the concerned individual in the context of his interaction with the government and other members of the society.

However, such rights would not mean much unless the governance structure limits the powers of the state. A proclamation of rights would be hollow without the institutional arrangement oriented to preserve, protect and promote such rights. Thus, human rights discourse must not be confined to value propositions of individual rights but must also include within its fold the institutional arrangements of the governing organs. The normative prescriptions of human rights should not be

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limited to the traditional rights-privileges dogma but must also incorporate structural identities of governmental authorities. It is in this context that judicial independence assumes significance in the human rights discourse. An independent judiciary is the most effective safeguard for individuals against abuse of state power. It is extremely significant for all, especially those from minority and vulnerable communities. Thus, I propose to examine the development of international legal instruments in this respect.

INDEPENDENT JUDICIARY AS A HUMAN RIGHT

The Universal Declaration of Human Rights 1948 asserts the requirement of an independent judiciary for a meaningful realisation of the rights contained therein. Article 10 of the Declaration categorically asserts the right of every individual to have his matter head in public by an independent and impartial tribunal. Thus the requirement of an independent judiciary has been raised to the status of a human right. Even in the International Covenant on Civil and Political Rights, the right of every individual to have his case decided by a competent, independent and impartial tribunal has been recognised.[1] A similar provision can also been seen in the European Convention on Human Rights.[2] Thus the concept of judicial independence as a basic premise can said to have been accepted as part of the accepted norms across legal jurisdictions.

INTERNATIONAL INSTRUMENTS ON JUDICIAL INDEPENDENCE

Though the legal frameworks dealing with the issues of judicial independence primarily operate within the national jurisdictions of various countries, the functioning of judiciary as a governmental organ has steadily emerged as a concern for the international community. The structuring of the judiciary has a significant impact on the stability of the countries and thus the international concerns regarding the rules concerning judiciary are becoming more expressive.

Though, most of these international concerns have not taken the shape of any binding instrument in the form of a treaty or a convention creating international obligations on the countries to formulated fundamental principles concerning the judiciary, there have been many instruments

[1] International Covenant on Civil and Political Rights 1966, Article 14 (1)
[2] European Convention on Human Rights 1953, Article 6

which reflect a growing understanding in the international community regarding the basic parameters in any legal framework dealing with judicial independence.

NEW DELHI MINIMUM STANDARDS ON JUDICIAL INDEPENDENCE 1982

The New Delhi Minimum Standards on Judicial Independence was adopted in the Plenary Session of the 19th International Bar Association[3] Biennial Conference.

It provides a very important point on the process of judicial appointment. It stresses that while involvement of the executive and the legislature in the appointment process is permissible, the judiciary should play a prominent role in the process.[4] It further emphasises that the Executive should not be involved in the disciplinary mechanism of the judges in an adjudicatory capacity. It should at most be involved the process of referring complaints and the institutional authority having the power of discipline over judges should be separate and independent from the judges.[5] It further recommends that the power of removing judges should be vested in a judicial tribunal and that in systems where the legislature has the power of removal; it should be exercisable only upon the recommendation of a judicial tribunal.[6] It stipulates that the power to transfer judges from one court to another should be with a judicial authority.[7] It also makes it incumbent upon the state to provide sufficient financial resources to the judiciary for proper discharge of its functions.[8] It prescribes significant restrictions on the scope of the legislature of affect the independence of the judiciary. The legislature is precluded from enacting legislations with the specific objective of retrospectively neutralising judicial decisions.[9] The legislature is also precluded from changing the service conditions of judicial officers during their tenure unless the alteration is beneficial.[10] It upholds the principle of life tenure for judges[11] and stipulates that any disciplinary action cannot

[3] The International Bar Association is an international body of lawyers with lawyers of bar associations from different countries as its members. Its primary objectives include exchange of information between legal associations at an international level and also to support the independence of judiciary. See < http://www.ibanet.org/About_the_IBA/About_the_IBA.aspx> accessed 10 August 2014

[4] The International Bar Association's Code of Minimum Standards on Judicial Independence 1982, cl. 3 (IBA Code)

[5] ibid, cl. 4

[6] ibid, cl. 4

[7] ibid, cl. 12

[8] ibid, cl. 10

[9] ibid, cl. 19

[10] IBA Code, cl. 20

[11] ibid, cl. 22

be taken against a judge without giving him an adequate opportunity of being heard.[12] It mandates for the disciplinary proceedings against a judge to be held in camera unless the judge requests for a public hearing.[13] It provides protection against arbitrary removal of judges by providing that the only grounds on which a judge may be removed from his office are a criminal act, gross or repeated misconduct and physical or mental incapacity rendering the individual manifestly unfit to hold judicial office.[14] It recognises the legitimacy of public criticism but advises caution to the press and other public institutions for preserving judicial independence.[15] It also prescribes certain standards of judicial conduct which judges are expected to uphold. Judges are not expected to take any role under the executive authority or legislative authority.[16] They are not supposed to hold positions in political parties.[17]

UNIVERSAL DECLARATION ON INDEPENDENCE OF JUSTICE, 1983

Also known as the Montreal Declaration, the Universal Declaration on Independence of Justice was adopted in the final plenary session of the First World Conference on the Independence of Justice held at Montreal in 1983.

The Montreal Declaration puts forth principles in relation to both judges serving in international tribunals and courts [international judges] and judges within the domestic framework of countries [national judges]. In relation to the international judges, it requires sovereign countries to respect the international nature of judicial responsibility vested in such judges and should not seek to influence them in discharge of their official duties.[18] It warrants that the judiciary should be free from all external influences, governmental and non-governmental in their judicial function.[19] It upholds the requirement of appointing only jurists of recognised standing to be appointed as judges[20] and seeks to preclude judicial appointments where there is a possibility of subsequent governmental influence in the functioning of the judge.[21] In relation to national judges, it

[12] ibid, cl. 27
[13] ibid, cl. 28
[14] ibid, cl. 30
[15] ibid, cl. 33
[16] ibid, cl. 36
[17] ibid, cl. 38
[18] Universal Declaration on Independence of Justice 1983, cl. 1.02 (UDIJ)
[19] ibid, cl. 1.03
[20] UDIJ, cl. 1.12
[21] ibid, cl. 1.13

prescribes the duty of judges to adjudicate matters impartially without any restrictions, influences, threats or any other factor comprising the independent decision making process.[22] It also espoused the importance of the internal independence of the judges from other members of the judicial organ.[23] Consequent to this duty, it requires the judges to conduct themselves in a manner befitting the dignity of judicial office.[24] It prescribes the judge to not sit in any case where there is the possibility of a reasonable apprehension of his bias arising. It does not resist the involvement of executive and legislature in the process of judicial appointment but mandates that the legitimacy of such process will depend on the members of judiciary being duly consulted for judicial appointments.[25] It also mandates that no discrimination should be made in the process of judicial selection on the ground race, colour, sex, language, religion, social origin and other such factors.[26] It stresses on the financial independence judges by providing that the salary and other benefits of judges should be adequate and commensurate with the dignity of their office and should be periodically adjusted to account for inflation.[27]

U.N BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1985

This instrument was adopted Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in 1985. Subsequently, it has also been endorsed by the General Assembly of the United Nations on two separate occasions in the same year.[28]

The instrument calls upon the member states to strive towards incorporating the principles contained therein into the legal framework of the country regarding the judiciary and also to integrate the ethos of these principles in governmental conventions and practices.

It warrants that the principle of judicial independence should secured by the legal framework of the country[29] instead of being a conventional practice. It enjoins the governmental branches and all other institutions to respect the independence of the judiciary and ensure its observance.[30] It

[22] ibid, cl. 2.02
[23] UDIJ, cl. 2.03
[24] ibid, cl. 2.10
[25] ibid, cl. 2.14
[26] ibid, cl. 2.12
[27] ibid, cl. 2.21
[28] General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985
[29] UN Basic Principles on the Independence of the Judiciary 1985, cl. 1(UN Basic Principles)
[30] ibid, cl. 1

mandates that the judiciary should be in a position to decide matters as per the facts and the law without other external interference of any kind from any source.[31] It prescribes the monopoly of the judiciary in relation to all issues of judicial nature and recommends the exclusive authority of the judiciary in such matters.[32] It also directs that the government has a duty to provide all necessary resources to the judiciary so that the performance of its functions is no compromised.[33] It stresses a great deal on ensuring that the process by which judges are selected is not defective and that only persons of integrity are appointed as judges.[34] Judges, no matter the method by which they have been selected, should be given security of tenure.[35] It also mandates that judges cannot be removed on flimsy grounds and the only justification for removing a judge from office is his incapacity or misbehaviour.[36]

BEIJING STATEMENT OF PRINCIPLE OF INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION, 1997

The Beijing Statement of Principles of Independence of Judiciary in the LAWASIA Region [Beijing Statement] is the collaborative effort by the Conference of Chief Justices in the Asia and Pacific Region.[37] The preparation of this statement of principles spanned a duration of close to six years.[38] It represents the collective vision of the judicial hierarchy of more than thirty countries in the Asia-Pacific region.[39] The origin of the Beijing Statement can be traced back to an initial statement of principles formulated at a Law Association for Asia and the Pacific (LAWASIA) Human Rights Standing Committee and a small number of Chief Justices and other Judges at a meeting in Tokyo.

[31] ibid, cl. 2
[32] ibid, cl. 3
[33] ibid, cl. 7
[34] ibid, cl. 10
[35] ibid, cl. 12
[36] ibid, cl. 18
[37] The biennial Conference of the Chief Justices of the Asia and Pacific Region is organised by the Law Association for the Asia and the Pacific (LAWASIA). LAWASIA in an international organization of lawyers, judges, legal academics and lawyer organizations which focuses on the concerns of the legal profession in the Asia-Pacific region. See <http://lawasia.asn.au/> accessed 15 September 2014
[38] J Clifford Wallace, 'An Essay on Independence of the Judiciary: Independence from What and Why' (2001-2003) 58 New York University Annual Survey of American Law 241
[39] ibid

The statement mandates that the judiciary should be empowered to adjudicate matters independently and also that the judiciary would have exclusive jurisdiction in relation to all justiciable issues. It emphasises the need judicial independence to uphold the rule of law.[40] It recognises the importance of an independent judiciary in upholding the rule of law and mandates that the independence of judiciary should be preserved in the constitutional framework of the country and not left to the wisdom of the government.[41] It makes it clear that it is incumbent upon the judges to uphold the image of judiciary by avoiding improper conduct and also lays stress on the importance of judiciary not being perceived to be indulging in improper conduct.[42] It emphasises that the capacity of the judiciary to discharge its functions is dependent on people with competence, integrity and independence being appointed as judges.[43] Thus the appointment process of judges should be insulated from the possibility of improper influences.[44] Though it recognises the authority of the executive to transfer a judge, it mandates that the executive cannot do so arbitrarily and has to function according to a uniform policy formulated after due consultation with the judiciary.[45] It places importance in adequate remuneration for judges and in ensuring that the service conditions of judges cannot be altered to their detriment during their tenure.[46] It categorically restricts the executive from using its executive authority to impede the independent adjudication of justice by abusing its ability to control the salary and service conditions of judges.[47] It recognises the monopoly of the judiciary over judicial functions and recognises its exclusive authority in this regard. According to this Statement, the budget of judiciary should either be prepared by the judiciary itself or by another authority in collaboration with judiciary ensuring that the independence of the judiciary is not compromised due to financial restrictions.[48]

[40] Beijing Statement of Principle of Independence of the Judiciary in the LAWASIA Region 1997, cl. 3 (Beijing Statement)
[41] ibid, cl. 4
[42] ibid, cl. 7
[43] ibid, cl. 11
[44] ibid, cl. 12
[45] ibid, cl. 30
[46] ibid, cl. 31
[47] ibid, cl. 38
[48] ibid, cl. 37

BANGALORE PRINCIPLE OF JUDICIAL CONDUCT, 2002

The Bangalore Principles of Judicial Conduct was initially developed by the Judicial Group on Strengthening Judicial Integrity consisting of a group of senior judges from African and Asian countries sharing common law traditions. This group was formed pursuant to the Global Programme Against Corruption of the UN Office of Drug Control and Crime Prevention. The principles formulated by the group were subsequently adopted in a roundtable of chief justices from many countries.[49]

It proposes a set of core values to be upheld by judges at all times to ensure the dignity and integrity of the judicial office. It requires the judges to keep themselves immune from any such connection with the executive or the legislature which can be used as a basis for exerting improper influence on them.[50] It also stresses that judges should also be careful to avoid even a perception of such inappropriate connections.[51] It asserts that the obligation to justify public confidence in the judiciary rests on the judges living up to high standards of judicial conduct.[52] A judge has duty to conduct himself both in and out of court in a manner which will inspire belief in the impartial nature of the judiciary.[53] It also expects the judge to disqualify himself from participating in any case where his ability to be impartial is affected or where there is a reasonable perception of his impartiality having been affected.[54] It emphasises that a judge must cope with personal restrictions which normal citizens might not have to suffer as a higher standard of conduct is expected of them in view of the dignity of them office.[55] A judge is expected to conduct himself with other members of legal profession in a manner which does not give rise to reasonable suspicions of favouritism or partiality.[56] A judge is required to participate in any case where any member of the judge's family is associated either as a litigant or in any other manner.[57] A judge is also duty bound to let

[4949] Greg Mayne, 'Judicial integrity: the accountability gap and the Bangalore Principles' <http://www.birosag.hu/sites/default/files/allomanyok/kozadatok/obh/7. sz. melleklet gcr chapter 3 final.pdf> accessed 12 November 2014

[50] Bangalore Principle of Judicial Conduct 2002, cl. 1.3 (Bangalore Principles)

[51] ibid, cl. 1.3

[52] ibid, cl. 1.6

[53] ibid, cl. 2.2

[54] ibid, cl. 2.5

[55] ibid, cl. 4.2

[56] ibid, cl. 4.3

[57] ibid, cl. 4.4

his family members of social relationships to improperly influence his judicial conduct.[58] A judge is also not supposed to use the stature of his judicial office for advancement of his private interests.[59] The judge should also refrain from accepting gifts or favours of any kind in relation to anything done by him in relation to his judicial duties. [60] This restriction should also be applicable in relation to the family members of a judge.[61] A judge is also supposed to ensure that his level of knowledge does not stagnate and should strive towards enhancement of his knowledge, skills and other personal attributes required for an improved performance of judicial duties.[62]

MT. SCOPUS INTERNATIONAL STANDARDS OF JUDICIAL INDEPENDENCE, 2008

The Mt. Scopus International Standards of Judicial Independence is formulated by the International Association of Judicial Independence and World Peace. It seeks to present an updated understanding of the issues concerning judicial independence considering the rapidly changing social and economic scenarios in general.

It categorically lays down that an individual judge is entitled to both personal and substantive independence.[63] It categorically asserts that the executive should not be influentially involved in the disciplinary mechanism in relation to the judges.[64] It recommends that the power to remove judges from their office should be vested in a judicial tribunal.[65] It admitted the role of legislature and executive in the process of judicial appointments on the ground of democratic legitimacy but only on the condition that the principle of judicial independence is honoured.[66] The power of transferring judges should be with the judiciary authority and should as such be based on the judge's consent.[67] It also proclaimed that the periodic review of the salary and pension of judges should be done independently of executive control.[68] The legislature is prevented from enacting

[58] ibid, cl. 4.8
[59] Bangalore Principles, cl. 4.9
[60] ibid, cl. 4.14
[61] ibid, cl. 4.14
[62] ibid, cl. 6.3
[63] Mt. Scopus International Standards of Judicial Independence 2008, cl. 2.2 (Mt. Scopus Standards)
[64] ibid, cl. 2.6 and 2.7
[65] ibid, cl. 2.8
[66] ibid, cl. 4.2
[67] ibid, cl. 2.19
[68] ibid, cl. 2.20

legislation to reverse judicial decisions retrospectively.[69] The legislature is also prevented from altering the term and conditions of judicial service to the detriment judges in service.[70] There is categorical directive to ensure that the process of judicial selection is not compromised by intrusion of improper motive.[71] However it laid more emphasis on the creation of judicial selection boards constituting of members from all the branches to manage the process of judicial selections.[72] A judge is supposed to refrain from engaging in business activities which are likely to affect the exercise of his judicial functions or compromise his personal image other than those concerning his personal investments, ownership of property and other such innocuous activities.[73] It stresses on the importance of internal independence of judges[74] and specifically prescribes that a judicial hierarchy shall not cause any interference in the capacity of a judge to adjudicate matters freely and independently.[75]

CONCLUSION

That the issue of judicial independence has emerged as a growing international concern which can be ascertained from a number of international instruments. Most of these instruments assert certain universal principles concerning the judiciary like security of tenure, removal on grounds of misbehaviour etc. However, as noted earlier, none of these instruments are binding. Other than eulogising the virtues of judicial independence and affirming the specific principles of judicial independence, there is yet to be a systematic effort to lay down obligatory international standards on the issue of judicial independence. Without robust monitoring mechanism to ensure compliance with identified standards, such affirmation of principles would be of little value. This would require that discussions on ensuring an independent judiciary should be streamlines into the human rights discourse instead of being located primarily as a domestic constitutional law concern of the countries.

[69] Mt. Scopus Standards, cl. 3.1
[70] ibid, cl. 3.2
[71] ibid, cl. 4.1
[72] ibid, cl. 4.1
[73] ibid, cl. 7.4
[74] ibid, cl. 9.1
[75] ibid, cl. 9.2

MAINSTREAMING GENDER THROUGH INTERNATIONAL INSTITUTIONS:

REVISITING SECURITY COUNCIL RESOLUTION 1325

Isha Jain[*]

INTRODUCTION

At the turn of the century, the agencies of the United Nations ('UN') were faced with calls to 'mainstream gender' at every stage of the policy-making process. Eventually, this wave of reform reached the Security Council, a body that had until then been exclusively concerned with high-level threats to international peace and security. On 31 October, 2000, the Security Council adopted resolution 1325 on Women, Peace and Security ('SCR 1325'). This was the first Security Council resolution to be concerned exclusively with the issue of women's experiences in conflict prevention, the conduct of conflict, and conflict resolution.[1] While this resolution was hailed as a watershed moment in the practice of the Council, it is worth examining whether, almost two decades later, SCR 1325 has proven itself to be an effective tool of gender mainstreaming.

The structure of this paper proceeds as follows: the first section introduces the concept of gender mainstreaming, and the second section examines the emergence of gender mainstreaming as the dominant strategy of addressing issues of gender at the UN. The third section deals in detail with SCR 1325, by analyzing whether and to what extent it has actually made the regulation of conflict more gender sensitive. The concluding section of the paper shall summarise the findings and identify the further questions they give rise to.

UNDERSTANDING GENDER MAINSTREAMING

The United Nations Economic and Social Council ('ECOSOC') defines gender mainstreaming as:

> the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral

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[1] Carol Cohn et al., *Women, Peace and Security Resolution 1325*, 6(1) INTERNATIONAL FEMINIST JOURNAL OF POLITICS, 130, 130 (2004).

> dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.[2]

This definition, though first formulated in 1997, continues to be cited with approval by UN agencies and academics alike as an authoritative statement on the meaning of gender mainstreaming.[3] Noticeably, this definition of gender mainstreaming does not prioritise women or women's interests. Rather, it simply stresses the need to take into account "women's as well as men's concerns" in all aspects of policy-making. While the need to take in account men's concerns may appear redundant in an international political system that has always equated men's concerns with human concerns, the very process of identifying the exclusively male interests underlying seemingly 'neutral' policies can help break down the façade of gender equality in UN policy-making.

The ECOSOC definition also makes clear that gender mainstreaming is not an outcome, it is one of several competing strategies for attaining the goal of gender equality. In institutional terms, this involves a shift away from designating specialized agencies with the task of promoting women's rights and towards raising the 'woman question' at every stage and in every field of policy-making. In theory, this strategy would appear to be the most effective at ensuring that women's interests are not overlooked at any stage of administration. Yet, breaking up women-centric agencies to spread their members across all other agencies could equally have the effect of diluting the resources, visibility, and power that they would enjoy as a collective. For this reason, critics of gender mainstreaming argue that attempting to promote a gender perspective everywhere results in gender being meaningfully addressed nowhere.[4]

The process of gender mainstreaming can be operationalised in several ways, depending on the actors involved. A technocratic approach to gender mainstreaming is one that relies on gender specialists or experts to spearhead the process of incorporating gender perspectives in policy-

[2] Report of the Economic and Social Council for the Year 1997, U.N. GAOR, 52nd Sess., Supp. No. 3, at 24, U.N. Doc. A/52/3/Rev.1 (1997).

[3] Economic and Social Council Resolution 2009/12, Mainstreaming a gender perspective into all policies and programmes in the United Nations system, U.N. Doc. E/2009/L.20 and E/2009/SR.40, ¶1; Jacqui True, *Mainstreaming gender in international institutions* in GENDER MATTERS IN GLOBAL POLITICS: A FEMINIST INTRODUCTION TO INTERNATIONAL RELATIONS, 227, 228 (Laura Shepherd ed., 2014); Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM RTS. J., 1, 4 (2005).

[4] True, *supra* note 3, at 234; Cohn, *supra* note 1, at 135.

making.[5] A participatory approach, on the other hand, is one that seeks inputs from grassroots feminist activists or local women's movements.[6] The latter approach more effectively accounts for difference feminisms concerns regarding the heterogeneity of women's experiences across cultures, as well post-structuralist and intersectionalist concerns with treating gender as the sole axis of differentiation. Yet, limitations of resources, scale, manpower, and time often prevent an international organisation at as high a level as the UN from being able to truly include *all* women in the policy-making process.

GENDER MAINSTREAMING AT THE UNITED NATIONS

Gender mainstreaming emerged as a strategy at the UN in response to the ineffectiveness of earlier strategies. There was a growing recognition that focusing on specific targeted initiatives to increase women's participation was unlikely to advance the pursuit of gender equality, especially when the very system in which participation was being sought was unjust.[7] There was a need to question the very foundations of existing political, societal, and economic structures and to identify the manner in which their functioning could be made more equitable. Gender was identified as an issue that involved not just women, but the relations between men and women. The identification of gender as a relational issue thus highlighted the futility of addressing it by focusing exclusively on women. Thus, the 'add women and stir' approach was gradually replaced by an acceptance of the need to 'mainstream' gender in all aspects of policy-making.

The language of gender mainstreaming was first introduced into the UN system through the Beijing Platform for Action ('BFA'), ratified by all member States at the Fourth UN World Conference on Women in 1995. The BFA advocated a new policy-making approach that would "promote a gender perspective in all legislation and policies".[8] Even then, the practice of including gender perspectives remained largely confined to the "soft" departments of the UN System – those concerned with social and developmental issues.[9] The Security Council was used exclusively to deal with "hard" peace and security matters, without regard for 'human

[5] True, *supra* note 3, at 231.
[6] True, *supra* note 3, at 231.
[7] Office of the Special Adviser on Gender Issues and Advancement of Women, Gender Mainstreaming: An Overview, 9 (2002).
[8] Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Beijing Declaration and Platform for Action, ¶207(d), U.N. Doc A/CONF. 177/20.
[9] Torunn L. Tryggestad, *Negotiations at the UN: The Case of UN Security Council Resolution 1325 on Women, Peace and Security* in GENDERING DIPLOMACY AND INTERNATIONAL NEGOTIATION, 239, 244 (Karin Aggestam and Ann E. Towns eds., 2017).

security' concerns.[10] It was only at the turn of the century that the Security Council began to include the human impact of conflict on its agenda. This attitudinal shift, bolstered by the tireless and sustained efforts of civil society organisations to get women, peace and security on the Security Council agenda,[11] culminated in the adoption of SCR 1325.

SECURITY COUNCIL RESOLUTION 1325

SCR 1325 was intended to lay down a framework for the management of armed conflict that accounted for women's experiences and interests at all stages of conflict.[12] The resolution encourages member States to increase representation and participation of women in decision-making institutions,[13] and to expand their role and contribution in field-based operations.[14] It seeks to incorporate a gender perspective in peacekeeping operations, both by involving women in peacekeeping measures as well as by sensitizing military, police, and peacekeeping forces to the particular needs of women.[15] It requires the authors of peace agreements to account for the specific needs of women in post-conflict reconstruction,[16] as well as in disarmament and demobilization.[17] It re-emphasises the importance of existing international conventions that protect women in both peace and war. It calls upon States to take special measures to protect women from gender-based violence, and emphasises the responsibility of States to prosecute perpetrators of such violence.[18] It calls upon parties to take into account the special needs of women in refugee camps.[19] It commits that the Security Council will take into account the needs of women when adopting measures, and will do so by consulting women's groups.[20] Finally, it invites the UN Secretary-General to carry out a study on the impact of armed conflict on women and girls, the role of women in peace-building and the gender dimensions of peace processes and conflict resolution, and to report on the progress on gender mainstreaming in peacekeeping missions.[21]

[10] Cohn, *supra* note 1, at 135.
[11] *See* Tryggestad, *supra* note 9.
[12] Cohn, *supra* note 1, at 130.
[13] Security Council Resolution 1325 (2000), U.N. Doc. S/RES/1325 ('SCR 1325'), ¶¶ 1-3.
[14] SCR 1325, ¶4.
[15] SCR 1325, ¶¶5-7.
[16] SCR 1325, ¶8.
[17] SCR 1325, ¶13.
[18] SCR 1325, ¶¶10-11.
[19] SCR 1325, ¶12.
[20] SCR 1325, ¶14-15.
[21] SCR 1325, ¶16-17.

The success of any gender mainstreaming initiative can be assessed from both a discursive perspective as well as an institutional perspective. Discursive analysis – concerned as it is with discourses – judges the success of gender mainstreaming by its ability to influence and alter the way people think and talk about women and their place in society.[22] Institutional analysis is more concerned with material change and involves an inquiry into the adoption and implementation of women's rights-enhancing policies.[23] Naturally, the two approaches intersect, since institutional changes shape discourses and vice-versa. Yet, in the following section, I shall attempt to discretely employ the two approaches in order to evaluate the successes and failures of SCR 1325 as a tool for gender mainstreaming in the peace and security context.

DISCURSIVE ANALYSIS

1. WOMEN AS VICTIMS

SCR 1325 emphasizes the value of women as participants in conflict prevention and resolution and also expressly acknowledges that women may be combatants. Yet, the resolution has been criticized for subordinating these narratives of agential women to an over-arching depiction of women as victims. As Laura Shepherd notes in her discursive analysis of SCR 1325, "women-as-informal-organizers and women-as-formal-actors are still, primarily, essentially women-in-need-of-protection".[24] She draws this conclusion from text of the resolution, according to which women are a part of "women and children", are "targeted by combatants" and therefore not combatants, and have "special needs" and are in need of "protection". Shepherd's critique borders on overly-academic, especially considering that SCR 1325 did significantly disrupt traditional, unidimensional conceptions of women as victims by additionally acknowledging their ability to valuably contribute to peace-building.[25] Yet, there may be some truth in the criticism that the Security Council predominantly views women through the lens of victimhood, despite paying lip-service to the importance of women as decision-makers in conflict situations. This is borne out by the contents of the four Security Council resolutions on women, peace and security that were adopted immediately after SCR 1325 (SCR 1820, SCR 1888, SCR 1960 and SCR 2106). These resolutions focus almost exclusively on women's

[22] True, *supra* note 3, at 234.
[23] True, *supra* note 3, at 227.
[24] Laura J. Shepherd, GENDER, VIOLENCE & SECURITY: DISCOURSE AS PRACTICE, 120 (2008).
[25] Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, 10 MELB. J. INT'L L., 11, 17 (2009).

vulnerabilities in war as victims of sexual violence, and recommend protective measures to address the same. Commentators therefore criticise this sudden departure from the narrative of women as agents of conflict-resolution and peace-building to women as victims defined by their vulnerability and helplessness.[26]

Yet, even if SCR 1325 is guilty of emphasising women's victimhood over their capacity to act as problem-solvers and decision-makers, the language used to describe this victimhood is a marked improvement from that contained in the international legal instruments of the 20th century. The four Geneva Conventions of 1949 along with their Additional Protocols are widely recognised to form the core of international humanitarian law, intended to regulate the conduct of armed conflict and limit its effects.[27] These conventions contain specific provisions proscribing acts of sexual violence against women. Article 27 of Geneva Convention (IV) provides that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault" (emphasis added). In a similar vein, Article 76 of Additional Protocol I to the Geneva Conventions provides that "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault" (emphasis added). These provisions appear less concerned with the physical and mental violence suffered by victims of sexual crimes than with the threat posed to socially constructed norms of honour and respect deriving from women's inviolability.[28]

The ad-hoc international criminal tribunals for Rwanda and the former Yugoslavia initiated the shift towards conceptualising rape as a crime of violence. Specifically, the *Akayesu* judgment of the ICTY was hailed as a watershed for treating rape as a violent crime against a woman's bodily and mental well-being rather than a moral crime against a woman's, or a community's, honour.[29] Similarly, Article 7(1)(g) of the Rome Statute of the ICC recognises rape as an act of sexual *violence* capable of amounting to a crime against humanity. Building on this

[26] Otto, *supra* note 25, at 23; Amy Barrow, *UN Security Council Resolutions 1325 and 1820: constructing gender in armed conflict and international humanitarian law*, 92 (877) INTERNATIONAL REVIEW OF THE RED CROSS, 221, 222 (2010).

[27] ICRC, The Geneva Conventions of 1949 and their Additional Protocols (October 29, 2010) available at https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm

[28] Barrow, *supra* note 26, at 225.

[29] The Prosecutor v. Akayesu, ICTR–96–4–T, (November 19, 1997), ¶731.

discursive shift, SCR 1325 uses the language of 'violence' and 'abuse' against women to describe rape and sexual assault in armed conflict.

The discursive harms that may be caused by the over-emphasis of women's victimhood and vulnerabilities in conflict should be weighed carefully against the institutional gains that may accrue from emphasising the degree of suffering caused by sexual violence in armed conflict and the need to better protect women from such violence. While gender mainstreaming, in theory, may be able to equally address every aspect of gender inequality in conflict zones at once, the practical reality is that policy-formulation and resource allocation is a zero-sum game. It is therefore worth questioning whether systemic sexual violence against women in armed conflict is not a more *urgent* threat to women's interests than their under-representation in formal decision-making bodies and should not be prioritised. Thus, while advocating against the discursive 'victimisation' of women and in favour of portraying them as agential actors, academic discussion should account for the lived experiences of women in conflict zones by identifying their interests, priorities, and perceptions of self.

2. WOMEN'S PARTICIPATION

Much of the focus of SCR 1325 is on calling for an increase in women's 'participation' in both informal and formal decision-making processes. This is unlikely to result in any meaningful increase in women's participation in decision-making processes. This is because the resolution fails to address the political, economic, and social causes underlying the under-representation of women in decision-making institutions, nor does it propose any strategy for increasing women's participation. As several commentators have noted, the call for participation is meaningless unless accompanied by a call for capacity building for women as well as an endorsement of affirmative action as a method for definitively securing a space for women in decision-making bodies.[30] However, these criticisms fail to recognize that the Security Council is constrained by its mandate, which is the "maintenance of international peace and security".[31] The need for long-term and structural changes at the grassroots to enable women's participation in governance structures, while legitimate, is too far removed from the realm of 'conflict-resolution' to be considered an issue of peace and security. This problem illustrates the limits

[30] Christina Binder et al., *Empty Words or Real Achievement? The Impact of Security Council Resolution 1325 on Women in Armed Conflicts*, 101 RADICAL HISTORY REVIEW, 22 (2008); Laura J. Shepherd, *Sex, Security and Superhero(in)es: From 1325 to 1820 and Beyond*, 13(4) INTERNATIONAL FEMINIST JOURNAL OF POLITICS, 504, 512 (2011).
[31] Charter of the United Nations, 1945, 1 U.N.T.S. XVI ('UN Charter'), Art. 24(1).

of gender mainstreaming as a strategy for attaining gender equality – there are certain gender issues that cannot be addressed holistically by working within the mandate of a single agency. Thus, the responsibility for thrashing out the modalities of women's 'participation' falls on individual member States.

But even if States are able to effectuate an increase in women's participation, this will not necessarily result in more gender-sensitive decision-making. As studies have repeatedly revealed, the mere presence of women in decision-making structures does not guarantee that they will use that platform to advocate for women's issues.[32] In any event, assuming that the women who do get to participate will act as a voice for *all* women is deeply problematic and fails to account for the high likelihood of ethnic identities assuming significance over gender identities in the aftermath of armed conflict.

Thus, SCR 1325's calls for greater participation of women rest on two unsubstantiated presumptions: that women who participate will use their voice to advocate for women, and that women constitute a homogenous group with shared interests.

3. WOMEN'S USE-VALUE

SCR 1325 stresses the importance of women participating in post-conflict decision-making because they have "an important role ... in peace-building" and their participation "can significantly contribute to the maintenance and promotion of international peace and security". Two aspects of this characterisation are noteworthy. *First*, the resolution reinforces a conception of womanhood that is essentially linked to 'peacefulness', which therefore holds woman as capable of contributing to the maintenance of international peace and security because of their natural tendency towards 'conflict-resolution' and 'peace-building'.[33] This not only perpetuates essentialising stereotypes but also has the effect of conditioning the usefulness of women's participation on their conformity to these stereotypes. *Second*, the very fact that women's role and usefulness is touted as justification for increased participation highlights the instrumentalization of women as objects or means to organisational ends rather than as persons entitled, as a matter of *right*, to participate in decision-making processes that impact them.[34] The limiting effects of this instrumentalist approach have been felt in other international

[32] Shepherd, *supra* note 24, at 117.
[33] Shepherd, *supra* note 24, at 118.
[34] Cohn, *supra* note 1, at 137.

institutions such as the World Bank, where proponents of gender mainstreaming projects are required to furnish detailed evidence of potential efficiency gains before proceeding with such projects.[35]

4. CONFLICT AND PEACE

The notions of 'violence', 'conflict', and 'peace' in SCR 1325 tend to obscure the full extent of violence that women experience both within and without situations of armed conflict. The resolution is only concerned with violence in situations of 'armed conflict' and defines peace as the absence of such conflict. Such a conceptualization has the discursive effect of de-recognizing very real forms of violence against women that fall outside the paradigm of armed conflict.[36] These include both interpersonal violences – such as criminal and domestic abuse – as well as structural violences – such as the systemic denial of access to power and resources – that continue to impact women in pre-conflict and post-conflict societies. Understanding peace, therefore, as the negation of armed conflict begs the question: *whose* peace?

Yet, this apparently myopic perspective on violence against women is an inevitable result of using the Security Council as a forum for addressing violence against women. The Security Council is the agency tasked with identifying and addressing threats to international peace and security. It has always restricted its focus to the 'hard' threat of armed conflict and has always prioritized the security of sovereign States over the security of individuals within those States. This inhibits it from looking beyond the geographic and temporal scope of 'armed conflict' in its attempt to understand and address the vulnerabilities of women.

INSTITUTIONAL ANALYSIS

1. NON-BINDING CHARACTER

The incentives for member States to expeditiously effectuate the directives in a Security Council resolution are strongly influenced by whether such directives are binding and whether non-compliance with such directives results in sanction. There is a common misconception among feminist activists that SCR 1325, by virtue of being a Security Council resolution, has binding force upon all member States of the UN. However, not all resolutions of the Security

[35] Shahra Razavi and Carol Miller, *Gender Mainstreaming: A Study of Efforts by the UNDP, the World Bank and the ILO to Institutionalize Gender Issues*, Occasional Paper 4, United Nations Research Institute for Social Development, 65 (1995).

[36] Barrow, *supra* note 26, at 230-231; Shepherd, *supra* note 24, at 122.

Council are binding. Article 25 of the UN Charter only obligates member States to "agree to accept and carry out the decisions of the Security Council" (emphasis added). 'Decisions' are a specific sub-category of Security Council actions, distinct from 'recommendations', and it is only decisions that are binding.[37] Whether a specific SC resolution is binding depends on "the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution".[38]

The terms of SCR 1325 are strongly suggestive of its non-binding character. *First*, operative paragraphs 1 to 17 uses decidedly 'weak' language by 'urging', 'encouraging', and 'calling upon' States to follow the directions laid down in the resolution. In the past, when the Security Council has intended to impose binding obligations, it has used more assertive terms such as 'decides' or 'demands'.[39] Further, the resolution explicitly allows States a significant amount of discretion in determining whether or not to implement the measures proposed by it. For instance, operative paragraph 5 states that field operations should include a gender component "where appropriate", and operative paragraph 11 stresses the need to exclude war crimes relating to sexual violence from amnesty provisions "where feasible". This interpretation is further bolstered by the absence from SCR 1325 of any reference to accountability mechanisms for monitoring implementation or benchmarks for measuring progress.[40] Finally, SCR 1325 does not invoke any Charter provisions that empower the Council to place binding obligations on member States. Perhaps the most obvious indicator of the non-binding nature of SCR 1325 is the absence of any attempt by the Council to enforce the provisions of the resolution, despite the widespread failure of States at addressing the issues highlighted by the resolution.

2. PEACEKEEPING OPERATIONS

In 2010, the UN Department of Peacekeeping Operations ('DPKO') released a report on the implementation of SCR 1325 through peacekeeping missions. The report made note of certain positive trends, including rising levels of women's participation in elections, both as voters and as candidates. UN peacekeeping missions were reported to have been valuable for maintaining

[37] Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep 174, 178; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 ICJ Rep 16, ¶ 115.
[38] Namibia, *supra* note 37, ¶114.
[39] Security Council Resolution 2298 (2016), U.N. Doc. S/RES/2298; Security Council Resolution 1373 (2001), U.N. Doc. S/RES/1373; Security Council Resolution 2356 (2017), U.N. Doc. S/RES/2356.
[40] Otto, *supra* note 25, at 22; Barrow, *supra* note 26, at 231.

a peaceful environment during elections in order to increase voter participation.[41] Further, women's success as political candidates was most noticeable in countries that implemented quotas or reserved seats for women, such as Burundi, Sudan, and Timor-Leste.[42] The findings in the Report therefore valuably supplement the abstract exhortations of SCR 1325 to "[increase] the participation of women at decision-making levels in conflict resolution and peace processes" by providing evidence of structural changes, such as affirmative action, that have been effective at ensuring such increases in participation.

At the same time, the Report also makes note of problem areas in which peacekeeping forces have struggled to bring lasting reform. Most notable among these is the continued resort to sexual and gender-based violence ('SGBV') as a tool of subjugation in armed conflict. While peacekeeping forces have successfully assisted in drafting legislations for combating SGBV in multiple jurisdictions and have also assisted in direct protection of civilians from SGBV,[43] "sexual and gender-based violence remain overwhelming problems in the countries under review".[44] The factors that contribute to the same are structural rather than situational, such as the cultural endorsement of female genital mutilation as well as the taboo surrounding SGBV that constrains victims from reporting incidents of the same.[45] This only demonstrates that SGBV is but a *symptom* of deeply ingrained gender-discriminatory beliefs and prejudices, and that short-term, military measures will never be sufficient to suppress this wellspring of violence against women.

The report further notes that the "deployment of female uniformed peace-keepers is generally very well received by conflict-affected communities, especially by women".[46] It specifically highlights positive role played by the Indian female Formed Police Unit, a peacekeeping unit comprised entirely of Indian women, in Liberia. These women peacekeepers are viewed as positive role models, effectively challenging stereotypical notions of femininity and encouraging local women to participate in security forces. However, certain commentators have taken a more cynical view of the call for more representation of women in peacekeeping forces. Olivera Simic argues that the rapid increase in the number of women peacekeepers was

[41] UN Department of Peacekeeping Operations and UN Department of Field Support, Ten-year Impact Study on Implementation of UN Security Council Resolution 1325 (2000) on Women, Peace and Security in Peacekeeping ('DPKO Study'), 19 (2010).
[42] DPKO Study, *supra* note 41, at 20.
[43] DPKO Study, *supra* note 41, at 31.
[44] DPKO Study, *supra* note 41, at 32.
[45] DPKO Study, *supra* note 41, at 32.
[46] DPKO Study, *supra* note 41, at 27.

a knee-jerk reaction to the allegations of sexual abuse against male-dominated peacekeeping forces.[47] Their purpose, therefore, is to provide a 'pacifying presence' to counter the aggressiveness and hypermasculinity of peacekeeping forces.[48] When viewed in light of their vulnerability to sexual harassment and exploitation while serving in peacekeeping operations,[49] this suggests that increasing representation of women in peacekeeping forces in conflict zones may be far from agency-enhancing.

3. NATIONAL-LEVEL IMPLEMENTATION

The policy ideals contained in SCR 1325 are institutionalised at the national level either through a mainstreaming approach or through the adoption of National Action Plans (NAPs) or Regional Action Plans (RAPs). The gender mainstreaming approach involves the re-evaluation of security policies and incorporation of gender perspectives within existing policy frameworks. Some commentators have noted that this approach tends to dilute the principles contained in SCR 1325 in order to bring them into harmony with prevailing political priorities.[50] The more common approach to domestic implementation is the adoption of NAPs or RAPs, which are intended to comprehensively detail the responsibilities undertaken and targets to be met by State and non-State actors towards establishing more gender-sensitive approaches to situations of conflict.[51]

The Security Council president's statement of 31 October 2002 was the first articulation of the concept of NAPs. The statement provides that "the Security Council encourages member states, civil society and other relevant actors, to develop clear strategies and action plans with goals and timetables, on the integration of gender perspectives in humanitarian operations, rehabilitation and reconstruction programs." As of this year, 74 countries have adopted NAPs in support of SCR 1325. However, a deeper enquiry into the contents of these NAPs leaves much to be desired.[52] Only 16 NAPs include budgetary allocations for implementation, only 22 reflect a willingness to take concrete measures towards disarmament, and only 38 include a

[47] *See* Olivera Simić, *Does the Presence of Women Really Matter? Towards Combating Male Sexual Violence in Peacekeeping Operations*, 17(2) INTERNATIONAL PEACEKEEPING, 188 (2010).
[48] UN Department of Peacekeeping Operations, Mainstreaming a Gender Perspective in Multidimensional Peace Operation, 41 (2000).
[49] Simic, *supra* note 47, at 196.
[50] *See* Amy Barrow, *[It's] like a rubber-band: Assessing UNSCR 1325 as a gender mainstreaming process*, 5(1) INTERNATIONAL JOURNAL OF LAW IN CONTEXT 51 (2009).
[51] Nicole George and Laura J. Shepherd, *Women, Peace and Security: Exploring the implementation and integration of UNSCR 1325*, 37(3) INTERNATIONAL POLITICAL SCIENCE REVIEW, 297, 302 (2016).
[52] Peace Women, Member States, available at http://www.peacewomen.org/member-states

detailed process for evaluating and monitoring implementation.[53] This lukewarm response to the issues highlighted by SCR 1325 can perhaps be attributed to the non-binding nature of the resolution and the absence of any threat of sanction.

Yet, there are promising examples of NAPs being used effectively, particularly in post-conflict societies in the Global South such as Burundi, Nepal and Uganda.[54] Importantly, SCR 1325 has provided local civil society organizations a powerful platform upon which to base their claims for amendments to security policies and reforms to military structures, which in turn can influence NAPs.[55] For instance, the Government of Nepal invited the Nepal Widows' NGO to formulate a policy for the Nepal NAP in order to identify women who have lost their husbands to war and develop strategies for their upliftment.[56] Thus, NAPs that account for the specific and culturally distinct issues of gender at the domestic level are far more likely to be successful than a simple copy-and-paste of the abstract norms contained in SCR 1325.[57]

CONCLUSION

SCR 1325 has secured valuable discursive and institutional changes – it has enabled the international community to reimagine the role of women in situations of conflict, it has served as an authoritative validation of the demands of civil society organisations against national governments, and it has served as a blueprint for National and Regional Action Plans across the globe. In some respects, SCR 1325 has fallen short – it conceptualizes gender as the sole axis of differentiation along which women in conflict situations view themselves, it lacks any monitoring or accountability mechanisms, and it has been unable to adequately combat violences against women that stem from structural inequalities rather than situations of conflict.

On a parting note, it is worth considering whether using the Security Council and Security Council Resolutions as vehicles of gender justice has the effect of silencing criticisms of the hegemonic, hypermasculine, and militaristic power structures that these institutions uphold.[58] Gender mainstreaming through SCR 1325 has meant strengthening the application of international humanitarian law to armed conflict and enhancing the number of women

[53] *Id*.
[54] Soumita Basu, *The Global South writes 1325 (too)*, 37(3) INTERNATIONAL POLITICAL SCIENCE REVIEW, 362, 366 (2016).
[55] Cohn, *supra* note 1, at 133.
[56] Margaret Owen, *Widowhood issues in the context of United Nations Security Council Resolution 1325*, 13(4) INTERNATIONAL FEMINIST JOURNAL OF POLITICS, 616, 617 (2011).
[57] Basu, *supra* note 54, at 368.
[58] Susan Willett, *Security Council Resolution 1325: Assessing the Impact on Women, Peace and Security*, 17(2) INTERNATIONAL PEACEKEEPING, 142, 151 (2010).

peacekeepers. However, it has done so without questioning the tendency of both international humanitarian law and arms-bearing 'peace'-keepers to validate a militarism that has long been identified by feminists as exacerbating insecurity for women globally.[59] As Diane Otto puts eloquently:

> [T]he price of the Council's endorsement of women's participation in peace-making and peace-building [...] is the silencing of feminist critiques of militarism and the failure to recognise the 'inextricable' link between gender equality and peace.[60]

[59] Gina Heathcote, *Feminist Politics and the Use of Force: Theorising Feminist Action and Security Council Resolution 1325*, 7 SOCIO-LEGAL REV., 23, 37 (2011).
[60] Otto, *supra* note 25, at 21.

HUMAN TRAFFICKING TRENDS AND CHALLENGES IN INDIA: NEED OF A SUSTAINABLE INITIATIVE

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Abstract:

Human trafficking which is an equivalent of modern day slavery has been a major issue that is being faced all over the globe since decades now and the problem at present has gained momentum. It is, today, the 3rd largest organised crime in the world. According to UNODC's latest report of 2016 on Trafficking in Persons, almost every country in the world, is at present facing the problem of human trafficking. India being a home to 17% of the world's population is also one of the most affected countries in the world.[1] The government data released by The Ministry of Women and Child Development showed that almost 20000 women and children were trafficked in 2016 in India which shows 25 percent growth in trafficking compared to the year 2015, with West Bengal recorded the highest number of victims.[2]

In this article, efforts have been made to chalk out and discuss the root causes like poverty, illiteracy etc. that leads to trafficking for various purposes mainly for slavery and forced labour which is also a gross violation of human rights. Moreover, the deep impacts of trafficking which leaves the victims traumatised for life are also discussed briefly by studying various reports and surveys published by NGO's and various international organisations like UNODC and WHO. Certain recommendations so as to fight against the crime of trafficking from every possible aspect and to establish a concrete legal framework with its implementation is being focused upon majorly in this article.

Key words*: Trafficking, Human Trafficking, Law, Victim, Immoral.*

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[1] United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (United Nations Publication, Sales No. E.16.IV.6).

[2] Nita Bhalla, 'Almost 20,000 women and children trafficked in India in 2016' (Reuters 9th March 2017) https://www.reuters.com/article/us-india-trafficking/almost-20000-women-and-children-trafficked-in-india-in-2016-idUSKBN16G29G accessed 12th June 2018.

INTRODUCTION

Trafficking in Person is one of the major problems faced by India currently. The problem doesn't seems to find a solution. The problem is its nature and the way it is dealt with in India. The nature of the crime is very secretive and clandestine which poses a difficulty in its identification on one hand and on the other, the government has not paid the level of attention which is needed to tackle the problem and there are till now no concrete laws to fight against trafficking.

Also, it is important to find out the root causes of trafficking in order to fight and form laws against it. There are various questions as to what are the root causes of trafficking which are being discussed ahead in the article. The problem of trafficking is not only limited to just identifying the causes and making laws but also to take proper care of the affected victims and making them safe from their vulnerable positions. This too need proper legislations and financial support which is approximately non-existent in India.

Also, India is placed on Tier-2 watch list by the Trafficking in Person Report 2017[3], which shows the condition of the country and its efforts to fight against the problem. India has failed to comply with the rules and regulations of global standards to deal with the problems and has not yet ratified several international treaties dealing exclusively with the problem of human trafficking.

There are various steps needed to be taken and also the gaps in legislations are needed to be identified to fight the problem at an effective level otherwise it will continue to grow at an unstoppable rate and keep on effecting the country.

In this article efforts have been made to identify the problems and also the loopholes in the current legislative framework which deals with trafficking giving key recommendation and showing the scope of progress and improvement in order to curb the problem and bring it to zero.

[3] United States Department of State, *Trafficking in Persons Report 2017*.

TRAFFICKING TRENDS AND ROOT CAUSES IN INDIA.

India is one of the major hub and transit country for sex and labour trafficking[4]. In India approximately 90% of the trafficking occurs locally or within the country and approximately 10% across borders.[5] India serves as a transit country to trafficking in the Middle East and also to other parts of the world and serves as a destination to people trafficked through neighbouring countries like Bangladesh and Nepal.[6] Additionally, India as a country is one of the major sources for people trafficked to Middle East, North America and Europe.[7]

In India, major victims of trafficking which includes men, children and women are trafficked by various means of coercion, duress or fraud for forced labour.[8] The people trafficked are forced and exploited for the purpose of labour, slavery and other similar practises.[9]

Sex trafficking is also prevalent at a very high rate in India and affects women and girls predominantly. It is difficult to estimate the exact numbers as the practice of trafficking is inherently of very secretive nature.[10] The US Department of State estimated in their report of 2012 that the figure of victims of forced labour ranges from 20 to 65 million.[11]

According to a study conducted by the Ministry of Women and Child Development in India, in 2008, there are approximately 3 Million sex workers currently present in India.[12] Due to the limited resources, education and options available to them they choose to be at the position where they are, the alternatives like that of domestic labour which is one of the options available is of very less paid nature and can't even fulfil their basic needs. Hence, in any case it is difficult to ascertain whether a person is engaged in this work voluntarily or is forced to do so.

[4] ibid 205.
[5] Sadika Hameed, Sandile Hlatshwayo, Evan Tanner, Meltem Türker, Jungwon Yang, 'Human Trafficking in India: Dynamics, Current Efforts, and Intervention Opportunities for The Asia Foundation' (Standford University 2010).
[6] ibid 11.
[7] Sadika Hameed (n 5).
[8] United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2016* (United Nations Publication, Sales No. E.16.IV.6) pp.109-110.
[9] ibid.
[10] Biswajit Ghosh, 'Trafficking in women and children in India: nature, dimensions and strategies for prevention' (2009) 13 IJHR 716.
[11] United States Department of State, *Trafficking in Person Report 2012* p 184.
[12] Ministry of Women and Child Development, *India Country Report 2008* p 4.

Out of the many sources present on the given subject one common factor of poverty is showed as the root cause of trafficking in India.[13] Other factors responsible for trafficking includes unemployment, low awareness of rights among citizens, especially rights of the women, illiteracy, a patriarchal culture and various other cultural factors like dowry and men oriented society.[14]

The deep-rooted caste system in India too is responsible for the growth of trafficking in India; the lower caste people are more vulnerable to trafficking. There are now various steps taken by government to tackle the problem and bring it to zero but it is yet to be seen whether these laws are implemented in a way so as to curb this problem and help in bringing it down.

HEALTH IMPLICATIONS

The crime of trafficking leaves a long-lasting and very deep impact on the mind and health of the victim. It is very hard to forget the sexual, physical and mental trauma that a victim of trafficking faces. Its effects can be devastating and if they are left unaddressed they can undermine the victims' recovery and can potentially lead to the re-victimization.[15] The force used by the traffickers leaves a lasting impact and make the victim feel powerless and incapable. This directly affects victims in depression and identity crises. Victims of trafficking often experience Post-Traumatic Stress Disorder (PTSD) and other traumatic disorders, anxiety disorders, nightmares, self-blame, Stockholm syndrome, paranoia, suicide attempts, sleeping issues, dissociative disorders etc. In many cases women suffer from Traumatic Brain Injuries (TBI) which affects their personality and overall functioning.[16]

Though there are very few prospective studies done to survey about the needs of trafficking victims. A survey done in 2006, in Europe, documented the sexual, mental and physical health signs experienced by victims of sexual exploitation.[17] In the said study 200 women were surveyed, with women who faced severe sexual abuse before (59%) and during (95%) the exploitation and also faced various mental and physical complications immediately after facing

[13] Sadika Hameed (n 5) 12.
[14] ibid.
[15] Priya Nair. V, 'Trafficking of Children for Sexual Exploitaton' (2015) 2(5) LMOJ http://journal.lawmantra.co.in/?p=209 accesses 11th June 2018.
[16] Heather J. Clawson, Amy Salomon, Lisa Goldblatt Grace, 'Treating the Hidden Wounds: Trauma Treatment and Mental Health Recovery for victims of Human Trafficking' U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation.
[17] Hossain M et al., 'The relationship of trauma to mental disorders among trafficked and sexually exploited girls and women' (2010) 12 AJPH 2442.

the unfortunate experience of trafficking. Most common health problems included sexual and reproductive related health problems, fatigues, headaches and weight loss at a significant level. Also, later interviews with the same women showed that, mental health complications lasted longer and deeper than that of physical health complications.

So, it is very evident that the problem of post-traumatic disorder and other physical complications are very dangerous for the victims and can lead to suicide and other life threatening steps by the victims.

CONSTITUTIONAL PROVISIONS AGAINST TRAFFICKING

India has provisions which aims at giving rights against trafficking. There are Fundamental Rights and Directive Principles of State Policies in the Indian Constitution which addresses certain issues related to trafficking. They are as follows:

Article 23 of fundamental rights under the Indian Constitution says:

"Traffic in human beings and Beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

Article 39 of the Directive Principles of State Policies under the Indian Constitution

i. Article 39(e) says:

"That the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength"

ii. Article 39(f) says:

"That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

The Constitution of India deals with trafficking with 2 different aspects – firstly, it ensures rights against trafficking under Fundamental Rights Chapter which defines the rights of basic necessity and are guaranteed to every citizen irrespective of their caste, creed, religion and sex.

These are directly enforceable by law and in any court of law. Secondly, the Directive Principles of State Policies (DPSP) also have certain provisions which gives the State proper direction to shape their policies in such a way that the trafficking and forced labour is avoided at any cost. Though these are non-justiciable and unenforceable in the court of law, they play a major role in helping the government to form its policies, also DPSP does not clearly states' rights against 'trafficking' but it says 'exploitation' which is also a key ingredient of trafficking.

IMMORAL TRAFFICKING PREVENTION ACT, 1956

The Immoral Trafficking (Prevention) Act, 1986, which was earlier known as Suppression of Immoral Traffic in Woman and Girls (SITA), 1956, is the current central legislation dealing with trafficking in India. Though the name of the Act says immoral trafficking of persons, the Act covers commercial sexual exploitation and prostitution only, its punishments are limited to the abettors of commercial sexual exploiters. The ITPA provide for rehabilitation of the victims in form of protective homes which are to be provided by the governments of different states.

The Act functions solely to counter the problem of trafficking in the country but there are severe gaps which are to be addressed to make it more effective. Some of the gaps are identified below.

1. CONCEPTUAL LOOPHOLES AND DEFINITIONAL INCONSISTENCIES.

i.) The very basic deficiency in ITPA is that it lacks the proper definition of trafficking. Also, even the commercial exploitation for sex is not properly defined in the Act. Instead of defining the main terms and other important aspects it defines brothel keeping as sites of commercial sexual exploitation and thus penalising them. Therefore there is ambiguity regarding a proper definition of the offence and its context. The question that arises due to these ambiguities is that whether engagement in the act of prostitution an offence or trafficking for prostitution is? These uncertainties leaves out a high number of offenders who carry out certain illegal activities related to trafficking.

ii.) The detention of the victim in the corrective homes reflects that the victim himself is taken as an offender and this shows the contradiction in terms of the Act. This shows the ambiguous position of defining prostitution which is inherent in the said Act. While prostitution is illegal in India, every worker engaged in prostitution is

seen as an offender under the ITPA. Moreover, the corrective measure is an offensive term for a victim who has been forcefully exploited sexually against his or her own will.

iii.) Under ITPA the rights of the victims are not defined clearly and this is very basic loophole in the Act, where without the clarification on the adherence to the basic rights the welfare measures are provided. The right of rehabilitation which should ideally include educational, legal, health and psychological support is totally absent.

iv.) The powers of Central and State bodies and their composition is totally absent in the Act. The time frame within which such bodies should be ideally formed is also not defined anywhere. This leads to the absence of preparation and deficiency in the roles of the bodies formed to combat trafficking.

2. PROTECTION, REHABILITATION AND COMPENSATION

The absence of clearly specified rights and for rehabilitation compensation is one of the biggest anomalies. This includes keeping the victim of trafficking in corrective homes without their consent. The ITPA instead of giving rights to the victims, provides for the government to build corrective homes. This only points out that the government has to comply only with the extent of their financial capacity or according to the budget allotted to fighting the problem of trafficking. This leads to the deficient attention to these areas. The arbitrary power to state government to make protective homes that too improperly equipped has worsened the condition. There is no support not even legal in these corrective homes and the victims are poorly assisted. The livelihood opportunities that can serve as an effective measure in rehabilitation are also totally absent. The absence of proper rights and rehabilitation options leads the victims to get back to their old lives after getting released from the corrective homes. This again nullifies the whole process and brings it back to zero.

3. CONVICTION AND OTHER ANOMALIES.

In India the record of arrest and punishments are seriously disheartening. It has been suggested that complicity between the traffickers and the law enforcement officers contributes to the low number of convictions.[18] Besides there are several other instances that shows the reasons for lack of proper conviction. The absence of witness protection mechanism leads to witness turning hostile or not coming into light in the first place itself. Also, there are no proper

[18] United States Department of States (n 3).

specified agencies to deal with the investigation of trafficking, this leads to carrying out all the investigation by the local police and thus leading to slowing down of the process in the initial stage itself.

Moreover, the application of different laws and absence of clarity about the role of each authority leads to overlapping of responsibilities and creating chaos. Like, Special Juvenile Police Units, Anti Human Trafficking Units, District Missing Persons Unit, Missing Persons Squad etc. all have overlapping jurisdiction. This leads to overlapping and fixing of liability becomes difficult thus impacting action.

After examining the ITPA it is clear that there is need for more comprehensive and specific law with proper definitions to counter the crime of trafficking. Trafficking being a complex crime involving gross violations of human rights should be dealt with more severity. India has also failed to keep up with the international standards to deal with trafficking which is also one of the reason for not being able to curb the crime of trafficking.[19]

OTHER MISCELLANEOUS PROVISIONS AGAINST TRAFFICKING.

1. INDIA PENAL CODE

The Indian Penal Code[20] has certain provisions that support the punishments for trafficking. Though IPC does not define trafficking anywhere explicitly but there are certain sections that deal with the punishment for human trafficking. The act of abducting or kidnapping women and compelling her for marriage,[21] kidnapping from lawful guardianship,[22] prosecution of minor girls,[23] buying and selling of minors for prostitution purposes,[24] illicit intercourse[25] and abducting minor girls for begging[26] are all punishable under the IPC.

The basic principle behind Section 360 and Section 361 of the IPC[27] is to protect the children of the minor age groups from the heinous offences of abduction, kidnapping and other immoral and illegal purposes. Section 363 of IPC defines begging[28] and aims majorly on the offender

[19] ibid.
[20] Indian Penal Code 1860 (IPC 1860).
[21] IPC 1860, s 366.
[22] IPC 1860, s 361.
[23] IPC 1860, s 366.
[24] IPC 1860, ss 372, 373.
[25] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 5(i).
[26] IPC 1860, s 363.
[27] IPC 1860, ss 360, 361.
[28] IPC 1860, s 363.

who have the motive to kidnap the children and use them for the begging business. Further, Section 366 A and 366B of the Indian Penal Code came into picture in 1923 in order to enforce an International convention.[29] The object of the Section 372 and Section 373 of the IPC is to contain the bonded labour and slavery which is again the main reason for trafficking.

2. SPECIAL AND LOCAL LAWS

There are certain other laws that deals with trafficking to certain extent but not as a whole dedicated to combat against trafficking. The Juvenile Justice (care and protection of children) Act, 2000, provides for the protection of children in need of special care and attention[30]. In case of a child being a victim of trafficking the law provides for their protection care and all the needs to help the child in the best of his or her interest. Chapter 4 of the said Act deals primarily with the same objective and certain provisions such as Sections 8, 9, 34, 37 provides for protective and residential homes for children in need of special protection and care.

3. LOCAL LAW

There was a practice of offering girls to god and goddesses in many party of the country, this was also one of the primary reasons for increase of trafficking activities in the some of the states. In Karnataka[31] and Andhra Pradesh[32] these activities are now banned by bringing in special laws for the same. These Acts ban all kind of offering activities related to the girls and fixes punishment for the violation or abating of same activities.

In Goa[33] there is a legislation for protection of children who are victim of sex tourism and other sexual offences against children. The said Act fixes punishment and aims primarily at targeting the abettors of these offences.

Further, under the provisions of Immoral Trafficking (Prevention) Act, 1956, there are different legislations made in different states to put a full stop on the problem of trafficking. In Andhra

[29] International Convention for Suppression of Traffic in Women of the Full Age 1933.
[30] The Juvenile Justice (care and protection of children) Act 2000.
[31] The Karnataka Devadasi (Prohibition of dedication) Act 1982.
[32] The Andhra Pradesh Devadasi's (Prohibition and dedication) Act 1988.
[33] The Goa children's Act 2003.

Pradesh,[34] Rajasthan,[35] Madhya Pradesh,[36] Punjab[37], Jammu Kashmir,[38] Himachal Pradesh,[39] Bihar,[40] West Bengal[41] and Gujrat[42] there are laws made by the state governments to protect the women and girls from immoral trafficking. The said Acts also provides for establishing rehabilitation centres and protective homes for the victims of trafficking.

There are laws and rules made in every state to counter the problem of trafficking but these laws are flawed and does not deal with the problem from the core. Building the protective homes and enacting the laws will not serve the purpose. What is needed is the concrete laws and bodies for their implementation and the problem has be taken more seriously.

INTERNATIONAL LAWS AND INDIA

1. INTERNATIONAL LAW

Every form of contemporary female slavery is prohibited under Article 4 of Universal Declaration of Human Rights, which specifically says that "no one shall be held for slavery or servitude; slavery and slave trade shall be prohibited in all the forms."[43] Article 8 declares the right to freedom from slavery as a non-derogable right.[44] This right has acquired the *jus cogen* status under customary international law.[45] Also, Article 8(1) and (2) of ICCPR states that no one shall be held for slavery and servitude and that all kinds of slave trade is prohibited.[46] The Human Rights Committee has addressed all kinds of trafficking in women, children and forced prostitution under Article 8 of the ICCPR. The committee has also asked the State parties to provide the information regarding the measures taken by them to counter these practises both within and across the national borders.[47]

[34] The Andhra Pradesh Suppression of Immoral Traffic in women and girls rules 1958.
[35] The Rajasthan suppression of Immoral Traffic in women and girls rules 1958.
[36] The suppression of Immoral Traffic in women and girls (Madhya Pradesh) Rules 1960.
[37] The Punjab suppression of Immoral Traffic in women and girls rules 1960.
[38] The suppression of Immoral Traffic in women and girls (Jammu and Kashmir) Rules 1959.
[39] The suppression of Immoral Traffic in women and girls (Himachal Pradesh) Rules 1982.
[40] The Bihar suppression of Immoral Traffic in women and girls rules 1958.
[41] The West Bengal suppression of Immoral Traffic in women and girls Rules 1959.
[42] The suppression of Immoral Traffic in women and girls (Gujrat) Rules 1985.
[43] UDHR (n 25) art 4.
[44] International Covenant on Civil and Political Rights (adopted 16th December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[45] Randall H. Cook, 'Dynamic Content: The Strategic Contingency of International Law' (2003) 14 DJC&IL 89 p 97-98.
[46] ICCPR (n 44) art. 8.
[47] UNCHR, 'Equality of Rights between Men and Women' (Mar. 29, 2000) UN Doc CCPR/C/32/REV.1/ADD.10.

2. TREATIES RATIFIED BY INDIA: AN OVERVIEW

India has signed several International Treaties to counter the problem of trafficking. These treaties helped in forming several national and local laws in India to fight against trafficking. Below is the list of treaties signed and ratified by India and their implementation.

1. *United Nations convention for Rights of the Child.*

India has signed this convention on 11 December, 1992. After the signing of this convention The Juvenile Justice Act, 2000 was enacted and certain provisions regarding care and protection of children were drafted and enforced with immediate effect.

2. *Convention for the suppression of immoral trafficking Acts and prostitution.*

The convention was signed on 9 May, 1950. This formed the basis for ITPA, which is currently the core trafficking and prostitution prevention Act in India.

3. *Optical protocol to CRC on Sale of Children, Child Pornography and Child Prostitution.*

This protocol was signed on 15th November 2004. The said protocol works towards prevention of crime such prostitution and engagement of children in the pornographic films.

4. *ILO convention 138, Minimum age convention.*

Establishing minimum age as 14 years, introduced into various legislations. It covers the domestic labour too. There are still difficulties of enforcing it that are faced from informal sector. Ratification of ILO Convention is post ponded till the enforcement of new legislations.

5. *ILO Convention 182. Concerning the elimination, prohibition and immediate action against any form of child labour.*

This convention is not yet ratified by India.

6. *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002 and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia.*

The given convention was signed at 11th SAARC Summit, on 5th January 2002.

7. *Protocol to Supress, Prevent and Punish Trafficking in Persons, Especially Women and Children*.

The said protocol was signed by India on 12th December 2002.

8. *Convention on Eliminating All Forms of Discrimination against Women (CEDAW).*

India ratified this convention with a declaration on 9th July, 1933.

9. *UN Convention against the Transnational Organized Crime.*

This convention was ratified by India on 12th December, 2002.

The abovementioned treaties are some of the primary International Treaties formed to counter the problem of trafficking from every possible aspect like in form of labour, using children as in pornographic movies, prostitution and other aspects. India has ratified some of the treaties as stated above but failed to ratify all of the treaties. Also, the ratified treaties are not being implemented properly.

IDENTIFIED GAPS IN THE LEGAL FRAMEWORK FOR PREVENTION OF TRAFFICKING IN INDIA

After assessing the various laws made in Indian so far and the laws that came into force after signing the international treaties there is a clear idea that the Indian laws are flawed and does not meet the standard needed to counter the problem of trafficking. There are some major gaps that are needed to be fulfilled primarily to curb the trafficking. Some of the primary gaps and deficiencies in the current laws are identified below.

- In India, trafficking is not considered as an organised crime also the definitions or provisions which are important for the purpose of organised crime are not being used while dealing with trafficking like they are used in other cases, say, Rape cases.
- Overall prosecutions are not satisfactory.
- As far as cross-border trafficking is concerned the co-operation mechanism is almost non-existent. Especially in case of
  a. Transfer of person sentenced.
  b. Legal assistance.
  c. Joint investigations.
  d. Providing information.

- There is no proper environment created for victims and witnesses in order to make them feel safer. The witnesses, as a result of this, turns hostile. Also, the lengthy procedure of trial adds to this.
- There is no or non-existent financial programs for the same.
- There are no adequate distinctions drawn between the victim and the trafficker. For example: in cases of unsafe migrations without any document, S.4 and S.8 of the ITPA are used against the victim herself.[48]
- There is no duty of protection casted upon state for the rehabilitation and rescue even after the presence of relevant provisions in the ITPA[49] and Juvenile Justice Act[50] The condition that exist in the homes needs improvement.
- Awareness programs with help of NGOs need to be increased and proper helpline numbers have to be introduced with high protection in sensitive areas.
- The current laws and policies are slow in responding to latest forms of trafficking and there is high criticism to the ITPA too, which is under consideration currently.
- Even when there is a need for licencing of the recruitment agencies, this primary requirement is not taken into consideration yet.
- Systems like identification and referrals of service provider and support staffs at different levels are not present, although there are certain NGOs supporting this activity.

Also, Article 3(d) in PROTOCOL[51] defines any person, below 18 yrs. of age as a child but in India laws like labour laws have different definitions and uses simultaneously 'minor' and 'child' which creates confusion. Also, India has not yet ratified the ILO's Minimum age convention which is a must.

India has not yet ratified the UNTOC or the Protocol which aims at setting global standards for the prevention of trafficking and lack of it leads to lack of common understanding to fight the problem.

[48] The Immoral Traffic (Prevention) Act 1956.
[49] The Immoral Trafficking (Prevention) Act 1956.
[50] The Juvenile Justice (Care and Protection) Act 2015.
[51] UNGA, 'Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime' (15 November 2000).

KEY RECOMMENDATIONS.

- India should ratify the major treaties like UNTOC in order to form a common understanding and blueprint which will help in fighting the problem effectively. Moreover, the ratified treaties should be taken with utmost seriousness and efforts should be made to meet the requirements which are primarily pointed out in them.
- There should be a concrete framework with addressing all the latest form of trafficking and laws against them should be formed. Also, the present legislations should be assessed keeping in mind all the latest form of trafficking coming up and form laws to counter them with immediate effect.
- There should be changes in the ITPA and it should be substituted with an overarching bill which aims at covering all the possible aspects of trafficking.
- All the terms like 'child', 'minor' should be explained properly and according to global standards.
- There has to be a proper coordination strategy with neighbouring countries mainly Bangladesh and Nepal to stop cross-border trafficking. Specific multi-lateral and bi-lateral treaties should be formed with these countries which can provide solutions to stop trafficking on both the side of the border.
- More financially stable and helping platform should be formed in order to take care for the rehabilitation and protection of the victims.
- A proper line of differentiation has to be drawn between victim and trafficker. Also, a differentiation between prostitution, unsafe migration and trafficking is a must.

Some other recommendations which are also provided in the new Trafficking of Persons (Prevention, Protection and Rehabilitation) Draft Act, 2017:

- Punishment for Dereliction of the Duty. There should be some form of punishment for personnel engaged in providing care protection and rehabilitation to the victims of trafficking for negligence in their duty.
- Application of law should be such that when two or more laws are applicable to the crime, the law with harsher punishment should be implemented.
- All the offences which involves any type of trafficking or any activity related to trafficking should be made cognizable and non-bailable.
- Setting up a National Anti-Trafficking Bureau to monitor and coordinate all possible aspects of trafficking.

CONCLUSION

After identifying the major causes and effects of trafficking on the victims and the country which is facing the problem of trafficking there are various gaps identified. The major gaps being lack of awareness and distorted legislative framework. Also, noncompliance with the international standards have put India in a backword state. There are significant changes that are to made in order to counter the problem effectively, stating with providing proper financial support, free legal aid, forming multi-dimensional legal framework and ratifying important international treaties. After these steps only will there be a change and the problem will then reduce to a significant extent.

RESTITUTION OF CONJUGAL RIGHTS: A WOMEN'S RIGHT OR A CONSTITUTIONAL VIOLATION? WITH SPECIAL REFERENCE TO T. SAREETHA VS. T. VENKATA SUBBAIAH

Nayantara Bhattacharyya[*]

Abstract:

This research paper focuses on the concept of restitution of conjugal rights in a marriage. It analyses the scope of fundamental rights within the restitution rights of the parties, especially women. The controversy regarding the restitution rights and its impact on the fundamental rights has been a long standing one and through this paper it aims to analyses whether the fundamental rights are getting infringed or not. For the same purpose to discuss the concept of restitution rights we are analyzing a landmark judgment of T. Sareetha v/s T. Venkataubbiah. It also discusses the rights of women with relation to restitution along with specific case laws. Along with that the research focuses on the abolition of restitution rights in the United Kingdom with drawing parallels with the existing restitution system in India. The paper concludes with certain recommendations which might help in keeping the scope of personal law separate from that of the fundamental rights of a person.

Keywords: *Restitution, fundamental rights, Abolition, women's right, choice.*

INTRODUCTION

Family law or personal law is a branch of law which affects and impacts our life the most. It deals with marriage, divorce, adoption, maintenance and many such aspects. In spite of the fact that personal laws have been under scrutiny many a times, its importance has not changed. The question which arises in respect of family law, in the mind of many intellectuals is that can personal laws be excluded from the scope of the Fundamental rights? This is a question which we will delve upon in the following pages.

'Restitution of conjugal rights', is a concept which has existed on society for ages. There has been numerous controversies which has surrounded its validity along with the question whether it is biased towards the husband or not. To answer these questions it is important that we know, the exact meaning of the two terms. Conjugal rights mean the "sexual *rights or privileges implied by and involved in the marriage relationship: the right of sexual intercourse between*

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husband and wife." [1] Restitution means, *"An act of restoring, or a condition of being restored. It can also be defined as a legal action serving to cause restoration of a previous state."*[2]

Section 9 of the Hindu Marriage Act of India has defined the clause of restitution.

"Restitution of conjugal rights – When either the husband or the wife has, without reasonable excuse withdrawn from society of the other, the aggrieved party may apply, by petition to the district court for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly."[3]

Hence, to explain the above definition it can be said that either husband or wife can file a claim for restitution when the other spouse has withdrawn from the society of the other without giving any reasonable cause and if the Court is satisfied with the petition of the aggrieved party, then there is no other legal ground why it should not be granted.

As discussed earlier, marriage gives rise to rights and obligations and these obligations are what is known as 'conjugal rights'. Three main objectives of marriage have been laid down. [4] They are as follows;

- Dharma (Justice)
- Praja (procreation)
- Rati (pleasure or sex)

ORIGIN OF THE REMEDY OF RESTITUTION: BRIEF HISTORY

The remedy of restitution did not originate in either Hindu or Muslim law, but in feudal England. Its roots can be traced back to early Jewish Law, where it was considered that the female or the wife was the property of the husband. This was one sided and the remedy was available only to the husband. English law adopted this and changed this a bit. This remedy was available to both the husband and wife and both of them had the right to bring the other spouse back. It was from this English Law that it was adopted in the Hindu Marriage Act. Although, this remedy of restitution was abolished in 1970 in England.

[1] *Merriam Webster Dictionary*; Merriam-webster.com, Last Visited 23rd August 2017.
[2] *Merriam Webster Dictionary*; Merriam-webster.com, Last Visited 23rd August 2017.
[3] As defined under Section 9 of the *Hindu Marriage Act*.
[4] M.Gangadevi, *Restitution of Conjugal Rights; Constitutional Perspective*, Indian Law Institute.

This remedy of restitution was originally introduced in India with the case of *Moonshee Bazloor v Shamsoonaissa Begum*.[5]It was held in this case that a suit for restitution of conjugal rights filed by a Muslim man was rightly filed as a suit for specific performance. It was on this lines that Order 21 Rule 32 of the CPC[6] spoke about the decree. This will be further elaborated later.

In cases of restitution, the burden of proof lies on the person who has withdrawn from society and the marriage.[7] It is for him/her to show reasonable cause as to why he/she has moved away. If the Court finds it just and reasonable then restitution is not granted but if not then it is ruled in favor of the person who has applied for the remedy.

With refer reference to the remedy of restitution, there have been numerous judgments which have been passed for and against it.Among them the case of *T. Sareetha v T Venkatasubbaiah*[8] is a landmark judgment on restitution and the constitutional validity of it.

CASE ANALYSIS: T. SAREETHA V. T. VENKATASUBBAIAH

1. FACTS OF THE CASE

Sareetha, 16, living in Madras had been married off to Venkata Subbaiah at Tirupati in the year 1975.Very soon after their marriage they started living separately and this went on till five years. After this Venkata filed a petition for the restitution of conjugal rights under Section 9 of the Hindu Marriage Act.[9]Sareetha's preliminary contention was that there was a lack of jurisdiction in the petition filed by Ventaka Subbaiah.The main reason behind this was that the husband had filed in his petition that the marriage took place at Tirupati and the respondent and appellant resided together at Madras.Ventake hails from Cuddapah and he has a house and agricultural lands there. This is the place where he claimed that Sareetha and he stayed for six months after marriage and then at Madras with the parents of Sareetha.This was what Sareetha contested. She said that Madras should not be considered as the last place they resided at

[5] *Moonshee Bazloor v Shamsoonaissa Begum* – 1866-67 (11) MIA 551.
[6] Code of Civil Procedure 1908.
[7] Sugandha.ch, *Restitution of Conjugal Rights*, Legal Service India.
[8] *T. Sareetha v T. Venkatasubbaiah* – AIR 1983 AP 356.
[9] Section 9 of the Hindu Marriage Act - Restitution of conjugal rights – When either the husband or the wife has, without reasonable excuse withdrawn from society of the other, the aggrieved party may apply, by petition to the district court for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly'

together as a couple. Apart from the question of the residence of the place the next question was of the constitutional validity of the case. Sareetha in her petition claimed that Section 9 of the Hindu Marriage Act was violate of the fundamental rights of a person.

2. JUDGEMENT

In this case it was decided that Section 9 was null and void and that by providing the husband, with the relief of restitution, the wife's fundamental right under Article 21 was being violated along with Article 14 of the Constitution.

3. ANALYSIS

The Andhra Pradesh High Court held Section 9 of the Hindu Marriage Act as invalid and null. The wife in this case pleaded that the violation of her right to privacy included how and where her body was used for procreation. This freedom that one has is what is the Right to Life and Personal Liberty as discussed in Article 21 of the Constitution of India. The husband's right to restitution of conjugal rights was hence dismissed.

This was a landmark case in reference to the restitution of the conjugal rights. Along with the fact that Section 9 was declared as invalid a very important question which arises is that whether personal laws can be excluded from the purview of the fundamental rights .The Fundamental rights are certain rights which cannot be suspended at any cost. They are applicable to every Indian citizen at every path of their life. The European Convention on Human Rights[10], says that any right to privacy must encompass and protect the personal intimacies of the house, marriage and family.

In Sareetha's case, it was seen that the Fundamental Rights of 14, 19 and 21 was violated. In the case of *State of Bombay v Naarasu Appa Mali's*[11], the decision was contradictory to what was held here.

However in spite of this landmark judgment there was another judgment in the Delhi High Court, *Harvinder Kaur v Harmander Singh* [12]which gave an opposite opinion to what was held in this case. The above mentioned case will be discussed shortly.

[10] European Convention of Human Rights 1953.
[11] *State of Bombay v Naarasu Appa Mi's* AIR 1952 BOM 84
[12] *Harvinder Kaur v Harmander Singh* AIR 1984 Del. 66

RESTITUTION IN RELATION TO THE FUNDAMENTAL RIGHTS

The Fundamental Rights is the section of the Indian Constitution of India that prescribe the fundamental obligations of the State to the citizens. It is those rights which cannot be suspended at any point of time irrespective of the situation which arises. The Fundamental Rights form Part III of the Constitution of India, starting from Article 12[13] and ending with Article 35[14].There is no law which can be surpassed from under the purview of the Fundamental rights, for it is absolute and irrevocable.

"*Can personal laws be excluded from under the scope of Fundamental rights*?" This is a question which has often been raised by numerous jurists. It has been noticed that on many occasions' personals laws get a higher preference than that of the Fundamental rights, which should never happen. In the case of *Harvinder Kaur v Harmander Singh*,[15] restitution of conjugal rights was held valid according to Section 9 of the Hindu Marriage Act, in spite of the fact that the above mentioned section violates the right to life, liberty and privacy of a person as defined under article 21[16] of the Constitution of India. In this case the Delhi High Court upheld the validity of section 9 by saying that there was no reasonable cause of the wife to withdraw from the conjugal society of the husband and hence restitution was granted.

The right to make reproductive choices fall under the purview of Article 21 of the Constitution of India. The reason being that, the choice to reproduce or abstain from reproducing is something which should depend on the woman. The dignity and wish of the woman should be kept in mind and respected. This was similar to the case of *T.Sareetha v T.Venkata Subbaiah*,

[13] Definition- In this part, unless the context otherwise requires " the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

[14] Legislation to give effect to the provisions of this Part- Notwithstanding anything in this Constitution-(a) Parliament shall have, and the Legislature of a State shall not have, power to make laws-

(i) With respect to any of the matters which under clause (3) of article 16, clause (3) of article 32 , article 33 and article 34 may be provided for by law made by Parliament and

(ii) For prescribing punishment for those acts which are declared to be offences under this part,

and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii)

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (I) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof any to any adaptions and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.

[15] *Harvinder Kaur v Harmander Singh* AIR 1984 del 66

[16] No person shall be deprived of his life or personal liberty except according to procedure established by law.

which was already discussed before. In that case, restitution was not granted and section 9 of the Hindu Marriage was held to be unconstitutional as it infringed the privacy of the woman.

In the case of *Harvinder Kaur v Harmander Singh* it was held by the judge that implementing constitutional law in the four walls of the home was most inappropriate. It is like "introducing a bull in a china shop", it would also prove to be ruthless destroyer of the very institution of marriage and everything that it stands for.[17]It was declared that in the privacy of the home neither Article 21 nor Article 14 played a role. The question of "marital privacy" is what is important than that of 'individual privacy'.

1. LINK BETWEEN PERSONAL LAWS AND PART III OF THE CONSTITUTION

While discussing the link between personal laws and the fundamental rights, it should be dealt with in two ways, the first being if the personal laws are contradicting the fundamental rights or which repeal or clash with the Constitution of India.[18] From the beginning of time there has been a dilemma to find the two find the right balance between two extremes of the personal laws which are based on the religious practices of society and the fundamental rights of the Constitution. The case of *State of Bombay v Narsu Appa Mali*,[19] will give an insight into the interlinking of the Constitution of India and the personal laws.

In this case the question was based on the Bombay Prohibition of Bigamous Marriage Act 1946.The constitutional validity of the same was challenged in reference to Article 14, 15, and 25.It was held that the act was not violative of Article 14 as the State was free to embark on any social reform that was deemed necessary. It also said that Part III of the Constitution of India cannot be applied to personal laws.

2. SAROJ RANI V. SUDARSHAN KUMAR

This case was a landmark case in the sense that it reconciled the two conflicting opinions posed in the T.Sareetha case and the Harvinder Kaur case.[20]In the case of *Saroj Rani v Sudarshan Kumar*[21], it was the wife who gave a petition for the restitution of conjugal rights. The lady got

[17] Saptarsh Mondal, *Right to Privacy in Naz Foundation; a Counter; Heteronormative Critique*, NUJS Kolkata Law Review. 2009.
[18] Mr.Ashok, *Judicial review of Personal Laws vis-à-vis Constitutional Validity of Personal Laws*. South Asian Journal of Multidisciplinary Studies (SAJMS) Vol. 2 Issue 3.
[19] *State of Bombay v Narsu Appa Mali* (1951) ILR Bom 775
[20] Floria Agnes, *Family Law- Family Law and Constitutional Claim*, Vol 1, Oxford University Press.
[21] *Saroj Rani v Sudarshan Kumar* AIR 1984 SC 1562 ;(1984) 4 SCC 90.

married in 1975 and bore two daughters. She was turned out of her matrimonial house which us when she filed a petition in 1977.In 1978, she was granted interim maintenance by the Court at the rate of Rs. 185 a month. In the month of March of the same year, her husband filed a petition for the restitution of conjugal rights .There was a dilemma regarding the validity of Section 9 of the Hindu Marriage Act and the judges were confused as to which way to go, whether they should follow the precedent set in the T.Sareetha case or the precedent set in the case of Harvinder Kaur case.

However the Supreme Court considered the judgment of the Delhi High Court and held that *"we are unable to accept the position that Section 9 of the Hindu Marriage Act is violative of Article 14 or 21 of the Constitution of India."*[22] The judgment said that the main purpose of restitution was to ensure that the husband and the wife lived together happily along with the fact that the differences which were between them were solved amicably. Hence, with this the constitutionality of Section 9 was upheld. The couple was granted divorce and the husband was required to pay a monthly maintenance. With this the husband, who was successful in his petition was required to pay the costs of the appeal.

Through the case of *Saroj Rani v Sudarshan Kumar*, it was seen that the restitution of conjugal rights is not something which was only created out of a statute, but it was the right of the husband or the wife to the society of each other. More than that it was engraved in the very institution of marriage itself. There it was concluded that there were "enough safeguards in section 9 to prevent it from becoming a tyranny."[23]

EMPLOYMENT AS A REASON FOR RESTITUTION OF CONJUGAL RIGHTS

Employment has many a times been the reason for dispute between husband and wife, which has ultimately led the husband to file for restitution for conjugal rights. But, the question which arises here is, is employment a valid reason for filing for such a remedy? Many have had different opinions on this and hence till now whenever the debate regarding this arises, the answer still seems to be dubious.

It has been seen that if the wife works in a different city from the husband, cases of restitution of conjugal rights are filed. However, the wife is ready to take her husband and reside with him

[22] Said by Justice Sabyasachi Mukhatji.
[23] Floria Agnes, *Family Law- Family Law and Constitutional Claim*, Vol 1, Oxford University Press.

at any time whenever he comes to visit her. Filing for restitution only on the mere fact that the wife works in a different city is not reasonable and hence should be struck down. In the case of *Mirchumal v Devi Bai*,[24] it was held that *"the mere fact that she is working against the wishes of her husband will not furnish a good ground for a decree for restitution on conjugal rights.* "The similar decision was given in the case of *Shanti Devi v Ramesh Chandra Roukar and Ors.*[25], it was held that the reason for asking restitution was unreasonable and not justified. It also speaks of the fact that the petition for restitution was filed after ten years, which in itself is not very justifiable. If there were complaints it should have been made within a reasonable time and not after so long.

In the case of *N.R Radhakrishnan v N. Dhanlakshmi*,[26] it was seen that the appellant i.e. the husband filed a petition for the restitution of conjugal rights because even after telling his wife numerous times, she refused to leave her job and live with him in a different city. The Court did not grant him the restitution because asking for his to leave her livelihood for him unjustified.

However, contradictory views can be seen in the case of *Vuyyuru Pthuraju v Vuyyuru Radha*[27], in which it was said that that it was the duty of a Hindu wife to live with her husband wherever he wishes to live and it is the right of the husband to make sure the wife resides with him and the courts cannot deprive him from that right.

In present day society, it has become an essential feature that both partners in a marriage due to the increasing economic needs of a family. Due to this reason, many a times, the wife or the husband may have to move to other cities for better job opportunities or for the fact that the job is of transferable nature. When the case is of the husband moving away, the society looks at it as a man working hard to fulfill the needs of his family. But, whenever the case is that the wife has to move away, it is considered that she is moving away from the society of the husband, hence compelling him to file a suit for the restitution of conjugal rights.

In Hindu law, as it has been seen before, it is considered that it is the duty of the wife to obey the husband and live with him wherever he goes, the question which arises is whether the same conditions are considered for the wife as well or not. As a general rule, it is observed that the

[24] *Mirchumal v Devi Bai* AIR 1977 Raj 113
[25] *Shanti Devi v Ramesh Chandra Roukar and Ors* ;AIR 1969 Pat 27
[26] *N.R Radhakrishnan v N. Dhanlakshmi*; AIR 1975 Mad 331
[27] *Vuyyuru Pthuraju v Vuyyuru Radha* ;AIR 1965 AP 407

wife's moving away for work purposes has been looked down upon , unlike that of the men. It could be called a feature of the patriarchal society which exists in India. In the case of *Tirath Kaur v Kartar Singh*[28], it was held by the court according to Hindu Law mentioned in Mulla, that *" the wife's first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection. She is not entitled to separate residence or maintenance."*[29]

Research shows that economic reason is not considered a valid reason for the wife to move away from the home and work in some city.[30] This is in spite of the fact that the income of the husband is not sufficient enough for the family to sustain a good and healthy life. The similar judgment was held in the case of *Gaya Prasad v Bhagwati*.[31]

MATRIMONIAL HOME

While talking about the restitution rights, in relation to the employment of the wife in different cities, it is imperative that we discuss about the concept of what is called a matrimonial home.[32] The matrimonial home is one which is set up after a couple marries. There are certain specifications regarding these which will be discussed below.

- HUSBAND CHOOSES MATRIMONIAL HOME – In this kind, it is the duty of the husband to choose the matrimonial home and along with that provide for the wellbeing of the wife. This is or was seen in primarily male dominated societies.

This principle was enunciated in the case of *Kailashwati v Ayodhia Prasad*.[33]

- BOTH HUSBAND AND WIFE HAVE A SAY IN CHOOSING THE MATRIMONIAL HOME - In this both the husband and wife have say in choosing of the matrimonial home. However, in the Dharmashshatra's there's no codified law pertaining to this and hence it is open for interpretation.
- WIFE SHOULD CHOOSE THE MATRIMONIAL HOME - This is the third category and in this it is been said that the wife should have the preference while choosing the

[28] *Tirath Kaur v Kartar Singh* ;AIR 1964 Punjab 28.
[29] *Mulla's Principles of Hindu Law 1974.*
[30] Kusum , *Wife's Right to Employment versus Husband's Conjugal Rights*; the Indian Law Institute.
[31] *Gaya Prasad v Bhagwati* ;AIR 1966 MP 212.
[32] Sukhdeep Kaur Billing:_*Choice of Matrimonial Home and Shared Responsibilities: Judicial Response*, International Journal of Legal Development and Allied Issues.
[33]*Kailashwati v Ayodhia Prasad*; 1971 CLJ 109 (P&H)

matrimonial home. In present day due to increasing needs of the society, it has been seen that the wife takes up job to financially help the family and also maintain a stable family life.

There have been instances where the woman has had to leave her marital home to go far for work. So as to prevent this and to stop the husband from filing the petition for restitution of conjugal rights, it is said that the woman should have a say in the choosing of the matrimonial house. This principle was seen in the case of *Gurinder Singh v Bhupinder Kaur*.[34]

Cases of restitution of conjugal rights have been present in Indian society for ages and the existence of the fact that many of these differences between the spouses arise due to the fact that the wife is living in another city for work reasons.[35] Hence, till date the debate is going on and will continue to be so till the time a conclusive solution is reached or there is some amendments made in the already existing laws.

RESTITUTION LAW IN THE UNITED KINGDOM

The concept of restitution of conjugal rights which is seen in Hindu Law came into being from the English law of restitution of conjugal law. It was an action first in the ecclesiastical courts[36] and then later in the Court for Divorce and Matrimonial Causes.[37] The action could be brought against either of the spouses who were living away from the society of the other spouse. If the petition was deemed to be successful then, the couple would be required to live together as a family again. In 1970, the restitution law was abolished by the Matrimonial Proceedings and Property Act 1970.[38]This was done in furtherance of a law commission report of 1969.

The English law of restitution was adapted by many countries in the world, especially through colonization. The countries under British rule were part of this and among other countries, India adapted the restitution of conjugal rights under Section 9 of the Hindu Marriage Act of 1955.In India the restitution of conjugal rights has been called unconstitutional as it may be a cause of violence and discrimination against the right of women.

[34] *Gurinder Singh v Bhupinder Kaur* ;AIR 2008 NOC 1110 P&H

[35] Rosy Sequeira *Wife's Refusal to Quit Job No Reason for Divorce: High Court*; Times of India October 5th 2013.

[36] Also called Court Christian or court spiritual. It was a court having jurisdiction mainly in religious or spiritual matters.

[37] This court was created by the Matrimonial Causes Act 19857.It transferred the jurisdiction of the ecclesiastical courts in matters relating to matrimony.

[38] An act of Parliament of the United Kingdom, concerning court cases between married people.

1. BRIEF ANALYSIS

The Indian legal system is probably one of the largest in the world, with its diverse laws and regulations. It has adopted many amendments and parts of different sections of statues of different countries. Similarly, it has adopted the concept of restitution of conjugal rights from England. However, the difference being that in England it was abolished in 1970, whereas it is still very much prevalent in Indian society.

Indian society has from the beginning of time being a patriarchal society and more than that the position of women have always been inferior and over time it has degraded even more. A major impact of that has been seen in the sphere of marriages and matrimonial relations. The primary reason of that being the remedy of restitution of conjugal rights. This remedy as stated before is one which gives either of the spouse to file a petition if the other spouse is withdrawing from each other's society .Many a times it has been seen that the claim that the wife is doing so happens to be false and baseless.[39] It was seen in the case of *Reba Rani v Ashit*. [40]In this the husband brought the suit for restitution of conjugal right, but he failed to prove that he had made any attempts to bring her back and hence the petition was dismissed.

Restitution of conjugal rights was abolished in England because it was considered as obsolete and outdated. The major reason for that being that it infringes on the right to privacy of the women. In India as well it was held that section 9 of the Hindu Marriage Act, too was one which discriminated women and forced women along with infringing their right to privacy under Article 21 of the Constitution of India. Here, in this context, right to privacy included the right to procreation.

In a recent judgment passed on 23rd August 2017, a nine judge bench declared that individual privacy is a guaranteed fundamental right.[41] The bench was headed by Chief Justice J.S Khehar. It is a milestone in the Indian legal system.

[39] Prof. G.C Subha Rao, Prof (Dr.) Vijendra Kumar *Family Law In India* ; Narendra Gogia and Company , Hyderabad
[40] *Reba Rani v Ashit* ;AIR 1965 Cal 102.
[41] Hindustan Times, *Supreme Courts' Judgment on Right to Privacy*. 24th August 2017.

CONCLUSION

Restitution of conjugal rights is a part of the Hindu society which has been under the scrutiny for years. It is seen under Section 9 of the Hindu Marriage Act and Section 22[42] of the Special Marriage Act 1954.It has been unjust and unconstitutional, but along with that it has been called valid. There has been a two-fold decision of the same. For this research paper, we dealt with the same issue through the analysis of the landmark case *T.Sareetha v T Venkata Subbaiah* .

In order to aid in the research two research questions were formed which made it easier to delve into the concept and understand it better. The first question that was put forth was whether personal laws should be excluded from the scope of fundamental rights. Data gathered and with case examples it is seen that it should not be excluded as by excluding them, discrimination and injustice takes place in society. The T.Sareetha case was a fight against this. In this case the Court held section 9 of the Hindu Marriage Act invalid and unconstitutional, but in the case of *Harvinder Kaur v Harmander Singh*, the Court upheld the section by saying that personal laws should not come under the scope of the fundamental rights as *"introduction of constitutional law in the home is most inappropriate*," as told by Justice Rohtagi in the case of *Harvinder Kaur v Harmander Singh.*

The Indian Union Muslim League has argued in the Kerela High Court stating that personal laws are exempted from fundamental rights.[43] This reaction was made to a PIL which was filed against gender discrimination against the women from inheriting property. It was said that the Muslim Personal Law was violating Article 14, 15, 19, 21 and 25 of the Indian Constitution. This proves that personal laws should not be excluded from the purview of the fundamental rights, as it has a negative impact on sections of society who become victims of discrimination. Through this along with the research done, the hypothesis is thus proved correct, i.e. personal laws cannot be excluded from the scope of fundamental rights. The Centre in a statement has stated said that inclusion of the personal laws under the scope of fundamental rights will aid the Supreme Court in making stricter laws and also determining the validity of certain aspects of personal laws, for example triple talaq. However in a recent judgment passed by the Supreme

[42] When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the courts, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

[43] 21st February 2014, *Personal Laws Exempted from Fundamental Rights: Indian Union Muslim League;* The Times of India

Court, instant triple talaq has been struck down proving the above statement that personal laws should be kept the provisions of the Constitution.[44]It is a step, a small step towards the change that society needs and awaits.

The second research question that was formed was whether employment can be considered a reason for demanding restitution. Cases and research shows that it cannot ads seen in the landmark case of *Mirchumal v Devi Bai.* The fact that the wife is working in another city cannot be considered a reason for demanding restitution. The reason has to be more valid and reasonable. However, like in every scenario there is a flip side here to there exists certain reports which say that it is the duty of the wife to serve the husband in every way and stay with him. Hence working in another city for even economic reasons is considered as unreasonable and restitution can be demanded from the spouse in question, which is in almost all cases the wife. Hence the hypothesis formed for this is proved correct that employment cannot be a cause for asking for restitution.

RECOMMENDATIONS

As a citizen of India it is our right to feel safe and secure and for that to happen it is essential that the judicial system and the process of the country is sound. Personal laws are a set of laws which affect our lives the most. It surrounds almost every aspect of our lives and it is imperative that those laws are made without any loopholes. In the question of restitution, it is necessary that they be brought under the scope of the fundamental rights and the Constitution so as to prevent injustice and discrimination. Stricter laws should be implemented if the personal laws invade the privacy of an individual, for the Constitution grants a person absolute liberty and freedom.

It can be hoped that with time, the situations will change and the state of the law and order will change and improve for the better for a safe and secure nation so that the principles of justice , liberty, equality and secularity and upheld.

[44]August 23rd 2017; *From Decoding the Judgment to why it is Just a Small Step*; August 23rd 2017. The Indian Express.

HUMAN RIGHT TO THE ENVIRONMENT IN INDIAN CONTEXT

Nidhi Chauhan & Rajat Solanki***

Abstract:

The world is facing environment crisis as a result of human activities. The problem of environmental degradation has been addressed to a certain extent by recognising the right to healthy environment as a human right. The fundamental right to life guaranteed by the Constitution has been expanded to give every person right to clean and healthy environment. The environmental human rights jurisprudence in India has been developed by the proactive judiciary. The public interest litigation and judicial activism has played significant role in protection of environment in India. The courts have recognised the principles of sustainable development, the precautionary principle and the polluter pays principle under Article 21 of the Constitution while adjudicating matters related to the environment protection. This article has examined the international framework on human rights to environment, and analysed the concept of sustainable development in human rights perspective. Further, the interpretation given by the courts has been analysed in context of environmental human right. The article concludes that the focus must be on strengthening the constitutional safeguards for conservation of nature and protection of environment, and realisation of sustainable development can be made by ensuring ecological security.

Keywords: Human Rights, Environment, Sustainable Development, Right to Life.

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated."[231]

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[231] United Nations Conference on the Human Environment 1972, Stockholm Declaration 1972 Principle 1.

INTRODUCTION

In the last few decades, the international concerns for human rights and the environment have grown considerably. This is because of threat to the earth mounted by international environmental crisis which has resulted from the human activities that place tremendous strains on the natural processes. It has been suggested that the problems of environmental deterioration can be addressed by recognising the right to a healthy environment as a human right.[232] In the area of international human rights law, the environmental right are emerging rights. The human rights perspective, in international environmental law, deals with the impact of environment on the life, health and property of individual humans. It tries to protect the standards of quality of the environment on the basis of the obligation of States to take steps for controlling pollution which is affecting human health and life.[233] Moreover, it helps in promoting the rule of law under which the government is accountable if it fails to regulate and control environmental nuisances, and the government is also responsible for facilitating access to justice and enforcing environmental laws and judicial decisions. The right to a decent environment has evolved out of the public interest in the environmental protection.

In India, the protection of human rights has become a tool to realize the goal of environmental protection. The right to life, personal liberty, equality and move the Supreme Court for any violation of fundamental rights have been invoked for protecting the environment. The economic and social rights are also covered by the environmental protection. It has been recognised internationally that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".[234]

India has taken a number of legislative measures concerning issues related to the environment. These measures are backed by the Constitution of India. However, there was no specific provision in the Constitution of India dealing with the environmental protection. The Constitution (42nd Amendment) Act, 1976 adopted certain provisions relating to the environment and protection of the forests and wildlife. It was made obligation for the State to take measures for protection and improvement of the environment and safeguarding the forests

[232] James T. McClymonds, 'The Human Right to a Healthy Environment: An International Legal Perspective (1992) 37 New York Law School Law Review 583.
[233] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613.
[234] United Nations Conference on Environment and Development 1992, Rio Declaration on Environment and Development, Principle 1.

and wildlife of the country.[235] Further, it was a fundamental duty of "every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures."[236]

The human right to environment jurisprudence is secured by the constitutional discourse to the right to life, and the inter-connections between environment and sustainable way of life.[237] A fresh jurisprudential insight is generated by the amalgamation of right to life, health, livelihood and environment in the holistic framework of human rights.[238]

The important legislations on environmental protection in India include, the Indian Forest Act, 1927, the Water (Prevention and Control of Pollution) Act, 1974, the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act 1981, the Environment (Protection) Act, 1986, the Biological Diversity Act, 2002. These legislations, in general, deal with the conservation of environment and prevention of pollution.

INTERNATIONAL RECOGNITION OF HUMAN RIGHT TO ENVIRONMENT

Initial international instruments on human rights do not explicitly talk about the environment. Nevertheless, several human rights conventions and declarations of international organisations cover the right to a decent, healthy and viable environment.[239] The Universal Declaration of Human Right, 1948 provides that "everyone has the right to life, liberty and security of person".[240] The Supreme Court has recognised that the right to life includes the right to healthy and wholesome environment.[241] The right to a clean and healthy environment is considered to an indispensible part of human life which is rooted in the right to life.[242] Similarly, Articles

[235] The Constitution of India 1950, art 48A
[236] The Constitution of India 1950, art 51-A(g)
[237] Zafar Mahfooz Nomani, 'The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective' (2000) 5 Asia Pacific Journal of Environmental Law 113.
[238] Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan E. Boyle and Michael R. Anderson (eds), *Human Right Protection Approaches to Environment* (Clarendon Press 1996) 71.
[239] Alan E. Boyle and Michael R. Anderson (eds), *Human Right Protection Approaches to Environment* (Clarendon Press 1996) 3.
[240] Universal Declaration of Human Right 1948, art 3.
[241] *Subhash Kumar v. State of Bihar* AIR 1991 SC 420.
[242] *Surya Prasad Sharma Dhungel v. Godavari Marble Industries*, (Nepal, October 31, 1995), 96.

23,[243] 25,[244] and 27[245] of the Universal Declaration of Human Rights, 1948 touch upon various aspects of environment without expressly stating the same. The International Covenant on Civil and Political Rights, 1966 provides 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."[246] Similar to the provision in Universal Declaration of Human Rights, this provision requires the States to take positive measures in public health and environment and prohibits arbitrary deprivation of life by the State.[247] The International Covenant on Economic, Social and Cultural Rights, 1966 recognises "the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular ... safe and healthy working conditions."[248] Further, it recognises "the right of everyone to an adequate standard of living for himself and his family... and to the continuous improvement of living conditions."[249] Moreover, the Covenant recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,"[250] and requires the State parties to take steps for "improvement of all aspects of environmental and industrial hygiene."[251] Overall, it recognises pollution free workplace, obligation of States to prevent and eliminate environmental pollution for right to a healthy environment.[252] The Convention on the Rights of the Child, 1989 recognises "the inherent right to life" of every child.[253] It recognises "the right of the child to the enjoyment of highest attainable standard of health,"[254] and requires the States to take appropriate measures, by taking into consideration the dangers and risks of environmental pollution, for providing adequate nutritious foods and clean drinking water.[255] The Convention on the Rights of the Child, 1989 is the first international instrument on human rights explicitly recognising the link between

[243] Universal Declaration of Human Right 1948, art 23 (1) "*Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*."
[244] Universal Declaration of Human Right 1948, art 25 (1) "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control*."
[245] Universal Declaration of Human Right 1948, Art 27 (1) "*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*."
[246] International Covenant on Civil and Political Rights 1966, art 6(1).
[247] United Nations Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 5 June 2012.
[248] International Covenant on Economic, Social and Cultural Rights 1966, art 7(b).
[249] International Covenant on Economic, Social and Cultural Rights 1966, art 11(1).
[250] International Covenant on Economic, Social and Cultural Rights 1966, art 12(1).
[251] International Covenant on Economic, Social and Cultural Rights 1966, art 12(2)(b)
[252] A.H. Robertson and J.G. Merrills, *Human Rights in the World* (1st edn Universal 2005) 78.
[253] Convention on the Rights of the Child 1989, art 6(1).
[254] Convention on the Rights of the Child 1989, art 24(1).
[255] Convention on the Rights of the Child 1989, art 24(2)(c).

human rights and environment. Several regional human rights instrument have also recognised the connection between human rights and the environment.[256]

SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS

The relationship between development and environment is analysed in a different manner in a developing country as compared to a developed country. Usually, the developed countries give adequate consideration to the environmental concerns in the development planning. On the other hand, the developing countries do not give so much consideration to the environmental concerns in the development planning on the ground that it will stop the economic growth of the country. However, the international community, in general, is committed to growth of the relation between development and environment, and the Stockholm Conference, 1972 can be considered as the foundational platform for the appearance of the concept of sustainable development in the world concerning the economic development and environment. The emphasis was laid on safeguarding natural resources through proper management and planning. Apart from this, the maintenance, improvement and restoration of renewable resources were suggested. [257]

The concept of sustainable development was given recognition by the report of Brundtland Commission, 1987. The Brundtland Report defined Sustainable Development as the "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs".[258] This concept of sustainable development, under the Brundtland Report, appears to suggest that the economic growth can be continued as long as better ways are developed to manage the environment.[259] The Rio Declaration on Environment and Development, 1992 recognised the concept of sustainable development as "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".[260] Further, it proclaims that "in order to achieve sustainable development, environmental protection shall constitute an integral part

[256] American Convention on Human Rights 1969; European Convention for the Protection of Human Rights 1950; African Charter on Human and Peoples' Rights 1981.

[257] Rhuks Temitope, 'The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India' (2010) 3 NUJS Law Review 423.

[258] G.H.Brundtland, Report of the World Commission on Environment and Development: Our Common Future (1987) 43

[259] Michael I. Jeffery, 'Environmental Ethics and Sustainable Development: Ethical and Human Rights Issues in Implementing Indigenous Rights' (2005) 2 Macquarie Journal of International and Comparative Environmental Law 105, 111.

[260] United Nations Conference on Environment and Development 1992, Rio Declaration on Environment and Development, Principle 3.

of the development process and cannot be considered in isolation from it".[261] The concept of sustainable development has been extended to the socio-economic sphere where the goal is sustained increase in the level of societal and individual welfare.

The concept of sustainable development aims at balancing the economic, social and environmental interests. It considers the impact on future generations and on the vulnerable groups in the society.[262] This has given rise to conflicts between individual and collective interests. The courts deal with the conflict between interests and rights, and their decisions give strength to sustainable development. The concept of sustainable development has also influenced the interpretation given by the human rights courts.

Since the Stockholm Conference, 1972, the environmental protection has gained a lot of interest across the globe, and many international and national instruments have included provision relating to the right to a clean environment.[263] The ecosystems and diversity of species are closely related to human health and wellbeing, and the actions of humans affect the environment subsequently changing the human wellbeing. The right to clean environment is a collective interest as the change in environment adversely affects the humans across borders and beyond the individual sphere. The damage to environment may severely affect certain individuals without affecting the general public. In perspective of human rights protection, the environmental protection is represented by protection against destruction of environment due to pollution, deforestation and unsustainable use of natural resources.[264] The combination of social and economic elements in perspective of sustainable development is referred to as socio-economic development. In context of the human rights, the economic element is represented by the right to property and the general interest of people in the economic growth. The economic element is related with the economic growth. The needs of human cannot be accommodated without economic growth.[265] The social element is given protection under various human rights instruments. It is represented by the matters relating to the human dignity,

[261] United Nations Conference on Environment and Development 1992, Rio Declaration on Environment and Development, Principle 4.
[262] Alan Boyle and David Freestone, *International Law and Sustainable Development* (OUP 1999) 16
[263] Phillippe Sands, *Principles of International Environmental Law* (1st edn Cambridge 2003) 254.
[264] Emelie Folkesson, 'Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest' (2013) 6 Erasmus Law Review 142.
[265] Dire Tladi, *Sustainable Development in International Law: An analysis of key enviro-economic instruments* (PULP 2007) 81.

basic human needs, education and health apart from the civil and political rights. These human rights protect the interests of collective as well as individual rights.

The principle of equity between the present and future generations is an essential part of sustainable development as it supports the preservation of the environment for future generations.[266] It is the duty of the present generations to leave the environment in best possible condition so that the future generations can fulfils their needs. This principle of inter-generational equity also refers to sustainable use of natural resources so as to protect the economic interests of the future generations.[267] On the other hand, the principle of intra-generational equity lays emphasis on current generation by aiming at promotion of justice between the present generation across communities and States. It focuses on the needs of poor, and highlights the importance of distributional justice in the society. The principle of intra-generational equity is closely related with the concept of socio-economic development.[268]

JUDICIAL INTERPRETATION OF ENVIRONMENTAL HUMAN RIGHTS IN INDIA

The judiciary has played an important role in promoting the human rights and enhancing the rule of law in India. It has applied international environmental principles and liberalised the access to justice through Public Interest Litigations by widening the standing of people to access the court. The courts have allowed the environmental activists and organisations to oppose the activities of corporations and challenge the decisions of government by applying the test of "sufficient interest" for enforcement of fundamental rights.[269] The courts have applied the environmental principles of sustainable development; polluter pays principle, and precautionary principle in deciding the environmental issues. In the PILs on environmental issues, the courts have given reliefs in the form of injunctions, directions and damages, and also, the courts have created expert committees for assisting the court in monitoring the progress of orders given by the court.[270] The Supreme Court has given orders for relocation and closure of industries engaged in activities polluting the environment,[271] and for paying

[266] Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules' in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds.), *The Oxford Handbook of International Environmental Law* (OUP 2007) 446.
[267] Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11 Ecology Law Quarterly 495.
[268] Sharon Beder, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics' (2000) 4 New Zealand Journal of Environmental Law 229.
[269] Sangeeta Ahuja, *People, Law and Justice: A Casebook of Public Interest Litigation* (2nd edn Orient Longman 1997) 1.
[270] *M.C. Mehta v. Union of India* (1998) 9 SCC 93; *M.C. Mehta v. Union of India* (1997) 2 SCC 411
[271] *M.C. Mehta v. Union of India* (1997) 2 S.C.C. 411

compensation for damage caused to the human health and the environment by the developmental activities.[272] The modern environmental jurisprudence was developed by the proactive judiciary which acted as "amicus environment".[273] The development of environment jurisprudence has shown that the courts have expanded the fundamental rights, and interpreted the unenforceable directive principles into the right to life under Article 21 of the Constitution. Several decisions on right to life have made significant implications for the struggle to establish environment as a human right. These decisions have given a wide interpretation to the fundamental right under Article 21 of the Constitution so as to include many basic human rights that include livelihood and environment.

The Supreme Court, in *Francis Coralie v. Union Territory of Delhi*,[274] observed that "the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings."

The Supreme Court, in *Shanti Star Builders v. Narayan Khimalal*,[275] stated that "basic needs of man have traditionally been accepted to be three- food, clothing, and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in."

In *Olga Tellis v. Bombay Municipal Corporation*,[276] the Constitution Bench of the Supreme Court observed that the right to livelihood is an important facet of the right to life as "no person can live without means of living. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation…. That which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life"

[272] *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388
[273] Gitanjali Nain Gill, 'Human Rights and the Environment in India: Access through Public Interest Litigation' (2012) 14 Environmental Law Review 200.
[274] AIR 1981 SC 746
[275] AIR 1990 SC 630
[276] AIR 1986 SC 180

In *Virender Gaur v. State of Haryana*,[277] the Supreme Court recognised that a pollution free environment is a healthy environment and observed that "Enjoyment of life ...including the right to live with human dignity encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water sanitation, without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air and water pollution, etc., should be regarded as amounting to a violation of Article 21. Therefore, a hygienic environment is an integral facet of the right to a healthy life and it would be impossible to live with human dignity without a human and healthy environment. ... There is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard a proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man made and the natural environment."

The Supreme Court, in *M.C. Mehta v. Union of India*,[278] observed that the "precautionary principle" is part of the law of the land and the State is under an obligation "to protect and improve the environment and safeguard the forests and wildlife of the country". Under the "precautionary principle", it is the obligation of the State "to anticipate, prevent and attack the causes of environment degradation".[279] The Court held that the "Life, public health and ecology have priority over unemployment and loss of revenue problem",[280] and ordered the State to protect the *Badkal* and *Surajkund* lakes from environmental degradation by restricting the construction activities in the surrounding area of the lakes.

In *Subhash Kumar v. State of Bihar*,[281] the Supreme Court stated that "Article 32 is designed for the enforcement of Fundamental Rights of a citizen by the Apex Court. It provides for an extraordinary procedure to safeguard the Fundamental rights of a citizen. Right to live is a fundamental right Under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be determined to the quality of life."[282] The court noted that the any person can file a petition for prevention of pollution on

[277] (1995) 2 SCC 577
[278] MANU/SC/1123/1997
[279] MANU/SC/1123/1997 [9]
[280] MANU/SC/1123/1997 [8]
[281] AIR 1991 SC 420
[282] AIR 1991 SC 420 [6]

behalf of the affected person under Article 32, but the remedy under Article 32 should be resorted to only by a person who is really concerned about protection of the environment.

In *M.C. Mehta v. Kamal Nath*,[283] the Supreme Court, while enunciating the "Public Trust Doctrine", stated that the Indian legal system includes "the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership".[284] The Court, observing that a large area, which a part of protected forest, on the bank of river Beas was given on lease for commercial purposes to the private Motel, held that the State has committed a patent breach of trust by leasing the ecologically fragile land.[285]

In *Vellore Citizens Welfare Forum v. Union of India*,[286] the Supreme Court considered the issue whether right to fresh air is a constitutional right. The Court recognised the international concept of "Sustainable Development" as a balancing concept between development and ecology being part of the customary International Law. The court was of the view that the "Precautionary Principle" and the "Polluter Pays Principle" are essential features of the "Sustainable Development".[287] The Court held that the precautionary principle and the polluter pays principle are part of the environmental law of the land. The court recognised the inalienable common law right of clean environment which is the basis of the Constitutional and statutory provisions to protect the human right to fresh air, clean water and pollution free environment. [288] The restoration of the damaged environment is part of the process of "Sustainable Development" and the polluter is liable to pay the compensation to the victims of pollution and pay the cost of restoring the environmental degradation.

In *M.C. Mehta v. Union of India*,[289] also referred to as "Oleum Gas Leak Case", the Supreme Court propounded the principle of absolute liability in case on an enterprise engaged in a hazardous and inherently dangerous industry. The court observed that such an industry, which poses a potential threat to the health and safety of the workers and the persons residing in the

[283] (1997) 1 SCC 388
[284] (1997) 1 SCC 388 [27]
[285] (1997) 1 SCC 388 [29]
[286] AIR 1996 SC 2715
[287] AIR 1996 SC 2715 [11]
[288] AIR 1996 SC 2715 [16]
[289] AIR 1987 SC 1086

neighbouring areas, owes an absolute and non-delegable duty to the society to ensure that no harm is caused due to the industry undertaken by the enterprise. The court held that such an enterprise must maintain highest standards of safety and it must be absolutely liable to pay compensation if any harm is caused due to its activity.[290]

In *Indian Council for Environment-Legal Action v. Union of India*,[291] where an environmentalist organisation filed writ petition to brings to light the misery of people living in the vicinity of chemical industrial plants in India. The Supreme Court applied the "Polluter Pays" principle in this case as "the incident involved deliberate release of untreated acidic process wastewater and negligent handling of waste sludge knowing fully well the implication of such acts".[292] The court, relying on the decision of Constitution Bench in the Oleum Gas Leakage Case, held that "once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity". As a consequence of the same, the court held that the polluter is absolutely liable to for the harm caused to the persons residing in the surrounding areas.

In *Intellectuals Forum, Tirupathi v. State of Andhra Pradesh*,[293]the Supreme Court held that "merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation."[294] The court recognised that shelter is one of the basic human rights. Highlighting the importance of sustainable development, the court observed that the State has to formulate policies, in pursuit of development, focussing on the sustainability of the development. The court, further, recognised that right to a healthy environment is a fundamental right of all human beings, and there is a corresponding duty of the State to preserve and conserve the environment in such a manner that the present as well as future generations are aware of them. The court has also the strengthened the public trust doctrine under Article 21.

[290] *M.C. Mehta v. Union of India*, AIR 1987 SC 1086 [31]
[291] AIR 1996 SC 1446
[292] AIR 1996 SC 1446 [37]
[293] AIR 2006 SC 1350
[294] AIR 2006 SC 1350 [58]

In Re: Noise Pollution - Implementation of the Laws for restricting use of loudspeakers and high volume producing sound systems,[295] where the special leave petition was filed in the Supreme Court for a direction to the authorities to rigorously enforce the existing laws on noise pollution. The court observed that the increase in volume of speech so as to compulsorily expose unwilling persons to hear noise raised to unpleasant or obnoxious level is violative of the rights to peaceful, comfortable and pollution free life guaranteed by the Article 21. The right to speech implies right to silence, not to listen and not to be forced to listen. The court held that Article 19(1)(a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21.

In *Rural Litigation and Entitlement Kendra, Dehradun v.State of Uttar Pradesh,*[296] where the writ petition involved an issue of environmental protection and maintenance of ecological balance in the process of mining in lime stone quarries, the Supreme Court directed the lessees of lime stone quarries to close down permanently. The court observed that it has to be done to protect and safeguard the right of the people to live in healthy environment with minimum disturbance of ecological balance.

In *M.C. Mehta v. Union of India*,[297] the Supreme Court held that "Protection of environment and keeping it free of pollution is an indispensable necessity for life to survive on earth."

There are plethora of decisions by the Supreme Court and various High Courts recognising the human right to clean and healthy environment and requirement of conserving natural resources and environmental protection. The environmental human rights jurisprudence in India has evolved as a result of judicial activism and creation of Public Interest Litigation. The status of fundamental right is given to environmental protection under Article 21 of the Constitution. The courts have recognised that the directive principles and fundamental duties also require protection of the natural environment.

CONCLUSION

The protection and preservation of environment are concerns of all human beings. The environmental pollution is a serious threat to human life. At global level, the steps have been taken to protect the environment. India has also taken important and significant steps towards

[295] (2005) 5 SCC 733
[296] AIR 1985 SC 652
[297] 1991 (2) SCALE 741

protection of environment. However, the role played by the courts in India for the promotion of environmental protection and sustainable development is significant. The courts have given expansive interpretation to the provisions of the Constitution, and given reliefs to the victims of environmental pollution. The courts have applied the fundamental principles of environmental jurisprudence arising out of Article 21, namely, the principles of sustainable development, the precautionary and polluter pays principle in upholding the right to healthy environment as a right to life.

The right to healthy environment can be realised within the framework of human rights law taking into consideration the public interest in environmental protection. Moreover, it is expected that while promoting sustainable development, a balance has to be maintained between the social, economic and environmental policy of the country. The Public Interest Litigation in India represents the logical expansion of existing policies, and represents progressive development of the environmental human rights jurisprudence. The recognition given to the environment as public interest has made an obligation on the part of the State to protect the environment for present and future generations.

The environmental pollution has increased beyond danger levels in most parts of India which is a matter of serious concern as it has adversely affected the life of the people. The main reason behind it is the poor enforcement of environmental laws. It is suggested that the focus must be on strengthening the constitutional safeguards for conservation of nature and protection of environment. The sustainable development can be realised only when the ecological security is ensured.

GENE PATENTING: COMMON HERITAGE VERSUS RECOGNITION OF HUMAN EFFORT

Priya Singh[*]

Abstract:

It has been years since it has been ruled that human-made living matter is a patentable subject-matter.

But in the year 2013, the Supreme Court of the United States gave a ruling that shocked the entire biotechnology industry. Nine judges ruled that isolated genomic deoxyribonucleic acid (DNA), being "products of nature", are not patent-eligible unlike man-made complementary DNA (cDNA) which do not exist naturally.

But since the development of the research and development sector along with the huge boom in the technology sector, scientists have engaged themselves in efforts of identifying the sequences of these molecules, their function and also in manipulating them to achieve desired results.

Hence, this paper would be an attempt to bring forward the conflicts between gene patenting and right to health in light of patentable subject matter under the (Indian) Patents Act, 1970.

Keywords: *Biotechnology, DNA, Patents, Right to Health*

INTRODUCTION

The patent regime has travelled a long way initiating from a grant to "any new and indigenous device, not previously made"[298] to the ruling which included even man-made living matter within the ambit of patentable subject-matter[299].

The latter though was considered as a breakthrough at the time when the judgement was delivered, it has to date given rise to various debates regarding the patentable subject-matter all over the world.

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[298] Venetian Patent Statute 1474

[299] *Sidney A. Diamond, Commissioner of Patents and Trademarks* v. *Ananda M. Chakrabarty* [1980] 44 US 303 [*Diamond* v. *Chakrabarty*]

The United Nations Convention on Biological Diversity[300] defines biotechnology as any "technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify"[301]. The definition is wide enough to include even the derivatives of living organisms and since genes are 'a unit of heredity which is transferred from a parent to offspring and is held to determine some characteristic of the offspring'[302], it may well be considered a subset of the term biotechnology.

Individualities in living organisms depend on proteins that a cell can manufacture. Instructions as to which proteins should be manufactured in a cell are stored in the genes located on the chromosomes in a linear order. Genes are segments of deoxyribonucleic acid (DNA) molecules.[303] The message for the synthesis of a particular protein is encoded in DNA as sequence of nucleotides or nitrogenous bases.[304]

Different proteins are needed to carry out different functions and to control development of various characteristics. Hence, each cell of living organisms has millions and billions of nucleotides arranged in a specific sequence in a DNA molecule.

Now, the debate surrounding gene patenting revolves around two major issues. First of it being that the grant of patent on human DNA would lead to an increase in the potential risk of blocking all sort of research on (patented) genes which may be a requirement for further innovation so as to safeguard public health at large. On the other hand, genetic tests are evolving as a major component for detection of various diseases beforehand and thereby establish medical procedures curing the same. Hence, the inventor would want such an invention of his to be granted patent so that his efforts are recognized and he is motivated to work further.

Amidst all this, the US Supreme Court in the year 2013 came up with a judgement that came as a sharp blow to the entire biotechnology industry. With a remarkable unanimity, nine judges ruled that "isolated genomic DNA, being 'products of nature', are not patent-eligible unlike man-made complementary DNA (cDNA) which do not exist naturally."[305]

[300] Convention on Biological Diversity on 5 June 1992
[301] ibid
[302] Oxford Dictionary
[303] Veer Bala Rastogi, *A Simple Study of Biology* (Srijan Publishers Pvt. Ltd., 2nd edn, 2016)
[304] ibid
[305] *Association for Molecular Pathology* v *Myriad Genetics* [2013] 133 SCt 2107

But the fact remains that technology progression and revelation of functions of DNA molecule demands the latter to be exploited if positive result is expected to be achieved. So there remains a clash between patentability of human genes and the right to human health.

RESEARCH QUESTION

Research on human genetic sequence is helpful in gaining information regarding various diseases and mutations but while rewarding the efforts of those inventors who led to the generation of such innovative ideas, *gene patenting is in a way raising concerns related to the public right to health.*

AN INSIGHT INTO THE GENE PATENTING REGIME

***The United States of America*:**

The issue of what constitutes subject-matter of patent under the US patent law is governed by section 101 of the US Patent Act 1952 (35 USC) which provides that:

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

In the US, it is an essentiality for the genes to be patented that the particular gene significantly differs from the naturally present genes. Thus, it is not important to determine whether the gene is a living matter or not. Ascertainment of whether the gene (to be patented) is a naturally occurring product or a human invention is the test that the US courts follow.

Novelty is considered to be the first and foremost criteria along with sufficient human skill, ingenuity and labour hence, a patent claim with respect to a mere mix of six naturally present bacteria[306] as well as revelation of the precise location of BRCA1 and BRCA2 genes[307] (having properties to cure breast cancer) were denied grant as it amounted to discovery because their claims were based on already present phenomena and not on any sort of chemical composition or man-made subject-matter.

***European Union*:**

[306] *Funk Brothers Seed Co.* v. *Kalo Inoculant Co*. [1948] 127 US 333
[307] *Association for Molecular Pathology* (n 8)

According to the European Patent Convention (EPC), for subject matter to be patentable it must be new, inventive (that is, not obvious), sufficiently disclosed in the patent specification, and have industrial application (also known as utility).[308]

Article 52(2) (a)[309] of the European Patent Convention excludes discoveries from the purview of inventions. In order to solve this dilemma (that is, whether human genes would be considered a discovery or an invention), the implementing rules of EPC state that aid must be taken from European Union's Directive on the legal Protection of Biotechnological Inventions (the Biotechnology Directive).[310]

The directive[311] states that "it should be made clear that an *invention based on an element isolated from the human body or otherwise produced by means of a technical process, which is susceptible of industrial application, is not excluded from patentability*, even where the structure of that element is identical to that of a natural element, given that the rights conferred by the patent do not extend to the human body and its elements in their natural environment."

Hence, human gene if isolated, is proved new and capable of industrial application becomes a patentable subject-matter.

***India*:**

In the year 2002, a process patent was granted in India wherein the end product had living organisms.[312] This was done as the Court opined that the whole process was a result of man-made effort and labour, the reward of it cannot be denied merely on the ground that the final product had some living organisms which was not the direct subject-matter of the claim.

Justice Bhat while dealing with a case claiming copyright over a genetic sequence held that, "*The microbiologist or scientist involved in gene sequencing 'discovers' facts ... Such scientists merely copies - from nature-genetic sequence that contains codes for proteins ... So long as a*

[308] Johanna Gibson, "The Discovery of Invention: Gene Patents and the Question of Patentability" [2007] 12 JIPR 38, 38

[309] (2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1:
(a) *discoveries*, scientific theories and mathematical methods

[310] *Diamond* (n 2)

[311] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions

[312] *Dimminaco AG* v. *Controller of Patents & Designs* [2002] 255 IPLR 255 (Cal)

researcher constructs a DNA sequence based on a sequence discovered in nature, there is no independent creation, no minimum creativity and thus no originality."[313]

Thereafter, the definition of invention was amended from a "manner of new manufacture" to a "new product or process involving an inventive step and capable of industrial application."

Section 2(1) (j) of the Patents Act, 1970 (the Act) now defines invention as "a new product or process involving an inventive step and capable of industrial application" following the footsteps of Article 27.1[314] of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In the year 2005, a new phase of amendment gave way to the grant of patents on products in any field of technological research including that of biotechnology.

Though India's Intellectual Property laws run on the broad guidelines suggested by TRIPS, it being an international instrument fails to provide a universal definition of invention and leaves it upon the enacting countries to decide the same according to their particular circumstances. India, in furtherance of the same incorporated Section 3 in the Act so as to outline "what are not inventions?"

Section 3(b) of the Act considers *an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment not an invention*. Human gene being a common property of mankind would lead to conflicts and chaos in the society as a whole, if it becomes a subject matter of patent laws or becomes the property of one organization or individual having all the exclusive rights to exploit it as per his (or its) whims.

Section 3(c) of the Act *does not consider mere discovery of any living thing an invention*. (The literal words of the section being *the mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substance occurring in nature*. Hence, mere discovery of a gene with certain characteristics may not be patentable but when a genetically modified Gene Sequence/ Amino Acid Sequence is novel, involves an inventive step and has industrial application[315], it becomes a patentable subject matter.

[313] *Emergent Genetics India* v. *Shailendra Shivam* [2011] 125 DRJ 173

[314] Patent shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application

[315] The Draft Manual of Patent Practice and Procedure 2008

Section 3(j) of the Act builds up a confusion in this regard. It reads as under:

plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals.

Now the question as to whether the term animals includes 'humans' or not remains unanswered by the Indian Judiciary. But it is common knowledge that for biological purposes, human beings are counted among 'mammals' category of the animal kingdom.

But if the words 'plants' and 'animals' have been used separately in the above-mentioned section, it refers to the fact that the legislators intended to exclude 'humans' from the application of this section. Confusion remains. Hence, whether human gene is barred from being patented under the above-mentioned section still remains an untouched area.

Even the above-mentioned judgement[316] did not specifically deal with the issue of gene patenting and hence, observance of guidelines laid down by foreign courts is what can be followed by Indian researchers.

Granting patents to genetic sequence will act as an incentive for the research and development going on in this field. Since, research on genetic sequence, its mutations, diseases attached and the cure therein demands time as well as loads of investment, the investors would become reluctant in providing aid to such an activity unless and until they are given some kind of assurance as to the reward of their funds.

Furthermore, if the patent law does not move forward to include gene within its ambit of protection, the companies or individuals working in this field would try to get protection under trade secrets laws. *TRIPS, under Article 39, enjoins its Members to protect undisclosed information* and data submitted to governments or governmental agencies through effective measures.[317]

Now, in a country like India wherein there is no specific law governing trade secrets or undisclosed information, the breakthrough achieved by companies through their research on genes would always remain a secret as also no accountability would be able to be imposed

[316] *Emergent Genetics India* (n 16)

[317] Surinder Kaur Verma, "Protection of Trade Secrets under the TRIPS Agreement, and Developing Countries" JWIP

upon them. This would impede not only further innovation related to that specific gene but would also be detrimental to the health-care industry as a whole.

GENE PATENTING AND RIGHT TO PRIVACY

Constitution of India guarantees right to privacy under the head, "protection of life and personal liberty."[318] The Apex Court has clearly stated that "a citizen has a *right to safeguard the privacy of his own*, his family, marriage, procreation, motherhood, child-bearing, and education among other matters. *No one can publish anything concerning the above matters without his consent* whether truthful or otherwise and whether laudatory or critical."[319]

In the US, Justice Benjamin Cardozo held in the case of *Schloendroff* v. *Society of New York Hospital*[320] "*Every human being of adult years and sound mind has a right to determine what shall be done with his own body*…"

Similarly in the United Kingdom, Bingham LJ said: "*only the most compelling circumstances could justify a doctor in acting in a way which would injure the immediate interests of his patient*, as the patient perceived them, without obtaining his consent."[321]

Such a breach of privacy can occur when any activity upon a human body is performed without the prior (informed) consent of the person involved as to the end use of the activity. A genetic test has the capability of exposing unknown diseases of a patient thereby, violating his privacy.

In *Samira Kohli* v. *Dr. Prabha Manchanda*,[322] the Court held that "Consent in the context of a doctor-patient relationship, means *the grant of permission by the patient for an act to be carried out by the doctor*, such as a diagnostic, surgical or therapeutic procedure."

Moreover, one of the four core principles of Medical Ethics is Autonomy[323]. The autonomy of thought, intention and action while deciding upon health care techniques is the basic requirement of such a principle. In India, the A.P. Shah Committee Report laid down nine

[318] Constitution of India, Art. 21
[319] *R. Rajagopal* v. *State of Tamil Nadu* [1995] AIR SC 264
[320] [1914] 92 NE 105
[321] *W* v. *Edgell* [1990] 2 WLR 471
[322] [2008] 2 SCC 1
[323] Other three being: Justice, Beneficence and Non-Maleficence

national privacy principles one of them being, "A data controller shall give individuals *the choice to opt in/out with regard to providing personal information*."[324]

So, the fact remains that a person's right to privacy and information cannot be ignored while researching upon a human gene and this leads to the trouble that if a human gene becomes a subject-matter of patent in India wherein most of the individuals are illiterate and thereby are a passive, ignorant and uninvolved participant in treatment procedures[325], it would eventually lead to their exploitation and the whole object of protecting Intellectual Property Rights would crumble.

IMPLICATIONS OF GENE PATENTING ON THE RIGHT TO HEALTH

The Constitution of the World Health Organization states down that the "*enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being*". Article 25 of the Universal Declaration of Human Rights states that everyone has the right to a standard of living of living adequate for…health and well-being if himself and his family. Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination states that the State Parties (should) undertake to…eliminate racial discrimination….and to guarantee the right of everyone,…to equality before the law, "*the right to public health*, medical care", social security and social services. Principle 8 and paragraph 8 of Cairo Programme of Action states that "Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services."

Article 12 of the International Covenant on Economic, Social and Cultural Rights underlines that *the State Parties (to the present Convention) recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*.

The essential elements of the right to health as laid down in the General Comment Number 14 by the Committee on Economic, Social and Cultural Rights (CESCR): The Right of the Highest Attainable Standard of Health are:

- *Availability* in adequate quantity the health care services, facilities, related goods and services within each State party.

[324] Report of the Group of Experts, *Privacy* (2012)
[325] *Samira Kohli* (n 25)

- *Accessibility* to the public at large *without any form of discrimination.*
- *Acceptability* referring that the health care facilities must be culturally appropriate with respect to the concerned State Party as well as respectful towards confidentiality.
- *Quality* of the health care facilities should be scientifically and medically appropriate that is of a decent quality.

Once a patent is granted, the patentee gets the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in the territory wherein the patent is granted.[326]

"Corporations, universities and research laboratories have expanded the opportunities to file patent applications on the fundamental research discoveries that broadly enable further scientific investigation, including such things as new DNA sequences, protein structures, and disease pathways, that are primarily valuable as inputs into further scientific research."[327]

Now once a patent on a particular gene or gene sequence is granted, no further research related to the inherited disease discovered in that particular gene sequence can be performed by anyone other than the owner without his due permission (or upon payment of requisite fees as demanded by the patentee) leading to the evolution of "blocking patent[328]".

Gene therapy on the other hand is a procedure through which information of genetic sequence aids in the exploration of genetic mutations and thereby, cure any kind of deficiency if the particular gene sequence is found to be mutated. All such therapeutic procedure(s) requires the original genetic information and if such an information is granted patent, each and every medical practitioner will have to obtain the consent of the patentee before conducting any research.

Similarly any product which will have an effect (even indirectly) on the patented gene will require prior consent (in the form of licensing or otherwise) of the owner of the latter, otherwise the inventor of the latter will be considered as an infringer of patent.

The above-mentioned impediments would in the end restrict the progress of better health care-services as also raise the price range of the health-care services involving the use of the patented

[326] Patents Act 1970 and the Patent Act 1952, 35 USC § 271
[327] John Frow, "Intellectual Property Rights and the Public Domain in the New World Order" (2006) IJLT 106, 119
[328] ibid 106

gene (known as gene therapy) thereby, belittling two of the most important elements of right to health that is, availability and accessibility. A vicious circle wherein adequate alternative health facilities would not be possible to be provided along with rising prices (due to monopoly of the owner of the patent) leading to inaccessibility of adequate health services to the public at large would be the net result of granting patents to human genes.

"The granting of patent rights in genetic material is tantamount to granting property rights in life which could lead to the exploitation of human beings as commodities. This can be detrimental to the basic ethos of human society as such patents indirectly patent a vital element of life. This can set in slow commercialization of human life and human relationships. This can denigrate basic human ethos and prejudice moral standards of the society. Thus gene patents can become unethical."[329]

Such a scenario would be against the acceptability element of health care facilities as commercialization of human life cannot be held culturally or socially appropriate for any State.

As human genes are the common heritage of mankind and humanity, the common viewpoint is that private ownership threatens to jeopardise the dignity and integrity of man.[330] This argument finds support in the Universal Declaration on the Human Genome and Human Rights (1997) as mentioned under:

Article 1: The human genome *underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity*. In a symbolic sense, it is the heritage of humanity.

Article 4: The *human genome in its natural state shall not give rise to financial gains*.

Based on this notion of "common heritage and common ownership", it is contended that human genes should not be patent-eligible.[331]

Furthermore, Article 27.2 of TRIPS allows State Parties to exclude from the ambit of patentability *the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious*

[329] Mathews P. George and Akanksha Kaushik, "Gene Patents and Right to Health" (2010) NUJS L Rev 323, 325
[330] Elizabeth Siew-Kuan NG, "Patenting Human Genes: Wherein Lies the Balance between Private Rights and Public Access in India and the United States?" (2015) IJLT 1, 44
[331] George and Akanksha Kaushik, "Gene Patents and Right to Health" (n 32) 324

prejudice to the environment, leading to the conclusion that since gene patenting has the capability of risking the common heritage of mankind and thereby, threatening public order, it should not be made a subject of patent laws.

CONCLUSION

Human gene or genetic sequence although being a comparatively new field for research and development, certainly has the prospect of improving the manner in which health care facilities are provided worldwide.

Hence, a balance needs to be struck between the reward to be provided to those who invest their time and resources in this field and the public right to health. Since the latter is counted among the basic necessities of human life to lead a dignified life, the right to health of the public at large cannot be accorded a secondary place while reaching to a conclusion of the ongoing debate around gene patenting.

Since the genetic diseases revealed through gene sequences would be hereditary in nature and will have a negative effect on many a generations, it would be a better approach to leave genes in the open area of research and not limit it to the exclusivity of any one person or company. Especially in a developing country like India where public health care services are of a standard lower the optimal standard required to lead a decent life, any kind of innovation or development in this sector should not be hampered.

For this, the patent law should be amended in such a manner so as to respect the rights of the individual who through his own skill, ingenuity and labour found something in the gene sequence and isolated it which would not have been naturally possible. On the other hand, exclusivity to the use cannot be granted as that would lead to an impediment in future research. Licensing or assignment is a tedious process and is completely in the hands of the patentee. Such rules must be modified so as to suit the particular circumstances related to gene patenting. This can be done by allowing the Government to intervene whenever any other party shows some better prospect of development in the patented gene thereby, achieving both the desired result of serving its national interest and compliance with the general (national and international) obligations of providing adequate protection to intellectual property rights.

NGO RESPONSES TO CHILD TRAFFICKING IN KAMRUP DISTRICT OF ASSAM

Ms. Manashi Neog[*]

Abstract:

The evil of child trafficking has emerged as a worldwide phenomenon affecting large numbers of boys and girls every day. The situation of child trafficking in Assam is grim too. In a UNODC published report commissioned by it and conducted by Shakti Vahini, an NGO working against trafficking, it has been highlighted that there has been an increasing trend of children being trafficked from the states of Assam, Jharkhand, Chhattisgarh, Odisha, West Bengal and Madhya Pradesh for the purpose of domestic labour. According to a recent study carried out by UNICEF, it was found that in between 2011 and July 2013, a total of 486 children have been recorded in Child Welfare Committees (CWCs) across the districts in Assam as per the data available. Moreover, the study by UNICEF has identified Kamrup along with six other districts as a vulnerable district for child trafficking.

The present study identifies the initiatives undertaken by the NGOs to prevent child trafficking in the district of Kamrup. It also highlights the limitations of the NGOs in undertaking the preventive activities in the district. So far, no studies have been made specifically of anti-trafficking work in the district of Kamrup. The study includes the views of the key informants on the anti-child trafficking initiatives undertaken by the NGOs in the district.

The study uses both primary and secondary data. Primary data were gathered through structured interviews with the key informants. Secondary data includes journals, reports, and materials from the government and NGOs.

Key words: *Trafficking, NGOs, Key informants etc.*

INTRODUCTION

The evil of child trafficking has emerged as a worldwide phenomenon affecting large numbers of boys and girls every day. The situation of child trafficking in Assam is grim too. The reports by CID in the year 2015 say at least 4,754 children have gone missing in the past three years in Assam. The trend revealed in the report is worrying as the number of girls missing

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in the recorded time frame is almost double than that of boys. Those missing in the past three years include 2,753 girls and 2,001 boys. Police and different NGOs, working for the children, have recovered only 3,840 children during the period.[332]This data on missing children reveals the magnitude of the problem in the state, since every missing child is a potential victim of trafficking.

In a UNODC published report commissioned by it and conducted by Shakti Vahini, an NGO working against trafficking, it has been highlighted that there has been an increasing trend of children being trafficked from the states of Assam, Jharkhand, Chhattisgarh, Odisha, West Bengal and Madhya Pradesh for the purpose of domestic labour.[333]

According to the report, displacement of a large population due to recurring floods in Assam makes it easier for the traffickers to target victims from such people. The report has attributed the reasons of trafficking in Assam to poverty, unemployment, migration from rural to urban areas, insurgency, communal clashes and natural disasters. There is trafficking of girls from Assam to Haryana and Punjab for marriage. The trafficking of children is being undertaken by illegal placement agencies which are making huge profits by bringing in children from these states. As per the report many of these placement agencies are operating from Delhi and the NCR (National Capital Region). Investigation has proved that these agencies have been involved in trafficking of thousands of children and are also responsible for the missing children figure in the states.[334]

Among the children trafficked, the number of girls trafficked was more than double as compared to the boys. Over the years there has been an increasing trend in the number of girls trafficked. In 2009 the total number of women trafficked was 600 which increased to 1,243 in 2011.[335]

According to a recent study carried out by UNICEF, it was found that in between 2011 and July 2013, a total of 486 children have been recorded in Child Welfare Committees (CWCs) across the districts in Assam as per the data available. The available data reflects that children in the age group of 10-14 constitute the bulk of children in distress. Most CWCs, other

[332]Pranjal Baruah, 'Child Trafficking on rise in Assam' *The Times of India*, (Guwahati, 4 Nov 4 2015)5
[333]UNODOC, *India Country Assessment Report: Current Status of Victim Service Providers and Criminal Justice Actors on Anti-Human Trafficking* (2014) p 13
[334] Ibid, p. 17
[335] Ibid, p.18

than Kamrup (M) have dealt with children from villages to townships for employment as labour-domestic or otherwise. However, there are some cases of children of the district being restored from other districts and states also.[336]

Moreover, the study by UNICEF has identified Kamrup along with six other districts as a vulnerable district for child trafficking.[337] The report titled "Secondary data analysis on Trafficking of Women and Children in Assam" is a composite quantitative database of trafficking of women and children in Assam. The dataset for preparing the report was collected from four different sources: CID data on rescued and missing women and children; DoLE data on rescued child labour; CWC data on rescued children produced before them and CSO data on rescued children handled by them in different capacities.

The present study identifies the initiatives undertaken by the NGOs involved in counter child trafficking activities in the district of Kamrup. It also highlights the limitations of the NGOs in undertaking the preventive activities in the district. So far, no studies have been made specifically of anti-trafficking work in the district of Kamrup. The study includes the views of the key informants on the anti child trafficking initiatives undertaken by the NGOs in the district.

To study the anti-child trafficking interventions undertaken by the NGOs in Kamrup district data have been collected from the key informants, belonging to the fields of police, health, social services and academics, who are considered as the eyes and ears of the society because of their presumed first-hand knowledge/ experience of child trafficking or related issues.

The selection of the key informants has been done in two stages. In the first stage the key informants were stratified based on their expertise from five purposively selected fields viz. Police, ICPS bodies, health, social services and academicians followed by the selection of key informants from each field. The selection of the key informants from each stratum was done through snow ball sampling procedure. The initial key informants from each stratum were selected through purposive sampling and the additional key informants in the sample were

[336] UNICEF, *Secondary Data Analysis of Trafficking in Women and Children in Assam* (2014) p12
[337] Ibid

obtained by referral or information provided by the initial informants. The general information of the Key Informants has been delineated in a Table 1 below.

General Information of the Key Informants

Category	Organization	Designation	N
Counsellor (n_1)	Childrens Home, Jalukbari	Counsellor	1
	Kalyani Niwas	Counsellor	1
	Childrens Home, Fatashil	Counsellor	1
	Gold NGO	Counsellor	1
	Assam Centre for Rural Development	Counsellor	1
	A. Total n_1		**5**
ICPS Bodies (n_2)	SCPS	Programme Manager, Programme Coordinators	4
	CWC		3
	DCPU	DCPO, Kamrup (R)	1
	DCPU	DCPO, Kamrup (M)	1
	B. Total n_2		**9**
		DCP, Crime	1
		ASP, Amingaon	1

Police(n_3)	Police	Inspector, Kamalpur	1
		ADCP, Guwahati (West)	1
		DIGI, CID	1
		SP, CID	1
		ADCP, Guwahati(PCR)	1
	C. Total n_3		**7**
NGO (n_4)	Utsah	President	1
	Gold	Assistant General Secretary	1
	BachpanBachaoAndolan	State-in-charge	1
	Childline	Coordinators	4
	D. Total n_4		**7**
Academician (n_5)	**E. Total n_5**	Assistant Professors, Associate Professors, Professors	**7**
Total (A+B+C+D+E)			**35**

Table 1

WHY NGOS?

The term NGO embraces a wide variety of organizations. NGOs mean 'exogenous or indigenous voluntary private non-profit organizations that are engaged in relief, rehabilitation and developmental programmes using finance raised from voluntary, private sources, and the

donor agencies and managing themselves autonomously at local, national and or international level.[338]

NGOs are often viewed as being the 'conscience of government', and representatives of civil society, and have traditionally stepped in where governments have failed to take the initiative. Trafficking is no exception. NGOs are well-placed to work with trafficked children for several reasons. Many trafficked persons fear and distrust state-based organisations as they frequently enter destination countries illegally, or have had their documentation removed on arrival. Concerns over their immigration status, fear of deportation, and fear of the traffickers, torture, death, and being pressurised to testify translate into mistrust and reluctance to approach statutory agencies for support. Corrupt officials and the involvement of the police and other law enforcement officials can increase distrust.[339]

Though there cultural, political, and geographical differences, yet the work and services provided to victims and survivors of trafficking by NGOs have some common features. Support for victims often includes social and psychological assistance, shelter provision, financial, return, and reintegration assistance, telephone advice and counselling, housing, vocational training, legal advice, and documentation assistance.[340]

SCOPE OF NGOS

The NGOs function either through the financial assistance provided by the government or through self-financing. Their primary objective is to provide service to the vulnerable sections of society and ameliorate their condition thus fighting against the various kinds of exploitations they are subject to. Though the NGOs may work in different fields they all are however motivated by the same urge of working for the downtrodden sections of society. There are a number of NGOs who have taken initiatives in addressing the serious issue of human trafficking. To combat this evil plaguing the society they work either in coordination with the government or independently. In most of the states, the police departments are characterised by lack of manpower, inadequate infrastructure, insufficient knowledge on trafficking and lack of experience in handling trafficking issues. This situation has warranted the need of NGOs to assist the police authorities in rescuing, rehabilitation, reintegration of the trafficked survivors.

[338] D.Valarmathi, Dr. Ramesh, 'Role of Non-Governmental organizations in Combating Human Trafficking–A Critical Analysis' 2017 5 JSS Journal for Legal studies and Research p 1

[339] Marina Tzvetkova, 'NGO Responses to Trafficking in Women' 2002 10 Gender and Development p 60

[340] Ibid

Few NGOs even assist in fighting legal proceeding to help the survivors in getting remedy. NGOs have even contributed in implementation of the provisions of Immoral Trafficking Prevention Act, 1956 besides insisting the government in bringing about various changes in the trafficking legislations in order to protect the survivors of trafficking. NGOs despite having limited resources, funding have contributed efficiently in combating trafficking of human beings.[341]

OVERVIEW OF THE NGOS INVOLVED IN COUNTER-TRAFFICKING ACTIVITIES IN THE DISTRICT OF KAMRUP

A range of actors are involved in counter-trafficking initiatives in the district of Kamrup. These include Government Ministries i.e. Ministry of Labour and Social Welfare, Ministry of Health, Ministry of Education; Legal; Police; Counsellors and Social workers; Employment and Labour Office Representatives and Civil Society Organisations. In addition, a range of regional, international, and national non-governmental actors are active in supporting the work of both government and civil society to strengthen their counter-trafficking response. Coordination and cooperation among all these actors is crucial to helping ensure and protect the rights of trafficked children and children-at-risk.

The State Child Protection Society is a registered society which implements the Integrated Child Protection Scheme (ICPS) and all other child protection related schemes in the state of Assam. The SCPS has established the District Child Protection Unit (DCPU) in the district of Kamrup. The SCPS acts as a facilitator, monitoring and funding authority of DCPU, CWC and JJB of the Kamrup district. The SCPS ensures that through ICPS and other grant-in-aid schemes there is proper flow and utilisation of funds to the district. Besides in all the districts including the district of Kamrup it ensures effective implementation of the Juvenile Justice (Care and Protection of Children) Act, 2000 and its Amendment Act, 2015. It also ensures effective implementation of the Child Labour (Prohibition and Regulation) Act, Immoral Traffic Prevention Act 1986.

The DCPU in Kamrup has set up the District Child Protection Committee and also the Block level child protection committee for effective implementation of programmes, as well as discharge of its functions. Besides it has ensured effective implementation of the Juvenile Justice (Care and Protection of Children) Act, 2000 and its Amendment Act, 2015 at the district

[341] Supra note 7.

level by supporting creation of adequate infrastructure, viz. setting up JJBs, CWCs, SJPUs in each district and homes in a cluster of districts as required.

Child Welfare Committee, Kamrup is the sole authority to deal with matters concerning children in need of care and protection in the district. All children in need of care and protection in the district are sent directly to the children's home by the Child Welfare Committee that passes necessary orders for their rehabilitation, restoration and social re-integration.

The CWC has so far disposed a number of cases for the care, protection, treatment, development and rehabilitation of trafficked children and has provided for their basic needs and human rights in the district of Kamrup. All the children rescued from hazardous occupation, brothel, abusive family or other such exploitative situation have been produced before the CWC who has conducted inquiries to ensure optimum rehabilitation with minimal damage to the child.

Assam Centre for Rural Development has two sub-centres under CHILDLINE India Foundation (CIF) at Rani and Boko Development Block of Kamrup District, Assam. The Union Ministry of Women and Child Development is supporting this project with CIF as the nodal agency.

Along with other major cities of the country, CHILDLINE has been operating in Kamrup towards the care, protection, development and rehabilitation of neglected and deprived children below the age of 18 years. Indian Council for Child Welfare, Assam State Branch (ICCW/ASB), Assam Center for Rural Development and Gramya Vikash Mancha, as collaborative organization and sub centers organizations respectively have been implementing CHILDLINE services in the Kamrup district. Whereas other three sub centers of CHILDLINE Kamrup is implemented by Rani.

CHILDLINE Kamrup reaches out to children in need of care and protection within the city. CHILDLINE intervenes in a crisis situation and provides the necessary emergency assistance, rehabilitation and care for unsafe situations. Besides, the case interventions, CHILDLINE Kamrup conduct other activities to sensitize the communities about the situation of children and to make the people aware about child protection systems. To achieve this target, CHILDLINE Kamrup conduct regular awareness programs, outreach programs, organize CHILDLINE Advisory Board (CAB) meeting, meetings with the resource organizations, advocacy with the Government Departments, networking with Media, training programme for

different allied system and various programmes on some special occasions relating to child rights and protection.

The Guwahati based NGOs, UTSAH, BBA and Gold have been directly involved in anti trafficking work in both the districts of Kamrup and Kamrup Metropolitan. Gold is the only NGO which is implementing the Ujjawala scheme from 1st November 2009. The NGO carries out awareness programmes on child trafficking in various parts of the state including Kamrup on a regular basis.

BBA's mobile caravan, namely the Mukti caravan has covered more than 60 villages in the two districts of Kamrup Rural and Kamrup Metro till now. In the course of the Caravan, activists took the assistance of local Panchayat leaders, college students unions and local village groups to make the campaign successful and secure. Women groups in villages have specially lent support to Mukti Caravan. In Kamrup Metro, a few lawyers joined the campaign and participated in organizing the performances.

Every year many young girls are lured by the traffickers either with the help of relatives or known persons in the pretext of jobs. These girls eventually fall prey to the traffickers who force them into prostitution or make them work as unpaid domestic help or join dance bars and clubs. Baksa and Udalguri are the two remote districts of Assam, where hundreds of trafficking cases have been identified and vulnerable girls are the target.

Assam Centre for Rural Development has been trying to combat trafficking, and has implemented the Ujjawala Project in these districts under Ministry of Women & Child Development to prevent and rehabilitate girls who are victims of trafficking. They have engaged in generating awareness among the community, by organising meetings and advocacy programmes with the help of the local community and civil society organisations.

These programmes and meetings have served as a platform to reach out to trafficked girls. Most girls are trafficked after being promised jobs in cities like Mumbai, Kolkata, Delhi, etc. These girls are mostly rescued from railway stations and other public places.

To help them lead a normal life again, ACRD has set up a rehabilitation home named 'Navajeevan in Sikarhati village of Palasbari circle, Kamrup district. Rescued girls are brought to the home, where they are monitored and counselled for a minimum of six months to one year.

The girls are medically examined by a Physician and counselled by an appointed Counsellor regularly. Routine health check-ups are conducted. In order to help these girls overcome the trauma of their ordeal, they are engaged in various activities, which include singing, dancing, drama, poetry recitation, prayer, meditation, indoor and outdoor games, etc. These activities are a part of our efforts to help in their mental and cognitive development.

Various income-generating activities like handloom, tailoring, doll making, flower making and beauty courses are also given to ensure that are able to lead a normal and a dignified life again.

There is a provision for non-formal schooling for the girls in the home. A library has been setup so that they can spend their leisure hours reading. The home also has a legal support cell that provides necessary support when required.

The international agency UNICEF is providing support to the government and NGOs to develop and expand anti-trafficking activities in different areas of Kamrup and Kamrup Metropolitan.

ANTI–CHILD TRAFFICKING INITIATIVES IN THE DISTRICT OF KAMRUP

Responding to the query- what programs in prevention of trafficking are run by the NGOs involved in counter trafficking activities in Kamrup, the key informants came out with a list of activities. The key informants said that for prevention, awareness raising, training and sensitization programs are mostly given emphasis.

The different kinds of anti–child trafficking initiatives undertaken by the NGOs in the district of Kamrup can thus be categorised as follows.

i. Awareness Programs
ii. Rehabilitation
iii. Rescue Operations
iv. Counselling

1. AWARENESS PROGRAMMES

It is seen that awareness programs make up the majority of counter trafficking initiative in the district of Kamrup. These programs often focus on making attempts to reach people. However,

it is to be determined whether the bias towards awareness programs is due to their ease of implementation.

2. RESCUE OPERATIONS AND REHABILITATION FOR TRAFFICKED CHILDREN

The different actors involved in counter trafficking activities aim to identify and rescue trafficked children. They also work on assisting trafficking survivors through placement in shelter homes. Here they are given counselling, training, or non-formal education. Attempts are made to reunite them with their families through family counselling or community advocacy. Some return home and receive financial support to start a new life. Others do not or cannot return home and often remain in residential care. All are given help with medical treatment.

The NGO, Gold works on trafficking as a stand-alone issue, exclusively in rehabilitation. The NGO aims to empower trafficking survivors and engage in a dialogue with women/girls about their futures. It addresses trafficking as a stand-alone issue and focusses on rehabilitation of trafficked victims.

The rehabilitative home of Gold provides different services to the inmates which include medical care by part time female medical officer, administrative support and education. The inmates who are drop out from school are motivated to join formal school. Tuition fees, uniforms, books are provided free of cost.

Besides the organisation also impart vocational training to its inmates and engages them in income generation activities. The vocational training provided is need based and depends on marketing outlets. It has been observed that Assamese woman has natural inclination towards weaving. The handloom products have sufficient demand in the market. Hence, the inmates are trained in weaving. Jute is locally available resource in Assam. The organization takes part in exhibition, fare and melas and search marketing avenues.

3. SHELTER HOMES AND COUNSELLING

The rescued trafficked children at the direction of the Child Welfare Committee of the district are kept in the shelter homes run by the State Government. At present all the rescued children are housed in any of the two government run shelter homes in the Kamrup Metroploitan. They

are given proper counselling sessions by the Counsellors specifically appointed for these shelter homes.

Also in view of rising crime against children, especially trafficking, child labour and child marriage, the Kamrup District Child Protection Committee has rolled out the massive awareness campaign known as 'Muskan-III', which aims to rescue and recover missing children.

LIMITATIONS OF THE NGOS

The present study finds that a few child trafficking prevention work is currently being undertaken in the Kamrup district by the NGOs. Prevention is the most vital technique to bring sustainable change in trafficking but unfortunately it is the most neglected one. In prevention sector the NGOs are involved largely in mass awareness raising programs. Through these programs the NGOs often focus on making attempts to reach people. The outcome of prevention measures is raised awareness of general people and reduction in the number of trafficking. But this does not seem to be happening in the district. The awareness level of people is not satisfactory.

Also the NGOs' working at grass root level in the vulnerable areas is low. The outcome of prevention activities is not instantly visible. And there is no such mechanism to measure intended output of these activities.

The human resource of the NGOs is not adequate. And with such limited human resource it becomes quite impossible for them to reach out to people.

CONCLUSION

The functioning of NGOs is dependent on various factors like social, economic and political. For effective and successful functioning of the NGOs financial contribution from the government and the volunteers plays a major role as they are primarily dependent on external funds to render services to the victims of trafficking. Very few NGOs are funded by the government and unfortunately the fund allotted to them does not reach on time.

All types of prevention activities require government interventions. The Government of India has formulated a number of policies to combat child trafficking. In these policies co-ordination and networking among different programs taken by different organizations, involvement of NGOs, implementation of programs by civil society and NGOs are given

emphasis. However, in reality, at local level there is no effective government intervention. There is no collaboration between government and the NGOs of the district. Only meetings are held customarily but there is no comprehensive work plan and no follow up of what NGOs are doing.

Besides, the legal framework regarding trafficking is very weak in India. There is no exclusive law on human trafficking which makes the conviction rate very low in the country.

The NGOs can raise awareness about child trafficking by involving children, duty bearers, the general public, and/or the demand sector. It can prove to be an important component of a comprehensive prevention strategy. The awareness-raising methods adopted by the NGOs can vary depending on the target audience, intended impact, and resources available. They can range from focus group discussions with small target groups of children to mass media campaigns with the general public and everything in between. Different forums and methods for awareness raising could be adopted by the NGOs which would include public information campaigns, developing messages with and for children, interactive forums including workshops, debates and creative performances involving children in raising awareness and promoting self-protection. The mass media campaigns could include radio spots, posters and/or billboards about child trafficking and disseminate them nationally with the support of local partners, media outlets and the police.

AN ANALYSIS OF THE POLICE POWERS IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA AND THE HUMAN RIGHT ISSUES

Zakiyyu Muhammad[*] and Pradeep Kulshrestha[*]

Abstract:

The police is one of the significant organ of criminal justice delivery in Nigeria, this can be seen from the powers confers on them by the constitution of the Federal Republic of Nigeria, Police Act and other International Instruments.

When a complainant reports that a serious crime has been committed, the first contact an alleged offender makes with the criminal justice system is the Investigating Police Officer who arrests and investigates the allegation. The Investigating Police Officer exercises large discretionary powers. He may decide to investigate the crime or merely arrest and prosecute the suspect. The position is that the Nigerian Police arrest first and investigate later.

The article sought to critically examined and analyzed police powers to arrest, detained and prosecute offences under the Police Act and the Constitution of the Federal Republic of Nigeria, 1999 (as amended) in order to ascertained the constitutionality or otherwise of some of the actions of the police and whether the Nigeria Police Force is in breach of United Nation International Covenant on Civil and Political Rights. Consequently, the methodology adopted is doctrinal.

The finding of the article is that the powers conferred on the police by the constitution of Nigeria, and Police Act are very wide and that is why in many cases, complain of use of excessive force, malicious arrest, malicious prosecution, arbitrary detention, extortion and torture has been reported. The article recommended the separation of police power to investigate from the power to prosecute and the need for the police to establish a public prosecution department within the force.

Key Words: Human Rights, Nigeria, Police, Arrest, Detention, Prosecution.

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INTRODUCTION

Nigeria as a country is notorious of its human rights violation. The country has been severally recorded poorly by Human Right Watch, Amnesty International and several other international organizations including the United Nations. In fact at some point, the United Sates refused to sell some fighter jets to the country to fight insurgency of Islamic extremist (Boko Haram) because of reports of various degrees of human rights abuse.

In an apparent reversal of the former assistance policy to the Nigerian military suspected of rights violations, the US donated 24 mine-resistant and armor-protected vehicles valued at about $11 million to the army. In mid-September, 2017 Congress was notified of plans to sell 12 A-29 Super Tucano light attack aircraft and weapons, including laser guided rockets and unguided rockets, valued at over $592 million. Critics of the move have expressed concern about the human rights implications of this sale, given the absence of genuine reform in the Nigerian military.

In a report of the study carried out by human rights watch on Nigeria for 2005, it was asserted the president (Obasanjo) empowered the men of the Nigerian police force to kill with impunity, this assertion by human right watch cannot be ignored as the presidents, in several cases had ordered reprisal attacks on civilians who had clashed with security forces.[342]

In December 2015, the Nigerian army killed 347 members of the Shia Islamic Movement of Nigeria (IMN) after a road blockade by the group in Zaria. Hundreds of IMN members including the leader, Ibrahim El-Zakzaky, and his wife remained in custody without charges not until late April, 2018 when the leader was charged with murder.[343]

The ban imposed on the IMN by the Kaduna State government in October 2016 triggered a wave of bans against Shia in four northern states. Since then, Shia religious activities have been met with mob and police violence leading to the death of scores of IMN members in Kaduna, Kano, Katsina, Plateau, Sokoto, and Yobe States.[344]

[342] Human Rights Violations By The Nigerian Available at https://www.researchgate.net/publication/268213712_HUMAN_RIGHTS_VIOLATIONS_BY_THE_NIGERIAN_POLICE_THE_NIGERIAN_EXPERIENCE_IN_A_DEMOCRACY accessed May 30 2018

[343] World Report (2017), Nigeria, Human Rights Watch available at https://www.hrw.org/world-report/2017/country-chapters/nigeria last assessed 3rd May, 2018

[344] ibid

In February and May, 2017 security forces were accused of killing at least 40 members of the Indigenous People of Biafra (IPOB), and Movement for the Actualization of the Sovereign State of Biafra (MASSOB). The groups are advocating for the separation of Biafra, mainly made up of Igbo-speaking people in the southeast and the release of Nnamdi Kanu, the IPOB leader detained and undergoing trial for treason since October 2015.[345]

The passage of the Same Sex Marriage (Prohibition) Act, SSMPA in January 2014, has far reaching effects on members of the lesbian, gay, bisexual and transgender (LGBT) community. The law is used to legitimize abuses against LGBT people, including mob violence, sexual abuse, unlawful arrests, torture and extortion by police.

On February 13, 2017 the police arrested a homosexual couples in the federal capital for allegedly attempting to conduct a wedding. The wedding sponsors and the hotel venue owner were also arrested. The penalty for entering into a gay marriage under the SSMPA is 14 years.

Ironically, former President Jonathan who defied global pressure before signing the bill into law, said belatedly in June 2016 that "with the clear knowledge that the issue of sexual orientation is still evolving, the nation may, at the appropriate time, revisit the law."

In a November 2016 report, the Office of the Prosecutor of the International Criminal Court (ICC), found that none of the allegations of crimes committed by so-called Fulani herdsmen or by government forces against pro-Biafaran protesters and civilians caught in the fight against Niger Delta Avengers were within the ICC's jurisdiction. The office continues an analysis of the Zaria incident involving members of the IMN as well as the assessment of national efforts to prosecute crimes committed in the Boko Haram violence as part of a preliminary examination of the situation in Nigeria.

The country also took retrogressive steps against human rights when it voted alongside five other members including China, Russia, and Cuba against HRC 31/32 on protecting human rights defenders addressing economic, social, and cultural rights at the council's 31st session in March. This follows a previous vote against the first ever UN General Assembly Resolution Recognizing the Role of Human Rights Defenders and the Need for their Protection in November 2015.

[345] ibid

Senator Dino Melaye, a senator of the Federal Republic of Nigeria was arrested while boarding flight to Morocco on the 23rd April, 2018 by the Nigeria Police Force at Nnamdi Azikiwe International Airport, Abuja on a case bordering on unlawful possession of fire arms, kidnapping and armed robbery. The arrest resulted in to further arrest of two members of his legal team who were subsequently charged to court and sent to prison whilst Dino was still at Hospital, receiving treatment of injuries sustained as a result of alleged failed attempt to escape from the police custody. These chain of events has resulted in to public outcry, resulting in to allegations that the arrest is politically motivated by some members of the ruling party (the APC) of which he is a card carrying member, the opposition party (the PDP) and members of the parliament.

Across the country, allegations of abuses including arbitrary arrests and detention, torture, forced disappearance, and extrajudicial killings continue to trail security operations.

OVERVIEW OF THE POWER OF THE POLICE

The Nigerian Police Force is an establishment of the constitution of the Federal Republic of Nigeria, 1999.[346]

Section 214(1) of the constitution provides as follows:

There shall be a police force for Nigeria, which shall be known as the Nigerian Police Force and subject to the provisions of this section no other police force shall be established for the federation or any part thereof. The Constitution further provides under subsection (2) (a) and (b) of this section that the Nigerian Police Force shall be organized and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly and the members of the Nigeria Police shall have such powers and duties as may be conferred upon them by law Pursuant to the above provisions.

In compliance with subsection (2) (a) and (b) of the said section 214, the National Assembly enacted the police Act[347] which spells out in details the duties and functions of the Nigerian Police Force. It is important, at this juncture, to examine the provisions of section 4 of the Police Act which spelt out expressly all the powers and duties of the police.

[346] Section 2014 of the constitution, 1999 (as amended)
[347] Cap 359 laws of the Federation of Nigeria (LFN) 1999, now cap p 19, LFN, 2004.

"The police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within or without Nigeria as may be required of them by or under the authority of this or any other Act"[348]

The court of appeal while interpreting the above section in the case of ***Chukuma V. Commissioner of Police***[349] held:

"By virtue of section 4 of the Police Act, Cap 359, laws of the Federation of Nigeria, 1990, the duties of the police include amongst others the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and they shall perform such military duties within or outside Nigeria as may be required of them by, or under the authority of the Police Act or any other Act…"

In another development, the court of appeal in ***Agbi V Ogbeh*** the identified investigation of crime as part of the duties of the police in furtherance of their role as embodied in section 4 of the Police Act. The court held that as the police have the statutory duty to investigate crime, a court of law is entitled to give their report of an investigation probative value where such report is properly tendered in evidence[350]

In order to successfully analyze the powers of the police, it is paramount to analyze section 4 of the Act and each and every power or authority so conferred. Consequently, the powers can be identified as follows:

1. POWER TO ARREST

This naturally flows from the first three duties enumerated under section 4 of the Police Act that is to say, prevention of crime, detection of crime and apprehension of offenders. An arrest has been defined as "The taking or keeping of a person in custody by legal authority, especially in response to a criminal charge".[351] In the context of criminal procedure, arrest is the act of

[348] ibid
[349] (2005)8 NWLR (PT – 926) 40
[350] (2005) 8 LWLR (Pt – 927) 278
[351] Black Law Dictionary, 9th edition at p 124.

securing the appearance of a person alleged to have committed an offence before a court of competent jurisdiction. The police are empowered to arrest a suspected offender unless there is a submission to custody by word or action.[352]

The general rule is that in serious offences such as murder or rape the police are empowered to effect arrest without warrant.[353] The basis of this rule is the need to avoid any unpleasant situation in which offenders will be allowed to escape arrest. It will be ridiculous to expect a police officer to go in search of a warrant when a felony is committed in his presence.[354]

It is an established principle of law within the context of national law that the police have power to arrest persons suspected to have committed a crime either with or without warrant, defending on the circumstances of each case. In the other hand, whilst international instruments such as *United Nation International Covenant on Civil and Political Rights* frowned at any form of arbitrary arrest and inhuman treatment whilst in lawful custody, the rights of member states to ensure law and order using the instrumentality of the law by arresting persons suspected to have committed offences is highlighted and guaranteed. I reproduce Article 9 (1)(2)(3) verbatim as follows:

Article 9 (1) everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

[352] See Section 3 of the Criminal Procedure Act (CPA) and section 24 of the Police Act
[353] See Section 10 (1) CPA, Section 26 Criminal Procedure Code (CPC) and section 4 Police Act.
[354] Section 26 CPC for the circumstances under which a police officer can affect arrest without a warrant

This power is very important as it is in most cases the beginning of the process of criminal trial, traditionally in Nigeria, immediately an allegation of crime is lodged, the police embark upon the arrest of the suspected offender and the first thing they do is the recording of the statement of a suspect follows by interrogation, sometimes interrogation comes first. However, this power is been abused by the police. This ha

In some instances, suspected offenders are invited by the police on phone or via a letter if the suspect is a public figure. As in the case of Dina Melaye, an invitation letter was sent to the president of Nigerian Senate, Dr. Bukola Saraki and even a court summon for Melaye to appear before the police team of investigators in his state.[355]

2. POWER TO SEARCH

Like the power to arrest, this power flows and it is also intended to enable the police to effectively discharge the duties conferred on them by section 4 of the Police Act, particularly items (a) (b) (c) and (e) thereof. Item (e) deals with protection of life and property, the first three items have earlier been listed. After a lawful arrest, a police officer can conduct searches of persons, premises and even things.[356] A Police officer is also authorized to detain and search a person upon a reasonable suspicion of being in passion of a stolen property. When, however, a woman is to be searched, in order to ensure the dignity of woman accused, the law requires that another woman should carry out such a search.[357]

3. POWER TO GRANT BAIL

While the police are empowered to apprehend suspected offenders in circumstances that are not unlawful, they do not have the power to detain suspects beyond a maximum period of two days or 48 hours.[358] Consequently, the law allows the police to grant bail to arrested persons pending the conclusion of investigation into the offences allegedly committed by such a person.

[355] Channels Tv New available at https://www.channelstv.com/2018/03/24/police-threatens-to-declare-dino-melaye-wanted/ last accessed on the 3rd of May, 2018

[356] See Sections 6 subsection (1), CPA, 44, CPC and 24 Police Act

[357] See Section 6 subsection (1) CPA, 44, CPC and 24 Police Act

[358] Except in exceptional circumstances where the court may deem it necessary to extend the period beyond 48 hours or two days. Also See in this connection, section 35, subsection (4) and (5), of the Constitution. Also See the case of Eda v Cop (1987)3 N.C.L.R. 219

It is usually upon the completion of investigation that suspects are formally charged to court by the police. When a suspect has been released on bail, he is allowed to go home until the police are ready to charge him to court, the bail granted by the police elapse as soon as the suspect is formally charged to court. Thus, for the suspect (now an accused person) to continue to enjoy bail, he must make an application for same except the judge or magistrate rules otherwise.

4. POWER TO INVESTIGATE CRIMES

Investigation of crimes is very significant to any criminal allegation and a critical aspect of police Act. Investigation, involves an examination or research into the details or facts about something, in order to discover who or what caused a particular thing or what happened. It is important that the police, state, with exactitude or near it, what happened. This will guide the police or the Attorney-General in coming to a conclusion whether a prima facie case has been established for the suspect to be charged. Pre-trial investigations will establish the extent of the injury or damage caused by the offence, the gain affected by the offender and the demands of the injured party.[359] This must be done without undue delay. It should be stated that a head of investigation is appointed for each criminal case to be investigated, who would usually drive the investigation to the end.

Investigation involves a systematic collection of information about crime (intelligence) and the assembly of Physical and testimonial evidence within the framework of the law in order to identify the perpetrators of crime and provide evidence for a successful prosecution of criminal suspects. Criminal investigation as defined, as an art mostly carried out by professionally trained detectives who are usually not in uniform. Apart from discovering the author(s) of a criminal act after the commission of crime, detectives surreptitiously stake out site of likely criminal activities in order to catch them in the act. They are sometimes involved in under cover activities, penetrating criminal syndicates or pose as people willing to commit illegal act (Agent provocateur).[360]

[359] "Pre-trail investigation of an offence" Uk Police Department available at https://www.police.uk/ last accessed on the 3rd May, 2018

[360] Nmerole, C.I. "police interrogation in criminal investigation" (Historical, Legal & Comparative Analysis (Minna: Haiygraph Nig. Ltd, 2008) at p. 89.

5. POWER OF INTERROGATION AND IDENTIFICATION OF SUSPECTS

As pointed out under the power of police to arrest, ancillary to police investigation power is police interrogation.[361] Perhaps, the most sensitive aspect of Police power in the quest for criminal justice is in respect of questioning of suspects. The significance of interrogation is huge. It should be stated that the human rights community have taken the police to task over gross abuses of human rights of persons in detention with some times apologies ordered and compensation granted.[362] In most cases these allegations are made against experienced police officers, predominantly by unexposed illiterate accused persons, the place in which the torture is alleged to have carried out is always a police station in this regard, a place that is rarely visited by those categories of people due to lack of exposure and fear of been extorted. In this context, how can an accused person prove to the court that he was indeed tortured? Simply put, accused persons are being tortured but they cannot be able to prove same before the court of law in order to render the self-incriminating documents that is tendered before the court of law.[363]

Interrogation should be distinguished from a normal interview, involving employment of persons. In criminal justice administration interview involves a lot more. It is more grueling, more detailed, indeed a person who has been interviewed, may later be interrogated when the investigation is focused on the person as suspect.[364] It is correct to state that interrogation is an extension, with greater intensity of the interview process. In terrorism offences, with the obstinacy and conviction of suspects, interrogation cannot be dispensed with. There is no doubt that the human rights community have questioned the appropriateness and indeed, the legality of the interrogation process of several Al-Qeada suspects in Guantanamo Bay, in Cuba and other "enemy combatants" in several detention centers around the world, with the use of sniffer dogs and water boarding.[365]

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[361] Amadi, G.O.S. Police Powers in Nigeria (Enugu: Afro-orbis publications Ltd 2000) at p. 206

[362] See https://www.naijanews.com/2017/05/09/court-orders-nigeria-police-pay-n1m-four-persons-violating-thier-rights/ last accessed 3rd April, 2018. In most instances at this juncture, allegation of torture is made against the police

[363] Zakiyyu M. and Pradeep K. (2018), 'Impact of the United Nation Convention Against Torture in the Protection of Human Rights In the Administration of Criminal Justice System in Nigeria' *Journal of Legal Studies and Research Volume 4 Issue 1 – January 2018* available at www.jlsr.thelawbrigade.com last accessed 3rd May, 2018

[364] Nmerole, C.I. "police interrogation in criminal investigation" (Historical, Legal & Comparative Analysis (Minna: Haiygraph Nig. Ltd, 2008)

[365] CIA's Harsh interrogation Techniques Described" www.abc-news.com.ail—1cia-interorgation accessed on 3rd May, 2018.

6. PREVENTION OF BREACH OF PEACE

The police are by virtue of the powers conferred by sections 4 of the Act engaged on daily basis in the prevention of crimes and breakdown of peace, law and order. Several acts may constitute a breach of peace as to violently threaten law and order in a few cases, this unlawful assembly may turn violent. Threats to peace could also arise from large gathering such as political rallies, conventions etc. The need to maintain public order and prohibit the formation of quasi-military organizations, regulate the use of uniforms, regulate assemblies, meetings and processions to avoid breakdown of law and order, informed the enactment of the public order Act.[366]

7. PROSECUTION OF CRIMINAL OFFENCES

It is necessary, at this point, to revisit the provision of section 214 subsection (2) (b) of the 1999 constitution. It states that "the member of the Nigeria Police shall have such powers and duties as may be conferred upon them by law". One of the relevant laws enacted by the National Assembly, pursuant to this provision, as we have already stated in this paper, is the Police Act. Now section 23 of the Act reads as follows:

"subject to the provisions of sections 160 and 190 of the Constitution of Nigeria, 1979"Any police officer may conduct in person all prosecutions before any court whether or not the information is laid in his name."[367]

The effect of this constitutional provision is that the police are empowered to institute and conduct criminal proceedings in all courts in Nigeria, including the Supreme Court. It must be admitted that this question has generated a lot of confusion due to a practice that has developed in our Criminal procedure whereby police officers institute and conduct criminal trials only in inferior courts.[368] This may have become the practice but it does not in any way change the position of the law. The power vested in the police by section 23 of the Police Act to conduct Criminal proceedings is exercisable subject only to the powers of the Attorney-General of the Federation or that of a state to institute, undertake, take over, continue or discontinue criminal trials in any court in Nigeria.

[366] Cap 382, LFN 1990

[367] Now sections 174 and 211 of the constitution of the Federal Republic of Nigeria, 1999 (as amended). These sections relate respectively to the powers conferred on the Attorney-General of the Federation and the Attorney-General of a state to institute, undertake, take over, continue or discontinue criminal proceedings against any person before any court of law in Nigeria.

[368] By this, we mean inferior Courts of record such as the Magistrate Courts, Area Courts, Customary Courts etc.

Indeed, the question as to whether the police can conduct criminal trials in all courts in Nigeria was one of the relevant issues the Court of Appeal considered in the case of ***Ajakaiye V FRN***.[369]

Delivering the leading decision, **Saulawa** J.C.A., stated thus, on the power of the police to conduct criminal trials:

"By virtue of the provision of section 23 of the Police Act, any Police officer has the power to conduct in person all the prosecutions before any court in Nigeria whether or not the information or complaint is laid in his name. However, the exercise of such power is strictly subject to the well set out provisions of sections 160 and 190 of the 1979 constitution and now sections 174 and 211 of the 1999 Constitution"

DISCUSSION

Going by the powers of the police analyzed above, it can be deducted that the powers of the police are very wide; in fact, one can say it is near to impossible for criminal trial to take place without the police playing some roles.

Section 23 of the Act conferred on the police the right prosecute criminal offences it provides *"subject to the provisions of sections 160 and 190 of the Constitution of Nigeria, 1979"Any police officer may conduct in person all prosecutions before any court whether or not the information is laid in his name."* looking at this section from critical point of view and the power of police to investigate, bestowed on them bunch of opportunities to torture suspects in their custody in order to obtained involuntary confession and use same in the prosecution.

In Nigerian criminal justice, a statement tendered by a prosecuting authority, that is alleged to be confessional statement carries more weight than any piece of evidence. Though the system has provided for trial within trial for the court to ascertain the voluntariness or otherwise of a confessional statement tendered but objected by the accused person, the process is still ineffective as 60% of accused persons at lower courts are unrepresented and accused persons are promised either a soft landing or a reward for keeping quite. In some cases, suspects were forced to sign documents without knowing the content and yet its admissible in evidence as a confessional statement. It is suggested in this regard that the police should use audio tape and video recording during interrogation to avoid allegations of abuse of civil rights and involuntary confessions.

[369] (2010)11 N.W.L.R. (Pt 1206) 500 at 524

Some IPO are transferred before or during the commencement of the trial involving accused persons they investigate. This is a major cause of delay in criminal trials. The Police IPO as federal officers are sometimes transferred with complete disregard for their current assignments. It is always an uphill task to get such officers to come back at their own expense to give evidence at the trial.

One cardinal area where the Nigerian Police has been bitterly criticized is the area of criminal justice. The Nigerian Police has been severally criticized for its shoddy conduct of investigation usually fraught with errors sometimes deliberates.[370] There are allegations that police arraign suspects in court before looking for evidence to prosecute them. Another awful practice by the police is the persistent use of the "holding charge" to detain awaiting trial suspect.[371]

Most legal practitioners agree that the incompetence of the police prosecutors and their unrelenting compromise have resulted in prison congestion in the country. The prisons are now really congested. According to the Comptroller General of Prisons, Mr. Ja'afaru Ahmed, there are about 70,000 inmates in Nigeria prisons, 70 per cent of them (48,000) are awaiting trial. At N450 per head, about N35, 000,000 is spent to feed them on a daily basis. If 70 per cent of them are not supposed to be there, it therefore, means that the country has no business burning N24, 500,000 of tax payers' money to feed these persons daily. This is aside the grave injustice done to them through unwarranted deprivation of their constitutional rights to liberty and dignity of their human person.[372]

On the 17th of February, 2012 his Excellency, the then President of Nigeria, Dr Goodluck Ebele Jonathan inaugurated a nine-person presidential committee on the reform of the Nigeria Police chaired by Mr. Parry Osayande, retired deputy inspector general of Police. It had five terms of reference to advise the Government on measures that could be taken to improve the performance of the Nigeria police and restore public confidence in the institution. The said terms of reference are set out below:

[370] See Millar v. State (2005) 16 WRN, P. 45 ratio 18. Note also that this explains the long list of unresolved murders and assassinations in Nigeria ranging from Chief Bola Ige, Funso Williams, Dele Giwa, Alfred Riwane, Seliat Adedeji and Hon. Oladimeji Segun (a.k.a. Segelu) See The Punch 22nd September, 2007 P. 11.
[371] Poor Prosecution: Lawyers back CJN against Police, Punch October 19, 2013
[372] The Punch 'Why Attorney General Should Stop Police Prosecution' published 11th January, 2018 available at http://punchng.com/why-attorneys-general-should-stop-police-prosecutors/ last accessed 30th May, 2018

1. Identify the challenges and factors militating against effective performance in the Nigeria Police Force and make recommendations for addressing the challenges.

2. Examine the scope and standard of training and other personnel development activities in the police to determine their adequacy or otherwise.

3. Determine the general and specific causes of the collapse of public confidence in the police and recommend ways of restoring public trust in the institution.

4. Examine records of performance of officers and men of the Nigeria Police Force with a view to identifying those that can no longer fit into the system due to declining productivity, age, indiscipline, corruption and or/ disloyalty.

5. Make any other recommendations for the improvement of the Nigeria Police Force.

A perusal of the above shows that the most significant change this reform seeks to imbibe is to strengthen the formal investigative capacity of police to gather evidence and investigate criminal activity. As the police is the life line and their work is critical to criminal investigation and proceedings, it is essential and urgent that they become adequately prepared to carry out these responsibilities to ensure that justice is done.

There have been calls by civil society groups and human rights activities for a cancellation of policemen as prosecutors at the lower Courts. Their basis of objection includes the following:

- Police arrest, interrogate, collect evidence, and decide to prosecute or not.

- There is need to separate the bulk of the investigatory process from the prosecutorial process.

- The policeman is concerned with obtaining a conviction and may ignore facts which a legally trained mind would take into consideration before initiating prosecution.

- The practice of police advocacy entails the police exercising a function proper for only professional advocates. The judicial officer is better able to ensure that justice is done when dealing with a lawyer as the prosecutor because a lawyer's training is divorced from and presumably detached from the investigatory process.

CONCLUSION

Looking at the various provisions of the Laws cited earlier on the general duties of the Nigerian Police; it is obvious that some of the provisions are very wide and nebulous as to give police officers indefinite or absolute powers in their duties of apprehension, detection, arrest, search, detention and prosecution of offenders. Hence, there is a need to reposition our laws in line with the laws in other jurisdictions noted for tradition of adequate policing.

Looking at the situation pragmatically, we are still stuck with police prosecution in view of the fact that the Nigeria Police does not have enough lawyers to take on prosecution at the lower courts. The number of lawyers cannot cope with the volume of cases in the Magistrates' courts alone. In the short term, more lawyers should be employed by the Police. It is suggested that the police should have a Prosecution Department created within the Nigerian Police and it should be carved out as a distinct unit of the force. Prosecutors should not be transferable to other units of the force. Intensive exposure to criminology, criminal law and procedure and investigative methods would be a great help in revamping the police prosecution. Organized in service training and retraining of prosecuting officers would be beneficial. These training programs should emphasize current trends on modern policing with regards to human rights issues and areas where police procedures are lacking. The local bar can be engaged by the office of the DPP either at the state or federal level to undertake prosecution in the Magistrates Courts and high courts. These if achieve will remodel human right issues with Nigerian police force.

TRAVERSING BEYOND TRADITIONAL HUMAN RIGHTS: A COMMENT ON NARAYAN DUTT BHATT V. UNION OF INDIA

- *Sohini Mahapatra*[*]

INTRODUCTION

"*A right delayed is a right denied." – Martin Luther King, Jr.* This statement may be reflective of the foundation of universal human rights. Promotion and implementation of human rights has for the longest time been a priority goal across all nations. However, say for a moment, we do not associate the statement made by Martin Luther King, Jr. only to 'human' rights. Does it then change the connotation or idea behind the 'right' that is mentioned? With globalization, the conventional norms of law and society are not only evolving but also expanding at a pace faster than ever before. In these times, can it then be asserted that human rights remain a static concept? Perhaps, not. The progression of human rights has expanded beyond the realm of basic rights, such as right to equality or right to life, to more unconventional and contemporary rights, such as right to clean and healthy environment. This poses yet another question – is human rights or rights per se limited only to 'humans' or extends beyond them? Maybe this is a question worth pondering upon.

In the recent past, the issue of animal rights has surfaced time and again in ethical discussions as well as within the legal fraternity. There has been a constant tussle between different sects of people, who demand an enhanced status for animals and those who believe that rights is the exclusive domain of humans. This conflict is not peculiar to just India but is a rather growing trend across many jurisdictions. The evolution of rights can be attributed not just to the legislature but to the judiciary as well. On many occasions, the courts have stepped up and broadened the horizon of a single right to include several tertiary rights. The best example of this is the expansion of Article 21[373] of the Constitution, which under the aegis of Right to Life, includes an array of ancillary rights, such as right to livelihood, right to education, right to dignity, right to privacy, *et al*.

The Indian judicial terrain has witnessed, more so in the last decade, several petitions before the courts addressing issues on animal welfare and animal rights. The debate of whether animals can be right-holders or not, is a contentious issue that the courts are being faced with.

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[373] Constitution of India 1950, a 21 – Right to Life and Personal Liberty.

In 2014, the Supreme Court in *Animal Welfare Board of India v. A.Nagaraja,*[374] rendered a landmark decision, where it expanded the scope of Article 21 to animals as well. It held that 'life' under Right to Life is not restricted to human life only.[375] Hence, animals also have an inherent value, intrinsic worth and deserve the right to live with dignity.[376] While, this decision was received with resistance and appreciation alike, it opened the avenue for essential human rights to go beyond humans, and apply to animals as well.

In the light of the same context, the High Court of Uttarakhand in its recent decision of *Narayan Dutt Bhatt v. Union of India and ors*[377] has delivered a path-breaking decision, wherein the court has dealt with the overall protection and welfare of animals.[378]

FACTS IN BRIEF

The present petition was filed seeking directions for restricting movement of horse carts across the Indo-Nepal border. The petitioner alleged that there was rampant transport of horses from Nepal to India and vice-versa not only without proper medical check-up of the horses but also in unchecked numbers.[379] Furthermore, there was violation of provisions of the Prevention of Cruelty to Animals Act 1960 (PCA Act), subjecting animals to cruelty, injuries, overloading and so forth. In addition, the petitioner has also argued that the provisions of Prevention and Control of Infectious and Contagious Diseases in Animals Act, 2009 (Act of 2009) as well as the Transport of Animals Rules, 1978 (Rules 1978) have not been enforced.[380] The petitioner had prayed before the court to confer upon all animals the status of legal person.

JUDGMENT AND ANALYSIS

The High Court of Uttarakhand has in detail dealt with the question of 'personhood' and whether animals can be treated as persons under the law. Before delving into intricacies of the same, the court has emphasized that since the trade between India and Nepal is governed by the Indo-Nepal Treaty of Trade, 2009 it is imperative that the Government of India imposes restrictions for protecting animal life.[381] This provision is similar to Article XX of General Agreement on Tariffs and Trade (GATT), which serves as exceptions to trade measures of the

[374] (2014) 7 SCC 547.
[375] ibid.
[376] ibid.
[377] Writ Petition (PIL) No. 43 of 2014; Date of Judgment – 04.07.2018.
[378] ibid.
[379] ibid [1], [4], [7].
[380] ibid [12].
[381] ibid [22]; Indo-Nepal Treaty of Trade 2009, a IX.

World Trade Organization (WTO).[382] Thus, in all inter- and intra- national trade activities, the value of protecting animal life is a relevant consideration.

Apart from the appreciation of legal provisions under PCA Act, Act of 2009, Rules 1978 as well as the Prevention of Cruelty to Draught and Pack Animals Rule, 1965 and Prevention of Cruelty to Animals (Transport of Animals on Foot) Rules, 2001, the Court has deliberated over the jurisprudential aspect of the issue at hand. For any 'person' to enjoy rights under the law, it is essential that the status of personhood is granted, either naturally or artificially. Human beings are natural persons, hence enjoy human rights. However, legal rights are not limited only to humans and are extended to non-human entities as well, who have been recognized as juristic persons. For example, corporations and companies. Thus, the two-judge bench has appreciated preceding decisions, wherein the question of rights has been widened to non-human entities. For example, Hindu idol or deity has been recognized as a juristic entity with the right to hold property liable to be taxed, with human beings playing the role of administrators or entrusted with their management.[383]

Furthermore, the court reiterated the decision of *Shiramoni Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass and ors*[384], wherein it was held that 'juristic person' is an artificially created person arising out of necessity in human development and societal faith.[385] Thus, the court has overtly recognized that persons may be of three kinds – natural, legal and artificial. Quoting from the *Shiramoni* decision, the bench in *Narayan Dutt Bhatt* has expressed that legal persons may be of as many kinds as the law desires, attributing legal personality to them, whereby they are capable of bearing rights and duties.[386] Thus, it may be inferred that both natural and juristic persons can be right-holders and be treated as legal entities. Rights are not exclusively granted to human beings only, and have been granted to non-human entities as well. Therefore, non-human animals may also be given legal rights, which they can enjoy despite not being natural persons.

The High Court in the instant petition has also harped upon the ratio given by Supreme Court in *A. Nagaraja*, reiterating that right to life includes animal life as well, and means more than

[382] General Agreement on Tariffs and Trade 1948, a XX (b).
[383] *Bhatt* (n 5) [70], [71]; *Yogendra Nath Naskar v Commission of Income-Tax, Calcutta* [1969 (1) SCC 555]*, Ram Jankijee Deities and ors v State of Bihar and ors.* [1999 (5) SCC 50].
[384] AIR 2000 SC 1421.
[385] *Bhatt* (n 5) [72].
[386] ibid.

mere existence or surviving as instrumental value for humans.[387] Hence, it is the duty of Governments, Ministry of Environment and Forests as well the Animal Welfare Board of India to protect the welfare of animals and ensure that they are not subjected to unnecessary pain and suffering.[388] Furthermore, the court has also stressed on flexibility of law so as to be able to reach out to both, living animate and inanimate objects equally, rendering them a standing before a court of law.[389]

Deliberating over the point of whether or not animals can be granted the status of legal person, the Court has further delved into understanding how animal minds function, in terms of emotions, intelligence, language and so on.[390] Thereafter, the Bench has opined that both natural persons and juristic persons are bestowed with rights and obligations, with the only difference being that juristic persons or legal entities act through a designated person.[391] Thus, it may be clearly inferred that just as corporations, idols, deities, corpus funds, etc. have been recognized to be legal entities with due rights and obligations, but with humans acting as designated guardians on their behalf, likewise the same may be applicable in case of animals. Humans have been cast the duty to ensure animal welfare by reading Sections 3[392] and 11[393] of the PCA Act with Article 51-A of the Constitution.[394] This duty of humans as laid down by the Supreme Court has only been further established by the High Court of Uttarakhand in this judgment. Adding further, the court has held that since non-human animals are mute and unable to voice their grievances, humans should speak on their behalf.[395]

The judgment also holds an environmental perspective, wherein the court has expressed that safeguarding environment and ecology is a growing concern and need of current times. Since, non-human animals are a part of the environment, they have a "right to life and bodily integrity, honour and dignity".[396] The emphasis on non-human animals having a right to dignified life, like humans, has been time and again expressly provided by various high courts as well as the apex court. This implies that there is a growing shift from rights being the sole territory of humans to rights being granted to non-human animals as well. The status of animals from mere

[387] ibid [74].
[388] ibid.
[389] ibid [78].
[390] ibid [80].
[391] ibid [82].
[392] Prevention of Cruelty to Animals Act 1960, s 3 – Duties of persons having charge of animals.
[393] ibid s 11 – Treating animals cruelly.
[394] *A. Nagaraja* (n 2).
[395] *Bhatt* (n 5) [83].
[396] ibid [84].

property or instruments having utility value for humans is undergoing a change, where the doctrine of necessity is confronted with right to life of animals. Thus, it can be fairly contended that basic human rights are now witnessing an expansion in terms of who its subjects are – are it only humans or other non-human animals as well. This is also seconded by the court by stating that 'subjects of rights' is an evolving concept and there has been a gradual extension in the same.[397] For example, there were times when slaves were not given any rights and were treated as property, despite being natural persons. Eventually they were brought under the ambit of human rights and there was abolition of slavery. Does this mean that rights are *suo motto* granted by virtue of being natural persons or human beings? Clearly, not. The theory of 'speciesism' propounded by Peter Singer caters to this argument. He argues that according humans with rights just because they are humans is speciesism, or being favourable to one's own species. However, from the example of slavery it is clear that humans and rights did not always naturally go together. Further, the legal extension of rights to corporations and companies also manifests that 'subject of rights' is susceptible to change. Hence, reasons why non-human animals may not be granted rights for their welfare and protection seems frail.

The two-judge bench has also stated that there is no valid grounds or reason to refuse legal personality to animals with humans acting as their administrators.[398] However, the reasoning given by the court for this seems to be rather volatile. The bench, referring to Jane Nosworthy's article 'The Koko Dilemma: A Challenge to Legal Personality', has expressed that granting an entity with legal personality is largely dependent on the 'emotional valuation' of the same in the community.[399] How the community and lawmakers perceive the entity is crucial in ascertaining whether or not legal personality should be granted. This suggests that mass support and community endorsement is an important parameter in order to grant animals with legal personality. If enough human beings do not support animals as right-holders or do not have an emotional value for animals, does it render them ineligible to hold rights? If so, then it defeats the purpose of courts widening basic human rights to non-human animals as well. This approach may also have an inverse effect, wherein hypothetically if growing number of people demand a legal status for animals, it will have to be granted. This two-way approach is the actual problem acting as an obstacle in according animals with rights because it leaves the possibility open for the status going either way. For example, suppose in a total population of

[397] ibid [92].
[398] ibid.
[399] ibid.

hundred human beings, fifty believe that animals should be granted legal personality and the other fifty believe that rights can only be accorded to humans because of their higher cognitive and reasoning ability. In this situation, what should be done? Therefore, it is essential for the courts to plug all holes while delivering such precarious decisions. To keep the reasoning dwindling between two extremes and relying on uncertainties would create more issues than solve.

However, at the end granting relief to the petitioners, the court has given a progressive decision and has conferred the entire animal kingdom, both avian and aquatic animals, with the status of legal entity or legal person, having corresponding rights, duties and liabilities of a living person.[400] Additionally, the court has stressed upon not only that they are entitled to justice but also have the right to health, comfort, nourishment, safety and the ability to express their natural innate behaviour without pain, fear and distress.[401] Furthermore, it declared that all the citizens of the State as "*persons in loco parentis"*, i.e. replacement of parents, in charge of animal welfare.[402] This is similar to the doctrine of *parens patriae* insisted upon by the Supreme Court in *A. Nagaraja,* holding the State responsible for welfare of animals.

CONCLUSION

This decision by High Court of Uttarakhand is certainly a potentially reformative judgment, holding the prospect of changing the landscape of non-human animals' status in this country. While this is a High Court decision and remains open to appeal in the Supreme Court, it nonetheless portrays a two-fold scenario – first, the changing judicial trend of not only being inclined towards animal welfare but also prepared to bend established legal rules for the same; secondly, the dynamic position of human rights, which is erupting out of its traditional confines. The legal personality of non-human animals accorded by the court is analogous to Justice Krishna Iyer's philosophy of 'Animal Citizens' in his book 'Towards a Natural World'. He explicitly states that a duty has been cast on the State and human citizen through Articles 48A and 51A, which makes *"justice to animal citizens is as fundamental as social justice is to exploited people."*[403] The concept of 'animal citizens' or Krishna Iyer's contribution for the same has hardly been referred or acknowledged by the courts. The reliance is more on foreign

[400] ibid [98], [99 A].
[401] ibid [98].
[402] ibid [99 A].
[403] Justice V.R. Krishna Iyer, *Towards a Natural World: The Rights of Nature, Animal Citizens and Other Essays* (Hope India Publications 2004) part II ch 3.

jurisprudence and Singer's idea of speciesism than Iyer's concept of animal citizenship. While it is appreciated that the Courts have applied foreign jurisprudence, perhaps, if this concept is further deliberated upon in the judicial discourse, it can open new dimensions in the field of animal law. Treating non-human animals as citizens, with rights that human citizens have, might be another avenue worth reflecting upon. Decisions in isolation by various High Courts, although welcomed, will fade away until it is solidified further by amendment in relevant legislations or the Constitution. Conferring 'legal personality' to 'animal citizens' having a 'right to life' makes the position of animals far stronger than it perhaps is now.

NEW CLASS OF UNTOUCHABLES? A COMMENT ON MR. 'X' V. HOSPITAL 'Z'

Rudra Roshan[*] and Aika Soni[*]

INTRODUCTION:

As Nelson Mandela rightly said and we quote,

"To deny people their human rights is to challenge their very humanity."

Entrusting people their rights is important and equally important is, imposing reasonable restrictions, and also ensuring that the Rights are not absolute in nature. There is no dubiety in saying that when any Right becomes absolute then chances of it being misused augments.

We are all aware of the importance and role of Fundamental Rights (enshrined under Part III of our Indian Constitution) in our lives.

But have we ever imagined what happens when there is a tussle between Fundamental Right of an individual with that of public interest?

Right to life enshrined in the Constitution of India is ground foundation of all the Articles and it covers a variety of rights under it and is protected.

But when it comes public interest this principle may become little ineffective.

Thus when we talk about Right to marriage and Right to Privacy, and there interpretation under Article 21: Right to life and personal liberty, very serious question arises in our mind that

How much broad interpretation had Right to marriage and Right to Privacy got in our country by the higher courts and can they override public interest?

When it comes to venereal diseases specially HIV/AIDS, we stand second in the list of countries with highest number of people infected with its virus but when we look into the history we could find no remedial programs than socially restricting them and hampering their Rights.

This again brings a query in our mind that;

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How much are we tolerant about this fact and do we really accept people already suffering with our open hearts or will it create another class of untouchables?

And the next thing to examine is regarding state acceptance accordance to the Constitution i.e.

Don't the people suffering from HIV/AIDS deserve the same treatment and Rights and equalities as enshrined under Part III Article 14, which is the Fundamental Right guaranteed by Indian Constitution?

To understand the present problems and to answer the above interconnected question, it would be feasible to take up the case of: **Mr. 'X' v Hospital 'Z' (1998) 8 SCC 296**

BACKGROUND OF THE CASE:

In this present case the appellant is Mr. 'X' who has completed his MBBS course in the year 1987 from Jawaharlal institute of Postgraduate Medical Education and Research, Chandigarh.

In June, 1990 he joined Nagaland State Medical and Health Service as Assistant Surgeon Grade-I, and after that he joined MD Pharmacology course and continued his Nagaland state service on condition that he will return to the job soon after completion of his MD course. Subsequently, after completing his course of diploma in Ophthalmology in April, 1993 he finally resumed his duty in Nagaland state service.

A person named Itokhu Yepthomi, was ailing from diseased Aortic Aneurysm and he was advised to go to Apollo Hospital at Madras and the appellant Mr. 'X' was directed by the Nagaland to accompany him to Madras for treatment. The date of surgery was previously decided as May 31, 1995 which was cancelled because of shortage of blood and on June 1, 1995 the appellant and the driver of the patient were asked to donate blood for the patient. On 2nd June, 1995 he was operated and at last on 10th June, 1995 he was discharged.

After reaching back to kohima, appellant in August, 1995 proposed to Ms. Akali, and she accepted the proposal and the marriage were scheduled on 12 December, 1995. Thereafter, the Madras hospital called in Nagaland and informed the concerned authority that the blood which they took from Mr. 'X' is tested HIV positive. Information regarding him being HIV+ spread like fire and everybody including appellant's family member, friends, colleagues, among others got to know, and soon his proposed marriage also got canceled .Moreover, he was forced to depart from the society.

Then, the appellant left Kohima (Nagaland) on 26 November, 1995 and started working in Madras itself. After facing so many difficulties because of the hospital's act of revealing his disease to the public he decided to approach to National Consumer Redressal Commission to seek damages for the same.

When he approached NCRC, the court dismissed his petition and said that the appellant may seek his remedy in Civil Court.

And likewise this case was listed for hearing before this Honorable Supreme Court by Special Leave Petition but later on a Writ petition was filed under Article 32 for setting aside this judgment and was viewed by three Judge Bench of this Hon'ble Court as interlocutory application for clarification and direction regarding the previous judgment.

JUDGMENT OF THE CASE:

While giving the judgment the Hon'ble Court had two issues in front:

1) Whether the Respondents were guilty of violating the appellants Right to privacy guaranteed under Article 21 of the Constitution?
2) Whether the Respondents were guilty of violating their duty to maintain secrecy under medical Ethics?

While answering the first issue Saiyed Saghir Ahmad, J. said that:

"It is the basic principle of Jurisprudence that every Right has a Correlative Duty and every Duty has a correlative Right. But the rule is not absolute. It is subject to certain exceptions in the sense that a person may have a Right but there may not be correlative Duty. The instant case, as we shall presently see, falls within the exceptions."[404]

Moreover, the Court said that the Right is not absolute and may be restricted lawfully for the purpose of prevention of crime, disorder or for protection of health or morals or for protection of the Rights and freedom of others. And thus, in order to protect health of public at large, it was important for respondent to disclose the fact to his fiancée and family, keeping public interest above individual Right to Privacy.

While answering the second issue Saiyed Saghir Ahmad, J. said that:

[404] (1998) 8 SCC 296

The Hippocratic Oath which the appellant were talking about cannot be enforced in court of law.

And again said that Rule of Right to correlative duty and duty to correlative Right is not absolute and there is exception, and Public interest becomes the legitimate ground of exception.

The court in answering the above issue covered another issue which was not raised by the appellant and said that if he would have been married to Ms. Akali, then he would have destroyed the healthy life of her by consummating the marriage and possibly their future generation due to transmission of the infected virus.

The court also said that, in marriage, the physical and mental health of the person is important, and the objective of marriage which is procreation of healthy children which cannot be fulfilled if the either spouse is suffering from venereal disease. For that matter, the Hon'ble Court gave examples of:

Section 13(i) (v) of Hindu Marriage Act, 1955

Section 2 of Muslim Marriage Act, 1939

Section 32 of Parsi Marriage and Divorce Act, 1936

Section 27 of Special Marriage Act, 1956; that says venereal disease is recognised as a clear ground of Divorce under these Matrimonial laws.

Further, the Hon'ble Court also noted that a person does not have his Right to Marry, until he or she is fully cured of that venereal disease and thus, this Right is not absolute and cannot be given without certain duty. There is a moral as well as legal duty to acknowledge about the disease to others. The Hon'ble Court also noted that "*in case of clash between two Fundamental Rights, the Rights which would advance the public morality and public interest would be enforced by the Court of law."*[405]

And hence, this Right of appellant remains suspended.

This judgment of the Hon'ble Supreme Court cannot be read in isolation as we have mentioned in the facts of this comment that afterwards a Writ petition was filed in the Hon'ble Supreme

[405] (1998) 8 SCC 296

Court to set aside this order, but the bench of three Judges decided to hear it in the form of 'Interlocutory application'.

While considering the question of petitioner that "*whether there is no bar on the marriage, if the healthy spouse consents to marry in spite of being made aware of the fact that the other spouse is suffering from the said disease?"*[406]

The Hon'ble court held that "except the extent of holding as pronounced earlier that the appellant's Right was not infringed in any manner in disclosing his HIV positive status to the relatives of his fiancée, are uncalled for."[407]

RELEVANT PROVISION OF THE LAW:

Section 20A of The Indian Medical Council Act, 1956

Professional conduct.—

(1) The Council may prescribe standards of professional conduct and etiquette and a code of ethics for medical practitioners.

(2) Regulations made by the Council under sub-section (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force.[408]

Article 21 of The Constitution Of India 1949

Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.[409]

Section 269 of the Indian Penal Code

Negligent act likely to spread infection of disease danger-ous to life.—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to

[406] (2003) 1 SCC 500
[407] (2003) 1 SCC 500
[408] The Indian Medical Council Act, 1956, s 20A
[409] The Constitution Of India, 1949, Art. 21

spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.[410]

Section 270 of The Indian Penal Code

Malignant act likely to spread infection of disease danger-ous to life.—Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[411]

Section 13(1) of The Hindu Marriage Act, 1955

13(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(v) has been suffering from venereal disease in a communicable form.[412]

Section 2 of the Dissolution of Muslim Marriages Act, 1939

2. Grounds for decree for dissolution of marriage.—A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:—A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease; (vi) that the husband has been insane for a period of two years or is suffering from leprosy or virulent venereal disease.[413]

Section 32 of The Parsi Marriage and Divorce Act, 1936

[410] The Indian Penal Code 1860, s 269
[411] The Indian Penal Code 1860, s 270
[412] The Hindu Marriage Act 1955, s 13(1)(v)
[413] Dissolution of Muslim Marriages Act 1939, s 2

32. Grounds for divorce.-any married person may sue for divorce on any one or more of the following grounds, namely:

(e) that the defendant has since the marriage voluntarily causing grievous hurt to the plaintiff or has infected the plaintiff with venereal disease or, where the defendant is the husband, has compelled the wife to submit herself to prostitution: Provided that divorce shall not be granted on this ground, if the suit has been filed more than two years (i) after the infliction of the grievous hurt, or (ii) after the plaintiff came to know of the infection, or (iii) after the last act of compulsory prostitution.[414]

Section 10 of the Divorce Act, 1869

10- Grounds for dissolution of marriage

(1) Any marriage solemnized, whether before or after the commencement* of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent

1. (v) Has, for a period of not less than two years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form[415]

Section 27 of The Special Marriage Act, 1954

27. Divorce

(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent- 2(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; (f) has been suffering from venereal disease in a communicable form.[416]

[414] The Parsi Marriage and Divorce Act, 1936, s 32
[415] The Divorce Act, 1869, s 10
[416] The Special Marriage Act 1954, s 27

ANALYSIS:

To analyse this Judgement in our humble opinion it is important we understand this in two parts i.e. the Judgment itself (the past) and the implication and effects (the present).

When we talk of Judgement it is rightly remarked by the three judge bench of the Hon'ble Supreme Court in Interlocutory application that the earlier division bench while giving the judgment, particularly relating on the suspension of 'Right to marry' as unnecessary and thus violating their rights. Later giving people back their right was really required and was justified. One reason for justification can be that even matrimonial laws provide venereal disease as a ground for divorce. However, this does not necessarily lead to suspension of 'Right to marry' and is left to discretion of the parties involved in marriage.

Moreover breach of confidentiality by communicating the news to fiancé and family in exceptional cases can be fair enough but news revealed to public causing humiliation and forced evacuation from the society is really not justified. This attitude of indifference in the judgment in can set a negative example in the society and will give right to Doctors to breach their duty towards maintaining confidentiality for public interest and thus making the implication and effects more towards the slope of negative mark. People due to fear of being surrounded by problems like these, do not reveal out their infection and thus can cause spread of infection. "United Nations estimates that if the disease is not checked, a mind-boggling 37 million people in India could be infected over the next 10 to 15 years."[417]

Thus the above discussion leaves us with principal questions:

- *Will the society stand for the people infected with HIV?*

To answer above questions we would like to quote Mr. Bill Clinton words:

"We live in a completely interdependent world, which simply means we cannot escape each other. How we respond to AIDS depends, in part, on whether we understand this interdependence. It is not someone else's problem. This is everybody's problem."

Hiding from the reality that they are a part of us is no solution to the problem. Hence the solution to this is that the society must start accepting the fact that the people suffering from

[417] Bates Gill & Sarah Palmer, The Coming AIDS Crisis in China, N.Y. TIMES, 16 July 2001, at Al 5, available at httpV/www.brook.edu/views/op-ed/gill/20010716.htm (comparing the rates of HIV in China with that of India)

HIV are no other and they are same as we are. Out of total population of India, around 2 million people suffer from this disease and forcing them to live apart from the community, or taking their Constitutional Rights away will do no good but definitely will add more trouble in the lives.

As rightly said by Alex Garner, HIV activist;

"One of the best ways to fight stigma and empower HIV positive people is by speaking out openly and honestly about who we are and what we experience."

And thus if we accept them above written words can happen in reality.

CONCLUSION:

The Public Interest Litigation in the above case only include the interest of majority but there are many cases where interest of the minority section was too secured and was given priority, as our Constitution provides for it.

We would like to state that the path of entrusting the Constitutional Rights in HIV infected person has been very challenging; we can say that by looking various other judgments where Judiciary played its role by providing interpretation and gradually ensuring them their equal rights in the society.

When we look into the decision in the case of **Dominic D'souza**[418]**;** it was contended that it is far from the victory of HIV infected people as the Section 53 of Goa Public Health (Amendment) Act, 1987 providing mandatory isolation to the people who are tested positive for HIV/AIDS. But, the Court surely changed this mandatory detention to a discretionary one on certain justified grounds.

Again, in the case of **Mr. X of Bombay v M/s ZY**[419]**;** Hon'ble Court said removal of workers on the basis of being positive of HIV infection would be violative of Article 14 and Article 21 of our Indian Constitution. This judgment gave a sign of real hope as the company who was at fault was directed to give 40,000 rupees in damages to the labour.

[418] MANU/MH/0048/1990
[419] MANU/MH/0073/1997

That means the Judiciary works in balance i.e. providing them their necessary rights too which are essential for their living.

In India, people honors Judiciary and definitely have faith in the judicial system. Judiciary having power of their own and faith which is endowed by the people on it, makes the Judiciary a suitable place for getting justice and protecting the Rights of people specially, of the disadvantages group.

Not only Judiciary but also legislature works in cooperation and thus by passing the HIV and AIDS (Prevention and Control) Bill, 2017 in Parliament which has led to formation of HIV/AIDS Act, 2017.Today our country have a well-developed law ensuring human rights of the HIV/AIDS persons. This was not possible without this case as it initiated the debate over rights of HIV/AIDS person.

Thus, the collective effort of Judiciary, legislature and the people is required to solve this problem and make HIV infected people as part of our own society, or otherwise it will lead to origination of a ***new class of untouchables.***

At this point we would like to conclude by quoting *Dominic D Souza* a late HIV Activist who said:
"live in the hope of a world that will be free, if not free of disease, free of fear and discrimination".

HRLJ

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