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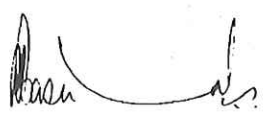
MESSAGE FROM THE PATRON

In the contemporary age, where no profession can survive without persistent emphasis on research, it becomes imperative for a premier law institution to provide scope for research in different disciplines including Social Sciences. Keeping this objective in mind, Rajiv Gandhi National University of Law, Punjab, has taken a step further to promote effective research by introducing RGNUL Social Sciences Review. The aim of this journal shall be to provide impetus to research skills and a platform for extensive study on various themes that hold relevance in the contemporary world. The journal shall always welcome interdisciplinary approach along with an amalgamation of ideas that pertain to various disciplines under the broader umbrella of social sciences. I hope the journal is able to set a benchmark for research in Social Sciences. I extend my gratitude to the contributors and referees. I also take this opportunity to congratulate the entire team of RGNUL Social Sciences Review for putting up a great effort and bringing out the journal in the present form.



Professor (Dr.) Paramjit S. Jaswal
Vice-Chancellor,
RGNUL, Punjab

MESSAGE FROM THE EXECUTIVE EDITOR

Writing and publishing a research article is an effective way of communicating one's personal ideas with people, at large. A research journal thus provides an avenue to accomplish this goal. The RGNUL Social Sciences Review is therefore an initiative undertaken to encourage multi-faceted research that caters to various disciplines falling under the domain of Social Sciences. The contributions to the inaugural issue range over a wide spread themes related to law as well as other social science subjects. It is really gratifying to see such good number of articles being received for the inaugural issue itself and I hope the journal will continue to receive a similar response in future too. I am thankful to all the academicians and professionals for extending their support in reviewing the articles and providing valuable inputs to the authors. I also congratulate Dr. Jasleen Kewlani - the Editor of the inaugural issue, along with the members of the Editorial Board of RGNUL Social Sciences Review for putting in all the efforts and shaping it up in present form.

Professor (DR.) G.I.S.Sandhu
Registrar
RGNUL, Punjab

MESSAGE FROM THE EDITOR

At the very outset I express and share my gratitude for my institution Rajiv Gandhi National university of law, Punjab, Patiala for giving me the pride of being the Pioneer Editor of the RGNUL Social Sciences Review. The Journal, in response to it's very first 'Call for papers' received an overwhelming response from social scientists, academicians, researchers, lawyers, students and professionals from all over the world. For this, I am thankful to all the researchers who contributed and I also congratulate all contributors whose papers/articles could successfully pass through the stringent editorial process along with the peer review of the manuscripts.

RGNUL Social Sciences Review is an attempt towards diversifying dimensions of legal knowledge by pouring in the Social Sciences Perspectives. RGNUL, Punjab being a law university had already started with law journals which are internationally recognized today in academia and research. The present journal was initiated with a very specific objective. The major objective of RGNUL Social Sciences Review is undertaking and inspiring inter-disciplinary research and inclusion of the social sciences perspectives for analysis. Social Sciences like sociology, economics, history, political science, psychology, anthropology, law and the like have potential to explore depth of the issues until the root cause of issue/s is detected. The theories owned by the social sciences are on one hand the road map of the research and on the other hand give space to the research being done in terms of analyzing its applicability. Literature's role can even not be ignored when it comes to social sciences. Literature is manifestations of uncountable analysis, thoughts and perspectives, which preserves the historicity in its formation. It plays a pivotal role in research, since no expression can be apt without the touch of literary aspect. More so, in literature many such research tasks had been undertaken which today form basis of many social science principles and theories. Thinking on these lines, RGNUL Social Sciences Review initiated a collective academic venture which aimed at incorporating research potentials of and by all social sciences and literature as well.

Contemporary times are burdened with some social issues like status of sexual minorities; gender inequality; drug addiction; poverty; population explosion and demographic imbalances; regional political instability; religious violence; communal and ethnic conflicts; violence against weaker section; environmental degradation; degeneration of human health; illegal migration (both international as well as internal); cyber crime and the like. All these issues have causes and impacts as well. There is a need to institutionalize the techniques of Social Impact Assessment of these issues and also of the privileges and provision made to curb them. RGNUL Social Sciences Review is such a platform which makes it open for all the social scientists, researchers, students from all fields of knowledge to contribute analysis of such issues so that workable resolution mechanisms can be rendered to. I hope that RGNUL Social Sciences Review will set a gracious milestone in global research and it will soon be one of the best research journals of the nation and world as well.

Best Wishes!

Dr. Jasleen Kewlani
Assistant Professor,
RGNUL, Punjab

RGNUL Social Sciences Review

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CONTENTS

BANKRUPTCY AND INSOLVENCY REGIME IN INDIA

Ali Waris Rao*

1.1 Introduction

This paper begins with an analysis of the Bankruptcy and Insolvency Code, 2015 along with the *Companies Act*, 1956, The *Sick Industrial Companies (Special Provisions) Act*, 1985 and The *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002 (*SARFAESI Act*) that deal with various provisions pertaining to corporate insolvency. The first section of the paper focuses on the need to incorporate a structured, comprehensive insolvency statute since the existing framework is inadequate as I have explained further. Subsequently, I have undertaken a cross-country comparison through a schematic chart highlighting India's position in comparison to the United Kingdom and Singapore pertaining to the corporate insolvency resolution parameters.

The second section of the paper explains the historical development of the statute, i.e., how the law of insolvency in India evolved over a period of time. It examines the ancient rudimentary basics of insolvency enactments that can be traced back to the colonial period. In addition, the third section of the paper delves into the current framework and briefly glances the Bankruptcy and Insolvency Code, 2015 and analyses The *Companies Act*, 1956, The *Sick Industrial Companies (Special Provisions) Act*, 1985 and The *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002 (*SARFAESI Act*) that deal with various provisions pertaining to corporate insolvency. Further, I have also given a brief outline on the *'Priority of Claims'* at the time of winding up of the corporation as laid down under the *Companies Act*, 1956. Consequently, the last section of the paper concludes by focussing on the way forward for India.

Bankruptcy and Insolvency Code, 2015 which has recently been tabled in the Indian Parliament aims to improve all aspects of insolvency pertaining to a Corporation, L.L.P's (Limited Liability Partnership's) and other entities, including a household[1].

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1 See the Report of the Bankruptcy Law Reforms Committee, Available at: *http://www.finmin.nic.in/reports/ BLRCReportVol1_04112015.pdf*

India, at present lacks a comprehensive statute to address all aspects of insolvency. The *Companies Act*, 1956 essentially deals with many provisions pertaining to corporate insolvency[2]. However, there are essentially three significant statutes, i.e., the *Companies Act*, 1956, *Sick Industrial Companies (Special Provisions) Act*, 1985 and the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002 ("*SARFAESI Act*") that address various elements of corporate insolvency. Moreover, the current system is inadequate and does not address the interests of unsecured creditors, i.e., bond holders, foreign creditors or institutions other than banks, such as NBFC's (Non-Banking Finance Companies)[3]. The Indian system at present provides neither an opportunity for a speedy and effective mechanism pertaining to winding up of a corporation nor for an efficient exit. The *Sick Industrial Companies (Special Provisions) Act*, 1985 through the institutional structure of 'The Board for Industrial and Financial Reconstruction' (BIFR) is susceptible to delays and does not provide for an effective framework for all stakeholders[4]. More so, the above-mentioned provisions, which provide procedural guidance on the liquidation of a Corporation, L.L.P (Limited Liability Partnership's) or other entities, having overlapping jurisdictions, further create inordinate delays and difficulties in the process. As a result, the liquidation and the winding up process pertaining to a Corporation, L.L.P (Limited Liability Partnership's) or other entities, are expensive, tremendously lengthy and results in complete abrasion of asset value. The Insolvency law ought to strike a balance between recovery and liquidation[5]. It ought to give a chance for an honest effort to investigate rebuilding/restoration of possibly feasible business corporations with agreement of partners reasonably arrived at. Where recovery/restoration is shown as not being achieved, winding up ought to be resorted to[6].

Bankruptcy regimes also elevate access to finance among Small Market Economies (SME's) by supporting predictability in credit markets[7]. A compelling indebtedness framework can help regulate effective ways out of the business sector, guarantee reasonable treatment through the orderly resolution of debts incurred by debtors in monetary misery and give opportunities for recovery by bankrupt entities and their creditors. In this way, a comprehensive Bankruptcy code is critical to improve the SME

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2 See the *Companies Act*, 1956 (Act No. 1 of 1956).

3 See Ravi, Aparna, Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings, Economic and Political Weekly, Vol. 1 No. 51.

4 See *Sick Industrial Companies (Special Provisions) Act*, 1985.

5 *Supra* note 2.

6 *Supra* note 1.

7 See RBI Report on the Committee on Medium-term Path on Financial Inclusion, December 2015.

finance gap[8].

Furthermore, the poor results of India's corporate insolvency procedure are reflected in the nation's rankings in the World Bank (2016)[9]. As for Insolvency Resolution, India's rank is as low as (136) contrasted with Australia's (14), Singapore's (27), The United Kingdom's (13), and United States of America's (5)[10]. As per Wadia (2000)[11], a winding up process under the *Companies Act*, 1956 takes about 3-15 painstaking years. Consequently, the cost of liquidation increases and the realizable value of assets decrease[12]. Additionally, banks have turned out to be progressively defenceless against poor recovery of loans made to corporate entities. The issue of 'Non-Performing Assets' (NPA's) in their books have turned into a reason for serious concern[13]. Gross Non-Performing Asset's of the banking framework have ascended from 2.4% (on a base of Rs. 23.3 trillion of advances) in 2008 to 3.2% (on a base of Rs. 59.8 trillion of advances) in 2013[14].

Also, evidence about credit results highlights the shortcomings in the legal framework for credit in India (Table A)[15]. In the event that Indian debt financing needs to move from the imperatives of a homogenous arrangement of formal Financial Institution's (FI's) and a huge informal business sector to the depth and assorted qualities of heterogeneous private and public debt markets, the corporate insolvency resolution structure of the nation should be changed to accomplish that objective.

Insolvency Resolution Parameters and Credit Data Table[16] (Fig. Below)

(The figure below has been taken from Gupta, Rajeshwari and Sharma, Anjali, Corporate Insolvency Resolution in India: Lessons from a Cross-Country Comparison, Indira Gandhi Institute of Development Research, Mumbai, December, 2015).

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8 *Ibid.*

9 See World Bank Doing Business Report, 2016.

10 See Gupta, Rajeshwari and Sharma, Anjali, Corporate Insolvency Resolution in India: Lessons from a Cross-Country Comparison, Indira Gandhi Institute of Development Research, Mumbai, December, 2015.

11 See Wadia, N.N (2000), Unshackling the Indian Industry, Technical Report, Prime Minister's Council on Trade and Industry.

12 *Ibid.*

13 *Supra* note 3.

14 See RBI Report on the Committee on Medium-term Path on Financial Inclusion, December 2015.

15 *Ibid.*

16 *Supra* note 10.

(Figure A)

Indicator	United Kingdom	India	Singapore
Rank	13	136	27
Time (In Years)	1	4.3	0.8
Cost (% of Estate)	6	9	3
Outcome (0-Sale; 1- going concern)	1	0	1
Recovery Rate (Cents on Dollar)	88.6	25.7	89.7
Domestic Credit to GDP (In %)[17]	171.5	74.8	126.3
Bank Credit to GDP (In %)[18]	85.3	93.1	56.5

Source: World Bank Doing Business Report, 2016; BIS Debt Statistics, 2014; World Development Indicators, 2015.

1.2 Historical Development

Historically, the law of insolvency in India is based on the *Roman principle of 'cession bonarum'*[19]. The beginning of the law of bankruptcy backtracks to the colonial period in India and is observed to be enacted in two centrally administered pieces of enactments: *'The Presidency-Towns Insolvency Act* of 1909' and *'The Provincial Insolvency Act* of 1920'[20]. These two statutes, primarily deal with consumer bankruptcy and the corporate insolvency is managed under the *Companies Act* of 1956[21]. The passing of Statute 9 in 1828 (Geo. IV. c. 73), can be said to be the start of the extraordinary bankruptcy regime in India[22]. Under this Act, the first bankruptcy Courts for the relief of insolvent account holders were set up in the Presidency-towns. In spite of the fact that the bankruptcy Court was directed by a judge of the Supreme Court, it had an unmistakable and separate presence[23].

The Insolvency Court was to sit and discard indebtedness matters regularly since

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17 Domestic credit by financial sector as a % of GDP.

18 Domestic credit to private sector by banks (% of GDP).

19 The term signifies 'surrender' of all his goods by the debtor for the advantage of his creditor, consequently for resistance from the process (Sathya, 2003) at pp. 93.

20 See Patnaik, Vaneeta, Elements of Bankruptcy Law and Business Rescue in India, her paper is based on the analysis of the *Companies Act* as provided in (Ramaiya, 2010).

21 See for historical background (Emerging Insolvency In India: Issues & Options), Available at: *http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf*

22 *Ibid.*

23 *Ibid.*

it was vital. Be that as it may, the Court at Calcutta was to sit in any event once per month[24]. The Act of 1828 was initially proposed to stay in power for a time period of four years, yet ensuing enactment extended its length of time up to 1843 and furthermore made certain changes therein[25].

The ancient rudimentary basics of insolvency enactment can be traced to Sections 23 and 24 of the *Government of India Act*, 1800, which presented bankruptcy locale (jurisdiction) on the Supreme Court at Fort William and Madras and the Recorder's Court at Bombay[26]. These Courts were empowered to make rules and orders for giving reliefs to insolvent account holders on the lines expected by the Act of the British Parliament called the Lord's Act enacted in 1759[27]. Though the bankruptcy Court was presided over by a judge of the Supreme Court it had its particular presence and independent existence[28]. While there was the extraordinary insolvency enactment for the Presidency-towns, there was no bankruptcy law in the rural territories. The primary explanation behind this distinction was the absence of any prospering exchange and business trade in those areas[29]. The enactment of bankruptcy law in the rural zones was in 1877. Rules were consolidated in Chapter 20 of the Code of Civil Procedure, 1877, conferring locale (jurisdiction) on the district Courts to captivate insolvency petitions and concede requests of release[30]. Moreover, guidelines were re-enacted with specific adjustments in Chapter 20 of the Code of Civil Procedure 1882[31]. Also, various lenders (creditors) of a debtor were not entitled to file a suit for an insolvency petition[32]. Subsequently, these ailments were removed by the enactment of the *Provisional Insolvency Act* of 1907 which was later repealed by the *Provincial Insolvency Act*, 1920. This statute is now in force in the areas other than the Presidency towns[33]. It must also be borne in mind that the basic

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24 *Supra* note 20.

25 *Ibid.*

26 *Supra* note 22.

27 *Ibid.*

28 *Supra* note 25.

29 *Ibid.*

30 *Supra* note 27.

31 *Ibid.*

32 See Feibelman, Adam, Consumer Finance and Insolvency Law in India: A Case Study (December 16, 2010). Brooklyn Journal of International Law, Forthcoming; Tulane Public Law Research Paper No. 1726583. Available at SSRN: *http://ssrn.com/abstract=1726583* hereinafter (Feibelman, 2010).

33 *Ibid.*

substantive provisions of both these statutes are similar[34].

The Corporate insolvency is managed under the *Companies Act* of 1956. This Act was enacted on the proposals of the Bhaba Committee set up in 1950 with the object to merge the current corporate laws and as a base for corporate operations in autonomous India. With the sanctioning of this enactment in 1956, the *Companies Act* of 1913 was repealed[35]. The 1956 Act next saw significant revisions only in 1988 on the suggestions of the Sachar Committee. The next real revamp has been just in 2002 on the suggestions of the Eradi Committee Report[36]. Furthermore, in the year 2004 another committee was set-up to look into the proposed amendments made to the *Companies Act* of 1956.

The recommendations of this committee headed by Dr. Jamshed J. Irani were drafted into a Bill and tabled and had been passed as the Companies Bill 2009[37]. This Bill had been considered by the Central Government taking into account the Report of the Parliamentary Committee on Finance and had been entitled as the Companies Bill, 2011 and later renamed as Companies Bill, 2012 - this was set to supplant the *Companies Act*, 1956 which is right now in force[38].

1.3 Current Framework

Insolvency laws can be broadly classified into two distinct heads, namely; a) Personal Insolvency, which essentially deals with individuals and partnership, corporations regulated by the Provisional Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1908 and (b) Corporate Insolvency, whose consequence is winding up of the corporation under the *Companies Act*, 1956[39].

Robust insolvency laws empower a sound debtor-creditor relationship by securing the privileges of both debtors and creditors; advancing consistency; clarifying the dangers connected with lending; and ensuring effective accumulation of debt through insolvency proceedings[40]. The Union Budget 2015-

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34 *Id.*, at pp. 26.

35 See Irani, J.J. The report was a result of the Expert Committee on Company Law and published its report in May 2005 advising the government on the new company law, Available at: *http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf*

36 Before the 2002 amendments, the *Companies Act* additionally saw some form of amendments in the year 1998 and 2000 yet they were not as significant as the 2002 amending act.

37 *Supra* note 35.

38 See Mulla, Law of Insolvency in India (1958), at pp. 16.

39 *Supra* note 2.

40 *Supra* note 7.

16 identified liquidation law reforms as a key priority and proposed a complete Bankruptcy and Insolvency Code, 2015 in accordance with worldwide norms to provide for essential judicial capacity[41]. It is envisaged to achieve legalized assurance, speed and also enhance the simplicity of doing business in India. More so, the word 'insolvency' has not been defined in the Code[42].

Now, if we delve into the *Companies Act*, 1956, Section 433(e) of the statute includes a corporation, which is unable to pay its debts, and hence constitutes a ground for winding up of a corporation[43]. However, it must also be borne in mind that inability to pay debts must be distinguished from unable to pay debts[44].

Winding up of a corporation would be when a corporation's entire capital is lost in heavy losses and the life of a corporation is essentially brought to an end and its property is administered for the benefit of its creditors and members[45]. The word *'debt'* cannot be deemed to be comprehensive to take into account un-liquidated damages or an un-identified sum inept of being ascertained immediately[46]. It should be precise and must be an ascertained sum. Under the *Companies Act*, 1956 a corporation is deemed unable to pay its debt if the corporation is unable to pay the debt exceeding rupees five hundred after the expiry of three weeks from the date of issuing of the notice claiming the payment by the lender[47]. Section 434 of the *Companies Act*, 1956 primarily deals with the position when the corporation shall be deemed to be unable to pay its debts. Moreover, under the *Companies Act*, 1956 the winding up proceedings are generally provided under section 425 of the statute and the grounds under which a corporation may be wound up is provided under section 433 of the *Companies Act*, 1956[48]. Broadly speaking, a corporation may be wound up either by; a) The National Company Law Tribunal (NCLT - Compulsory winding up) or, b) Voluntarily[49]. There used to be a third option available to the corporations prior to the 2002 amendment of the *Companies Act*. This option was *'voluntarily*

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41 *Ibid.*

42 Sourced from: *http://www.mbcindia.com/Image/18%20.pdf*

43 *Supra* note 39.

44 See Smt. *Nagaveni Bhat v. Canara Leasing Ltd.* ILR 2001 KAR 5569.

45 See the Report of the Advisory Group on Bankruptcy Laws, Available at; *https://www.rbi.org.in/scripts/PublicationReportDetails.aspx?ID=225*

46 *Ibid.*

47 *Ibid.*

48 *Supra* note 43.

49 *Ibid.*

winding-up' wherein which the Court orders the same to be carried on, but subject to the supervision of the Court[50]. The 2002 amendment had replaced the word *'Court'* for the Tribunal in current usage. As enumerated above, till the approval of the Tribunal the presently existing forums would continue to play a crucial role.

Additionally, The *Sick Industrial Companies (SIC) Act*, 1985 constituted the closest option to an inclusive bankruptcy framework which had established a quasi-judicial body, the Board for Industrial and Financial Reconstruction (BIFR), to fortify apt detection of *'sick'* industrial companies and provided a suitable type of intrusion[51]. Furthermore, it must also be borne in mind that this procedure is only applicable to industrial corporations that have been registered for more than five years and have further accumulated losses at the end of any year which is more than their net worth[52]. Once an application for intrusion has been filed, the Board for Industrial and Financial Reconstruction (BIFR) has three viable choices, namely[53]; a) it can give its consent for a management/lender sponsored arrangement without concessional investment, b) establish un-viability of the business and advise insolvency to the Court (pursuant to the *Companies Act*, 1956 as discussed above) or, c) assert that the corporation must be revamped in *public interest* and endorse an arrangement involving chief concessions and forego itself from different groups as well as subsidies from the government.

Moreover, The *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act*, 2002 (SARFAESI) accredits the Financial Institutions (FI's) to redeem their non-performing assets (NPA's)[54]. This statute provides viable choices for recovery of non-performing assets (NPA's), namely; a) Asset Reconstruction, b) Securitisation and, c) Enforcement of Security without the intervention of the Court[55]. More so, Recovery of Debts due to *Banks and Financial Institutions Act*, 1993 is an exceptionally contentious and

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50 *Supra* note 28.

51 See Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Oct. 03-Mar. 04.

52 The *Sick Industrial Companies (SIC) Act* characterizes net worth as the sum total of paid up share capital and free reserves; free reserves incorporate all reserves from profits and share premium account yet not from the revaluation of assets, depreciation write-offs or mergers & acquisitions.

53 *Ibid.*

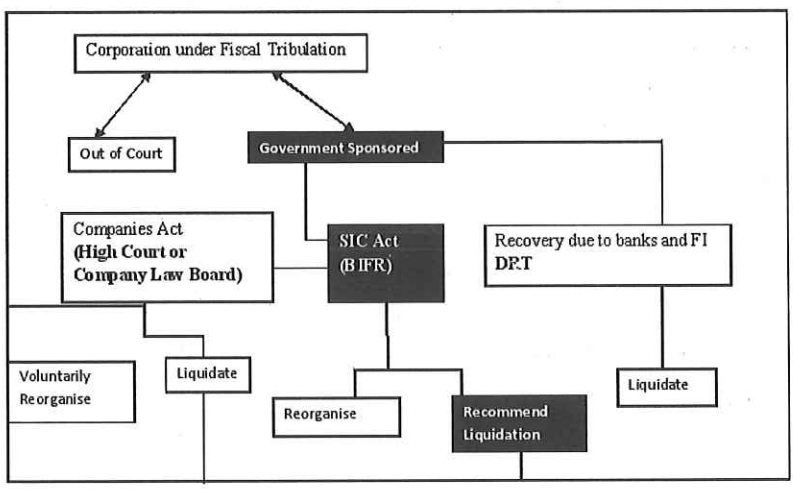
54 See Parasaran, Mohan, Additional Solicitor General of India, Note on the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of India*, 2002, Clean Energy Investment US-India Partnership, Centre for Climate Change Law, Columbia University, Columbia Law School.

55 *Ibid.*

commonly challenged legislation accepted as part of the fiscal reforms in the early nineties (1990's). This statute authorized the banks and other financial institutions to pursue recovery of debts more than Rs 10 lakhs by filing a petition before the Debt Recovery Tribunal (DRT)[56]. Subsequently, the Debt Recovery Tribunal issues a recovery decree (preliminary) (by way of the liquidation of assets) following a fairly quick procedure of appraising and legitimising the claim which might countermand or override the other two rules in the jurisdiction, predilection and priority of claims[57]. Also, various banks and other financial institution's compared to various other litigants experience the procedure by following the cases for recovery through civil Courts for overly extensive periods of time (Justice Eradi Committee Report, 2000)[58].

The Fig. B below shows an outline of the diverse legal alternatives available to a corporation under fiscal tribulation[59].

(Note 1: Fig. B has been taken from Kang, Nimrit and Nayar, Nitin, The Evolution of Corporate Bankruptcy law in India, ICRA Bulletin: Money and Finance, Schematic Chart at pp. 5, Oct. 03-Mar. 04)



56 *Supra* note 51.

57 *Ibid.*

58 See the Eradi Committee report of the High Level Committee on the Law Relating to Insolvency and Winding Up of Companies, 2000, Available at; *http://reports.mca.gov.in/Reports/24-Eradi%20committee%20report%20of%20the%20high%20level%20committee%20on%20law%20relating%20to%20insolvency%20&%20winding%20up%20of%20Companies,%202000.pdf*

59 *Supra* note 56.

1.3.1 Priority of Claims in Liquidation

Section 530 of the *Companies Act*, 1956 determines certain payments in priority to every other debt subject to payment of workmen's dues and debts due to secured lenders on a *'pari passu'(evenly)* basis[60]. This is an imperative provision as it draws out the pro-lender and pro-dispensation administration predisposition of the Indian law. The payments to be made first are called *'Preferential Payments'*. *"They must be paid in priority to all other debts"*[61].

Subsequent to retaining sums imperative for meeting the expenses and costs of winding up of the corporation, the above debts must be discharged forthwith to the extent assets are adequate to meet them[62]. Where the Liquidator carries on business for gainful winding up, the taxes that get due on the profits are the costs of winding up[63]. Also, the payment due to a Chartered Accountant in preparing the balance sheet is also an overhead cost or expense of winding up of the corporation. The *'Preferential Payments'* rank evenly among themselves and have to be discharged in full settlement. But, when the assets are inadequate to meet them, they shall abate on a *'pari passu' (evenly)* basis. Moreover, by virtue of Section 178 of the Income Tax Act, 1961, the Income Tax authorities have claimed priority over other preferential payments[64]. Nonetheless, the Courts have held at various periods of time that there is nothing in the statute that negates or hinders with the provisions for priority of claims as laid down under Section 530 (1) (a) of the *Companies Act*[65].

1.4 The Road Ahead

The life of a corporation has its highs and lows just like a living being[66]. There are various reasons for the same. To put it in simple terms, purely an expert corporate practitioner can identify the ailment and regulate the treatment[67]. There might be certain situations where for some other reasons the speedy demise of a corporation

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60 See Singh, Avtar, Company Law, Lucknow: Eastern Book Company (IXth Edition), at pp. 506-508.

61 *Ibid.*

62 *Ibid.*

63 *Supra* note 45.

64 The *Income Tax Act*, 1961, See S. 178.

65 *Supra* Note 62.

66 *Supra* note 63.

67 *Ibid.*

is conceivably better for the financial system altogether[68]. Regrettably, in a country like ours there is no corporate practitioner to efficiently identify and regulate the proper treatment at an appropriate moment[69]. Corporate law neither provides for any such methods that effectively ensures superior governance nor sufficiently protects the health of the corporation[70].

In India, the legal structure that essentially deals with corporations in tribulation is multifaceted, concerning a blend of collective insolvency and debt enforcement statutes[71]. Moreover, the significance of a well-functioning insolvency resolution structure can barely be overstated. Prior to the introduction of the Insolvency and Bankruptcy Code, 2015 corporate insolvency regimes differed considerably across the nation and in varied respects. Likewise, insolvency statutes kept evolving over a period of time and did not remain static, thus, making it even more complicated to arrive at a steady system for designing a proper resolution mechanism[72].

More so, the N.L. Mitra Committee[73] had made certain recommendations about an all-inclusive rework of Bankruptcy laws. The Bankruptcy Law Reforms Committee had thereafter made certain recommendations in order to formulate a fresh Code[74]. The effort of the Bankruptcy Law Reforms Committee in order to provide for a fresh code is a one of a kind initiative undertaken by the committee on the account of Indian codification since, at present there is no such structured, comprehensive insolvency statute in India[75].

Lastly, the Code ought to give prominence to the lowering of the overhead costs of transactions during the bankruptcy process and that must be its chief objective. The bankruptcy body must pave the way for decision-making and assume an empowering role rather than be a judge of what is an adequate reallocation of existing claims[76]. Obviously, for this to have any significance, it must guarantee that the negotiating parties deliberately acknowledge all reallocations[77]. This is best

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68 *Supra* note 59

69 *Ibid.*

70 *Supra* Note 67.

71 *Supra* note 13.

72 *Supra* note 16.

73 *Supra* note 66.

74 *Ibid.*

75 *Ibid.*

76 *Supra* note 68.

77 *Ibid.*

accomplished when the parties have data, the ability to assess the significance of alternative propositions, are not pressured into accepting reallocations that are not ideal to them, and, in particular, know how the court will settle the dispute on the off chance that it can't be deliberately determined by the respective parties[78].

[78] *Ibid.*

THE SIXTH SCHEDULE: A CRITICAL EVALUATION

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The tribal areas of the states under the sixth schedule are disparate from the other tribal areas of the mainstream India; they have their roots in their culture, customs and civilization. Therefore, these areas are treated differently by the constitution and sizeable amount of autonomy is given to the people for self-governance. The Sixth Schedule is entirely focused at protection of tribal areas and interests, by allowing self-governance through constitutional institutions at the district or regional level. These institutions are entrusted with the twin task of protecting tribal cultures and customs and undertaking development tasks.[1]

1.1 Brief history

The tribals of the Northeast have traditionally lived in close contact with the nature and they have a rich tradition of customary law.[2] Most of these tribal communities continue to retain their customary practices which provide them identity, security and employment. Although the erosion of these customary traditions started with the arrival of the British in the region and introduction of the formal law but in order to avoid resistance, the British government was forced to recognize the customary laws of the tribal communities. The various laws that they passed formed the basis of the Sixth Schedule. Through the *Scheduled District Act* of 1874, the British government was forced to recognize the customary laws of Assam tribes. Then the *Assam General Clauses Act* 1915 protected tribal customs and practices by restricting the application of the Provincial Laws in the Hill areas. The Montague-Chelmsford Reforms 1919 also made similar provisions. The 1930 Indian Statutory (Simon) Commission recommended the protection of tribal customary rights. The *Government of India Act* 1935 accepted it and divided the hill areas into 'Excluded' and 'Partially Excluded'. It was stipulated that no Act of the Central or Provincial Legislature apply to them unless the Governor in his discretion so decided in view of

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1 North East India: Status of Governance in the Sixth Schedule Areas, available at *socialissuesindia.files.wordpress.com/2012/10/sixthschedule.pdf* (last accessed on 5 January 2016), p. 3.

2 *Id.*, p. 9.

'peace and good governance'.[3] The Luhsai Hills, the Naga Hills and the North Cachar Hills were under the excluded areas. Whereas, the Garo Hills, the Jaintia Hills and the Mikir Hills were included under partially excluded areas. The British administered these areas through specially appointed officials and the local chief who administered these areas as 'virtual dictator'. Thus, the *Government of India Act* 1935 did not really provide scope for local 'self-governance'. Thus, the policy makers of independent India were determined to ensure the development of these areas equally the rest of the India as well as protect their customary rights. They sought to develop a mechanism through which they can ensure the autonomy of the region and assimilate them with the mainstream society.

The Bordoloi sub-committee: The primary objective behind the provisions of the Sixth Schedule, when it was drafted, was to see that the aspirations of the people of the area are met and simultaneously get these areas assimilated in the mainstream of the country.[4] An advisory committee on Fundamental Rights of Minorities in the Tribal Areas was constituted in May 1946 by the Constituent Assembly of India. One of the sub-committees constituted by the Advisory Committee was the Northeast Frontier (Assam) Tribal and Excluded Areas Sub-Committee under the Chairmanship of Assam Premier, Gopinath Bordoloi.[5] The sub-committee toured various provinces of Assam so as to develop first hand data about the opinions and feeling of the people. It submitted its report on July 28, 1949 to the Chairman, Advisory Committee on Fundamental Rights, Shri Ballabhbhai Patel.

During its visits of various areas and interaction with representatives of the hill people, the Sub-Committee observed that:

1. The people of the region were sensitive towards their land, forest, lifestyle and traditional systems of justice and, thus, needed safeguards and protections so as to preserve their way of life and,

2. There were traditional self-governing institutions which functioned democratically and settled issues according to their traditional lifestyle.[6]

The Bordoloi sub-committee also made provision for Regional Council for the tribes other than the main tribes. This scheme sought to build up autonomous administration

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3 *Ibid.*

4 *at http://socialissuesindia.wordpress.com/2012/10/26/birth-and-spirit-of-the-sixth-schedule/,* (last accessed on 2 January 2016)

5 *Supra* note 3.

6 *Ibid.*

for: United Khasi-Jaintia Hills District, Garo Hills District, Lushai Hills District, Naga Hills District, North Cachar Hills District, and Mikir Hills District so that the tribal people could manage their affairs in their own traditional ways.

Its proposed sixth schedule was presented to the Constituent Assembly for debate on September 5, 1949, and fully ratified on September 7,1949 after three days of dialogue among four competing factions: those who wished for district autonomy to be overseen more directly by the central government; those who wished for such autonomy to be more subject to the influences of the state government; those who thought that autonomy under any guise would hinder assimilation; and those who wished for such autonomy to evolve according to the changing developmental conditions of people in the districts as understood, autonomously, by those people. In the event, the draft sixth schedule based on this report was accepted almost exactly as presented to the Constituent Assembly.[7]

1.1.1 Birth of the Sixth Schedule

Building on its observations the Sub-Committee made some recommendation and these recommended policies became the framework of the Sixth Schedule of the Indian Constitution. It introduced the concept of Autonomous District Councils (ADCs). Under the Sixth Schedule, the Assam Autonomous District (Constitution of District Councils) Rules 1951 and the Pawi-Lakher (Constitution of Regional Councils) Rules 1952 for the autonomous region in the Lushai Hills District were framed. Thus, the ADCs were constituted in certain hill districts (except Naga hills) of the then composite State of Assam in 1952 and in the Lushai Hill District (now Mizoram) Regional Council (are now District Council) was introduced in 1953.[8] Since then these councils have been managing forest, primary education, agriculture and other activities in these autonomous areas and in turn have affected the traditional institutions of tribal council, tribal chiefs etc.

The areas specified in Parts I, II, IIA and III of the table below shall, respectively, be the tribal areas within the State of Assam, the State of Meghalaya, the State of Tripura and the State of Mizoram:

PART I – THE STATE OF ASSAM

1. THE NORTH CACHAR HILL DISTRICT;
2. THE KARBI ANGLONG DISTRICT;

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7 David Stuligross, "Autonomous Councils in Northeast India: Theory and Practice", available at *http://www.jstor.org/stable/40644976*, (last accessed on 9 January 2016)

8 *Supra* note 6.

3. [3. BODOLAND TERRITORAIL COUNCIL – created on 13th February 2002]

PART II – THE STATE OF MEGHALAYA

1. KHASI HILLS DISTRICT;
2. JAINTIA HILLS DISTRICT;
3. GARO HILLS DISTRICTS;

PART II (A) – THE STATE OF TRIPURA

1. TRIPURA TRIBAL AREA DISTRICT

PART III – THE STATE OF MIZORAM

1. THE CHAKMA DISTRICT;
2. THE MARA DISTRICT;
3. THE LAI DISTRICT[9]

1.2 Provisions of the Sixth Schedule

The tribal areas of the states under the sixth schedule are disparate from the other tribal areas of the mainstream India; they have their roots in their culture, customs and civilization. Therefore, these areas are treated differently by the constitution and sizeable amount of autonomy is given to the people for self-governance through the creation of Autonomous District Councils (ADCs). These councils are vested with legislative power on specialized subjects, allotted sources of taxation and given power to set up and administer their system of justice and maintain administrative and welfare service in respect of land, revenue, forest, education, public health etc.[10] It is also noteworthy here that although the provisions of the Sixth Schedule can be amended from time to time by the Parliament, yet any such changes introduced by Parliamentary Legislations are not to be deemed as amendment to the Constitution for the purpose of Article 368.

Provisions regarding administration of tribal areas with the Sixth Schedule:

1. The tribal areas under part I, part II and Part II of the schedule shall be an autonomous district.

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[9] Durga Das Basu, *Commentary On The Constitution Of India,* Lexis Nexis, Butterworths Wadhwa, Nagpur, 2013, p. 11701

[10] *Id.*, p. 11673

2. If there are different schedule tribes in an autonomous district, the governor may, by public notice, divide the area or areas inhabited by them into autonomous regions (except for BTAD).

3. The governor, by public notice ----

   a) Include any area in any of the parts.
   b) Exclude any, area from any of the parts.
   c) Create new autonomous districts.
   d) Increase the area of any autonomous district.
   e) Diminish the area of any autonomous district.
   f) Unite two or more autonomous district districts or parts thereof so as to form one autonomous district.

   [(ff) *alter the name of any autonomous district,*]

   g) Define the boundaries of any autonomous district.[11]

--- this sub-paragraph 3 that the governor had the power to issue a notification for the purpose of bringing about any of the results enumerated in clauses (a) to (f). However, before doing so it is mandatory of him to appoint a commission and consider its report. Once the governor has issued a notification in the exercise of his power, it takes effect without any legislation by the parliament.[12] Clauses (c) and (e) of sub paragraph 3 empowers the governor to create new autonomous districts by dividing the existing district by following the procedure mentioned in the proviso, then no parliamentary confirmation is required and the validity of the governor's notification in this behalf cannot be challenged.

Provision regarding constitution of District Councils and Regional Councils are:

1. There shall be a district council for each autonomous district consisting of not more than 30 members, of whom not more than four shall be nominated by the governor and the rest of the members are to be selected on the basis of adult franchise. (exception- Bodoland territorial autonomous district shall consist of not more than forty six members, of whom forty shall be elected on the basis of adult franchise 30 seats reserved for STs, 5 for non-tribal communities and 5 opened for all communities and six nominated by the governor)
2. There shall be separate regional council for each area constituted an autonomous region.

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11 *Supra* note 9

12 *Edwingson v State of Assam*, (1966) 1 SCA 895 (915)

3. Each district council and each regional council shall be a body corporate by name respectively of 'the District council of (name of the district)' and the regional Council (the name of the region)' shall have perpetual succession and a common seal and shall by the name sue and be sued.
4. Subject to the provision of this schedule, the administration of an autonomous district shall, in so far as it is not vested under this schedule in any regional council within such district, be vested in the district council for such district and the administration of an autonomous region shall be vested in the regional council for such region
5. In an autonomous district with the regional councils, the district council shall have only such powers with respect to the area under the authority of the regional council as may be delegated by the regional council in addition to the power conferred on it by the schedule with respect to such areas.
6. The governor shall make rules for the first constitution of the district council and the regional council in consultation with the existing tribal councils or other representative tribal organization within the autonomous district or region concerned, and such rules shall provide for:
   a) The composition of the district councils and the regional councils and the allocations of the seats therein;
   b) The delimitation of the territorial constituencies for the purpose of election of those councils;
   c) The qualification for voting at such elections and the preparation for the electoral rolls therefor;
   d) The qualification for elected at such elections as member of such councils;
   e) The term of office of members of regional council
   f) Any other matter relating to or connected with elections or nominations to such councils.
   g) The procedure and the conduct of business (including the power to not withstand any vacancy) in the district and regional councils;
   h) The appointment of officers and staff of the district or the regional council

6(A). The elected members of the District council shall hold the office for the term of five years from the date appointed from the first meeting of the council after the general elections to the council, unless the district council is sooner dissolved and a nominated member holds the office at the pleasure of the governor.

7. The district or the regional council may after its first constitution make rules with regards the matters specified in sub-paragraph (6) of this paragraph and also make rules regulating:

a) The formation of subordinate local Councils or Boards and their procedure and their conduct in business; and
b) Generally all the matters relating to the transaction of business pertaining to the administration of the district or the region; as the case may be.[13]

1.2.1. Autonomous District Councils (ADCs)

The district council is both administrative as well as legislative body. All the legislative and administrative powers were vested in the governor till the district council were constituted. The governor framed rules called the Assam Autonomous Districts (constitution of district councils) Rules, 1951, the rules provide, inter alia for an executive committee with the chief executive member as the head and the two other members to exercise the executive functions of the district council.[14]

Nature and Composition: The sixth schedule envisages the creation of the autonomous district councils and empowers them with legislative and administrative power, which also includes power to administer justice. No law of the Centre or the State applies in any autonomous area without District Council's approval. The District Councils are also empowered to constitute Village councils and Village courts to administer justice.

According to the sixth schedule, there shall be a district council for each autonomous area. Moreover, in case there is more than one schedule tribe within the autonomous district, the governor can bifurcated the regions of different schedule tribes and create autonomous regions within the autonomous district. A Regional Council is also needs to be established for the autonomous region.[15]

The state Governor is empowered to nominate few members of the district council known as the Members of District Council (MDC) on the advice of the Chief Executive Member (CEM); the rest of the members are elected based on adult franchise from the single member constituencies. Normally, the nominated members represent the minorities and/or unrepresented communities. They hold office at the pleasure of the governor. However, the Governor can exercise his discretionary power only at the advice of the Council of Ministers[16]. The number of constituencies

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13 *Supra* note 11 at pp. 11675-11677

14 *Id.*, at p. 11677

15 North East India: Status of Governance in the Sixth Schedule Areas, available at *socialissuesindia.files.wordpress.com/2012/10/sixthschedule.pdf* (last accessed on 5 January 2016), p. 13

16 *Pu Myllai Hlychho v. State of Mizoram*, (2005) 2 SCC 92: AIR 2005 SC 1537

in the District Councils varies depending on the number of elective seats provided. The term of District Councils is five years but it is subjective to the Governor decision as the governor may extend the term for a period not exceeding one year at a time, during the national emergency or in event of impossibility of holding of elections.

The rules for electoral qualifications vary in different Autonomous District Councils. In some council like Mara in Mizoram, anyone above 18 years is eligible to vote but in others like Karbi Anglong right of access to traditional lands and length of stay in the region also determine voters' eligibility.[17]

The Chief Executive Member (CEM), the Chairman and the Deputy Chairman of the Council (equivalent of Speaker and Deputy Speaker) are elected from the council members and then the CEM selects the other executive members. Functionally, the Chairman and the Deputy Chairman act like the Speaker and the Deputy Speaker of a legislature. The Chairman calls for the meeting of the District Council, presides over the Council in session and regulates the proceedings of the Council. He has a casting vote in case of a tie. In the absence of the Chairman, the Deputy Chairman performs duties.[18]

1.2.1.1. Executive committee and its functions

Under the Sixth Schedule, the District Council shall have all such executive powers that are necessary for the purpose of administration of the district. It provides Executive Committee (EC) of the District Council to carry on the executive functions. The EC consists of the Chief Executive Member (CEM) who is elected by the members of the District Council and then he selects other Executive Committee members, number of which varied from councils to councils. The Governor on CEM's recommendation appoints the Executive Committee members. The EC performs all executive functions of the Council and is analogous to Cabinet of the State or Central Government. The executive committee stands automatically dissolved when the CEM resigns. After the dissolving of the EC, a new CEM must be elected within 48 hours, or else the Governor may appoint any other member of the Council as the CEM.

Functionally, the EC is responsible for all executive orders and policies as well as implementation of all development schemes in the DC area. It makes rules,

17 *Ibid.*

18 *Ibid.*

regulations and appointments with the approval of the District Council. It also prepares the budget of the District Councils and gets it passed.[19]

1.2.1.2. Legislative functions

The District Councils have powers to make laws on a wide range of issues. It has the power to make laws regarding allotment, use, or setting apart of land for agriculture or residential purpose, management of any forest which is not reserved, use of water sources for agriculture, regulation of the practice of jhum or any form shifting cultivation, primary education, health, establishment of village councils and town committees and their power, appointment and succession of chiefs or headmen, inheritance of property, marriage, divorce, money lending, trading by non-tribals, etc., within their territories.

The Sixth Schedule also empowers the Governor to alter the laws passed by the District councils, if they are in violation to the provisions of the Schedule. It is not necessary for the state and central laws apply to the autonomous districts automatically. The District Councils have the right to approve and alter State and central laws before allowing their application in their areas.

The Sixth Schedule empowers the District Council to exercise legislative power, it does not mean that until such laws are passed, the council could not exercise any administrative power. Thus, the council has the power to make law relating to appointment or removal of the chiefs/ Headmen. However, until such laws were made, there was nothing to prevent the council to appoint or remove a chief in exercise of its executive power.[20]

Power of the councils in respect to administration of justice: The schedule does not empower Council to exercise any judicial function on their own. It authorized to constitute Village and District Council Courts to try cases according to customary laws where both the parties are member of Schedule tribe, within the limitations prescribed. The extent of this authority is ambiguous because the governor may also direct the high court of the state to perform these same functions. Once such courts are established they will perform judicial functions under the supervision of the High Court under Art. 227, and the control of the Supreme Court under Art. 136 of the constitution. However, no case involving offences punishable by death or imprisonment for five or more years can be taken up by these courts unless specially empowered by the governor. The District Council Court and the Regional Council Court are courts of appeal for all subordinate courts. Only the High Court and the

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19 *Supra* note 15, at p. 15.

20 *Supra* note 11, p. 11678.

Supreme Court of India have jurisdiction over suits and cases decided by the Council Courts.

1.2.1.3. Power of councils with respect to imposition of taxation

The District and the Regional Councils are given mutually exclusive powers to collect land revenues, levy and collect taxes on lands, holdings, shops, entry of goods into market, tolls etc., within their respective jurisdictions. However, the District Council has the concurrent power on the professions, trade, callings, employments, animals, vehicles and huts, tolls on passengers, and goods carried in ferries and maintenance of schools, dispensaries or roads.

Under the Sixth Schedule, the royalty on the licenses or leases for the extraction of minerals in the autonomous districts goes to the District Council. However, the tax on motor vehicles is collected by the State Government on behalf of the District Council. Other sources of income are grant-in-aid, loans and advances from the state government.[21] In case of disputes arising from the royalties, the Governor decides the matter 'in his discretion', and in case of any other disputes pertaining to the Tribal Areas of the region, the Governor would act according to the advice of the Minister.[22]

1.3. Sixth Schedule in Assam

After the division of the state of Assam, there was redrawing of new administrative divisions. Some of the divisions are covered under the Panchayati Raaj and some are under the sixth schedule. Under the article 244A, provisions have been made for creating an Autonomous State, within the State of Assam consisting of Tribal Areas, mentioned in Part I of clause 20 of the VI Schedule. The three districts/areas under Sixth Schedule are:

1. Karbi Anglong District;
2. North-Cachar District;
3. Bodoland Territorial Autonomous District.

1. The Karbi Anglong Autonomous Council (KAAC)

The Karbi Anglong Autonomous Council covers an area of 10434 sq km. Its population of 8.1 lakhs according to the 2001 census and is spread out over 2563 villages. Mikir Hills District Council was formed out of parts of Nagaon District,

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21 *Supra* note 15.

22 See, comments of Hidayatullah, J., in *Edwingson v. State Of Assam*, AIR 1966 SC 1220, 1240: (1966) 2 SCR 770.

Sivsagar District, United Khasi and Jaintia Hills District. The Mikir Hills Council was constituted on 23rd June 1952. The Governor of Assam altered the name of the 'Mikir Hills District' as 'Karbi Anglong District' on 14th October 1976.[23]

The district has three sub-divisions, Diphu, Bokajan and Hamren and 11 development blocks. The Executive Council for the KAAC consists of a Chief Executive Member and 10 Executive Members. There is also a Speaker & a Deputy Speaker for the Council. Each village has a hereditary headman, who can be expelled only through impeachment.

2. North Cachar Hills Autonomous Council (NCHAC)

The NCHAC, earlier a part of Kachari Kingdom before 1832, has an area of 4890 sq km. The population of 2 lakhs, belonging to 13 communities is widely dispersed in scattered habitations. The NCHAC has two subdivisions, namely, Haflong and Maibong, and five development blocks. The North Cachar hill district council was constituted on 19th April 1952. The administrative structure and the planning mechanism in NCHAC is by and large similar to that of the Karbi Anglong Autonomous Council.

3. Bodoland Territorial Areas District Council / Bodoland Territorial Council

Bodoland Territorial Council (BTC) covers a geographical area of 8790 sq km, spread over 4 districts. Since the 1980's there has been a demand for the creation of autonomous district from the Bodo community.

In February 20, 1993 a Memorandum of settlement was signed between the Government of India, Government of Assam and Bodo leaders(All Bodo Students Union and Bodo People Action Committee), which led to the enactment of *Bodoland Autonomous Council Act*, 1993 paving the way for the establishment of Bodoland Autonomous Council.[24] However, due to frequent changes in the provisions and the areas allotted within BAC, people became dissatisfied. In February 1996, all Bodo Students' Union revived the statehood movement and demanded that the 1993 accord to be dismissed. These led to several incidents of ethnic violence. Thereafter many rounds of tripartite talks were held between parties and finally on 13th February, 2002 state cabinet formally approved the formation of Bodoland Territorial Council (BTC) under the Sixth Schedule of the Constitution of India, with

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23 Vijay Haansaria, *Justice B.L. Hansaria's Sixth Schedule to the Constitution,* 3rd edition, Universal Law Publishing Co., New Delhi, 2011, p. 160.

24 Id., at p. 161.

adequate and specific safeguards of the rights of the non-bodos.[25] Accordingly, on 10th February, 2003 an agreement for the creation of Bodoland Territorial Council was signed between the Union Government, the Assam government and the Bodoland Liberation Tigers.

The aim of the BTC is to:

(a) fulfill the economic, educational & linguistic aspirations & preservation of land rights, socio-cultural & ethnic identity of Bodos.

(b) speed-up infrastructure development in BTC area.

The Bodoland Territorial Council shall consist of not more than 46 members of whom 40 shall be elected on the basis of adult suffrage, of whom 30 shall be reserved for the Scheduled Tribes, 5 for non-tribal communities, 5 open for all communities and the remaining 6 shall be nominated (including at least two women) by the Governor having same rights and privileges as other members.[26]

The Executive Council (EC) consists of 12 Executive Members including the Chief Executive Member (CEM) and the Deputy Chief Executive Member. Non-tribals are also given representation on the EC.

1.4. Critical review of the Sixth Schedule

The Sixth Schedule too suffers from various drawbacks that have crippled its functioning. Though the main objective of the Sixth Schedule is to provide maximum autonomy to tribes in their governance and functioning, however, this has not been realized because of some inherent limitations in its provisions.

1. The sixth schedule was instituted to integrate the secluded Northeastern regions with the modern system of administration and ensures its economic development, while maintaining their traditional custom and practices of self-governance. However, it was only partially successful in integrating those regions with the mainstream India and completely failed in ensuring the economic development of the region. There is a large gap between the approved budget and the flow of funds from the state government to the Council, which adversely affects both the planning and the execution processes. While the Sixth Schedule provision assigns powers to the District Councils to initiate and carry out development activities at the grass roots level, it does not provide them with

[25] *Id.*, at p. 162.

[26] *Supra* note 15, at p. 16.

financial autonomy. They have to depend upon the state government their funds. As a result, in many states resource allocation has become a major bone of contention between the state government and the ADCs.

a) First, they are ineffective at lobbying the state government and shaping the state developmental budget
b) Second, ADCs have been unable to influence state budget processes indirectly through members of the state legislative assembly (MLAs) elected from constituencies in the ADC territory.
c) Third, ADCs themselves have relatively tiny development budgets.
d) Fourth, within the context of their small budgets, ADCs face annual budget difficulties because the state government is almost always late in providing its required disbursement
e) Fifth, ADCs have been ineffective at collecting taxes them- selves. To be sure, local and state governments in India typically collect less in taxes and fees than their authority permits because taxpayers, in their guise as voters, frequently punish ambitious tax collectors at the polls
f) Sixth and finally, ADCs are ineffective agents of development because they do not deploy their meager budget in ways that would promote a direct role in economic growth.[27]

2. Councils are almost totally dependent on the devolution of funds from the governments, which denies them the flexibility required to emerge as a vibrant institution for local development. The ADC is not dependent upon the state government only for finance, even its legislation requires the consent of the Governor before it attains the force of law. Besides, in many areas the ADCs lack the requisite machinery to implement their legislations. For example, the institution of village courts set up by the ADC failed to achieve the desired objective as the ADC has no means to pressurize an accused to appear before it. What needs to be noted is that in this dual structure the state government exercises considerable leverage of power over the ADCs which severely restricts its autonomy. Thus the legislation passed by the ADCs amounts to nothing more than recommendations which the state government may reject.

3. The sixth schedule empowered the ADCs to design primary school and run schools in their district. It emerged as an excellent source of socialization for the students who were able to learn and broaden their perspective. It also served the purpose of political socialization, Teachers are important links between villagers

[27] Uddhab Pyakurel, "Autonomous Regions Under Federalism: The Indian Experience", available at *www.ccd.org.np/.../Autonomous_Regions_Under_Federalism_Indian_E.*, (last accessed on 10 January 2016), p. 25.

and "modern" society. Their advice is sought regarding legal, medical, and most importantly political voting questions. However, the problem of nepotism led to detoriation of the schools -- the ADC selected teachers based on political conviction rather than on merit - and according to more straightforward nepotism criteria.

4. Although the purpose of the Sixth Schedule is to preserve the autonomy and system of self-management prevailing among the tribal people, in reality the ADC has failed to integrate traditional tribal practices and grass roots institutions, such as the village council in its functioning. The *Constitution (Seventy Third Amendment) Act*, 1993, which relates to the Panchayati Raj institutions, has further brought out the severely limited power of self-government conferred by the Sixth Schedule. Under the *Seventy Third Constitutional Amendment Act*, the Panchayats have been assigned with 29 subjects on civic, regulatory and developmental activities and assured of funds from a separate Finance Commission, unlike the ADCs, which has to depend upon the state government. Besides, there is no mandatory time limit for the reconstitution of the ADC once it is dissolved. This sharply contrasts with the mandate of the Seventy Third Constitutional Amendment that prescribes that Panchayats would have to be reconstituted within six months of their dissolution.

5. The ADCs empowers the courts to handle case ranging from petty civil cases to major crimes. However, there not many instances where these courts have had a hearing on a major case. To the contrary, in the early 1960s the governor of Assam took advantage of another sixth schedule clause that enabled him to empower the state high court to adjudicate all cases that ADC courts are constituted to try.

6. Further, the thrust of the Sixth Schedule is on the district as it presupposes the existence of the traditional political institutions at the grass- roots level. This again differs from the provisions of the *Seventy-Third Amendment Act*, which not only gives formal recognition to the village community by designating it as the Gram Sabha, but also treats it as the pivotal point of the local self-government. Last but not the least, the *Seventy Third Constitution Amendment Act* contains one of the most revolutionary provisions which stipulates that one third of the seats at all levels of Panchayats shall be reserved for women, in addition to those prescribed for the Scheduled Castes and the Scheduled Tribes. This revolutionary provision has had a strong appeal for those who are committed to social and gender justice. For tribal women, this provision is of immense significance because the Fifth and Sixth Schedules are completely silent on issues relating to women. But, where as Parliament has taken steps to

extend the provisions of the Seventy Third Constitutional Amendment to the Fifth Scheduled areas vide the *Panchayats (Extension to the Scheduled Areas) Act*, 1996, the same has not been done in the case of the Sixth Schedule areas.[28]

7. There are many tribal areas within the North-East (Arunachal Pradesh, Nagaland, Manipur – also have laws respecting self-governance and non-interference of outsiders) with dominant tribal population, but are not covered by the Sixth Schedule. Thus, it cannot be justified that sixth schedule has successful given the tribal people a right to self-governance. Tribal living in the non-scheduled areas are more vulnerable in terms of losing their land ownership, control over the forest and natural resources. The process of scheduling, which started in the fifties and resumed in the seventies remained incomplete largely due to lack of political will.

8. The Nagas, for whom the Sixth Schedule was primarily created, have no autonomous District Council. The Arunachal Pradesh Assembly had passed a bill to create four Autonomous District Councils under the Sixth Schedule in the state in 2003 but the Parliament is yet to approve it. The Government of Manipur also constituted six Autonomous District Councils for the tribal people for the hill areas of Manipur and wanted inclusion in the Sixth Schedule. But the demand is pending for a long time with the Central government. Nagaland and Hills of Manipur are not covered by provisions of the Sixth Schedule; autonomy of the local governance of these areas is administered by their State's Laws. Mizoram is only partly covered by the Sixth Schedule; autonomy of rest of the areas is established by the State's law.[29]

1.4.1 Conclusion

The Sixth Schedule of the Indian Constitution contains provisions for the autonomous administration of the tribal areas. It provides for the creation of Autonomous district councils (ADCs) and the Regional Councils in these tribal areas where people still root themselves in their own culture, customs and civilization. In addition to this District and Regional Councils, a North-Eastern Council has also been set up, for the unified and coordinated approach to the development of the entire region. It covers the tribal areas of Assam, Meghalaya, Tripura and Mizoram. The Sixth Schedule though has aimed to maintained self-governance in the areas mentioned above, it has not been completely successful in objectives. Except for the Bodo community, there are many other plain tribes of Assam are yet to be included

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[28] Tiplut Nongbri, "Democracy, Gender and Tribes: A Critical Appraisal of India's Constitutional Policies", *Indian Anthropologist*, Vol. 31, No. 2, 2001, pp. 1-14.

[29] *Supra* Note. 5.

under the Sixth Schedule. Major tribal states, namely Nagaland, Manipur, and Arunachal Pradesh are yet to be included under the Sixth Schedule. Thus, in a country as diverse as India, although the Sixth Schedule was a step in the positive direction, it still has a lot of areas that call for attention and improvement for better access and opportunity to the people of those areas.

COLLECTIVE ACTION IN FOREST MANAGEMENT: A STUDY OF SELECTED VILLAGES OF *UTTARAKHAND* AND *HIMACHAL PRADESH*

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1.1 Introduction

Sustenance of the forest commons is crucial for local as well global context. It is important with respect to economic significance and as source of cheap cooking option i.e. fire-wood. According to the National Sample survey (68th Round) 69.3 percent of the house-hold have reported fire-wood as their primary cooking medium. This figure is even higher in hills. Moreover, forest commons act as a buffer zone for the state forests. Needless to say, these forest commons creates a cushion for the reserve forests which is otherwise had to bear the burnt for increasing fuel demand. Thus, forest commons have a larger impact on global climate change and sustainable ecosystem management.

But, theoretically forest commons are classified as common property resources and liable to ruin due to negligence (Gibbons, 1992; Olson, 1971). Contrary to theoretical prediction, evidences across the across the world shows (Ostrom, 1990) collective action by the appropriators successfully maintaining common property resources (CPRs). Now, the question is how we can protect those forest commons from getting destructed.

The existing studies have indicated a constructing picture. More recent empirical work on the commons draws significantly from the theories of property rights and institutions. It also uses many other approaches eclectically, including political ecology and ethnography. Using detailed historical and contemporary studies, writings on the commons have shown that resource users often create institutional arrangements and management regimes that help them allocate benefits equitably, over long time periods, and with only limited efficiency losses (Agarwal, 1999; McKean, 1992; Ostrom, 1992). Much of this research typically has focused on locally situated small user groups and communities.

This paper focuses on the issue of forest commons in Western-Himalayan region and possibilities of sustainable management through collective action. It shows how informal governance can influence the behavior of the appropriators which interns result into forest management.

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1.1.1 Importance of forest commons: why they are critical for the local livelihood and economy?

CPRs play an important role in the rural economy and benefit villagers in a number of ways. According to the National Sample Survey Report No. 452, sixty-two percent of the house-holds in rural India reported the use of fuel wood for different purposes. Among these users forty-five percent directly collect fuel wood from common property forests. More than direct benefits, people obtain large positive externalities (ecological and environmental benefits) from these forests. People also get benefits from the forests by extracting medicinal herbs, resin, bamboo etc. A large belt of forest can be found in and around the *Himalayan* range. The fuel wood and shrubs available to them are used for cooking. Grass leaves and shrubs are used as animal fodder. Bamboo, small timber and palm leaves are used for making the houses. Furthermore, a variety of fruits, vegetables and fish, for instance is used for subsistence, particularly during the lean seasons. CPRs also provide irrigation water, manure for cultivation, raw materials and common pastures for grazing.

The National Sample Survey Organization (NSSO here after) divided the CPRs into four broad categories (i) common pasture and grazing land, (ii) village forest & wood lot (iii) village site, threshing floor etc., and (iv) other barren or waste land formally held by the *panchayat* or any community of the village. To explain the dependency on CPRs, one can look at the table 1.

Table 1

Importance and use of Common Property Resources (CPRs)

Item	Estimate
1. Households reporting collection of any material from CPRs	48%
2. Average value of annual collections per house hold	Rs. 693
3. Ratio of average value of collection to average value of consumption expenditure	3.02%
4. Households reporting grazing of livestock on CPRs	20.00%
4. Households reporting use of common water resources for:	
(i) irrigation	23%
(ii) livestock rearing	30%
(iii) household enterprise	2.80%

***Source*: National Sample Survey, Round 54, Report no. 452, page: 25.**

According to the table 1, about half of the rural households in India collect something out of common property resources and the average value of this

collection was Rs. 693 per month in the year 1998. This amount is much less than the average collection of Rs. 2000 per month in the Western *Himalayan* region (NSS, 54th Round report).

In a typical *Rajasthan* village, Jodha (1986) estimates that 30 per cent of labourers and small farm households consume only the CPR food that they collect from their neighboring commons. In Madhya Pradesh, the corresponding percentage is 50. Further, Jodha (1986) estimates that 42 percent of the income of the vulnerable section of Rajasthan comes from the CPRs.

It is found that in the Western *Himalayan* region forest commons, common grazing and pasture land accounts for 74 percent of the total CPR land (NSSO, 1998, 54th round, p. 22). Collection from CPRs in this region is the highest in the country, and approximately Rs. 1939 per year per family[1]. In the Eastern *Himalayan* region, this figure stands at Rs. 1219 per year per family. It was approximately 4 to 5 times of monthly per capita consumption expenditure (MPCE). In the Western *Himalayan* region, major component of collection is fuel wood (59 percent) and fodder (39 percent). 73 percent of the households in the Western *Himalayan* region reported using wood and 67 percent of the household collected fuel wood from the CPRs. In this agro-climatic zone, average collection by each house-hold is 1203 Kgs of fuel wood from the local CPRs, which is much higher than the national level of 500 Kgs (NSS report no 452, p. 36). Common land is a major supplier of fodder in the rural areas. At the all-India level, 56 percent of the rural households reported possession of livestock, and 20 percent of the households depended on the CPRs. Quantity of fodder collected from the CPRs in the Western *Himalayan* region is 1273 Kgs, which, is much higher than national average of 275 Kgs.

1.1.2 Threat to Common Forest

Hardin's influential 1968 article in Science on "The Tragedy of the Commons" is the starting point for the entire commons debate. The "tragedy of the commons" presents an important paradigm in the human behaviour, especially, with regard to degradation of the environment. The prototype of the scenario is simple. There is a resource –which usually is referred to as common pool resource – where people have full access to the resource (open access resource). According to Hardin (1968), these open access resources are under a great risk of overuse. In these common property resources, people have an incentive to extract as much as

[1] During that same time monthly per capita consumption expenditure was Rs. 382 in India (NSS report no. 448).

possible but resources can be replenished only up to a certain limit.

Even before Hardin, Gordon (1954) and Schaefer (1954) have modelled the effect of fishing effort (the quantity of fish harvested from a fishery) on ecologically sustainable yields as well as calculated the economic results of varying levels of effort. The so-called Gordon-Schaefer model has dominated the study and execution of the fisheries management since the 1950s. Both the scholars assume that at low levels of fishing effort in a newly opened fishery, yield increases rapidly as a function of effort, but, with diminishing returns as more effort is needed to harvest the additional units of fish. Beyond the "maximum sustainable yield," however, further increases in harvesting would result in a reduction of the total harvest and revenue. This is because the replenishment of the fish stock depends on the size of the current fish stock, which falls below the level that ensures full replacement, once fishing extracts are more than this maximum yield. By including the revenue occurring from fishing (yield times the fish price) and the costs of fishing effort, they define the "maximum economic yield," that is, the fishing effort at which the difference between fishing revenue and costs is the maximum, and the level of the fishing effort under open access.

1.1.3 Institutions and the Commons

Since 1980s, research on sustainable institutional setup for common property resources has undergone a remarkable change. The shift has occurred partly due to development in the field of non-cooperative game theory and more directly, as a result of the voluminous of work on common property arrangements and common-pool resources (Berkes, 1989: McCay and Acheson, 1987; National Research Council, 1986; Ostrom, 1990).

Scholarship on common property spans many disciplines. Anthropologists, resource economists, environmentalists, historians, political scientists, and rural sociologists among others have contributed to the flood of writings on the subject. More recent empirical work on the commons draws significantly from the theories of property rights and institutions. It also uses many other approaches eclectically, including political ecology and ethnography. Using detailed historical and contemporary studies, writings on the commons have shown that resource users often create institutional arrangements and management regimes that help them allocate benefits equitably, over long time periods, and with only limited efficiency losses (Agarwal, 1999; McKean, 1992; Ostrom, 1992). Much of this research typically has focused on locally situated small user groups and communities.

There are, of course, many users who are not able to manage common-pool resources successfully. Outcome of the experiences of commons management are highly variable. Documentation of the performances of regimes in the management of common resources gives us many cases where locals are able to manage the resources successfully. Studying them would give us a wide range of factors which are responsible for successful management of resources. In synthesizing the extensive empirical work that has occurred over the past two decades, it might be possible to develop a plausible causal mechanism that can link outcomes with casual variables. An enormous experimental and game theoretic literature has also begun to inform how humans act under different incentive scheme.

Given the large number of factors, as many as 35 of them, that have been highlighted as being critical to organization, there is not yet a fully developed theory of what makes for sustainable common-pool resource management. She also finds systematic tests of relative importance of factors missing in the existing literature.

As there is no single widely accepted theory on sustainability of common pool resources, it is important to analyze case studies on sustainable resource management. Among a large number of research works on common property resources and its sustainable management, three seminal works exist, which we will use as background for this study. The three important works are of Wade (1988), Ostrom (1990) and Baland and Platteau (1996).

1.4 Indian Case Studies

A number of research studies have been done in India regarding CPRs and community work. Most of the studies are descriptive analyses of given facts. Among all the studies a comprehensive study of irrigation system was done by Wade (1986). He studies the phenomena of how irrigation canals are maintained in South India. Moose (2004) analyzes the irrigation system in *Tamil Nadu*. He looks at anthropological aspects of the cooperative activities in south India and identified caste and social hierarchy as a determinant of cooperation.

Agarwal (2006) presents a thorough description of the experience of common property management in the *Kumaun* region in Northern India. Her study suggests that caution must be exercised in lauding past success and underscores the need to recognize that formal and informal institutions in the commons are either eroding or facing significant challenges over the past two decades. The study finds that local institutions (formal or informal) have had a strong interest

in the conservation of natural resources and have been very successful in managing commonly held resources (particularly village forests) sustainably. The forest under common land continues to be managed more effectively than private and government forests. She also observes that non-firm economic opportunities and a rise in male migration have posed challenges at the local institutional and the house-hold levels. At the institutional level, the wave of male migration has already led to the erosion of informal system of the commons management. Male migration is significantly affecting formal institutions as only a few young men are left to assist with duties of forest councillor for monitoring and enforcing activities. The immediate effect has been a greater participation of women in the forest councils which has reduced the gap between user and decision makers. Given the fact that women are subject to increased responsibility of subsistence work at the house hold level, it is unlikely that women could devolve adequate time for forest councils and guard duties, even if they are not constrained by illiteracy or social norms.

Though Baland et al. (2010) find that local community management appears to be an attractive option as a means of halting forest degradation in the *Himalayas*; some words of caution are in order. First, the use of cross-sectional data will always leave room for possible biases resulting from unobserved heterogeneity. Second, the ecological benefits from conversion to local community management may take a long time to materialize, while alternative policies may yield quicker and larger benefits. By acting on household incentives directly, such policies may be more effective than community management initiatives. Of course, there is no reason that both kinds of policies cannot be pursued at the same time.

A number of comparisons have been done to test the efficiency of the forest department and village *panchayat* forests. Somanathan et al. (2005) have done a comparative study of the state owned forests and village *panchayat* controlled forests. There they find that forests under state the forest department are no better than village forests. In fact some *van-panchayat* forests may be better in crown coverage. Agarwal and Yadama (1997) examine 279 *van-panchayat* forests in the *Kumaon* region of *Uttarakhand*. They find that older *van-panchayats* and those hiring more guards are associated with better forest stock. Agarwal and Chhatre (2006) examine local perceptions of forest condition in a non-random sample of 95 forests in the neighbouring state of *Himachal Pradesh* that were managed by local communities. After controlling for geographic, demographic and socio-economic village characteristics, they find better forest condition in those areas where community management has been in existence for a longer time and where internal competition exists. Moreover, they observe a poorer condition in those

that hire guards or impose more fines. In these two studies we find that forests are better managed under community governance rather than state influence. The only shortcoming of these two studies is the reliance on subjective perceptions of local villagers to measure forest quality. Those who are actively participating in the local user group council may, thus be pre-disposed to the view the forest conditions in a favourable light. Moreover, respondents often tend to over emphasise degradation of state maintained. It could be also be the case that they are resentful of the outsiders (e.g.- forest officials) limiting their control over forest resources.

A few papers attempt to address similar problems. In the context of forest degradation in Nepal, Edmonds (2002) and Baland et al. (2007) use data from household responses to address the questions concerning firewood extraction, and relate these to the existence of self-governing forest user groups, controlling for a range of household and community characteristics. Edmonds uses a number of methods to control for endogeneity bias, such as a comparison between communities forming user groups at different points of time, and instruments (such as distance to forest range post) for user group formation.

Somanathan, Prabhakar and Mehta (2006) use satellite-based measures of vegetation indices (which are used to predict canopy cover of forests) over geographical regions spanning *van-panchayat* and non-*van-panchayat* forests, from a large random sample covering a wide area in *Uttarakhand*. This enables them to avoid subjective perception-based bias of local forest quality, and the problem of narrow geographic coverage. Moreover, they control for a number of geographical attributes (such as slope, aspect, altitude and distance from the village) that affect forest quality, and unobserved village characteristics by using village fixed effects. They find that *van-panchayat* broad-headed forests have a better crown cover compared to unprotected broad-leaved forests, and about the same as state protected forests. Moreover, they find that *van-panchayat* and non-*van-panchayat* forests do not differ systematically with respect to altitude, aspect and slope, suggesting that there is little bias caused by endogenous selection of forest boundaries within the vicinity of a given village. They conclude that *van-panchayats* are at least as effective as the state forest department in managing forests, though at a much lower cost.

2.1 Research Question

The above discussion established the base for the objectives of this study. The objectives can be grouped under the following headings:

i) Finding relational dynamics among cooperation, governance and forest management.
ii) Determining the conditions that favour collective work.
iii) Determining how our cooperative behaviour is influenced by governance, caste, gender and income.

The research question in this paper is how we can protect those forest commons. Due to very definition and usability of these forest commons they cannot be protected like any other state forests. The crux of the issue is to be solved through informal mechanism. Like same issue which is being applied in other parts of the world through collective action.

Collective action is seen as a solution for the sustainable management of non-renewable natural resources. Common property resources (CPRs) represent a unique public goods problem where users have to decide about the optimal extraction level. Similarly, non- maintenance of the commons can be seen as a free riding problem.

3.1 Case Studies

This chapter gives more emphasis to the qualitative explanation for successful collective action. A village level and a house hold-level questionnaire is prepared to facilitate qualitative comparison and explanation (The questionnaires are attached in the Appendix). The three study areas have been selected from list of 165 villages.

3.1.1 Comparative analysis of Kalogi study area

The above discussion boils down to three major findings. Firstly, collective action in forest management in Kalogi village has been successful over the years. In this section we will analyse the plausible reasons for successful collective forest management in Kalogi village. Secondly, conflict has significant negative influence on community participation and collective forest management in Paluka village. Thirdly, ignorance of the forest users in Tinya village fails to develop any type of management activity in their forest commons.

3.1.2 Kalogi: Success due to strong women's organization

We have found a number of reasons behind successful collective action in forest management of their forest commons. Firstly, being the largest village in the

panchayat, the power equation acted in their favour. Due to a dominant position in the *panchayat,* they were able to protect their common forest in a better way than the other two villages. Moreover, being the dominant power in this region, they could punish any type of intrusion (human or animal). In this study area, power equation plays an important role in determining successful collective action. Secondly, the presence of informal bodies like *Mahila Mangal Dal* and *Yuvak Magal Dal* (apart from *van-panchayat*) helps the *Kalogi* villagers carry out forest maintenance activities in a better way. We observe that the *Mahila Mangal Dal* in *Kalogi* village is involved in many social activities and meets regularly. Frequent meetings and gatherings raises the level of social networking and makes punishment (formal or informal) effective, in the event of any deviation. In the other the two villages, we did not find such presence of informal bodies. Thirdly, we find that the *Kalogi* village is more homogeneous as compared to *Paluka* and *Tinya. Kalogi* is an OBC (Other backward class) dominated village and resided by '*Rana*' and '*Sahay*' communities (Description of caste composition is given above). Both of these communities belong to the '*Verma*' caste. *Paluka* is a *Harijan* village with more than 50 percent of the population belonging to the SC category. *Tiyan* is a mixed village with *Brahmin*, OBCs and SCs. In all three villages we did not find any tribal family. This homogeneous caste composition might be helping *Kalogi* villagers in successfully maintaining their local forest.

Geographical location of the *Kalogi* village forest facilitates them to carry out collective forest management in a better way. Here, the forest land and plantation area is visible from their farm and the villagers are thus very cognizant of animals or human being entering the plantation and destroying vegetation.

3.1.3 Paluka: A case of inter-village conflict

The forest department carried out a plantation drive during the year 2004-05 in Paluka village. They appointed a watchman and looked over the plantation for couple of years. Three year back, the plantation was handed over to the locals. But the locals failed to look after the plantations and for the last three years, the plantation is continuously degrading and now remains as a severely lopped forest. The principal reason behind this is lack of decision making power, non-allocation of funds and intrusion of animals. When they are asked why they are not keeping their animals away from the plantation area, the unanimous reply was "animals mainly trespass from the other villages (mainly Kalogi)". Firstly, they resisted such intrusion, which resulted in major conflict with other villages.

But the panchayat did not take any action in response to complaints and incidences of intrusion remained unpunished. Later on villagers of Paluka started allowing their animals to graze into village forest area. In the words of Sangram Singh, a Paluka shopkeeper, "We understand the benefits of a healthy forest. But we faced too much conflict from our neighbours. We are peace loving people.....better to live in peace than have a healthy forest."

3.1.4 Tinya: Ignorance of the villagers led to Destruction of Forest Common

Tinya is a case where we did not find any particular reason for failure. It could be a typical case of ignorance. The failure can be explained by the inactive in participation of the villagers in the plantation process or later on, forest maintenance. Talking to the locals reveals that no initiative from the *van-panchayat* or from the forest department was taken to plant trees or setup boundaries. They got *van-panchayat* status and the local forest land at the same time as the other two villages did, but no serious efforts were taken to utilize that land. It is important to mention that the allocated forest land in all three cases was quite barren at the beginning.

On the other hand it is observed that world food program (WFP hereafter) is running a successful food bank in this village. But it is too early to comment about its success. Till now the WFP is supervising and financing the project but it is too early to predict what would happen when the donor hands over the project to the locals.

3.1.5 Summing up

To conclude we can argue that conflict has a significant negative influence on the success of collective management. Secondly, we observe the importance of other local institutions in successful forest management of *Kalogi* village. This is particularly true for womens' activity bodies[2]. Women being the major direct collectors and user of forest resources, have a special interest in maintaining the forest commons. Thirdly, regular meetings among the villagers have significant influence on commons management in this study area. *Kalogi* villagers used to meet often due to one reason or another. None of the other two neighbouring villages had regular meetings among their villagers. Meetings might be the crucial catalyst for collective action in this study area.

[2] Women activity organization is locally known as Mahila Mangal Dal.

3.2 Mazuli: Failure due to migration

We found that the local forest is in a dilapidated state in *Mazuli* village. Conflict does exist in the governing body, but the primary reason behind this dilapidated condition is the lack of manpower, resulting from the out-migration. The out-migration in this study area is found to be playing an important role in shaping social dynamics. During the last 10 to 15 years, *Sheelalekh* and *Mazuli* experienced a steady rise in migration. At present about 60 per cent households in the *Mazuli* have at least one family member working outside the village. Migration is affecting collective effort in two ways. Firstly it is creating a dearth in the availability of man-power. Secondly, it is blocking the decision making process of the locals.

We came across the fact that donation for the common fund was not collected for years in *Mazuli*. When asked about the reason, the *sarpanch* of *Mazuli* told us that the treasurer works in town and hence, the collection is very irregular.

3.2.1 Jalna: Success due to appropriate incentive design

Primary reasons for successful cooperation in community activity in *Jalna* are their institutional structure and punishment strategy. Over the last 10 years, this *van-panchayat* has worked to rejuvenate their local forest. The current *sarpanch* (head of the *van-panchayat*) actively conducts meetings at regular intervals. They usually have meeting every three months and decide on work projects like annual collection of leaves, building boundaries around new plantations, planting new saplings, and other financial matters. It is mandatory for the users to attend these meetings. Regular meetings among the users help them to formulate policies and build a social network, which facilitates the carrying out of community public works and implement punishment successfully.

One interesting point that played a crucial role in success of the *Jalna van-panchayat* is their incentive design and punishment strategy. Here they divided the entire common forest into several clusters and fenced them with barbed wire. In each year, one or two clusters are put up for regulated cutting. The villagers who contribute in the corpus fund to maintain the forests get the right to acquire those branches and trees. Interestingly, households who do not contribute to the common pool and do not participate in the annual leaf collection (this also helps to bring down the threat of the forest fire) or are found breaking rules several times are barred from this resource. This incentive has a very beneficial effect on cooperation. While travelling in the 9 villages in the Western mid-*Himalayan* region, we come across this phenomenon. People are initially willing to

cooperate and actively participate in maintenance (like setting up fences, contributing to the corpus fund etc). However in reality they neglect their duties due to many reasons, of which one very important reason is the incentive structure. The governing body of the common forest should design an incentive mechanism that encourages the appropriators to cooperate and abide by the rules. It is found that 95 percent of the respondents assert that forest quality is degrading and 99 percent of them say that action needs to be taken. But when it comes to execution, we find a bleak picture. Only 20 percent of the surveyed villages witnessed any sort of collective forest management

3.2.1 Summing up

We argue after reviewing this study area that collective activities of any area can tolerate a certain level of migration. Beyond that threshold level, migration has serious and negative influence on cooperative work and decision-making. Secondly, conflicts in local governing bodies strictly need to be avoided. A mechanism must be there to resolve intra-institution or intra-village conflict within a limited time period. Thirdly, along with good governance and moderate migration, what came out from this analysis is that a suitable and acceptable incentive design is required to motivate the users to maintain commons in a sustainable way.

3.3 Description of Ghagruta Study Area

This study area is located in the Indian State of *Himachal Pradesh*. This region enjoys a history and local culture that is different from the other two study areas. The earliest known inhabitants of the region were tribals called *Dasas*. Later, *Aryans* came and they were assimilated within the tribes. In the later centuries, the hill chieftains accepted suzerainty of the *Mauryan* Empire, the *Kaushans*, the *Guptas* and the *Kanauj* rulers. During the *Mughal* period, the Rajas of the hill states made some mutually agreed arrangements which governed their relations. In the 19th century, *Ranjit Singh* annexed/subjugated many of the states. When the British came, they defeated the *Gorkhas* and entered into treaties with some Rajas and annexed the kingdoms of the others. The situation more or less remained unchanged till 1947. After Independence, 30 princely states of the area were united and Himachal Pradesh was formed on 15th April, 1948. With the recognition of Punjab on 1st November, 1966, certain areas belonging to it were also included in *Himachal Pradesh*. On 25th January, 1971, *Himachal Pradesh* was made a full-fledged State.

The State is bordered by *Jammu & Kashmir* on the North, *Punjab* on the West and the Southwest, *Haryana* on the South, *Uttar Pradesh* on the Southeast and *China* on the East. Unlike *Uttarakhand,* here the concept of community managed forest developed much later. Participatory forest management was introduced in 2001. But participatory forest management on the ground is very limited. We visited the three villages in this study area. But we did not find any forest patches included under the participatory forest management act.

3.3.1 Comparative analysis of Ghagruta Study area

This study area reflects the absence of any type of cooperative attitude towards forest management. Three study villages in this study area depict a similar picture. Hence, instead of village-wise analysis, an overall investigation is done to identify causes for the absence of collective action.

It seems that locals in this area are not able to coordinate amongst themselves to mobilize community driven forest management practices. The principal reason for non-cooperation in forest management is the lack of participation in the local bodies and illiteracy. Sustainable forest management, with the help of locals came into being in Himachal Pradesh only in 2001, when a notification for Joint Forest Management came in to existence. The implementation and successes of these schemes are highly dependent on local participation and the causes would be heterogeneously varying across the villages.

Secondly, the incentive structures in this region are also not favourable in encouraging the locals to demand local forests for themselves. People in this region are mostly illiterate and semi-educated. An immediate corollary is under employment. Employment opportunities for women are negligible in this area. Hence, the opportunity cost of fire wood collection for women is very low. Due to this negligible opportunity cost of collection, locals are not interested in decreasing their collection time for firewood. The average collection time in this area is significantly more than in Jalna. The average collection time in Jalna village is approximately 3.5 hours which is half of the average collection time in this area

Thirdly, a heterogeneous demographic composition might be another cause for the lack of effort in community participation. Heterogeneous composition in these villages might not be allowing the villagers enough space to meet and discuss issues. Lack of common meeting points (social and religious gatherings) might be responsible for weakening of social networking.

3.3.2 Summing up

In this area, very little participatory forest management is observed. Thus the institutions and norms pertaining collective action did not grow over time. Late introduction of local bodies, large-scale illiteracy and a heterogeneous demographic composition make it hard for local people to collectivize efficiently.

4.1 Conclusion

The three case studies analysed in this chapter attempt to represent the ground reality and bolster our findings from regression analysis. The rural sector in India is so unique and diversified that one can hardly apply a single yardstick to all villages. Hence, in different villages different sets of conditions predispose them in favour of or against cooperative forest management. The major issues coming out of these case studies are described below.

The case studies find significance of local governance in successful collective forest management. It is true for the Kalogi village as well as for the Jalna village in Uttarakhand. Success in Kalogi village is due to active involvement of other local institutions in forest management and the Jalna villagers are actively participating in collective action because of incentives given by their van-panchayat.

Secondly, a lack of conflict is found to be critical for the success of collective action. Conflict can be either inter-village or intra-village. But, both types of conflicts have a deteriorating effect on cooperative work. In the Sheelalekh village, we witness intra-village conflict in the van-panchayat, which hampers the decision making process and impedes regular activities in the village. On the other hand, in Paluka village of the Garwal, inter-village conflict can be observed. Interestingly, both of these villages are suffering from very low participation in collective work. Interviewing the locals reveals that conflict is the primary cause of non-participation. The survey result shows that about 90 percent of the respondents feel that conflict is the primary reason for failure in collective forest management.

Thirdly, out-migration significantly hampers collective work as well as decision-making processes in villages. We have found no significant influence of this on the success of forest management in regression part. But in two villages (Mazuli and Sheelaghrat) we find a significant influence of migration on forest management activities. In other villages, migration does not have any significant influence on the management of the forest commons.

Fourthly, the right incentives are very effective in ensuring collective decision making. In our survey, we found that none of the villages have any user incentive schemes except Jalna village. Incentive schemes in this village motivate the villagers to act cooperatively. The villagers also contribute to a common fund on a regular basis, which is uncommon in the other villages, which do not have effective incentive schemes.

The fifth observation is that direct involvement and subsidization discourage community involvement and collective work. We observe that MGREGA has replaced few traditional areas of collective action, i.e. road, canal excavation etc. Directed involvement by the state has discouraged cooperative work in these activities. One can argue that if state intervention is not permanent or essentially mandatory (technically and physically), then it should be avoided, provided there exists a sustainable collective management system and the intervention should be to empower that system. In other cases intervention should be to promote collective action in certain areas, where, it is technically and physically sustainable.

Finally, involvement of women's groups in forest management is found to be significant. A strong women' working group (in this case it is the Mahila Mangal Dal) is more effective than rules that require the mandatory participation of individual women in forest management organizations.

5.1 Policy Findings

A few policy directives are suggested for the developmental programs. This study has found a number of results and observations. Based on those findings, some of the policy recommendations are given below.

a. This study finds a significant role of the local informal institution (governance of that institution) on successful collective action. This result supports the findings of other studies done in this field. The experimental games also indicate that presence of informal institutions might make locals more cooperative. Based on these results we can recommend establishing mandatory local governing structure for maintenance of public work and resource.

b. The peripheral informal institutions are found significant in this study. Our recommendation would be then that the implementing agency must setup peripheral informal institutions along with principal governing body. Our argument behind this recommendation is that the peripheral institutions help to improve social networking and participation in the collective works.

c. Based on the findings of this study we can recommend flexibility on the rules for setting up informal institutions and running it. Setting some standard parameters the rule should allow the management institutions to adapt according to situation.

THE TALE OF A BATTERED WOMAN: RE-DEFINING PROVOCATION AND ANALYSING THE BATTERED WOMAN SYNDROME IN LIGHT OF R v. AHLUWALIA

Aishwarya Deb*

Prithwish Roy Chowdhury**

1.1 Introduction

It is a paradox of our time that those with power are too comfortable to notice the pain of those who suffer, and those who suffer have no power.[1] The punishment given to the battered women, who kill, is technically a punishment for the crime of *choosing a violent man* as her husband. The story does not end here because apart from facing criminal charges at a time when she is likely to be suffering from post-traumatic stress, she also has to face serious barriers to obtain a fair trial on the merits. Even if she is acquitted of all charges, the society takes a back seat in showing acceptance towards people like her. Thus, it has become a necessity to recognize the self defence principle in order to educate the members of the society about the prevalence of such ruthless violence inside the households and also expose the societal bias and labels that nourish this brutal endemic. The paper attempts to analyse the battered woman syndrome evidence and the defence of provocation and how such a defence can be used by the Courts of law to deal with such special cases of homicide.

2.1 *R* v. *Ahluwalia*: A Brief Background

> Deepak, if you come back I promise you-I won't touch black coffee again, I won't go town every week, I won't eat green chili, I ready to leave Chandikah and all my friends, I won't go near Der Goodie Mohan's house again, Even I am not going to attend Bully's wedding, I eat too much or all the time so I can get fat, I won't laugh if you don't like, I won't dye my hair even, I don't go to my neighbour's house, I won't ask you for any help.[2]

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1 D Goleman, *Vital Lies, Simple Truths: The Psychology of Self-Deception*, 1997, p. 13.

2 Elizabeth Mytton, "The Radical Potentialities of Biographical Methods for Making Difference Visible", *School of Finance & Law Working Paper Series, Bournemouth University,* Vol. 12,1997; Kiranjit Ahluwalia & Rahila Gupta, *Circle of Light*,1997, p. 893.

These were few among the number of altruistic promises of the most abject kind, made by Kiranjit Ahluwalia to her husband, before she finally decided to put an end to the never-ending violence imposed on her. Born into a privileged family in India, Kiranjit Ahluwalia came to England in 1979 to be married to a man she hardly knew.[3] As per the societal norms, a woman on her marriage devotes herself entirely to the welfare of her husband and his family, even if it is at the cost of her own avocations. It is not only the sharing of emotions, sentiments, mind and body of the wife with her, but it's a life-long sacramental sacrifice of her own self.

Just like any other normal Indian woman, Kiranjit Ahluwalia had the same idea concerning her marriage and soon she found herself in a place away from her paternal home, taking care of her husband and his kins. From the very onset of her marriage, she had been subjected to abuse at the hands of her husband, which she endured wordlessly in order to maintain the honour of the family. There was no one she could turn to for support as 'domestic violence' was a taboo subject for many Asians in Britain, and family honour was at stake for anyone who went outside the family for help.[4] However, after ten years of suffering such mental and physical abuse she obtained a court injunction to restrain her husband from hitting her. Despite such legal intervention, he continued to be abusive towards his wife. One evening, when he told her that their marriage was over and threatened to burn her with an iron, she decided to kill her husband. Kiranjit was then charged, tried and convicted of murdering her husband. In her defence, she had pleaded that the requisite criminal intent for the commission of the crime was lacking on her part and sought to rely on provocation, but the jury did not accept her plea and she was sentenced to mandatory life imprisonment.

Her case gathered enormous support from the Southall Black Sisters[5] who filed an appeal on her behalf. The appeal mainly dealt with the subjective question of whether there had been a sudden and temporary loss of self control, and the objective test of whether any normal reasonable, educated Asian woman would

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3 Provoked: The Story of Kiranjit Ahluwalia, Southall Black Sisters, available at *http://www.southallblacksisters.org.uk/provoked-kiranjit-ahluwalia/* (last accessed on 19 February 2016)

4 *Ibid.*

5 Southall Black Sisters, a not-for-profit, secular and inclusive organisation, was established in 1979 to meet the needs of Black (Asian and African-Caribbean) women and aims to highlight and challenge all forms gender related violence against women, empower them to gain more control over their lives, live without fear of violence and assert their human rights to justice, equality and freedom.

react the way she had done. While considering the appeal, the Court was not willing to accept the ground of provocation, however on finding fresh evidence of diminished responsibility, a retrial was ordered where Kiranjit was found guilty of manslaughter instead of murder and was sentenced to a term of 40 months which she had already served. The Court of Appeal had also taken into consideration the defence of battered woman syndrome and gave a broader meaning to the defence of provocation. The jury was compelled to lay emphasis on the larger societal pressure that had placed the battered woman in a situation where her only option was to kill the abuser.

3.1 Battered Woman Syndrome: A Paradox

The criminal justice system is basically an expression of the central moral code of our society. One of the reactions of legal advocates after the initial trail of *Ahluwalia*[6] was that the court had not properly conceptualized the testimony under the objective test by regarding the syndrome as evidence of mental impairment or abnormality.[7] Consequently it was clarified that the Court of Appeal had actually considered the testimony in terms of a condition which normal people can suffer and which affects their personalities in ways which may reduce or eliminate criminal liability. The Court, recognizing the concept of battered woman syndrome had opined that normal women who repeatedly suffer domestic violence may be reduced to a state of learned helplessness which slows or distorts their response to the last act of provocation, but does not thereby lose them the protection of that doctrine.[8] This battered woman syndrome was primarily introduced to help explain the reasonableness of a woman's actions in self-defense against her abuser.[9] Pioneered by experimental psychologist, Dr. Lenore Walker, it was developed to allow experts to testify at trials, most commonly where a woman was on trial for killing her batterer, and was alleging self defense.[10]

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6 *Supra* note 1.

7 Juliette Casey, egal Defences for Battered Women who Kill: The Battered Woman Syndrome, *Expert Testimony and Law Reform,* 1999, p. 25.

8 *Ibid.*

9 Cynthia Gillespie, Justifiable Homicide: Battered Woman, Self Defense and the Law, 1989, p. 159.

10 Elizabeth M. Schneider, Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering, *Women's Rights Law Reporter*, Vol. 9, 1986, pp. 195-207; (Virtually all of the cases that have considered the issue of expert testimony have done so in the context of testimony on battered woman syndrome and they have focused on Dr. Lenore Walker's work in her book *The Battered Woman*).

The battered woman syndrome evidence mainly explains why a battered woman having d special knowledge of the imminence of an attack did not make use of retreat as a reasonable alternative.[11] In other words, it explains the reasonableness of the woman's actions in a situation in which most jurors would probably not be familiar.[12] In common parlance, the word syndrome carries with it pessimistic connotation, and there is a propensity for members of the society to interpret this as some sort of inability defense. As per the Walker theory, there are three major distinct phases in any battering cycle, beginning with the 'tension-building phase' when there is a gradual intensification of tension which is manifested by obnoxious behavior on the part of the batterer and which sometimes escalates to minor acts of physical abuse. In order to avoid such situations in future, the woman attempts to pacify her husband by doing what she thinks might please him. However such attempts eventually fail and this invariably gives way to the 'acute battering phase'. In fear of pain and injury, which she will have to endure during this phase, she often expedites the inevitable explosion, forcing it to occur in conditions so as to minimize the impending harm. The explosion itself is constituted by physical and verbal aggression which leaves the woman injured and shaken. The final phase being the 'loving contrition phase' is characterized by extremely loving and contrite behavior on the part of the batterer where he portrays compassion and repentance, often promising a better future without brutality. The woman believes her husband and, early in the relationship at least, derives a ray of hope from this behavior. This phase provides optimistic reinforcement for the woman to stay in the relationship, even if the phase comes to be characterized simply by an absence of anxiety or violent behavior. Thus the latter phase acts to keep the woman in the relationship believing that the nightmare is over when in fact, most often it has just begun.

The cycle continues with the violence inflicted upon the woman increasing with every phase. Over time, an emotional progression may occur, with the victim acquiring a defenseless response to the situation. She becomes convinced that options to defend herself are negligible and that the batterer is all powerful. Lastly, her life is engulfed by fear and she lives in a state of terror, persistently vigilant against the ever present but unpredictable threat of violence. However, the actual killing of the batterer is usually preceded by an extraordinary incident; something done by the husband that was not in his usual repertoire of violence which might often concern the children in the family or he threatens

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11 *Supra* note 11, at p. 93.

12 *Supra* note 12.

their life which is usually referred to as 'the turning point'. Such an action on the part of the batterer might have simply gone beyond the level of what she had learned to live with, and that ultimately led to the commission of the crime. Theoretically, the concept of Battered woman syndrome is essentially a paradox. The term 'syndrome' carries with it the stigma of psychological disorder. In order to establish the battered woman syndrome, what is essential is an expert testimony. The main reason behind this is that Judges still require an expert to give the battered woman's claim of self-defense a voice of authority, because her claim challenges long held social norms.[13] It is assumed that judges cannot possibly see the correctness of the woman-defendant's claims of reasonableness without the help of an expert. Domestic violence is so far beyond the 'ken of the average layman', and so ingrained in our beliefs that it is a private, family matter, an expert is essentially required to fit this into commonly held views of reasonableness.[14] Using testimony about a syndrome to explain what a reasonable person would do is a contradiction in terms—it is a legal fiction that the legal community has developed to allow experts to testify in trials of battered women.[15] Such an expert testimony might actually prevent the unjust result of sending a victim to prison for acting out of necessity, but doesn't require changing the actual substantive self-defense laws. This use of expert testimony to explain reasonableness, though logically baffling, is the only realistic option for introduction of evidence of battering under the current evidentiary laws.[16] The ability to present expert testimony at trial for a battered woman who has killed her abuser in self-defense is not only priceless but also has the potential to educate members of the community on the societal norms and pressures that create the environment that tolerates such ruthless domestic violence.

4.1 How to Get Away with Murder: The Defence of Provocation

Murder is a common law crime which carries a mandatory life sentence for those found guilty. As in all areas of law, the accused may put forward a defence so as to seek an acquittal. In murder cases, there are statutory defences which may provide a partial defence which allows the charge of murder to be reduced to manslaughter. The unique defences to murder, as provided by the English

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13 *Id*, at p. 202.

14 *Supra* note 11, at p. 98.

15 *Supra* note 8, at p. 13.

16 Myrna S. Raeder, "The Double-Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence", *University of Colorado Law Review*, Vol.67, 1996, pp. 790-802.

criminal law are 'diminished responsibility' [17] and 'provocation' [18]. If a person is charged with a non fatal offence, he may argue provocation in mitigation but not as a defence to the actual crime charged. Diminished responsibility and provocation each consist of separate elements which must be established i order for the defences to succeed. Diminished responsibility includes the element of an abnormality of mind whereas provocation is concerned with a sudden and temporary loss of self control.[19]

The doctrine of provocation has its origin in the common law system where the judges had introduced it in order to mitigate the harshness of the mandatory death penalty that was previously invoked in all cases of homicide .Although the reason which gave rise to the doctrine no longer exists, its continued recognition as a partial defence indicates a modern day empathy with the heat of passion killings. The term provocation has been re-defined by Lord Taylor C.J as:

"Provocation is some act, or series of acts done [or words spoken] ... which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind"[20]

In order to establish the defence of provocation, two essential requirements or questions of the reasonableness test have to be satisfied. While, the subjective question is whether the accused was provoked to lose his self-control, the objective question is whether a reasonable man would have been provoked to react in the manner as the accused did. However, there is difficulty for women to succeed with the defence of provocation especially in domestic violence cases where there is a 'cumulative development of provocation'. The alternative is to make out a defence of diminished responsibility which reflects the woman's mental abnormality such as depression and other traumatic disorders following years of abuse. But there is a stigma associated with this. It is clear that the law will not recognize forms of retaliation or revenge per se.[21] One of the most essential elements of the defence of provocation is self-defence. Self defence often appears to be the most attractive defence for a battered woman who kills her partner for a number of different reasons. These women speak in terms of

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17 *The Homicide Act,* 1957, S. 2.

18 *Id*, at S.3.

19 *Supra* note 4, at p. 9.

20 *Supra* note 20 ;(Referred to by Lord Taylor C.J. in *R v. Ahluwalia*, (1993) 96 Cr App R 133,894).

21 *Supra* note 18.

finding themselves trapped in abusive relationships to the point where the choice becomes either to 'kill or be killed'.[22]

Another crucial requirement of the defence of provocation, which has caused considerable controversy, particularly in cases involving battered women who kill, is that which relates to immediacy. This requirement demands that the accused react immediately after the provoking incident. Any delay between the provocation and the response, therefore, is taken as contradicting the suggestion of loss of self control which forms the essence of the plea. Although battered women who kill have described their actions in terms of having been provoked to the point of losing self control, the law has difficulty recognizing their defence of provocation. Women, who have been subjected to long-term violence by the deceased, often speak in terms of their resilience to retain self control being eroded over time. Thus, instead of reacting under the influence of a 'red anger', this anger may perhaps better be described in terms of a 'white anger'. While they may not kill immediately after the first violent assault, the effect of continuous abuse eventually culminates causing a loss of self control, not necessarily immediately after a violent encounter but very often some time after a relatively minor triggering incident. However, because of the limitations of the immediacy requirement, which focuses on the last act of provocation, law has struggled to find provocative behavior which could excuse a killing. On this view, both the nature of the provocation and the degree of force used in response would appear to be inconsistent with law's requirements.

Previously, in order to enforce the defence of provocation, the defendant had to prove that she suffered a sudden and temporary loss of control as a result of the provocation. This condition being merely subjective seemed to be disadvantageous for battered women who were accused of killing their own husband, as it did not include the cases where the women experienced a loss of self-control gradually rather suddenly. The concept of cumulative provocation seeks to remove the veil and to allow law to look beyond the events, which immediately preceded the killing, so that the act of killing can be viewed in the context of years of escalating violence and abuse and a gradual erosion of self control. This issue was addressed in *Ahluwalia*[23], where there was ample evidence at the trial to support that from the very outset of marriage she had been subjected to abuse at the hands of her husband. Primarily, several occurrences of violence, like the incident where she was pushed by the deceased

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22 *Supra* note 9, at p. 116.

23 *Supra* note 1.

(her husband) when she was pregnant with her first child, were recorded in her doctor's notes. Adding onto her physical injuries was the harsh truth that her husband was having an affair with another woman. It was in the year 1983, that Kiranjit (the appellant) obtained a court injunction to restrain the deceased from hitting her. Despite such legal intervention, bouts of violence continued and one fine evening when the deceased threatened her by holding a knife to her throat, she decided to approach the Court for another injunction. However, the deceased continued to be abusive towards his wife and the violence reached its culmination point during the course of the month which preceded the killing. On the night of the crime, when she decided to talk to him about their relationship, she was threatened to death by her husband (who also threatened to use the hot iron on her and beat her the next morning). That was the moment when she finally took a stand and decided to put an end to this torturous relationship. She set her husband's room on fire and her husband, who was sleeping before the room caught fire, ran to the bathroom to save himself but eventually died after he was taken to the hospital. As per the testimony of the neighbours, they described her as standing at a ground-floor window with a 'glazed expression'.[24]

One of the major arguments made on appeal was that the trial judge's direction to the jury asking them to look for a sudden and temporary loss of self control was erroneous. Relying on expert evidence which was not before the trial judge, it was argued that women who have been subjected frequently to violent treatment over a period of time may react to the final words or act by a slow burn rather than an *i*mmediate loss of self control.[25]

In other words, instead of viewing the time lapse between the provocation relied upon and the fatal act as a period during which a conscious desire for revenge was formulated, it should be viewed as a period during which the appellant suffered a slow burn reaction which eventually culminated in a loss of self control. For the first time ever, the Courts resorted to the possibility of interpreting the time lapse between the last act of provocation and the reaction in terms of it being a heating up period rather than a cooling off period. Therefore, when placed against the entire history of violence, the time lapse between the deceased's behavior, his denial to speak about the relationship indicating that it was over, his threat to use the hot iron on her and his threat to beat her the next morning, was in reality, a period during which the appellant underwent a slow burn reaction which concluded in a loss of self control.

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25 Kiranjit Ahluwalia & Rahila Gupta , Circle *of Light*, 1997, p. 893.

Supra note 9.

From the above view, it can be inferred that the words 'sudden' and 'temporary' mean only that the act must not be premeditated and the loss of control, which must be sudden, need not be immediate. The test of reasonableness constitutes that the jury must not only believe, as a matter of fact, that the provocation led the accused to lose self control, but also that such provocation would have had the same effect on a reasonable man. Thus, the test involves an evaluative question as to whether an accused is deserving of mitigation by measuring his or her reaction to the provocation against that of the hypothetical reasonable person. The reasonableness test is postulated on the standard of the even-tempered man. On the one hand, the test safeguards against bad-temperedness by penalising the bad-tempered person from indulging his tendency to lose his temper. While, on the other, it allows the accused's loss of self control to be considered from his or her perspective in the circumstances rather than the basis of the reasonable man sitting in the calm atmosphere of a court.[26]

Another argument on appeal in *Ahluwalia*[27] was that, the trial judge misdirected the jury when he asked them to consider how a reasonable, educated Asian woman could have responded to the provocation, omitting to mention that being a battered woman was also a relevant characteristic for the purposes of the reasonableness test. It was also argued that the violence, abuse and humiliation, which the appellant had suffered over a decade, had affected her personality to such an extent so as to produce a state of learned helplessness. Although the Court of Appeal recognized that the appellant 'had suffered grievous ill treatment'[28], it rejected the appeal not on the basis that battered woman syndrome or post-traumatic stress disorder could not amount to a characteristic but because there was nothing to suggest that the effect of this abuse was to make her a different person from the ordinary run of women or marked off or distinguished from the ordinary woman of the community.[29]

Finally, the Court of Appeal considered the new evidence which was overlooked at the initial trial and, which in part formed the basis for the appeal, was the expert's opinion that the appellant was suffering from endogenous depression at the time of the killing. This evidence when combined with the evidence of neighbors as to the appellant's strange behavior after lighting the fire warranted the ordering of a retrial. The outcome of this retrial was the acceptance of a plea to diminished responsibility.

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26 *Id*, at p. 202.

27 *Supra* note 1.

28 *Supra* note *4*.

29 *Ibid.*

After a legal wrangle of over three years in *Ahluwalia*[30], the law finally settled on the defence of diminished responsibility as a solution to the problems which the cases similar to this presented to the courts.

5.1 Effectiveness of the Plea of Battered Woman Syndrome in Criminal Cases

It is clear from the above discussion that with *Ahluwalia*[31], Courts have only recently considered the probability that battered women can experience anger in the form of a slow burn but it is yet to concede to the fact that these women's perception and reaction to provocation may be different to those previously recognized. Thus, before these women can be treated equally by the law of provocation, we need to begin constructing their legal subjectivity. One way of achieving this in cases involving battered women is to cultivate the use of expert evidence as to the long-term effects of violence. However, for battered women who kill, perhaps the most difficult task is to explain why they stay with such abusive partners and why they eventually kill. The condition of learned helplessness is merely one explanation for the above-mentioned question and, in any event, is a condition which has nothing to do with pathology but loss of control over one's surroundings. Thus, using an expert testimony would further safeguard the woman against the label of pathology. Equally important, this approach also has the advantage of emphasizing the abnormal nature of the batterer or the so called male violence.

It is indeed a sad indictment of the state of our legal and social evolution that we can only access the experiences of battered women through the medium of psychology.[32] However, the reality is that the use of expert testimony has served to ameliorate the predicament of battered women who kill. If the method of expert testimony is used ingeniously in the future, it could help such women to plead successfully the defence of provocation as well as establishing a grip in an even greater variety of legal defences. Despite the prevalence of domestic violence, there is substantial evidence that the public continues to endorse a number of myths and misconceptions concerning victims.[33] Expectations concerning a victim's ability to leave, her lack of passivity, and helplessness, more than often conflict with the way many victims of such violence actually react. However, the fact is that such behavior of the battered

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30 *Supra* note 1.

31 *Ibid.*

32 Cathryn Jo Rosen, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill", *American University Law Review*, Vol. 36, 1986, pp. 11-13.

33 Jennifer G. Long, "Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions", available at *http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf* (last accessed on 19 February 2016).

victims that may be viewed as counterintuitive by laypeople, instead, actually represents common victim responses to trauma.[34]

The main objective behind introducing expert testimony in self-defense cases is to counteract these myths and misconceptions surrounding battered women and to explain the dynamics and impact of violence, and in so doing, aid the judges in assessing the reasonableness of a woman's use of homicidal force. However, some of the critics believe that the battered woman syndrome testimony promotes a clichéd standard for battered women. As a result, for women whose experiences differ from this set standard, their responses to their victimization risk are doubted owing to the fact that they fall outside the scope of those typical victims. In fact, syndrome-based testimony can be used to help establish that a particular woman is not a legitimate battered woman.[35] Unless a battered woman's experience of violence conforms to the pattern detailed within Walker's 'cycle theory of violence', or is consistent with learned helplessness, the evidence will essentially be viewed as irrelevant and disregarded by judges. However, this framework fails to account for the complexity and diversity of victim experiences.[36] As a result, the nature and dynamics of domestic violence is often left obscured and misinterpreted in a Court of law. Despite such shortcomings, expert evidence remains an important tool within the courtroom, the main reason being that the battered woman syndrome terminology supposedly provides a frugal framework under which the experiences and behaviors of battered women may be expediently considered.

6.1 Expert Testimony as a Tool to Change Social Norms

More than often it happens that women, who have been victimized by their respective partners, may have tried, and failed, to get help from the police or neighbours. With time such a battered woman realizes that she cannot solely rely on the police, the courts, neighbors, relatives, or anyone else for protection against her violent partner. Every attempt to get help is likely only to reinforce her perception that she has no alternative but to protect herself.[37] The 'don't ask, don't tell' mentality demonstrates a societal preference for idealized notions of

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34 Elizabeth M. Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering", *Women's Rights Law Reporter,* Vol. 9, 1986, pp. 195-198.

35 Cheryl Terrance, Karyn Plumm & Katlin Rhyner, " Expert Testimony in cases involving Battered Women who Kill", *North Dakota Law Review*, Vol. 88, 2012, p. 921.

36 *Supra* note 31, at p. 17.

37 *Supra* note 11, at p. 135.

the family over protection of the woman.[38] This predilection prevents such women from seeking protection from the very public agencies that were created to help victims of household violence, severely limiting a battered woman's choices thereby. This is what an expert testimony should recognize and seek to cure. It is not a woman's pathological syndrome that keeps her from leaving a violent relationship, but society's infirmity that makes it acceptable for a man to batter in the first place, and also pressurizes the woman to stay in the relationship. The battered woman's actions then become reasonable, because the society left no other choice for her. This is where the function of expert testimony comes into play.

As we know, social mores determine when self-defense is reasonable"[39], experts can work to alter and refine social norms. Expert evidence on the frequency of battered woman syndrome can reveal that domestic violence is a public problem in general. Evidence regarding the impassiveness of law enforcement, the skepticism of judges, and the social pressures that keep women in battering relationships can reveal the community-wide syndrome that allows for the perpetuation of domestic violence.[40] These social ills impel women to privatize domestic violence, and force them to take matters in their own hands in order to defend their lives. Expert testimony can not only reveal that these acts of self-defense are entirely reasonable, but can also awaken in jurors and judges a sense of social injustice, and a need to become more publicly aware of lingering house-hold violence.

7.1 Conclusion

Ahluwalia[41] might have brought about a change in the law recognizing diminished responsibility in converting cases of murder to manslaughter, but there is thus still an insistence upon one major provocative incident that occurred immediately prior to the killing. Unlike cases of self defence, where the evidence creates the normative standard which determines the outcome, in provocation cases involving battered women, the jury cannot simply apply a given standard. Instead, it must measure the evidence as to the reasonable woman who had been subjected to violence and who has a normal capacity for self control whom we would not expect to kill, against the actions of the particular battered woman in question. Furthermore, while assessing the gravity

38 *Supra* note 8, at p. 18.

39 *Supra* note 9.

40 *Ibid.*

41 *Supra* note 1.

of the provocation to the reasonable woman subjected to violence, it has to be kept in mind that every case involving a battered woman should considered on its own merits allowing for individual differences to be carefully considered.

Subsequently, in the case of *R* v. *Hobson*[42], murder conviction of the woman who had admitted killing her abusive partner was quashed and a retrial was ordered, in the light of fresh psychiatric evidence that she might have been suffering from battered women's syndrome which had, since the time of the trial, entered the standard British classification of mental diseases, and was thus capable of founding the defence of diminished responsibility.[43] The verdicts, finding battered woman who killed not guilty of murder, passed by the Courts subsequent to that of *Ahluwalia*[44], reflect the willingness of the society to be educated about the potential impact of the scarcity of alternatives available to battered women in our society.

However it is believed that expert testimony of the battered woman syndrome can help dispel myths about the battered woman and eliminate sex-bias in the criminal self defense law. The battered woman syndrome should, like in the case of Kiranjit Ahluwalia, be used to explain the context of a woman's actions which is not generally understood by the majority of the population. The authors consider that recognizing battered woman syndrome in criminal cases might prove to be an effective tool to educate members of the community about domestic violence. Further, it also believed that in order to remove the clichéd idea of associating the condition of the battered woman with some psychological disorder, the world syndrome could be eradicated but the general mechanism by which expert testimony is introduced at the trial of a battered woman should not change. Instead, the experts should downplay a discussion of the woman's specific syndrome, and emphasize more on the societal factors that allow men to batter women, and calls for a woman's action of self-defense. In this way, the battered woman syndrome analysis will be an able to shift the focus from the pathology of the woman to the pathology of society and the men who abuse. It is expected that instead of focusing on the traits of a woman, if the society takes up the responsibility to understand this sort of violence which finds place even in the most sacrosanct relationship of a husband and wife, it can gradually help transform the social norms that accept domestic violence and insist that a

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42 (1997) EWCA Crim 1317 (Court of Appeal).

43 Kate O Hanlon, "Battered Woman's Conviction Overturned", available at *http://www.independent.co.uk/news/people/law-report-v-6-june-1997-battered-womans-conviction-overturned-1254390.html* (last accessed on 3 June 2016).

44 *Ibid.*

battered woman accept the violence in silence After all, a victim's actions should not be exempted because of any personal weakness; instead it should be acknowledged as justified because of the situation in which she was placed.

18TH CONSTITUTIONAL AMENDMENT AND ITS IMPACT ON FEDERALISM OF PAKISTAN: CHALLENGES AND OPPORTUNITIES

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1.1 Introduction

The 18th amendment is the hallmark in the history of Pakistan. It is considered as the biggest achievement of then government of Pakistan. This amendment was meant to make effective constitutional measures by which no elected government can be dissolved, provinces should have autonomy, renaming of North West Frontier Province (now Khyber Pakhtunkhuwa), procedure for appointment of Judges at Supreme Court of Pakistan and some other prominent issues pertaining to the Government of Pakistan. The amendment is also credited because it changed political system of Pakistan from Semi-Presidential State to completely Parliamentary State. At present, the President is like the Queen of England who performs only ceremonial functions.

In Pakistan, most of the times, federalism is damaged by the ruling parties. Pakistan is a federal State according to the constitution of 1973, but indeed, it has not remained as a federal State in terms of provincial autonomy. Provinces have always struggled for their autonomy as given by the constitution, but due to some reasons, provinces were ignored to get their autonomy. Federalism is a vital bond that keeps the territory together under one administration. In case of Pakistan the issue and nature of federalism has created multiple hazards in the consolidation and survival of the state (Khalid 2013, 206). When we discuss features of federalism, provincial autonomy is the chief element of federalism which was partially missing in Pakistan. Pakistan's federal structures have been the subject of controversy since independenc. Longstanding demands for change have been made, particularly changes to the vertical and horizontal division of resources and demands for a reorganization of provinces along ethno-linguistic lines. The 18th Constitutional Amendment of 2010 introduced major changes to the federal system, agreed by consensus (Adeney 2012, 01).

After 18th amendment, Pakistan started to revive her federal characteristic as promised by the constitution. It is argued that responding to the challenges of democracy and

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federalism, the 18th Amendment to the Constitution of 1973 became law on April 19, 2010 with signature by the President of Pakistan. The amendment itself shows the strength of democracy in its ability to achieve consensus after many rounds of discussions and political compromise. Primarily, the amendment tries to rectify tw arrangements. One is to empower the Parliament and the office of the Prime Minister and the second is to increase resource share of the provinces (Abbasi 2010, 47). The passage of 18th Constitutional Amendment Bill was the moment many political leaders and civic activists of Pakistan had struggled for decades. President, Asif Ali Zardari signed the 18th Constitutional Amendment Bill on April 19, 2010 that was earlier passed unanimously by both houses of the Parliament. This development can be regarded as a historic milestone in the constitutional history of Pakistan, entering in a new era of democratic federalism (Pakistani Federalism 2010). The 18th amendment gave those powers to the provinces which were due for them, for example, some ministries were transferred from federal government to provincial government like ministry of education to enhance provincial autonomy. The Council of Common Interests is made more effective where mutual interests and conflicts of provinces can be resolved, this also strengthened federal system. Another step was taken that the President solely shall not be able to enforce emergency in any province at his own will and wish.

2.1 Historical Perspective

The 18th Constitutional Amendment was nothing short of a legislative revolution, and the most significant move towards the consolidation of democratic federalism in Pakistan's history (Pakistani Federalism and Decentralization). The major objective of the 18th amendment was to repeal article 58 (2) (B), which was reason of abolition of many elected governments of Pakistan, thus this article converted a democratic President into a dictator President. Article 58-2(b) was exercised by President Ghullam Ishaque Khan against Prime Minister Benazir Bhutto on 6th August 1990, and again against Prime Minister Nawaz Sharif in 1993. President Farooque Ahmed Khan Leghari used this article against Prime Minister Benazir Bhutto in November 1996. Therefore, it was a demand by the political parties to revoke this article in order to make democracy and democratic system safe and strong.

After general elections of 2008, a democratic government leaded by Pakistan Peoples' Party came into power. This period is also known as revival of democracy. Thus, the demand regarding repealing of article 58 (2) (B) was increased. After different sessions between political parties and government, finally a bill was drafted which was brought to the Parliament through proper channel. Subsequently it was passed from both the houses and finally signed by the President and this bill became law of the land which is known as 18th constitutional amendment.

After 18th amendment, long lasting issues related to provinces were also resolved. Amongst which, renaming of NWFP, decentralization of some federal powers to provinces, empowering judiciary and election commission of Pakistan are top of the list. All these steps strengthened federalism in Pakistan.

3.1 Salient Features of the 18th Amendment

- Article 58 (2) (B) was repealed and sovereignty of Parliament was restored. This meant a permanent barrier in abrogating either constitution or elected government.
- A limited space is created for presidential ordinances, since in past, presidential ordinances were hitting a mortal blow on the elected governments and democracy as well.
- A Judicial Commission was designed which was responsible for appointment of Judges at Supreme Court of Pakistan. This commission is comprised of 04 Judges from Supreme Court, Federal Law Minister, Federal Attorney General and one representative from Supreme Court Bar Association. This clause of the 18th amendment ensured higher judiciary free from any political pressure.
- Islamabad High Court was established and two benches of Supreme Court were established at Turbat and Mangora.
- Chief Election Commissioner of Pakistan was to be appointed with the consent of Leader of the House (Prime Minister) and Leader of the Opposition. The reason behind this clause was to ensure free and fair elections through independent Election Commission of Pakistan.
- Name of General Zia-ul-Haq was removed from the constitution. This was a demand by different political parties to remove his name, as they considered him a person who was against democracy, political system and free will of the people.
- Council of Common Interest, which was already established, was made more effective so that mutual affairs between the provinces could be tackled carefully and constitutionally.
- Name of North West Frontier Province was changed to Khyber Pakhtunkhuwa, keeping in view the demand from Pashtuns since years. **Source:** *www.na.gov.pk*

4.1 Important Characteristics of Federalism

Federalism is a form of government which is usually applied when several units combine together to form State. For democratic government, federal system is highly suitable to run the government as per will and wish of the people. In contemporary period, the best model of the federalism is observed in United States of America which is a role model for rest of the world. Federalism and democracy are closely related with each other. Federalism has been adopted as their system, mostly, by the countries with

large population and territory (Ahmed 2014, 08). Any State which is combination of various units can only be run smoothly and democratically when federal form of government exists there. Following are some important elements of federalism;

- Supremacy of the Constitution in all the units of federation.
- Equal distribution of powers among all the federating units.
- Supremacy of the Judiciary under all circumstances.
- Bicameral Legislature is one of the key element of federalism

5.1 Impact of 18th Amendment on Federalism in Pakistan

The 18th amendment dealt with different core issues of Pakistan but in a nut shell, every clause of the amendment strengthened federalism in Pakistan. The important section of the amendment is to repeal article 58 (2) (B), this clause directly affected federalism in Pakistan. It provided benefit to federal system, democracy and parliament of Pakistan. Federalism approaches a significant transformation in Pakistan in the repercussion of 18th amendment. The amendment produces a facet of loose federalism which is relevant with United States of America (USA) federal model (Bukhari 2014, 109). The 18th constitutional amendment has drastically changed the character of Pakistani federal system, making it significantly decentralized (Ahmed 2014, 11).

After 18th amendment, provincial autonomy was increased and residuary powers were transferred to provinces, this clause also affected federal system, keeping in mind that provincial autonomy is heart of federal system.

President, after 18th amendment, has become ceremonial Head of the State while much of his powers are given to the Prime Minister and Parliament. A limited authority has been given to President for Presidential ordinances. This all indicates towards strong federal structure in Pakistan. The Constitution had made it clear the President can dissolve the National Assembly only if the Prime Minister advice him to do so. Therefore, the 18th Amendment invalidated the inclusion by the 08th and 17th Amendments where the President was empowered to dissolve the House on his own (Rizwan, et al 2014, 152).

6.1 Challenges to Federalism after 18th Amendment

- International experiences of federalism suggest that massive constitutional reforms - such as the 18th Constitutional Amendment - require substantial time, resources, commitment and capacity to translate a federal framework into an effective and sustainable functional reality for the provinces (A report of Pakistan Study Group on Federalism 2014). Since Pakistan is not a politically well matured State, significant steps are still needed to be taken from the Governments

at Federal and Provincial level so that the State can actually enjoy its federal component.

- Economic distribution among provinces has remained a key issue since the inception of Pakistan. National Finance Committee (NFC) award remained under question for a long time, but previous Government of Pakistan paved a way forward to resolve this problem and subsequently NFC award was finalized. However, still some issues related to economic distribution need a focused attention by the Governm nt.
- After the general elections of 2013, each province have government belonging from different parties, e.g. Punjab has Pakistan Muslim League (N) government, Sindh has Pakistan Peoples' Party Parliamentarians, Khyber Pakhtunkhuwa has Pakistan Tehrik-e-Insaf and Balochistan had National Party's government with collation of PML-N (At present, PML-N has formed its government as per Murree Agreement 2013). In this scenario, relations between Centre and Province are sometimes observed as weak. Khyber Pakhtunkhwa and Balochistan Government showed thier grievances against federal government specially on China-Pakistan Economic Corridor. Sindh Government has some reservations especially on the issue of extension of policing powers given to Pakistan Rangers Sindh to maintain law and order situation in Karachi as particular and Sindh as general. The question of extending Rangers' stay in Karachi became controversial when the Sindh government failed to renew it before the expiry of the previous order on Dec 6. In August, Sindh Chief Minister Qaim Ali Shah had extended the period of Rangers' "special powers" in Karachi hours before the previous extension was set to expire (Dawn, 2015, December 13). These acts by the Federal and Provincial Governments directly effects federal structure of Pakistan. Thus, Centre-Provincial relations must be dealt smoothly, also a well effective mechanism should be suggested through which Centre-Provincial relations may be maintained properly.
- Although, devolution process of different ministries has been completed as determined after the 18th amendment, still some clarification is needed regarding devolution so that confusions which already exist may be removed. The major confusion is about energy crisis where Federal Government says that it is responsibility of provinces to generate sources to overcome energy crisis. While some provinces still claim that it is Federal Government who is responsible to get us out of this dilemma.
- Local Government system is considered as a vital component of democracy. All the provinces must ensure effective Local Government system in order to strengthen both democracy and federalism. It is important to mention here that the Local Government Elections were held in 2015 after the verdict by the Supreme Court of Pakistan (Dawn, 2015, March 07).

- Since 2008, Parliament of Pakistan is considered as an independent or even a political institution, therefore, Parliament should work for better domestic and foreign policies for wellbeing of Pakistan.
- All three elements of the Government viz: Executive, Legislature and Judiciary should work in coordination of each other as per true soul of the principle of separation of powers and balance of power.

7.1 Opportunities for Federalism after 18th Amendment

- The 18th amendment has provided some golden opportunities which should be availed timely, keeping in mind that so far since implementation of this amendment, its core benefits have not been availed as per its true spirit, thus the importance of this amendment becomes diminish.
- The important character of the 18th amendment is abolition of Article 58 (2) (B), this means an strong Parliament can be made in Pakistan, unfortunately, the Parliament is still not so much powerful as it should be. A fully sovereign Parliament can be possible if 18th amendment is completely implemented.
- The tensions between Centre and Provinces may also be avoided if Council of Common Interests becomes more effective.
- The supermacy of Parliament has been restored after 18th amendment. A powerful and independent Paliament will be beneficial for the federal structure of Pakistan.
- Proper utilization of powers which are given to the provinces after this amendment can also increase self-sufficiency of the provinces and ultimately for Pakistan.

8.1 Analysis and Conclusion

The 18th constitutional amendment is a milestone achievement in the constitutional history of Pakistan. This amendment was a demand of time which different political entities stipulated since years. This amendment was mainly focused to repeal article 58 (2) (B). Many other important issues related to federal and provincial governments were also addressed. The amendment proved extremely supportive for federal system in Pakistan. From secondary sources of data collection, it was observed that the 18th amendment directly blessed federalism in Pakistan. The present status of federalism is stronger than the federalism before 18th amendment. Amongst different clauses of 18th amendment, clauses regarding revoking article 58 (2) (B), reducing powers of the President and devolution of some of the powers from federal government to provincial government provided benefit to federalism in Pakistan. There is no other competitor of 18th amendment in the constitutional history which made federalism stronger in Pakistan. However, still some challenges exist for federal structure but timely focus and proper solution of such challenges may avoid any major dilemma to Pakistan's federal structure.

A TAKE ON ENVIRONMENT SUSTAINABILITY AND THE ROLE OF SOCIAL DYNAMICS

Ayushi Misra*
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Environmental sustainability i a 20th century invention. The concept of there being a culminated effort with respect to the consumption of natural resources in harmony with the order of nature, as well as the respect for those resources and our environment as a whole, the knowledge of these resources to be non-renewable, i.e., once depleted, our dependence on the same will lead us to desolation. In the last century, we have witnessed a massive surge in production and output capabilities of nations, who tapped the success of the industrial revolution to propel them past the countries which were oppressed or colonized by the major imperialist countries, which sit at the top of most development indices due to their subjugation of plethora of nations all around the world. It is essential to remember that all these actions and doings of mankind has been in relation to something which was prior thought to be never-ending or unlimited. But, the stark realization of what days are ahead of us if we continue on the same tangent of mere economic prosperity and technological development at the cost of the environment, catastrophe is not far at all. We cannot sacrifice what enables us to survive for something which merely supplements our leisurely desires. We have, in the 21st century, been bombarded with grave environmental issues and repercussions of a very long exploitation of our Earth and her resources. Our world has woken up to the dangers and ill-effects of all those "Golden Years" of industry, where the complete dependency on carbon-based energy such as petroleum, coal, natural gas and other derivatives of these resources has hit our diverse ecosystem very hard. These carbon-based energy resources, once the boon of every industry, the central focus of most economies, where the price of oil dictates international policy and forum discussions, are now viewed as the bane of mankind. Once where all of mankind headed towards these fuels, now rigorous scientific research is on to reduce and remove our dependence on these fossil fuels, but the damage has been significant. Can we still take measures to protect what enables life to exist is the question which now rings in every discussion for the future of mankind. We now stand at a flashpoint, where our actions and direction we head towards will decide the quality of life of the creatures existing on this planet. There is only one Earth, mankind is

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coming to grips with the constraint of limited natural resources which have been plundered, now there is the requirement of sensitive and sensible action to be taken by the human species for taking care and rejuvenating our environment, as to help it flourish and prosper, not to exploit it in the hopes of reaching to the pinnacle of human development.[1] A holistic approach is required, and mankind has to introspect that environment is not something one can be detached from, exploited and left to be in tatters. We have to pick up the tools for creating a well-balanced ecosystem with the help of co-operation between nations and communities, as every life, from the single-celled organisms to mammals, need an environment to survive.

Sustainable Development has been given its most comprehensive definition by the Brundtland Commission[2] in 1987, where a work was published namely, 'Our Common Future', which defined sustainable development as "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."

The aforementioned definition places before us the concept of inter-generational equity[3] which speaks of fairness, equality and justice with respect to children, adults and elderly in relation to external stimuli such as psychological or environmental factors. The role of intergenerational equity in understanding sustainable development is paramount as the whole concept revolves around the knowledge that we must promote development in a manner where incessant exploitation of our resources for the achievement of short-term goals and objectives by governments and international organisations such as multi-national corporations who by virtue of their massive wealth and lobbying power get hold of a vast amount of society's resources. The development can only be sustainable if the needs of the future are also taken into consideration and then programmes and action towards development that lean more towards smart and efficient consumption with high output, low wastage, sophistication of production methods so as to reduce the damage or ill-effects of the production to a minimal level and so forth. The Brundtland Report or World Commission on Environment and Development thereby attempted to bring the issue of Sustainability to the world forum, with efforts to bring the international community to solidarity on the issue

1 Sharon Beder, The Nature of Sustainable Development, 2nd edition, Scribe, Newham, Vic., 1996.

2 UN World Commission on Environment and Development, 1992.

3 Brown-Weiss, E (1989) *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity.*

of a concept of development which seeks to harmonise the needs of today, the resources and the needs of tomorrow.[4]

The Brundtland Commission thereby, caused the international community to step forth and bolster the status of this concept of sustainable development in the United Nations Conference on Environment and Development or Earth Summit,1992. Five documents were adopted, the two most important of these being the Rio Declaration on Environment and Development, which got this name as the conference was held in Rio De Janeiro, Brazil and the second document is Agenda 21.

The Rio Declaration primarily consists of 27 principles which are to help guide the countries present at the Earth Summit towards a brighter and sustainable future, one free of excess and wastage, but where resources provide highest utility as well as minimized pollution and wastage of such resources. The 1st principle[5] of the Declaration is always worth a read to get an overview of what sustainable development talks about. It reads as "Human beings are the centre of the concerns of sustainable development. They are entitled to a healthy and productive life in harmony with nature."

Agenda 21 is the document of the Earth Summit 1992, which lays down a schematic for the actions to be taken by the signatories to the UNCED, which is to facilitate the transformation from a production and output obsessed attitude of development to a sustainable one. There must be a shift from the central belief of profit being the singular goal of every effort and utility of the resources. We now have to holistically discover newer ways of developing the economy and society which is environmentally feasible. We cannot ignore the possibility of our society moving towards a world full of hardship and difficulties if we continue down the same path of pure economic growth at the cost of our surroundings and the organisms which make up the delicate ecosystem of ours.[6]

Twenty-four years have passed since the Earth Summit was held, yet today, environmental degradation and the rise of degenerative aspects of mankind, such as poverty, gender inequality, infringement of rights and so forth have seemed to condemn our world to a pitiful existence. Respect for the environment and development which upholds that respect seems to have only been restricted to

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4 Iris Borowy, Defining Sustainable Development: the World Commission on Environment and Development (Brundtland Commission), Milton Park: Earthscan/Routledge, 2014.

5 Rio Declaration on Environment and Development 1992 Pg. 1.

6 Agenda 21 p. 2.

paper, in agreements and reports, but reality checks seem to bring about staggering facts to the fore.The environment and the conditions of human life are so intertwined that we must understand that every major human problem has some root in environmental issues.[7] Nearly all of human conflicts arise out of the scarcit of earth's usable resources such as arable land, fossil fuels, minerals, drinking water and limitlessly many other fruits of Mother Nature which provides us with the way of life we enjoy, the comforts and leisurely activities which are fuelled by these resources.

Social conflicts such as civil war, disturbance between communities, the inequality between the level and rate of development which some societies have achieved due to efficient utilisation of resources, or having a larger portion of agriculturally usable land; all these aspects have caused there to be grave inequality between the various races of mankind, and the stark difference of the state of life all around the globe has been witnessed all around the globe which has even led to the demarcation of certain countries as First World, which can be considered to be the foremost developed nations which have mastered the technology age and have massive defence capabilities and deterrent measures such as warheads, standing army, research programs solely dedicated to defend their nation, at cost of global annihilation as well. The concept of First World and these categories were originally coined during the cold war between the USSR and the USA, where the First World countries were democracies which had market based economy, or the capitalist states and their allies such as United States, United Kingdom, France, Italy, Germany and so forth. The Second World countries were the ones which governed themselves based on a socialist form of government, influenced by the Communist ideology. The major countries were USSR, China, North Korea, Cuba and Vietnam, The Third World countries were the nations who were not aligned with any bloc during the cold war and remained neutral throughout. These were mostly the colonial states that had attained freedom after the Second World War, mostly in South America, Asia and Africa.

This understanding of the terms turned irrelevant after the fall of the Soviet Republic in 1991 but took a turn to be interpreted as Developed, Developing and Least Developed. Due to the mass media and the process of evolving meanings from these terms, and the added problem of having no agreed-upon definitions in any sort of context, now the terms are construed to explain the categorization of the countries according to their economic development and living conditions for the population residing in the territory of that country. Due to most of the First World countries were technologically advanced and having a capitalist regime had

[7] Blewitt, J. (2008). *Understanding Sustainable Development*. London: Earthscan.

prospered during the end of the 20th century and the third world countries were mostly colonies freed from their imperial masters who had left many of those nations economically and socially bankrupt after the Second World War, were left to find their own way out of the centuries of colonial disruption of their societies, thereby they were technologically bereft of the new-age capabilities of agriculture, production, industry, infrastructure and so forth. Due to this, the major part of the population was marred by poverty and strife. This kind of divergence between the populations of countries as stark as millions dying because of drought and poverty, and massive amounts of food wastage in one part of the world creates a very disturbing image of how mankind has treated its own members as outcasts.[8]

All such conflict and categorization has arisen between the races of mankind, is because of the difference of the situations where people survive. Where one person can afford to have 3 meals a day, clean drinking water, shelter, clothing with ease and in other parts of the world, people go hungry day and night, left helpless and scavenge to survive, on not even the bare minimums of life. The quality of life depends on the environment in which the people reside, as environment is the source of all comforts and necessities of life. Environment is directly tied to poverty, one of the greatest scourges of humanity, where more than half of the World's population lives in a manner where every necessary requirement of their life is barely met, they are bereft of the resources which they need to grow, develop and enjoy life. The ill-utilisation of resources of the earth and the concentration of wealth and development in only certain territories of the world has caused widespread damage to the environment and now the rise of international institutions and organisations which deal in spreading awareness and invigorating action towards the preservation of environment and the resources which are extracted from it.

The international perspective on the concept of environmental sustainability has been understood and summarised by Global Sustainable Development Report which has been instituted by the Department of Economic and Social Affairs of the United Nations which seeks to collect a report on the progress of the sustainable development in the UN members and create a platform where there can be active comparative analysis and accountability. There are 17 goals laid down in the 2030 Agenda for Global Sustainable Development which has been proposed by the UN namely:

1) No poverty

[8] Daniels, John (2007). International Business: Environments and Operations. Prentice Hall.

2) Zero Hunger
3) Good Health and Well-being
4) Quality Education
5) Gender Equality
6) Clean Water and Sanitation
7) Affordable and Clean Energy
8) Decent Work and Economic Growth
9) Industry, Innovation and Infrastructure
10) Reduced Inequalities
11) Sustainable Cities and Communities
12) Responsible Consumption and Production
13) Climate Action
14) Conservation and Sustainability of Oceans, Seas and Marine Resources
15) Protect, Restoration and Promotion of Sustainable Use of Terrestrial Ecosystems
16) Peace, Justice and Strong Institutions
17) Global Partnership for the Goals[9]

These aforementioned goals stated by the 2030 Agenda broadly encapsulate the essence of what sustainable development is all about. Sustainability must be imbibed in all institutions and in the way of life of human beings everyday so as to achieve these goals and create a society of humans where utmost respect for environment, its resources and the inhabitants of this environment. For a peaceful and secure world where every human being who comes into existence is guaranteed a life where he or she has every opportunity to grow, to pursue their desires, and fulfil every aspect of what makes the human spirit so unique and intelligent.[10]

Before we cleanse the environment of the whole world, we must first begin by cleansing our own home, the territory where we are born and reside in. We must address the issues of our own country and create an example for the world on how the environment is to be protected.

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9 Agenda 2030 Sustainable Development.

10 Folke, Carl. "Resilience: The Emergence of a Perspective for Social–Ecological Systems Analyses". *Global Environmental Change* 16.3 (2006).

India has one of the most beautiful ecosystems of the countries all around the globe. From the foreboding Himalayas which range all across the northern region, to the sun-bathed coastline of more than 7,000km, from the arid desert of Rajasthan to Meghalaya, where constant rain is the bane of everyday life, our country has various kinds of ecologies all throughout the territory. The Gangetic Plains which spread across the northern region present one of the most arable areas of the world harbours the Indus Valley civilisation, has created a great society which has rich he tage and culture which has spoken about the conservation and protection of the flora and fauna of the territory. Since the age of Yajnavalkya, where he in his Smriti laid down that the felling of trees and damage to the forests is a punishable offence, to the new-age legislations, India has always been a society sensitive to nature. Where a majority of the deities resided in dense forests and how the rivers of our country have attained a divine role in our society, the role of environment has been pivotal towards every move made by the Indian society forward towards the development and enjoyment of life. This has however, been set back in the last 2 centuries where most of the region of the country had been completely colonized by the British Empire. The ecologically sensitive areas of the country were affected and ravaged by the arrival of industrialization and usage of coal in the daily working of society. The country was forcibly ushered into a way of dependence on industry, where nearly every family was engaged in agriculture. This involuntary switch from a known way of life to something that was completely foreign created a huge rift and by the time India had attained independence, the agriculture sector was left in ruins due to the concentration of land holdings with only certain few individuals who were in favour with the British government. After independence, the country was left to its own devices only having a few certain environment legislations created by the British government which had mostly enacted these laws for their own benefit, where they declared areas as protected or unprotected only assigning the rights to the resources and materials to themselves to the send back home to the United Kingdom. Their sole purpose was the use the territory as a colony for the furtherance of their object of imperialism, by creating ad hoc governments and an illusion of control whereas every action was performed by the Monarchy back in the United Kingdom. With these few legislations and a huge population ravaged by the cultural deterioration and constant oppression, our country was affected massively by this leaving an indelible print on the Indian society. Our country was marred by issues such as poverty, partition, discord between communities, secessionism and the void left by the British Government which led to a stagger to the health of the economy, the living conditions of many members of the society, who were oppressed prior to the independence and did not find themselves in a better situation than they were before independence. We must

trace the fight towards environmental sustainability and the uplifting of the classes of society who were exploited in a dastardly manner, by the steps and legislations caused into being to create a better life for those who had been subjected to harsh situations and merely felt as their life being one where they merely must survive rather than develop and become a fully functioning human being, socially and psychologically.

During the British Rule, the *Empire enacted the Forest Act*, 1865 which asserted the State monopoly over the forests of the country, then the *Indian Forest Act*, 1927 whose preamble was conserve, protect and maintain the forest area. These laws seemingly enacted to protect and conserve the environment and its resources, in the practical application of these Acts, they focussed more on the earning of revenue rather than performing the tasks of conservation of the environment.

After our country attained independence, many legislations were enacted to protect the environment which was caused wide sorts of damage to the ecosystem of the country. To begin the restoration and furthering protection over revenue from the avenues, the Constitution was amended to include Article 48A of Part IV, which speaks about the Directives Principles and State Policy, reads as, "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country". It weighs heavily on the government to follow the Part IV of the Constitution and for the protection and improvement of the environment to be one of the guiding principles for the governance of the country is a bold step towards recognizing that environment is to be sustained for the future generations who are to inhabit our land and resources. Article 51A(g) imposed additional environmental mandates on the Indian state.

There are more recent enactments brought into existence which bolster the state's responsibility to protect and conserve the environment and move towards a sustainable future. The *Water (Prevention and Control of Pollution) Act*, 1974, and *Air (Prevention and Control of Pollution) Act*, 1980, were brought into picture to perform the duties of prevention and control of pollution as their names clearly state. These acts sought to prevent the activities of industries and other units which are openly polluting the environment of the country have to be reined in and a specific legislation was required to perform this duty. The Air act was also inspired by the Stockholm Conference in 1972 on human environment.

The Indian Judiciary has also played a supremely pro-active role to uphold the status of the environment as fundamental to every human being. The Supreme Court of India has repeatedly held as the environment having more essentiality over every other aspect related to human life. The environment is to be protected

and conserved and not to be left open for human greed to ravage and consume the resources and materials of the environment. There are many landmark judgements made by the Judiciary which support the cause for environmental sustainability.

In the case of *R.L.E.K., Dehradun v. State of U.P*[11], was the first case in which the Supreme Court recognized a "Fundamental Right to live in a healthy environment with minimum disturbance of ecological balance"

In *Sachidanand Pandey v. State of West Bengal*[12], the court recognised society's interaction with nature the environment supreme affecting the humanity.

In *Olga Tellis v. Bombay Municipal Corporation*[13], the Supreme Court directed the Municipal Corporation to provide alternate accommodation with basic amenities like latrines, water, road before slum dwellers and pavement dwellers were evicted, emphasizing on poverty as one the major cause of environment pollution.

In *Indian Council for Enviro-Legal Action v. Union of India*[14], Supreme Court emphasized on the Doctrine of Sustainable Development.

In *Vellore Citizen's Welfare Forum v. Union of India*[15], the Supreme court of India recognised the Principle of Sustainable Development and it referred to the Brundtland Report, other international documents and Articles 21, 47, 48-A and 51-A (g) of the Constitution of India. The court held that the "Precautionary Principle" and "Polluter Pays Principle" form part of law of India are the essential features of "Sustainable Development".

The Court defined the concept of Precautionary Principle and said that the State Government and statutory authorities should anticipate, prevent and attack the causes of environmental degradation and if there is any damage to the environment the burden of proof will be on developer/industrialist to show that his action is environmentally benign. "Polluter Pays Principle" was also defined by the Supreme Court as "the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation".

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11 AIR 1985 SC 625.

12 AIR1987 SC1109.

13 AIR 1986 SC 180.

14 (1996) 3 SCC 212.

15 AIR 1996 SC 2715.

The Vellore Citizen case plays a major role in the growth on Environment law in India. The ratio of Vellore citizen case was applied to many subsequent cases.[16]

If anybody ponders about the problems which are faced by the Indian society, the first and foremost issue which plagues our nation is poverty. Poverty has one of the widest interpretation of any of the terms coined to explain social situations, ranging widely from society to society, and generation to generation. Poverty needs to be understood by taking a broad spectrum view of the concept and understand how poverty in itself in wide and complex.

In layman's terms, Poverty is the inability of a person to acquire and consume the bare minimum necessities required to survive. This definition is the simplest definition that can be given by anyone to explain the concept of poverty. Poverty, is the situation in a human's life where he or she having or not having the capabilities to perform tasks and be productive finds themselves helpless and fail to find opportunities to fulfil the basic requirements which enable the person to grow, be healthy and survive.

Every human being depends on natural resources to live a life, and thereby the procurement of the resources is done by performing activities which lead to earning of livelihood for the purchase of those resources. Poverty restricts the person's ability to purchase these resources and therefore they are bereft of the requirements of a healthy human life. Due to poverty, the retrograde practices which are discontinued by the population which affords to utilise their resources in a sustainable manner, the activities of the poor remain restricted to an unclean and ineffective utilisation of these resources which adds pollution to the severely polluted environment affected by rampant industrialization.[17] The best example of this aspect of the relationship of poverty and environmental degradation is the burning of biomass as a substitute of refined fuel causes massive amounts of air pollution and causes rapid deterioration of air quality in the environment. The poor's inability to purchase the refined fuels limits their consumption to the unrefined fuels such as biomass and kerosene which in turn causes them serious health problems which restricts their ability to live a healthy life. Therefore, the situation of poverty causes the environment more damage than any other aspect of human society today as the practices which have been refined to push back the problem of industrial pollution hits a wall when a majority of the population of

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16 *M.C. Mehta v. Kamal Nath,* (1997) 1 SCC 388; *S. Jagannath v. Union of India,* (1997) 2 SCC 87; *M.C. Mehta (Taj Trapezium Matter) v. Union of India,* (1997) 2 SCC 353; *M.C. Mehta (Calcutta 15 Tanneries' Matter) v. Union of India,* (1997) 2 SCC 411.

17 Evans, Peter B. *Livable Cities?: Urban Struggles for Livelihood and Sustainability.* University of California Press, 2002.

the word lives on less than 1$ a day, still performs retrograde activities causing more damage than can be subverted, leads to the constant deterioration of the environment not finding any stop gap.

The other major problem India faces is population. India being the second most populous state has a population of 1.21 billion according to the 2011 census[18]. Population directly affects the health and quality of life especially of women and children in particular by exe .ing pressure on natural resources which causes environmental degradation and also reduces food availability. Population growth affects the environmental quality, which is measured by ambient concentrations of air pollutants and per capita income. Family planning programmes should be promoted and families and individuals should be made aware of it and other services and information needed to make informed choices about reproductive health.

Environment degradation has serious consequences on all human beings but it particularly affects women and children as they are the most vulnerable who constitutes the majority of world's poor. Gender roles create differences in the way men and women interact with the environment. Gender equality is not only a human right but is also essential for achieving sustainable security. Women play a very important role in management and preservation of biodiversity, land, water and other natural resources. Sustainable development strategies should focus on role of women as agent of change in relation to mitigation and adaption to the changing environment. Women should be made aware about their rights and important role they have in the society and gender-sensitive approaches and solutions should be taken out to minimise consumption of natural resources.[19]

After analysing the international as well as national stage on the topic of environmental sustainability and social dynamics, we can conclude that the role of human society with respect to the environment is not of any owner, but a guardian and protector. We as the intelligent species of this planet, must understand the strength in unity and cooperation, the global organisations which strive to do the same promote integrity of every man, woman and child across boundaries and that they have the right to live life to the fullest and that can be only achieved when there is the presence of a clean and healthy environment. We must respect our environment and take every little chance we get to do something

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18 *http://www.censusindia.gov.in/2011census/PCA/A-2_Data_Tables/00%20A%202-India.pdf* (Census 2011).

19 Organization for Security and Co-operation in Europe: *"Gender and Environment"*, 2009.

to better it. Only society can instil such values in its members and hence, it is pertinent that we understand we are nowhere above the environment, we are a part of it. We must feel the same with fellow beings as well that they are as equally a part of this huge ecology, and are to be treated with equal respect. T protect the environment should always be the foremost thought of every action and strive to create a system of development which pushes towards sustainability, so that the environment prospers and we prosper with the help of that progress.

EXISTENCE OF CHILD LABOUR IN THE 21ST CENTURY AND HUMAN RIGHTS: INTERNATIONAL PERSPECTIVE AND LEGAL IMPLICATIONS

Dr. Babita Devi Pathania*

Sonu Sharma **

1.1 Introduction

Children are the greatest gift to humanity. They are the potential human resources for the progress of any society. Every nation links its future with status of child and neglecting children would result in a loss to the society as a whole. Child labour is one of the worst forms of violation of human rights. Child labour exploits children physically, morally, economically, and blocks their access to education.[1] The problem of child labourers over the years has assumed international dimension. Recognized for long as a social evil, the practice of child labour for economic gain existed in nearly all countries at some time or the other.[2] The Universal Declaration of Human Rights (1948), which has been widely acclaimed as Magna-Carta of human kind, and has acquired the attributes of jus cogens constitute, the heart of the global bill of rights. Article 3 of the Universal Declaration of Human Rights has envisaged that all human beings are born free and equal in dignity and rights and that everyone has the right of life, liberty and security. The Declaration also contains the economic, social and cultural rights, such as right to work, social security, education, adequate standard of living, better working conditions for every man, woman and child worker too.[3] United Nations Children's Fund explains that Human rights apply to all groups; children have the same general human rights as adults. But children are particularly vulnerable and so they also have particular rights that recognize their special need for protection.[4]

On November 1989, the United Nations General Assembly adopted a Convention on the Rights of the Child (CRC). This became the international standard to measure states compliance with international law and the protection of children. India ratified CRC on December 2, 1992. This ratification implies that India will ensure wide awareness

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1 Nuzhat Parveen Khan, *Child Rights and the Law*, at 115 (Universal Law Publishing company New Delhi, 2013).

2 N.P Patro, "Child Labour in the Global Era-A New Perspective", quoted in Dr. R.N. Misra (ed.), *Problems of Child Labour in India, at 1* (Commonwealth Publishers, New Delhi, 1st edn., 2004).

3 B.D.Rawat, "Human Rights And Child Labour : An Appraisal of Legislative Trends and Judicial Response in India", *Journal of Legal Studies*, Vol. 29, at 46(1998).

4 Available at: *http://www.unicef.org/crc/index_protecting.html* (Accessed on 11 June 2014)

about issues relating to children among government agencies, implementing agencies, the media, the judiciary, the public and the children themselves. The Government's endeavor is to meet the goals of the Convention and to amend all legislation, policies and schemes to meet the standards set in the Convention. But even after years of this ratification millions of children in India are living a barren life with no hopes and no identities.[5] India employs the largest number of children in the world. Every third household in India is said to have a child worker. Children are employed both in organized and unorganized sectors of the economy. Most inhuman conditions exist in match factories, firework factories and private mines. Children, barely five years of age, work in these factories for sixteen hours a day, starting as early as three in the morning.[6] The existence and perpetuation of child labour is a blot on the conscience of modern day civilized society.[7]

2.1 Conceptualizing Child Labour

The complex nature of the concept of 'child labour' as it involves differing interpretations of 'child' and 'labour' and further 'work' and 'labour', makes it difficult to have a consensually validated definition of 'child labour' both in national and international context. Some agencies, organizations and countries, however, use the term child labour and child work interchangeably.[8] The worldwide concern with child labour has resulted in two major international conventions on children, which set age limits for childhood and entry into work.[9] The Indian Constitution also has set the age limit for children.[10] However, it is to be noted that perceptions of childhood differs in different countries and societies. In many societies childhood does not end when a child attains a certain age, but entrance into adulthood is a gradual process, or is based on criteria other than age. Thus, the two main approaches to defining child labour are (i) any labour force activity by children below a stipulated minimum age; and (ii) any work economic or not –that is injurious to the health, safety and development of children. De La Luz Silva defines a child as "someone who needs adult protection for

5 Ravinder Kaur Pasricha, "Violation Of Child Rights And Victimization Of Child Labourers Working In Restaurants & Dhabas", *The Indian Journal of Criminology & Criminalistics*, Vol. XXVIII, at 55 (2007).

6 S.N. Jain, "Child Labour", *The Journal of Indian Law Institute*, Vol. 23, at 338 (1981).

7 Tapan Kumar Shandiliya , Nayan kumar and Navin kumar, *Child Labour Eradication: Problems, Awareness Measures,*at 83(Deep and Deep Publications Pvt. Ltd.,New Delhi, 2006).

8 Thomas Paul, "Child Labour-Prohibition *v.* Abolition: Untangling the Constitutional Tangle", *Journal of Indian Law Institute*, Vol.50, at 145 (2008).

9 ILO, Minimum Age Convention, 1973 (No. 138, Art. 3); and UN Convention on the rights of the Child, 1989, Arts. 1 and 32.

10 Article 24 of The Constitution of India provides that no child below the age of 14 years shall be allowed to work in a factory, a mine or in any hazardous employment.

physical, psychological and intellectual development until able to independently integrate into the adult world".[11]

When the business of wage earning or of participation in self or family support conflicts directly or indirectly with the business of growth and education, the result is child labour . The function of work in childhood is primarily developmental and not economic. Children's work, then, as a social good, is the direct, antithesis of child labour as a social evil.

The United Nations Convention on the Rights of the Child, 1989, defines perception of what constitutes child work. The term child under Article 1, "as every human being below the age of eighteen years unless, the law applicable to the child, majority is attained earlier".[12] Kulshresthais of the view that "child labour in a restricted sense means the employment of child in gainful occupations which are dangerous to their health and deny them the opportunities of development.[13] The word child and an adolescent used in different labour laws have created confusion. Section 2 (b) of the *Factories Act*, 1948 defines adolescent, as a person who has completed the age of 15 years but has not completed 18 years. Same definition has been given in 2 (a) of the *Motor Transport Workers Act*, 1961 while no definition of adolescent has been given in *Beedi Workers (Conditions of Employment) Act*, 1966. A child as defined in different Acts, as discussed above means a person who has not completed 15 years. This demarcation between the children and the adolescent creates more confusion instead of distinguishing these two terms and clarifying them. It is suggested that the term "Adolescent" should be abolished and a minimum age should be laid down for the employment of children for the sake of uniformity. It is further suggested that the minimum age for employment of children should be fixed as 15 years and this should be strictly adhered to irrespective of any consideration.

3.1 Magnitude of the Problem:

Despite vigorous campaign and efforts to eliminate child labour , a 2013 report of the International Labour Organisation (ILO) estimates that there are still about 168 millions child labourers in the world , accounting for almost 11 percent of the total child population.[14] About half of these child labourers (approximately 85 million) are engaged 'in hazardous work that directly endangers their health,

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11 Jerry Rodger and Guy Standing , *Child Work, Poverty and Underdevelopment,* at 7 (1981).

12 The United Nations Convention on the Rights of the Child, 1989, Article 1.

13 J.C. Kulshrestha, *Child Labour in India*, at 2 (Asia Publishing House, New Delhi, 1978).

14 International Labour Office, Marking Progress against Child Labour: Global Estimates and trends 2002-2012 (Geneva: ILO, 2013). Available at: *http:// www.ilo.org/wcmsp5/groups/public/-ed-norm/-ipec/documents/ publication/ wcms_221513.pdf* (Visited on June 16, 2014).

safety and moral development'.[15] Since most of the children work in agriculture, services and industry sectors,[16] the role of non- state actors- such as farmers, families and businesses- becoming critical in dealing with the problem of child labour. United Nations International Children's Emergency Fund report, 2011, estimated that in India, 28 million children between the ages of five and 14 were engaged in child labor.[17] There are approximately 12 lakhs children working in the hazardous occupations/processes which are covered under the *Child Labour (Prohibition & Regulation) Act* i.e. 18 occupations and 65 processes. However, as per survey conducted by National Sample Survey Organisation (NSSO) in 2004-05, the number of working children is estimated as 90.75 lakh.[18] This phenomenon is prevalent throughout India cutting across different sectors of the economy.[19]

4.1 Human Rights and Child Labour

The issue of child labour is a major human rights issue and at the same time it is highly emotive one, these emotions tend to be coupled with very strong views both on what the child labour problem is and on what ought to be done for its elimination.[20] Human rights are rights which are possessed by all human beings irrespective of their race, caste, nationality, sex, language etc. simply because they are human beings. As pointed out by Fawcett, human rights are sometimes called fundamental rights or basic rights or natural rights. As Fundamental or basic rights they are those which must not be taken away by any legislature or any act of government and which are often set out in a Constitution.[21] Human rights are legally guaranteed by human rights law, protecting individuals and groups against actions that interfere with fundamental freedoms and human dignity. They are expressed in treaties, customary international law, bodies of principles and other sources of law. Human rights law places an obligation on States to act in a particular way and prohibits States from engaging in specified activities. However, the law does not establish human rights. Human rights are

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15 *Id.*, at p 3.

16 *Id.*, at pp. 7-8.

17 Available at: *http://digitaljournal.com/news/world/child-labour-in-india-hidden-shame-or-necessity /article/368942* (Accessed on 11 June 2014)

18 Available at:*http://labour.nic.in/content/division/child-labour.php (*Accessed on 6 June 2014).

19 Dr. Basant Kumar Bahera, "Child Labour: An Indian Perspective", quoted in Dr. R.N. Misra (ed.), *Problems of Child Labour in India*, at 102 (Commonwealth Publishers, New Delhi, 1st edn., 2004).

20 *Supra* note 7 at p. 82.

21 S.K. Kapoor, International Law and Human Rights, at 56 (Central Law Agency, Allahabad, 14th edn., 2008).

inherent entitlements which come to every person as a consequence of being human.[22] Child labour is a crime against humanity, it is an inhuman practice that stunts the physical and mental growth and stifles the free roaming spirit of the child and simply goes against nature. Worse still the victims are too young to even comprehend that they are being exploited. It is among the most serious social issues facing the world today and also among the most complicated.[23] Although it is said in general terms that physical labour has a tremendous impact on the growth of the child, the socio- psychological studies have portrayed the real magnitude of the problem. Labour has its impact on the physical development, general health condition and morality of a child. Physical labour and consequent work pressure make the child both weak and timid. These hinder the educational or intellectual development of a child Therefore, physical labour as a long lasting veil impact on the overall development of the children.[24] Although the Constitution of India guarantees free and compulsory education to children between the age of 6 to 14 and prohibits employment of children younger than 14 in hazardous occupations as provided in the Schedule of the *Child Labour (Prohibition and Regulation) Act*, 1986[25]. Child labor is still prevalent in the informal sectors of the Indian economy.[26] Child labour violates human rights, and is in contravention of the International Labor Organization (Article 32, Convention Rights of the Child). Child labour is a violation of fundamental human rights and has been shown to hinder children's development, potentially leading to lifelong physical or psychological damage.[27]

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22 Available at : *http://www.un.org/en/globalissues/briefingpapers/humanrights/index.shtml* (Accessed on 1st February 2015)

23 Available at: *http://www.answers.com/Q/Write_an_essay_on_child_labour* (Accessed on 1st Febreuary 2015)

24 Tapan Kumar Shandilya and Shakeel Ahmad Khan , *Child Labour: A Global Challenge,* at 14 (Deep and Deep Publication Pvt. LTD., New Delhi, 2006).

25 Hazardous occupation means any occupation connected with (1) Transport of passengers, goods or mails by railway;(2) Cinder picking, clearing of an ash pit or building operation in the railway premises;(3) Work in a catering establishment at a railway station, involving the movement of a vendor or any other employee of the establishment from one platform to another or into or out of a moving train;(4) Work relating to the construction of a railway station or with any other work where such work is done in close proximity to or between the railway lines;(5) A port authority within the limits of any port.(6) Work relating to selling of crackers and fireworks in shops with temporary licences. (7) Abattoirs/slaughter Houses.

26 Available at : *http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3425238* (Accessed on 30th January 2015).

27 Available at: *http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/child-labour/lang--it/index.htm.* (Accessed on 1 February 2015)

5.1 International Instruments on Child Labour and Human Rights

The problem of child labour is not only recognized in India but all over the world. The League of Nations in 1924 adopted Geneva Convention on the Rights of Chil stating that "measures should be taken against social evils of slavery, child labou and trafficking and prostitution of minors." In 1959 the United Nations unanimously adopted resolution on the rights of the child and reaffirmed its faith in fundamental human rights and the dignity and the worth of the human beings.[28] Article 25 of the Universal Declaration on Human Rights adopted in 1948 had proclaimed that childhood was entitled to special care and assistance. The United Nations Convention on the Rights of the child adopted in 1989 proclaims in Article 6 that every child has the inherent right to life and that the state parties shall ensure to the maximum extent possible the survival and development of the child. Again in Article 32 of the Convention mandates the state parties to recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.[29] U.N. General Assembly's special session on the "Rights of the Child" held from 8th to 10th2002 has underscored the need to review Indian legislation to bring about uniformity in definition of a child with regard to age.[30] Every year, the world community celebrates June 12 as the Anti-Child Labour day. With the establishment of I.L.O. efforts have been made to evolve legal standards on various Labour issues including child Labour. Some of the important International Instruments include:

- Adoption of minimum Age (Industry) Convention (No. 5) 1919.
- Adoption of First Forced Labour Convention (No. 29) 1930.
- Adoption of Minimum Age Convention (No. 138) 1973.
- Adoption of U.N. Convention on Rights of the Child 1989.
- Establishment of the International Programme on Elimination of Child Labour (PEC) 1992.
- Stockholm Declaration and Agenda for Action 1996.
- Adoption of Declaration on Fundamental Principles and Rights at Work 1998.
- Adoption of Worst Forms of Child Labour Convention (No. 182) 1999.
- Adoption of 12 June as World Day Against Child Labour 2002

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28 *Supra* note 1 at p. 122.

29 Thomas Paul, "Child Labour-Prohibition *v.* Abolition: Untangling the Constitutional Tangle", *Journal of Indian Law Institute*, Vol. 50, at 143 (2008).

30 R.P. Sarma, "Child Labour in Fishing Community", quoted in Dr. R.N. Misra (ed.), *Problems of Child Labour in India*, at 94 (Commonwealth Publishers, New Delhi, 1st edn., 2004).

India has ratified four International Conventions. These are; Minimum Age (Industry) Convention, 1929, which lays down the minimum age of twelve years for child, labour; Trimmers and Stockers Convention, 1921 under which minimum age of sixteen years is fixed; Medical Examination of young Persons (sea) Convention, 1921, minimum age fixed under that is eighteen years and Night Work Young Persons (Industry) Convention 1948 under which it is being provided that no night work for twelve hours for persons below seventeen years.[31] India become a member to the Convention on Right of the Child in 1993 and fully subscribed to the objectives and purpose of the convention realizing the rights of the child. However declared that, "those pertaining to the economic, social and cultural rights (of the children) can only progressively implemented subject to the extent of available resources and within the framework of international co-operation. Keeping in view the gigantic problem of child labour, Government of India had ratified ILO Conventions concerning working children and enacted appropriate laws for protecting them from economic exploitation and from performing any work that is, in a way, likely to be hazardous or harmful to their health or physical, mental, spiritual, moral or social development.

6.1 Constitutional Mandates on Child Labour in Pursuits of Human Rights

The very preamble of the Constitution of India stands as a testimony to witness the presence of philosophy of socio economic and political justice under our national charter. In order to achieve goal of social, economic and political justice, the Constitution of India guarantees special protection to the children against exploitation. To impart justice to them, the state has been empowered to make special provisions to their welfare so as to bring them at par with other sections of the society. There are various provisions in the Constitution which put the state under duty to ensure that the tender age of children is not abused and they are not exposed to economic necessity to enter avocation unsuited to their age and strength. Article 15(3) of the Indian Constitution empowers the state to make special provisions for women and children.[32] Since independence, there are several laws and regulations prohibiting employment below a certain age and providing protection for working children.[33] According to Article 24 of the Constitution of India - "No child below the age of 14 years shall be employed in work in any factory or mine or engaged in any other hazardous employment." Similarly, Article 39(e) of the Constitution of India

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31 Devinder Singh, *Child Labour & Right to Education*, at p. 33 (2013).

32 L.B. Punecha, *Child Labour: A social Evil*, at 60 (Alfa Publication, New Delhi,2006).

33 Ashok Narayan, "Child labour policies and Programmes: The Indian Experience", quoted in Assefa Bequele and Jo Boyden (eds.),*Combating Child Labour , at* 145 (International Labour office , Geneva, 1988).

clearly says that "The State shall, in particular, direct its policy towards securing 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 and strength[34], Article 39(f) of the Constitutio states that the 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.[35]"

7.1 Legislative Measures for Child Labour in India

Child labour in India has received considerable attention in the recent years from social scientists, social activists, Government and voluntary organizations.[36] There are a number of enactments in the country which protect and safeguard the interests of the child labour. The employment of children below 14 years of age has been prohibited under: (i) The *Children (Pledging Labour) Act*, 1933, (ii) The ***Factories Act,*** 1948, (iii) The *Mines Act*, 1952, (iii) The ***Motor Transport Workers Act***, 1961; and (v) The *Bidi and Cigar Workers (Conditions of Employment) Act*, 1966. The ***Plantation Labour Act***, 1951 prohibits child labour during night, i.e. from 7.00 P.M. to 6.00 A.M. Children are, however, permitted to work in plantations only where certificate of fitness is granted by a certifying surgeon.[37] The ***Child Labour (Prohibition and Regulation) Act***, 1986 is the central piece of legislation dealing with child labour. The Act Provides that no child (i.e., any person below fourteen years of age)[38] shall be 'employed or permitted to work' in certain occupations and processes specified in the schedule'.[39] Any contravention of this provision is made a punishable offence,[40] and a more severe punishment is prescribed for repeat offences. It also regulates the working hours and bans night work.[41] The government is empowered to appoint inspectors to carry out inspections and ensure compliance with the

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34 The Constitution of India, Article 39(e).

35 *Id.*, Article 39(f).

36 B.D. Rawat, "Human Rights And Child Labour : An Appraisal of Legislative Trends and Judicial Response in India", *Journal of Legal Studies*, Vol. 29, at 43 (1998).

37 *The Plantation Labour Act*, 1951, Ss. 25 and 27.

38 *The Child Labour (Prohibition and Regulation) Act*, 1986 (Act 61 of 1986), S. 2(ii).

39 *Id.*, S. 3.

40 *Id.*, S. 14. The Punishment is imprisonment for a term which shall not be less than three months but which may extend to one year, or a fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees, or both.

41 Section 7 of The *Child Labour (Prohibition and Regulation Act),* 1986.

provisions of the Act.[42] Any person, police officer or inspector can file a case against any employers for this offence. The Act also establishes a Child Labour Technical Committee, on the advice of which the government could add occupations and processes to the schedule.[43] The list of the occupations and processes has been extended over the years by the government. For example, the employment of children as domestic workers or in dhabas (roadside eateries), restaurants, tea shops, and hotels was prohibited by the government in 2006.[44] In 2008, more processes – such as process involving excessive heat and cold, food processing, beverage industry, timber handling and loading, warehousing, and processes involving exposure to free silica such as slate, pencil industry , stone grinding, slate stone mining, stone quarries as well as the agate industry – were added to the list of prohibited occupations and processes.[45] Most recently 'circus' and 'caring of elephants' were added to the prohibited occupations in 2010.[46] In December 2012, the Indian government introduced a bill in the parliament to amend the 1986 Act.[47] The bill was referred to the standing committee on Labour of the Ministry of Labour and Employment Considering, which submitted its report in December 2013. The bill has not yet passed.

Numerous Supreme Court Judgments during the period 1986-1997generated a renewed interest in child labour issues in India. A number of NGOs and social action groups emerged like Child Relief and You (CRY) and others to pressurize the Government to fulfill the constitutional mandates of abolition of Child Labour and provision for compulsory and free education of children.[48]

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42 *Id.*, S. 17.

43 *Id.*, S. 5.

44 ILO, '*Amendment to the Child Labour (Prohibition and Regulation) Act*'. Available at: *http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang==en&p_isn=74553* (Accessed on February 13, 2015).

45 ILO, 'National Legislation and Policies Against Child Labour in India'. Available at: *http://www.ilo.org/legacy/english/regions/asro/newdelhi/ipec/responses/india/national.htm* (Accessed on June 12, 2014).

46 ILO, Ministry of Labour and Employment Notification No. S.O. 2469(E) amending the Schedule to the *Child Labour and (Prohibition and Regulation) Act* 1986 (No.61 of 1986)'. Available at : *http://www.ilo.org/dyn/natlex/natlex-browse.details?p_lang=en&p-isn=93653* (accessed on June 12,2014).

47 *The Child Labour (Prohibition and Regulation) Amendment Act*, 2012, Bill No. LXII of 2012 . Available at: *http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=IND&p_classification=04&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY* (Accessed on February 14, 2015).

48 Veer Singh, "Child Labour in India: The Genesis and the Prognosis", *NALSAR Law Review,* Vol. 5, at 7 (2010).

The PUDR case , while dealing with the mandate of Article 24 of the Constitution and ILO Convention No. 59 opined that 'no child below 14 years can be engaged in construction work even if there is no legislation banning construction work '. For the court, construction was squarely within the ambit of hazardous employment.[49] Furthermore, in Salal case, the court reiterated the position of education being essential for children of construction workers living near or at the work site.[50]

The Supreme Court in numerous cases observed that all laws on Child Labour including the constitutional mandates have been violated with impunity and state system has failed to do its duty in enforcement of these laws. One of the important Judgment[51] where the Supreme Court directed that:

(1) Offending employer must be asked to pay Rs.20,000/- as compensation to every child employed in violation of *CLPR Act* 1986.
(2) A Child Labour Rehabilitation-Cum-Welfare Fund was to be established in every district.
(3) Employer should be asked to recruit any adult suggested by parents of children who are removed from work.
(4) Where alternate employment could not be made available, parents of the child concerned would be paid Rs. 25,000/- from the corpus provided the parent sent the child to school.

India formulated a National Policy on Child Labour in 1987. The National Policy on Child Labour (NPCL) 1987 suggests a gradual and sequential approach to:

- Eliminate Child Labour Bondage in all its forms
- Completely prohibit employment of children in ever expanding list of hazardous occupations.
- Implement various Poverty alleviation and employment generation programmes and schemes.
- Provide for rehabilitation of Child workers Provide for their free and compulsory education.

Some of the poverty alleviation Schemes launched already includes Nehru Rozgar Yogna (1989), Integrated Rural Development Programme (IRDP) (1978). In recent

49 People's Union for Democratic Rights V. Union of India, AIR 1982 SC 1480 (a markedly 'intriguing' area of the judgement was the court saying that education for the children of construction workers was the responsibility of the appropriate Government).

50 Salal Hydro Project *v.* State of Jammu and Kashmir and others, AIR 1984 SC 177 (the judgement was rather qualified unto the fact that it related to cases wherein the directive was to the Central Government in cases of long construction projects started by the Government).

51 *M.C. Mehta v. State of Tamil Nadu*, AIR 1997 SC 699.

years, Government has played a very pro-active role towards the final goal of elimination of Child Labour in India. The National Rural Employment Guarantee Scheme (NREGA) launched in 2005 has been a rare success in some of the States. It has secured minimum of one hundred days of paid work to the rural unemployed poor. This has a considerable impact in checking migration of poor workers to other areas in search of work and livelihood. Consequently, their children have fair chance of stable and uninterrupted schooling. Their Children now are less prone to labour bondage, exploitation a Child workers on account of extreme poverty.

Another powerful legislative response for abolition of Child Labour in India is the recent enactment of The *Right of Children to Free and Compulsory Education Act* 2009. Another major initiative in the direction of abolition of Child Labour through alleviation of extreme poverty The *National Food Security Act*, 2013 for all families below the Poverty Line (BPL). Inspite of improval legislations like *Child Labour Act* 1986 and National Policy on Labour and other action programmes for welfare of children the incidence of child labour has not come down significantly. In spite of various laws and policies regarding child rights, the condition of children still remains deplorable in our country. One of the biggest reasons for this is that all the laws and policies work independent of each other. Under our legal system, on the one hand free and compulsory education is a fundamental right under Article 21-A of the Constitution, and on the other hand, child labour under the *Child Labour (Prohibition and Regulation) Act*, 1986. This shows the contrast in governmental policy and goals itself.[52]

8.1 Conclusion

Child labour is one of the worst forms of violation of human rights. This pernicious practice, wherever it is practised, is regarded as a moral outrage, an affront to human dignity, a denial of the joy of childhood and access to social opportunities particularly education which eventually impair the personality and creativity of the inheritors of the future. The issue of human rights and child labour is of utmost importance and has attracted considerable international and media attention. Several governmental, non- governmental and international agencies have attempted to highlight the plight of child labourers and the deprivation of their human rights. Exploitative child labour is seen as a major social problem of the twenty first century world trade due to globalization and multinational corporations. Thus, the moral responsibility is imposed on the international and national bodies to curtail the evils of child labour. The National laws are deficient as compared to international

[52] Nuzhat Parveen Khan, *Child Rights and the Law*, at 124 (Universal Law Publishing Company New Delhi, 2013).

standards as laid down by I.L.O. some of the reasons for this are economic backwardness necessitating a family to seek employment for children, lack of educational facilities and unorganized nature of some of the economic sectors and small size of manufacturing units making enforcement of laws difficult. Thus for employment of children, the various ages prescribed for different occupations are lower than the I.L.O. standards. We do not have any law for agriculture labour. Smaller factories employing workers below a certain minimum number are left uncovered by law. *Child Labour Act* was enacted in 1986 has been in operation from last 28 years and being a social legislation need to revisited on account of the societal changes having occurred since then. The existing legislation should be amended to include child labour in unorganized sector and agriculture sector specifically. Need is that the Act should be amended in accordance of *RTE Act*, 2009, which says children between 6 to 14 must be in school. Child Labour Act should be amended to ban all work for those under 14 years. Law alone is not an end to eliminate child labour unless there is social transformation and people employing child labour feel ashamed. People have to be sensitized towards the children irrespective of their cast, creed, colour, sex or religion. It is possible only with the combined efforts of Government and Society.

GOVERNMENT OF INDIA ACT, 1858

Devarsh Saraf*

1.1 Introduction

On 2nd August 1858, the English Parliament passed the *Government of India Act*,[1] (Hereinafter referred to as "the Act") formally taking the reigns of India from the East India Company, which had by that time come to be seen by many as a shell company.[2] The long title of the Act is, "An Act for the better Government of India".[3] The East India Company's powers were slowly transferred to the Crown,[4] and the revolt of 1857 catalyzed this transfer,[5] which was made official via the Act.[6]

The revolt of 1857 caught the British unaware and unprepared.[7] India was an important colony of Great Britain at that time.[8] An important reason the British were unwilling to forsake India was that it was a colony that did not require subsidization, due to adequate revenue from the land tax.[9] Lawrence Jones speaks of a retired Indian officer who said that without India, Great Britain would reduce to nothing more than a "third-rate state".[10] This British dependence of India led to the promulgation of the Act and consequently Queen Victoria's proclamation of 1st November 1858.[11] This proclamation, marketed as India's Magna Carta,[12] served as

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1 *Government of India Act*, 1858 (21 & 22 Vict. c. 106).

2 Barbara D. Metcalf and Thomas R. Metcalf, *A concise history of modern India* (New York: Cambridge 2006), 103.

3 *Supra* note 1.

4 *Government of India Act*, 1853 (16 & 17 Vict. c. 95).

5 Saul David, *The Indian Mutiny: 1857* (London: Penguin 2003).

6 *Supra* note 1.

7 Belkacem Belmekki, *The wind of change: The new British colonial policy in post-revolt India, Journal of the Spanish Association of Anglo-American Studies* 30.2 (2008): 111–124.

8 *Ibid.*

9 Lawrence James, *Raj: The Making and Unmaking of British India* (Hachette UK, 2010).

10 *Ibid.*

11 *Indian History* (Allied Publishers, n.d.).

12 Miles Taylor, *Queen Victoria and India,* 1837-61, *Victorian Studies* 46, no. 2 (2004): 264–74.

an announcement to the people of India and the native princes of the Queen's assumption of the governance of India.[13]

The Indian nationalist perspective is that the revolt was the first war of independence.[14] This is due in large part the nationalist aspirations that the historians in the years just after 1947 wanted to establish.[15] In reality, South India, Punjab and Bengal were relatively dormant during this revolt, with Delhi and Meerut being hotspots.[16] Religion was a driving factor in the revolt, with a large number of sepoys[17] rebelling due to the fear that the British would enforce Christianity upon them.[18]

The rebellion of 1857 was a one of a kind uprisal in colonial India. The passing of the *Government of India Act* 1858 led to the development of civil institutions. All further agitations occurred in a civil manner within the framework of these civil institutions. In this manner, the Act changed the way a nation demanded freedom.

2.1 Methodology

This paper aims to provide a context-sensitive portrayal of the Act. To achieve this, a two-layered method of analyzing the Act is used, and this paper has been structured along the same lines. The first layer consists of analyzing the Act for its contents without looking at external factors. The second layer consists of placing the Act in the relevant context and then analyzing it. This two-layered analysis would give the reader two different perspectives vis-à-vis the Act. This paper does not seek to provide a final judgment of the Act but seeks to provoke informed thought and leaves the reader to form his or her own opinion.

The paper begins with an introduction to the Act to familiarize the reader with the subject matter of this paper. The Act is then analyzed thoroughly using the two-tiered method as explained above. The paper concludes with a summary of the main arguments and the conclusions reached from them.

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13 Hermann Kulke and Dietmar Rothermund, "A History of India," October 28, 2010, *http://cw.routledge.com/textbooks/9780415485432/48.asp*.

14 Ashok Nath, *1857-War of Independence, Mutiny or What? Problems of Interpretation*, *Militärhistorisk Tidskrift*, (2008), ISSN 0283-8400.

15 Biswamoy Pati, "Historians and Historiography: Situating 1857," *Economic and Political Weekly* 42, no. 19 (2007): 1686–91.

16 Bipan Chandra, *India's Struggle for Independence, 1857-1947* (Penguin Books India, 1989) 31.

17 The word sepoy is actually a derivation of the Indian word ***sipahi***, which means a soldier. *See* Abram Smythe Palmer, *Folk-Etymology: A Dictionary of Verbal Corruptions Or Words Perverted in Form Or Meaning, by False Derivation Or Mistaken Analogy* (G. Bell and Sons, 1882) 347.

18 *Id.*, at p. 33.

3.1 Analysis

The passing of the *Government of India Act* 1858 constituted a landmark in India's pre-independence history.[19] Passed in the wake of a violent revolt, the legislation completed the transfer of power, which had commenced a few decades previously, from the East India Company to the Crown.[20] The British, harboring a civil society with civil institutions, responded to the revolt in a manner, which civil society would approve.[21] These responses ultimately lead to the promulgation of the Act and Queen Victoria's proclamation.[22]

British historians such as Abraham Williams strongly believed that British colonization of India caused the evolution of Indian society from ancient to modern.[23] English society, in general, believed the British were India's saviors, uniting and providing stability to territories, which were wrought with confusion caused by the decline of the Mughal Empire.[24] Undertones of this biased approach[25] can be seen throughout the Act,[26] which hides in plain sight evidence of several repressive measures and evils such as the Drain theory[27].

The revolt of 1857 sparked a debate in England on the merits of the system of governance prevalent in India at that point of time.[28] The Parliament of England in the course of these discussions decided that the "double government" system, as was the nomenclature attached to East India Company rule, was not in the interest of the welfare of the Indian people.[29] The English media also supported this view.[30] These

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19 Cyril Henry Philips, *The Evolution of India and Pakistan, 1858 to 1947: Select Documents* (Oxford University Press, 1962).

20 V. P. Menon, *Transfer of Power in India* (Orient Blackswan, 1957) 436.

21 Jose Harris, *Civil Society in British History: Ideas, Identities, Institutions* (OUP Oxford, 2005).

22 *Ibid.*

23 "India under the Crown - 1858-1907," *History of India* 8 (1907): 467.

24 *Ibid.*

25 The decline of the Mughals was to a large extent the product of the East India's Company insatiable desire for funds, which caused them to pursue tactics to subdue the mighty Mughals. *See* Thomas R. Metcalf, "A Clash of Cultures: Awadh, the British, and the Mughals. By Michael H. Fisher. Riverdale, Md.: Riverdale Co., 1987. X, 284 Pp.," *The Journal of Asian Studies* 48, no. 02 (May 1989): 422–23, doi:10.2307/2057448.

26 *Supra* note 1.

27 Ganguli, Birendranath N., and Dadabhai Naoroji. "the Drain Theory." *London, 1964 Ganguli Dadabhai Naoroji and the Drain Theory 1964* (1965).

28 Earl of Malmesbury, House of Lords Hansard, Victoria Year 21, February 4th 1858 658-715.

29 Parliamentary proceedings, House of Lords Hansard, Victoria Year 21, February 4th 1858.

two factors were driving forces behind the introduction of the Act by the then Prime Minister of Great Britain.[31] However, there was no corresponding debate on the deteriorating economic situation of the Indians, which can be construed from the fac' that the Act maintains status quo on most economic issues.[32]

The Act in its first few provisions makes way for the governance of India by the Crown by transferring power from the East India Company.[33] The second provision states that all revenues and tributes payable to the Crown from the territories under their control would be used for the Government of India alone.[34] However, in its 43rd provision[35], the Act states that a part of the revenues of India would be remitted to Great Britain from time to time. The ambiguity in the legislation gave the British a free run on the funds obtained from India. To add to the problems created by this ambiguity, there was a requirement of approval from neither the English Parliament nor any other authority, thereby making the Governor General similar to a dictator.

In this regard, the Act maintained the status quo regarding the amount of funds leaving India, with the only difference being that the recipient of such funds would be the Crown directly rather than the East India Company.[36] The effects of such contradictory provisions were magnified due to a government that owed its existence not to the people it governed, but to a power thousands of miles away.[37]

The difference between direct governance and colonialism is that in the former, the sovereign (whether a person or a group of people) has its source of power in the people of the nation itself, whereas in the latter, the sovereign gains authority from

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30 Don Randall, "AUTUMN 1857: THE MAKING OF THE INDIAN," *Victorian Literature and Culture* 31, no. 01 (March 2003): 3–17, doi:10.1017/S1060150303000019.

31 Patrick Tuck JN, *The East India Company, 1600-1858: Problems of Empire: Britain and India, 1757-1813*. Vol. 2. Taylor & Francis, 1998.

32 *Supra* note 1.

33 *Id.*,1 at §1-6.

34 *Id.*,1 at §2.

35 *Id.*, at § 43.

36 *Id.*,. It should be mentioned here, that the East India Company and its shareholders were also paid the dividends due to them for a few years beyond the passing of the Act.

37 Bernard S. Cohn, *Colonialism and Its Forms of Knowledge: The British in India* (Princeton University Press, 1996). *See also* the theory of reciprocity by J. Khehar in the recent NJAC judgment, although given in a different context in *Supreme Court v. Union of India* 16 October 2015, Writ Petition No. 13 of 2015.

the suppression of the people of the colonialized land.[38] In the case of the East India Company, a major tool to suppress the Indians was an army largely comprised of Indians themselves.[39] When the sepoys revolted in 1857, the British realized that it would have to strengthen the source of its authority in India. The 56th and 57th provision of the Act[40] were the foundations for several future measures affecting the Indian army. These provisions do not seem to be unjust at the outset, but they provide an absolute authority without any limitations, the shortcoming of which can be seen in the repressive measures implemented post the passing of the Act.[41]

The irony of the creation of a Council for India was that it added a layer of bureaucracy, therefore defeating the entire argument against "double government" that led to its formation in the first place.[42] Another important feature of this Council was that out of the total composition of fifteen members, the East India Company would get to appoint seven members to the first Council for India.[43] Since there was no expiration date on the tenure of the members, with it simply being said that the Queen, for "bad behavior", could remove a member, the East India Company would hold significant influence in the Council even after the transfer of power.[44] Further, after the first round of appointments, only people having resided in India for at least a period of ten years would be eligible for the post of a member. Although Directors and Officers of the East India Company were excluded, the Act did not exclude all people associated with the East India Company. Such people would be most likely to fulfill the eligibility criteria laid down in the Act. Further, the language of the Act vis-à-vis this eligibility criterion shows an apparent bias. The language "served in India" creates the impression of an Englishman having worked in India, rather than an India himself.

The Council of India formed vide the Act was democratic neither externally nor internally. The Act provided that the Governor-General would have a veto and the

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38 Gavin Rand, "'Martial Races' and 'Imperial Subjects': Violence and Governance in Colonial India, 1857–1914," *European Review of History: Revue Européenne D'histoire* 13, no. 1 (March 1, 2006): 1–20, doi:10.1080/13507480600586726.

39 Christopher Alan Bayly and C. A. Bayly, *Indian Society and the Making of the British Empire* (Cambridge University Press, 1990).

40 *Supra* note 1 at §56 and §57.

41 Seema Sohi, *Echoes of Mutiny: Race, Surveillance, and Indian Anticolonialism in North America* (Oxford University Press, 2014).

42 Kumkum Chatterjee, "History as Self-Representation: The Recasting of a Political Tradition in Late Eighteenth-Century Eastern India," *Modern Asian Studies* 32, no. 4 (1998): 913–48.

43 *Supra* note 1.

44 *Ibid.*

final word. This meant that the Council in itself was in actuality not a departure from the earlier system of governance.

The Act called for the formation of the Indian Civil Service (ICS). The members of the ICS were appointed under the 32nd provision of the Act.[45] Clive Dewey states that the members of the ICS, mostly British, were amongst the most influential people in the world.[46] This is because a small number of people ruled every aspect of hundreds of thousands of people's lives.[47] Jawaharlal Nehru critiqued the civil service by stating that it was neither Indian, civil nor a service.[48] The Act gave absolute authority to the British vis-à-vis laying down the eligibility criteria. Glad, having studied tyrants and absolute power, states that such absolute and limitless power makes for tyrants.[49]

The Act did not specify a requirement of equality amongst the British and Indians.[50] It instead created provisions for the appointment of Indians through a separate mechanism. Such deference given to the Indians was a method of official discrimination in which the assumption was that the Indians needed some help or special privileges since they were less-abled. Additionally, the appointment system made it possible for the British to control the type of Indians entering the service. They exploited the opportunity by deliberately involving religion and caste into appointments, thereby increasing the consciousness of the same.

James Bryce, writing in 1901, said that the European nations had brought under their control a large part of the barbarous and semi-civilized world.[51] He predicted that the ways of the Europeans would prevail while the native traditions of the colonized would be destroyed.[52] This prediction is based on the assumption that the Europeans would promote their lifestyle and traditions rather than adapting to the native ones.

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45 *Supra* note 1 § 32.

46 Clive Dewey, *Anglo-Indian Attitudes: Mind of the Indian Civil Service* (Bloomsbury Academic, 1993).

47 Xiao Wei Bond, "Civil Service," Text, accessed January 27, 2016, http://www.bl.uk/reshelp/findhelpregion/asia/india/indiaofficerecordsfamilyhistory/occupations/civilservice/civilservice.html.

48 Jawaharlal Nehru, *Glimpses of world history: being further letters to his daughter* (Lindsay Drummond Ltd., 1949) 94.

49 Betty Glad, "Why Tyrants Go Too Far: Malignant Narcissism and Absolute Power," *Political Psychology* 23, no. 1 (March 1, 2002): 1–2, doi:10.1111/0162-895X.00268.

50 *Supra* note 1.

51 Bryce, James. "The Roman Empire and the British Empire in India." *James BRYCE, Studies in History and Jurisprudence, I, Oxford University Press, New York* (1901): 1.

52 *Ibid.*

This can be seen in the Act. The entire Act is constructed to promote English methods of governance. An example of this would be the Council of India.

Apart from points mentioned earlier, the Act itself did not contain any provisions that would seem unjust or repressive. However, the Act remained silent on many issues it should have addressed and gave absolute power without any limitation vis-à-vis many areas. The Act contains detailed provisions on the duties of the Council of India, but it does not mention ny guidelines or restrictions that the Council had to adhere to. The absence of certain rights that should have been conferred upon the Indian subjects showcase the hypocrisy and double standards of the British Government.[53] While the technicalities of the Council were deliberated in great detail, the actual substance of legislation was left untouched.[54]

The absence of any substantive regulations made it possible for repressive measures such as the Arms Act and the Vernacular Press Act of 1878 to be passed, severely restricting the rights and freedoms of the Indian populace.[55] An alternate argument could be made stating that the purpose of the Act was simply to set-up a framework system to facilitate the better governance of the nation. This line of argumentation would support the Act by stating that the Council set-up was a more civilized set up promoting deliberation and a more direct form of government.

The supporters of the Act, however, dawn the garb of being naïve when they adopt the stance that they do. This is because even a procedurally sound set-up does not amount to better governance unless it produces legislation that does not violate the rights of its subjects.[56] The British set up a system in which the people who made the rules were had their self-interests and traditions in absolute contradiction to the one prevalent amongst the natives. The failure of this system to ensure British dominance, in the long run, led to the adoption of several other policies by the British. One of these policies was the "Divide and Rule" policy.[57]

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53 David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance," *South African Law Journal* 119 (2002): 501.

54 *Supra* note 28.

55 Gauri Viswanathan, *Masks of Conquest: Literary Study and British Rule in India* (Columbia University Press, 2014).

56 James Bohman and William Rehg, *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997).

57 A. J. Christopher, "'Divide and Rule': The Impress of British Separation Policies," *Area* 20, no. 3 (1988) pp. 233–40.

The British policy of "Divide and rule" can be seen in Queen Victoria's proclamation corresponding to the Act.[58] The Act begins with the British addressing the Princes and people separately. The policy of appeasement of the loyal princes and ruthless suppression of all rebels formed a divide amongst the different classes of people. Further, the British also created a division amongst the different religions present in India.[59] The Act did not provide against any such regressive policies, and facilitated the Governor General in implementing them by granting him absolute authority.

4.1 Conclusion

The *Government of India Act* 1858 was a landmark legislation, which officially brought in the period of British colonization of India. The Act signified that the British were accepting the direct responsibility of the Indian Government. The Act created steps through which there would be some form of Indian representation in the House of Commons to represent the Indian perspective. However, the Act created indirect rule rather than direct rule, leading to the creation of a tyrannical government in India. The Act also served as a huge drain on India's wealth, by facilitating the export of Indian wealth to England. The Act lacked in several substantive issues, such as rights and duties, which meant that there were no limitations on the policy makers. This lack of limitation was one of the main reasons for the passing of repressive measures and the implementation regressive policies by the British government.

The Act also developed India's civil institutions. This transformed the Indian populace and ensured that a violent uprising such as the one that occurred in 1857 was never repeated.

58 Richard Morrock, "Heritage of Strife: The Effects of Colonialist 'Divide and Rule' Strategy upon the Colonized Peoples," *Science & Society* 37, no. 2 (1973): 129–51.

59 Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India*, Princeton University Press, (2011).

SOCIO-ECONOMIC & POLITICAL STATUS OF INDIAN MUSLIMS

Eshaan Bansal*

Economists are divided as to whether the rapid economic growth, which India has experienced in the past more than a decade, has been accompanied by an equal measure in the growth of various human development indices or not? Whether the benefits of this growth has been equally distributed amongst various strata's of society or not? Whether Indian minorities, particularly the Muslims, who are amongst the most backward community on most economic indices have also benefitted from this growth or not? The last question becomes particularly important as India hosts second biggest Muslim population in the world next to Indonesia and socio-economic backwardness can become a major factor in their disenchantment, particularly of Muslim youth, exposing them to growing influence of radical elements who draw their fodder from such disenchantment in different sections of society. This paper thus tries to explore the socio economic growth of the minorities in India with specific reference to the largest minority group i.e. Indian Muslims.

1.1 Weak Economic Growth and Subsequent Alienation

On the aggregate, the study of various data, published as per the Census 2011 and by erstwhile Planning Commission, indicate that Indian Muslims have experienced very uneven and uncertain economic growth which can at the very best be described as below average. Muslims who constitute 14.2% of the Indian population according to the 2011 census, and form a major portion in the social fabric of the country are the most backward community with the lowest employment rate. According to the Planning Commission's (erstwhile) estimates, the poverty ratio for Muslims was 33.9% in urban areas, especially on account of states such as Uttar Pradesh, Gujarat, Bihar and West Bengal. The literacy rate and work participation rate amongst the Muslims is low as compared to other minority communities. The majority of them are engaged in traditional and low paying professions, or are mostly small and marginal farmers, landless agricultural labourers, small traders, craftsmen and so on. Only a few of them are reported to have benefited from various developmental schemes. The other Minority communities on the whole enjoy a comparatively better socio-economic status, although there are segments among the Christians and Buddhists, Mazhabi Sikhs and even sections of Zoroastrians/Parsis who are disadvantaged. An important concern vis-à-vis the Muslim community is the perception of discrimination and alienation which if no addressed properly can be

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catastrophic for India's national integration. In this brief background it would be useful to discuss the issue in detail on various disaggregate parameters starting with education, health, employment and political representation.

2.1 Educational, Health and Employment- Important Parameters

2.1.1 Education

> Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.
>
> Kofi Annan

Education as a means of empowerment is a powerful determinant for determining a nation's progress. The higher the level of education amongst the people of a country higher would be its ranking. All developed nations in the world boast of a strong human resource base which has very high level of education (E.g. Japan). A country like India which has such varied population, educational empowerment assumes extreme significance, especially in the context of minorities. Among religious minorities, it is the Muslims who have been seriously been lagging behind the rest and this has been dealt with extensively in the reports by Sachar Committee and the Ranganath Mishra Commission. The **Rajinder Sachar Committee**, appointed in 2005 by the then Indian Prime Minister Manmohan Singh, was commissioned to prepare a report on the latest social, economic and educational conditions of the Muslim community of India. The committee was headed by former Chief Justice of the Delhi High Court Rajinder Sachar and it submitted its report to the Indian Parliament on November 30, 2006. The report highlighted the backwardness and vulnerability of Indian Muslims by highlighting how their educational status was even below that of the Scheduled castes and Scheduled Tribes. Performance of minorities on some key parameters of assessment on the education front are discussed in detail below.

The literacy rate for Muslims was far below the national average as per 2001 census. This difference between the two rates was greater in urban areas than in the rural areas. The gap was greater for women too in the rural areas. The growth in literacy for Muslims when compared to the Scheduled Castes and Scheduled Tribes was lower than for the later. The female urban enrolment in literacy ratio for the Scheduled Castes/ Scheduled Tribes was 40 percent in the year 1965 that rose to 83 percent in 2001. For Muslims, the equivalent rate-- that was considerably higher in 1965 (52 percent) – recorded a figure of 80 percent, lower than the figure for the Scheduled Castes/ Scheduled Tribes. Similarly, among the Christians, Literacy Rate was 80.3% according to the census of 2001. The situation has not significantly improved for the Muslim minority in 2011 census which continues to be the most backward in the literacy rate at 62% which is way below the national average of

73%. Rest of the minorities have done very well on this count with Jains topping the literacy rate with a literacy rate of 94.9%.

Further analysis of census data indicated that there is a high rate of admission at primary levels which shows the intense desire of the minorities to seek modern education. Lower percentages at other levels show that minorities, especially the Muslims, start lagging behind from the secondary level onwards. This pointed towards the need for neighbor'ood schools and schools up to middle level in the minority concentrated blocks, large villages and urban minority concentrated settlements. In rural areas more schools for girls up to senior secondary level needs to be opened to ensure that girls continue their education.

The incidence of drop-outs is also high among Muslims in comparison to other minorities. The high dropout rate among the Muslim Community indicates the wastage of the school education and tends to undermine benefits of increased enrolments. The "Educational Statistics" published by the Ministry of Human Resource Development, during 1999-2000, indicated that out of students enrolled in classes I to V, more than 40 percent students dropped out. Out of students enrolled in classes I to VIII, over 55 percent dropped out. Similarly, in classes I to X, the dropout rate was over 68 percent. In addition to it, it is special to be notified that the dropout rate has been higher for girls. Some of the reasons for attributed to high level of dropout rate among Muslim students are lack of the interest of the parents in the education of their children, inability of the students to cope up with the studies and economic considerations, like compulsion to work augmenting their family income or need to look after younger siblings. Unfriendly atmosphere in the schools also has contributed towards the increasing dropout rates among Muslim children especially among the girls.

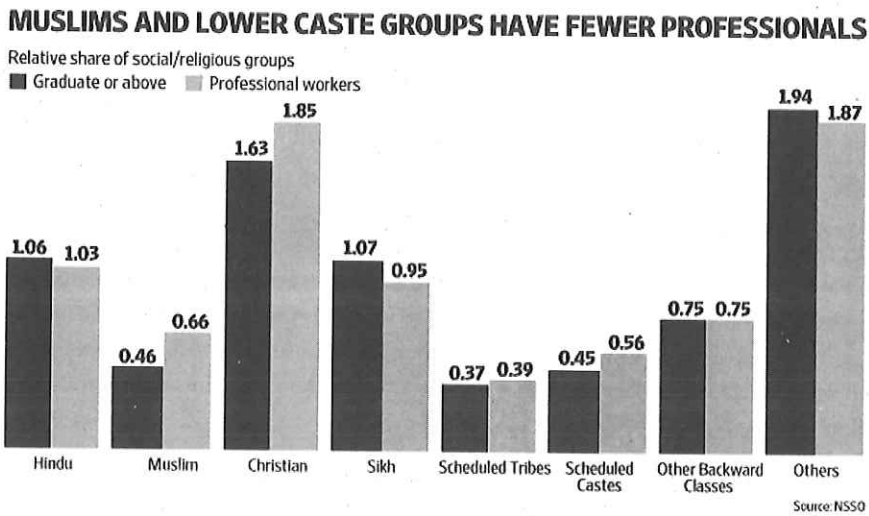
The education level attained by different religious communities also reveals the sharp gap between the representation of Muslims in higher education and that of other communities. In accordance with the report of the Sachar Committee, only one out of 25 undergraduate students and one out of 50 post-graduate students in 'premier colleges' were Muslims. Only 16 percent of the Muslim graduates belonging to poor households pursued post-graduate studies which significantly lower compare to other communities.

Experts feel that one of the important causes behind the low level of education of Muslims is the dearth of facilities for teaching Urdu and other subjects through the medium of Urdu which is the mother tongue of the lower classes. This is also vouched by the fact that in Karnataka and Maharashtra, the educational level of Muslims is far better when compared to other States. The reason behind this good education level is that both these States are much equipped with the Urdu medium

schools at the elementary level. Karnataka has also provided facility for English medium in a good number of schools.

Apart from this, the existence of religious institutions from primary to higher level where only religious education is imparted cripples students by making them unab' to face competition for admission to institutions of higher learning or professional courses and therefore ends up removing them from the mainstream education system.

Net effect of low literacy rate, high dropout rate and lower enrolment for higher education of the Muslim students also reflects adversely on their participation for professional employment. NSSO data (graph below) indicates that share of Muslim graduates in professional jobs is lowest among the minorities in India and is almost at the comparative level of most backward communities of SC & STs.



2.1.2 Health Parameters of Indian Minorities

Statistics from the health sector are quite encouraging. All communities of India have fared equally well with minorities performing either on par or in some instances better than the national average. Of course this doesn't mean that the figures are a reason to celebrate. Figures are only indicating that a lot of good work has been done in the public health sector while a lot has still to be done. Analysis of two important health sector outcomes i.e. Infant Mortality Rate and Perinatal Mortality Rates, as revealed by National Family Health Survey–3 (2005–2006), indicates that all three major religious minorities including Muslims, have performed better than the national average.

Community	Infant Mortality Rate	Perinatal Mortality
Muslims	**52**	**47**
Sikhs	**46**	**31**
Christians	**42**	**40**
National Average	**57**	**49**

Source: National Family Health Survey–3 (2005–2006)

Further the NFHS-3 report reveals that Buddhist/Neo-Buddhist mothers are most likely to use health facility for child birth at 59 per cent closely followed by Sikh mothers at 58 per cent. Use of health facility for child birth by Muslim mothers is very low at 33 per cent. The report further states that births to Muslim women are least likely to be followed by a postnatal check-up. This not only reflects social and economic circumstances of Muslims but also their hesitation in approaching state institutions due to a real or perceived sense of discrimination. Report also points out that Hindu and Muslim children are about equally likely to be undernourished, but Christian and Sikh children are considerably better nourished.

Another vital health sector parameter i.e. coverage of households by a health scheme and health insurance also points out toward reluctance of Muslims for approaching organised institutions for providing health care.

Community	% of Households covered by a health scheme or health insurance
Muslims	**2.1**
Sikhs	**6.5**
Christians	**7.3**
National Average	**4.1**

Source: National Family Health Survey–3 (2005–2006)

This extremely low level of coverage of the community under health scheme/insurance is a matter of serious concern as it leaves the community vulnerable to financial costs of the health care.

On the aggregate Muslims have fared quite well on the various health indicators and are well above the national average on most counts. However poor access to health insurance remains to be a very vital concern as it creates a major vulnerability to growing health care costs and creates a high risk for marginal groups to poverty relapse.

3.1 Employment Status of Indian Minorities

One of the most vital parameters of assessment of socio-economic status is the employment status of a social group as this reflects directly upon the group's economic well-being and indirectly upon the other parameters of education and health. The National Sample Survey Organisation in their survey found that more than half of the workers in the rural areas were self-employed or were employed as labourers, the proportion being the highest among all the religious minorities in India for the Muslim workers. The survey also showed that the Muslims lagged far behind the other religious communities as far as the urban salaried jobs are concerned. This indicated that the employment of Muslims (in both organised and unorganised sectors) is very low in urban areas, affecting their economic stability.

Job Profile of Different Religious Communities in India

CATEGORY	HINDUS	MUSLIMS	SIKHS	CHRISTIANS
Urban Self- Employed	**33.3**	**45.5**	**36.1**	**22.1**
Urban Jobs	**41.2**	**30.4**	**35.7**	**42.8**
Rural Self-Employed	**47.7**	**46.3**	**48**	**44.2**
Rural Labour	**40.5**	**40.7**	**36.7**	**31.5**

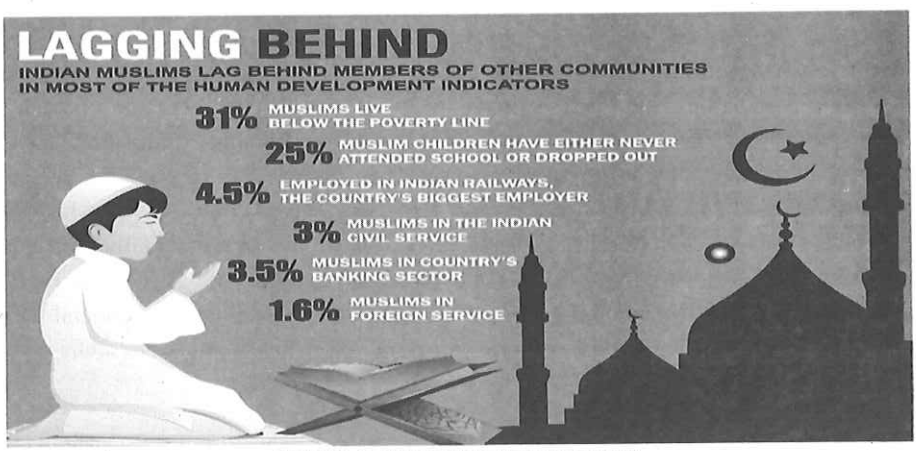
Source: NSSO survey between 2004-05 and 2009-10 **All figures in %**

According Sachar committee, the participation of Muslims in salaried jobs is quite low at only 13 per cent. While the national average of formal sector employment in the urban areas is 21 per cent, the same is less than 8 per cent for Muslims. Similarly compared to the national average of less than 8 per cent for street vending, more than 12 per cent of Muslim male workers are engaged in it. Even in the industrial sector employment Muslim workers are largely engaged in tobacco (41 per cent), wearing apparel (30 per cent) and textiles (21 per cent). These figures indicate that Muslim workers are largely concentrated in the sectors which are characterised by low wages, bad working conditions and little or no social security.

Sachar Committee further analysed that the representation of Muslims is considerably low in the jobs in the Government including those in the Public Sector Undertakings. It also found that the Muslim employment is not proportionate to their percentage in the population in any State of the country. According to an analysis, in almost all the States the percentage of Muslims in Government employment is about half of their population proportion.

The employment rate among the Muslims is even lower than Scheduled Castes and Scheduled Tribes. There is high share of Muslim workers in self-employment activity. It is noticeable that Muslims in the urban areas Muslim participation in the regular jobs is less even when compared to the Scheduled Castes and Scheduled Tribes. As per the 2011 census the work participation rate of Muslims continues to be the lowest among all religious communities in India with a work participation rate of 32.6% as against the national average of 39.8%. In contrast Hindus have a work participation rate of 41%, Buddhist 43.1%, Sikhs 36.3%, Jains 35.5% and Christians 41.9%.One major factor attributable to this low aggregate work participation ratios for Muslims is due to lower participation in the economic activity by the women of the community. Work participation rate for Muslims women is much lower even than for women belonging to upper caste Hindu households.

It is also noted that in both the urban (5.6%) and rural areas (4.8%) participation of Muslims in regular jobs in the public and Government sector is quite limited. Even the traditionally disadvantaged Scheduled Castes and Scheduled Tribes (16.6 in the urban areas and 8.8 in the rural areas) fared better compared to Muslims. In the Civil Services, Muslims are just 3 percent in IAS, 1.8 percent in IFS and 4 percent in IPS. These figures are much low as compared to the population percentage. Muslim presence judiciary is also very low. In the recent recruitments by the different State Public Service Commissions, the share of Muslim employment has been as low as 2.1 percent. Thus, with regard to the government employment, Muslims have become more backward than Dalits. For Dalits Muslims and Christians, the reservations have been a contentious issue for decades. Thus on aggregate Muslims are generally employed as casual labourers and the participation of Muslim workers in the salaried jobs (both in the public and the private sectors) is quite low even in comparison to the Scheduled Castes and the Scheduled Tribes workers



(SOURCE: SACHAR COMMITTEE REPORT, 2006)

4.1 Indian Minority Empowerment through Political Representation:

It is said that there are four essential elements without which no state can exist. Once of these four elements, which is also the primary element to constitute a state is – 'POPULATION'. No nation-state can exist without its people. The uniformity of this population is another matter of debate wherein intellectuals have been for years been divided on the issue of whether a nation is better off with a uniform population or with a diverse population, with one opinion being that a nation with a diverse population will face social friction, but no one has said that a nation with a diverse population cannot exist. Across the globe there are several nations who have diverse populations which comprise of some majority group and some minority groups. Studies show that the way to promote positive attitude towards the state within the minorities is through the encouragement of political participation and strengthening of political representation of the minorities. One study of the United States and New Zealand showed that redevising of electoral constituencies to maximise the number of black voters of Naozi descent in the latter has led to a marked increase in minority representation in their national legislatures. It is a known fact that minorities in India are not adequately represented in nation's political institutions. Correcting this flaw in our democracy demands the urgent attention of the decision makers before these communities get further marginalized.

The community of Muslims has always been under-represented in the Indian Parliament except the year 1980 when against the Muslims in the Indian population i.e. 11.4 according to the 1981 Census, the percentage of Muslims MPs in the Lok Sabha was 9%. In the late 1980s this gap increased as the percentage of the Muslims MPs decreased to about 5% in 1990s. But because of the good performance of parties, by whom large number of Muslim candidates were nominated, the percentage of Muslim candidates in the parliament had slightly increased in 1999 and 2004. According to the 2001 Census, in the 15th Lok Sabha Muslim Members of Parliament represented 6.4% of the total members of Parliaments as against 13.4% of the Indian population. This figure is as low as that of Muslim Members of Parliament (MPs) in the year 1990s. Again in the 2009 elections, the Muslim citizens had faced political marginalization in terms of representation in the Lok Sabha. The worst representation of Muslims has been in the 16th Loksabha wherein only 22 Muslim MP's has been elected which constitute to be 4% of the strength of the current Loksabha. Such low level of political representation of a community which has such a huge chunk of its population living in this country is extremely detrimental for them, because this cripples them from making their voices heard and issues addressed at the national level.

S.no	Year of Polls	Number of MP's	%
1	1952	11	2
2	1957	19	4
3	1962	20	4
4	1967	25	5
5	1971	28	6
6	1977	34	7
7	1980	49	10
8	1984	42	8
9	1989	27	6
10	1991	25	5
11	1996	29	6
12	1998	28	6
13	1999	31	6
14	2004	34	7
15	2009	30	6
16	2014	22	4

We know that various issues related to minorities have started putting pressure on the policy formulation and implementation by the government. Also, the dominant heterogeneous groups are quite fragmented and that government policy cannot be faulted for working to further the interests of any particular group as such. However, there are substantial difficulties; these include problems with the implementation of policies currently dealing with property rights and interests and the restructuring of rights of religious minorities. The plurality existing within the political framework and the process of social churning is substantially affecting the position of minority groups. Adequate representation at the national level coupled with implementation of schemes that only run on paper but not on ground is the need of the hour. We need to realize that a formal recognition of diversity by the state is indispensable: it can minimize the disadvantages faced by a community in the public arena and create new opportunities for it.

5.1 Conclusion

On the whole it is matter of serious concern that India's largest religious minority community (Muslims) has not benefited to a large extent from the economic spurt that India has witnessed in the past decade. The gap between the Muslims minority is

not only growing with the majority Hindu population but the community is also seriously lagging behind the other minority communities like Jains, Buddhists, Sikhs and Christians on most human development indices like education, health, work participation, employment etc. It is also noted that the community is behind even the traditionally backwards classes of SC's and ST's on many counts. Further the poor performance of Muslims on human indices is compounded by the fact that the community has also not got its due share in the political power, in proportion to its population, which has led to furthering the feeling of alienation amongst the community. This situation has thrown a serious challenge before the policy makers to urgently address some very vital concerns of the community which may otherwise led to some alienated members to the exposure and propaganda of the radical elements creating serious repercussions for our national integration.

Steps like introducing basic education in Urdu or opening more schools near the Muslim majority areas, improving access to health care institutions & targeted health insurance, creating more employment opportunities for the community in the traditional trades like 'textiles' and other crafts etc. are urgently needed to redeem the current situation. Development of the country will be complete only when the development takes place for all the communities equitably. So 'Sabka Saath, Sabka Vikas' should not just remain a slogan but should truly be reflected in the policies planning and policy implementation.

THE *ARBITRATION & CONCILIATION (AMENDMENT) ACT* 2015 – TIME LINES DRAWN FOR ALTERNATIVE DISPUTES RESOLUTION

Garv Malhotra*
Maneesh Kumar**

1.1 Introduction

Delay is one of the biggest killers in the traditional dispute resolution. The well intended alternative to the traditional dispute resolution got plagued with the same malady though of less magnitude. Fromstart up to finality, thedelays occurs at the following stages in the arbitral process:

- Appointment of arbitral tribunal
- Post Interim protection
- Finalisation of award
- Challenge to award
- Implementation of award

When law does not bind actions leading to delays, the consequence is remediless annoyance of academic interest only. Prescribing statutory time lines with penal consequences for non observance thereof has, therefore, been considered imperative. Besides delay, cost of arbitral proceedings and less than optimal trust in arbitrators have caused expert committees, parliamentary committee, Law Commission of India and the judiciary etc. to address these issues so as to make this on traditional dispute resolution a viable alternative. These efforts culminated in the *Arbitration and Conciliation (Amendment) Act* 2015.

2.1 The *Arbitration and Conciliation (Amendment) Act* 2015 Draws Statutory Timelines

The *Arbitration and conciliation (Amendment) Act* 2015 passed by Parliament in December 2015 is of far reaching significance for expeditious settlement of commercial disputes. The intent and purport of the amendment is to cut down delays through structured time schedule. Both pull and push factors incentivizing early disposal and penalizing delayed finalization of arbitral proceedings have been introduced.

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3.1 Appointment of Arbitrators

The *Arbitration and Conciliation Act* 1996, section 11(2) endows liberty upon parties to enter into an agreement w.r.t. the number of arbitrators and chalk out procedure for appointment of Arbitrator(s). Procedure has been prescribed by statute for appointment of arbitrator(s) if any agreement between the parties to that effect is conspicuous by its absence. In the event of failure to observe the prescribed procedure, the intervention of Chief Justice or designate can be sought upon application for appointment of arbitrators. The following chart gives a bird's eye view of the two alternatives and the resultant intervention by court.

Time Bound Appointment of Arbitrators

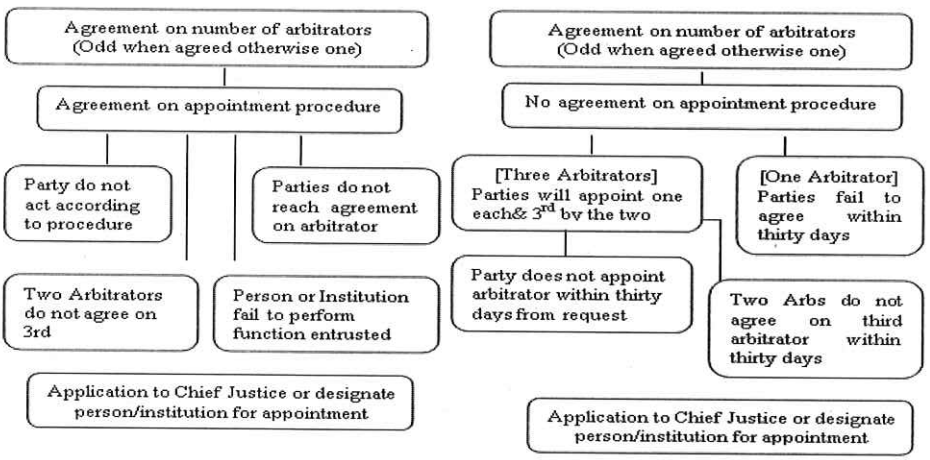

Figure – 1.

A perusal of figure 1 reveals that in the absence of an agreement w.r.t. procedure of appointment of arbitrators, in case of arbitral tribunal comprising three arbitrators, the party is required to appoint arbitrator within 30 days from the receipt of such request from the other party and the two arbitrators appointed by the two parties are required to appoint the third Arbitrator within 30 days from the date of their appointment. If this does not materialize, the party may approach Chief Justice or any person or institution designated by him for appointment of arbitrator.

In the *Arbitration and Conciliation (Amendment) Act*, 2015 the Chief Justice or his designate specific intervention has been institutionalized by substituting Supreme Court of India and High Court as the case may be in place of Chief Justice. Further, it has been provided that while doing so the court shall not go into the merits but confine itself to the existence of arbitration agreement. The decision of court or its designate has been made final with no appeal lying against that decision. Only an

appeal to Supreme Court of India by way of Special Leave Petition may lie from such an order for appointment of Arbitrator. Further before appointment of arbitral tribunal, disclosures or conflict of interest has been required to be obtained from the arbitrator(s). The court has also been required to dispose of application for appointment of arbitrator as expeditiously as possible and that endeavours shall be made to dispose of the same within a period of sixty days from the date of service of notice on the opposite party.

4.1 Time Limit of 90 days for Commencement of Arbitral Proceedings when Interim Protection has been Granted by Court:

An application for interim protection can be made before, during and after the arbitral proceedings[1]. Generally the party which is able to secure interim protection in arbitral proceedings is less than enthusiastic in helping push through the proceedings because its interest, in the event of favourable award, is substantially protected. This approach is antithetical to the alternative dispute resolution. Under the *Arbitration & Conciliation Act* 1996, no time limit was prescribed for giving an award by the arbitral tribunal if interim protection has been granted.

Highlighting raison d'être of alternative dispute resolution in the backdrop of interim protection the Hon'ble Supreme Court of India of India observed "The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the 'proximately contemplated or 'manifestly Intended' arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made 'before', i.e. in contemplation of arbitral proceedings. The court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so. The court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms.[2]"

Taking note of the phenomenon of delays consequent upon interim protection granted by court and need to enhance limited success of alternative dispute resolution, the

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1 Interim Protection by Arbitral Tribunal and Civil Court – Scanned Through The *Arbitration & Conciliation (Amendment) Act*, 2015 by Garv Malhotra & Maneesh Kumar, International Journal of Innovative Research and Development, 2016, Volume 5, Issue 1.

2 *Firm Ashok Traders and Anr. v Gurumukh Das Saluja and Ors.*(2004) 3 SCC 155.

lackadaisical post interim protection stage delays were addressed in 'The *Arbitration and Conciliation (Amendment) Act* 2015'. As per the latest amendment, in case an application is made prior to arbitral proceedings and the court passes interim orders before commencement of arbitral proceedings, the proceedings must commence within 90 days from passing of such order or within time specified by court. The court has not been granted jurisdiction to entertain application for interim protection once arbitral tribunal has been constituted unless court thinks that arbitral tribunal may not be able to provide[3] efficacious remedy.

4.2 Time period for Making Arbitral Awards\

Section 29 of the *Arbitration & Conciliation Act* 1996 envisages decision making i.e. making award without specifying any timelines for giving award. The *Arbitration and Conciliation (Amendment) Act* 2015, prescribes time frame for giving award. Section 29A with nine sub clauses and section 29B with six sub clauses have been inserted below hitherto section 29. Section 29A in its entirety can be captured from the following flow chart:

4.3 Timelines for Arbitral Proceedings

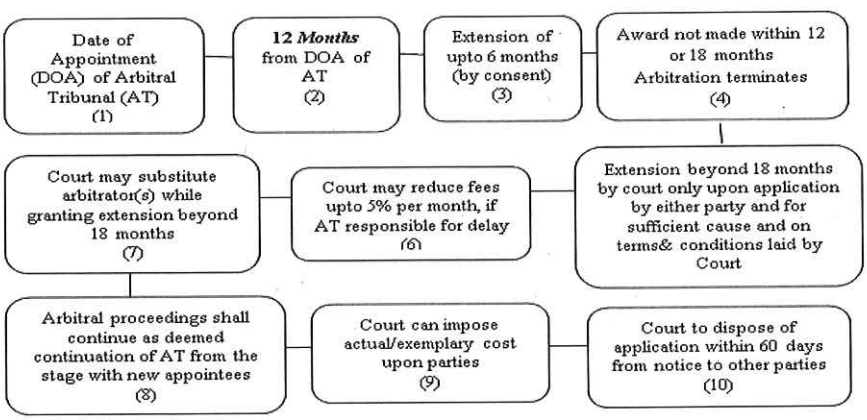

Figure – 2

The amendment introduces a provision that requires an arbitral tribunal to make its award within 12 months. This may be extended by a further period of six months. The arbitral proceedings, if not finalized within twelve or eighteen months, as the case may be, are terminated. An application for extension could be made by either party before or after expiry of such period. Besides, early finalization of arbitral award has also been incentivised by stipulating that if an award is made within six

[3] *The Arbitration and Conciliation Act*, 1996, section 17

months, the arbitral tribunal will receive additional fees as agreed upon. Similarly the delay in furnishing award has been visited with penal consequences. It is envisaged that if award is delayed beyond the specified time due to reasons attributable to the arbitral tribunal, the fees of the arbitrator will be reduced up to 5%for each month of delay.

The time limit for making of award has not been specified when the court reconstitutes arbitral tribunal after eighteen months. It falls within the court's discretion. There are no invalidating consequences. The period of sixty days stipulated for courts to dispose of the application is also not mandatory as the words used in section 29A(9) are 'as expeditiously as possible' and 'endeavour shall be made' etc. In this connection it is also mentioned that even if, the arbitral proceedings are terminated, the issue would still remain unresolved and the precious time in commercial dispute would have already been lost.

5.1 Fact Track Procedure

The *Arbitration and Conciliation (Amendment) Act* 2015 permits parties to opt for conducting arbitration proceedings in a fast track manner and have the benefit of receiving award within six months. Fast track arbitration is an option exercisable at the discretion of the either party to the agreement. It has some semblance of summary suit under Civil Procedure Code and summary trial under Criminal Procedure Code. In fast track arbitration, the oral submissions or arguments are dispensed with and the award is made based on pleadings and written submissions, if any.The newly incorporated section.29B envisaging fast track procedurein its entirety can be captured from the following flow chart:

Fast Track Procedure of Arbitral Proceedings

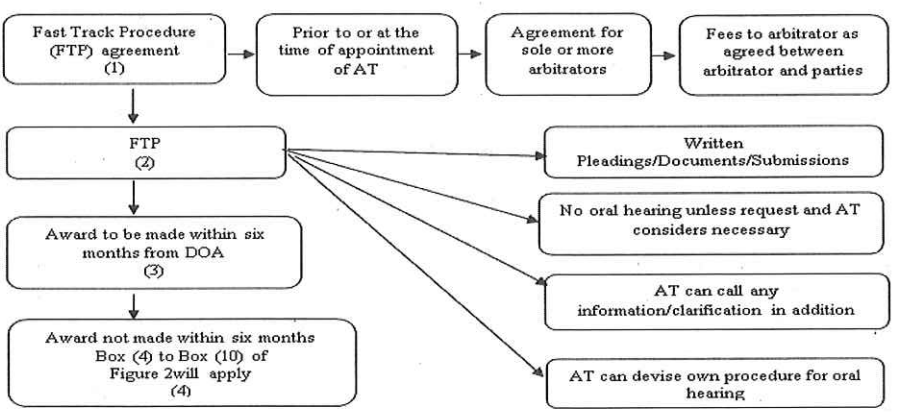

Figure – 3

Fast track procedure is time bound arbitral proceedings agreed to between parties, based on written submissions. The effectiveness of this well intended fast forward mode may be for low value commercial stakes. Nevertheless this is a trust building measure in the alternative dispute resolution.

6.1 Counter Claims Permitted and Adjournments Rationalised with Punitive Consequences:

In the *Arbitration and Conciliation (Amendment) Act* 2015, the setting off of counter claim has been permitted in the same arbitration. This is likely to help in obviating multiplicity of litigations. Section 23 of the *Arbitration and Conciliation Act* 1996 titled 'Statement of claim and defence' has been amended by incorporating section (2A) below sub section 2. It envisages that the respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

Adjournments in arbitral proceedings have also been put under check. Section 24 of the *Arbitration and Conciliation Act* 1996, has been amended to ensure hearing on day to day basis and impose exemplary cost in case of default. The amended section stipulates that "the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.".

In line with the expeditious conduct of arbitral proceedings, section 25 of the *Arbitration and Conciliation Act* 1996 has also been amended to penalize the lackadaisical conduct of party. It envisages that the arbitral tribunal shall continue the proceedings without treating the failure to file defence statement by the respondent as an admission of the allegations by the claimantand shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited. These measures are likely to have salutary effect in expeditious conduct of arbitral proceedings.

7.1 Time Period for Disposal of Challenge to Award in the Court of Law:

After an Arbitral award has been made, any challenge to the same in court signifies further delays. A party that looses out in arbitration may move an application in court for setting aside the award. Since arbitration is an alternative to the traditional dispute resolution, the court has very limited jurisdiction in entertaining such application. As per Section 34 of the *Arbitration and Conciliation Act* 1996, there are only five grounds on which an award can be challenged in the court. Additional

grounds on which court can set aside the award are subject matter not capable of settlement by arbitration under law and award in conflict with public policy. Award is signified to be in conflict with public policy when it is induced by fraud, corruption or violates section 75 or section 81 of the *Arbitration and Conciliation Act* 1996. Thus there are ten groundsin all, including four reflecting conflict with public policy, as indicated below, available for challenging a domestic arbitral award[4].

8.1 Challenge to Domestic Arbitral Award in Court

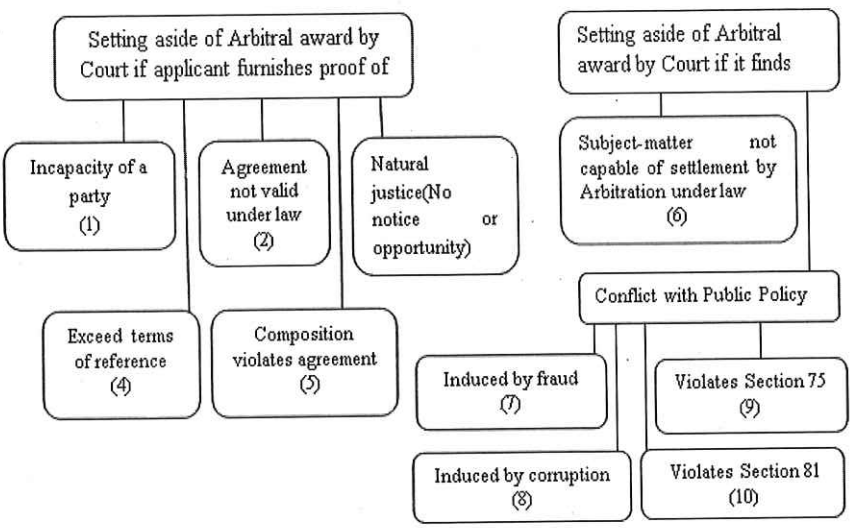

Figure – 4.

The explanation under section 34 of conflict with public policy has been amended under the *Arbitration and Conciliation (Amendment) Act* 2015. Besides extant four grounds, two additional grounds i.e. contravention with the fundamental policy of Indian law and conflict with the most basic notions of morality or justice have been added. Patent illegality has also been added as a ground for setting aside domestic award, though this does not come under generic ground conflict with public policy. Review on merits of dispute, setting aside award on erroneous application of law or re appreciation of evidence has been specifically prohibited[5].

Further it has been made incumbent to serve prior notice on the other party and an affidavit to that effect before filing an application in the court challenging the award.

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4 Touchstone of Conflict with Public Policy – A Symptomatic Legislative Treatment through the *Arbitration and Conciliation (Amendment) Act* 2015, International Journal of Innovative Research and Development, 2016, Volume 5, Issue 3 (Under publication process).

5 *Ibid.*

Courts have been advised to dispose of such application expeditiously but within one year of service of notice to the other party. The enforceability of the arbitral award as envisaged in section 36 of the *Arbitration and Conciliation Act* 1996 has also been made obstruction free unless a stay has been specifically granted by the court. Thus a mere challenge to the award does not put a stop to the enforcement of award.

9.9 Interest on Sums Awarded by the Arbitral Tribunal:

Interest on arbitral claim falls in three parts. First part is the interest on the amount due and the composite claim is filed before the arbitral tribunal. Second part is interest on this composite amount granted by the arbitral tribunal up to the date of the award. Third part is interest on the revised composite amount which includes composite claim and interest thereon granted by the arbitral tribunal from the date of the award to the date of actual payment. At the 2nd stage, the calculation of interest is on amount due plus interest whereas at the 3rd stage, the calculation of interest is on such composite amount i.e. amount due plus interest and another component of interest thereon granted by the arbitral tribunal. In the *Arbitration and Conciliation Act* 1996, arbitral tribunal has been clothed with discretion to grant interest on the amount claimed up to the date of award.

There is mandatory stipulation of interest on such amount for the period from date of award to the date of payment. There is an escape from this interest only when arbitral tribunal in its award has done away with it. Then came the judgment dated 29.01.2010[6] wherein the Hon'ble Supreme Court of India held that "section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest." The Law Commission in its report observed that "Apart from being contrary to the statutory scheme of the Act, the decision in Arora is also against the decision of (co-ordinate) two judge benches of the Supreme Court of India in *ONGC v. M.C.* Clelland Engineers S.A, (1999) (4) SCC 327 and *UP Cooperative Federation Ltd v. Three Circles,* (2009) 10 SCC 374. Recognising this conflict of judicial opinion, the Supreme Court of India, in *Hyder Consulting (U.K.) v. Governor of Orissa*, (2013) 2 SCC 719 has referred this issue for determination to a three judge bench."[7]

It is in this context that the Law Commission in its 246th report recommended amendments for clarification on the scope of powers of the arbitral tribunal to award

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6 *State of Haryana v. S. L. Arora & Co.*, (2010) 3 SCC 690

7 Amendments to the *Arbitration and Conciliation Act* 1996, Report No. 246, Law Commission of India, August 2014, pp. 33,34

compound interest and rationalization of the rate at which default interest ought to be awarded and suggested moving away from the existing rate of 18% p.a. to the market based determination in line with commercial realities. Taking note thereof, section 31 of the *Arbitration and Conciliation Act* 1996 was amended in the *Arbitration and Conciliation (Amendment) Act* 2015. Interest from the date of award to the date of payment at the rate of two per cent higher than the current rate of interest prevalent on the date of award has been specifically stipulated.

10.1 Determination of Cost by Arbitral Tribunal

Fairness, speed and cost are the three pillars on which the success of alternative dispute resolution rests. In the arbitral proceedings, the costs involved include:

- Fees and expenses of the arbitrators, courts and witnesses;
- Legal fees and expenses;
- Administration fees of the institution supervising the arbitration; and
- Other expenses incurred in connection with the arbitral or court proceedings and the arbitral award.

The monetary savings in arbitration are in the form of court fees which is ad valorem i.e. percentage of amount involved, high fees of counsels etc. The Law Commission of India, in its 246th Report observed that "The loser-pays rule logically follows,as a matter of law, form the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations."

In the *Arbitration and Conciliation (Amendment) Act*, 2015 an elaborate section 31A has been inserted with regard to imposition of costs by arbitral tribunal. The unsuccessful party has been required to pay the cost to the successful party. The conduct, part success, frivolity of counter claim adding delays, reasonable offers include factors for award of costs. The cost bearing/sharing agreement between the party shall be valid if made after the disputes. Thus, a prior agreement to share the cost equally etc. will not deter the Tribunal to pass order to the contrary.

11.1 Date of Effect of the *Arbitration and Conciliation (Amendment) Act* 2015

The *Arbitration and Conciliation (Amendment) Act* 2015 replaces an ordinance promulgated earlier that came into effect from October 23, 2015. Proviso to section 12(5) of the *Arbitration and Conciliation Act* 1996 stipulates that, "....this sub-section shall not apply to cases where an arbitrator has already been appointed on or

before the commencement of the *Arbitration and Conciliation (Amendment) Act*, 2015." Retrospectivity in the amendment is section specific and not generic in the absence of specific stipulation. In another civil law i.e. The *Negotiable Instrument (Amendment) Act* 2015, passed in December 2015 only, the date of effect was June 15, 2015. However the expression used were that "...as if that sub-section had been in force at all material times....." This gave generic retrospectivity to the provision. This was reinforced by Hon'ble Supreme Court of India in a recent case titled *Bridgstone India Pvt. Ltd. V Inderpal Singh* decided on November 24, 2015, wherein the Hon'ble Court applied the amended provision, in respect of cheque bounce case of August 4, 2006 on the ground of retrospectively of the provision.[8]

12.1 Concluding Remarks

Concerted efforts to make arbitration a viable alternative dispute resolution mechanism led to the *Arbitration and Conciliation (Amendment)* 2015 Act. It is an effort to stabilize, invigorate and restore confidence in the alternative dispute resolution regime by removing impediments observed in the reality check With the legal system vastly in place over platform of rule of law, the amendments effected are likely to make India arbitration friendly.

[8] Jurisdiction Conundrum in Cheque Bounce Matters – The Negotiable Instrument (Amendment) Act 2015 – a Panacea, by Garv Malhotra and Maneesh Kumar, Imperial Journal of Interdisciplinary Research, 2016, Vol.2 / Issue.2 .

ALCOHOLISM AND FAMILY CRISIS: A CONCEPTUAL ANALYSIS

Honey Kumar*

Cheers, let's celebrate the good life

The above mentioned remark is famous among all generations and commonly heard by people as liquor glasses are raised, appears to involve that alcohol consumption is directly linked to the source of enjoyment and prosperity, however the facts reveal a different scenario. It is true that the people who consume alcohol are not necessarily addictive and problem creators inside or outside the family premises. But it is also true that taking alcohol even once in a while leaves the possibility of a habit-forming experience and the drinker may start taking it frequently in large quantity that may result 'Alcoholism'.

Alcoholism is an increasing serious social problem in the world that contributes to the destruction of individuals and families (World Health Organisation 2003). In any discussion of this nature it is important that a clear distinction be maintained between alcohol, alcoholic and alcoholism. Alcohol is an ingredient found in alcoholic beverages i.e. beer, wine, spirits, that causes intoxication. Alcoholism is a chronic disease, or disorder of behaviour, which is a result of the repeated drinking of alcoholic beverages to an extent that exceeds customary dietary use or the socially approved drinking customs of the community and alcoholic is one who break these social norms and carry out 'binge drinking' i.e. drinking large quantities of alcoholic beverages at a single time (Fox and Lyon 1955, Bucholz and Robins 1989, World Health Organisation 2003; 2011).

The deadly harmful effect of alcohol is no doubt informed to most of the people as it destroys the abuser's ability to work, decrease earning power and leads to gradual ruin of his family life. But, the habit of harmful drinking is still increasing and continuously destroying families. (Saxsena 1999, World Health Organisation 2003). However, the purpose of using alcohol vary widely around the world, as at some places it is used in religious context and somewhere it carries symbolic values. But, the burden of disease, death and family crises remains quite similar everywhere due to its harmful use (World Health Organisation 2011). Data reveals that the harmful use of alcohol results in approximately 2.5 million deaths i.e. 4% of total deaths, every year in the world and causes illness and injury to many more. Globally,

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320000 young people aged 15-29 year die annually from alcohol related consequences resulting in 9% of all deaths in this age group (World Health Organisation 2011). The harmful use of alcohol is also associated with many serious social issues including family crises like domestic violence, divorce, child neglect (Saxsena 1999, Nayer et al. 2012), breakup in social relationships (Velleman and Templonton 2007), economic problems(Velleman and Templonton 2007, Saxsena 1999) and many more. Thus alcohol abuse results in enormous cost, not only to the abuser but also to his or her family.

Families which experience problems with alcohol are known as 'fragile families'. Such families are always unable to play effective roles sufficiently inside and outside the family. Alcoholic's family depicts reciprocal extremes of behaviour among family members, lack of a model of normalcy and power inequity in family organisation .Besides the family members, adverse impact can also be seen on relatives, friends, co-workers, neighbours and many others (Room 1976). Thus, present research paper primarily concerned to analysis the factors responsible for alcoholism in society and particularly in family. Further it also discusses the implications of alcoholism on family life and others associated, directly or indirectly, with alcoholic's family. Before discussing factors and implications, let us first understand classification of alcoholic's and history of alcohol consumption.

1.1 Classifications of Alcoholics: Different Perspectives

The per capita consumption figure only reveals the trend of alcohol consumption in particular area and time but it does not tell the exact figure who consumes what content and type of alcohol. Although it is difficult to find out, who is alcoholic but there are certain measures set by every country and every field of research concerned to the study of alcoholism. Sociologist defined that "if person's drinking is deviant in the eyes of another then it may be said that an event of alcohol abuse has occurred" (Roman 2007). For National Institute on Alcohol Abuse and Alcoholism (NIAAA) problematic drinking is the amount of alcohol leading to blood alcohol content (BAC) of 0.08% for most adults that would be reached by consuming five drinks of 30ml for men or four for women over a 2-hour period. Similarly World Health Organisation defines if the male is consuming more than 3 standard drinks of 30 ml and female more than 2 standard drinks in a day, their drinking will be consider as problematic. Other symptoms which define persons drinking deviant are, slurred speech, inability to walk strait, continuously laughing, hooting, aggression, fighting and impaired judgement after the use of alcohol. The factors which can effect persons drinking are, the ability of their liver to break down alcohol, how much alcohol they have had to drink, if they have eaten food or not, how quickly they drink the alcohol,

their body type, their age (Health Promotion Agency 2012) and most importantly cultural norms of society in which they are living (Mandelbaum 1965).

2.1 History of Alcohol and its Rise in Indian Society

The use of alcoholic beverages existed before the beginning of recorded history (Mandelbaum 1965). In Indian context the use of alcohol can be seen in ancient literature dating back to the Vedic period around 2000 B.C in the form of 'soma' and 'sura'. Soma was consumed by social elite and was credited with positive qualities. Sura was consumed by warriors to enhance their courage among other things (Saxsena 1999).It is also true that use of alcohol was restricted by some communities like Brahmins, but other communities were allowed to drink only on specific occasions like war, religious events and festivals. This shows that the use of alcohol has never been a part of staple food in India. Similarly throughout the time this restriction was maintained by various religions such as Hinduism, Islam, Sikhism, and Buddhism for the use of intoxicating products including alcohol in India.

The major shift in the history of alcohol use in India can be seen at time of British rule. British rule, India witnessed a slow and steady rise in alcohol availability and consumption. The other major factors lies behind this increase are modernization, Westernization and Globalization. Due to these processes, there came better fermentation and distillation processes which turned alcohol into a mass produced commercial item (Saxsena 1999). Similarly there came change in the types of alcoholic beverages consumed, at the same time the patterns of drinking as well as in the attitude of the society towards drinking alcohol. Distilled beverages with higher concentration of alcohol gradually replaced traditional beverages. Thus after independence, due to many factors such as industrialization and green revolution in various parts of India became the reasons for boost in alcohol consumption. Today it has become the major source of revenue for some states that fostering its consumption day by day. Presently, liquor provides 20 per cent of the share of the government's own revenue in most States (The Hindu December 8, 2013)

3.1 Alcoholism: Major Social Factors

The major social factors of alcoholism are State intervention; availability of alcohol, social approval of excessive drinking, role of media in the spread of alcoholism, peer pressure, family circumstances and social prestige etc. The brief discussion on some major factors of alcoholism is as following.

India is one of the countries where prohibition has been included into the constitutional provision in the form of directive principal of state policy. Article 47 of Indian constitution states that " the state shall make an effort to bring about

prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health". Some state governments have followed this policy inconsistently but many rejected to accept this due to various interests. For instance, Gujarat state in western India, the birth place of Mahatma Gandhi, has had complete prohibition in sale of alcohol since 1947. But it does not mean the abstinence rate is 100 percentages in Gujarat. The main reason for ignoring the constitutional prohibition by states is the large amount of revenue that the state government derive from the sale of alcoholic beverages (Saxsena 1999).

Besides state intervention, peer group influence is the most compelling factor in the environment of an individual's life. The desire for being a part of a particular peer group makes a pressure on the person to adopt the habit or norm of that group. According to the study conducted by Suman (2011) 50.5 percentage addicted people agreed that they started their drinking with their peers. Besides the peer pressures, social pressure also account for addiction to alcohol such as pressure in corporate sectors, marriages and other occasions.

Another major factor behind these phenomena is family. Family is a primary institution where the individual spends his whole life. Sometime family environment or certain kind of family conflicts becomes the root cause of the problem of alcoholism (Suman 2011). Family environment is the bottom line of a person's personality. The socialization of persons decides whether person is going to be an addict or not. Other than these factors, anomie situation such as dissatisfaction with work, poor housing condition, lack of love, celebration and so on forces individual towards addiction.

4.1 Alcoholism: Social Implications on Family

Alcoholism is a major factor that affects the functions of family. It causes many changes in the life of family members. Several studies described a direct relationship between alcoholism and domestic violence. Some of them indicate, addiction to alcohol is one of the responsible factors for various types of domestic violence which sooner or later ruins and de-regulates the social life of family members, especially the wife and children (Subhadra and Rahul 1999, Nayer et al. 2012). Some studies on domestic violence shows that approximately half of deaths caused by domestic violence are under the influence of alcohol or other drugs (Saxsena 1999).Among these deaths 95% victims are women (Choudhury 2009).

The use of alcohol can increase the user's sense of personal power and domination over others which can, in turn, make it more likely that an abuser will attempt to exercise power and control over other family members that will assist in the occurrence of violent behaviour in the family. So, alcohol is an instrument of intimate

domination used to excuse the exercise of illegitimate force against subordinates. Similarly, in a patriarchal society spousal violence is higher among those whose husband takes alcohol and it is five times higher among those who took alcohol very often (Subhadra and Rahul 1999, Choudhury 2009). Thus, the consumption of alcohol has been identified as a significant menace in family life which gave birth to spousal violence mostly among illiterate and lower socio-economic groups (Sahoo 2009). Spousal violence frequently disrupts the self respect of women and put them into greater risks like depression, suicide, and some time force them to use alcohol or other drugs.

Excessive use of alcohol can become the cause of other social problems in the family such as divorce. People who abuse alcohol are about seven times more likely to be divorced or separated than non-abusers (Levitt 1974).Divorce is frequently seen as the only option for women fleeing violent drunkard husbands. But in some cases women living with their abusive partner faces confusion due to the dual nature of their partner as caring when not drunk and frustrating when drunk. In such cases many women become uncomfortable in taking decision about the rest of their lives as to whether she should leave her husband or cope up with the problems.

Alcoholism not only affects the spouse but as well as their children. Most of the research indicates that misuse of alcohol by at least one partner causes some serious problem in their children's life. Children with alcohol addicted parents face the problems like social isolation, lonely feeling, depression, mental illness, earlier marriages, feeling of guilt, anti social behaviour, disturbance in educational life, difficulties in friendship circles or peer groups, leaving home early and taking drugs. In certain cases it even decreases parenting capacity as they are not able to get love, care, affection etc., due to the father's drinking (Nayar et al. 2012).Elder siblings are often forced to take up job early for the family survival and younger ones become isolated in peer groups, start refusing to invite friends and lose their affection with their parents etc. Parental alcoholism decreases parental ability to perform effective monitoring, interferes with communication and is associated with the neglect or abuse of the child.

The problem of alcoholism in the family has a tendency to change the roles played by family members in relation to one another and outside the family premises. In most of the families there is some form of division of labour as one member manages the family economy, the other takes care of children, some do cooking and so on. This division of labour, according to Emile Durkeim, is beneficial for society as it increases reproductive capacity, establishes social and moral order and creates a sense of social solidarity among the member of family, community and society (Lemert 2010). But as one member of the family develops alcoholic problem, rest of

the members are likely to find themselves gradually taking over the roles of such a member. Eventually, one member may have to perform the roles of others like management of finances, performing all the rituals even those associated with drinker, disciplining, shopping, and cleaning and so on. (Velleman and Templonto 2007). Parental alcohol misuse also disrupts family rituals and routines. Family routines and rituals are repetitive behaviours involving two or more family members. These are traditions and customs, developed to celebrate culturally defined occasions as well as anniversaries. Family rituals are important because they are expected to strengthen family relationships and kinship ties. Though alcohol is used for hospitality on many occasions like marriage etc., it can also create distortions in family rituals. For instance, on the day of occasion other family members of an alcoholic generally feel tense and keep a watchful eye over the alcoholic. Due to problem drinking, the drinker's behaviour becomes unpredictable and naturally this makes it very difficult for the family members to carry on with the rituals and routine activities (Velleman and Templonton 2007).

The addiction to alcohol commonly creates financial problem in the family that further creates many problems. Besides the money spent on alcohol, an abuser also suffers other adverse effects. These include fewer wages due to lowered efficiency on the job or loss of business and employment, increased medical expenses for nominal and effective illness and accidents etc. (Saxsena 1999, Velleman and Templonton 2007).

5.1 Conclusion

Alcoholism has always destroyed families in all over the world. It has more harmful effects on lower class families, as they people already facing certain economical as well as social issues. There have been research studies to discover the underlying factors of alcoholism, and both social as well as genetic factors have been found to be responsible for it. Not only family suffers, but also alcoholic, suffers the most due to the habit of drinking. He destroys his health and harmful drinking cause fatal diseases like cancer, cirrhosis of liver, epileptic seizures and many more. Further alcohol abuse causes road accidents, murders, theft etc. However, the menace of alcoholism as a larger social problem is something that has emerged in modern societies only. Initially alcoholism was treated more as a medical problem but around 1950s it became a major area of research in social sciences as well, especially in the West. In case of India, most of the studies related to alcoholism started in 1970's with a few studies related to the region of Punjab too. In contemporary Indian society, with increasing harmful use of alcohol, the phenomenon of alcoholism has become major concern for every society, which requires more scholarly work for analysing problem and getting effective solutions.

TAKING OF ALIENS' PROPERTY: THE LINE BETWEEN THE CONCEPT OF INDIRECT EXPROPRIATION AND GOVERNMENT REGULATORY MEASURES NOT REQUIRING COMPENSATION

Kudirat Magaji W. Owolabi*

1.1 Introduction

Expropriation (direct and indirect) requires compensation, based on clearly set rules of customary international law. However, while determination of a direct expropriation is relatively straightforward to make, determining whether a measure falls into the category of indirect expropriation required tribunals to undertake a thorough case-by-case examination and a careful consideration of the specific wording of the treaty. However, a close examination of the relevant jurisprudence reveals that, in broad terms, there are some criteria that tribunals have used to distinguish these concepts.

1.1.1 What Constitute Takings?

In the early instruments on foreign investment, the terms mostly used to describe takings were "nationalization" or "expropriation".[1] Though the distinction between the two terms was not clearly made; they basically applied to the taking of property by the State through legislative or administrative measures. In modern law, as suggested, it is best to refer to takings by states as expropriation, as in most instances these takings are carried out for an economic or a public purpose. Exploration, the targeting of a specific business, will be the most usual form of governmental interference with which the law has to be concerned. Therefore, theory of litigation in the ***Ethyl***[2] and ***Methanex***[3] *Cases* was that any depreciation of the assets of the foreign investor amounted to a taking.

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1 B. H. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth", 75 *AJIL*, 1981, 438,

2 (1999)38 ILM 708. In the Ethyl Case, the claimant company, a US investor in Canada, was the sole manufacturer in Canada of a petroleum additive. A Canadian minister announced in Parliament that he was contemplating a ban on the substance as it was a pollutant. The litigation was brought on the basis that the announcement led to the depreciation in the value of the shares of the claimant company and thereby amount to a taking. The tribunal upheld jurisdiction, but the dispute was settled as a result of Canada agreeing to pay damages.

3 (2005) 44 ILM 1345

However, customary international law does not preclude host states from expropriating foreign investments provided certain conditions are met. These conditions are: the taking of the investment for a public purpose, as provided by law. in a non-discriminatory manner and with compensation.[4] There are two ways in which takings can occur. It is direct taking where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright physical seizure. Expropriation could also occur through interference by a state in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State are generally termed "indirect", "creeping", or "de facto" expropriation, or "constructive" taking[5], or measures "tantamount" to expropriation.

However, under international law, not all state measures interfering with property are expropriation. The interference must be of a certain quality and exceed a certain magnitude, degree, or intensity. States have the right, indeed the duty, to regulate and public governance would be impossible if States were liable to pay compensation for every measure that reduced the value of foreign investments. As *Brownlie* has stated, "state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle, such measures are not unlawful and do not constitute expropriation".[6] Similarly, according to *Sornarajah*,[7] non- discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state.

Despite a number of decisions of international tribunals, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and depends on the specific facts and circumstances of the case. However, while case-by case consideration remains necessary, there are some criteria emerging from the examination of some

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4 NAFTA, Article 1110.

5 Burns H. Weston, "Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation", 16 VA. *J. INT'L L.* 105-06; *also* Allahyar Mouri, *The* International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims, *TRIBUNAL* 70 (1994).

6 Ian Brownlie, "Public International Law", *Oxford University Press, 6th Edition, 2003 at 509.*

7 M. Sornarajah, "The International Law on Foreign Inve stment" *(1994) at 283, Cambridge University* Press.

international agreements and arbitral decisions for determining whether an indirect expropriation requiring compensation has occurred.

1.1.2 Criteria for Identifying Indirect Expropriation

The contours of the definition of an indirect expropriation are not precisely drawn. An increasing number of arbitral cases and a growing body of literature on the subject have shed some light on the issue but the debate goes on.[8] In *Midland Eastern shipping and Handling Co. v. Egypt*[9] indirect expropriation was described as 'measures taken by a state, the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights'. In *Lauder v Czech Republic,*[10] the tribunal stated that such taking 'does not involve an overt taking but effectively neutralises the enjoyment of property.' Such descriptions, while providing catchy labels for takings outside the obvious situation of direct takings of physical property, do little to further the identification of indirect takings which will attract the application of the international law on expropriation. However, the difference between a direct and indirect expropriation turns on whether the legal title of the owner is affected by the measure in question.

A typical feature of an indirect expropriation is that the state will deny the existence of an expropriation and will not contemplate the payment of compensation. Today it is generally accepted that certain types of measures affecting foreign property will be considered an expropriation, and require compensation, even though the owner retains the formal title. Few legal texts attempted to address directly how to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation, requiring compensation. Scholars recognised the existence of the distinction but did not shed much light on the criteria for making the distinction. This may reflect reluctance to attempt to lay down simple, clear rules in a matter that is subject to so many varying and complex factual patterns and a preference to leave the resolution of the problem to the development of arbitral decisions on a case-by-case basis.[11] The two most prominent

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8 Y Fortier and SL Drymer, 'Indirect Expropriation in the Law of International investment: I Know it when I see it, or caveat investor' (2004) 19 *ICSID Review –FILJ* 239.

9 (2002) ICSID ARB/99/6, para. 107.

10 (2003) ICSID para. 54.

11 Christie wrote that (G. Christie "What Constitutes a Taking of Property under International Law?". *British Yearbook of International Law, 1962 pp307-338)* "it is evident that the question of what kind of interference short of outright expropriation constitutes a 'taking' under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development".. Sornarajah, ("The International

sources of such decisions were the Iran-United States Claims Tribunal and decisions arising under Article 1, Protocol 1 of the European Convention for the Protection of Human Rights. The recent period has seen a further body of jurisprudence, from cases based on NAFTA and bilateral investment treaties (BITs). At the same time, a new generation of investment agreements, including investment chapters of Free Trade Agreements has developed, which include criteria to articulate the difference between indirect expropriation and non-compensable regulation.

2.1 Jurisprudence

Although there are some 'inconsistencies'[12] in the way some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation. A careful examination reveals that, in broad terms, they have indentified the following criteria : (a). the degree of interference with the property right, (b). the character of governmental measures i.e the purpose and the context of the governmental measure and (c). the interference of the measure with reasonable and investment-backed expectation.

2.1.1 Degree of Interference with the Property Right

2.1.1.1 Severe Economic Impact

Most international decisions treat the severity of the economic impact caused by a government action as an important element in determining whether it rises to the level of an expropriation and requiring compensation. International tribunals have often refused to require compensation when the governmental action did not remove essentially all or most of the property's economic value. There is broad support for the proposition that the interference has to be substantial in order to constitute expropriation, i.e. when it deprives the foreign investor of fundamental rights of

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Law on Foreign Investment" *(1994) at 283, Cambridge University Press.*) noted that the difficulty is "in the formulation of a theory that could be used as a predictive device so that there could be guidance as to whether the taking is a compensable or not. Here, though several efforts have been made at devising a theory capable of making the distinction, none has been successful". Dolzer ("Indirect Expropriation of Alien Property", *ICSID Review, Foreign Investment Law Journal, (1986) pp. 41-59 at 44.*) acknowledged after an extensive review of judicial precedent and state practice that "one cannot but admit at this stage that the law of indirect expropriation can be established, at this moment, on the basis of primary sources of international law, only in a very sketchy and rough manner".

12 There is a view that the "inconsistent" case law which has been developed may simply reflect the different approaches to different treaties. According to this view, for example , the practice of the European Court of Human Rights on what "indirect expropriation " means could well be expected to differ from that of NAFTA tribunals, given the different wording, overall purpose and history of the Treaties they have to refer to (European Convention on Human Rights on the one hand, and NAFTA on the other hand)

ownership, or when it interferes with the investment for a significant period of time. The European Court of Human Rights (ECHR) has found an expropriation where the investor has been definitely and fully deprived of the ownership of his/her property. If the investor's rights have not disappeared, but have only been substantially reduced, and the situation is not "irreversible", there will be no "deprivation" under Article 1, Protocol 1 of the ECHR.[13]

Under the Iran-United States Claims Tribunal, it was held in *Starrett Housing*[14] that the foreign investor had not been expropriated formally but a local "temporary manager" had been put in charge of the project. The tribunal found that this amounted to an expropriation:

> It is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

In the NAFTA context, in the *Pope & Talbot* case, the Tribunal found that although the introduction of export quotas resulted in a reduction of profits for the Pope & Talbot Company, sales abroad were not entirely prevented and the investor was still able to make profits. It was stated:

> Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.

The European Court of Human Rights, in the most widely cited case under Article 1, Protocol 1 of the European Convention Human Rights, *Sporrong and Lonnroth* v. *Sweden*, did not find indirect expropriation to have occurred as a result of land use regulations that affected the claimant's property because:

> Although the right of peaceful enjoyment of possessions lost some of its substance, it did not disappear. The Court observes in this connection that the claimants could continue to utilize their possessions and that, although it became more difficult to sell properties as a result of the regulations, the possibility of selling subsisted."[15]

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13 *Handyside v. United Kingdom,* 24 Eur. Ct. H.R. (ser.A) at 29 (1976); *Poiss v. Austria,* 117 Eur. Ct.H.R. (ser. A)84, 108 (1987); *Matos e Silva, Lda v. Portugal* App. No. 15777/89, 24 Eur. Ct. H.R. rep. 573, 600-01 (1996); H. Ruiz Fabri, "The Approach Taken by the ECHR to the Assessment of Compensation for 'Regulatory Expropriations of the Property of Foreign Investors", *N.Y.U. Environmental Law Journal, Volume 11, No 1, 2002, pp. 148-173.*

14 *Starret Housing Corp. v. Iran, 4 Iran-United States Cl. Trib. Rep.* 122, 154 (1983).

15 In this case, long-time expropriation permits had been granted by the city of Stockholm in respect of the applicant's properties. These did not of themselves expropriate the property , but gave local authorities the power to do so, should they so decide in the future. Sporrong and Lonnoth

A different approach was taken by the Tribunal in the case of *CME (Netherlands)* v. *the Czech Republic*[16], the Claimant had purchased a joint venture media company in the Czech Republic and alleged, inter alia, breach of the obligation of the host country not to deprive the investor of its investment because of the actions of the national Media Council. The Tribunal, citing inter alia, the *Tippets* and *Metalclad* cases, found that an expropriation had occurred because 'the Media Council's actions and omissions caused the destruction of the joint venture's operations, leaving the joint venture as a company with assets, but without business. It stated also that although "regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the host state' the administrative measures taken by the host country did not fall under this category. It therefore concluded that:

> Expropriation of the Company's investment is found a consequence of the host country's actions and inactions as there is no immediate prospect at hand that the joint venture will be reinstated in a position to enjoy an exclusive use of the license.

2.1.1.2 Duration of the Regulation

The duration of the regulation could be another criterion of whether the regulation has had a severe enough impact on property to constitute a taking.[17] In order to constitute an appropriation, regulatory measure should be definite and permanent. A measure that leads to a temporary diminution in value or loss of control would normally not be viewed as expropriatory. The Iran-United States Claims Tribunal has acknowledged this was an issue but it has had little difficulty in finding that the appointment of "temporary" managers may constitute a taking of property, when the consequent deprivation of property rights is not "merely ephemeral (in *Tippetts, Phelps Dodge and Saghi* cases).

In *S.D. Myers v. Canada*,[18] the tribunal dismissed the expropriation claim because the measure was temporary in its effect:

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complained that it was impossible for them to sell these properties and that it amounted to an interference with their right to peaceful enjoyment of possessions. The Swedish government , by contrast, emphasised the public purpose of the permits system and intentions of the city of Stockholm to make improvements for the general good.

16 (Partial Award) (13 September, 2001) available at www. *Mfcr.c/scripts/hpe/default.asp*

17 J.M. Wagner, "International Investment, Expropriation and Environmental Protection", *Golden Gate* University Law Review (1999), Vol.29, No 3; pp. 465-538.

18 *S.D. Myers, Inc. v. Canada*, (November 13, 2000) Partial Award, 232. International Legal Materials 408, para. 232.

> In this case, the interim order and the final order were designed to, and did, curb SDMI initiative, but only for a time.....An opportunity was delayed. The tribunal concludes that this is not an expropriation case.

Equally, in *Suez* v. *Argentina*, the tribunal found that the measures taken by Argentina to cope with the financial crisis "did not constitute a permanent and substantial deprivation" of the investment.

However, some of the tempor ·y measures may also be considered expropriation depending on the specific circumstances of the case. As noted in the explanatory note to Article 10(3) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), whether an interference might amount to indirect expropriation will depend on its extent and duration, but "*there obviously comes a stage at which an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property.*" It was on these grounds that the Iran- United States Claims Tribunals found in a number of cases that the appointment of "temporary" managers constituted a taking, particularly because the surrounding circumstances after the Islamic revolution gave no realistic prospect that the investors could resume their business activity.

2.1.1.3 Economic Impact as the Exclusive Criterion.

There is no serious doubt that the severity of the impact upon the legal status and the practical impact on the owner's ability to use and enjoy his/her property is one of the main factors in determining whether a regulatory measure effects an indirect expropriation. What is more controversial "is the question of whether the focus on the effect will be the only and exclusive relevant criterion, 'sole effect doctrine' or whether the purpose and the context of the governmental measure may also enter into the takings analysis"[19]. The outcome in any case may be affected by the specific wording of the particular treaty provision. From the doctrine and the case examination, it seems however that the balanced approach is pre-dominant.

A few cases have focused on the effect of the owner as the main factor in discerning a regulation from a taking. In two nearly simultaneous awards, *Tippetts* case and *Sea-Land Service case*, the Tribunal seemed to endorse different approaches to whether a finding of expropriation required a finding that the state concerned had intended to expropriate the property. In the *Tippetts* case, the Iran-United States Tribunal held that:

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[19] Dolzer, "Indirect Expropriations: New Developments?" Article of the Colloquium on Regulatory Expropriation organised by the New York University on 25-27 April 2002; *11 Environmental Law Journal 64 at 79.*

> The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.[20]

In the *Metalclad* case,[21] the claimant had been assured by the federal government th t his project for a landfill facility had complied with all relevant environmental and planning regulations. Subsequently the local municipal authorities denied a construction permit. Then, the regional government declared the land in question a national area for the protection of rare cactus. The Tribunal upheld the investor's claim under the NAFTA's provision on expropriation. It said:

> "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State".

The case *Compania del Desarollo de Santa Elena* v. *Costa Rica*,[22] has attracted particular attention because the panel expressly stated that the environmental purpose had no bearing on the issue of compensation. In this case, the Claimant (Company Santa Elena) was formed primarily for the purpose of purchasing Santa Elena, a 30 kilometer terrain in Costa Rica with the intention of developing it as a tourist resort. In 1978, Costa Rica issued an expropriation decree for Santa Elena aiming at declaring it a preservation site. While this case concerns a direct expropriation where the issue was the day of the taking for purposes of determining compensation, the panel, citing the Tippett case, indicated that a compensable expropriation could occur through measures of state which deprives the owner of access to the benefit and economic use of his property or has made those property rights practically useless. The panel held that:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference.

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20 Iran-United States Claims Tribunal, (2002).

21 *Metalclad Corporation v. United Mexican States* (Tribunal Decision August 30, 2000).

22 ICSID Case No. ARB/96/1 (February 17, 2000)

It also added that:

> Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriate, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.

2.1.2 Character of Governmental Measures, i.e the Purpose and the Context of the Governmental Measure

A very significant factor in characterizing a government measure as falling within the expropriation sphere or not, is whether the measure refers to the State's right to promote a recognized "social purpose"[23] or the "general welfare"[24] by regulation. "The existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking'".[25] In the context of the jurisprudence of the ECHR, the State may affect control on activities by individual by imposing restrictions which may take the form of planning controls, environmental orders, rent controls, import and export laws, economic regulation of professions, and the seizure of properties for legal proceedings or inheritance laws".[26]

According to Article 1 of Protocol 1 of the ECHR, the European Court has given States a very wide "margin of appreciation"[27] concerning the establishment of measures for the public interest and has recognized that it is for national authorities to make the initial assessment[28] of the existence of a public concern warranting measures that result in a "deprivation" of property. The Court held that the state's judgment should be accepted unless exercised in a manifestly unreasonable way. Also, the Court has adopted a common approach to "deprivations" and "controls" of

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23 *The Iran-United States Claims Tribunal: Its contribution to the Law of State Responsibility 196-97 at 200 (*Richard Lillich and Daniel Magraw editors, 1998).

24 B. Weston "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'", *Virginia Journal of International Law, 1975, Volume 16, at p116.*

25 G. Christie "What Constitutes a Taking of Property under International Law?" *British Yearbook of International Law, 1962 at p. 338;* Sornarajah, "The International Law on Foreign Investment" *(1994) at 283, Cambridge University Press.*

26 *D.J. Harris et al.*, Referring to the Jurisprudence of the European Court of Human Rights in the *"Law of the European convention on Human Rights"*, (1995) at 535

27 *Hatton* v *United Kingdom* where the ECHR, overruling the Chamber Decision, held that the adverse effect on the applicants' sleep of a decision to increase the volume of night flights into Heathrow did not amount to a violation of article 8. The government was entitled to give greater weight to the economic interests of the country than to the interests of the small number of individuals living underneath the flight path whose sleep would be disrupted thereby.

28 *James v. United Kingdom,* 98 Eur. Ct. H.R. (ser. A) 9,32 (1986).

use[29] of property. In either case, there has to be a reasonable and foreseeable national legal basis for the taking, because of the underlying principle in stability and transparency and the rule of law.[30] In relation to either deprivation or control of use the measures adopted must be proportionate. The Court examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victims of the deprivation and whether an unjust burden has been placed on the claimant. In order to make this assessment, the Court proceeds into a factual analysis insisting that precise factors which are needed to be taken into account vary from case to case. In the *James* case[31] for example, the Court said that:

> The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest'. In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the 'public interest', even if they involve the compulsory transfer of property from one individual to another.

In the *Sporrong* and *Lonnroth* v. *Sweden* case, the Court stated that Article 1 contains "three distinct rule":

> the first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of the possessions and subjects it to certain conditions; it appears in the second sentence in the same paragraph. The third rule recognizes that the States are entitled, amongst other things to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

The European Court of Human Rights found no expropriation as a result of the first test, yet found compensation to be required as a result of the second test. Under the "fair balance test", it found that over the years the state had failed to take proper account of individual interests involved. Since the state had neither shortened the temporal effect of the rules nor paid compensation, the court rules that the State had placed "an individual and excessive burden" on plaintiffs and therefore acted in violation of Article 1.

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29 Helen Mountfield, 'Regulatory Expropriation in Europe. The Approach of the ECHR', 26/27 *NYU Colloquium on Regulatory Expropriations in International Law* 136 (2002) <*http://www.law.nyu.edu/journals/envtllaw/issues/vol11/1/mountfield.pdf*>; David Anderson, 'Compensation for Interference with Property', 6 *E.H.R.L.R.* (1999) 543-548; Daniel Geradin, ' Free Trade and Environmental Protection in an Integrated Market: A Survey of the Case Law of the United States Supreme Court and the European Court of Justice' , 2 *J. Trans'l L & Pol* 141 (1993).

30 H. Mountfield, "Regulatory Expropriations in Europe: the Approach of the European Court of Human Rights", *N.Y.U. Environmental Law Journal, Volume 11, No 1, 2002 pp. 136-147.*

31 *James v. United Kingdom,* 98 Eur. Ct. H.R. (ser. A) 9, 32 (1986).

The Claimant in *Tecnicas Medioambientales Tecmed S.A* v. *The United Mexican States*[32] filed a claim with ICSID alleging that the Mexican government's failure to re-license its hazardous waste site contravened various rights and protections set out in the bilateral investment treaties (BIT) between Spain and Mexico and was an expropriatory act. The Tribunal in order to determine whether the acts undertaken by Mexico were to be characterized as expropriatory, citing the ECHR's practice, considered 'whether such actions or , measures are proportional to the public interest presumably protested thereby and the protection legally granted to investments, taking into account the significance of such impact plays a key role in deciding the proportionality'[33] it added that there must be a reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought to be realized by an expropriatory measure.

2.1.3 Interference of the Measure with Reasonable Investment-backed Expectations

Another criterion identified is whether the governmental measure affects the investor's reasonable expectations. In these cases, the investor has to prove that his/her investment was based on a state of affairs that did not include the challenged regulatory regime. The claim must be objectively reasonable and not based entirely upon the investor's subjective expectations. In the *Oscar Chinn*[34] case, the Permanent Court of International Justice (PCIJ) did not accept the contention of indirect taking[35] noting that, in those circumstances, a granting of a de facto monopoly did not constitute a violation of international law and that "favourable business conditions and good will are transient circumstances, subject to inevitable changes":[36]

> No enterprise can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.

The Iran-U.S. Claims Tribunal in *Starett Housing*[37] took into account the reasonable expectations of the investor:

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32 ICSID Award Case No. ARB (AF)/00/02

33 *Id.*, para. 122.

34 *Oscar Chinn* 1934 P.C. I. J. Ser A/B, no 63

35 The P.C.I.J. employed "effective deprivation", as the standard for determining if the interference was sufficiently serious to constitute a compensable taking.

36 H. Seddigh, "What level of Host State Interference Amounts to a Taking under Contemporary International Law? *Journal of World Investment, 2001, Vol. 2, No. 4, pp. 631-84 at 646.*

37 *Starret Housing Corp. v. Iran, 4 Iran-United States* Cl. Trib. Rep. 122, 154 (1983).

Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution. That any of these risks materialised does not necessarily mean that property rights affected by such events can be deemed to have been taken.

1.3 State Practice

The recently concluded *US-Free Trade Agreements with Australia,*[38] *Chile*[39], *Dominican Republic-Central America,*[40] *Morocco*[41] *and Singapore*[42] and the *new US model BIT*107 provide explicit criteria of what constitutes an indirect expropriation. As set out therein, the criteria for a finding of indirect expropriation are as follows:

I. The economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

II. The extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and

III. The character of the government action.

However, a number of treaties have taken the approach of adding a relevant explanatory clause (in an annex or in the expropriation provision itself). It is often phrased as follows:

> Except in rare circumstances, non discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

Recent treaties concluded by other countries also include similar language. For instance, Belgium /Luxembourg-Colombia BIT (2009), provides in Article IX(3)(c):

> except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and

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38 US-Australia Free Trade Agreement signed on 1 March 2004, [Annex 11-B, Article 4(b)].

39 The US-Chile Free Trade Agreement was signed on 6 June 2003 (Annex 10-D).

40 US – Dominican Republic-Central America Free Trade Agreement signed on 5 August 2004, (Annex 10-C). The countries Parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the United States.

41 US-Morocco Free Trade Agreement signed on 15 June 2004 (Annex 10-B).

42 US Trade representative Robert Zoellick to Singapore Minister of Trade and Industry, George Yeo on 6 May 2003.

> applied for public purposes or with objectives such as public health, safety and environment protection, do not constitute indirect expropriation.

This formulation requires, inter alia, an assessment of the severity of the measure and its bona fide nature.

Relevant clauses usually describe those measures that do not constitute an indirect expropriation and, therefore, are non-compensable. Some clauses additionally set out conditions or criteria that wou'd render a measure expropriatory that is prima facie non-compensable. The Protocol to the India-Latvia BIT (2010) provides:

> (b) Actions by a Government or Government controlled bodies, taken as a part of normal business activities, will not constitute indirect expropriation unless it is prima facie apparent that it was taken with an intent to create an adverse impact on the economic value of an investment.

Importantly, even though the relevant clarifications are legally confined to those treaties where they are made, the exception of good faith non-discriminatory regulatory measures exists in general customary international law on the basis of the police powers doctrine. Indeed, many treaties specify that the clarifications with respect to indirect expropriations are "intended to reflect customary international law concerning the obligation of States with respect to expropriation. Criteria for the delineation of such measures formulated by investment tribunals are similar to the ones that can be found in recent treaties

In *Fireman's Fund* v. *Mexico*, the tribunal summarizing the law of expropriation under NAFTA (which does not have additional clarificatory language on regulatory measures) stated as follows:

> To distinguish between a compensable expropriation and a non- compensable regulation by a host state, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host state; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.

The treaty approach has been to introduce so-called general exceptions, which exclude from the scope of the treaty as a whole government measures necessary for, or relating to, certain public policy objectives. They often include objectives such as the protection of human or animal or plant life or health, the conservation of exhaustible natural resources and the protection of public morals. Relevant examples can be found in the India-Republic of Korea Comprehensive Economic Partnership Agreement (CEPA)(2009), Artcle 10.18(1)

More so, general exceptions usually come with safety valves which ensure that the exceptions are not abused by the State. For instance, the Canada model BIT provides

in the chapeau of Art.10 that the measures concerned must not be applied "in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment"

While being a progressive and balanced solution, the limitation of this approach is that it carves out only measures that relate to public policy objectives specifically mentioned in the general exceptions clause. Potentially, there might be public interest measures that do not fall within the scope of the listed exceptions but which still must be considered non-expropraitory and non- compensable. Therefore, some countries, such as Canada and India, have combined the two approaches- a clarification clause with respect to indirect expropriation and general exceptions provisions

4.1 The Ideas of Property

The philosophical underpinnings of property have also become important in the analysis of taking. Property has been seen not as a single right of ownership but as involving a series of rights relating to its use and enjoyment. The growth of modern law, particularly administrative law, has resulted in the rediscovery of the idea that, when government interference occurs, it targets only some of the rights in the bundle of rights that constitute ownership and thereby reduces the value of the ownership in the property. However, protection from expropriation relates not only to tangible property or physical assets but to a broad range of rights that are economically significant to the investor. In the words of Professor Giorgio Sacerdoti:[43]

> All rights and interests having an economic content come into play, including immaterial and contractual rights.

This principle is reflected in the definitions of the terms "investment" in the treaties for the protection of investments. The ECT in Article 1(6) refers not only to tangible but also to intangible property. In addition, it lists, among others, claims to money and claims to performance pursuant to contract, intellectual property and generally any right conferred by law or contract among protected investments. The NAFTA[44] and BITs[45] contain similarly comprehensive definitions.

Judicial practice unanimously supports a wide concept of "property," that includes intangible rights especially rights under contracts, for purposes of expropriation and

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43 G. Sacerdoti, Bilateral Treaties and Multilateral Instruments on Investment Protection, 269 Recueil des Cours, 251, 381(1997)

44 NAFTA, Article 1139.

45 Dolzer and Steven, Bilateral Investment Treaties, pp 26-30 (1995)

equivalent measures in the *Amoco*[46] case, the Iran-US Claims Tribunal said with respect to rights arising from a concession agreement:

> Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction.[47]

Therefore, for there to be a recovery for expropriation, there must be a taking of property. Significantly, in the *Oscar Chinn* case,[48] market access was held not to amount to property. The Belgium Government, with a view to maintaining viable shipping on the river Congo, gave a subsidy to UNATRA and directed it to charge nominal freight rates. The effect was to close down the business of Mr Chinn, who was UNATRA's sole competitor. The United Kingdom argued that this amounted to a breach of the general principles of international law, in particular of respect for vested rights. The Court, however, rejected this position, reasoning thus, 'the Court is unable to see in his original position which was characterised by the possession of customers and the possibility of making a profit anything in the nature of a genuine vested right'.[49]

5.1 Conclusion

Although the scope of indirect expropriation was expanded even further by use of the language "take a measure tantamount to nationalization or expropriation of such an investment," NAFTA's Chapter 11 did not contain any standard for identifying an indirect expropriation.[50] Moreover, since the decisions of international tribunals do not have precedential value, there has been no consistency among the indirect expropriation cases. Many scholars have criticized NAFTA's Chapter 11 provision for going beyond U.S. regulatory takings laws, and the U.S. government also realized that this broad definition of indirect expropriation could result in the undesirable situation of having a legitimate regulation for public welfare hindered by an individual investor under Chapter 11.[51]

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46 *AmocoInternational Finance Corp v. Iran, 1987, 15 Iran-US C.T.R. 189.*

47 *Id.*, para. 108.

48 *UK v Belgium,* 1934 PCIJ (ser A/B) no. 63 (December 12).

49 *Id.*, at p. 88.

50 North America Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, Chapter 11, 32 I.L.M. 605, 642 (1993) [hereinafter NAFTA], Art. 1110(1).

51 There are three major criticisms of NAFTA: first, Chapter 11 decisions adjudicating claims of alleged "denial of justice" in U.S. courts threaten the finality of judicial decisions; second, the specter of NAFTA liability deters governmental regulation of health, the environment, and other public interests; and third, NAFTA provides foreign investors with a competitive advantage over domestic investors. Catherine M. Amirfar & Elyse M. Dreyer, *Thirteen Years of NAFTA's Chapter*

At the same time, prudence required to recognise that the list of criteria, which can be identified today from state practice and existing jurisprudence is not necessarily exhaustive. Despite the efforts of authors and adjudicators alike to define ir sufficiently concrete terms, the meaning of indirect expropriation is still uncle: . Indeed, the doctrine and case law on indirect expropriation in international law remain somewhat unsettled. Several factors may explain why this is so. These include the university interests at play, divergences in cultural, economic and legal concepts of property, different understandings of the role of the State, and a general heterogeneity in state practice.[52] Indeed, new investment agreements are being concluded at a very fast pace and the number of cases going to arbitration is growing rapidly. Case-by-case consideration, which may shed additional light, will continue to be called for. Therefore, this deficiency in indirect taking cannot be cured but there should be standard for what should be an indirect taking.

11: The Criticisms, The United States' Responses, And Lessons Learned, 20 N.Y. INT'L L. REV. 39, 41 (2007); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections And The Misguided Quest For An International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 47-48 (2003) at 59.

52 L Yves Fortier and Stephen Drymer, Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor.

EXPANDING FACETS OF PERSONAL LIBERTY WITH SPECIAL REFERENCE TO RIGHT TO PRIVACY

Dr. Monika Ahuja*

1.1 Introduction

The right to life is the most fundamental of all the rights guaranteed in the constitutions of the States beca se none of the other rights would have any value or utility without it. The right to life is basic and most fundamental of all the rights that man can aspire for. He needs to be sure that he is not deprived of his life arbitrarily. Protection against arbitrary deprivation of life must be considered as an imperative norm of national as well as international law which means that the non-derogatability of the right to life has a preemptory character at all times, circumstances and situations. In this last quarter of 20th century, right to life does not merely mean the physical existence of an individual. It means to provide the fullest opportunity to a person to develop his personality in all its manifestations. Therefore, every civilized society or political system of the world provides, one way or the other, adequate measures to protect this basic, inherent and most sacrosanct right of an individual.[1]

The duty of the State to protect the right to life of individual has also been recognized by international community. The Preamble to the U.N. Charter lays down that the Peoples of United States determined to re-affirm faith in fundamental human rights, in the dignity and worth of human person..." Article 3 of the Universal Declaration of Human rights 1948 states that *"Everyone has the right to life, liberty and security of person"*. Article 6(1) of the International Covenant on Civil and Political Rights, 1966 declares:

> 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.

Similarly, Fifth Amendment to the Constitution of United States of America states that 'No person shall be deprived of life, liberty or property, without due process of law.'

Article 21 of the Indian Constitution upholds the above-stated right when it says that:

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

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1 D.K. Bajwa, *Right to Life*, Amar Parkashan, Lawrance Road, New Delhi, (2000), p. 1.

India has adopted Democratic Parliamentary form of political system. It includes formal as well as informal institutions which interact with one another. By formal institution we mean the three organs of the Government, i.e., Legislature, Executive and Judiciary whereas informal institutions include Political Parties (ruling politic l partyor opposition parties), Pressure Groups, Trade Unions etc. No doubt, right to life under Indian political system has been constitutionally recognized as one of the fundamental rights in part-III of the Indian Constitution, yet the ruling parties had always resorted to curtailment or violation of this right on political considerations. They even amend the Constitution to achieve their objectives. When duly elected persons find power slipping from their hands because of some exigencies of the moment or because of their decreasing popularity on account of their failure of their policies, they do not hesitate to curtail or violate the right to life.[2]

The very concept of life implies some amount of liberty also. In other words, the right to life can be enjoyed by an individual only with the availability of liberty to act freely. The concept of nascent life is of very limited use. It is on this account that the Founding Fathers of the Indian Constitution have sought to club the right to life and right to liberty together in order to enable the citizens of India to inhale the air of freedom and flourish according to their aspirations. Hence, Art.21 of our Constitution puts the two rights together. The two concepts, life and liberty are so closely related that they cannot, by any stretch of imagination, be completely divorced from each other. The concept of life itself includes personal liberty, though such is not the case with personal liberty.

Articles 19, 20, 21 and 22 of our Constitution form one group of rights entitled, 'Right to Freedom'.[3] Article 19 specifies certain important rights which may be viewed as essential hallmark of free citizenship in democratic countries. Article 20 deals with certain fundamental rights of a person accused of a crime and embodies certain important principles of criminal jurisprudence.[4] Article 21 guarantees the

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2 *Ibid.*

3 Article 19 guarantees to every Citizen of India the following six basic fundamental freedoms–
(*a*) Freedom of speech and expression;
(*b*) Freedom to assemble peaceably and without arms.
(*c*) Freedom to form associations of unions;
(*d*) Freedom to move freely throughout the territory of India;
(*e*) Freedom to reside and settle in any part of the territory of India; and
(*f*) Freedom to practice any profession, or to carry on any occupation, trade or business.

4 Article 20 of the Indian Constitution provides the following safeguards to the persons accused of crimes.–
(*a*) Ex post facto law: Clause (1) of Article 20.
(*b*) Double jeopardy: Clause (2) of Article 20.
(*c*) Prohibition against self-incrimination: Clause of Article 20.

most essential Right of Life and Personal Liberty which it says cannot be taken except according to 'procedure established by law'.[5]

Under Article 21, no person can be deprived of his 'Life' or 'Personal Liberty' except according to the 'procedure established by law'. This means that right to life and personal liberty guaranteed by the Constitution is not an absolute right, but is subject to the limitations or restrictions as imposed by law of the land. Article 21 has its prototypes in the 5th and 14th amendments of the Constitution of America. But the framers of Indian Constitution used the terms personal liberty and procedure established by law in place of Liberty and due process of Law which are to be found in the American Constitution.

'Personal Liberty' has both narrow and wider meaning. In its narrow sense, it means protection against arbitrary arrest or detention. This expression was first sought to be interpreted in famous *A.K. Gopalan* v. *State of Madras,*[6] case. In this famous case interpreting the term 'personal liberty' in a most restricted form, Justice Mukharjee observed:

> In the ordinary language 'personal liberty' means liberty relating to or concerning the personal or body of the individual and personal liberty in this sense is the antithesis of physical restraint or coercion.

Lord Denning has given another view relating to the liberty of person. He observed:

> By personal freedom I mean the freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person. . . It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live.[7]

Thus, Lord Denning has moved towards the positive aspect of personal liberty as he found in personal freedom the key to the development of human personality within the society.

In a different way, Chief Justice Kania, and Justice Das of the Supreme Court interpreted Personal Liberty to say that it includes not only freedom from bodily restraint but also those rights which go to make the human personality a reality. In this way, Justice Das interpreted personal liberty in a wider sense. He observed:

> I cannot accept that our Constitution intended to give no protection to the bundle of rights which together with the rights mentioned in Article 19 make up personal liberty. Indeed, I

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5 Alan Gledhill, "Life and Liberty in the First Ten Years of Republic of India," *Journal of the Indian Law Institute,* Vol.2, No.242, 1959-60, p. 241.

6 AIR 1950 SC 27.

7 Freedom Under the Law, *Hamlyn Law Lectures,* (1949), p. 5.

> regard it as a merit of our Constitution that does not attempt to enumerate exhaustively all the personal rights but uses the compendious expression 'personal liberty' in Article 21 and protects all of them.[8]

Justice Das further said that whatever the intentions of the Drafting Committee of the Indian Constitution might have been, the Constitution under Article 21 used the words 'personal liberty' which has a definite connotation in law. It does not mean only liberty of the person but it means liberty or the rights attached to the person (Jus personarum). Article 19 protects some of the important attributes of personal liberty as independent rights and the expression 'personal liberty' has been used in Article 21 to include all varieties of rights which go to make up the personal liberties of man.[9]

2.1 Right to Privacy

There is no agreed meaning of the term 'privacy' which covers a very vast field of the discipline of jurisprudence. Various meanings assigned to this term are: keeping one's affairs to one's self; non-disclosure of information by a person about himself; a desire not to be observed by others; the privacy of family affairs; the privacy of private property; the privacy of the internal management of a business organization etc. Thus, privacy may be understood as the state of being unobserved or unknown, confidential, undisturbed or secluded type of existence of an individual. Hence, the state of not being open to or shared with the public is known as privacy.

The right to one's protection is as old as the origin of life itself. In primitive society, individual was himself responsible for his own protection but now it is the duty of the state to protect its citizens in a politically organized society. The right to life and protection expanded its horizons and came to include the right to enjoy, right to liberty, privacy etc. the right to privacy is synonymous with the right to be let alone.[10]

There are four distinctive interests which need protection: (1) intrusion upon a person's solitude or seclusion or into his affairs; (ii) public disclosure of embarrassing facts of a person's private life; (iii) publicity which places an individual in false light in public eyes; and (iv) appropriation to a person's advantage of another's name or likeness. These acts constitute four different types of civil wrongs.[11]

This indicates that privacy is an important aspect of human dignity and their civilized existence. It is the acquisition or transmission of private information about the person

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8 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27 (110).

9 *Ibid.*

10 Cooley, *Torts*, Second Edn., (1998), p. 29.

11 Dean Prosser, "Privacy", 48 *Calif. Law Review* (2000), p. 383.

or persons without his or their consent or knowledge. If consent is obtained by coercion or fraud or by manipulative or mechanical device, it constitutes a violation of right to privacy.

> "Privacy" can be defined as "the state of being free from intrusion or disturbance in one's private life or affairs."[12]

In *Govind* v. *State of M.P.*,[13] it was held that the right to personal liberty, and the right to move freely and speech could be described as contributing to the right of privacy. However, the right was not absolute and would always be subjected to reasonable restrictions.

In *Malak Singh* v. *State of Punjab*,[14] the name of the petitioner was included in the surveillance register by the police under Section 23 of the *Punjab Police Act*, he not being given opportunity of being heard. Upholding the validity of Section 23, the Supreme Court held that the impugned Section 23 of the Police Act imposed a duty on the police officers to keep surveillance over bad characters and habitual offenders, for the purpose of preventing crimes. So long as surveillance was for the purpose of prevention of crimes and confined to the limits prescribed by rule 23(7) of the *Punjab Police Act*, a person could not complain against the inclusion of his name in the surveillance register. In these matters, the Court held that the rule of natural justice was not attracted.

In *R. Rajagopal* v. *State of T.N.*,[15] popularly known as "Auto Shanker Case", the Supreme Court has expressly held the "right to privacy" or the right to be let alone is guaranteed by Art.21 of the Constitution. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and education among other matters. None can publish anything concerning the above matters without his consent whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right of the person concerned and would be liable in an action for damages. However, position may be differed if he voluntarily puts into controversy or voluntarily invites or raises a controversy.

This rule is subject to an exception that if any publication of such matters is based on public record including court record it will be unobjectionable. If a matter becomes a matter of public record the right to privacy no longer exists and becomes a legitimate subject for comment by press and media among others. Again, an exception must be

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12 *Distt. Registrar & Collector v. Canara Bank*, 2005 (1) SCC 496.

13 AIR 1975 SC 1378.

14 AIR 1981 SC 760.

15 (1994) 6 SCC 632.

carved out of this rule in the interests of decency under Art. 19(2) in the following cases, viz., a female who is the victim of a sexual assault, kidnapping, addiction or a like offence should not further be subjected to the indignity of her name and incident being published in press or media.

The second exception is that the right to privacy or the remedy of action for damage is simply not available to public officials as long as the criticism concerns the discharge of their public duties; not even when the publication is based on untrue facts and statements unless the official can establish that the statement had been made with reckless disregard of truth. All that the alleged contemner needs to do is to prove that he has written after reasonable verification of facts.

In *State of Maharashtra* v. *Madhulkar Narain,*[16] it has been held that 'right of privacy' is available even to a woman of easy virtue and no one can invade her privacy. A police Inspector visited the house of one Banubai in uniform and demanded to have sexual intercourse with her. On refusing he tried to have her by force. She raised a hue and cry. When he was prosecuted he told the Court that she was a lady of easy virtue and therefore her evidence was not to be relied. The Court rejected the argument of the applicant and held him liable for violating her right to privacy under Article 21 of the Constitution.

In *Mr. X* v. *Hospital Z.,*[17] the Supreme Court has held that although the "right to privacy" is a fundamental right under Article 21 of the Constitution but it is not an absolute right and restrictions can be imposed on it for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. In this case, the appellant after obtaining the degree of MBBS in 1987 joined the Nagaland State Medical and Health Service as Assistant Surgeon Grade I. A government servant was suffering from some disease. He was advised to go to the 'Z' hospital at Madras. The appellant was directed by the government of Nagaland to accompany the said patient to Madras for treatment. For the treatment of the disease the patient needed blood. The appellant was asked by the doctors to donate blood for the patient. When his blood samples were taken the doctors found that the appellant's blood group was (HIV) (Aids). In the meantime, the appellant settled his marriage with one Miss Y which was to be held on Dec 12, 1995. But the marriage was called off on the ground that the blood test of the appellant conducted by the respondent's hospital was found to be HIV(+). As a result of this, he contended that his prestige among his family members was damaged. The appellant filed a writ petition in the High Court of Bombay for damages against the respondents on the ground that the

16 AIR 1991 SC 207.

17 AIR 1995 SC 495.

information which was required to be secret under Medical Ethics was disclosed illegally and therefore the respondents were liable to pay damages. He contended that the respondents were under a duty to maintain confidentiality on account of Medical Ethics formulated by the Indian Medical Council. He contended that the appellant's "right to privacy" had been infringed by the respondents by disclosing that the appellant was HIV(+), and 'therefore' they are liable in damages.

A two judge division Bench of the Supreme Court comprising of Saghir Ahmad and Kripal, JJ., held that by disclosing that het appellant was suffering from AIDS the doctors had not violated the right of privacy of the appellant guaranteed by Article 21. The Court held that although the right to privacy is a fundamental right under Article 21, but it is not an absolute right and restrictions can be imposed on it. The right to marry is an essential element of right to privacy but is not absolute. Marriageis the sacred union, legally permissible, of two healthy bodies of opposite sexes. Every system of matrimonial law provides that if a person is suffering from venereal disease in a communicable form it will be open to the other partner in the marriage to seek divorce. If a person is suffering from that disease even prior to the marriage, he has no right to marry so long as he is not fully cured of the disease. As such when the patient was found to be HIV(+), the disclosure by the Doctor was not violative of either the rule of confidentiality or the patient's right to privacy as the lady with whom the patient was likely to be married was saved by such disclosure or else she too would have been infected with the dreadful disease if marriage had taken place.

In *Mr. X* v. *Mr.Z,*[18] the wife filed a petition for dissolution of marriage on the ground of cruelty and adultery against husband under Section 10 of *Divorce Act.* The husband also asserted that his wife had adulterous affairs with one person which resulted in family way. The pregnancy of wife was terminated at All India Institute of Medical Sciences and records and slides of tabular gestation were preserved in the hospital. The husband filed an application for seeking DNA test of the said slides with a view to ascertain if the husband is the father of the foetus. The Court held that the right to privacy, though a fundamental right forming part of right to life enshrined under Article 21, is not an absolute right. When the right to privacy has become a part of a public document, in that case a person cannot insist that such DNA test would infringe his or her right to privacy. The foetus was no longer a part of body and when it has been preserved in AIIMS the wife who has already discharged the same cannot claim that it affects her right of privacy. When adultery has been alleged to be one of the grounds of divorce in such circumstances, the application of the husband seeking DNA test of the said slides can be allowed.

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[18] AIR 2002 Delhi 217.

3.1 Right to Privacy and Telephone Tapping

Allegations of political opponents and even colleagues being under surveillance have been endemic in our country under all regimes over the last six decades. Even the Western democracies are not immune from this malaise. Unless permitted under the law, it has been held to be a serious inroad into the right to privacy, a facet of the right to personal liberty.

Section 5(2) of the *Indian Telegraph Act*, 1885 empowers the Central Government or the State Government or any specially authorized officer, to intercept messages, if satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India, the security of the State, friendly relation with foreign states, public order, or for preventing incitement to the commission of an offence. It can be done in the event of the occurrence of a public emergency or in the interest of public safety for reasons to be recorded in writing. A Division Bench of the Supreme Court in *People's Union for Civil Liberties* v. *Union of India,*[19] laid down certain procedural safeguards to be observed before resorting to telephone tapping under Section 5(2) of the Act.

The Court explained that the *"right to privacy, not identified– by itself– under the Constitution, might be too broad and moralistic to be judicially defined. Whether the right could be claimed or that it had been infringed, would depend on the facts of the given case. But, the right to hold a telephone conversation in the privacy of one's home or office, without interference, could certainly be claimed as right to privacy, a part of the right to life and personal liberty".*

Except in cases, when the *Indian Telegraph Act*, 1885 empowers the state to intercept messages, telephone tapping would be violative of the right to privacy.

4.1 Woman's Right to Make Reproductive Choices

A woman's right to make reproductive choices includes the woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods; woman's right to choose birth-control methods such as undergoing sterilization procedures; woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.

In *Suchita Srivastava v. Chandigarh Administration,*[20] a three-Judge Bench of the Supreme Court, headed by Hon'ble Chief Justice, was moved to determine the scope

19 AIR 1997 SC 568. In this case the PUCL filed a petition, by way of PIL, in the wake of the report on "Tapping of politicians' phones" by the CBI, published in an issue of "Mainstream".

20 AIR 2010 SC 235.

of "woman's right to make reproductive choices" in view of the "right to privacy" secured as an important facet of "right to personal liberty" under Article 21 as also constitutionality of the *Medical Termination of Pregnancy Act*, 1971. Holding that the said right was a dimension of "personal liberty" as understood under Article 21, the Court said that it was important to recognize that reproductive choices could be exercised by the woman to procreate as well as to abstain from procreating. Stating that a woman's right to privacy, dignity and bodily integrity, was of crucial consideration, the same should be respected.

The Court held that there should be no restriction whatever, on the exercise of reproductive choice. However, in the case of pregnant women, there comes in a "compelling state" entered in protecting the life of the prospective child. As a result, in their case, termination of pregnancy would be permitted only when the conditions specified in the relevant Statutes are fulfilled.[21]

The law as to the termination of pregnancy is contained in the *Medical Termination of Pregnancy Act*, 1971. A perusal of the provisions of the Act 1971 explains that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that "a continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health, or when there is a substantial risk that if the child was born, it would suffer from such physical or mental abnormalities as to be seriously handicapped."[22] Where the pregnancy is the result of a rape or a failure of birth-control methods, it may be terminated only with the consent of the pregnant woman. In case the pregnant woman is below 18 years or is "mentally ill", her guardian's consent would suffice. In view of these provisions, the Court ruled that the Act, 1971 placed reasonable restrictions on the right of woman to make productive choices.

In the instant case, the victim, a mentally retarded, orphan woman became pregnant as a result of an alleged rape that took place while she was an inmate in a Government run welfare institute located at Chandigarh. Taking into consideration the fact that the victim had expressed her willingness to bear a child as also the risk involved in the termination at a late stage (19-20 weeks of gestation period), the Supreme Court came to the conclusion that it would be in her "best interest", that the victim's pregnancy could not be terminated without her consent.

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21 The Court referred the decision of the U.S. Supreme Court in the Roe *v.* Wade, 410 US 113 (1973), wherein the right of a woman to seek an abortion during the early stage of pregnancy held to be included within the constitutional protected right to privacy".

22 The *MTP Act*, 1971, S. 3(2)(i) and (ii).

The problem of population explosion is a national and global issue. It provides justification for priority in policy oriented legislations wherever needed. So observed, the Apex Court in *Javed* v. *State of Haryana,*[23] upheld the validity of Section 175(1)(g) of the Haryana Panchayati Raj Act, 1994, which disqualified a person with more than two living children from holding office in Panchayati Raj Institutions. The provision was held not violative of the right to life and liberty, howsoever expanded the meanings of the right might be.

India is a free democratic and secular country and therefore, any person who has attained majority, has the right to live freely with anyone. The Allahabad High Court in *Jyoti* v. *State of U.P.,*[24] ruled that a person, he or she, who has attained 18 years of age, being major according to Section 3 of the Indian Majority Act, 1875, was deemed to understand his/her welfare and hence he/she could go wherever he/she liked and life with anybody. He/she could not be restrained from doing so, even by the parents. Individual liberty under Article 21 has the highest place in our Constitution.

Two adult person living together of their free will has come to be termed as "Live-in Relationship".This concept as "a walk in and walk out" relationship which entitled no obligations on the parties who enter into it.Explaining that it was a construct of living together which was renewed everyday, Hon'ble Judge said that either party to such relationship could terminate it without consent of the other.

In a significant judgement in *Selvi* v. *State of Karnataka,*[25] the accused have challenged the validity of certain scientific techniques namely, Narcoanalysis, polygraphy and Brain Finger Printing (BEAP) tests without their consent as violative of Article 20(3) of the Constitution, they argued that these scientific techniques are softer alternatives of the regrettable use of third degree methods by investigators and violates right against self incrimination under Article 20(3) of the Constitution. The State argued that it is desirable that crime should be efficiently investigated particularly sex crimes as ordinary methods are not helpful in these cases. So, the issue was between 'efficient investigation' and preservation of individual liberty'.

In Narco analysis test a drug is given to him so that he can divulge important information. The drug is known as Sodium Pentothal- used or introduced as general anesthesia in surgical operations. The Polygraphy of Brain Finger Printing (BEAP) test is also known as the Wave test. Electric waves are introduced into the mind. It

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23 AIR 2003 SC 3057.

24 AIR 2004 All 45.

25 AIR 2010 SC 1974.

was held that compulsory administration of the narcoanalysis techniques constitutes cruel, inhuman or degrading treatment in the context. Article 21 of the Constitution disapproves of involuntary testimony irrespective of the nature and degree of coercion, threats fraud or inducement used to elicit the evidence. The popular means of the terms such as 'torture and cruel' inhuman or degrading treatment are associated with gory images of bloodletting and broken bones. A forcible invasion into a person's mental process is also an affront to human dignity and liberty often with grave and long and lasting consequences.

The court laid down the following guidelines for these tests:

- No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such tests.
- If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and physical, emotional and legal implications of such a test should be explained to him by the police and his lawyer.
- The consent should be recorded by a Judicial Magistrate.
- During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
- At the hearing the person in question should also be told in clear terms that the statement that if made shall not be a confidential statement to the Magistrate but will have the statement made to the police.
- The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
- The actual recording of the Lie Detector shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
- A full medical and factual narration of the manner of the information received must be taken on record.

5.1 Conclusion

Indian constitution is an amalgam of many constitutions and many of its provisions have been borrowed from the Constitution of America, Britain and Japan. It should not surprise to know that the main provisions of the Constitution of India guaranteeing the right to life has been lifted from the American and the Japanese

Constitution. The main provision of the Constitution of India that declares the right to life in Article 21 read as under:

> No person shall be deprived of has life or personal liberty except according to procedure established by law.

Article 21 is the filtrate of the mixture of 5th and 14th Amendment of American Constitution and Article 31 of the Japanese Constitution. In India, Article 21 has not only survived but has also widened in scope and content by judicial interpretation. It is, truly speaking, a very healthy sign that Article 21 has not suffered Constitutional emasculation.

Fast developed means of communication and the expanding sphere of activities of the modern state have threatened the very concept of right to privacy. Modern Science and technology have developed such information- gathering devices which cause invasion of personal privacy. The smallest microphone of the size of match-head only can easily pick up a whisper from a distance of about six meters. Similarly, a mini-camera of the size of an inch space can photograph a person's daily life without his knowledge. Technological development in the field of electronics and computers has made it much more difficult for the individual to preserve his privacy. Electronic computers and tele-communication has affected the human life to a great extent. Computerized telephone switching, electronic storage and retrieval of information and the use of orbiting earth satellites have already changed the manner in which individuals and countries communicate with each other. In modern times, the storing of information of individuals or organizations in computers is becoming much useful for ruling party. Here the problem of protection of personal privacy arises because information supplied by, or collected from, an individual for a particular purpose may be used in future for a totally different purpose.

COMPULSORY REGISTRATION OF MARRIAGES FOR CURBING THE EVIL OF CHILD MARRIAGE

Dr. Neelam Tyagi*

1.1 Child Marriage- An Issue of Grave Human Rights Violation

- Some Facts concerning Child Marriage[1]
- Worldwide, more than 700 million women were married before their 18th birthday.
- More than one in three (about 250 million) entered into union before age 15.
- Child marriage affects girls in far greater numbers than boys.
- Almost half of all child brides worldwide live in South Asia: 1 in 3 are in India
- The highest rates of child marriage are found in South Asia and Sub-Saharan Africa.
- The 10 countries with the highest rates of child marriage include India.
- In every region, the poor are most at risk of child marriage.
- Child marriage is most common in rural areas.
- Child brides tend to have low levels of education.
- Child brides end up having many children to care for while still young.
- Child brides are less likely to receive medical care during pregnancy than women who married as adults

2.1 Prevalence of Child Marriage in India

Child marriage is an unethical practice that has been in vogue from time immemorial.[2] It is a marriage in which either of the party is a child[3] ie: one of the party to the marriage is a child.[4] Though child marriage is practiced worldwide and affects both sexes, but girls are the worst sufferers in terms of health, lack of education and stunted personality. Every year numerous cases of child marriage are reported proving that this evil is still widely practiced.[5] The 205th Law Commission

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1 *Ending Child Marriage Progress and Prospects*, UNICEF, New York, 2014.

2 Bharti Dalbir, *Women and the Law*, APH Publishing Corporation, New Delhi, 2008, p. 24.

3 The Convention on the Right of the Child, Article 1, "Child" means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

4 The *Prohibition of Child Marriage Act*, 2006, S. 2 (b).

5 (Startling Statistics 'As many as 113 cases under the Prohibition of Child Marriage Act, 2006 were reported in the country in 2011, out of which the highest were in West Bengal (25), followed by

Report gives glaring statistics regarding the frequency of child marriages in India.[6] According to the National Family Health Survey of 2005- 2006, 45% of women were married before the age of eighteen years and in this, percentage of child marriage was much higher in rural areas (58.5%) than in urban areas (27.9%).[7] Though there is a decline in the incidence of child marriage in India, however, in some states, the prevalence of child marriage still exceeds 60 per cent with the highest rates found in Bihar, Jharkhand, Rajasthan and Andhra Pradesh.[8] The rate of child marriage quoted by NHFS-3 is even higher than the average for South Central Asia (45%) where the average is 34%.[9]

3.1 Human Rights Violated Due to Child Marriage

According to *United Nations* estimates, by 2021 there will be over fifteen million newly married girls.[10] There are various justifications that reinforce the tradition of child marriage including patriarchy, emphasis on virginity, fear of sexual violence, family honour, high costs of education and thus fewer dowries for younger girls.[11] Many studies points towards a strong link between poverty and child marriage.[12] A girl child is considered to be a burden or '*ante property*' and are married early to thwarts promiscuity, chastity and virginity. Lack of education, lack of awareness about the ill effects of child marriage, poor implementation of the law, lack of will and action on the part of the administration are some other reasons for the continuation of this practice.[13] The failure to effectively address the underlying reasons of child marriage makes girls vulnerable to various harms like; early

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Maharashtra (19), Andhra Pradesh (15), Gujarat (13) and Karnataka (12)), *The Hindu*, October 16, 2012, p. 6.

6 *Proposal To Amend The Prohibition of Child Marriage Act 2006 and Other Allied Laws*, Law Commission of India, Report No. 205, February 2008, p. 20.

7 National Family Health Survey of 2005-2006 (NFHS-3), Available at: *http://www.rchiips.org/nfhs/nfhs3.shtml*, (Accessed on 8th May, 2016).

8 *Knot Ready: Lessons from India on Delaying Marriage for Girls*, International Center for Research on Women (ICRW), 2008, p. 9.

9 Mukherji Anahita , '47% of young Indian women marry before 18', *The Times of India*, May10, 2011, p. 10.

10 *Marrying too young: End Child Marriage*, United Nations Population Fund, 2012, p. 6.

11 *Plan Asia Regional Office, Asia Child Marriage Initiative: Summary of Research in Bangladesh, India and Nepal*, ICRW, January 2013, p. 27.

12 *Id.*, at p. 28.

13 *Proposal To Amend The Prohibition of Child Marriage Act 2006 and Other Allied Laws*, Law Commission of India, Report No. 205, February 2008, p. 18.

pregnancies, unsafe abortions, denied educational opportunities, poor development, violence, social isolation, constrained decision making and reduced life choices.[14]

A child bride is exposed to a range of violations of her human rights including: right to equality, right to non-discrimination, right to health,[15] right to privacy, reproductive rights, right to abortion and reproductive self-determination, protection from violence and sexual abuse and right to education.[16] International conventions and other instruments enumerate standards for the protection of children and prohibit Child marriage for ensuring safe childhood. As a signatory to these conventions, India is under a legal obligation to protect its children and their basic human rights. Some of the important International instruments and provisions under them are mentioned below:

Universal Declaration of Human Rights, 1948	
Article 16.1	Right to marry.
Article 16.2	Free and full consent to marriage.
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964	
Article 1	Full and free consent to marriage.
Article 2	Minimum age for marriage ("not less than 15 years").
Article 3	All marriages shall be registered by the competent authority.
Convention on the Elimination of All Forms of Discrimination Against Women, 1979	

14 *Association for Social Justice and Research v. Union of India*, W.P. (CrL) No. 535 of 2010 decided on 13.5.2010.

15 (Maternal mortality amongst adolescent girls is estimated to be two to five times higher than adult women according to one estimate it is three times higher amongst girls aged 15-19 years), Barua Alka, Hemant Apte, and Pradeep Kumar , 'Care and Support of Unmarried Adolescent Girls in Rajasthan', *Economic and Political Weekly*, Vol. XLII No 44 , November 3-9, 2007, p. 54.

16 *Supra* Note 13 at p. 8. (Statistics suggest a strong association between child marriage and education. The incidence of child marriage is 77% among girls with no education, 62 % among girls with a primary education and 27% among girls with a secondary education or higher.)

Article 16.1(b)	Eliminate discrimination against women in matters relating to marriage
Article 16.2	Specify minimum age for marriage and make registration of marriages compulsory.
Convention on the Rights of the Child, 1989	
Article 3	Best interests of the child shall be a primary consideration.
Article 24.3	Abolishing traditional practices prejudicial to the health of children.
Article 28.1	Right of the child to education and equal opportunity.
Article 34	Protection from all forms of sexual exploitation and sexual abuse.
Beijing Declaration and Platform for Action, 1995	
Mission Statement number 112	Violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.

4.1 Desertion: An Adverse effect of Child Marriage

Apart from the above adverse effects, a child bride is susceptible to physical violence and psychological abuse from husband and his family. Violent behaviour can be in the form of physical and psychological violence,[17] threatening behaviour and forced sex including rape. Early marriage can also be a leading factor behind abandonment, divorce, separation and risk of being widowed which can aggravate discrimination in terms of status, ostracisation by society and denied property rights.[18] Studies confirm a strong link between child marriage and the frequency of violence faced by them, especially below the age of 15 when girls have highest rates of vulnerability to sexual violence in marriage.[19] In India, the domestic violence among women married by 18 is highest with a rate of 67 per cent.[20] Tender age, lack of education, lack of autonomy and decision-making makes them vulnerable to such violence and abuse.

17 The Annual Report of NCW, 2010-2011, p. 227. (Total 3272 complaints were registered at NCW).

18 *Association for Social Justice and Research v. Union of India*, W.P. (CRL) 535 of *2010.*

19 Somerset Carron, *Early Marriage: Whose Right to Choose?* Forum on Marriage and the Rights of Women and Children, London, 2000, p. 21.

20 *Early Marriage: A Harmful Traditional Practice*, UNICEF, Florence, 2005, p. 22.

Limited options available to women further aggravate the situation and trap her within the marriage.[21]

Desertion and divorce has massive implications for women.[22] Termination of a marital bond could be one of the most traumatic experiences for woman and her children. After desertion the woman belongs neither to the marital home nor to the natal one.[23] Parents are reluctant to take their daughter back into their home once they had given her in marriage, often at very great expenses. They pressure her to remain with her husband as they fear of inviting social disgrace and due to unwillingness to assume the financial burden of supporting her for the rest of her life. Though there is no specific data to prove it, but it is well known fact that it is almost impossible even for a young girl to find a match after a divorce.[24] Although public disapproval of divorce has softened, divorced individuals still confront stigma. Families and friends disapprove of divorce and women experience social and emotional fallout. Society assess and attribute blame, elaborate accounts are developed to explain the divorce to self and to others.[25] Separation and divorce leads to economic hardship and general lack of commodities.[26] Since women devote substantially more time for caring for children it restricts their educational and occupational opportunities and earning capacity.[27] Society expects women to make all or greater adjustment for preserving the marriage partnership without magnifying little problems.[28]

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21 On this refer two sensational cases of the Colonial India : *Phulmonee case* of 1890 where an eleven year old Phulmonee died of marital rape by her husband which raised questions whether families or communities had the right to inflict pain or suffering on women using the plea of tradition (See: Sarkar Tanika, Hindu Wife, *Hindu Nation: Community, Religion and Cultural Nationalism*, Permanent Black, New Delhi, 2001, p. 226): The *Rukmabai Case* of 1884 in which a low caste, educated girl sought to repudiate an unconsummated marriage contracted at her infancy with an illiterate, sick husband (See: Charles H. Hemsath, *Indian Nationalism and Hindu Social Reform*, Princeton University Press, (1964), pp. 91-94.

22 Neaz Ahmed, "The Legal Procedures of Marriage and Divorce Among the Muslims Between Bangladesh and India: A Comparative Analysis", in *Gender Justice*, by Subhash Chandra Singh (ed.), Serials Publications, New Delhi, (2009), p. 196.

23 Kulkarni Seema, Bhat Sneha, "Issues and Concerns of Deserted Women in Maharashtra", *Economic & Political Weekly*, September (2010), Vol XIV No 38, p. 60.

24 Mukherjee Roma, *Legal Status and Remedies for Women in India*, Deep & Deep Publications, New Delhi, (1997), p. 70.

25 Sharma Bela Rani, *Women: Marriage, Family, Violence & Divorce*, Mangal Deep Publications, Jaipur, (1997), p. 148.

26 Gobind Kashyap Bal, *Reformative Law and Social Justice in Indian Society*, Regency Publications, New Delhi, (1995), p. 148.

27 *Supra* Note 24 at p. 149.

28 *Supra* Note 25 at p. 152.

5.1 Legal Framework for Registration of Marriage

A marriage certificate is a proof of registration of a legal marriage confirming to all the essential conditions of marriage. In India, the laws concerning registration of marriage are very dissimilar. Different personal laws have different regime for registration of marriage, with registration being compulsory under Christians and Parsis laws and voluntary under Hindu laws.

I. *Registration of Hindu Marriages*- Section 8 of the Hindu Marriage Act, 1955 mandates the State governments to make Rules for optional registration of marriages. If a State Government issued such a direction for compulsory registration of marriages, non-registration would be punishable with a fine of Rs. 25 only.

II. *Registration of Muslim Marriages*-Among Muslims, no marriage rites and rituals are required and marriage takes place in the privacy of homes. The professional *kazis* who conduct the *Nikah* ceremony prepare and maintain proper records of every marriage and issue a document called the *Nikahnama* (marriage-certificate) maintaining details of the parties to the marriage and all its terms. It is admissible as evidence of due proof of marriage.[29] However, the efforts towards legal registration are always resisted.[30]

III. *Registration of Christian Marriages*-The Indian Christian Marriage Act, 1872 provides that all marriages solemnized in India between persons one or both of whom professes or profess the Christian religion, shall be solemnized in accordance with Part IV of the Act.[31] The Act lays down certain conditions for the certification of marriage.[32] Thus Act provides for a compulsory but complicated system of registration of marriages and lacks uniformity.

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29 Mahmood Tahir, Mahmood Saif, *Muslim Law*, Universal Law Publishing Co. Pvt. Ltd, New Delhi, 202, p. 151.

30 *Syed Amanullah Hussain v. Rajamma*, (1977)1 Andh WR 123, *Mohammed Amin v. Vakil Ahmed*, AIR 1952 SC 358, *Gokal Chand v. Parveen Kumari*, AIR 1952 SC 231, *Badri Prasad v. Deputy Director of Consolidation*, AIR 1978 SC 1557 (In 1981 the Jammu and Kashmir enacted the Muslim Marriage Registration Act that was later taken back).

31 Part IV of the Act (Sections 27-37): Provisions for registration of marriage to be solemnized by Ministers of Church who have received Episcopal ordination; Clergymen of the Church of Scotland; Ministers of Religion licensed under the Act; Marriage Registrars appointed under the Act; and persons licensed under the Act to grant certificates of marriage between "Indian Christians".

32 *Indian Christian Marriage Act*, 1872, Part VI, S. 60.

IV. *Registration of Parsi Marriages*- Parsi marriages solemnized under the Parsi Marriage and Divorce Act, 1936 are certified by the officiating priest in the form contained in the Second Schedule.[33] This record register shall be evidence of the truth of the statement therein contained.[34]

V. *Registration of Jewish Marriages*- the Jewish marriage is solemnised by a Jewish priest known as Rabbis and he issue certificate of marriage to the parties.

VI. *Registration under Special Marriage Act 1954*- Section 13 of the Act states that a marriage certificate snall be deemed to be conclusive evidence of the fact that a marriage has been solemnised and all formalities have been complied.[35]

VII. *Registration under Foreign Marriage Act 1969*- Section 17 of the Act provides for the registration of marriage.

However, under all these laws, non-registration of marriage does not affect the validity of the marriage and only petty fine are provided for performing child marriage.[36] In case of *G. Saravanan* v. *The Commissioner of Police, Trichy City and others,*[37] it was held that marriage solemnized between two Hindus is neither void nor voidable, but valid. In case of *Manish Singh* v. *State Government of NCT,*[38] it was observed that the Child Marriage Restraint Act, 1929, aims to restrain performances of child marriages but the Act does not affect the validity of a marriage, even though it may be in contravention of the age prescribed under the Act. In some cases Courts have given extremely light punishments or have let off the accused with small fines.[39] The validity of challenged marriage is always dependent on the due performance and in accordance with all the religious rites applicable to the form of marriage.[40]

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33 The *Parsi Marriage and Divorce Act*, 1936, S. 6.

34 The *Parsi Marriage and Divorce Act*, 1936, S. 8.

35 The *Special Marriage Act,* 1954, S. 13.

36 The *Hindu Marriage Act*, 1955, Ss. 5 and 11 - do not authorize the Court to declare a marriage void on the ground that either of the parties is underage. The exception to section 375 of the Indian Penal Code exempts a husband from the charge of rape if his wife is not under 15 years of age. These provisions are in direct contradiction to the *Child Marriage Restraint Act*, 1929, under which no child marriage is allowed. Registration of marriage can be essential to combating child marriage by requiring documentation of the age of the prospective spouses prior to solemnization.

37 H.C.P. (MD) No. 190 of 2011.

38 AIR 2006 Del 37.

39 *Mt. Jalsi Kuar & Others v. Emperor,* AIR 1933 Patna 471; *Kondepudi Sriramamurthi v. State of Andhra Pradesh and another,* AIR 1960 Andhra Pradesh 302.

40 *Khushalchand Janki Prasad v. Shankar Pandey Gaya Prasad,* AIR 1963 Madhya Pradesh 126.

Therefore the requirements of registration of marriage are rarely enforced and the practice is typically not widespread.[41] Despite this socially beneficial law, majority of States has not enacted any law on marriage registration. Even, in States where laws for compulsory registration of marriages are made, their application is ineffective, administrative machinery is faulty. Above all, people generally are not aware about the advantages of registration of marriage and disadvantages of non-registration.

6.1 Need for Compulsory Registration to Combat Issues Concerning Child Marriage

Though Child marriage and its registration is a neglected social problem in India but it is seldom given attention by policy makers, legislators, and judiciary. The non-registration of marriage may cause great hardship to women. It is recommended time and again to take steps for the compulsory registration of marriage but no steps are initiated towards its realization. The National Consultation on Prevention of Child Marriage, held on 25th May 2012, which recommended the formulation of a National Strategy on Prevention of Child with the goal to curb child marriage so that children can realise their full potential and live a life of dignity.[42] Pointing towards the need for making registration of the marriages compulsory it was observed that the option of declaring a child marriage as void *ab initio* might not act as a deterrent unless registration of marriage is made compulsory.[43] The Committee on empowerment of Women,[44] in its 12th Report suggested that all marriages in India, irrespective of religion should be compulsorily registered. For this it is highly desirable that the Government should make the procedure for registration simpler, affordable and accessible. The Law Commission of India[45] also recommended for a

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41 The following enactments by the State Governments have provided for compulsory marriage registration: (1) The Bombay Registration of Marriages Act, 1953. (2) The Karnataka Marriages Act, 1976 in force since 1983, (3) The Himachal Pradesh Registration of Marriage Act, 1997 (4) Andhra Pradesh passed the Compulsory Registration of Marriage Act, 2002.

42 Draft National Plan of Action to Prevent Child Marriages in India, Available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=100741, (Accessed on 10th May, 2016).

43 Report on the National Consultation on Prevention of Child Marriage held at New Delhi on 25th May 2012, pp. 3-5, available at http://icds-wcd.nic.in/childwelfare/childwelfare.htm, (Accessed on 8th May, 2016).

44 *Plight of Indian Women Deserted by Indian Husbands*, 12th Report of the Committee on Empowerment of Women, 2006-2007, p. 12.

45 *Laws on Registration of Marriage and Divorce- A proposal for consolidation and Reform*, Law Commission of India, 211th Report, Government of India, October 2008, p. 34.

Parliamentary Legislation on Compulsory Registration of Marriages applicable to whole of India and its citizens irrespective of their religion and personal law.

In case a married woman is driven out of her matrimonial home her husband and in-laws she needs to seek legal redress for matrimonial reliefs and benefits. Lack of evidence of age at the time of marriage and to prove the fact of performance of marriage is an important legal barriers that deprives her for her legal entitlements. Compulsory registration of marriage is a measure to save women from being victims of such a situation and other connected disputes concerning:

I. Dowry harassment: Compulsory registration of Marriage Act will provide details of gifts given to the bride by her parents at the time of marriage. This would ensure that in cases of marital dispute, woman can take back valuables given to her by her parents

II. Child marriage: The registration of marriage will also help in checking the child marriages. It will introduce a uniform minimum age of marriage and will prevent sexual exploitation of children.

III. Marriage without consent: It will ensure free and informed consent of both parties especially of millions of girls who are married as child in the name of culture, religion, morality without their consent or against their consent.

IV. Bigamous or polygamous relationships: It will help women who are victims of bigamous relationships, facing enormous hardship in establishing their marriage, by proving the fact of first or second marriage of their husband.

V. Domestic Violence: Women, who are married as children, are vulnerable to violence, abuse and harassment. If child marriage is curbed, it will check the frequency of violence against women.

VI. Denial of Property rights: It will streamline the inheritance rights and will ensure immediate and emergency relief to women in times of distress. Marriage proof will enable a widows to claim her inheritance rights and other benefits and privileges which she is entitled to after the death of her husband.

VII. Maintenance litigation: It would also empower a woman to secure her maintenance rights during the subsistence of marriage and even after its dissolution. It will prevent unnecessary harassment by providing evidence of marriage.

VIII. Custody disputes: It will provide evidence in the matters of custody of children and cases concerning right of children born from such wedlock.

IX. Trafficking of women: Child marriage is also associated with trafficking of girls, prostitution and bonded labour.[46] Traffickers use fake marriages to procure girls and since most of these marriages are unofficial and unregistered, trafficking easily get away without stringent punishments.[47] It will deter parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage."

X. Docket explosion: It will relieve the already overburdened judiciary from numerous matrimonial litigation, FIR, habeas corpus etc.[48]

XI. Desertion and abandonment: It will tackle the tendency of easy desertion and large number of abandoned, exploited and trafficked spouses in India in case of NRI marriages. It will curb the tendency of denying the existence of marriage and thus taking advantage of the vulnerable situation of women as that in most of the States there is no official record of the marriage.

Thus there is a dire need for compulsory registration of marriage as it will be beneficial for the distressed women. It will help them live in the matrimonial home. Data from marriage records can also be used for many worthwhile statistical purposes. It will provide a proof of marriage and will tremendously help women whose husband disowns them for a want of proof of marriage.

7.1 Judicial Perspective on Child Marriage and Need for Registration

Times have changed but the law has not evolved. The Child Marriage Restraint Act 1929, popularly known as the Sharda Act, prohibited child marriages of girls below the minimum age of 18 years.[49] The Act was enacted to carry forward the reformist movement of prohibiting child marriage.[50] The Prohibition of Child Marriage Act 2006 was enacted to overcome the shortcomings of Child Marriage

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46 Bhatt Aparna (et. Al), *Child Marriage and the Law in India*, Human Rights and Law Network, New Delhi, 2005, p. 37; *A Report of Trafficking in Women and Children in India*, Volume I, NHRC - UNIFEM - ISS Project 2002-2003, p. 83.

47 *Nihal Singh v. Ram Bai,* AIR 1987 MP 126.

48 *Jitender Kumar Sharma v. State and Another*, 171(2010) DLT 543, I (2011) DMC 401, ILR (2010) Supp. (1) Delhi 600.

49 The Act was amended in 1940 to raise the age at 15 years and in 1978, by a further amendment, the minimum age rose to 18 years.

50 *Lila Gupta v. Laxmi Narain* , AIR 1978 SC 1351.

Restraint Act. Both the Acts seeks to eliminate child marriage, which has the potentialities of dangers to the life and health of the female child. However they do not invalidate a child marriage and merely gives child bride an option to end the marriage after the age of 15 years. Despite the law against child marriages continues to take place due to the lack of awareness regarding these provisions. The Act is a good legislation but it does not holistically address the problem of child marriage. It does not take into account the diverse personal laws and customary practices which promote child marriage. Negotiation and preparation for the marriage is not punishable.[51] Reporting of child marriage is ineffective[52] due to the reluctance on the part of society. Even when reported very few results in conviction. Child marriage is rendered void only if the children or their guardians file legal proceedings[53] which is highly improbable. The Act is absolutely silent on the aspect of registration of marriages.[54] The lack of will on the part of legislature to ensure compulsory registration of marriage has not gone unnoticed by the Courts. In a number of decisions it has not only pointed towards the ill consequences of Child marriage but has also pointed toward the registration. In case of *Association for Social Justice and Research* v. *Union of India & others*,[55] it was observed that the Prohibition of Child Marriage Act, 2006 was enacted to ensure that no child marriage is performed as a child is neither psychologically nor physically fit to get married. However in case of *T.Sivakumar* v. *The Inspector of Police*,[56] the Court held that child marriage is illegal and destructive although it is only voidable ie: perfectly valid until it is avoided.

In case of *Seema* v. *Ashwani Kumar*,[57] the honorable Supreme Court highly recommended for the compulsory registration of marriages. If the marriage is registered it would provide a rebuttable presumption of the marriage having taken place. It was also observed that though, the registration itself cannot be a proof of valid marriage *per se*, and would not be the determinative factor

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51 *Sheikh Haidar Sheikh Rahimmo Attar Musalman v. Syed Issa Syed Rahiman Musalman and others*, AIR 1938 Nagpur 235.

52 *Crime in India, Compendium*, National Crime Bureau Records, Ministry of Home Affairs, Government of India, 2014 (169 incidences were reported in the country under the Child Marriage Restraint Act in 2012, 222 in 2013 and 280 cases reported in 2014).

53 The *Prohibition of Child Marriage Act*, 2006, S. 3.

54 Gonsalves Colin, *Illegal Yet Valid*, Human Rights and Law Network, Indian Social Institute, 2007, pp. 1-2.

55 W.P. (CrL) No. 535 of 2010 decided on 13.5.2010.

56 AIR 2012 Mad 62.

57 2006 (2) SCC 578.

regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. Thus, it would be in the interest of the society to make compulsory registration of marriage a prerequisite. The Court directed that all marriages in India should be compulsorily registered and that the State Governments should initiate action for rule-making in the matter of framing necessary statutes.

In *Lajja Devi* v. *State (NCT of Delhi) and Others*,[58] it was held that the compulsory registration of marriage, if implemented properly, would discourage parents from marrying off their minor children since a written document of their ages would prove the illegality of such marriage. This would probably be able to tackle the sensitive issue of minor marriages sanctioned by personal laws. In case of *Jitender Kumar Sharma* v. *State and Another*,[59] the court observed that Child Marriage is an unhealthy practices and the State must take measures to educate the youth that getting married early places a huge burden on their development. The legislature should examine these issues and comes out with a comprehensive and realistic solution.

These decisions highlights the Court's understanding of the violations experienced by women and girls as a result of child marriage. In each of these rulings, the Court has placed significant weight on the negative outcomes of child marriage and stressed upon the need for making appropriate modifications in the existing laws. It is worth mentioning that the Compulsory Registration of Marriage Act 2006[60] and the amendment in the Registration of Births and Deaths Act, 1969[61] are the other efforts in the right direction as they seek to achieve the objective of preventing child marriages by prescribing minimum age of marriage.

8.1 Action Needed to Curb Child Marriage

Child marriage is thus a grave and systematic abuse of young girls and is violative of internationally protected human rights and fundamental rights. The

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58 2013 Cri L J 3458

59 2012 (3) JCC 148: 2012 (193) DLT 619.

60 National Commission for Women Draft on the Compulsory Registration of Marriage Bill, 2005.

61 18th Law Commission of India recommended for compulsory registration of marriages by enacting a "Marriage and Divorce Registration Act" for this the government decided to amend the Registration of Births and Deaths Act, 1969.

judiciary has also approved the validity of child marriages[62] in the name of public policy leading to the exploitation of women.[63] In the absence of ancillary support mechanisms such as registration of marriage, mere enactment of Child marriage has not been able to curb the practice of child marriage in any substantial manner.[64] Therefore we need to address the root causes of child marriage, including poverty, gender inequality and discrimination apart from providing equal access to education for girls. There is a need to develop support systems for girls who are married and are experiencing violence and abuse within marriage. There should be easy access to legal support, health care facilities, psycho-social support system and effective child protection services.

National government should make suitable amendments for absolutely prohibiting child marriage by prescribing 18 as the minimum age for marriage for girls with stringent punishment against any contraventions. As recommended by the 2008 report recommended, all the child marriage below 18 for both boys and girls should be prohibited and that marriages between 16 to 18 be made voidable. Compulsory registration of all marriages, with severe punishments for non registration, should be introduced to scrape child marriage in a time phased manner. These recommendations represent important legal steps that must be taken by the governments to demonstrate their commitment to end the practice of child marriage and protect the human rights of million young girls.

9.1 Conclusion

Child marriage is a social phenomenon, rooted in our social fabric, which cannot be tackled by legislative interventions alone. Human rights jurisprudence mandates that governments must address the evil effects of this practice but lack of political will and initiative on the issue is one of the major areas of concern. Inconsistency in the different personal laws regarding the legally permissible age at marriage, the option of puberty in personal laws, and judicial computation of the age of discretion inhibits implementation of the laws meant for curbing this evil practice. Central Government should make stringent provision for compulsory registration of all marriages, irrespective of the religion. Lastly,

> *Ending child marriage will help break the intergenerational cycle of poverty by allowing girls and women to participate more fully in society.*

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62 *Manish Singh v. State Government of NCT. And Others*, 2006(1) HLR 303.

63 *Durga Bai v. Kedarmal Sharma*, 1980 (Vol. VI) HLR 166, *Shankerappa v. Sushilabai*, AIR 1984 Kar 112, *Smt. Lila Gupta v. Laxmi Narain and others*, 1978 SCC (3) 258.

64 Negi B S, *Child Marriage in India*, Mittal Publications, New Delhi, 1993, p. 9.

Empowered and educated girls are better able to nourish and care for their children, leading to healthier, smaller families. When girls are allowed to be girls, everybody wins[65].

[65] *Ending Child Marriage: Progress and Prospects*, United Nations Children's Fund, New York, 2014, p. 8.

DECISION MAKING IN MARRIAGE: A STUDY OF GENDER RELATIONSHIP

Ramneet Kaur*

The socially constructed gender divide in the roles of men and women act as a guiding force in regulating the functioning of decision making process in marriage. The decision making power of men and women is determined and distributed on the basis of gender role which they are socialized to perform in marriage. It is the gender role socialization which makes men and women internalize that there are certain acts which they are expected and not expected to perform in marriage.

As Parsons conceptualized basic roles in the family as instrumental and expressive and dichotomized them as male and female roles respectively. Parsons argues that family functions better when men are primarily responsible for earning money and making family decisions and women are primarily responsible for caring family members, particularly young children. As men are expected to play what Bernard has called the role of provider taking the responsibility of economically supporting the family while women were assign responsibility of taking care of home and family.[1]

It is the gender role socialization which makes them internalize that there are certain decisions which are to be made by men, some to be made by women, some decisions need to be discussed, some decisions cannot be discussed, and some matters will have silent arrangements. The socialization of gender roles plays an important role in regulating the conduct of men and women in regard to decisions which they can or cannot make in marriage. The kinds and amount of decisions one is making or can make in marriage determines the status and position one occupies in marriage. As Caroline Dryden says, marriage is a gender power relationship[2] in which patriarchal norms, and beliefs are manifested in the decision making process.

The traditional source of power in marriage is inferred from the manner in which the couple perceives their marital roles.[3] We can assess power by studying the role of each spouse in decision-making by considering the total feeling-tone of the marriage-who deferred to whom, who tiptoed around whom, who conciliated or influenced whom. So,

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* Those lines which are italicized are referring to the views of participants.

1 J. Wallen, *Balancing Work and Family. The Role of the Workplace*, Allyn and Bacon, Boston (2002), p. 25.

2 C. Dryden, *Being Married, Doing Gender. A Critical Analysis of Gender Relationships in Marriage* Routledge, London, (1999), p. 19.

3 M. Komarovsky and J. Phillips, *Blue- Collar Marriage*, Yale University Press, New Haven, (1962), p. 225.

the distinction of "who makes the decision" "who carries them out" and "who decides who is to make the given decisions"[4] are the fundamental basis on which one can determine the power of each spouse in marriage. Decision making is, therefore, one of the important parameter of measuring power in marriage. In other words an important determinant of power in marriage is who decide for whom.[5]

Scanzoni argues that an important characteristic of equal partner marriage is equal sharing of decision making power.[6] As decision making is one of the medium through which we can measure the power relation between the men and women in marriage because the one who is having major say in making decisions would be the one who is exercising the dominant power in marriage and through this we can measure the status and position of men and women in marriage.

Following Scanzoni argument on decision making as an indicator of equal partner marriage, in this study I have tried to study decision making power of working married women. I have attempted to examine inequality in marriage through the lens of decision making. The focus of research were women because I want to study from women standpoint how far they believe that they have been able to negotiate for decision making power in marriage.

To understand decision making in marriage from women standpoint feminist methodology was adopted and through qualitative approach married women from Delhi belonging to professions such as Doctors, School Teachers, Bank Employees, Nurses, and Beauticians were selected by random sampling and semi-structured interviews were conducted.[7] The women belonging to different professions were selected on the basis of feminist standpoint theory which provides that all understanding is socially situated or locatedas what people do what kind of interactions they have in social relations and relations to the natural world- both enable and limits what one can know.[8]

In this study I have taken decision making in association with financial and child welfare decisions. I have taken financial decisions as critical decisions because financial matters are associated with money which is one of the important sources of power in marriage. I

4 *Ibid.* pp. 221-222

5 D. Morgan, *Family Connections. An Introduction to Family Studies*, Polity Press, Cambridge, (1996), p. 75.

6 L. Scanzoni and J. Scanzoni, *Men Women and Change. A Sociology of Marriage and Family*, McGraw Hill, Toronto, (1976), p. 235.

7 The interviews were conducted at-Joy nursing home, Mai Kamali Wali Hospital, Amarleela hospital, Gambhir Hospital, Guru Nanak public school, Mira model school, Neha beauty parlour, Good looks herbal beauty parlour, IDBI bank, Bank of Baroda, Indusland bank, Punjab and Sind bank, Punjab national bank, and Indian overseas bank.

8 S. Harding, "The Feminist Standpoint", S. Biber, (ed.), Handbook *of Feminist Research. Theory and Praxis*, Sage, California, (2012), pp. 50-51.

have attempted to understand how much decision making power does working married women have over their financial matters? Does she able to decide how she is going to spend her income? Who is taking the financial decisions in their marriage? Through child welfare/care decisions I have attempted to investigate whether married working women have any say in deciding child welfare matters? Like the school her child would go? The extracurricular activities the child should opt for? Who decides that whether child would go for picnic or not? Which tuition would their child go for?

Feminist approach was adopted because it is the one which starts out from the women's experiences.[9]Harding asserts that all knowledge is socially situated and some of these objective social locations are better than others as starting point for knowledge. According to Harding one's social situation enables and sets limit on what one can know. Some social situations are critically unexamined dominant ones are more limiting than others and what makes this situation more limiting is their inability to generate the most critical questions about received belief. Further, women lives can provide the starting point for asking new, critical questions about not only their lives but also about men's lives and most importantly the casual relations between them.[10]

According to Bernard, feminist methodology view women through female prism in research developed to have a description, analysis, explanation, and interpretation of female world. Mackinnon's argues that feminist methodology seeks to validate the private, emotional, interiorized, and the intimate world. As the feminist investigator locates herself as a subject so that her own vantage point arises from the same social relations that structure the everyday worlds of the experiences of those she studies. Understanding the common experiences of women subjects in a society characterized by a marked degree of gender asymmetry enables the feminist researcher to bring women's realities into sharper focus.[11]

As Sandra Harding in standpoint theory provides:

> that understanding women lives from a committed feminist exploration of their experiences of oppression produces more complete and less distorted knowledge than produced by men. Women lead lives that have significantly different contours and patters than those of men and their subjugated position provide the possibility of more

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9 M. Maynard, "Methods, Practice and Epistemology: The debate about Feminism and Research", S. Delamont and P. Atkinson, (ed.), *Gender and Research, Feminist Methods*, Volume3, Sage, London, (2008), p. 81.

10 S. Harding, "Rethinking Standpoint Epistemology: What is "Strong Objectivity"?" A. Cudd and R. Andreasen, (ed.), *Feminist Theory: A Philosophical Anthology,* Blackwell Publishing, Malden, ()2005), pp. 221-222.

11 J.A. Cook and M. Fonow, "Knowledge and Women's Interest: Issues of Epistemology and Methodology", S. Delamont and P. Atkinson, (ed.), *Gender and Research. Feminist Methods*, Volume 3. Sage, London, (2008), p. 159.

> complete and less pervasive understandings. Thus, adopting a feminist standpoint can reveal the existence of forms of human relationships which may not be visible from the position of the ruling gender.[12]

Feminist standpoint theorists contend that standpoint of women is superior from that of men because women have less interest than men in concealing inequality and injustice. The standpoint of women is more impartial than male-dominated system of ideas because it comes closer to representing the interest of society as a whole; it is more inclusive or comprehensive because it recognizes and demystifies dominant system of knowledge.[13]

According to Mies:

> if women lives are to be made visible, feminist women must deliberately and courageously integrate their repressed, unconscious female subjectivity, i.e., their own experience of oppression and discrimination into the research process. Because women and other exploited group are forced out of self preservation to know the motives of their oppressors as well as how oppression and exploitation feels to the victims as they are better equipped to comprehend and interpret women's experiences.[14]

One of the driving forces of feminism was to challenge the passivity, subordination, and silencing of women by encouraging them to speak about their own condition and in doing so to confront the experts and dominant males with limitations of their own knowledge and comprehension. Thus, legitimacy of women's own understanding of their experiences is one of the hallmarks of feminism. Dorothy Smith argues:

> A sociology for women must be able to disclose for women how their own social situation, their everyday world is organized and determined by social processes which are not knowable through the ordinary means through which we find our everyday world.[15]

As one of the fundamental central subject of feminist methodology is gender. The feminist methodology aims to analyze how gender relations are constituted and experienced this includes; the situation of women and the analysis of male domination. By studying gender we can gain a critical distance on existing gender arrangements through which revaluing and altering our existing gender arrangements become

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12 M. Maynard, "Methods, Practice and Epistemology: The debate about Feminism and Research", S. Delamont and P. Atkinson, (ed.), *Gender and Research, Feminist Methods*, Volume3, Sage, London, (2008), p. 80.

13 A. Jaggar, (ed.), *Just Methods. An Interdisciplinary Feminist Reader*, Paradigm Publishers, Boulder, (2008), p. 305

14 J.A. Cook and M. Fonow, "Knowledge and Women's Interest: Issues of Epistemology and Methodology in Feminist Sociological Research", S. Delamont and P. Atkinson, (ed.), *Gender and Research, Feminist Methods*, Volume 3, Sage, London, (2008), p. 159.

15 M. Maynard, "Methods, Practice and Epistemology: The debate about Feminism and Research", S. Delamont and P. Atkinson, (ed.) Gender *and Research, Feminist Methods*, Volume 3, Sage, London, (2008), p. 84.

possible. Gender can be understood by close examination of meanings of male and female and the consequences of being assigned to one or the other gender within concrete social practices.[16] As Cook, J. and Fonow, M. suggested that 'gender' implies women's relationship to men and this need to be included, when examining from a woman's perspective in any inquiry involved in understanding how women's experiences in a male world are structured.[17] Thus, to understand marriage as a gendered relationship between the powerful (men) and powerless (women) feminist methodology was adopted.

1.1 Conceptual Understanding of Decision Making Power in Marriage

According to Zartman, bargaining power in marriage is an ability to produce movement or re-evaluation or change of behavior on the part of the other. Power is present in a negotiation situation when party shifts another from its initial positions toward the position of the first party because the first party has caused to move. As power is a process of modification and convergence. Power is not solely the capability of making changes; it is simultaneously the capability of resisting changes or modifications desired by other.[18] Therefore, when parties gain and grant changes of comparable importance, their relative power is symmetrical and when there is an imbalance of gains and grants power is asymmetrical in favor of one of the parties.[19]

Power may be wielded equally or unequally in marriage. Inequality traditionally yields dominance to the husband.Equality involves in sharing all decisions that is 'syncratic' power or making an equal number of separate decisions that is 'autonomic' power'.[20] Power structure in marriage can be thought of in terms of three components- first, authority: who has the legitimate right to have the most say according to prevailing cultural and social norms. Second, influence: the degree to which a spouse is able to impose his or her point of view through various subtle or not so subtle pressures even though the other spouse initially opposed that point of view. Third, decision making: that is who is making decisions, how often and so on.[21] McDowell argues that by understanding who took what action or decision on an issue being debated and who

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16 J. Flax, "Postmodernism and Gender Relations in Feminist Theory", S. Delamont and P. Atkinson, (ed.) *Gender and Research, Feminist Methods, Volume 3*, Sage, London, (2008), pp. 393-398.

17 M. Maynard, "Methods, Practice and Epistemology: The debate about Feminism and Research", S. Delamont and P. Atkinson, (ed.) Gender *and Research, Feminist Methods*, Volume 3, Sage, London, (2008), p. 76.

18 J. Scanzoni and M. Szinovacz, *Family Decision-Making. A Developmental Sex Role Model*, Sage, Beverly Hills, (1980), p. 86.

19 *Id.*, p. 104.

20 R. Blood, *Marriage*, Collier-Macmillan, London, (1969), p. 205.

21 L. Scanzoni and J. Scanzoni, *Men Women and Change. A Sociology of Marriage and Family*, McGraw Hill, Toronto, (1976), p. 440.

prevented the issue from emerging into public arena or who distorted or remolded, and diverted it[22] one can judge who is exercising the power in marriage.

The degree of importance couple attach to different aspects of family living about which decisions have to be made and assessment of importance of decision by considering whether the decision is mainly the wife's or husband's responsibility, with the frequency with which decisions has to be made.[23] In this way, power is relative, situational, issues, as well as sphere specific.[24] The spouse may relegate one or more decisions to other spouse because he finds these decisions relatively unimportant and very time consuming. The relegating spouse in such cases has considerably more power than the one who might appear to take the decisions because the relegating spouse can orchestrate the power structure in the family according to his preferences and wishes.[25]

Decision making processes thus, involves ongoing series of exchanges that are based on negotiations, interpersonal skills, overall marital adjustment, and one's location in life cycle.[26] Who should decide what and why she/he has the right to do so, involves a long chain of hundreds of negotiations and exchanges, many of which become institutionalized over time.[27] Negotiations between men and women are common characteristic of day to day life in doing so the key issues such as who should do what job around the house, spending priorities etc., have to be sorted out through argument and compromise.[28] Routine decisions such as who goes to market, how much to buy, might have been contentious during the first year of marriage but as the time passes these things no longer become matters that seriously engages couples. Every relationship over the years seems to have settled into much routinized ways of doing things.[29]

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22 A. Maguire, "Power: Now You See It, Now You Don't. A Woman's Guide to How Power Works", L. McDowell and R. Pringle, (ed.), *Defining Women. Social Institutions and Gender Divisions*, Polity Press, London, (1992), p. 23.

23 A. Murcott, "'It's a Pleasure to Cook for Him': Food, Mealtimes, and Gender in Some South Wales Household's", Gamarnikow, E. et al, (ed.), *The Public and the Private*, Heinemann, London, (1983), p. 88.

24 J. Scanzoni and M. Szinovacz, *Family Decision-Making. A Developmental Sex Role Model*, Sage, Beverly Hills, (1980), p. 104.

25 L. Scanzoni and J. Scanzoni, *Men Women and Change. A Sociology of Marriage and Family*, McGraw Hill, Toronto, (1976), p. 441.

26 G. Ramu, "Single Dual Earner Couples: Economic Status and Marital Power", S. Rege, (ed.), *Sociology of Gender: The Challenges of Feminist Sociological Knowledge*, Sage, Delhi, (2003), p. 146.

27 *Id.*, at pp. 138-139.

28 T. Chapman, *Gender and Domestic Life. Changing Practices in Families and Households*, Palgrave Macmillan, New York, (2004), p. 208.

29 G. Ramu, "Single Dual Earner Couples: Economic Status and Marital Power", S. Rege, (ed.), *Sociology of Gender: The Challenges of Feminist Sociological Knowledge*, Sage, Delhi, (2003), p. 144.

2.1 Impact of Gender Roles on Decision Making Power in Marriage

The socialized gender roles regulate the decision making power in marriage because each spouse knows his/her part so well that allow them to spared some decisions. Gender socialization makes them internalize which decisions are to be taken by whom in their marriage. Their behavior is shaped by preconceptions of their roles about how decision-making ought to be handled as what I supposed to do and not do.

For Scanzoni men and women sex role preferences affect their behavior in certain ways. Sex role preferences of each spouse influence how these processes are carried out.[30] Scanzoni asserts the adherence to traditional roles makes great deal of decision making unnecessary. In effect conflict should be relatively less frequent. The partners share an "understanding" of what things can and what things should not be brought up. When the number of things that can be discussed is limited or declared out of bounds ahead of time, then the opportunities for a whole range of potentially serious conflict is eliminated.[31]

Some family arrangements are not discussed or negotiated. In spite of the fact that no one talks about a certain matter, family members seem to know what to do. According to Strauss, these are implicit means are apart from any words. They are silent arrangements. However, the fact that the arrangements are silent does not necessarily mean they are weak, tentative, vague, unclear, or loosely binding. The children and adolescents learned traditional sex roles when they saw parents, neighbors, other adults, are behaving in those ways. Books, magazines etc., reinforce these patterns. They knew their parents expected them to act in certain ways and that they would accord them approval and affirmation for doing it. This is what Fox called spontaneous consensus based on the idea that "everybody does it this way". Everyone knew they behaved in certain ways and they simply imitated those ways. They knew it was socially rewarding to conform and that it was socially punishing to try different kinds of housework and paid work arrangements. They sensed all these things through learning, observation, and perhaps anticipation of the rewards of conformity and cost of non-conformity-as everybody does this way.[32]

Scanzoni and Szinovacz asserts that the fear of talking about changing the silent boundaries of a tacit understanding can by itself be taken as an indicator of power. The more powerful is the one who strongly prefers the unspoken agreement to continue as it is. Each has the idea of how the other feels what he or she wants but they have silent arrangements that they will avoid discussing this particular matter. Instead they leave the

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30 J. Scanzoni and M. Szinovacz, *Family Decision-Making. A Developmental Sex Role Model*, Sage, Beverly Hills, (1980), p. 25.

31 *Id.*, at p. 75.

32 *Id.*, at pp. 105-106.

things pretty much as they are.[33] This power imbalance is an important factor in regulating the acts of men and women which produces inequality in their marriage.

It is the pre-conceptions of marital roles in the minds of couples which made them believe that there are certain socially expected roles which they have to play in their marriage. This internalization of gender roles while enables one to make some decisions at same time also unable one to make some decisions. Due to their socialization men and women know which matters have to be decided by whom, so it cannot be and need not to be questioned it. Men and women know that there are certain matters which cannot be brought up for discussion because for them they already have pre-defined or pre-determined decisions to follow. These silent arrangements reflect the internalization of gender roles through which the couples regulates their decision making processes in marriage.

3.1 Field Results

3.1.1 Financial Decision Making

The spouse who gets to make the decisions may seem at first glance to be the one with the greater power; after all it is his or her wishes that will be carried out. One way of measuring power in marriage is to determine which partner has the final say in major decisions for example decisions involving finances.[34] Keeping track of money and bills is an administrative task closely associated with family power structure and with the size of the husband's income. Robert Blood said that the higher husband income, the greater the likelihood that he will control the outflow of money by paying bills and figuring accounts.[35] But even when wife earn more or when wife is the sole earner it's the husband who ultimately takes the big decisions of household finances.[36] The traditional prerogatives of husband being head of family provides him the power of ultimate decision making and as unique provider, he has freedom to organize his life and lives of other family members around his occupation.[37]

Though Melville asserts that when wives work balance of power shifts as they get power to make fewer decisions of day to day life[38] as well as they can participate in

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33 *Id.*, at pp. 113-116.

34 L. Scanzoni and J. Scanzoni, *Men Women and Change. A Sociology of Marriage and Family*, McGraw Hill, Toronto, (1976), p. 440.

35 R. Blood, *Marriage*, Collier-Macmillan, London, (1969), p. 211.

36 T. Chapman, *Gender and Domestic Life. Changing Practices in Families and Households*, Palgrave Macmillan, New York, (2004), p. 114.

37 J. Scanzoni, *Sex Roles, Life Styles, and Childbearing. Changing Patterns in Marriage and the Family*, Macmillan Publishing, New York, (1975), p. 38.

38 K. Melville, *Marriage and Family Today*, Random House, New York, (1977), p. 217.

making of economic decisions.[39] But in reality *they still follow the traditional demarcation of departments as financial department belongs to husband and emotional department to wife.* It shows that though both the men and women are working but the traditional patriarchal demarcation of financial and emotional responsibilities still continue in marriage.

Scanzoni argues that working wives can use their resources as way of obtaining more bargaining leverage. Wife bringing money can always feel she has a right in particular decision like about financial arrangements.[40] But in actual they follow the common pattern of traditional marriage in which the husband may control the decisions about major expenditures.[41] The way men and women account for spending is also gendered because husband ultimately makes the big decisions about the finances.[42] As one participant said *at the end of the day I have to give my salary in husbands hands as he is the one who decides about financial matters, this is something very much clear from the day one of my marriage and there is nothing to be discussed or negotiate ....this is the way things carried out in our society and our family.*

Melville argues that the wife who brings pay checks has more influence in decisions about how to spend family income but it is still the husband who has upper hand in major decisions as he is the primary earner and money is crucial ingredient in marital power.[43] Despite the fact both are earning the decisions regarding finances as how they are going to spend their income or whose income will be used and for what purpose is depend on the husband because the financial matters are still in the hands of husband.

How the couple is spending their income determines whose income is given what importance. It shows how they are sharing or dividing their income in running their house. The findings of the study have the mixed response in regard to how married working women negotiating decision making processes in marriage. There is itself a variation in the way in which these married working women due to their socialization have perceived their decision making in marriage. The response of the women can be categories in the four cases.

In case one, the men money regarded as family money while women income

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39 R. Blood, *Marriage*, Collier-Macmillan, London, (1969), p. 228.

40 L. Scanzoni and J. Scanzoni, *Men Women and Change. A Sociology of Marriage and Family*, McGraw Hill, Toronto, (1976), p. 216.

41 A. Smith and W. Reid, *Role-Sharing Marriage*, Columbia University Press, New York, 1986, p. 6.

42 T. Chapman, *Gender and Domestic Life. Changing Practices in Families and Households*, Palgrave Macmillan, New York, (2004), p. 111.

43 K. Melville, *Marriage and Family Today*, Random House, New York, (1977), p. 217.

regarded as only her money[44] which she can spend in the way she wants to. In this case it is seen that *wives earning is not acceptable to men as family money as he still seems to call himself as breadwinner of the family and did not use wives income for any purposes* as *he did not consider her wives income as an important asset to her family. In this case the wife is spending just on herself.* This shows that husbands believe that to use wives salary in running the house is against the societal norm which says husband should be the provider of the family. In such cases women often said *that they have very good husband because he is not interested in her salary and in any case it's the men's obligation to pay for the family, we women should not interrupt these things... finance is actually men's sphere.* In this case women due to their socialization have actually not realized the under valuation of their earning and considered this as very normal part of our society.

In case two, the husband money is used for running the family and wives money is consider for extras. *Wives money is for some particular expenses like investment, child tuition fee, saving, rent, etc. It is the husband who decides whose income has to be put to what use.* In this case men are still reluctant to accept their wives as equal to them in role of provider of the family because they look towards wives income as only extra money for particular expenses. These kinds of cases shows that husbands considered only themselves as primary breadwinners the ones whose income really supports the family. As Potuchek says the husband income is for essentials while wife income is for extras.[45]

In this case the wife has realized that though they are working and earnings for the family but they are not having equal say over the spending of their incomes and have accepted that financial matters are something on which the husband still retains his control. It is their husbands who decides the amount of importance to be given her income and determines whether her wife salary is for extras or essential contribution to the family income. Thus, value of wife's income and the way it should be put to use is dependent on the husband.

In case three, *wife spends her salary by taking permission of husband because the husband takes away her salary.* Women need to take permission of their husband before making any expenses as it is the husband who makes all financial decisions. In this case, we can see the patriarchal nature of their marital relationship where husband still retains the control over their wife by controlling the command of financial matters and financial decisions. This permission taking of women from her

44 T. Chapman, *Gender and Domestic Life. Changing Practices in Families and Households*, Palgrave Macmillan, New York, (2004), p. 111.

45 J. Potuchek, *Who Supports The Family? Gender and Breadwinning in Dual-earner Marriages*, Stanford University Press, California, (1997), p. 5.

husband itself reflects the power relation between them which expressed the depth of inequality of their marital relationship. This taking of permission itself shows the status which women occupies in her marriage. The patriarchal hold of men over women is still maintained by taking away her wife's own earned money. As Allan provides that even when wives are employed the structure of marital relationship is normally not altered significantly because the primary responsibilities in families are governed by gender roles. [46]

In these situations some women are trying or negotiating to overcome their unequal position as some participants said that they *either overtly or covertly are trying to get their decisions implemented by using various techniques of negotiation like giving justifications and reasons as to why their decision should be implemented as to why they should be heard while some try to please their in laws and husband to get decisions implemented.* These techniques shows the amount of struggle which these women face in making their voices heard as this techniques reflects that women are still facing difficulties in getting their decisions implemented.

In case four, *even if wife is the sole earner of the family husband still dominates as how they should spend and run the house.* This shows even if women are the only breadwinner of the family it is still the husband who dominates the financial matters. Even in such cases it's still in the hands of husband because it is he who decides how they should spend, and when they should spend. It is certainly does not matter whether wife is working as co-provider or herself is the sole breadwinner of the family because she is not in the position to take individual decisions of her own as how she will be going to spend her salary on the household and other expenditures.

This shows that even wife is sole earner she cannot become the prime decision maker for the family. It is men who are still consider to be head of the household and the one who can and should take decisions for the family even if he is not earning the single money for the family. This shows that men continue to enjoy the right of taking financial decisions even when wife is sole earner of the family. Though Rao argues that wives decision making participation increases when she contributes her resources to the functioning of the family[47] but it is mistake to assume that more money married women contributed more power they had.[48] As *wife can only suggest because the decisions are taken by husband.* Though she is free to discuss her own

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46 A. Graham, *Family Life. Domestic Roles and Social Organization*, Basil Blackwell, New York, (1985), p. 95.

47 P. Rao and N. Rao, *Marriage, the Family and Women in India*, Heritage Publishers, New Delhi, (1982), p. 209.

48 T. Chapman, *Gender and Domestic Life. Changing Practices in Families and Households*, Palgrave Macmillan, New York, (2004), p. 108.

opinion on the particular issue but yield to husband will in the end and give to his wishes. The final decision is still in husbands hands because he retains final authority and control.[49]

Child Welfare Decision Making-Though childcare is considered to be duty of women but the authority to take decisions regarding children's is taken by men as their right. It was found that it is husbands who usually take decisions regarding their children's school, picnic, party, profession, marriage etc.

Though Ramu stated that husband with employed wives are more egalitarian but this is not the case because husband still plays dominant role in decision making process.[50] As one participant said *Though I wanted my daughter to go for further study but my husband wanted her to get married thus we ended up by making her married as my husband takes all decisions related to children's and being a wife I am bound to accept husband's decision.* The women have realized that while they are responsible for taking care of the child they do not have any right to take decisions for them and they are critical of this fact but accepted this as part of male dominated society.

Though Kaila argued that women economic independence has encouraged women to confront the traditional principle of marriage that husbands are always right[51] but women are still having less of decision making power than their husband as one participant said *at home my husband rules and takes all the decisions.* In marriage husbands have been seen as key decision makers.[52] The statement that *husband consent is more important and his decisions are supreme and without the husband consent no action can be taken* shows what Allan says that what matters is not who make decision but who benefits most from those decisions[53]and it can be seen the benefiter always is the men because she rarely resents his decisions.[54]

Folbre's argued that outcome of bargaining and negotiation within the household cannot be determined purely by reference to economic asset because it significantly affected by the cultural and political implications of membership in certain demographic groups

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49 L. Scanzoni and J. Scanzoni, *Men Women and Change. A Sociology of Marriage and Family*, McGraw Hill, Toronto, (1976), pp. 210-211.

50 G. Ramu, "Single Dual Earner Couples: Economic Status and Marital Power", S. Rege, (ed.), *Sociology of Gender: The Challenges of Feminist Sociological Knowledge*, Sage, Delhi, (2003), p. 145.

51 H.L. Kaila, *Women, Work, and Family*, Rawat Publications, Jaipur, (2005), p. 92.

52 T. Chapman, *Gender and Domestic Life. Changing Practices in Families and Households*, Palgrave Macmillan, New York, (2004), p. 102.

53 A. Graham, *Family Life. Domestic Roles and Social Organization*, Basil Blackwell, New York, (1985), p. 83.

54 C. Dryden, *Being Married, Doing Gender. A Critical Analysis of Gender Relationships in Marriage* Routledge, London, (1999), p. 92.

refers directly to importance of socially established difference between people.[55] But in patriarchal structured society the gendered divisions in the roles of men and women are so internalize and socialized that they even sometimes over-rule the class distinctions which might make difference in their experiences of women in marriage. As Evans argued that gender orders have a fundamental effect on individual's life chances and experiences affecting more fundamentally than their class position.[56]

The employment of women does not allow her freedom or independence[57] *as one participant said thatit is still women who have to adopt and acceptthemselves to the situations.* This acceptance reflects that women's lack of negotiating power in marriage because of which they are not able to get their demands and decisions implemented and therefore, adopted and accepted themselves to their situations. For them to maintain marriage is more important therefore, to keep peace, and avoid arguments they subordinated themselves in marriage.

This makes hard to expect the notion of equality in marriage where men and women are expected to play their socialized gender roles. As the performance of these socialized and expected gender roles in marriage makes their marital relationship hierarchical and unequal. Therefore, socialization to sex specific roles and performance of one's expected gender role produces inequalities in marriage.

4.1 Conclusion

Thus, it can be said that in patriarchal structured society the gendered divisions in roles of men and women create the power relation which impacts the women negotiation of decisions making power in matters related to finance and child care. Though the women are working and earning but decision making power in matters related to finance and child care are in hands of men. In financial matters though women earn but the decisions regarding how they are going to spend their income is taken by the husband. Women need to take permission of their husband before spending their own earned money. Women need to please or provide justifications for getting their decisions implemented. It shows women have no control even on their own earned money. On the other hand, in matters related to child care it is the husband who is playing the dominant role. It shows though nurturing of the children is the duty of women but the right to take decisions for them is with men. It reflects that women are still not being able to get the equal decision

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55 H. Moore, *A Passion for Difference. Essay in Anthropology and Gender*, Polity Press, Cambridge, (1994), p. 91.

56 M. Evans, *Gender and Social Theory*, Rawat Publications, Jaipur, (2009), p. 70.

57 A. Graham, *Family Life. Domestic Roles and Social Organization*, Basil Blackwell, New York, (1985), p. 94.

making power in marriage which proves that women have not been able to achieve the equal position with men in marriage.

Though Ramu said that wife contribution to family economy does result in a certain degree of flexibility between the husbands and wives in exercise of power and authority[58] but with regard to marital power, the general perception is that the husband retains the formal power to influence their wife.[59] Ramu provided that economic resources are an objective force in renegotiating the balance of power between spouses. Greater the resources either spouse has greater will be his or her marital power. If economic resources are basis of strength to negotiate for greater marital power then employed women are in ideal position to do so but it has not yielded uniform and universal change in domestic relations.[60]

Traditional role expectations seem to appear even in marriage where the provider role is shared and where each spouse has a commitment to career.[61] The prevailing social norm about marital power in a particular culture or subculture can influence the power relation in marriage. In other words, if a culture expects husband to have greater power in marriage, this norm can have profound effect upon marital power in spite of comparative resources of the husband and wife.[62] The power relation between the spouses in marriage impacts women decision making power in marriage. As Rothschild argued marital equality is still largely an ideal, not an accomplished fact. 'Neither decision making nor division of labor in the family has been found to be equalitarian, nor has the conception of marital roles by married people been reported as companionate or equal in any sense.'[63] Thus, there is lack of voiced concern about equity leading to expression of subordination and domination and affirmation of social hierarchy[64] in marriage.

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58 G. Ramu, "Single Dual Earner Couples: Economic Status and Marital Power", S. Rege, (ed.), *Sociology of Gender: The Challenges of Feminist Sociological Knowledge*, Sage, Delhi, (2003), p. 144.

59 H.L. Kaila, *Women, Work, and Family*, Rawat Publications, Jaipur, (2005), p. 102.

60 G. Ramu, "Single Dual Earner Couples: Economic Status and Marital Power", S. Rege, (ed.), *Sociology of Gender: The Challenges of Feminist Sociological Knowledge*, Sage, Delhi, (2003), pp. 128-129.

61 K. Melville, *Marriage and Family Today*, Random House, New York, (1977), p. 220.

62 L. Scanzoni and J. Scanzoni, *Men Women and Change. A Sociology of Marriage and Family*, McGraw Hill, Toronto, (1976), p. 446.

63 K. Melville, *Marriage and Family Today*, Random House, New York, (1977), p. 221.

64 S. Fenstermaker and C. West, (eds.), *Doing Gender, Doing Difference. Inequality, Power, and Institutional Change*, Routledge, New York, (2002), p. 115.

INDIAN LEGISLATIONS AND NOISE POLLUTION: AN APPRAISE

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1.1 Environmental prudence in Indian Philosophy

Environmental Jurisprudence includes the laws, both statutory and judicial, concerning varied aspects of environmental protection and sustainable development. Environmental ethics had always been an inherent part of Indian religious percepts and philosophy. Man, nature relationship is at the centre of Vedic Vision and those sacred scriptures specifically talk about man's responsibility to preserve his environment. Worship of nature-Sun, Moon, Earth, Air and Water was not merely primitive man's response to the fear of the unknown but arose from the deep reverence shown to the forces of nature which sustained and preserved human life on earth. The Upanishads provide a vision of cosmic piety and harmony with the natural environment.

In Vedic period, it was Law that created the state.[1] The Purohit's were considered as lawmakers and their judicial authority was highly valued.[2] Vedic people believed that "order dwells amongst men, in trouth, in noblest places.[3] This was the foundation of law. Law covered all fields of human activity. The word 'rta' in the Vedic hymns signifies cosmic order. In Vedic period there was only one 'rta' for both men and nature. Knowledge of 'Dharma' prevented the members of the society from doing wrong, against fellow beings and against the nature. Duty of the state was only to make the members conscious of their 'dharma'.

2.1 Recent trend in Legislative Environmentalism

In 1972, Stockholm Conference on Human Environment was convened by UNO and after that various other conferences have been held. However the subject of noise pollution was not touch specifically. The Conference suggested "that 10% of any population is likely to become highly annoyed when exposed to noise levels in the uncomfortable range of 55db. The highly annoyed proportion, however, can

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1 Radha Krishna Choudhary, "Law in Ancient India", H.S. Bhatia (ed.), *Vedic and Aryan India*, Elegant Printers, (2001).

2 Raj Dharmasasana Parva 77 Manu VIII, 391, *Ibid.*

3 Rig Veda IV, 40, Dattas Translation, *Ibid*

grow up to 45% at the unacceptable level of 65db and at 85db of 75% become extremely annoyed."[4]

At present there is no international law for controlling noise pollution but International and European Community Laws lay down certain norms in respect of noise pollution control. There has been much concern of international law, particularly with aircraft noise issues. The principle standards setting body is the International Civil Aviation Organization (ICAO) which was set up under the Chicago Convention of 1944. Under the Chicago Convention there is provision for international legal basis to regulate Aircraft Noise.[5] The European Community formally took action on noise for the first time in its second action programme in 1977 though there had been some antecedent measures. It has relied on noise standards set up by other international bodies such as I.C.A.O. and historically has also tendered to follow the paths of compromising national standards. European noise standards normally harmonies ambient noise levels as well as noise standards for individual generators of noise. Now it have laid down certain noise standards to be observed by the nations in various kinds of industries, motor vehicles, motorcycles, tractors, construction plants, aircrafts and household appliances.

The role of World Health Organization about the control of noise pollution is also noteworthy.[6] It is to raise the standard of health of the people which can be adversely affected by noise. Although, it is not an authority to prescribe the limits of noise, it recommends some permissible limits of noise which are just advisory for its member states. It has responded in two main ways by developing and promoting the concept of noise management, and by drawing up community noise guidelines. It's guideline values are organized according to specific environment.

Defining Noise: The word noise is derived from the Latin term *nausea*. It has been defined as unwanted sound, a potential hazard to health and communication dumped into the environment with regard to the adverse effect it may have on unwilling ears.[7] The sound and noise are considered as synonymous but from environmental point of view these two terms are different. Interpreting otherwise, when the effects of a sound are undesirable it is termed as noise. The Encyclopedia Britannica says[8] "In acoustics, noise is defined as any undesired sound. Usually,

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4 Nomita Aggarwal, Noise Pollution in Environment Administration Law and Judicial Attitude cited in Paras Diwan (ed.)), pp. 415

5 The Chicago Convention, Article 9.

6 N.S. Kamboj 1999, Control of Noise Pollution, p. 50

7 Paramjit S., Jaiswal and Nistha Jaiswal, 'Environmental Law', (2003), p. 327

8 Vol. 16, 1968, p. 558.

noise is a mixture of many tones combined in a non- musical manner." The Encyclopedia Americana[9] defines it as "Noise by definition is unwanted sound. What is pleasant to some ears may be extremely unpleasant to others, depending on a number of psychological factors. In other words, any sound may be noise if circumstances cause it to be disturbing." In India there is no statutory definition of noise or noise pollution.

However, the word "noise" has been included in the law relating to air pollution[10] in the definition part where 'air pollutant' has been defined. The Act was enacted in year 1981 but only in the year 1987 with an amendment[11] the word 'noise' has been included but reference has been made as there is no independent statute on noise pollution. As per the Act , 'air pollutant' means any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment.[12] Thus Act intends to mean noise to be an air pollutant present in the atmosphere.

Noise has not been defined anywhere. Subsequently to the enactment of a legislation relating to air, Environment (Protection) Act, 1986[13] was enacted which empowered Central government to make rules for regulating environmental pollution.[14] Noise is also subject to the Noise Pollution (Regulation and Control) Rules, 2000 which were enacted by the central government pursuant to the Environment (Protection) Act, 1986[15] and the Environment (Protection) Rules, 1986[16]. The Rules recognize that noise pollution in public places can 'have deleterious effects on human health and the psychological well-being of the people, so it is considered necessary to regulate and control noise producing and generating sources with the objective of maintaining the ambient air quality standards in respect of noise'.[17] Taking into consideration the totality of circumstances and proportions in which noise is becoming injurious to human health, it is quite

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9 Second edition, 1969

10 *Air (Prevention and Control of Pollution) Act*, 1981

11 *Air (Prevention and Control of Pollution) Amendment Act*, 1987, Act 47 of 1987 which became effective from 1.4.1988.

12 *Air (Prevention and Control of Pollution) Act*, 1981, S. 2 (a)

13 Act No. 29 , 1986

14 *Id*, S. 6.

15 *Environment (Protection) Act*, 1986 (29 of 1986), Ss. 6 (2) (b) (1); 3 (2) (ii), 25

16 Environment (Protection) Rules, 1986 (EPR), Rule 5.

17 Ministry of Environment and Forests Notification, New Delhi, 14 February 2000, SO 123 (E)

natural that a comprehensive legislation on the subject to tackle the growing menace is required urgently.

3.1 Factors responsible for Noise pollution

With the scientific and technological advancement and also the changing lifestyle corresponding to the changing societal conditions contributed significantly for spreading the noise. Noise as a major factor creates problem and it has emerged as one of the important pollutants of environment. After taking into consideration major factors which are responsible for generating noise, the sources may be divided into two classes *Industrial & Non- Industrial.* Most of the industries use big machines which are capable of producing large amount of noise. Apart from that, various equipment's like compressors, generators, exhaust fans, grinding mills also participate in producing large amount of noise. Justice V.R. Krishna Iyer rightly said "Noise has become a problem of importance to an industrial society as a result of the extensive use of machinery. Modern industries use machines, vehicles and processes which consume large amount of energy. The human ear is constantly being assailed by man-made sounds from all sides and there remain few populous areas where relative quiet prevail."[18] The disturbing qualities of noise emitted by industrial premises are generally its loudness, its distinguishing features such as tonal or impulsive components, and its intermittency and duration.

Non- Industrial Sources includes the two categories i.e. indoor and outdoor sources. Outside source includes the traffic, railways, aircrafts, construction work, railways and agricultural activities whereas indoor sources include phones, television, radios, appliances, power tools etc. In most of the developing countries, poor urban planning also plays a vital role. Congested houses, large families sharing small space, paucity of parking place, frequent fights over basic amenities leads to noise pollution which may disrupt the environment of society. Under construction activities like mining, construction of bridges, dams, buildings, stations, roads, flyovers take place in almost every corner of the world. These construction activities take place every day to reduce traffic and accommodate more people congestion. The down point is that these construction and repairing equipment's are been done at such massive scale that it's putting the inhabitant in great trouble. Huge machines used in construction work produce a lot of noise.

In India, one of the very common man made source of noise pollution has been the frequent use of loudspeaker. For every occasion, religious, or non-religious, public or private, presence of loudspeaker has been a must, as if it has been one of the

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[18] V.R. Krishna Iyer , *Environmental Pollution and the Law*, 1984, p. 31

paraphernalia. The most shocking example of the use of loudspeaker is the one made for religious purposes. Most people bear it and are reluctant to lodge a complaint for the fear of unpleasant neighbourhood relations and fear. It is torturous for a person who wants to rest or sleep patients, students, and old age people. Loudspeakers are also blaring loud noise for advertisement purposes by various persons, groups and companies to popularize their products. Almost in all kind of celebrations, festivals, pujas, akhandpathas, azans, loudspeakers are used rampantly adding a new dimensions to the problem. Noise is at its peak in ***festivals, cultural celebrations & social events.*** Whether it is marriage, parties, pub, disc or place of worship, people normally flout rules set by the local administration and create nuisance in the area.

A proportional noise pollution is added to the atmosphere by artillery, tanks, launching of rockets, explosions exercising of military airplanes and shooting practices. Shrieking of jet engines and sonic booms have a deafening impact on ears and in extreme cases have been known to shatter the window panes and old ramshackle constructions. Large number of vehicles on roads, airplanes flying over houses, underground trains produce heavy noise and people get it difficult to get accustomed to that. The high noise leads to a situation where in a normal person loses the ability to hear properly. Generally no regulation has been observed in blowing of horns and use of defective silencer pipes except in some specific zones. Automobiles constitutes largest group of creators of noise. The noise from locomotive engines, horns and whistles, and switching and shunting operation in rail yards can impact neighbouring communities and railroad workers. Fast trains are being introduced on various routes of railways and they are also contributing to the noise pollution. The higher the speed of an aircraft the greater the noise pollution the invention of supersonic aircrafts has added more noise for the plight of persons who live near aerodromes. The noise of supersonic jet planes may sometimes break windowpanes, crack plaster and shake buildings. By these effects of noise one can very easily and fully understand that what would be the effects of such noise on human body. The defence forces uses several sophisticated and other aircrafts use of which generates great noise. Another cause of noise pollution other than manmade causes could be natural causes which include crying voices of wild animals, roaring of volcanoes, seas, rivers, voices of other living creatures including man and mammals.[19]

3.1.1 Consequences of Noise Pollution

Noise pollution leaves a varied impact on the human health. The effects have been

[19] Dr. N. MaheshwaraSwamy, *Environmental Law*, Asia Law House, (2010), p. 34

classified as physiological and psychological which includes behavioral and personal effects.[20] Noise adversely affects human body leading deafness and other physical ailments. From psychological point many behavioral changes may happen resulting in poor attention and concentration.

Any unwanted sound that our ears have not been built to filter can cause problems within the body. Exposure to excessive noise for sufficient long period of time may result into temporary depression of hearing which disappears after some time., such temporary hearing loss is a physiological phenomenon referred as 'temporary threshold shift' (TTS)[21] which is reversible. Constant exposure to loud or impulsive levels of noise can easily result in the damage of our ear drums and loss of hearing as "prolonged exposure to excessive noise produces varying degree of inner ear damage which is initially irreversible".[22] It is termed as 'noise induced hearing losses of 'permanent threshold shift (PTS)'. It may also reduce the sensitivity to sounds that ears pick up unconsciously to regulate body's rhythm. Noise that is not intense enough to impair hearing may interfere seriously with communication by speech. It is non- auditory effect of noise. Background noise increases hearing threshold, the extent to which this is increased and called "speech interference levels". Constant sharp noise can give severe headache and may disturb emotional balance.

Excessive noise pollution in working areas such as offices, construction sites, bars and even in our homes can influence psychological health. The occurrence of aggressive behavior, disturbance of sleep, constant stress, fatigue and hypertension can be linked to excessive noise levels. These in turn can cause more severe and chronic health issues later in life. Anger, annoyance, emotional outburst, anxiety, aggression, depression may affect the working conditions and social interaction. Loud noise can certainly hamper sleeping pattern and may lead to irritation and uncomfortable situations. Cardiovascular Issues such as Blood pressure levels, cardio-vascular disease and stress related heart problems may be caused. The high intensity noise causes high blood pressure and increases heart beat rate as it disrupts the normal blood flow. According to Kryter[23], noise causes heart output to decrease and fluctuations in aerial blood pressure and vasoconstriction of peripheral blood vessels. Respiratory diseases, neurosis and nervous breakdown,

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20 D.C. Vershney, "Noise Pollution: S.O.S. for a Legislation" in 'Enviornment Protection' Paras Diwan (ed.), (1987), p. 387

21 N.S. Kamboj quotes Mayer, S. Fox on "Control of Noise Pollution", (1999), p. 14

22 S.R. Khirsagar "Noise as an Occupational Hazards and Public Nuisance", *Journal of the Institute of Engineering*, (1973), p. 60.

23 N. Manivasakam 'Environmental Pollution', NBT India, (1991), p. 120.

mental illness and emotional distress may be there due to exposure to excessive noise.

Wildlife faces far more problems than humans because noise pollution since they are more dependent on sound. In nature, animals may suffer from hearing loss, which makes them easy prey and leads to dwindling populations. Others become inefficient at hunting, disturbing the balance of the eco-system. Species that depend on mating calls to reproduce are often unable to hear these calls due to excessive man made noise. As a result, they are unable to reproduce and cause declining populations. Others require sound waves to echo-locate and find their way when migrating. Disturbing their sound signals means they get lost easily and do not migrate when they should. Children are also considered to be worst victims of such noise pollution as may have hearing impairment, neurological disturbances which makes them irritable and hyperactive, impairs mental development and growth. According to a report, noise is also suspected of aggravating nausea, headache, insomnia and loss of appetite.[24] Another study conducted by a medical team discovered an increased incidence of birth defects, still birth and usually low weight among children born to mothers living near airports.[25]

Thus it's clear that noise pollution carries its adverse effect on all living beings to great extent and some effects are so serious that they are alarming their survival.

4.1 Modern Legislative attempts for Protection of Environment

Indian legislation's and Noise Pollution -In India, in absence of specific law, noise pollution is regulated by certain other laws which indirectly have relation with noise pollution, beside these laws under Indian Constitution there are although there are no direct provision on noise pollution but has direct provision and concern for environmental pollution.

4.1.1 Noise pollution and Indian Constitution

When Constitution came into force there was no particular word 'Environment' was present, it only after 42nd amendment in year 1976 specific provisions were made through Article 48 A[26] and 51 A (g)[27] to protect the environment. In former provision state is directed to make necessary provisions for the protection of

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24 Report of Expert committee on Noise pollution constituted by Bombay High Court in Writ petition no. 1878 of 1985 (Dr. Y.T. Oke *v.* State of Maharashtra).

25 Chaturvedi and Chaturvedi 'Law on Protection of Environment and Prevention of Pollution', 1998 p. 54

26 Directive Principle of State Policy under Constitution of India

27 Fundamental Duties under Constitution of India

environment, in later provision citizens are under a duty to safeguard and protect the natural environment. Thus no specific provision on noise pollution is created but noise as component of environment is being drawn into contours of both the Articles of the Constitution.

4.1.2 Religious Freedom- No right to create Noise

Loudspeakers, as discussed in sources significantly contribute to the pollution hazards. The constitutional hurdle's to control the use of loudspeakers are enumerated in certain right guaranteed by Constitution, first one is freedom of speech and expression under article 19 (1)(a) and another one is the exercise of religious freedom under Article 25. The former Article states that all citizens have a right to freedom of 'speech and expression' which means right to express one's convictions and opinions freely by mouth, writing, printing, picture or electronic media or in any other manner addressed to eye or ear.[28] Although loudspeaker has not been specifically mentioned in the article yet same has assumed the status of a fundamental right as it being considered as an integral part of the basic nature of the fundamental right as expressed in Article 19 of the Constitution. Thus "Though the state can regulate the use of loudspeakers and mechanical or other contrivances to amplify sound, yet a condition that the mile, loudspeakers etc, should not be used at any time amounts to an infringement of the right under Article 19 (1) (a) which guarantees not merely a right to express and propagate one's view but also includes in it the right to circulate to other by all such means as are available to the citizen to make known these views."[29] In Madras, the owner of a temple argued that freedom of expression as provided in Constitution required that he be given consent to emit sounds from loudspeakers at his temple. The court remarked that such freedom exists, individual liberties must be subordinated to greater social interests and 'to enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.[30]' Thus although Constitution provides freedom of speech and religion but these are rights are however subject in every case to public order, health, morality etc.

A limited degree of discretion lies at the hand of the State Government, which may allow loudspeakers to operate between the hours of 10 pm and midnight for a

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28 D. D. Basu, Shorter Constitution of India, Vol. I, (2011) pp. 119-120

29 *D. Ananda Prabhu v. District Collector*, 1974 KLT 291 a reported in Chaudhari & Chaturvedi's Law of Fundamental Rights, 1998, p. 492

30 *M. Veerateswaran v. The Deputy Collector cum Sub-divisional Executive Magistrate Revenue (Taluk office) Karaikal, Union Territory of Pondicherry*, (2003) (3) KLT SN. 13, p. 10

period not exceeding fifteen days, during religious or cultural festival occasions.[31] However such rule specifies that loudspeakers may be used in 'closed premises' between 10-6 pm if the institution exists or was created permanently for any religious, charitable or other purposes like cultural, educational etc. Such discretion enables the balance to be struck down between the right to practice one's religious and the public interest from noise interference. Silence is a biological necessity. The Supreme Court observed it is considered to be one of the human rights as noise is injurious to human health which is required to be preserved at any cost[32].

Indian Constitution under Article 25 guarantees that every person in India shall have the freedom of conscience and shall have the right to profess, practise and propagate religion, subject to the restrictions that may be imposed by the State on the following grounds, namely public order, morality and health; other provisions of the Constitution; regulation of non-religious activity associated with religious practise; social welfare and reform. This Article is also frequently used to propagate religious discourses taking the aid of freedom of speech and expression and such loudspeakers and amplifiers become the best medium to reach to a quiet good number of people. The only way to put restriction on use on them is on the ground of health as the right is subject to health and for that the 'nexus between the noise and health will have to be judicially established'[33].

The judiciary while confronting cases regarding allowance of use of such equipment's in the name of enjoying freedoms and which creates the problem of noise pollution came out with very progressive decisions and interpretation of Constitutional provisions. The decision by Calcutta High Court in *MasudAlam v. Commisioner of Police*[34], where the Commissioner of Police of Calcutta banned the use of loudspeakers for calling *azan* ruled that azan on loudspeaker which is source of disturbance in the area , could not be justified on plea of religious freedom guaranteed under Article 25 of Constitution. Similarly Supreme court in *Bedi Gurucharan Singh v. State of Haryana*[35] gave ruling that "the fundamental rights guaranteed under Article 19 (1) (a) and 25 are not absolute and unfettered but rather subject to the condition that it does not violate similar fundamental rights of followers of other religion." The similar sentiment was observed by Kerala High

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31 As amended by Noise Pollution (Regulation and Control) Amendment Rules, 2002, S. 5 (3).

32 *Farhd. K. Wadia v. Union of India*, (2009) (2) SCC 442

33 Chaturvedi & Chaturvediin "Law on Protection of Environment "

34 AIR 1956 Cal. 9

35 AIR 1975 Cr L.J., pp. 917-18

court in *P.A. Jacob v. The Superintendent of Police*[36] that 'the right to speech implies , the right to silence it implies freedom , not to listen and not to be forced to listenthe right is subordinate to peace and order'. Recently apex court in *Church of the God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Association*[37] the court laid down certain rules relying on guidelines laid down in *Appa Rao's*[38] case: No religion prescribes that prayers to be offered by disturbing the peace of others nor does it preach that those who preach should use amplifiers or beat drums. In a civilized society activities that disturb old, infirm persons, students, aged, sick person and children and persons carrying on other activities cannot be permitted in name of religion. Noise pollution has become a serious problem. The courts have observed that noise pollution 'may cause interruption of sleep, affect communication, loss of efficiency, hearing loss deafness, depression, irritability, gastro-intestinal problems, mental stress and other problems'. It is clear that the freedom guaranteed under the Constitution can in no way be considered as a defence as long as it is associated with generating noise which interferes with the peaceful living of beings.

4.1.3 Right to Environment: Judicial environmentalism

Article 21 of Constitution which is heart of fundamental rights has received expanded meaning and given new interpretation which deals with right to life and close link between life and environment has been established. Thus under this analogy the beings have right to live in an environment free from all sorts of noise. In *Bijayananda Patra and others v. District Magistrate, Cuttak*[39] , writ petition was filed seeking court's intervention for directing the concerned authorities to prevent sound pollution. The court was of the opinion that "The effect of noise on health is a matter which has not yet received full attention of our judiciary, which it deserves. Noise can well be regarded as a pollutant because it contaminates environment, causes nuisance and affects health therefore, offend Article 21 if it exceeds a reasonable limit.[40]" The Hon'ble Chief Justice, Shri R.C. Lahoti in landmark judgment[41] remarked , "...Indian judiciary opinion has been uniform in

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36 AIR 1993 Ker 1

37 AIR 2000 SC 2773

38 Appa Rao's M.S. *v.* Government of T.N. (1995) I LW 319 (Mad); also see Om Birangana Religious society *v.* State (1995-96) 100 CWN 617 (Cal)

39 AIR 2000 Orissa 70

40 *Id.*, at p. 76

41 In *Re : Noise Pollution- Implementation of the Laws for Restricting Use of Loudspeakers & High Volume Producing Sound Systems* , 2005 (5) SCJ 165

recognizing right to live in freedom from noise pollution as fundamental right protected by Article 21 of Indian Constitution."

4.1.4 Noise Pollution (Regulation and Control) Rules, 2000 (NPR, 2000), (Amended 2002)

The following are some measures provided for regulation and control of noise pollution in India under NPR, 2000 with the objective of maintain the ambient air quality standards in respect of noise. *Ambient air quality standards in respect of noise for different areas/zones:*[42] The ambient air quality standards in respect of noise for different areas/zones shall be such as specified in the Schedule annexed to these rules. The State Government authorized to categorize the areas into industrial, commercial, residential or silence zones for the purpose of implementation of noise standards for different areas and to take measures for abatement of noise including noise emanating from vehicular movements and ensure that the existing noise levels do not exceed the ambient air quality standards thus specified. All development authorities, local bodies and other concerned authorities while planning developmental activity or carrying out functions relating to town and country planning shall take into consideration all aspects of noise pollution as a parameter of quality of life to avoid noise menace and to achieve the objective of maintaining the ambient air quality standards in respect of noise. For the purpose of these rules, an area comprising not less than 100 meters around hospitals, educational institutions and courts may be declared as silence area/zone.

Responsibility as to enforcement of noise pollution control measures[43]-The noise levels in any area/zone shall not exceed the ambient air quality standards in respect of noise as specified in the Schedule I.The authority shall be responsible for the enforcement of noise pollution control measures and the due compliance of the ambient air quality standards in respect of noise.

Restrictions on the use of loud speakers/public address system[44]- A loud speaker or a public address system shall not be used except after obtaining written permission from the authority. A loud speaker or a public address system shall not be used at night (between 10.00 p.m. to 6.00 a.m.) except in closed premises for communication within, e.g. auditoria, conference rooms, community halls and banquet halls. State government, if necessary to reduce noise pollution, permit

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42 As contemplated in Rule 3 of the NPR, 2000

43 As contemplated in Rule 4 of the NPR, 2000

44 *Id.*, Rule 5

use of loudspeakers or public address systems during night hours (10pm- 12 midnight) on or during cultural or religious festive occasion of a limited duration not exceeding fifteen days in all during a calendar year.[45]

Consequences of any violation in silence zone/area[46]- Whoever, in any place covered under the silence zone/area commits any of the following offence, he shall be liable for penalty under the provisions of the Act whoever, plays any music or uses any sound amplifiers,beats a drum or tom-tom or blows a horn either musical or pressure, or trumpet or beats or sounds any instrument, or exhibits any mimetic, musical or other performances of a nature to attract crowds.

Complaints to be made to the authority[47]- A person may, if the noise level exceeds the ambient noise standards by 10 dB(A) or more given in the corresponding columns against any area/zone, make a complaint to the authority. The authority shall act on the complaint and take action against the violator in accordance with the provisions of these rules and any other law in force.

Power to authority to prohibit continuance of music sound or noise[48]-If the authority is satisfied from the report of an officer in-charge of a police station or other information received by him that it is necessary to do so in order to prevent annoyance, disturbance, discomfort or injury or risk of annoyance, disturbance, discomfort or injury to the public or to any person who dwell or occupy property on the vicinity, he may, by a written order issue such directions as he may consider necessary to any person for preventing, prohibiting, controlling or regulating:(a) the incidence or continuance in or upon any premises of -any vocal or instrumental music, sounds caused by playing, beating, clashing, blowing or use in any manner whatsoever of any instrument including loudspeakers, public address systems, appliance or apparatus or contrivance which is capable of producing or re-producing sound, or (b) The carrying on in or upon, any premises of any trade, avocation or operation or process resulting in or attended with noise. The authority empowered may either on its own motion, or on the application of any person aggrieved by an order made, either rescind, modify or alter any such order. Provided that before any such application is disposed of, the said authority shall afford to the applicant an opportunity of appearing before it either in person or by a person representing him and showing cause against the order and shall, if

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45 Rule 5 (3) has been inserted by Noise Pollution (Regulation and Control)(Amendment) Rules , 2002

46 *Supra 43* Rule 6

47 *Id.,* Rule 7

48 *Id.,* Rule 8

it rejects any such application either wholly or in part, record its reasons for such rejection.

In pursuant to the Rules made by Central Government and its directions to State governments to follow them strictly much litigation filed. In *Re : Noise Pollution- Implementation of the Laws for Restricting Use of Loudspeakers & High Volume Producing Sound Systems* , 2005 (5) SCJ 165 the amendment made in year 2002 inserting Rule 5 (3) was challenged with contention that provision is not accompanied by any guidelines and can be grossly misused which may defeat the purpose behind enacting Rules itself. The court while convinced with far reaching implications in life of people relatable to noise pollution *vis-a-vis* right to life enshrined in Article 21 of Constitution, emphasized on need for checking noise pollution and accordingly issued certain guidelines,[49] which includes instructions for manufacturing of crackers, use of loudspeakers and vehicular noise came to close scrutiny and necessary orders were issued& need for creating general awareness towards hazardous effect of noise pollution States were asked to take necessary steps. The apex court maintained orders will remain in force until modified by this court or superseded by an appropriate legislation. Later, in *Forum, Prevention of Environment and Sound Pollution v. Union of India*[50] supreme court upheld constitutional validity of Rule 5 (3) and held rule to be intra vires reasoning that power to grant exemption is conferred on State government which it cannot further delegate and it can be reasonably expected that State government would exercise the power with due care, caution and public interest.[51]

In the recent case[52] referring to Articles 21 and 141 Supreme Court stated that Right to peaceful living in one's home, as essential part of Right to Life. It is the duty of all concerned to follow law laid down and comply with directions issued in *Noise Pollution (5), In re*, (2005) 5 SCC 733, in letter and spirit. The court observed that as directions issued by Supreme Court in *Noise Pollution (5), In re* case relating to curb noise pollution have not been implemented in letter and spirit, it is directed to ensure strict compliance with directions issued in *Noise Pollution (5) In re case* and to take remedial measures to check noise pollution and other forms of nuisance.

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49 The guidelines were issued in exercise of the powers conferred on Supreme Court under Article 141 & 142 of Indian Constitution.

50 AIR 2006 SC 348

51 *Id.*, at pp 350-51

52 *Balwant Singh v. Commr. of Police*, (2015) 4 SCC 801

5.1 Noise Pollution Control and Allied Laws

5.1.1 The Indian Penal Code

Noise as public nuisance is covered under section 268 of I.P.C. Section 290 of the Code provides for punishment for act of public nuisance. Common nuisance cannot be excused as it causes some convenience or advantage. Thus, as per the provision a person can be held liable for illegal omission resulting into common injury, danger or annoyance to general public and as noise causes annoyance it can be well within ambit of this provision. The Punjab and Haryana High Court in 1958[53] upheld decision of lower courts where accused was convicted sentenced and fined under Code provisions for causing noise and emitting smoke and vibrations by operating heavy machinery in residential area. However later A.P. High court in 1984 treated the offence from noise as mere trifle and observed that 'plating radio loud at particular time did not constitute public nuisance, because it was too trivial for being pursued in a court of law.'[54]

5.1.2 The Code of Criminal Procedure

The magistrate under section 133 of Cr. P.C., 1973 has power to make conditional order requiring the person causing nuisance to remove, prohibit or regulate such nuisance either on police report or on other information. As public nuisance cause physical discomfort to public, this provision can be well utilized for controlling noise nuisance.

5.1.3 Law of Torts

Noise as nuisance is not new tort. Personal inconvenience, discomfort and annoyance are being treated as private nuisance. Quietness and freedom from noise are indispensable to free enjoyment of land. Noise will be treated an actionable nuisance only if it materially interferers with the ordinary comforts of life, judged by ordinary, plain and simple notions and having regard to the locality ; the question being of degree in each case[55]. Indian courts have taken seriously cases where material interference with comfort or convenience of the people has been taken seriously and treated to be actionable. In *Dutta mal Chiranjilal v. Ladli Prasad*[56] and in *Ram lal v. Mustafabad O. and C.G. Factory*[57], the High court's

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53 *Kirorimal Bishamber Dayal v. State of Punjab*, AIR 1958 Punjab 11

54 The court took aid of S. 95 of I.P.C. where under an act causing slight harm does not amount to offence.

55 Ratanlal & Dhirajlal, Law of Torts, (2001), p. 541.

56 AIR 1960 All 632

dealing with noise created in residential areas ruled that it will amount to actionable nuisance only if it has violated standard of comfort judging from standard comfort of an average person from that locality. Similarly additional noise created in a noisy locality *Ram rattan v. Munnalal*[58] and *Radheyshyam v. Gur prasad*[59] held by courts to be actionable nuisance. Despite all encouraging decisions by several courts a divergent view was taken by Gujarat High Court in *New GIDC Housing Association v. State of Gujarat*[60] where complaint on noise pollution created by an iron & steel factory was turned down because housing colony was established after the factory and that residents 'come to nuisance' could not be heard to complain.

5.1.4 The Police Act, 1861

The section 30 (4) of the Act provided that Police Superintendents are authorized to regulate the extent to which music may be used in streets on occasion of festivals and ceremonies. Thus act intents to control the extent of musical noise which is important cause of noise pollution.

5.1.5 The Factories Act 1948

It does not specifically deals with any provision relating to noise pollution but section 89 appended schedule contains list of noticeable diseases which includes hearing impairment caused by noise thus imposes duty on manager / medical practictioner to report the matter. Similarly noise as nuisance can be well covered section 11 that states 'factory shall be kept clean and free from effluent arising from any drain, privy or other nuisance'

5.1.6 The Air (Prevention and Control of Pollution) Act 1981

The Act was initially meant exclusively to control air pollution, but in absence of specific law on noise pollution, it was amended in year 1987 to cover noise with the definition of 'air pollutants'[61]. Later under section 16 (2)(b) of Act Central Pollution Control Board got power to include noise within its plan and programme meant for abatement of air pollution and lay down noise standards so also State Board.

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57 AIR 1960 P & H

58 AIR 1959 Pun 217

59 AIR 1978 All 86

60 1997 (2) Guj. L. HER 221 as reported by Divan & Rosencranz in "Environmental Law and Policy in India", 2001 p. 286

61 Section 2 (a) of Act

5.1.7 The Environment (Protection) Act, 1986

It also has no direct provision on noise pollution control but under section 3, Central government empowered to take all such measures as it deems necessary or expedient for purpose of protecting and improving quality of environment and controlling and abating environmental pollution which includes noise pollution also. Further sec 6 (2)(a)(b) empowers Central government to make rules regarding environmental pollution, thus to carry out Act objectives Environment Protection Rules 1986 framed which are amended as per need.

5.1.8 The Motor Vehicles Act, 1988

Noise pollution caused by motor vehicles covered by MVC, 1988 which empowers both Central and State governments to enact rules for reduction of noise emitted by vehicles. Thus rules appended to the Act known as Central Motor Vehicle Rules 1989 in Rules 119-120 deals with reduction of noise specially deals with horns. Beside these Central legislations, various States has either enacted some laws or made provisions in certain allied laws to regulate noise and nuisance created by noise.

6.1 Why there is need of Legislation?

The modern technological state does not eliminate, but intensifies, the conflict between environmental values and developmental needs. Legal strategies are necessary in more areas to reconcile the conflict and to augment sustainable developments[62]. One of the areas that require immediate legislative consideration is Noise Pollution. In India, there has not been any legislative attempt, to control noise pollution. A comprehensive legislation to solve this problem is the need of the day. Despite having plethora of laws and regulation the problem of noise pollution is aggravating and making problem challenging because approach of all these laws is not satisfactory as far as noise pollution control is concerned. From the foregoing study one thing is clear that the existing laws and regulations treat noise pollution from different angle and same has been described as threat to environment. Though, the Indian Judiciary has also done a lot but it is ground reality that there are some limitations on jurisdiction of Judiciary and Judiciary cannot take over the functions of other organs of the State viz. executive and legislative. In this connection, Legislation on Noise Pollution, a constitutional mandate, is awaiting the mercy of Indian Legislature. While noise has been considered as an integral part of environment, on same analogy it has also been interpreted by Judiciary that citizens have the right to live in environment free from

[62] Environmental protection Rules 1986 (EPR)

noise. Thus instead of multiple provisions and regulations under various civil, criminal, constitutional and allied laws which failed to check and control problem of noise pollution and taking into consideration the constituents being governed by noise need to be dealt with separately and effectively. For this purpose there is the exigent need for enacting a comprehensive and the stringent national legislation is seriously felt.

The Supreme court after co ıiderable deep study and analysis of existing all prevalent laws and allied laws in India and also of some notable legislations of several developed counties in the its prominent judgment[63] felt and favoured the enactment of specific legislation on Noise pollution. The court opined that "Need for specific legislation to control and prevent noise pollution still need some emphasis. Undoubtedly, some laws have been enacted, yet compared with the legislation in developed countries; India is still lagging behind in enacting adequate and scientific legislations. There is need to have single simple but specific and detailed legislation dealing with several aspects referable to noise pollution and providing measures of control thereof."

As of now, there are not many solutions to reduce sound pollution. On a personal level, everybody can help reducing the noise in their homes by lowering the volume of the radio, music system and the television. Listening to music without headphones is also a good step forward. Removal of public loudspeakers is another way in which the pollution can be countered. As it is to controlling the sound levels in clubs, bars, parties and discos. Better urban planning can help in creating 'No-Noise' zones, where honking and industrial noise are not tolerated. It is only when understanding noise pollution is complete; one can take steps to eradicate it completely. Thus it high time that sensing the gravity of the problem, a new legislation should come out to tackle noise pollution problem before it's too late to meet the situation.

7.1 Conclusion

Environmental protection and prevention of pollution, no doubt, is the function of the executive, which makes the decision. Equally important is the role of legislation which initiates measures for achieving goal of sustainable development. The contribution of courts will only be marginal. However judicial vigilance with judicial restraint helps in orientation of authorities. The courts in India have made significant contribution in evolving new principles and uplifting the age-old

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[63] *Re : Noise Pollution- Implementation of the Laws for Restricting Use of Loudspeakers & High Volume Producing Sound Systems* , 2005 (5) SCJ 165

tradition of care and gratitude towards the nature. Swami Abhedananda says, *"The law of 'Karma 'includes law causation, action, reaction, compensation and retribution. We create our own destiny, mold future, and determine character by our thoughts and deeds. What we deserve we got now and what we shall make, we shall receive in future. This is the eternal law".*

DRONE STRIKES: A NEW FORM OF AMERICAN IMPERIALISM

Satyajeet*

Sanskriti Mohanty**

1.1 Introduction

Tracing the roots of drone strikes: from drone to drone attacks:

> Drone strike is, as it operates now, an egocentric agenda underpinned by the U.S's tacit resolve to demonstrate to the world at large that it can endanger the peace and security of any foreign nation to make its sovereign authority invincible.

Drone strikes legalized by a horror-struck Bush administration under the authorization of use of military forces (AUMF), post-9/11 terrorist attack, are a ramification of the drone's military exploitability from a mere surveillance tool to a missile bomber.[1]

The U.S drone strikes were first undertaken in Afghanistan with the authorization of Security Council and declaration of Afghanistan and its air space as a combat zone but departure from this mandate was soon made with America making geographical expansion of use of drone strikes far beyond Afghanistan to Yemen, North west Pakistan and Somalia on the premise that battlefield follows those designated as enemy for their affiliation to al-Qaeda.[2] Thus implying that, notwithstanding any prohibition, the U.S is at liberty to undertake drone strikes anywhere in the world basing on its subjective satisfaction of presence of enemy. Thus U.S affirms its stand on the pretext that:

> "The war against terrorists of global reach is a global enterprise of uncertain duration."[3]

Bush's regime, though marked the inception of drone strike, Obama's regime proliferated it to an extent where it became brutal and a bane to humanity. After assuming the office of president, since 2009, Obama has ordered as many as 361 drone strikes as on January 31st, 2015 whereas Bush had ordered only 52 strikes during his reign[4].Moreover, the Bush administration had ordered one drone strike

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1 Milena Sterio, *The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International* , 45 Case W. Res. J. Int'l L. 197, 198 (2012)

2 *Id.* at p. 199.

3 The White House, *The National Security Strategy of The United States of America*, (September 2002), available at: http://history.defense.gov/docs_nss.shtml , (2014) [hereinafter National Security Strategy-2002]

4 Jack Serle, *Monthly Updates on the Covert War*(Feb 2, 2015), available at: https://www.thebureauinvestigates.com

over Pakistan in 2004, whereas Obama's administration was ordering a strike every four days during the first two years of his administration when the program was at peak.[5] Report of Bureau of Investigative Journalism (BIJ) states that 2500 people so far have been killed by the strikes during Obama administration since 2009 and further the report of the bureau reveals that of all the drone attack victims since 2004, more than 76% of the dead fall in the legal grey zone, 22% are confirmed civilians (included 5% minors) and only the remaining 1.5% are high-profile targets.[6]

Evidently, drone has emerged as the core tool of counter terrorism under Obama's administration, given that drones, unmanned and remotely operable, have reduced warfare into a "video game" easy to handle, thereby involving no deployment or loss of the U.S troops in the bloodshed zone of the targeted area where the lethal missile are released through the click of a button by CIA operators tucked to their seats in their Nevada office.[7] But Obama and other officials in his administration justify the resort to drone attack on a more altruistic ground that it causes fewer civilian casualties compared to other bombing technologies. In this context, Obama answered to a pointed question on drone attacks as:

> "a lot of strikes being in the FATA[federally Administered Tribal areas of Pakistan] going after al-Qaeda suspects , actually has not caused a huge amount of civilian casualties."[8]

The advocates of U.S drone strikes uphold its use on the basis of its high precision, goal achieving proficiency in targeting and eliminating the suspected "high-value" al-Qaeda leaders while overlooking the high scale civilian casualties caused as a result of such attacks[9].

In 2009, CIA director Leon Panetta observed that drones are "the only game in town in terms of Confronting or trying to disrupt the al-Qaeda leadership," which remains the position of the Obama administration[10].

According to Professor O'Connell, an American scholar, paradoxically, drone strikes

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5 Chris Woods, *'OK, Fine. Shoot him.' Four Words That Heralded a Decade of Secret US Drone Killings*, BUREAU OF INVESTIGATIVE JOURNALISM (Nov. 3, 2012), http://www.thebureauinvestigates.com

6 Louis Jacobson, *Do drone attacks comply with International Law,* http://www.politifact.com,July 1st 2010

7 Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*,44 CORNELL INT'L L.J. 729, 735 (2011)

8 White House, "President Obama's Google+ Hangout," (Jan 30, 2012)

9 John O. Brennan, *this Week with george Stephanopolous*, ABC, April 29, 2012.

10 "U.S. Airstrikes in Pakistan Called 'Very Effective,'" CNN, May 18, 2009

have killed 750-1000 unintended victims for the sake of killing nearly 20 leaders of Al-Qaeda by October 2009 in Pakistan.[11]

on an analysis of the above competing stands, it can be concluded that the success of the drone strikes may seem welcoming when considered from a narrow military front but on a wider strategic plane reckoning with the human rights concerns, the disproportionate killing of innocent people while preying on its targets at a micro level, makes the drone strikes unpalatable and its success dismal. Hence, it reflects the blurred distinction between those targeted to be killed and those actually killed by the drone strikes raising questions on its sustainability and reliability.

2.1 CIA's Most Private Affair: The Drone Warfare

Jane Mayer stated in her article quoted:

> The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based.[12]

Drone strikes by CIA[13] have been categorized into two-the "kill list" targeting and the "signature strikes". Strikes that target anyone on a "kill list", consisting of the details of high level al-Qaeda leader selected through a complex multilayered sanction procedure, requires ultimate 199pproval of the president, Obama. The second type of operation is the "signature strike", under which CIA exercises the discretion to target any person suspected to be a militant without any official procedure being followed as such[14]. Further, the wall street journal report reveals that the CIA's Pakistan drone strike program was initially exempted from the "imminent threat" requirement until the end of combat operation in Afghanistan.[15] In this context it is to be noted that CIA drone strikes are conducted with high confidentiality, unlike the military run programs subject to public scrutiny, and are classified as Title 50 covert actions, defined as "activities of the United States Government . . . where it is intended that the role . . . will not be apparent or acknowledged publicly, but does not include traditional . . . military

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11 Mary Ellen O'Connell, *Drones Under International Law*, WASH. UNIV. L. INT'L DEBATE SERIES 585, 590 (2010).

12 Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'sCovert Drone Program?*, THE NEW YORKER, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (Oct. 26, 2009).

13 Central Intelligence Agency (CIA)

14 Micha Zenko, *Transferring CIA drone strikes to the Pentagon*, http://www.cfr.org

15 *Id.*

activities." [16]And this aspect of the drone strike has triggered controversy about the legality of the procedure adopted in the undercover CIA program.

The drone attacks conducted by the CIA have been resented by the international community for their non-combatant status and it has been demanded that they be subjected to legal process for their unlawful killing of civilians amounting to murder. Vogel quoted that CIA operators are "unprivileged belligerent" akin to those militants against whom they are fighting[17]. In fact, intelligence personnel do not enjoy immunity like the military or armed forces for the same act and thus the CIA personnel could be prosecuted for murder under domestic law of any country in which they carry out the drone strike and could be prosecuted for violation of any U.S law as well. But the U.S through its political tactics has successfully evaded holding the CIA operators liable for the unlawful killings even under its domestic laws for killing its citizens, as in the 2011 incident in which CIA was absolved from legal prosecution despite having killed two innocent men held as hostages, one of whom was an American, in a drone attack.

As the operation is clandestine, the government cannot disclose anything about CIA's drone program. Hence, it has been pointed out in this regard that even a threshold of transparency cannot be expected from the CIA program.[18] Therefore, all other legal issues apart, drone strikes by U.S can get over its major legal controversies only when the shroud of secrecy is raised and the operation is transferred to military to bring in transparency and accountability.

3.1 U.S. Drone Strike, Whether State Terrorism Under International Law?

U.S. has been criticized widely of carrying out its drone strikes at the cost of international law in justifying its stand by distorting and giving its own self-favoring interpretation of the various legal integral concepts of international law, thus, attacking the very soul of international law[19]. More so, in a broader sense the drone strikes have become the bone of contention in the international arena owing to :

Firstly, the covertness of the CIA's drone strike program has resulted in skepticism about the legality of the key parameters constituting the targeted killing.

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16 *Id.*

17 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*,39DENV.J.INT'L L. &POL'Y 101, 134-35 (2011); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*,WASH.POST, Mar. 12, 2010, A17

18 *Supra* note.13

19 Rosa Brooks, *Drones and the International Rule of Law, 28 Journal of Ethics and International Affairs, pp. 83-103, 83, (2014)*

Secondly, the absence of any international instrument specifically dealing and laying down the necessary legal framework on the use of drone strikes renders its position under international law uncertain and contentious.

4.1 In an Armed Conflict with Al-Qaeda: America's Defence for Use of Drone Strikes

U.S administration has astutely responded to the questions raised on the legal validity of drone program under international law affirming that it is in a continuous armed conflict with al-Qaeda and so drone strikes comply with the international rule of war as a measure of self-defense.

Obama at the National Defense University, Washington, DC[20] asserted:

"We are at war with an organization that would kill as many Americans as it could if we did not stop them first. So, this is a just war- a war waged proportionally, as a last resort, and in self-defense"

Harold Koh, State Department Legal Advisor, at the American Society of International Law Annual Meeting on March 25, 2010, rationalized the use of drones stating:

> it is the considered view of this Administration that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." In his speech, Koh cited both domestic law (AUMF) and international law as proof that the United States is engaged in armed conflict with al-Qaeda, the Taliban, and "associated forces.[21]

Koh substantiated his argument enumerating the three legal foundations of the drone operation:

First, it is a continuing *war of self-defense* against an enemy that attacked America on September 11, 2001, and before, and that *continues to undertake armed attacks* against the United States.

Second, in Afghanistan, U.S works in partnership with a consenting host government. And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of *"all necessary measures"* by the

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[20] Rune Ottosen, *Underreporting the legal aspects of Drone Strikes in international conflicts: a case study of how Aftenposten and The New York Times cover the drone strike,* Vol.13, No.2 conflict and communication online(2014)

[21] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law 14,*available at* http://www.state.gov/documents/organization/179305.pdf(Mar. 25, 2010)

NATO countries constituting International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan.[22]

The consistency of the U.S drone strikes with International law will, hence, be examined and determined in light of the U.S argument of use of drone strikes as a measure of self-defense, proportional to the threat posed, in the continuous war with al-Qaeda and the associated force.

5.1 An Issue of Sovereignty, Consent and Intervention

No controversies were raised on the first U.S drone strikes carried out in Afghanistan with the authorization of Security Council but the subsequent extension of drone strikes to Yemen, Somalia and Pakistan were widely censured and strongly protested especially in Pakistan on the ground that drone strikes amounted to state intervention and breach of sovereignty. Ben Emmerson, U.N. Special Rapporteur on counter-terrorism and human right stated that:

> the U.S. drone campaign "involves the use of force on the territory of another state without its consent, and is therefore a violation of Pakistan's sovereignty.

The Pakistan judiciary also condemned the drone attacks in the *Peshawar case* and ruled:

> United States drone strikes on targets in Pakistan illegally breached national sovereignty and were in "blatant violation of Basic Human Rights" and provisions of the Geneva Conventions.
>
> That the drone strikes by the CIA & US Authorities, are *blatant violation of Basic Human* Rights and are against the UN Charter, the UN General Assembly Resolution, adopted unanimously, the provision of Geneva Conventions thus, it is held to be a *War Crime*.[23]

The court further held that drone strikes illegally breached Pakistan's sovereignty and ordered the government to "use force" to cease the drone strike within the sovereign territory of Pakistan.

Inspite of all these oppositions U.S continues its drone strike defiantly alleging tacit consent from Pakistan to drone strikes. Further stating that it carries out counter terrorism activities only in the territories of the countries which consented to it or "unwilling or unable" to fight against terrorist groups operating in their territory.[24]

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22 *Id.*

23 Andrew Buncombe, 9 May 2013, "Pakistani court declares US drone strikes in the country's tribal belt illegal", *The Independent*.

24 See Rosa Brooks , *supra* note.18 at p. 90

Moreover, U.S has intervened in the internal affairs of Pakistan thus risking the exacerbation of national armed struggle by targeting and killing vast majority of low-level suspected militants who were mostly insurgents rather than international terrorist.[25]

6.1 Drone strikes, jus ad belum and the right of self-defense under the U.N Charter

Drone strikes constitute extraterritorial use of force against the non-state actors. In this regard the justification forwarded by the U.S is that the use of force is the lawful exercise of its right of individual or collective self defense, one of the two main exceptions under chapter VII to the general prohibition on the use of force under article 2(4) of the U.N Charter.[26]

The restriction under the Charter on the use of force is the central pillar of the concept of *jus ad bellum* which provides the threshold restriction on the recourse to force. *Jus ad bellum* recognizes the use of force by a state when it is in conformity with the requisites of right of self-defense under article 51 of the Charter:

> Nothing in the present Charter shall impair the inherent right of collective or individual self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

The provision contemplates that an armed attack should pre-exist the resort to force as a defensive move and no measures should have been taken by the Security Council in respect of that armed attack.

The defensive stance of America pertaining to terrorist attack of the scale of 9/11 falling within the meaning of an armed attack under article 51 of the Charter remains conflict-ridden as armed attack is not defined either under the Charter or any treaty. So it is pertinent to determine whether terrorist attack qualify as an armed attack under international law with the help of judicial interpretation and juristic writings.

In *Nicargua case*[27], the court affirmed that only acts attributable to a state can

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25 Micha Zenko, *Reforming U.S. Drone Strikes Policies,* Council Special Report No.65

26 Article 2 (4) of UN charter states:
"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

27 International Court of Justice (ICJ), Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Judgment, 27 June 1986, para. 195.

constitute an "armed attack" and also assistance to rebels in the form of the provision of weapons or logistical or other support by a state amount to armed attack.

However, labeling terrorist attacks of high magnitude, like 9/11 attack, as armed attack still continues to be crossroads of contradicting views.

Addressing this issue on the connotation of armed attack, America hinged its argument on the Security Council resolution 1368 passed a day after the 9/11 terrorist attack which at the outset condemned the attack as "such acts, like any act of international terrorism, constitute "a threat to international peace and security."[28] And in the subsequent resolution of 1373 it also unequivocally recognized ""the inherent right of individual or collective self-defense in accordance with the Charter."[29]

And this move by the Security Council is considered to have brought a paradigm shift in the conception of armed attack ,thus, implying that armed attack also include terrorist attack.

To review the vindication invoking the principle of self-defense, the action has to be assessed on the basis of the twin doctrines of necessity and proportionality laid down in the *Caroline test* also as the basis of pre-emptive or anticipatory self-defence.[30]

Alston , the U.N special Rapporteur has, further, insisted on seeking immediate approval of the Security Council for the strikes ,as a measure of self-defense to be lawful which U.S has defiantly flouted through its stealthy program.

U.S's actions which has continued for over a decade now hardly seems to be satisfying either the requirement of 'imminence of threat' as a stimulus for attack under the doctrine of necessity or the requirement of proximity of action and purpose under the rule of proportionality, given the extent of civilian casualties.

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29 UN Security Council, Resolution 1368(2001), September 12, 2001,UN document S/1368(2001).

UN Security Council, Resolution 1373(2001),September 28, 2001,UN document S/RES/1373 (2001).

30 "Lawful right of self-defense exists where there is a 'necessity of self-defence, instant, overwhelming, and leaving no choice of means, and no moment for deliberation', and also, 'the actions must be proportional, as the acts justified by the necessity of self-defense must be limited by that necessity, and kept clearly within it.' Letter dated 27 July 1842 from Mr Webster, US Department of State, Washington, DC, to Lord Ashburton.

7.1 Jus in bello and U.S drone strikes

jus in bello or the rules of war govern the actions of the states and protect the individuals against excessive use of violence by hostile powers in a conflict situation. For a state action under *jus in bello* to be valid, there should be an armed conflict as contemplated under Geneva Convention and it should conform to the fundamental rules of proportionality, precautionary in attack, distinction and the weapons prohibited and considered unlawful under IHL should not be employed.

An assessment of the drone program with the available little public information indicates that America's adherence to the cardinal working principles of *jus in belo* has been murky as it has resulted in the disproportionate death and damage to civilians amounting to indiscriminate attack violating rule of proportionality[31]. This reflects, the failure of the program in meting out humane treatment to those not taking part in the conflict and civilians and distinguishing them from the legitimate targets, persons actively participating in the conflict or combatant[32]. Further the adoption of signature strikes to strike suspected militants basing on rudimentary behavioral pattern has resulted in blatant violation of rule of distinction.

Drone attacks: extra legal arbitrary execution under international human rights law

Kofi Annan quoted:

> We should all be clear that there is no trade-off between effective action against terrorism and protection of human rights... In the war against terrorism, human rights norms are not respected by many states but if great powers become the violators of such norms then it will open doors to "unrestricted wars.[33]

Human rights law, centered around right to life and liberty and the corollary rights guarantying the former, is of inexhaustive, universal application. Irrespective of the situation, it is firmly established under international human rights law and humanitarian law that the right to life of an individual is absolute and cannot be compromised upon in any situation of emergency or war without just reasons.

The International Covenant on Civil and Political Rights provides for right to life under Article 6 and states that: Every human being has the inherent right to life. This

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31 Rule 14 of the ICRC's study of customary international humanitarian law: Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

32 See common Article 3 of Geneva Convention

33 Kofi Annan, UN Secretary General, in his address to the UN Security Council meeting on counterterrorism measures, New York, January 18, 2002, SG/SM/8105SC/7277 21 January 2002,http://www.unis.unvienna.org/unis/pressrels/2002/sgsm8105.html

right shall be protected by law. No one shall be arbitrarily deprived of his life.

And the arbitrary deprivation of life, ultravires the law, by a state constitutes extrajudicial killing.

Amnesty International puts that:

> International law permits the use of lethal force in very restricted circumstances. But from the little information made available to the public, U.S. drone strike policy appears to allow extrajudicial executions in violation of the right to life, virtually anywhere in the world[34]

8.1 Conclusion

It can be concluded from the above discussion that the U.S unilateral drone strike policy has reaped more political nuances than military success. As it is rightly said *"every cloud has a silver lining"*, the dawn of a just war against terrorism can also be heralded by doing away with the repulsive *unilateral* drone strikes and carving out an international legal framework fostering participation, transparency, communication and allegiance among the states and ensuring prevalence of rule of law.

An organized adversary power can be fought only by concerted unified efforts and not by monopolized programs.

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34 *Killing outside the bounds of law,* www.amnestyusa.org

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015: IN/JUSTICE WITH RESPECT TO JUVENILE DELINQUENCY

Saumya Tandon*

1.1 Introduction

In a time when the common idiom '*kids not acting their age*' has a different connotation altogether, the laws regarding juvenile delinquency have suddenly been pushed to the spotlight. This can be attributed to the belief that the graph of criminal activity by juveniles is constantly increasing. The tipping point of the same was the gang rape of a young paramedic on the ghastly night of December 16, 2012 a juvenile being one of the six perpetrators. The incident triggered nation's woes leading to a heated debate between child right activists for maintaining the status quo, i.e. maximum punishment of three years and the general public demanding retributive justice for the barbaric crimes committed by juveniles. As a result, The *Juvenile Justice (Care and Protection of Children) Act*, 2000[1] came under scrutiny owing to its lenient provisions and was subsequently replaced by a stricter *Juvenile Justice (Care and Protection of Children) Act*, 2015. The Bill was introduced in the Lok Sabha on August 12, 2014 by the Minister of Women and Child Development, Ms. Maneka Gandhi which was later referred to the Standing Committee on Human Resource Development which submitted its report on February 25, 2015. Thereafter, the Lok Sabha passed the Bill on May 7, 2015 and subsequently by the Rajya Sabha on December 22nd, 2015 amid pressure due to public protests and demonstrations regarding the release of the juvenile involved in the Nirbhaya gang rape case.

2.1 Need for the new and reformed *Juvenile Justice (Care and Protection of Children) Act*, 2015.

'Juvenile delinquency' is defined as '*the habitual committing of criminal acts or offences by a young person, especially one below the age at which ordinary criminal prosecution is possible*'.[2] Cases of juvenile delinquency or the commission of crimes by young persons who are not yet adults[3] has been gaining a lot of heat over the last few years. Whether it be trivial offences such as eve

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1 Hereinafter referred to as the Act of 2000.

2 T. Nishiyama, *Oxford English Dictionary,* Oxford University Press, United Kingdom, 1992.

3 *Ibid.*

teasing, chain snatching or grave ones showing complete depravity, such as robbery, rape, murder etc.; the increasing role of minors or juveniles has come to the notice of the policemen as well as the general public. This is further backed by statistics from the National Crime Records Bureau (NCRB) which states: 'Over the last 10 years, crimes committed by children, as a percentage of all crimes committed in the country, have risen from 1.0% to 1.2%.'[4] Juvenile delinquency has been on the rise and the same has been duly acknowledged by the people of India; however one particular incident which gripped the nation and shocked the conscience of each and every citizen of India was the December 16, Delhi Gang rape case commonly referred to as the Nirbhaya case.

2.1.1 Impact of the Nirbhaya gang rape case.

The case involved the brutal gang rape and assault of a 23-year-old physiotherapy student on a moving bus by six accused; one of whom was a juvenile. The horrific incident occurred on December 16, 2012 when Jyoti Singh, referred to as "Nirbhaya" meaning "fearless" in Hindi, boarded a bus in South Delhi along with her friend. Thereafter the bus driver along with the five accused dragged the woman at the rear of the bus where they assaulted her and her friend. They further raped her in the most barbaric way possible; using iron rods for penetration thus pulling out her intestines and later threw her out of the bus in an attempt to kill her and her companion. The six accused included a juvenile, aged 17 years and 6 months. The revolting nature of the crime showing extreme depravity made the people question the maturity of the juvenile.

In a trial before the fast track court, the four adult accused were found guilty of rape, murder and destruction of evidence on 10 September, 2013 and were sentenced to death by hanging three days later. The decision was further upheld by the Delhi High Court. Meanwhile, the juvenile owing to his being six months short of eighteen, was tried in a separate Juvenile Court in front of the Juvenile Justice Board as per the provisions of the *Juvenile Justice (Care and Protection of Children) Act*, 2000 and was convicted of rape and murder and given the maximum sentence of three years' imprisonment in a reform facility.

The decision was met with public furore and large-scale demonstrations on the streets of Delhi and other parts of the country. The manner in which the incident occurred was appalling and left the nation in disbelief; forcing them to question the lenient laws with regard to juveniles who even after committing heinous crimes as the one stated above are practically scot-free. The citizens of India

[4] 'Crime in India' (2003-2013), National Crime Records Bureau, Ministry of Home Affairs.

demanded justice for Nirbhaya and innumerable other victims who perished due to the acts of these so-called 'juveniles' who are still not considered mature enough to be treated as adults by our criminal justice system. Justice understood in its general form, i.e. retributive and not rehabilitative or reformatory justice, was the cry of the nation. The public was of the view that a person who could perform an act of such nature could hardly be considered immature and was fully capable of understanding the consequences of his actions; yet was protected under the garb of the law and the tag of 'juvenile'. The Nirbhaya incident was the prime cause which triggered the demand for the overhaul of the present *Juvenile Justice Act*.

2.1.1.1 Role of media trial in administration of justice of the juvenile.

While discussing the Nirbhaya gang rape case and the role of the accused juvenile; discussing the role of media trial in the present day becomes extremely relevant.

'Media trial' or 'trial by media' is a phrase popular in the late 20th and early 21st century to describe the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt or innocence before, or after, a verdict in a court of law.[5]

Media is regarded as the fourth pillar of democracy. It plays a vital role in moulding the opinion of the society and is capable of changing the whole viewpoint through which people perceive various events. The people have a right to clear and truthful account of events, so that they may form their own opinion and select their future course of action. Thus, the media has the right of Freedom of Speech and Expression under Article 19(1)(a)[6] of the Constitution of India. However, the same is not absolute and is subjected to certain restrictions under Article 19(2), one such restriction being 'Contempt of Court'.

Although role of media is quintessential in the modern day society, yet it is observed that the media more than often exaggerates and sensationalises a piece of information thereby blinding public judgement who as a result develop a bias towards one or the other person. There have been numerous instances in which media has been accused of conducting the trial of the accused and passing the 'verdict' even before the court passes its judgment. This is precisely what happened with the juvenile accused in the Nirbhaya gang rape case. Due to

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5 *Trial by Media, https://en.wikipedia.org/wiki/Trial_by_media (last accessed 8 September, 2015).*

6 Hereinafter referred to as *'Art.'*

selective leakage of information by the police; even before trial, the juvenile was branded as a 'savage beast' and most 'violent' amongst the accused. He was a criminal in the eyes of the people even before the actual verdict.

It is pertinent to point out that in the interrogation reports of the rape victim Jyoti, as well as the testimony given by her companion before the Juvenile Justice Board; the fact that the juvenile was most brutal of all accused was never mentioned. It is sensationalism on part of the media which led to negative portrayal of the juvenile in the eyes of the general public. Similar was the case in Jessica Lal, Arushi Talwar murder case, Priyadarshini Mattoo case and several other high profile cases. It is also put forth that the disclosure of information by the police, including the juvenile's name, village, family etc. and its publication in media is an outright violation of Section 21 of the *Juvenile Justice (Care and Protection of Children) Act*, 2000 which attracts a fine of 25,000 rupees. Such unsubstantiated news coverage serves no purpose except that of shutting down the possibility of rehabilitation and mainstreaming of this juvenile along with causing unprecedented vilification of the juvenile. Thus, arose the need to curb the freedom given to the media.

Effect of media trial: Trial by media even before the actual trial by a court of law, leads to the public forming preconceived notions about the guilt or innocence of the plaintiff/accused and further leads to an unwanted hype regarding a social issue. The same subconsciously affects judges who may get swayed by emotions and mob mentality of the people. Media trial puts pressure on the judges to give their verdict in favour of either the plaintiff/accused; whomsoever has the sympathy of the crowd. Thus, media trial hampers the accused's right to fair trial and hinders in the administration of justice.

This issue was also discussed in the 200th Law Commission Report released in 2006 titled *'Trial by Media: Free Speech v. Fair Trial under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)'* which essentially stated that Art. 19(1) (a) of the Constitution of India guarantees freedom of speech and expression and Art. 19(2) permits reasonable restrictions to be imposed by statute for the purposes of various matters including 'Contempt of Court'. Art. 19(2) does not refer to 'administration of justice' but interference of the administration of justice is clearly referred to in the definition of 'criminal contempt' in Section 2 of the *Contempt of Courts Act*, 1971 and in Section 3 thereof as amounting to contempt. Therefore, publications which interfere or tend to interfere with the administration of justice amount to criminal contempt under that Act and if in order to preclude such interference, the provisions of that Act impose reasonable

restrictions on freedom of speech, such restrictions would be valid.[7] Thus, the Report allows for restrictions to be imposed on media trial as it prejudicially affects trial of the accused.

In conclusion, role of media trial needs to be curbed to ensure fair and effective administration of justice which did not take place during trial of the accused juvenile in the Nirbhaya case.

Several other factors also contributed towards the formation of a new and reformed *Juvenile Justice Act*. The need for revamp of the present Act arose due to lacunae present in the existing Act and its inability to cope up with the changing times.

2.1.2 Lacunae present in the existing Juvenile Justice (Care and Protection of Children) Act, 2000.

The *Juvenile Justice Act* of 2000 has certain drawbacks which need to be addressed; hence the need for a new and reformed Act.

2.1.2.1 The existing Act goes against the deterrence principle.

Subjecting juveniles accused of committing heinous offences to a measly punishment of three years that too in a Special Home where he/she will be allowed to carry on day to day activities without any rigorous punishment will hardly contribute towards making them realise the gravity of their crime. The objective behind punishment in a criminal justice system is to deter the potential offenders. However, the meagre penalty prescribed under the Act of 2000 in no way acts as a deterrence for the large pool of juveniles with criminal propensities from committing crimes nor the juvenile delinquents from becoming repeat offenders. On the contrary it incentivises and corrupts the minds of docile young individuals leading on to them becoming criminals.

2.1.2.2 Punishment prescribed under the existing Act is disproportionate to the crimes committed by the juveniles.

Section 15 deals with *'Order that may be passed regarding juvenile'* by the Juvenile Justice Board. The penalties prescribed are in the nature of giving advice/admonition or counselling to the juvenile; demanding community service or placing him under the supervision of a guardian or fit institution. For grave offences, only if the accused is above seventeen, provision has been made for him

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[7] The Law Commission of India, 200th Report on 'Trial by Media: *Free Speech v. Fair Trial under Criminal Procedure (Amendments to the Contempt of Court Act*, 1971)' (2006).

to stay in a Special Home. And as a last resort for violent juveniles, there exists a provision for putting them separately in a 'Place of Safety'. It a pity that children committing heinous crimes as those of robbery, rape and murder should be let off with such meagre penalties. Thus, amendment of certain provisions of the Act, such as the one above, is quintessential.

2.1.2.3 Children are being used by anti-social elements of the society taking advantage of the loopholes in the Act.

Following the *Juvenile Justice Act* of 2000 blindly in black and white without giving it any scope of flexibility has led to the misuse of the provisions by anti-social elements of the society. Poor and needy minors, cognitive of the consequences of their actions, yet considered 'children' in the eyes of law; are lured by criminals to commit crimes. They are well aware of the fact that even for the gravest offences these minors will be let off in three years without undergoing any rigorous punishment per se; hence they take the maximum advantage of this loophole.

2.1.2.4 The Act violates Article 21- Right to life and personal liberty.

The Act of 2000 has been termed as unconstitutional by plenty. It is believed to be shielding criminals namely juveniles and releasing them back into the society soon after the expiry of three years. It further destroys the faith the innocent citizens have in the criminal justice system who find solace in the fact that a criminal is being punished and is suffering for the wrong done by him. The protection and induction of these criminals back into the society endangers its citizens and infringes their right to lead a life of peace, dignity without any fear; thereby violating their fundamental right provided under Article 21 of the Constitution.

2.1.2.5 The Act ignores the mental maturity of the juvenile.

The Act of 2000 needs to be amended as Section 15 completely ignores the mental and physical maturity of the accused juveniles. The Act focusses only on the age of the juvenile and accords punishment based on the same.

In criminal law, a person is convicted only when both "Actus Reus" and "Mens Rea" are proved. The Act protects the Actus reus part of the juvenile and doesn't take into consideration the Mens Rea as there are no parameters in the Act to judge the same. Thus, a juvenile fully aware and conscious of his acts is let off. If that be the case, an adult aged 30 who commits a crime unintentionally should be tried as a juvenile considering he was not mentally alert during commission. Hence, this provision of the Act is arbitrary in nature and needs amendment.

The Act also fails to express the minimum age, below which the Act would not be applicable. It fails to take into account Section 82 and 83 of the Indian Penal Code, 1860 which deal with the age of criminal responsibility in India. As per Section 82, the criminal responsibility is fixed at 7 years below which nothing is an offence. Also, Section 83 which states: 'Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.'

2.1.2.6 No provision for maintenance of records with regard to repeat offenders.

Section 19 of the Act provides for *'Removal of disqualification attaching to conviction'*. Clause (1) states that a juvenile convicted of an offence will not suffer any disqualification attaching to the same. Clause (2) states: 'The Board shall make an order directing that the relevant records of such conviction shall be removed after the expiry of the period of appeal or a reasonable period as prescribed under the rules, as the case may be.'[8]

Thus, after deletion of records there is no way to keep track of the repeat offenders. Also, there exists no provision for gradation of punishment with respect to repeat offenders.

2.1.2.7 Laws must be dynamic and responsive to change.

'What does not change will ultimately result in failure'. So, is the case with rules and regulations. Laws of any country should be dynamic, accommodative and adaptive to the change in society. Reformation and a rehabilitative approach for juveniles is appreciated however it must not send a signal to the perpetrators that they can easily get away even with the gravest of offences. According to Dr. Prannoy Roy, a renowned psychologist; owing to biological changes, the age of puberty of children has shifted earlier and with greater exposure in the 21st century; the age of maturity, adolescence and ability to reason and distinguish between right and wrong has also shifted. Thus, stringent laws with stricter punishments for the juveniles is the cry of the public.

Another drawback of the existing Act is it fails to provide for inter-country adoption which could have proved to be extremely beneficial for the orphaned and abandoned in India. This practice is acknowledged in several parts of the world, the most popular example being U.S.A. Other aspects lacking recognition in the Act are; procedural guarantees such as right to counsel and speedy trial;

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[8] *The Juvenile Justice (Care and Protection of Children) Act*, 2000, S. 19.

facility for higher education; concept of parental responsibility in reformatory homes.

It is appropriate to cite the *Bombay Blasts Case*[9] here, where a juvenile who was tried and convicted along with adults under the Terrorist and Disruptive Activities Act (TADA), was denied the protection of the *Juvenile Justice Act* of 2000, on account of the existence of a special Act read along with Section 28 of the *Juvenile Justice Act*. This, though an isolated incident, led the courts to disassociate him from the tag of a child in the eyes of law considering the gravity of the crime. Hence, it can be concluded, even the Courts at times acknowledge the need for more stringent laws with respect to juveniles.

In conclusion, the above factors along with the brouhaha over the December 16 gang rape incident majorly contributed towards and highlighted the need for amending the existing *Juvenile Justice Act* of 2000. The aggrieved citizens of India demanding stringent laws proposed changes such as lowering of the juvenile age from 18 to 16 years or trying of the juveniles as an adult etc. The *Juvenile Justice (Care and Protection of Children) Act*, 2015 is a direct outcome of the above.

3.1 Overview of the *Juvenile Justice (Care and Protection of Children) Act*, 2015.

The *Juvenile Justice Act* of 2015[10] contains provisions for children in conflict with law and in need of care and protection and replaces the previous Act of 2000. The Supreme Court in the case of *Salil Bali v. Union of India & Anr.*[11], held that the Act of 2000 was not *ultra vires* the Constitution of India and in consonance with several international conventions ratified by India hence did not need to be struck down or amended. Nevertheless, a new Act was passed in December 2015.

The Act has gained much heat recently due to the contentious provision 'which allows for juveniles between ages 16-18 to be tried as adults for commission of heinous crimes'. Much debate ensued after the repeated use of this loosely worded phrase by media. And that is primarily the reason for viewing the Act in a negative light; ignoring the various positive changes it has brought about. There was literally a war of words between child right activists admonishing the Act

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9 *Essa @ Anjum Abdul Razak Memon & Ors. v. The State of Maharashtra, through STF, CBI Mumbai & Ors.*, 2013 (3) SCALE 1 referred to as the Bombay Blasts Case.

10 Hereinafter referred to as the 'Act of 2015'.

11 AIR 2013 SC 3743.

and the rest demanding justice for the grave offences committed by juveniles. Several writ petitions, including one by Mr. Subaranium Swamy, for reducing the age of juveniles from 18 to 16 years were rejected by the Apex Court. The actual procedure relating to juveniles along with the intricacies of the provisions will be made clear through the course of this paper.

3.1.1 Who is a juvenile?

The dictionary definition of 'juvenile' is 'for or relating to young people'.[12] However, the Act of 2015 deviates from the traditional definition and Section 2 (35) defines *'juvenile'* as 'a child below the age of eighteen years'. It is synonymous with clause (12) defining *'child'* as 'a person who has not completed eighteen years of age'.

The subjects of the Act is a *'child in conflict with law'* defined as 'a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence'[13] and *'child in need of care and protection'* meaning a child either homeless; without parent or guardian or found working in contravention of labour laws or under the threat of sexual abuse/trafficking or a victim of natural calamity and under imminent risk of similar nature.[14]

3.1.2 Procedure with relation to children in conflict with law.

Section 10 requires for a child alleged to be in conflict with law on apprehension to be placed under the charge of special juvenile police unit/ officer who shall produce the child before the Juvenile Justice Board within a period of twenty-four hours.

A provision for bail of the concerned child for both bailable and non-bailable offences exists in the Act of 2015 subject to certain conditions.[15] If not released on bail, the child is placed in an Observation Home until the completion of proceedings of inquiry. The harbinger of the same was the case of *Sheela Barse v. Union of India*[16] wherein the Supreme Court issued directions to the state government to set up necessary observation homes where children accused of an

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12 T. Nishiyama, *Oxford English Dictionary,* Oxford University Press, United Kingdom, 1992.

13 *The Juvenile Justice (Care and Protection of Children) Act, 2015,* S. 2 (13).

14 S. 2(14).

15 S. 12.

16 (1986) 3 SCC 632.

offence could be lodged, pending investigation and trial will be expedited by juvenile courts.

It is worth mentioning that Juvenile Justice Board deal specifically with 'children in conflict with law'; conduct inquiry for the alleged offences and pass orders; whereas Child Welfare Committees are responsible for 'children in need of care and protection'.

3.1.2.1 Composition and functions of Juvenile Justice Boards.

Composition: Juvenile Justice Boards are required to be constituted in every district by the respective State Government of a State.[17] It consists of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan or Chief Judicial Magistrate (referred to as Principal Magistrate in the Act) with at least three years of experience along with two social workers, actively involved in health, education, or welfare activities for at least seven years or a professional child psychologist (one of whom is a woman). These persons constitute the Bench during inquiry proceedings of concerned children. Due regard has been given to child rights' through provisions requiring the Boards to ensure informed participation of the child, conducting proceedings for ease and comfort of the child, providing legal aid etc.

3.1.2.2 Inquiry of children in conflict with law by Juvenile Justice Boards.

When a child is produced before the Board, an inquiry is done delving into the details of the alleged offence; and is required to be completed within four months for 'petty' and 'serious' offences and three months for 'heinous' offences according to Section 14 of the Act. It is noteworthy that 'petty offences' are defined as those for which the maximum punishment under the Indian Penal Code, 1860 or any other law for the time being in force is imprisonment up to three years; 'serious offences' imprisonment between 3 to 7 years and 'heinous offences'- imprisonment for seven years or more.[18]

3.1.2.2.1 Procedure for 'heinous offences'

Preliminary assessment: The Act provides for a separate procedure for inquiry of 'heinous offences' committed by a child above 16 years of age. Section 15 states that 'the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly

17 *Supra* note 13, S. 4.

18 S. 2 (45); 2 (33) and 2 (54) respectively.

committed the offence, and may pass an order in accordance with the provisions of section 18(3)'. 'Preliminary assessment' here does not imply a trial.

Penalties under Section 18: On completion of inquiry by the Board; for 'petty' or 'serious' offences committed by a child irrespective of his age and for a 'heinous' offence committed by a child below 16 years; the Board may pass an order for counselling of such child, or for placing him under supervision of a specified organisation; or place him in a Special Home for reformative theory or psychiatric support.

Transfer of trial: For 'heinous offences'; if after the preliminary assessment the Board feels that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.[19] 'Children's Court' is 'a court established under the *Commissions for Protection of Child Rights Act*, 2005 or a *Special Court under the Protection of Children from Sexual Offences Act*, 2012, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.'[20]

After the receipt of the preliminary assessment, the Children's Court has two options: It can either decide that-

- there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 and pass appropriate orders after trial; or
- there is no need for trial as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18.[21]

Order of Children's Courts: For a child found to be in conflict with law, the Children's Court has to ensure that he is first sent to a place of safety where he shall serve his sentence till he attains the age of twenty-one years,[22] and thereafter if the person has not undergone reformative changes and is unlikely to be a contributing member of the society; only then shall he be transferred to a jail (adult prison).[23] Thus, trial of a child as an adult and putting him in an adult prison along with other convicts are last resorts under the Act of 2015. The Act

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19 *Id.* S 18 (3).

20 *Id.*, S. 2 (20).

21 *Id.*, S. 19 (1).

22 *Id.*, S. 19 (3).

23 *Id.*, S. 20 (1).

allows for life imprisonment with a possibility of release, but prohibits death penalty.

Further, there are provisions to ensure the care and protection of the child along with reformatory programmes at every step of the procedure; starting from maintaining a child-friendly atmosphere in the Court; providing for an individual care plan for the rehabilitation of every child irrespective of the final order of the Children's Court; a periodic follow-up report, provision of reformative services including education, skill development, alternative therapy such as psychiatric support in the place of safety.

It can hence be concluded that there exist several safeguards in the Act to ensure the care, safety and development of the children in conflict with law before inducting them into adult prisons. Further, the newspaper and the media reports almost completely ignore the various beneficial provisions apart from trying juveniles as adults.

3.1.3 Children in need of care and protection.

The Act has a comprehensive structure with respect to children in need of care and protection and also a detailed procedure regarding adoption and eligibility of adoptive parents.

3.1.3.1 Composition

Section 27 provides for Child Welfare Committees (CWCs) to be constituted in each district to deal with children in need of care and protection. They will be composed of a chairperson and four other members who shall be experts on matters relating to children out of which at least one will be a woman.

3.1.3.2 Procedure

A child who is found to be in need of care and protection shall be brought before a CWC within 24 hours. Subsequently, a Social Investigation Report is required to be prepared within 15 days. After assessing the report, the CWC may recommend that the child be sent to a children's home or another facility for long term or temporary care, or declare the child as free for adoption or foster care.[24]

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24 A. Shankar, *Legislative Brief on the Juvenile Justice (Care and Protection of Children) Bill, 2014*, at http://www.prsindia.org/uploads/media/Juvenile%20Justice/Legislative%20Brief%20Juvenile%20Justice%20Bill.pdf (last accessed 12th February, 2016.)

3.1.3.3 Provisions regarding adoption

The Central Adoption Resource Agency will frame regulations on adoption which will be implemented by state and district agencies.[25] Prospective adoptive parents are required to be physically and financially sound under the Act. The Act allows for a single or divorced person to adopt a child except a single male who may not adopt a girl child. Institutions for child care are required to be registered within six months of the Act coming into force which will be valid for five years and needs to be renewed. Provision for inspection committees to inspect these institutions and cancel registration if need be, has also been made.

3.1.3.4 Inter-country adoption

Another neglected feature of this Act is the provision regarding 'inter-country adoption'. A much awaited step addressing the lacuna in the previous Act; inter-country adoption has been made available under Section 59 for an orphan or surrendered child not adopted within 60 days of being declared free for adoption. 'Inter-country adoption' as per Section 2(34) means adoption of a child from India by non-resident Indian or by a person of Indian origin or by a foreigner.

The Act also lays down several offences with their respective penalties with relation to children. These include giving a child an intoxicating or narcotic substance attracting punishment of imprisonment up to seven years and a fine extending up to one lakh rupees; selling or buying a child for any purpose will be imprisonment up to five years and a fine of one lakh rupees etc.

In conclusion, the efforts of the legislators is commendable as the Act lays out a comprehensive and cohesive procedure to tackle the problem of stricter punishment for juveniles. It tries to strike a balance between lenient and extremely harsh provisions for juveniles. Giving due regard to the care and protection of needy children and adoption are highlights of the Act. The Act draws inspiration and is in consonance with criminal laws of various countries which makes it all the more cohesive.

4.1 International comparison of criminal laws.

On comparison of criminal laws in various countries addressing treatment of juvenile offenders; we can deduce that the amended *Juvenile Justice Act*, 2015 is not all that harsh as being portrayed by the media. Several countries such as France, Germany, United Kingdom etc. who have ratified the same international

25 *Supra* note 13, S. 56.

conventions as India, have provisions for trying juveniles as adults for heinous crimes.

4.1.1 Age at which juvenile can be tried as an adult

United States of America- 13 years; United Kingdom- 16 years; France- 16 years and Germany- 14 years. India- 16 years.

4.1.2 Type of offence for which juvenile can be tried as adult

Offences such as murder, robbery, rape, sexual assault are common to the above mentioned nations. India- Heinous offence, (punishment greater than 7 years e.g. murder, rape, robbery).

4.1.3 Penalty for juveniles treated as adults

Among the nations mentioned; only United Kingdom and Germany have a provision for life imprisonment of juveniles; and all the nations prohibit death penalty. In India, penalty is the same as adults. Life imprisonment with possibility of release is allowed, however capital punishment is prohibited.

Therefore, after a comparative study of criminal laws; it can be concluded that India has not overstepped its line and its provisions are in consonance with those of the rest of the world.

5.1 Drawbacks of the *Juvenile Justice Act*, 2015.

The Act of 2015 although drafted meticulously, keeping in mind the demands of the public is all the same a case of remedy being worse than the disease. The striking feature of the new Act is the option of trying juveniles between the ages 16 to 18 accused of committing 'heinous offences' as an adult. This provision was met with extreme criticism primarily due to the following reasons.

5.1.1 Child psychology and causes of juvenile delinquency.

At this point it becomes quintessential to understand the psychology of juvenile offenders and why the concept of 'adult time for adult crime' must not be employed while punishing juveniles.

5.1.1.1 Biological and scientific aspect

The public logic is that if the present day juveniles are mature enough to commit adult crimes, in the nature of rape, murder etc., they should be considered mature enough to be treated as adults and serve adult punishments. However, the ignorant and ill-informed public fails to take into account that sexual impulses and the ability to commit a murder or a rape can develop in children as young as

10 years old, however the same does not signify 'maturity'. According to a recent brain studies conducted by Tata Institute of Social Sciences (TISS), according to which risk-taking tendency is really high during adolescence; it is discovered by neuroscientists that prefrontal lobe, also called the CEO of the brain, which is responsible for functions such as planning, reasoning, controlling the impulse, etc. develop only after 25 years.[26] Thus, there exists a biological and scientific reason behind treating juvenile offenders as children.

Aristotle, one of the greatest philosophers, ages back, concluded that 'the young are heated by nature as drunken men by wine' as they are prone to risk taking and inability to properly control their impulses. Adolescents, especially teenagers in the age of group of 16 to 18, lack the capacity to fully appreciate the future consequences of their actions. At the same time, the systems in the brain that control emotions are highly activated, leading some to describe the teenage brain as 'all drive and no brakes'.

It is a known fact that adolescents are heavily influenced by opinions of their fellow mates and are led to commit crimes under peer pressure. Now, consider the case of a 16 year old accused of substance abuse. If tried as an adult, he can be put behind bars for up to 10 years. There is a high probability he was led into drugs by bad company and he is probably not even aware of the anti-narcotics laws. Convicting and punishing such children as adults would be a travesty of justice.

It can thus be concluded, 'stern laws' that fail to deter even adults from committing rape or murder will certainly not deter youngsters who are naturally rash. Thus, as a mentally challenged child is given special treatment; so must the juvenile offenders be treated citing the scientific and biological reasons behind their actions.

5.1.1.2 Primary causes of juvenile delinquency:- Socio-economic conditions.

Studies suggest that children lacking stability and consistency in their lives are at the greatest risk for delinquent behaviour. A child brought up in a peaceful family environment under parental guidance will rarely get involved in criminal behaviour. It is the children who have had a neglected and abused childhood that constitute the major portion of the juvenile offenders. Poverty adds to their misery. Such children flee their homes and get involved in petty crimes such as theft, pickpocketing, chain snatching etc. to make their ends meet.

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26 "Transferring juveniles to adult justice system detrimental", *The Indian Express,* November 16, 2014, p. 8.

It is also observed that children who have witnessed crime at their homes; in the form of marital rape, domestic violence, assault etc. turn out to be criminals themselves. The best example of the same is the juvenile rapist in the Nirbhaya case. The accused was an orphan who was repeatedly abused and sodomised as a child and had hence fled his home. Such children become vulnerable to crime as is evident from his act on December 16. Throughout their lifetime, such children have been wronged; never receiving the opportunities or the childhood they deserved. By treating them in an adult criminal system, the saga continues. It is hence put forth that such children are in need of adult guidance not the company of adult criminals as they have the scope of becoming reformed citizens.

An appropriate question here is, where do children learn to rape and kill? The innocent children learn what the society teaches them. When they witness police officers in Bastar or esteemed personalities like Asaram Bapu, Tejpal and Pachauri roaming scot free after being accused of sexual assault or rape; they come to the conclusion that the responsibility to prevent heinous offences e.g. rape, lies with the women and not men. Also, crimes committed by family members are kept under a hush and never come to light, owing to the practice of 'protect the patriarch' in the Indian society. Hence, these notions engrained in the minds of the youth by our very own society are major contributing factors towards juvenile delinquency. Lastly, one should not forget that a juvenile delinquent, could be, nothing more than a poor child caught red-handed in the struggle for survival and he or she deserves an empathic treatment.

It is thus the need of the hour to sensitize the juvenile offenders and provide them with the care and concern previously lacking in their lives; instead of shoving them in the adult criminal system where they are bound to be worse-off criminals.

5.2 Objective of the Act is reformation and rehabilitation not retribution.

The *Statement of Objects and Reasons of the Act* clearly states its purpose being 'care, protection, development, and social re-integration of children in conflict with law and in need of care and protection.' Thus, the objective of the Act is indubitably rehabilitation of the juveniles. Inserting a clause for allowing juveniles to be tried in the adult criminal system goes against its very objective as children can only become hardened criminals while staying with adult offenders who might go on to commit even graver offences.

The judges and legislators of our country view 'justice' as punishment only. They subscribe to outdated notions of retribution and a deterrence-based penology, unable to appreciate a juvenile justice that centers on reforming the child. It

seems as if the legislators, judges and the general public need to be reminded that the very purpose of a separate Act for juveniles was to provide assistance to reintegrate juvenile delinquents into the society. Had retribution and punishment been the purpose, our previous criminal laws and trial system were sufficient. This cry against reformative and for retributive justice is due to the misconceived notions of the public that crimes, especially 'heinous crimes' and crimes committed against women by juveniles are on the rise. The statistics that follow belie this notion.

Out of the overall incidences of crime, children committed just 1.2% of the total of 23,87,188 crimes.[27] Thus, out of 1,00,000 children, only 2.3 children were arrested for an offence. More than half of the children (50%) apprehended in the 16 to 18 years age group are for offences such as theft, causing hurt, burglary etc. whereas rape constitutes only 5.4% of the total crimes committed by juveniles.[28] In the last decade, juvenile crime has shown only a marginal increase. Compared to Western countries, juvenile delinquency rates in India are quite low. Rates in the UK and the US range between 11 and 13 per cent. Yet, they have not considered the option of trying their children as adults. Instead they have opted for a liberal approach towards juveniles. The American Supreme Court in 2005 abolished death penalty for children below 18 years of age. Recently, it ruled against solitary confinement and life imprisonment without parole in all juvenile crimes.[29]

The Delhi gang rape incident has led to juveniles being portrayed as the biggest threat to the women population. It is beyond doubt that for the nature of the crime committed by the juvenile, he should be given the strictest punishment possible without mercy. However, passing such a draconian law as the one in question based solely on one incident would be a travesty of justice. It is therefore suggested that a method be employed to punish the small percentage of juveniles accused of committing horrific crimes such as the Nirbhaya rapist but not at the cost of a thousand others who may have a chance of reformation and scope for leading a normal, fruitful life in the future.

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27 A.Shankar, *Vital Stats: Children in Conflict with Law*, at http://www.prsindia.org/administrator/uploads/general/1438698738_Children%20in%20conflict%20with%20law-%20Vital%20stats.pdf (last accessed on 26th January, 2016.)

28 *Crime, Statistical Year Book, India 2015*, Ministry of Statistics and Programme Implementation, at http://mospi.nic.in/Mospi_New/upload/SYB2015/index1.html (last accessed on 13 February, 2016).

29 F. Mustafa, "Rough Justice", *The Indian Express*, November 27, 2014, p. 22.

5.3 Trial of juveniles as adults will not deter crimes.

Putting children with adult criminals would be self-destructive and self-defeating. Adolescents, who are in conflict with law, need adult guidance not the company of hard core criminals whereby they are bound to become street gladiators. And the irony is that this guidance is all the more essential for those accused of heinous offences who are the targets of this regressive law. Repercussions of placing children with criminals include dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society.[30]

It is pertinent to quote the renowned judge, Justice V.R. Krishna Iyer here who states that *"adult jails are where young offenders acquire 'PhDs in crime'"*. The US Department of Justice, in a 2011 report, cited six large-scale studies that found youth who were transferred to adult jails were generally found to have re-offended 'sooner and more frequently' than those retained in the juvenile justice system, because of 'the direct and indirect effects of criminal conviction on the life chances of transferred youth, the lack of access to rehabilitative resources in the adult corrections system, and the hazards of association with older criminal mentors'. As a result of this experience, between 2005 and 2010, fifteen US states enacted laws to prevent young people from entering the adult criminal justice system.

As a matter of fact, evidence shows that rate of recidivism is higher amongst the juveniles who are sent to adult criminal justice system and the proposed change would not achieve its stated objective, namely deterring juveniles from committing crime in future. Even the Verma Committee Report, constituted under Justice J.S. Verma on December 23, 2012 as an aftermath of the December 16 gang rape to recommend amendments to the Criminal Law so as to provide for 'quicker trial and enhanced punishment for criminals accused of committing sexual assault against women'; also suggested that if a person at the age of sixteen is sent to life imprisonment, he would be released sometimes in the mid-30s; and thenceforth there is little assurance that the convict would emerge a reformed person, who will not commit the same crime that he was imprisoned for or, for that matter, any other crime.[31]

Also, there was no concrete data to prove that stiff punishment resulted in the

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30 Amnesty International India, *India should reject regressive move to treat alleged child offenders as adults*, PRESS RELEASE, 10 December, 2013, ASA 20/045/2013 (last accessed 29 January, 2016).

31 H. Kalra, *Justice Verma Committee Report Summary*, at *http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/* (last accessed 25 January, 2016).

lowering of the crime rate anywhere in the world, whether it be adults or children. Had subjecting convicted adults to severe punishment actually deterred crime; then the crime rate of adults would have fallen drastically. But that is not the case. The percentage of adult repeat offenders has actually increased from 6.9% in 2011 to 7.8% in 2014 instead of decreasing or remaining constant.[32]

5.4 The deterrence theory fails for offences committed by close ones.

Evidence suggests that majority of the offences in the nature of theft, rape, murder etc. are committed by close ones wherein protectors themselves become perpetrators. Statistics show that 94 percent of the rapes are done by family members, neighbours etc.[33] Thus, one must stop concentrating solely on crimes by strangers and divert attention to the ones by loved ones.

The Act which seeks to impose harsher penalties on children, in the form of trying them as adults, will only lead to decrease in reporting and filing of FIRs by the victims of offences committed by loved ones. The societal/family pressure along with the possibility of adult punishment will deter them (especially rape victims) from reporting the crime of their juvenile brothers, cousins, neighbours etc. Thus, these juveniles who would probably have served punishment in a juvenile home making them regret their actions and reform themselves; would now be shielded and not undergo punishment in any form let alone trial and punishment of an adult. Thus, the new provision in reality encourages the perpetrators rather than deter crime by juveniles.

5.5 The Act violates several international conventions.

India is signatory to various international conventions, one being the United Nations Convention on the Rights of Child (UNCRC), 1989 which was ratified by India in 1992. The Act, however, is an outright violation of the same.

Article 1 of the Convention on the Rights of Child defines *'child'* as:

'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

Thus, by treating certain group of 'children' below 18 years as adults and subjecting them to adult punishment, the Act signifies non-compliance with the Convention to which it gives mention in the Statement of Objects and Reasons.

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32 S. Nair, D. Tiwari, "Juvenile Crime share static", *The Indian Express,* December 23, 2015, p. 14.

33 A.K. Verma, "Death Penalty no Deterrent to Rape", *Rediff News,* 9 January, 2013.

The Act also goes against the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985 and Universal Declaration of Human Rights, wherein it is stated *'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'*. It also goes against the International Covenant on Civil and Political Rights (in particular Articles 23 and 24) and various other statues of international organizations concerned with the welfare of children which recognize that in all countries in the world, there are children living in exceptionally difficult conditions and that such children need special consideration.

5.6 The Act results in overburdening of the Indian criminal justice system.

The people of India are well aware of the backlog and pendency of cases in the Indian judiciary. The very purpose of constituting Juvenile Justice Boards and separate provisions for juveniles was to take care of their needs and also to reduce the burden on the overburdened judiciary. By trying children as adults for 'heinous offences', i.e. all children committing crimes which entail a punishment of more than 7 years under IPC; one can only imagine the increase in the number of cases which the Indian criminal system would have to deal with. This is equal to taking a step in the backward direction, further adding to the backlog of cases. Certain aspects arising out of the change in juvenile laws will add to the workload of the criminal justice system. These include:

5.6.1 Fabrication of charges

One has to take into consideration the false charges and fake FIRs that are filed almost daily in the police stations. There are innumerable instances wherein young boys and girls in an adrenaline rush get involved in consensual sex or elope. This is usually followed by filing of FIRs by the respective family members and on interrogation the boy or most of the time, the girl; go back on their words leading to the other being falsely accused in a molestation, sexual assault or rape case. Now, under the new provision of trying children as adults, there is a very high possibility of such innocent teenagers being subjected to rigorous punishment with a chance of being sent to adult prisons. This would be no less than a mockery of justice.

5.6.2 Problem of under trial prisoners

Before the amendment to the *Juvenile Justice Act*, 2000; Juvenile Justice Boards used to ensure speedy trial and effective disposal of cases. The consequence of trying juveniles in the adult criminal system would be increase in the number of

under trial prisoners languishing in jails, a major portion being juveniles transferred under the new Act; adding on to the burden of the judiciary. Another point of concern is the discretion provided to the Juvenile Justice Boards to try the juvenile as an adult.

Critically analysing the bare provisions of the *Juvenile Justice Act*, 2015; with its drawbacks, loopholes etc. as well as the need for the same is well and good; however it is quintessential to get a true picture of how the Act is actually being implemented; its status, condition of the various institutions under the Act etc.

6.1 Elements of concern regarding the Act.

6.1.1 Condition of juvenile/reformatory homes.

The juvenile homes established for the care, protection and development of juveniles have turned out be 'horror homes' and 'exploitation centres' as reported by newspapers. The best examples are the children of Drone Foundation, a juvenile home in Gurgaon where inmates were sexually abused almost regularly; and the instances of juveniles running away from such homes in Karnataka and West Bengal. The fact that the juveniles prefer the unprotected world with its evils rather than the secure walls of juvenile homes itself speaks volumes about the miserable conditions of such centres. An example of a boy, Deepak who faced abuse by his caretaker in the juvenile home was cited in the Verma Committee Report as well. The reasons for the deteriorating condition of these homes are listed below.

6.1.2 No monitoring

Several reformatory homes are not registered under the *Juvenile Justice Act*; thus there exists no mechanism for monitoring their functioning or making them accountable.

6.1.3 No redressal mechanism

Presently, there is no redressal mechanism in the form of child committees for the inmates to voice their grievances to an outsider; considering in most cases the management itself is the culprit. The sad state of affairs come to light only through a whistle blower or when children from such homes escape.

6.1.4 Lack of regular inspection and review by concerned authorities

The children are not a priority as they are not voters. They are poor and illiterate and hence people get away with providing inadequate facilities without proper

checks. Hence, more than often it is observed the juveniles are a subject of sexual abuse, sodomy, ragging etc.

6.1.5 Lack of trained staff

Although there exists a cohesive model for reforming a juvenile offender through an individual care plan, periodic review and report, counselling, psychiatric support etc.; in reality there exist no such trained psychologists or staff to deal with children and even so they fail to execute their duties in a responsible manner. Thus, instances such that of a sixteen year old juvenile who used to watch television and while away his time in the juvenile home later going on to become a sweeper in East Delhi; are not uncommon. Vocational training and counselling are provisions only on paper and are rarely availed by the juvenile inmates. Hence, the reason for tagging juvenile homes as 'hellholes'.

6.2 Ensuring rehabilitation of the juvenile after release.

The Act's objective is to reform, rehabilitate and reintegrate the juvenile into the mainstream society. However, rehabilitation is a near impossible task. A juvenile convicted of a heinous crime would always be viewed as a convict by the society. He is bound to be ostracized, victimized at the time of job selection and can never lead a normal life as projected by the Act. Thus, ensuring rehabilitation by concerned authorities in its true sense is a matter of concern.

6.3 Age reduction or fabrication of age to escape punishment.

The age of a juvenile is first determined using his birth certificate or school pass certificate; and only if the same is unavailable, other means such as bone ossification test etc. are employed. We are all too aware of the rampant misappropriation of age that exists in the Indian society. Age is reduced even by educated people let alone the uneducated. Thus, the credibility of the age of a juvenile is a matter of concern, as it may be used by borderline cases of juveniles to escape adult punishment.

6.4 Effect of unending trials on juvenile justice.

It is a fact that trial proceedings in the Indian judiciary go on for years. Now, once a trial is concluded; what should the punishment for the accused be who is no longer a juvenile but an adult. Considering age is determined on the date of commission of crime, should a 30-year-old accused be placed in a juvenile home to reform and rehabilitate him? The very proposition is preposterous. This issue also becomes a matter of concern in the delivery of justice to juveniles.

Thus, the above mentioned are challenges which hinder effective implementation of the Act and also give us a true picture of the role and functioning of the *Juvenile Justice Act* in the Indian society.

7.1 Suggestions

The amended Act of 2015 is not altogether a fail. It has tried to strike a balance between two extremes; i.e. increasing punishment from three years and giving due regard to the mental capacity of the juvenile at the time of trial as an adult. However, the Act is tilted more towards the deterrence principle as opposed to reformation. Hence, for an effective administration of juvenile justice; a few suggestions have been enlisted below.

7.1.1 Opting for a middle path for juvenile punishment.

The previous Act of 2000 was undoubtedly extremely lenient; with a measly punishment of three years even for heinous offences. The new Act on the other hand allows for juveniles to be tried as adults hence receive adult punishments. This can be termed as too harsh as children in the heat of the moment may commit grave offences (as discussed above under 'Child psychology') without bothering about the consequences. Thus, a child may be sentenced to ten years in prison for substance abuse done under peer pressure, or life imprisonment for selling adulterated products.[34] These seem disproportionate considering the reasons which might have led the child to commit the offence (as discussed above). It is thus proposed that a middle path/approach be adopted wherein the juveniles may be tried as adults but penalties should not be as harsh as adult penalties. The punishment should be proportionate to the crime keeping in mind that the act was done by a juvenile. This could include rigorous training and work in juvenile homes; but they should under no circumstances be placed in adult jails where they are bound to become hardened criminals. India can take inspiration from the "Get Tough' concept in USA and "Youth Courts" in U.K for the same.

7.1.2 Culpability or mental maturity and not age should be the criteria for laying down penalties.

The reason for removing age barriers are; consider a 17-year-old commits rape as in the Nirbhaya gang rape and there are demands for juvenile age being reduced to 16 years; how can we be rest assured that tomorrow a 14-year-old will not commit the same or an even graver offence. Will we demand the age to be reduced from 16 to 14 years then? It is not practically possible and the best

34 *The Indian Penal Code, 1860.* Classification of Offences (First Schedule).

solution is to take into account mental element without being constrained by age of an individual.

Criminal responsibility in India starts from the age of seven.[35] Thus, sentence should be served by the Juvenile Justice board taking into account the nature of the offence, culpability, mental element of the accused along with his socio-economic background. Drawing a parallel; age limits have been prescribed for daily activities such as 18 years for driving and obtaining a license; 21 years for voting etc. The sole criterion is the maturity and level of understanding; the time when it is felt that children are responsible enough to carry on these activities. Therefore, it is only logical to give out a certain punishment when the accused is considered mature and responsible enough for his act. The recently passed Act is in consonance with the above to some extent. It takes mental capacity into account while trying juveniles as adults. However, the act exempts children below fourteen even if they have committed a 'heinous offence'.

The suggestion may seem cumbersome at first as it requires setting up of additional boards to assist the Juvenile Justice Boards along with trained psychologists to assess the mental capacity of the juveniles. However, it is the only effective solution at doing justice to the juveniles of India.

7.1.3 Effective implementation and not change in law is the need of the hour.

It is a fact that the reform and rehabilitation of child offenders under the juvenile justice system often exists largely on paper. The pitiful state of affairs of the juvenile homes have already been discussed earlier. Thus, it is not the debate on the juvenile age or change of laws that is of utmost importance; but the proper enforcement of the provisions that already exist in the Act. If we want to reduce crimes by young people, we should invest in reforming juvenile correctional homes so that the care and effort needed to transform juvenile offenders is actually provided. The concerned authorities must ensure that quality counselling, psychiatric support, vocational training etc. are being provided to the inmates of juvenile homes. Further, effective implementation of individual care plans, periodic reports by Probation Officers, social investigation reports etc. is taking place. Regular inspection is a must to ensure juveniles are not subjected to any kind of abuse. It is hence concluded that only by effective implementation of the Act can justice be truly meted out to the juveniles.

35 The *Indian Penal Code, 1860*, S. 82.

7.1.4 Education and sensitization of children as means to address juvenile crime.

The root cause of juvenile crimes is the circumstances and socio-economic conditions which lead innocent, poverty stricken children to take to crime for subsistence. Thus, it is of utmost importance to sensitize and mould our juveniles and provide them with such an atmosphere that they don't commit crime at the very first step itself. This is possible only through education; both inside and outside juvenile homes. The Right to Free and Compulsory Education under Article 21-A of the Constitution needs to be strictly implemented to prevent children being subjected to risk and exploitation at a very tender age and facing the risk of getting into situations of neglect, abuse or exploitation and/or turning to crime.

Also, children who are abandoned, orphaned or runaways should be given due care and protection by the concerned authorities under the provisions of this Act. Further, the onus is on the Indian society to teach children that rape, sexual assault and crimes against women are wrong and are not due the fault of the women. Sensitization and education can reduce juvenile crimes to a large extent.

7.1.5 Recidivism data must be collected and analysed to prevent juvenile crimes.

Data on recidivism and statistics of juvenile repeat offenders should be collected by the concerned institutions, such as NCRB which at the moment is absent. This should further be analysed in detail and "What Works" principles comprising Risk, Needs, Responsivity, Integrity and Professional Discretion Principles must be employed which suggest that recidivism can be minimized if candidates are subjected to the appropriate principles amongst those mentioned above.[36]

8.1 Conclusion

The Act is indubitably a commendable effort by our law-makers at bringing about much awaited changes, such as inter-country adoption, provisions relating to children in need of care and protection along with providing a cohesive structure with respect to children in conflict with law. It has done a brilliant job at striking a balance between the demands of the agitated public and the rights of the child by imposing stricter penalties as compared to the previously lenient Act of 2000. However, the Act fails on one account, i.e., subjecting juveniles to the adult criminal system which is as severe as imposition of death penalty. It is a decision

36 A. Day, K. Howells, D. Rickwood, "Current Trends in the Rehabilitation of Juvenile Offenders", *Trends and Issues in Crime and Criminal Justice,* No.284, October 2004, p. 2.

to end the juvenile's childhood and in turn his life. We do exhort for stringent laws for juveniles, however the same should not deny them the scope for reformation and a chance for leading a normal, fruitful life in future. In conclusion, effective implementation of the Act and not major change in laws is the need of the hour for truly achieving juvenile justice.

CLEMENCY POWERS OF THE EXECUTIVE

Dr. Shruti Goyal*

1.1 Introduction

Clemency can be defined as kindness, mercy, forgiveness, leniency, and is used to describe an act of a state when it commutes death sentence to life imprisonment or grants pardon.[1] The philosophy is that in every civilized society mercy power should be exercised as an act of grace and humanity in proper cases. It can be viewed as one last chance to be spared capital punishment. Historically, clemency was considered as a grace by kings that originated from the notion of divinity of kings. However, today clemency is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive authority keeping in view the considerations of larger public interest and welfare of the people.[2]

In this article the provisions regarding grant of clemency, the power of the executive, the procedure, the power of judicial review and the rights of the accused shall be discussed. The paper is divided into seven parts. The first part is introductory. In the second part, the procedure adopted by courts while awarding death sentence is discussed. In the third part, the executive powers of the legislature with regard to grant of clemency along with the terms used in the Indian Legislation have been discussed. The fourth part of the paper focuses on the procedure that is followed in granting clemency together with the instructions and the guidelines followed. In the next part, the Supreme Court's power to interfere once a mercy petition is rejected by the President/ Governor is analysed. In the sixth part, rights of death convict vis – a- vis mercy petition has been discussed. The last part of the paper concludes the whole paper.

2.1 Award of Death Sentence

The death penalty has been enrooted in Indian culture and has managed to entrench itself on a privileged pedestal in spite of criticism from many quarters. Death sentence can be imposed by the trial court. It is important to note that

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1 Elizabeth Rapaport, "Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins", *New Mexico Law Review*, Vol. 33, 2003, pp. 349-380, at p. 352.

2 *Devender Pal Singh Bhullar v. State (NCT of Delhi)* 2013 (6) SCC 195.

death sentence can be awarded only in those cases which fall under the category of 'rarest of rare' cases as this doctrine has been enunciated by the apex court in the case *of Bachan Singh* vs. *State of Punjab.*[3] After the award of death sentence by the trial court, the same is required to be confirmed by the High Court.[4] The convicted person also has a right to appeal against conviction in the High Court[5] and Supreme Court.[6] Thus there is a three- tier judicial check on death penalty.

In addition to judicial scrutiny, there is an administrative remedy available with the death convict. A review petition can be filed before the Supreme Court under Article 137 of the Constitution. It is important to note that in case of convicts facing death penalty, the remedy of review has been given high procedural sanctity. In the case of *Mohd. Arif alias Ashfaq* vs. *Registrar, Supreme Court*[7] the Constitution Bench of Supreme Court has laid that the review petition in a case of death sentence shall be heard in the open court by giving an opportunity to the review petitioner to make oral submissions, unlike other review petitions which are decided by the Court by circulation in chambers. It also held that such review petitions is to be heard by a Bench consisting of minimum three judges.

Apart from the judicial and administrative remedy, the death convict can file mercy petition to the executive. A petition filed to commute death sentence into life imprisonment is known as mercy petition. This article focuses on the power of executive to grant clemency when mercy petition is filed before it.

3.1 Legislative Powers of the Executive to Grant Clemency

The power to grant clemency is recognized in almost every nation.[8] Clemency gives the executive the power to override criminal law when in its estimation grave reasons of state so require. Granting of clemency is in no sense an

3 AIR 1980 SC 898.

4 The *Code of Criminal Procedure*, 1973, S. 366.

5 The *Code of Criminal Procedure*, 1973, S. 374 (2).

6 The person has a right to appeal in Supreme Court only in two cases – (1) If the High Court has convicted the person in its extraordinary original criminal jurisdiction [Section 374 (1) of the *Code of Criminal Procedure*, 1973]. (2) If the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death [Article 134 (1) (a) of the *Constitution*]. In other cases there is no right to appeal has the accused can approach the Supreme Court only by means of Special Leave to Appeal provided under Article 136 of the *Constitution*. This, a person who has been convicted and sentenced to death by a trial court and whose conviction and sentence has been confirmed by High Court can appeal to Supreme Court only by virtue of Article 136.

7 AIR 2014 SC (Cri) 2046.

8 Leslie Sebba, "The Pardoning Power-A World Survey", *Journal of Criminal Law and Criminology*, Vol. 68, 1977, pp. 83-112 at p. 83.

overturning of a judgment of conviction, but rather it is an executive action that mitigates or set aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence.[9]

In India, the clemency power is vested in the President and the Governor of the state by virtue of Constitution and other criminal statutes. The constitutional scheme would reveal that the President and the Governor in India do not pardon the offence, but pardon the pu ishment and the sentence. The power being one of an executive nature, cannot tamper or supersede the judicial record and the consequence of its exercise is merely that the punishment or the sentence would not be executed either fully, or in part, even though the offender has been judicially convicted and held guilty.[10]

3.1.1 The Constitutional Power

Article 72 of the Constitution gives to the President the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence including death offence. Parallel to this, Article 161 gives the Governor the power to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. It is pertinent to not that despite the language of the constitutional provisions; the powers of clemency are exercised by the government for all practical purposes.[11]

The power to suspend, remit or commute sentence is divided between the Central Government and State Government. The power of State Government shall extend to the cases where the punishment is for an offence against any law relating to a matter with respect to which the State has the power to make laws or where the offender is sentenced. The Central Government has much wide powers. In addition to cases where the offender is sentenced under law relating to a matter with respect to which the Union has the power to make laws the Central government also has the power to grant pardon etc in all cases where sentence of death has been awarded or where punishment is by a Court Martial.[12] Thus, every person convicted to death sentence has the right to submit clemency petition to the Governor of the State in which he was convicted and to the President of

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9 *Epuru Sudhakar and Anr. v. Govt. of A.P. and Ors.* 2006 (8) SCC 161.

10 Rohan Sahai, "Limits of the Pardoning Power under the Indian Constitution", *NUJS Law Review*, Vol. 2, 2009, pp. 283-303 at p. 299.

11 *Maru Ram v Union of India and Others* (1981) 1 SCC 107.

12 The *Constitution of India,* Article 72.

India.[13]

3.1.2 Power under Criminal Statues

In addition to the powers granted under the Constitution, the *Code of Criminal Procedure*, 1973 (CrPC) also talks about the power of the appropriate government to suspend or remit sentences. Section 432 (1) of CrPC speaks about the power of the appropriate Government to remit or suspend sentences with or without any condition.[14] Section 432(3) specifically provides for consequences in the case of conditions which are contemplated under section 432(1) are not fulfilled and contemplates remanding the person so subjected to remission to jail once again. Section 433 of the Code specifically talks about the power of the appropriate government to commute the sentence of death into any other punishment provided under the Code.[15] In cases where the sentence of death is commuted to life imprisonment, the person shall not be released from prison unless he has served at least fourteen years in prison.[16] The division of powers between the Central Government and State Government is on constitutional lines only.

In addition to the provisions mentioned under CrPC, the *Indian Penal Code*, 1860 (IPC) also provides that in every case in which death sentence has been passed, the appropriate government is empowered to commute the punishment for any other punishment provided by the Code.[17] The Government can do so even without the consent of the offender.

The powers enlisted under IPC are similar to those provided under CrPC. Therefore, the Law Commission of India in its 41st Report had recommended that Section 54 of IPC should be scrapped from the statute book.[18] However, so far the section stands as such.

Although the powers mentioned under the criminal statue and the Constitution are apparently similar but they are not same. The source of both powers is different and so is their strength. The powers vested by the Constitution in the

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13 David T. Johnson "The Death Penalty in India", *Crime and Justice in India*, N. Prabha Unnithhan (eds.), Sage Publications, New Delhi, 2013, p. 379.

14 *Krishnan Nair v. State* 1984 Cr LJ 87 (Ker).

15 The *Code of Criminal Procedure*, 1973, S. 433 (a).

16 *Id.*, S. 433 A

17 *Id.*, S. 54

18 The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1969, p. 253.

executive stands at a higher pedestrian and cannot be equated by a power granted under a statue.[19]

In India, since independence till date, a total of 5,106 mercy petitions have been filed with the President by death row convicts from 1947 to 2015 (as on 05.08.2015). Out of these 3,534 mercy petitions or 69% were rejected while death sentences in 1,572 mercy petitions or 31% were commuted to life imprisonment.[20]

3.1.3 Terminology

It is pertinent to note that the Indian legislation does not use the word 'mercy petition' or 'clemency'. In place of it the words used are 'pardons', 'reprieves', 'respites and remissions', 'suspension', and 'commutation'. 'Pardon' is also sometimes called a 'free pardon'. It means to clear the person from all infamy and from all consequences of the offence. It also clears the person from all statutory or other disqualifications which follow conviction.[21] Pardons can however also include conditions. The pardon power is the broadest power and allows the President to release the offender from any punishment for his crime, and also vitiates moral guilt for the offense, so that in the eyes of the law he is as innocent as if he had never been charged or convicted.[22]

'Reprieve' means to take back and withdraw the judgment for a time. The effect of reprieve is to suspend the execution of sentence temporarily. 'Respite' also means delaying the sentences, especially in cases of death sentence. It means that 'reprieve', 'respite', is practically indistinguishable from suspending the sentence for a temporary period.

'Remission' means reduction of quantum of sentence without changing its nature. The order of remission neither wipes out the offence nor the conviction. It only effects the execution of sentence.

The reprieve power is the most limited clemency power. The vital difference between a pardon and a mere remission of sentence lies in the fact that in the former case it affects both the punishment prescribed for the offence and the guilt of the offender : in other words, a full pardon may blot out the guilt itself; in the

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19 *Maru Ram v. Union of India and Others* (1981) 1 SCC 107.

20 Asian Centre for Human Rights, *The Status of Mercy Petitions in India*, New Delhi, 2015, p. 2.

21 The Law Commission of India, 41st Report on the Code of Criminal Procedure, 1969, p. 249.

22 Daniel T. Kobil, "The Quality of Mercy Strained: Wresting the Pardoning Power from the King", *Texas Law Review*, Vol. 69, 1991, pp. 515-568 at p. 576.

latter case the guilt of the offender is not affected nor is the sentence of the court affected, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it. Pardon and remission, therefore, stand on different footings and give rise to different consequences.[23]

Commutation means alteration of a sentence of one kind into a sentence of less severe kind. For example, death sentence may be commuted to life imprisonment. It may be noted that sometimes the word 'pardon' is synonymously used to describe the power of executive to commute death sentence to life imprisonment. This is not correct, because pardoning conveys the message that all of a sudden a person who was sentenced to death has been forgiven and is walking free on streets.[24]

4.1 Clemency Procedure

As discussed earlier, the clemency powers are in practice exercised by the government.[25] Mercy petitions are thus decided by the Ministry of Home Affairs (MHA).[26] A memorandum on the case is prepared by a junior official in the Ministry and on the basis of the same, a Joint Secretary or an Additional Secretary 'recommends' a decision to commute the death sentence or reject the mercy petition. This 'recommendation' is considered by the Minister of Home Affairs who makes the final 'recommendation', on behalf of the Cabinet of Ministers, to the President. The proviso to Article 74(1) provides the President with only one opportunity to return the 'recommendation' for the decision to be reviewed. If no change is made, the President has little option but to sign his assent.[27] Thus for all practical purposes, the decision on a mercy petition is arrived at within the MHA.

4.1.1 Instructions Issued by MHA for filing mercy petitions

A death convict can file mercy petition to both the Governor of the State and the President. The petition can be filed by the convict himself or by someone on his

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23 AIR 1958 Assam 183.

24 Daniel Kobil, "Chance and The Constitution In Capital Clemency Cases", *University Law Review,* Vol. 28, 1999-2000, pp. 567- 578 at p. 568.

25 See 3.1 above.

26 The subject has been allocated to the Department of Home, MHA vide the second schedule of the Government of India (Allocation of Business) Rules 1961.

27 Bikram Jeet, *'Court' of Last Resort A Study of Constitutional Clemency for Capital Crimes in India,* Working Paper Series, Centre for Law and Governance, JNU, New Delhi, 2012, p. 19.

behalf. The Ministry of Home Affairs has issued instructions regarding procedure that is to be followed by the states while handling mercy petitions.[28] The instructions are:

I. A convict (death sentence) whose appeal has been dismissed by the Supreme Court or whose application for special leave to appeal has been dismissed shall be given seven days time period for preparation and submission of mercy petition. The period of seven days should reckon from the date exclusive of the date on which Superintendent of Jail informs him about such dismissal. In cases where no appeal has been filed or no application for special leave has been lodged the period of seven days shall be computed from the date after the date on which the time allowed for filing such appeal has expired.

II The petition should be addressed in case of State to the Governor of the State and the President of India. In case of Union Territories it shall be addressed to the President of India. The execution of sentence in all cases shall be postponed pending receipt of their orders.

III The petitions shall in the first instance in case of state be sent to the Governor for consideration. If the petition is rejected by the Governor, then it shall be forwarded to the Secretary, MHA.[29] If the petition is accepted by the Governor, then the petition addressed to the President of India shall be withheld. The petitioners should be intimated about the fact.

In case of Union territories the petition shall be sent to the Lieutenant Government / Chief Commissioner / Administration who shall forward it to the Secretary, MHA stating that the execution has been postponed pending the receipt of the orders of the President of India.

IV If the petition is submitted after the expiry of prescribed period (see instruction I), then it shall be the discretion of the Lieutenant Governor/Chief Commissioner/ Administrator or the Government of the State concerned as the case may be to consider the petition and to postpone execution pending such consideration and also to withhold or not to withhold the petition addressed to the President. However, in cases where the sentence of death was passed by the appellate Court on an appeal against acquittal or as a result of enhancement of

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28 The instructions are available at *http://court.mah.nic.in/courtweb/criminal/pdf/chapter18.pdf.*

29 If the petition is made in a case where the sentence of death is for an offence exclusively relatable to a matter to which the executive powers of Union extends, then such petition should not be considered by the Governor and shall be forthwith forwarded to the Secretary, Government of India, Ministry of Home Affairs.

sentence it shall be mandatory to forward the petition to the Secretary, MHA. The petition shall also be forwarded to Secretary in those cases where in the opinion of the Lieutenant Governor /Chief Commissioner/ Administrator or the Government of the State concerned it is desirable that the President of India should have an opportunity to consider it. For example, cases where considerable public interest is involved

V In cases where petition is to be forwarded to MHA, it should be forwarded as expeditiously as possible. The petition should be forwarded along with the records of the case and the observations made by the Government, Lieutenant Governor/ Chief Commissioner/Administrator Governor in respect of any of the grounds urged in the petition. In case of States, where the previous mercy petition was rejected, a brief statement of reasons for rejection of previous petition should also be forwarded.

VI Upon the receipt of the order of the President, an acknowledgment is to be sent immediately by the State or U.T. to the MHA.[30]

VII A petition submitted by a convict shall be withheld by the Lieutenant Governor/Chief Commissioner/Administrator or the Government of the State if a petition containing a similar prayer has already been submitted to the President. The same shall be intimated to the petitioner.

VIII These instructions shall also apply in those cases where the petition is submitted by someone on the behalf of the convict. The convict shall be informed about the submission of petition on his behalf and the orders passed thereon. The petitioner shall also be informed about the orders. If the petition is signed by more than one person then it shall be sufficient to inform the first signatory. It is important to note that the execution cannot be carried out till the mercy petition has been rejected both by the Governor and President.

As evident from the facts above, the procedure of deciding clemency petition is altogether different from the procedure followed by courts. In judicial proceedings the accused is heard in open court, the evidence adduced by the parties is examined by the court, the court adjudicates on the basis of evidence, the judgment is pronounced in the court and the reasons for passing that judgment

30 In case of Assam and Andaman and Nicobar Islands, all orders will be communicated by telegram and the receipt thereof shall be acknowledged by telegram. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letter in the case of Delhi and by telegram in all other cases and receipt thereof shall be acknowledged by express letter or telegram, as the case may be.

is also made public. On the contrary, mercy proceedings are neither bound by evidence nor by the findings of the courts. The Executive while exercising its mercy powers examine a larger set of circumstances and facts beyond the 'fact' of the judicial world. The judgment given in a mercy petitions and the reasons for arriving at that decision are neither published nor made public. Thus, clemency proceedings are 'close' proceedings. As a matter of fact, the decision-making process leading up to a grant or refusal to grant clemency is conducted in secrecy.

4.1.2 Guidelines for Deciding Mercy Petitions

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation of the criminal law.[31] Mercy proceedings are said to examine a larger set of circumstances and facts beyond the 'fact' of the judicial world. The death convict can plead a variety of new and diverse grounds for commuting death. That is, in addition to the records of the case, other points are also considered by the executive while deciding mercy petition. In a Constitution filled with checks and balances among the branches of government, the executive pardon power 'stands alone in its capaciousness'.[32] It leaves much scope for arbitrariness.[33] Therefore, the question is what are the additional factors that are considered by the Executive while deciding mercy petitions?

This question of additional factors that are taken into account by the executive has always been a matter of controversy. The doors of the apex court have often been knocked on the issue. The Supreme Court of India in 1981 while admitting the writ petition of a death convict observed that "We do not know whether the Government of India has formulated any uniform standard or guidelines by which the exercise of the constitutional power under Article 72 is intended to be or is in fact governed". The Court asked for an explanation from the State on the existing guidelines.[34] The accused in this case had challenged the rejection of his mercy petition on the ground that there were no guidelines on the basis of which his petition was rejected.[35] However, later on the Supreme Court declined to interfere and said that it was not a fit occasion to examine the scope of powers of

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31 Hugo Adam Bedau, "The Decline of Executive Clemency in Capital Cases", *New York University Review of Law and Social Change*, 1990-91, Vol. 18, pp. 255-273 at p. 258.

32 Kristen H. Fowler, "Limiting the Federal Pardon Power", *Indiana Law Journal*, Vol. 83, (2008), pp. 1651- 1670 at p. 1652 .

33 Poornima Sampath and Priyadarshini Narayanan, "Mercy Petitions: Inadequacies in Practice", *The Student Advocate*, Vol. 12, (2000), pp. 72-81 at p. 76.

34 *Kuljeet Singh alias Ranga v. Lt. Governor, Delhi and Anr*, AIR 1981 SC 2339.

35 In this case two school going children of a naval officer were killed.

President as regards clemency. The Court did not interfere in the rejection of mercy petition and the accused were hanged.[36]

Although some guidelines were framed by the MHA, but these guidelines were not made public and were for internal regulation only.[37] In the absence of guidelines, the Supreme Court was on numerous occasions approached to frame the guidelines. In the case of *Kehar Singh* vs. *Union of India,*[38] the Supreme Court through a five-judge bench observed that the language of Article 72 itself provides sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged there under, it was perhaps unnecessary to spell out specific guidelines. The court was of the view that keeping in mind the myriad kinds and categories of cases which may come up for the exercise of such power; it was not conceivable to lay down guidelines. The Supreme Court has consistently declined to frame any guideline. The view taken in *Kehar Singh's* case was subsequently followed in a number of judgments.[39] In the case of *Shatrughan Chauhan* vs. *Union of India*[40] the Supreme Court held that there are two reasons to decline the framing of guidelines. Firstly, it is a settled proposition that there is always a presumption that the constitutional authority acts with the application of mind and secondly, considering the nature of powers enshrined in Articles 72/ 161, it is unnecessary to spell out specific guidelines.

Although, the apex court has declined to specify any guidelines, the Minister of Home Affairs has on numerous occasions been asked about existence on 'any' guidelines for deciding the mercy petition.[41] In 2014, the Minister of Home

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36 AIR 1982 SC 774.

37 For details, refer to Bikram Jeet, *'Court' of Last Resort A Study of Constitutional Clemency for Capital Crimes in India,* Working Paper Series, Centre for Law and Governance, JNU, New Delhi, 2012. He discusses various letters that were meant for internal circulation in the ministry, where the additional factors were enlisted.

38 (1989) 1 SCC 204

39 See *Bikas Chatterjee v. Union of India* (2004) 7 SCC 634*; Ashok Kumar v. Union of India* (1991) 3 SCC 498; *Swaran Singh v. State of U.P* AIR 1998 SC 2026*; Satpal and Anr. v. State of Haryana and Ors.* AIR 2000 SC 1702*; Narayan Dutt v. State of Punjab* (2011) 4 SCC 353*; Epuru Sudhakar v. State of Andhra Pradesh* (2006) 8 SCC 161.

40 (2014) 3 SCC 1.

41 The Minister of Home Affairs was asked in 2006 about the presence of any guidelines. He answered that no specific guidelines can be framed for examining the mercy petitions as the power under Article 72 of the Constitution is of the widest amplitude, can contemplate myriad kinds and categories of cases with facts and situations varying from case to case. However, the broad guidelines generally considered while examining the mercy petitions are personality of the accused such as age, sex or mental deficiency or circumstances of the case, conduct of the offender, medical

Affairs was posed with the question "whether there are any guidelines regarding clemency of death row convicts?" He agreed that keeping in view the vast and varied majority of cases and circumstances no specific guidelines could be framed. However, the broad guidelines which are generally considered while deciding clemency of death row convicts are:

- Personality of the accused (such as age, sex or mental deficiency) or the circumstances of the case (such as provocation or other similar justification).
- Cases in which the Appellate court has expressed its doubt as to the reliability of the evidence and has nevertheless decided on conviction.
- Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified.
- Where the High Court has reversed on appeal an acquittal by a Sessions Judge or has on appeal enhanced the sentence.
- Difference of opinion in a bench of two judges necessitating reference to the third judge of High Court.
- Consideration of evidence in fixation of responsibility in gang murder cases.
- Long delays in investigations and trial etc.[42]

Although a number of instructions and guidelines have been framed by the Ministry of Home Affairs, but there have been numerous incidents where there has been blatant violations of the instructions and the guidelines.[43] Mercy petitions are decided in a manner which is standard less in procedure, discretionary in exercise and unreviewable in results.[44]

5.1 Judicial Review

The clemency powers of the executive are the highest powers reposed in an office. However, in a number of cases it is alleged that the power has been abused

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abnormality falling short of legal insanity and so on. (Rajya Sabha Unstarred Question no. 815, answered on 29 November 2006).

42 "Guidelines regarding clemency to death row convicts" answered on the 12th February 2014 available at *http://mha1.nic.in/par2013/par2014-pdfs/rs-120214/2280.pdf.*

43 In *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1 the Supreme Court looked into the petitions which were filed subsequent to rejection of mercy petition by the President. In this case the Court found that in some cases all the material records were not supplied to the President (case of Suresh and Ramji); in some cases mercy of mentally unfit persons also rejected (case of Manganlal Barela). Also see *Mahindra Nath Das v. Union of India* (2013) 6 SCC 253, *Devender Pal Singh Bhullar v. State (NCT of Delhi)* (2002) 5 SCC 234, *Shabnam v Union of India and Others* (2015) 6 SCC 702.

44 Leavy, "A Matter of Life and Death Due Process Protection in Capital Clemency Proceedings", *Yale Law Review*, Vol. 90, 1981, pp. 889-911 at p. 891.

and exercised in arbitrary manner. This poses two questions before us, that is, firstly, can the writ jurisdiction of Supreme Court be invoked in such cases and if yes, whether the Supreme Court can interfere and commute the death sentence to life imprisonment, once the mercy petition has been rejected by the executive.

In order to answer the first question it is important to note that right to file mercy petition is one of the fundamental rights of the accused guaranteed under Article 21 of the Constitution. Article 21 provides that no person shall be deprived of his right to life or personal liberty except according to procedure established by law. Further, the procedure should be just, fair and reasonable. This implies that if a procedure is unjust, unfair and unreasonable, then it does not stand the scrutiny of Article 21 and is thus violative of fundamental right guaranteed under it. Supreme Court is the final custodian of fundamental rights and thus the writ jurisdiction of Supreme Court can be invoked.[45]

On the second issue, two things are important. First, is interference on the merits of the case and second is interference on account of procedural lapses. The Supreme Court has consistently taken the view that rejection of mercy petition by the executive is a matter of discretion and the Supreme Court will not interfere in the case on merits.[46] As regards the second point, the Supreme Court has been of the consistent view that the executive orders under Article 72/161 should be subject to limited judicial review based on the rationale that the power under these Articles is per se above judicial review but the manner of exercise of power is certainly subject to judicial review. Thus, Supreme Court has retained the power of limited judicial review.

The executive should take into account the supervening events that have taken place after the award of death penalty while rejecting the death penalty. Levying death sentence on account notwithstanding the existence of supervening circumstances will amount to violation of fundamental right and will thus validate a ground for judicial review.

It is further important to note that Supreme Court is the final custodian of fundamental rights and is best equipped to adjudicate the content of violation of human rights. Therefore, if a death row convicts pleads non consideration of supervening events leading to violation of fundamental rights, then Supreme

45 The *Constitution of India*, Article 32.

46 See *Bikas Chatterjee v Union of India* (2004) 7 SCC 634; *Ashok Kumar v. Union of India* (1991) 3 SCC 498; *Swaran Singh v. State of U.P* AIR 1998 SC 2026; *Satpal and Anr. v. State of Haryana and Ors.* AIR 2000 SC 1702; *Epuru Sudhakar v. State of Andhra Pradesh* (2006) 8 SCC 161.

Court can itself determine the relief that is to be granted and there is no need to remand the matter back to the concerned authority.[47]

The Supreme Court through a catena of judgments has laid down a list of supervening events which are to be considered by the executive. The factors are:

Delay- Every accused has a right that the mercy petition should be decided expeditiously. However, there are delays by the executive. The executive takes into account the delay in investigation and trial while commuting death sentence into life imprisonment.[48] But what is not taken into account is the delay caused on their part while deciding the mercy petition.

Sometimes, delay is on account of non availability of material. It is incumbent for the ministry to place all relevant material connected with the conviction before the President/ Governor at once. The material should not be supplied in a piecemeal manner. The Supreme Court has directed the ministry to send all material in one stroke and to send periodical reminders to the office of President/ Governor if no response is received.

Delay in deciding the mercy petition has a dehumanizing effect. However, this delay must not be due to the accused. The Supreme Court in a number of cases has held that unreasonable delay in deciding the mercy petition amounts to unjust, unfair and unreasonable procedure and warrants interference by the Court. The delay alone is a sufficient ground for judicial review and is available as a ground in all types of crimes irrespective of the gravity of crime.[49]

However, it is important to note that the Supreme Court has not clearly laid down a definite time line and each case has to be decided on its own facts.[50] In cases of delay, the Supreme Court can commute itself the death sentence and it need not remand the matter to the executive.[51]

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47 *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

48 See Guidelines issued by executive above.

49 In *Devinder Pal Singh Bhullar v. State (NCT of Delhi)* (2013) 6 SCC 195 it was ruled that delay cannot be a ground for commutation in case of serious offences under TADA. However, the Supreme Court in *Shatrughan's* case reversed *Devinder Bhullar's* case on this point.

50 In *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68, it was held that two years delay in deciding mercy petition amounts to unreasonable delay and is a ground for commuting death sentence into life imprisonment. However, the Supreme Court in *Shatrughan's* case reversed *Vatheeswaran's* case on this point.

51 *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

Mental Illness- When an accused is under death sentence there is constant pressure on his mind. Many a times, the convict loses his mental balance. A large number of International instruments prohibit the execution of death on a mentally ill patient.[52] The executive has also stated that the mental health of the convict is taken into account while deciding the mercy petition. Thus, mental illness or insanity is a supervening event which should be taken into account.

Procedural Irregularities- The executive has prescribed instructions and guidelines regarding presentation and disposal of mercy petitions. Any procedural lapse while following these instructions may amount to supervening event and warrant court's interference. Some of the procedural lapses are non receipt of written official communication from the President/ Governor regarding rejection of mercy petition, interval between date of communication and date of execution, non application of mind by the minister by not referring to relevant issues like delay, mental insanity and other factors while referring rejection of mercy petition to President/ Governor and rejection of advice by President.

In addition to instructions a number of rights accrue in favor of the death row convict during pendency of mercy petition like no solitary confinement prior to rejection of mercy petition, availability of legal aid during trial and afterwards etc.[53] Any violation of these rights can also be a ground for judicial review. .

However, it is important to note that non consideration of supervening events by the executive will not entitle death convict to commutation in every case. Each case has to be appreciated on its own facts and no guidelines can be framed in this regard.[54]

6.1 Rights of Death Convict

Right to Human Dignity- Every person has a right to human dignity. In case of death row convicts this right does not end with confirmation of death sentence but goes till the point the convict meets his destiny. Therefore, the process/procedure from confirmation of death sentence by the highest Court till

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52 India is a member of United Nations and has ratified the International Covenant on Civil and Political Rights. In order to comply with this convention Clause 3(e) of the *Resolution 2000/65* dated 27.04.2000 of *the U.N. Commission on Human Rights titled "The Question of Death Penalty" requires member states not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person. Similarly,* Clause 89 of *the Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions* also prohibits death sentence on mentally insane person.

53 For details, see rights of death row convict below.

54 *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

the execution of the said sentence, the convict is to be treated with human dignity to the extent which is reasonable and permissible in law.[55]

Right to Recourse to Administrative and Judicial Remedies- In order to preserve human dignity it is incumbent that enough time must be given to the accused to avail other judicial and administrative remedies even after death sentence is confirmed by the court in appeal.[56] So the death warrant should not be issued by the court immediately after confirmation of sentence and time is to be given to the accused to have recourse to filing of review and mercy petition.

Right against Solitary Confinement- The accused should not be kept in solitary confinement. Solitary confinement is violative of fundamental right of accused as observed by a five judge bench of Supreme Court in the case of *Sunil Batra* vs. *Delhi Administration*.[57] Moreover, keeping in view that at times mercy petitions take as long as thirteen years for their disposal, it is inhumane to keep the convict in solitary confinement.[58]

Section 30 (2) of the Prisons Act require that the accused should be kept in solitary confinement when "under sentence of death". It is pertinent to note that the time during which mercy petition is pending the accused cannot be termed as under 'sentence of death'. Therefore, custodial segregation/ solitary confinement during pendency of mercy petition amounts to additional and separate punishment not authorized by law.[59] The ratio laid down in *Sunil Batra's* case need to be followed in spirit.

Right to legal aid- Legal aid must be provided to the accused even at the stage of filling appeal and mercy petition. The accused can also challenge the rejection of mercy petition by the President on the ground of supervening events. Therefore, the legal aid should be provided at this stage also.

Right to be medically examined- The death convicts are under a constant mental pressure. The death convict has a right to have regular physical and mental

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55 *Shabnam v. Union of India and Others* (2015) 6 SCC 702.

56 *Shabnam v. Union of India and Others* (2015) 6 SCC 702. In this case the death warrant was issued by the Sessions Judge soon after the death penalty was upheld bt the Supreme Court. No time was given to the death row accused to file review petition in the Supreme Court or to file mercy petition with the President/ Governor.

57 (1978) 4 SCC 494.

58 See *Dharam Pal v. State of Haryana and Others* 2016 Cri LJ 52 where accused was kept in solitary confinement for about 13 years and 5 months during pendency of mercy petition.

59 *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

checkups. If a death convict is duly certified as insane by a competent doctor then the prison authorities should have the discretion to stop the execution and take up the matter with the Government.

Communication of rejection of mercy petition- The accused and his family members have a right to be communicated about the rejection of the mercy petition by the President or the Governor as the case may be. The rejection should be communicated in writing at the earliest. The copy of rejection should also be supplied.

Fourteen days notice- There should be a gap of fourteen days between the communication of rejection of mercy petition to the accused and his family members and the date of execution. This time period is necessary so that the accused can prepare himself mentally for execution and also avail other judicial remedies available to him.

In the recent case of *Yakub Abdul Razak Memon* vs. *State of Maharashtra*[60], a question before the Supreme Court was whether 14 days time period awarded or not. It is important to note that there is no limit to filing of mercy petition and the accused can file the mercy petition a number of times. In the said case the first mercy petition of the accused was rejected by the President on 11-4-14. The death sentence was to be executed on 30-7-15 through a death warrant issued on 30-4-15. On 29-7-15 the accused filed another mercy petition which was rejected on 30.7.15. The question was whether the accused could be executed on 30.7.15 or 14 days notice is required. The Supreme Court sitting at the wee hours of the morning decided that no more notice is required as there was considerable time after the rejection of first mercy petition. Moreover, it will induce an element of infinitus.

Meeting with family members- The death convict has a right to meet his family and friends before execution. In cases where the mercy petition is rejected, the prison authorities have been directed to facilitate a meeting of convict with friends/ family.[61]

Issuance of Death Warrant- Before issuing death warrant, the Sessions Judge should give enough notice to the convict so that he is enable to consult his advocates and be represented in the proceedings so that Principles of natural Justice are followed. If the convict is not having legal assistance, then legal aid

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60 (2015) 9 SCC 552.

61 *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.

must be provided. A copy of the warrant is to be immediately supplied to the convict.

Date for Execution to be fixed- The death warrant must specify the exact date and time for execution and not a range of dates which places a prisoner in a state of uncertainty. Moreover, a reasonable period of time must elapse between the date of the order on the execution warrant and the date fixed or appointed in the warrant for the execution so that the convict has a reasonable opportunity to pursue legal recourse against the warrant and to have a final meeting with the members of his family before the date fixed for execution.[62]

Death should be executed in certain, humane, quick and decent manner- The act of execution of death should be as quick and simple as possible and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension. The act of execution should produce immediate unconsciousness passing quickly into the death and should not involve mutilation. It should be decent.[63]

Right to post mortem -The accused has a right to postmortem after his execution. This right accrues from the fact that there is dearth of experienced hangman in the country. Therefore, it is obligatory on the prison authorities to get postmortem conducted.

7.1 Conclusion

Mercy jurisprudence is a part of evolving standard of decency which is the hallmark of society and India has to its credit at being the forerunner in developing the jurisprudence of clemency. Clemency procedure under Article 72 and 161 of the Constitution provides a ray of hope to the condemned prisoners and his family members for commutation of death sentence into life imprisonment.[64] It is the highest power reposed by the Constitution in the executive. A number of instructions and guidelines have been formulated from time to time to regulate the manner for exercising these powers. However, so far this power has been exercised in a discretionary manner without following any set standards. Keeping in view, the callous attitude followed by executive while rejecting the mercy petition, the Supreme Court has used its power under judicial review to intervene and interfere in matters where the petition has been rejected

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62 *Shabnam v. Union of India and Others* (2015) 6 SCC 702. Also see *People's Union for Democratic Rights (PUDR) v. Union of India and Ors* 2015 SCC Online All143.

63 This fourfold test was laid down in the case of *Deena v. Union of India* (1983) 4 SCC 645.

64 *V. Sriharan alias Murugan v. Union of India and Ors.* AIR 2014 SC 1368.

by the executive. Therefore, the need is that the right of convicts under death should be realized in a democratic society and the executive should itself rise to the occasion and exercise its power in a manner which is demonstrable and lay path to be followed by others in the world.

THE REVIEWS THE RELATIONSHIP BETWEEN THE RULE OF LAW, GOOD GOVERNANCE, AND SUSTAINABLE DEVELOPMENT

Tahmineh Rahmani*

Iran Nader Mirzadeh Koohshahi**

1.1 Introduction

It is widely recognized that good governance with Privatization is essential to sustainable development. Well functioning legal institutions and governments bound by the rule of law are, in turn, vital to good governance. Weak legal and judicial systems where laws are not enforced and noncompliance and corruption are the norm undermine respect for the rule of law, engender environmental degradation, and undermine progress towards sustainable development. Practitioners in the development field have increasingly turned their attention to reforms to improve legal and judicial institutions and promote the rule of law and good governance. For example, various United Nations agencies such as the United Nations Environment Program (UNEP) and the United Nations Development Program (UNDP), as well as the World Bank and other regional development banks, are directing increasing resources to reform legal and judicial institutions. To date, however, most of these efforts have concentrated on developing new laws and creating new institutions, rather than building capacity for ensuring compliance with existing rules. Yet without compliance, laws and regulations are meaningless or worse, they undermine respect for the rule of law and cannot promote sustainable development. As a result, many developing countries and countries with economies in transition still suffer from weak legal and judicial systems, lack investment, and have poor development prospects, sustainable or otherwise. Thus, donor driven reform efforts need to ensure that their rule of law efforts include sufficient training and capacity building to establish the institutional foundation for compliance and enforcement, through both instrumental and normative efforts. The first section of this paper reviews the relationship between the rule of law, good governance, and sustainable development, after Privatization and they are as those terms are used by the relevant development organizations. It then briefly describes the efforts made by various organizations to promote the rule of law and good governance. Finally, the paper addresses the need to strengthen compliance and enforcement for sustainable development.

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In today's world, business environment has an increasing complexity and turbulence and changes constantly and companies are considered as the economic pillar of the society in creating wealth and jobs and attracting capital (Solomon, 2007). In order to create value in the market and gain a sustainable competitive advantage and survive and advance in that market, innovation process and regulatory mechanisms in the organization should be improved to Prevent stagnation and destruction (Alvani, 1985). Recently, implementing the general policies of article 44 of the constitution (privatization) has revitalized our national economic scenes and financial markets. In fact, communicating the policies of article 44 of the constitution represents the attitude of the system toward the national economic activities and declaring this attitude is very important for economic actors and indicates a new horizon for the national economic activities that requires an appropriate strategy. But, the main objective of communicating these policies is to convert the national current economy to a dynamic, developmental and competitive economy that will be possible via reducing government outsourcing as well as developing the activities of private sector (Kianpour, 2009, pp. 219). Research in experienced countries such as England, Germany, etc. have shown that the privatization laws cause to change in the state role, create new financial facilities, expand the public welfare and increase the financial, operational performance in the divested companies, restructure and change in the corporate governance of the privatized companies (Moshiri, 2010, pp. 141158) and due to transparent financial markets and strong legal systems, this led companies to an optimal allocation of interests, financial and economic stability, enhancement of the rates of national growth and efficiency and effectiveness. The framework of the process of privatization is one of the most effective and essential strategies for achieving a dynamic and progressive economy and industry (Prokopenko, 2001).

2.1 Thought Study of Privatization in Iran

2.1.1 Government, Article 44 of the constitution In line with privatization[1]

The Expediency Council has provided new and liberal interpretations of Article 44 of the Constitution following years of ambiguity, debate and controversy concerning private sector activity (domestic and foreign) in Iran. This article in relevant part provides: "The economy of the Islamic Republic of Iran is to consist of three sectors: state, cooperative, and private, and is to be based on systematic and sound planning. The state sector is to include all large-scale and mother industries, foreign trade, major minerals, banking, insurance, power generation, dams and large-scale irrigation networks, radio and television, post, telegraph and

[1] Atieh Associate (2004), Vol. 4, No. 2, "the document is available online at: *http://www.atiehassociates.com/law/newsletters/Newsletter200410.pdf*"

telephone services, aviation, shipping, roads, railroads and the like; all these will be publicly owned and administered by the State. The cooperative sector is to include cooperative companies and enterprises concerned with production and distribution, in urban and rural areas, in accordance with Islamic criteria. The private sector consists of those activities concerned with agriculture, animal husbandry, industry, trade, and services that supplement the economic activities of the state and cooperative sectors. The [precise] scope of each of these sectors, as well as the regulations and conditions governing their operation, will be specified by law." As evident from the comprehensive definition of the state sector, most major economic activities of Iran fall under a state monopoly. Nevertheless, in recent years a more liberal and pragmatic interpretation was applied in order to legitimize the government's efforts of privatization. The major example of such approach was reflected in the law of the Third Five Year Development Plan. Although the Guardian Council objected to privatization provisions in the Third Plan based on Article 44, the Expediency Council (the highest body who resolved disputes between the Guardian Council and parliament) let those provisions stand. Notwithstanding, the Guardian Council has consistently objected to any legislation which runs afoul of the principals articulated in Article 44. The most recent objections were made to the Fourth Five Year Plan ratified by the previous parliament provisions of privatization. Given the ongoing uncertainty regarding Article 44 and the disputes between the government, parliament and Guardian Council concerning its applicability, the Expediency Council has finally stepped in to provide a binding interpretation of this article. After months of deliberation, The Expediency Council has commenced providing its interpretation (as the highest body in Iran) and policies on this subject. In sessions held last week of September and first week of October, the Expediency Council has ratified two major provisions concerning Article 44 which are as follows.

(i) The government is obligated to disengage from those economic activities that private sector participation is permitted by the end of the Fourth Development Plan (i.e. 2010). In case necessary, such participation by the government will only be permitted by proposal of the cabinet and ratification by the parliament for a specified time.

(ii) investment, ownership and management in those fields provided in Article 44 shall be permissible, as provided below, by the public non government organs, private and cooperative sector: a. Large industry, mother industry (including large oil and gas downstream industry) and large mines (excluding oil and gas); b. International trade activities within the framework of the country's trade and foreign currency policies and so long as it does not create a monopoly; c. Banking and Insurance; d. Power generation including

production for domestic and export consumption; e. Dams and large irrigation networks; f. All post and telecommunications with the exception of mother telecommunications networks, transfer of frequencies and exchange and distribution of basis mail services; g. Roads and railways; h. Aviation and shipping; Based on the foregoing, private sector participation is clearly authorized in most sectors that were once deemed under the exclusive control and monopoly of the government. Upstream oil and gas activity remain as the most significant exception to private participation whereby the government is to maintain a monopoly. This directive by the Expediency Council has for the first time provided a clear and transparent interpretation of Article 44 and thus disallowing any further objections by the Guardian Council concerning privatization efforts by the government and parliament.

Purview and the way of government intervention in the economy and its advantages and disadvantages are topics discussed by economists and economic theorists during the past few decades. The delimitation of government intervention is the most important issue that has been considered by economic theorists since the formation of the thought of modern economy. The delimitation of government intervention in the field of economic activities depends on different attitudes and perspectives of economic system on the property, hence the issue of property is considered as the most important discussions of any economic system because by knowing the form of property and its purviews in any economic system, the system position about other economic issues can be realized[2]. In other words, proper understanding of the views of any school on property identifies the attitude of that school on other economic issues. In a general classification of the role the government plays in economic domain and the extent its intervention should be, three periods (approaches) can be separated:

2.1.2 Market Government Approach

This period initiated with the industrial developments in England from the eighteenth century and was along with the thoughts of classical economists. The basic feature of economic system in this era is limited government intervention in economic affairs. Functions were consistent with what Adam Smith had raised as the basic functions of government i.e. providing public security, defending country's territorial integrity and investing in sectors producing public goods. Despite sharp criticisms on such economic system, this period continued until the twentieth century (Moshiri, 2010, pp. 141158).

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2 Cooperation Office of Hawzah and University, Islamic Economy, Tehran, The Organization for Researching and Composing University Textbooks, (Samt), V. 1. (1992).

GovernmentMarket approach In the first half of the twentieth century, two events of the Great Revolution (1917) and the Great Economic Crisis in Europe and America (19291934) led the government to play a greater role in the economic domain. With the revolution in 1917 that the idea of socialist economy was operationally implemented for almost 70 years, the government began to completely take over the helm of affairs and left no opportunity for private sector; however, with great economic crisis namely Capitalism, the government acted as a complementary to private sector in investment area and finally, Keynesian ideas were crystallized in the framework of government. In fact, it can be said that the effective function of the process of Market government led to larger dimensions of the government's decision-making in a diverse way. But it should be considered that Keynes raised the government only as a catalyst and did not raise a discussion on the process of the government market. Indeed, it can be said that after defeating the market during decades of 19301970, states became responsible for many economic activities with the aim of removing market failures, traditional and limited production and structural duality in traditional, modern and contrasting both economic and social affairs, creating economic infrastructure, optimal allocation of interests, providing basic goods and services, achieving political social targets and accelerating developments. Also, in developing countries, where there is no organized system called market to be able to allocate resources, governments had a special status in national economy; therefore, these countries drove towards Government market approach (Mahdavi Adeli, 2006).

2.1.3 Returning to Market Government Approach

In the later quarter of the twentieth century, a returning period to the ideas of the first period was created and an approach known as Neoliberals could remove government oriented ideas of socialist and Keynesian etc. In this period, in addition to the inability of wellbeing states to solve the stagnation inflation problem in developed capitalist countries, the inability of socialist systems in response to the consumption requests and demands of individuals provided a field to revive the liberalism approach in new intellectual formats. In these conditions, one of way to achieve economic development was privatization policy. Privatization is a process in which the government accesses the possibility of transferring its duties and facilities from the public sector to the private sector at any rate and if a government acts for such transfer in the case of diagnosis and appropriation, the concept of privatization expresses to make eligible and open doors of a public financial institution to market forces according to the inputs and outputs (Kianpour, pp. 219, 2009).

In Iran, Privatization was first raised in 1983 and followed with the First Development Plan in 1989 and finally, according to articles 44, 134, 138 of the constitution was first initiated from June 1991. In recent years, the movement that revitalized the national financial markets and economy has been the implementation of the general policies of Article 44 of the constitution. In Iran, Article 44 of the constitution considers the economic system of Islamic Republic of Iran based on three sectors of state, cooperative and private ones (according to the plan, the government wants to reach its ownership share to 20%, the private sector share to 55% and the cooperative sector share to 25% at the end of the fourth development plan). This Article of the constitution has authorized the government for all major industries, mother industries, foreign trade, major miners, banking, insurance, power generation, dams and great networks of irrigation, radio and television, post and telegraph, telephone, aviation, shipping, rail and etc., and in this way, it considers the property of these industries as public property. Article 44 of the constitution considers the cooperative sector as cooperative production and distribution companies and institutes formed in cities or villages according to the Islamic rules. In the Article, that part of agriculture, livestock, industry, trade and services that is the supplement of governmental and cooperative economic activities has subjected to private sector. According to this Article, as far as the property in these three sectors does not exist from the scope of Islamic law and other Articles of the constitution and causes the national economic development and growth, it will be protected by the constitution (Jahangir, 1989). Everyone consents on the necessity of implementing these policies ensuring that the process of privatization of state enterprises and providing a legal ground for this movement. The main objective of communicative these policies is to convert the current national economy to a dynamic, developmental, and competitive economy that will be possible via reducing the government outsourcing as well as expanding the activities of private sector. So, providing the operational strategies leading to achieve the objectives of these policies has an extraordinary importance. Communicating the policies of article 44 of the constitution actually represents the type of system attitude to the country's economic activities. Although declaring this attitude is very important for economic actors and indeed, it indicates the emergence of the horizon of economic activities in future, providing the operational strategies leading to achieve the objectives of this policy has an extraordinary importance (Mahdavi Adeli, 2006).

2.1.4 Privatization

Privatization has currently moved to the first front of economic and political thought and has been considered as an acceptable solution to increase production and achieve economic growth in less developed countries (Berg, E., 1987). Privatization is the

term widely spreaded in political arena from late 1970s and early 1980s with the emergence of conservative governments in Britain, America and France so that in our country, privatization is now considered as one of the major issues in the domain of economic and social policies. In the 80s, production in the private sector increased globally and in many developed countries, this increase reflected the growth and provision of services (Hanke, 1987).

Many less developed countries and states with less economic growth than countries with the economy of free market tended to privatization to relieve the burden of these services and wanted to experience it (Pherson, 1987). Because they consider privatization not only as a means for restructuring the economy and increasing competition in the global business arena but also as a necessary infrastructure for economic development (Mclean,2002). To date, several prominent definitions have been slated for privatization. Basely mentions that privatization is a means to improve the performance of the economic activities through increasing the role of market forces provided that at least 50% of government stocks are divested to private sector. Key and Thampson defined privatization as several and various ways to change the relationship between government and private sector such as sailing the state owned assets, deregulating or removing the restrictive regulations and introducing competition in absolute governmental monopolies and free agent contracts with private sector for producing goods and services governed and funded by the government. For countries with centralized economy, Schwartz defined privatization far beyond transferring the property and modifying regulations and pointed out that privatization means creating a new economic system based on market; consequently, transformation in various aspects (Schwartz, 2005).

Privatization is considered as a movement towards market economy through the following:

- Economic policymaking: strengthening an organizational framework for a market economy (property rights, legal instruments, financial institutions, etc.)
- Development of the private sector
- Privatization of public financial institutions (Behkish, 2001, p.110).

Therefore, privatization can be considered as an attempt to highlight the role of market against government decisions as an economic agent, as one of vertices for policies of modification and transferring of assets or divesting services from the government to the private sector aiming at the creation of competitive conditions and achieving greater economic and social efficiency and as an excellence sign of Capitalism thought and confidence in the market efficiency compared to distrust to the performance of the public sector (Faizpour, 2009).

2.1.5 Objectives of Privatization

According to the features, location and structure of national economy, all countries have followed different objectives of privatization which are determined according to the policies, economic plans and general strategies of each country. Therefore, the instruments used for privatization are determined based on the objectives and are certainly different with each other. However, there are a series of general objectives of privatization that can be mentioned as common objectives among countries (Beesly, 1983).

2.1.5.1 Primary Objectives of Privatization

The primary objectives of privatization include: reducing the domain of direct activities of the government in economy, increasing entrepreneurship and the efficiency level of economic enterprises, developing domestic capital markets, accessing to capital, technology and foreign financial resources, gaining revenue for the state in order to cover budget costs, dropping out the financial burden of bad companies and reducing the volume of the internal and external debt of the public sector (Beesly, 1983).

2.1.5.2 Secondary Objectives of Privatization

The secondary objectives of privatization include: increasing people's participation in economic affairs, decisionmaking and appropriate distribution of incomes through extending stock among the public, growing the entrepreneurship and creativity for providing grounds for the promotion of national economic productive ability, desirable allocation of the country's resources based on the market performance, improving the commercial conditions and creating a balance between savings and investment (Mahdavi Adeli,2006) But experts at privatization have addressed the issue from a specific aspect and divided the its objectives. Henry Gibbon asserts that the objectives of privatization are:

- Increasing the efficiency by further competiveness of goods and services in favor of consumers
- Increasing and spreading ownership among the community
- Achieving the highest value on goods or services sold by the government

Chuck Davis considers the objectives of privatization as: reducing the size of government and shortening the public sector, providing financial revenues for the public sector, getting rid of financial pressures, improving economic efficiency, promoting the equality, justice and equity and reducing the influence of public organizations (Davis, 2005). In general, in most countries, the main objective of privatization is to increase the efficiency of enterprises and optimize the allocation

of resources and all pundits of privatization agree that the main objective of privatization is to improve the economic circumstances.

2.1.6 Necessary Infrastructure for Successful Privatization

To achieve successful privatization, conditions and infrastructures are required that the major ones include: strengthening the legal system based on private ownership, determining the necessary regulatory frameworks and restructuring provisions, eliminating or weakening restrictions, reducing governmental investments, removing subsidies and governmental pricing. Competitive Environment and its Advantages in Economic Growth In recent decades, in the field of privatization and its role in the economic growth, the remarkable topic has been the issue of competitive environment, competitiveness and its advantages, the right to property, etc. Vickrey and Yaro (1988) emphasis on the importance of the existence of competitive environment and regulated market to improve the efficiency of private enterprises and also, some believe that for the economic growth, the issue of competition is more important than property right (Fuchs, 2001). Today, in the business, the main role of success of public and private organizations is determined through economic, political and cultural environment and their competitiveness ability. Competitiveness is a process in which every institution trys to act better than others and overtakes others. Achieving competitive capabilities in today's world is one of the main challenges of various countries at international level (Abu Tapanjeh, 2008).

Competitive advantage is one of the components ensuring the organizational survival and it is not achieved random ally and unplanned. Organizations should move with thinking and designing scientific frameworks in this field. Competitive advantage was first developed by Porter (1985) (KHodadad Hosseini, 2008). He believes that competitive advantage belongs to the company which values his customers. However, with regard to competitive advantage, numerous definitions have generally been provided that some are mentioned in this section. Ama (1999) stated that competitive advantage is the difference and asymmetry of factors and features that will allow the company to offer better services compared to their competitors and thus, to achieve a better value for customers and as a result, superior performance. Competitive advantage ia a factor or a combination of factors that make an organization very successful compared to other organizations in a competitive environment and that competitors cannot easily imitate it. So, to achieve competitive advantage and economic growth and development, countries should consider their foreign positions and domestic capabilities (Faizpour , 2009). Washington Consensus forming the basis of policies of World Bank and IMF for a long time was based on three bases including constraints of the government's

financial intervention in economy, privatization and market liberalization and the aim of implementing these three principles was to create a free business environment where private sector has a pivotal role in economic growth and development. In most countries, the main objective of privatization is generally to increase the efficiency of enterprises and optimize the allocation of resources and the consensus of all privatization pundits is that the privatization causes to improve the economic circumstances. In short term, privatization leads to increase the government's income resulted from selling governmental enterprises and as a result reducing budget deficit. Also, in long term, it leads to advance technology, increase efficiency and create and enhance a strong private sector. Therefore, it is expected that privatization as a fundamental economic reform causes more economic growth (KHodadad Hosseini, 2008). The main objective of communicating Article 44 of the constitution is to convert the country's current economy to a dynamic, developed and competitive economy that will be possible by reducing the government outsourcing and developing the activities of the private sector. In experienced countries such as England, Germany, etc. much of research conducted have shown that privatization laws and their implementation have led to optimal allocation of interest, financial stability and enhance national growth rates, efficiency and effectiveness of the privatization process which is a crucial element in the country to survive in the turbulent and changing world and achieve proper economic growth and development (Arabi, M., 2007, pp. 7197).

3.1 Context of sustainable development

3.1.1 Definitions of "Rule of Law" and "Good Governance"

There is a political consensus that the rule of law and good governance are a necessary foundation for efforts to achieve sustainable development. But these broad concepts carry many meanings and there are many strategies for promoting them. This section provides some brief definitions to illustrate how the concepts are used in the international financial institutions and other donor and capacity building agencies. It then explores the relationship among the rule of law, good governance, and sustainable development.

3.1.1.1 Rule of law

Many institutions identify a fair, impartial, and accessible justice system and a representative government as key elements of the rule of law.1 In this paper, the term "rule of law" is used to mean independent, efficient, and accessible judicial and legal systems, with a government that applies fair and equitable laws equally, consistently, coherently, and prospectively to all of its people.

3.1.1.2 Good governance

Good governance is generally characterized by accessibility, accountability, predictability and transparency. This paper treats "good governance" as having openness, participation, accountability, and transparency as key elements.

3.2 Relationship among the Rule of Law, Good Governance, and Sustainable Development

While many factors play an important role in development, good governance is now recognized as playing an essential role in the advancement of sustainable development. Good governance promotes accountability, transparency, efficiency, and rule of law in public institutions at all levels. In addition, it allows for sound and efficient management of human, natural, economic, and financial resources for equitable and sustainable development. Moreover, under good governance, there are clear decision making procedures at the level of public authorities, civil society participation in decision making processes, and the ability to enforce rights and obligations through legal mechanisms. These aspects of good governance do not in themselves ensure that society is not run well nor do they guarantee sustainable development. However, their absence severely limits that possibility and can, at worst, impede it. Without proper functioning institutions of governance based on the rule of law that promote social stability and legal certainty, there cannot be investment and assumption of risk that form the basis of market economy development, let alone sustainable development. Indeed, the strength of the rule of law is the best predictor of a country's economic success. Furthermore, deficiency in the rule of law encourages high rates of corruption, with further devastating consequences on the confidence of economic actors. This lack of investment, in turn, slows economic growth and consequently deprives the governments of resources to invest in education, social safety nets, and sound environmental management, all of which are critical for sustainable development. Introduction of good governance and rule of law, however, cannot be done overnight. The process is often a gradual one, involving changes to longstanding practices, entrenched interests, cultural habits, and social and even religious norms. A significant step was taken in this endeavor in 1998 when countries adopted the Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters ("The Aarhus Convention")[3]. The Convention recognizes that sustainable development can only be achieved through the involvement of all stakeholders and

[3] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, available at *http://www.unece.org/env/pp/treatytext.htm*. The Convention came into force on October 31, 2001 and has been ratified thus far by 33 countries.

seeks to promote greater transparency and accountability among government bodies by guarantying three pillars for the public:

- The rights of citizen access to information;
- Citizen participation in decision making, and
- Citizen access to justice in environmental matters.

In other words, the Convention guarantees freedom of access to information on the environment, gives citizens a right to participate in environmental decision making, and provides for recourse to judicial and administrative remedies when these rights are denied by state authorities. Moreover, in 2000, 191 United Nations member States pledged to fulfill a set of key goals (the Millennium Development Goals) for poverty reduction and sustainable development by the year 2015. In the Millennium Declaration, the member States agreed to "spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development[4]." In addition to these international agreements by heads of the States, donor agencies are making significant efforts to promote the rule of law and good governance throughout the world. The following section briefly describes these efforts.

3.3 Efforts to Promote the Rule of Law and Good Governance

Recognizing the importance of rule of law and good governance, many donor agencies are actively supporting legal and judicial reforms, including judicial training, development of new laws and legal institutions, and capacity building. For example, UNEP has convened several symposia for judges to facilitate judiciary communication, sharing of legal information, and harmonization of different approaches to the implementation of global and regional instruments[5]. One such symposium was the Global Judges Symposium on Sustainable Development and the Role of Law that UNEP organized with the International Network for Environmental Compliance and Enforcement (INECE) as a key partner in 2002. At the Symposium, the participants adopted the Johannesburg Principles on the Role of Law and Sustainable Development, in which they affirmed, among other things, "that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law" and that "there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and persons who

[4] United Nations Millennium Declaration, Res. 55/2, Sept. 8, 2000, available at *http://www.un.org/millennium/declaration/ares552e.pdf.*

[5] See UNEP, Judges Programme, available at *http://www.unep.org/DPDL/Law/Programme_work/Judges_programme/i ndex.asp.*

play a critical role at national level in the process of implementation, development and enforcement of environmental law[6]."

UNDP also has helped promote good governance by focusing on the following six areas[7]:

- Parliamentary development;
- Assistance with electoral systems and processes;
- Improvement of access to justice and human rights;
- Promotion of access to information;
- Support for decentralization and local governance; and
- Reform of public administration and civil service.

Financial institutions and other organizations have also made significant efforts to advance good governance and the rule of law. The World Bank, for example, has several legal and judicial development projects supporting law reform, court modernization, training of judges and court personnel, and legal education[8]. In addition, institutions such as the Organization for Economic Cooperation and Development (OECD) have worked to improve and reinforce the legal, judicial, and law enforcement systems[9]. For instance, on February 67, 2005, OECD and UNDP, along with the Arab League, the World Bank, the European Union, and a number of organizations working in the region, including those from the private sector and civil society, launched a major program to promote good governance for development in the Arab region[10]. Called the "Good Governance for Development in the Arab Countries", the program is designed to address the following six themes:

1) Civil service and integrity;
2) The role of the judiciary and enforcement of judgments;
3) e-government, administrative simplification, and regulatory reform;
4) The role of civil society and media in reform of the public sector;

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6 The Johannesburg Principles on the Role of Law and Sustainable Development, adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002, available at *http://www.rolac.unep.mx/ deramb/publicaciones/GlobalJu.pdf.*

7 UNDP, Promoting Democracy through Reform, available at *http://www.undp. org/governance/index.htm.* For other examples of UNDP's efforts, see Ramaswamy Sudarshan, Rule of Law and Access to Justice: Perspectives from UNDP Experience, 7-9, available at *http://www.undp.org/oslocentre/ access.htm.*

8 The World Bank Group, Annual Report 2002, Themes: Promoting the Rule of Law, available at *http://www.worldbank. org/annualreport/2002/chap0406.htm.*

9 Final Report of the Ad Hoc Working Group, supra note 1, at 6

10 Organisation for Economic Co-operation and Development, OECD to Join Arab States in Launching "Good Governance for Development" Programme, Feb. 2, 2005, available at *http:// www.oecd.org/document/36/0,2340,en_ 2649_201185_34368484_1_1_1_1,00. html.*

5) The governance of public finance; and
6) The public services delivery and private public partnership[11].

3.4 Importance of Compliance and Enforcement for Sustainable Development

Despite a growing body of environmental law both at the national and international levels, environmental quality has been declining in many countries. Furthermore, even after more than ten years and hundreds of millions of dollars in aid, many judicial and legal systems in the world are still functioning poorly. One reason for these trends is the inadequate investment in enforcement and compliance efforts.

The need to strengthen enforcement and compliance has been widely recognized. For example, the participants of the Rio Earth Summit in 1992 recognized this necessity in Chapter 8.21 of AGENDA 21, which established an international mandate to build compliance and enforcement capacity as an essential element of environmental management[12]. Agenda 21 also, empowered UNEP and other organizations to more actively support compliance and enforcement activities, including capacity building. Moreover, UNEP Executive Director Toper has recently highlighted the importance of enforcement and compliance:

We all have a duty to do whatever we can to restore respect for the rule of law, which is the foundation for a fair and sustainable society...Sustainable development cannot be achieved unless laws governing society, the economy, and our relationship with the Earth both international and domestic are put into practice and connect with our deepest values. Law must be enforced and complied with by all of society, and all of society must share this obligation[13]. Various institutions' efforts, including those mentioned above, are helping advance rule of law and good governance. However, it is insufficient to point out a legal obligation and to invest in institutional reforms if the culture of law abidingness has not replaced the culture of corruption. In other words, if the countries receiving the aid do not work to make the internal changes and do not actually implement the legal and judicial reforms, their legal and judicial systems will continue to struggle to improve, their economic development will continue to falter, and there will be no progress towards sustainable development. Therefore, the donor agencies need to focus more on those reforms aimed at the deeper goal of increasing governments' compliance with the laws. This requires tools

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11 Declaration of the Initiative on Good Governance for Development in the Arab Countries, Feb. 6-7, 2005, available at *http://www.oecd.org/dataoecd/ 51/12/34425871.pdf.*

12 Adenda 21, 8.21, available at *http:// www.un.org/esa/sustdev/documents/agenda21/english/ agenda21chapter8.htm.).*

13 Making Law Work: Environmental Compliance and Sustainable Development, Preface (Zaelke, Durwood, Kaniaru, Donald & Kruˇzíková, Eva eds., 2005.

that empower citizens to participate in governance, including access to justice, with opportunities to pressure the judicial and legal systems. It is increasingly recognized that the fundamental changes that are needed for rule of law and sustainable development require the support and commitment of the key people within the system, and this core group needs to be given enabling assistance to help build the essential internal political will these reforms require. Donor assistance is critical, but so is the will to reform, which must be fostered from within.

The international community is already beginning to move in this direction. For example, as noted, the Aarhus Convention guarantees the rights of access to information, public participation in decision-making, and access to justice in environmental matters. These rights empower citizens to ensure that environmental laws are properly enforced and complied with. On the capacity building front, institutions such as UNEP, the Global Environmental Facility, and the United Nations Economic Council for Europe (UNECE) have produced guidelines to facilitate implementation and compliance with certain multilateral environmental agreements (MEAs)[14]. The UNEP Guidelines, for instance, highlight several compliance assistance strategies, including sharing experiences, evaluating the effectiveness of technology transfer, and drafting model legislation.

In addition, public agencies and researchers have begun collecting empirical data to analyze the effectiveness of different policies and strategies in inducing compliance with various environmental regulations. For instance Oran Young, Helmut Breitmeier, Michael Zürn, and others have created the International Regimes Database to empirically analyze 23 MEAs[15]. However, the empirical literature on environmental enforcement is still fairly sparse, due to the difficulty of obtaining reliable empirical information about the compliance of particular regulated entities. There is a great need for better functioning, reliable, and comprehensive data gathering systems. NGOs and various international networks, including INECE, can play an important role in gathering and validating information for such systems.

14 See Mrema, Elizabeth and Bruch, Carl, UNEP Guidelines and Manual on Compliance with and Enforcement of Multi lateral Environmental Agreements (MEAs), 7th INECE Conference Proceedings (2005).

15 Breitmeier, Helmut, R. Young, Oran & Zürn, Michael, Analyzing International Environmental Regimes: From Case Study to Database, Chapter 6 (forthcoming 2005). The IRD contains information for more than 50 states and the European Union. *Id.* at Chapter 2, 33. The IRD includes 23 regimes: Antarctic, Baltic Sea, Barents Sea Fisheries, Biodiversity, CITES, Climate Change, Danube River Protection, Desertification, Great Lakes Management, Hazardous Waste, Inter-American Tropical Tuna Convention, Conservation of Atlantic Tunas, International Regulation of Whaling, London Convention, ECE Long-Range Transboundary Air Pollution, North Sea, Oil Pollution, Protection of the Rhine Against Pollution, Ramsar (Wetlands), Protection of the Black Sea, South Pacific Fisheries Forum Agency, Stratospheric Ozone, and Tropical Timber Trade. Id. at 19-21.

With better coordination and increased support, all of these efforts – those addressing the rule of law and good governance issues, environmental compliance assistance, and empirical data collection and analysis – will help expedite progress towards sustainable development.

4.1 Conclusion

One of the tasks of privatization is to create efficient mechanisms in financial markets that the issue greatly helps to solve problems associated with poor efficiency and effectiveness of the public companies. Due to massive government intervention in economy, financial markets, poor management, contrast and different and personal interpretations of rules, poor internal controls, etc. the state owned enterprises in developing countries repeatedly show poor performance that clear examples can be observed in communist countries, ect. In the experienced countries, privatization not only transformed their structure of rules and regulations but also caused economic growth and prosperity in pioneer countries in privatization. A wide part of research in countries such as England, Germany, Turkey, ect. show that privatization show an increase in financial and operating performance in divested companies and privatization laws have led to change in the role of government, create new financial facilities and expand public welfare, increase financial and operational performance in divested companies and also restructure and economically change micro and macro levels and this issue has caused the countries in which the process of privatization has happened, by financial market transparency, a strong legal system, to lead to optimal allocation of interest, financial stability and enhance national growth rates, efficiency and effectiveness. But with respect to the legal, financial, and economic conditions of the country, by accelerating the formulation and adoption of principles, appropriate infrastructure to provide confidence in capital markets be provided so that by creating competitive environment of the market, private practice have more efficient performance than the public sector and so, there is a consensus that the rule of law and good governance are the foundation for achieving sustainable development goals. Various institutions have taken initiatives in promoting the rule of law and good governance throughout the world and have made considerable progress over the years. However, despite these efforts and the growing number of environmental laws and regulations, environmental quality and public health continue to deteriorate due in significant part to lack of implementation, enforcement, and compliance with existing laws. A strengthened focus on compliance and enforcement efforts could overcome these problems and would be a critical investment for advancing sustainable development, and the bottom line is that a successful privatization can be cause of sustainable development.

PROMOTION OF SUSTAINABLE LIVELIHOOD THROUGH SKILL DEVELOPMENT AMONG RURAL YOUTH; ROLE OF MICRO-FINANCE IN DEVELOPMENTAL PARADIGM

Vikram Singh[*]

1.1 Introduction

India is an Agrarian Society; here more than 70 percent population living in rural area. They depend on agriculture and associated sectors of agriculture for their livelihood. The ability of the individuals in any society is necessity to vest them for social alteration, economic growth, contribution in development process. Therefore a Nation seeking towards development requires institutions, entrepreneurship and skill development, to initiate, engross and achieve the course of change and the changing societal structure and livelihood profiles. In 40's after independence India was developing nation because of the burden of imperialism. It is understood that restraints and possibilities towards development of rural area is itself embedded in the agrarian society. In 20th century Industrial Revolution fetched fundamental alterations in agrarian societal structures that were entrenched in agriculture sector. 'The Industrial Revolution took away this responsibility from women's, brought about a rural-urban dichotomy, particularly in agrarian societies and created a demand for some other educational agent outside homes. The educational agent, the school, was assigned two basic goals: (1) development of human resource (particularly men) with skills for the manufacturing sector; (2) undertaking partial responsibility of the home, namely value addition and moral education' (India, 2006). It gave rise to separation in all sectors; and bulk of deficient Rural Youth in productive and technical skills. Hence, youth living in the rural areas have to struggle to get earnings or voluntarily/forcibly migrated to urban areas in search of Job. The migration arrangement varies with the region, prospects and socio-economic status of the families. The poorest families, particularly the landless and marginal holders have poor quality land inclined to migrate. Such migrations severely affected the quality of life, because of poor health, lack of education, skill development and social pressures leading to erosion of moral values. 'In 50's, almost national governments in Asia formulated 'community development' programme with a view to achieve self-reliance and development through local institutions and participation of the rural communities for their development' (CIRDP, 1987). The core elements of community development were (i) People's participation in local community development projects, (ii) democratic decentralization, (iii) transfer of technology,

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(iv) self-help efforts. 'The rural development pursued in the 1950's and 1960's was largely centered around 'growth first' models. Despite robust growth in the 1960's, economic benefits did not 'trickle down' and majority of the population was languishing in abject poverty, rising unemployment and increased inequalities' (India, 2006).

'The general disenchantment with the performance of economic growth in 60's was, it based on without distributive justice, prompted the economists of the day to engineer such theories and models as redistribution with growth, basic needs approach integrated rural development, and a demand for the establishment of new international economic order' (Agarwal, 1994, pp. 1455-1478). 'In India, Small Farmers Development Agency (1971), National Rural Employment Programme (1980), Rural Landless Employment Guarantee Programme (1983), Minimum Needs Programme, Development of Women's Children in Rural Areas, Training for Rural youth for Self Employment, and Integrated Rural Development Programme (1978-79) were launched, (Ibid). 'The 1980's era saw the emergence of a new philosophy in the name of efficiency. The structural adjustment policies of IMF stabilization policies to reduce fiscal deficits and restore the balance of payments fragments position to viable levels and the World's Basic's long term 'structural reforms' to raise productivity and enhance efficiency' (Reddy and Subramanyam, 2003). 'India is rich in human resources, what is needed now is a long term policy for development of human resources through education, training, skill development healthcare, empowerment and creation of congenial socio-economic, institutional and political environment for the fullest possible utilization of the vast, untapped reservoirs of human power and ingenuity' (Singh, 2003).

1.2 Objectives

1. To analyze the process of Sustainable livelihood through Skill Development in India for Rural Youth.
2. To understand the feature of various Skill development and Livelihood Policy/Programme for Rural Youth.
3. To analyze distinctive features/role of Micro-Finance in Promotion of Sustainable livelihood through Skill Development for Rural Youth.

1.3 Methodology

Methodologically this paper is based on survey of literature; a literature review surveys books, scholarly articles, and any other sources relevant to an issue, area of research/theory has been used to provide description, summary, and critical evaluation of the paper toward to the Livelihood, Skill Development and Micro-

Finance has been investigated. Survey of Literature has been done; it may provide an overview of sources; it demonstrates the larger framework of the issue.

'Policy Shift in Rural Development Paradigm' (India, 2006).

Five Year Plan	*Period*	*Period Rural Development Policy*
1st	1951-56	Community development as method and national extension service as the agency.
2nd	1956-61	Cooperative farming with local participation
3rd	1961-66	Panchayati Raj – three tier model of democratic decentralization.
4th	1969-74	Area based programme
5th	1974-78	Introducing concept of minimum needs programme.
6th	1980-85	Emphasis on strengthening socio-economic infrastructure in rural areas, alleviating disparities under Integrated, Rural Development Programmes.
7th	1985-90	Emphasis on creating new employment opportunities, special programmes for income generation through asset endowments, Land reforms, participation of people of the Grass-roots level.
8th	1992-97	Emphasis on building up rural infrastructure, priority on rural roads, especially in tribal, hill and desert areas, minor irrigation, soil conservation, social foresting and participation of people in rural development programmes.
9th	1997-02	Jawahar Gram Samridhi Yojana, Swarn Jayanti Gram Swarojgar Yojana, Pradhan Mantri Sarak Yojana, Sarva Shiksha Abhiyan etc. implementation.
10th	2002-2007	Construction of roads, capacity building, human resource development, communication technology transfer, education, women empowerment, self-help groups and micro credit etc.

India's Youth and Employment Picture

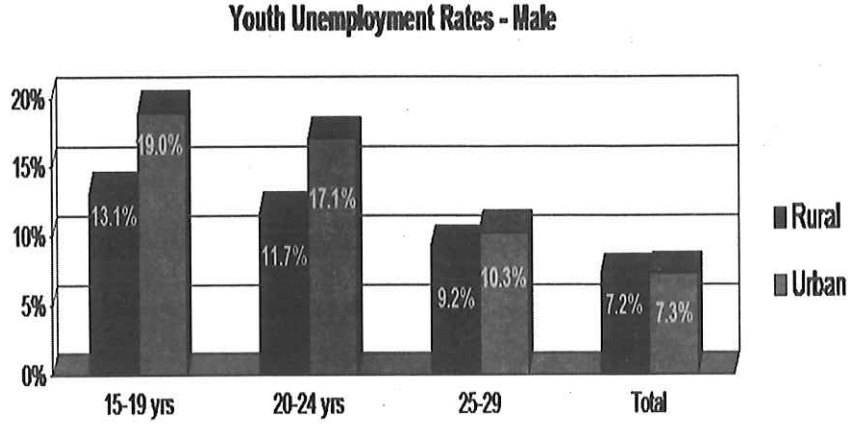

Table 01; Source: National Sample Survey Organization (NSSO) 55th Round; 2000.

1.4 Skill Development in India; Various Frameworks

India is the largest democracy as well as "Youngest nation" in the World having 54 percent population under age of 25 years. It consists of 459 million of total workforce. Training' and 'Employment' is on coexisting list of Indian Constitution. In India Union Government responsible for Policy formulation and States are responsible implementation process. Directorate General of Employment & Training (DGE&T) is accountable for Policy formulation, setting down standards, enlargement and alteration of course curriculum, affiliation, trade testing & certification for skill development.

'In addition to DGE&T, following Ministries and Departments also impart vocational training as per their requirement:

1. Health and Family Welfare
2. Human Resource Development
3. Information Technology
4. Micro, Small & Medium Enterprises
5. Tourism
6. Urban Development
7. Urban Employment and Poverty Alleviation
8. Agro and Rural Industries

9. Agriculture
10. Textiles
11. Heavy Industries and Public Enterprises
12. Food Processing Industries
13. Rural Development
14. Social Justice and Empowerment
15. Tribal Affairs
16. Women and Child Development'[1]

Advisory Bodies:

Central Government

- National Council for Vocational Training (NCVT)
- Central Apprenticeship Council (CAC)

State Government

- State Council for Vocational Training (SCVT)
- State Apprenticeship Council (SAC)

1.5 Institutional Establishment and Policy Formulation for Skill Development for Rural Youth

'In India, skill development occurs through two broad institutional structures formal and non-informal. The formal structure includes higher technical education in colleges, vocational education in post-secondary schools, technical skills in specialized institutions and apprenticeship training. As part of the Government's social development agenda, there are several schemes which provide basic employable skill development' (NCSD, 2013, p. 14).

Skill development and information expansion for youth are the heavy forces of fiscal and social development of any nation.

Both are important in the cumulative period of globalization and modernization has widened it all over the world. 'Potentially, the target group for skill development comprises the labour force, including those entering the labour market for the first time (12.8 million annually), those employed in the organized sector (26.0 million) and those working in the unorganized sector (433 million) in 2004-05. The current

[1] Planning Commission of India.

capacity of the skill development programs is 3.1 million. India has set a target to skilled 500 million people by 2022' (National Skill Development Policy, 2009, p. 2). 'Harnessing the demographic dividend through appropriate skill development efforts would provide an opportunity to achieve inclusion and productivity within the country and also a reduction in the global skill shortages. Large scale skill development is thus an imminent imperative' (Ibid, p. 2). 'In the Eleventh Five Year Plan (2007–12), sparingly has been given to create a pool of skilled personnel in appropriate numbers. A comprehensive skill development programme with wide coverage throughout the country has been initiated by the Government.

The Government has set up the Prime Minister's Council on Skill Development for policy direction to be supported by the National Skill Development Coordination Board (NSDCB) chaired by the Deputy Chairman of the Planning Commission.

To promote private sector initiative for skill development, an institutional arrangement as non-profit corporation called the National Skill Development Corporation (NSDC) has been set up in the Ministry of Finance' (Ibid, p. 20). 'National Skill Development Initiative will empower all individuals through improved skills, knowledge, nationally and internationally recognized qualifications to gain access to decent employment and ensure India's competitiveness in the global market' (Ibid, p. 9).

Inter-Ministerial Group (IMG) is established to highlight the concern of capability building and development of the unemployed youth in rural areas; with constituting a plan having distinct features namely ***"Special Project for Skill Development of Rural Youth"*** through ***Swarnajayanti Gram Swarozgar Yojana (SGSY).*** "Its' inception is to provide training to unemployed rural youth from Below Poverty Line status which would provide them to pursue sustainable ***livelihood opportunities through Micro-Finance and Micro- Enterprises.*** 'The objective of SGSY was to bring the *Swarozgaries* (assisted poor families) above the Poverty Line by insure appreciable sustained level of income over a period of time. This objective is to be achieved by inter-alia organizing the rural poor into Self Help Groups (SHGs) through the process of social mobilization, their training and capacity building and provision of income generating assets' (Sharma, 2009, p. 20).

Afterwards Ministry of Rural Development decision to transformed the Swarna Jayanti Swarozgar Yojna (SGSY) into the National Rural Livelihood Mission (NRLM) that was clear evidence that the 'poor' are the key focus of the Union Government, and past inefficiencies in programmes need to be set right if real time outcome and impression from outlays are to be seen' (Sharma, 2009, p. 19).

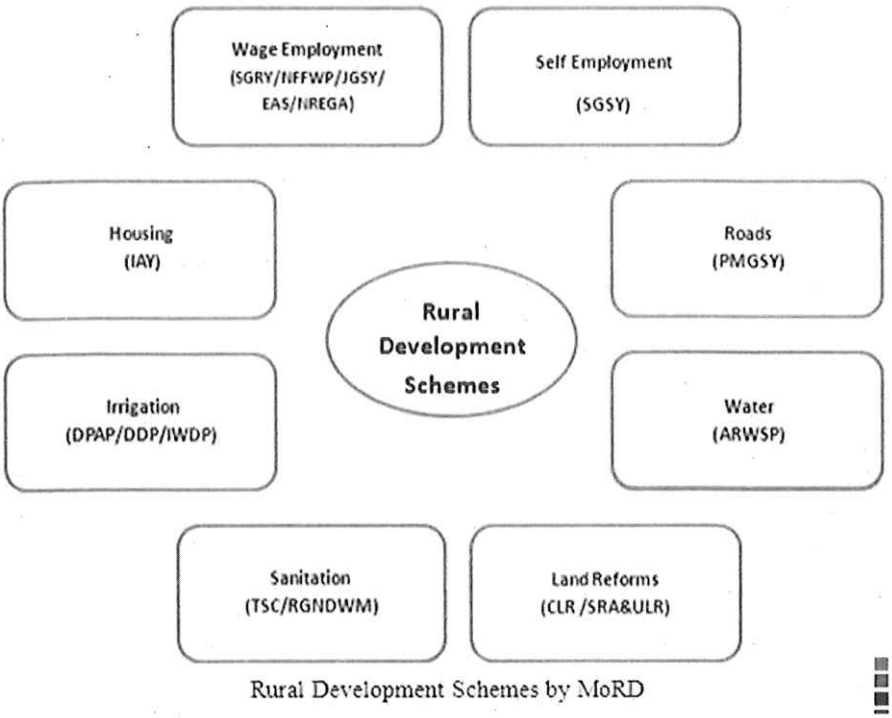

Figure: 01; Rural Development and Livelihood generating Schemes

Source: Ministry of Rural Development

1.6 Sustainable Livelihood Through Skill Development Programme; an Overview of Aajeevika - National Rural Livelihoods Mission (NRLM)

'Aajeevika - National Rural Livelihoods Mission (NRLM) was launched by the Ministry of Rural Development (MoRD), Government of India in June 2011. Aided in part through investment support by the World Bank, the Mission aims at creating efficient and operative institutional platforms of the rural poor enabling them to increase household income through sustainable livelihood enhancements and improved access to financial services. NRLM has set out with an agenda to cover 7 Crore rural poor households, across 600 districts, 6000 blocks, 2.5 lakh Gram Panchayats and 6 lakh villages in the country through self-managed Self Help Groups (SHGs) and federated institutions and support them for livelihoods collectives in a period of 8-10 years. In addition, the poor shall be help to achieve increased access to their rights, entitlements and public services, diversified risk and better social indicators of empowerment.

NRLM believes in harnessing the innate capabilities of the poor and complements them with capacities (information, knowledge, skills, tools, finance and collectivization) to participate in the growing economy of the country'[2]

Aajeevika- National Rural Livelihood Mission (NRLM) is an initiative launched by Ministry of Rural Development (MoRD), Government of India in June 2011. The Aajeevika Skill Development Programme (ASDP) is a sub-mission under NRLM. It has evolved out of the need to:

1. Cater to the occupational aspirations of the rural youth who are poor
2. To diversify incomes of the rural poor.

'ASDP gives young population from poor communities an opportunity to upgrade their skills and enter the skilled work force in growing sectors of the economy. Training and placement schemes are run in partnership with public, private, non-government and community organizations. Strong relationships are being built with industry associations and employers'. The target is to skill and place 50 lakhs youth in the formal sector by 2017'[3]

Key Features

1. Provides customized residential and non-residential training.
2. Minimum 624 hours of training with modules on trade specific skills, IT and soft skills.
3. Special programs for Jammu and Kashmir, Minorities and almost critical Left wing Extremist Districts
4. Implemented under the supervision of the Central and State governments
5. 75% assured placement above minimum wages
6. Post placement support
7. Food and transport support during training

National Rural Livelihood Mission (NRLM), works on three pillars – enhancing and expanding existing livelihoods options of the poor; building skills for the job market outside; and nurturing self-employed and entrepreneurs (for micro-enterprises).

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2 *http://www.aajeevika.gov.in/* retrieved on 26/09/14 14:43 hrs.

3 *http://www.nrlmskills.in/* retrieved on 26/09/14 14:43 hrs.

'In order to provide an impetus and to trigger and harness the entrepreneurial potential Honorable Finance Minister, Government of India, declared in the budget speech on 10th July 2014, "I also propose to set up a "Startup village Entrepreneurship Programme" for encouraging rural youth to take up local entrepreneurship programs. I am providing an initial sum of 100 crore for this". While; the broad Indian grow'h story is explicitly credited to dynamic business entrepreneurship, the village communities do express their entrepreneurship, given the right business opportunity. Even in the interior rural areas of several states, a micro entrepreneurial class is emerging and undertaking several innovative activities. Some of them are providing services in education, livestock, dairying, health and financial services. This expanding entrepreneurial class presents a vast, hidden reservoir of talent to supplement formal systems of programme delivery. However, the micro-entrepreneurs need to be trained, handheld and supported with enabling environment to exploit their full potential. The Community Based Organizations (CBOs) are eminently suited to provide such support to the emerging micro-entrepreneurs. The key learning drawn from the two decade long work of State-wide livelihoods projects in Andhra Pradesh, Kerala and Tamil Nadu along with the outstanding work by several NGOs in the country draws upon the inference that dedicated support structures build and strengthen the village institutional platforms. These platforms, with the support of their human and social capital, offer a variety of services to their members. These services include financial and capital services, production and productivity enhancement services that include technology, knowledge, skills and inputs, market linkages etc. Being conscious of the above fact National Rural Livelihood Mission [NRLM], works on three pillars – enhancing and expanding existing livelihoods options of the poor; building skills for the job market outside; and nurturing self-employed and entrepreneurs (for micro-enterprises).

Swarn Jayanti Swarojgar Yojna (SGSY): Overall Achievement

States	Districts	No. of PIAs	Total Projects	Total Target	Total Trained	Total Placed	Total Under Training	Male Placed	Female Placed
32	575	79	145	1088002	964806	775324	303867	504000	271322

Table 02: Source; Ministry of Rural Development.

National Rural Livelihoods Mission (NRLM) Progress at Glance; till 08/10/14

NRLM Progress at a Glance

(as on Oct-08-201

Sl.No.	Indicators	Achievement
I.	Geographical coverage under NRLM	
1	Number of States transited to NRLM (27 States + 1 U.T.)	29
2	Number of Districts with intensive blocks in NRLM States	344
3	Number of Blocks identified for intensive approach in NRLM States	2631
4	Number of Blocks where intensive implementation has commenced	2458
5	Number of Grampanchayat in which intensive implementation has started	29404
6	Number of villages in which intensive implementation has started	93672
II.	Progress in Intensive Blocks (includes NRLM- EAP/ State Projects)	
6	Number of households mobilized into SHGs (in Lakh)	116.5
7	Number of SHGs promoted (in Lakh)	11.8
8	Number of Village Organizations promoted	41302
9	Number of SHGs provided Revolving Fund	216877
10	Amount of Revolving Fund disbursed to SHGs (in Lakh)	33,034.3
11	Number of SHGs provided Community Investment Fund (CIF)	146144
12	Amount of Community Investment Fund disbursed to SHGs/ Village Organizations (in Rs. Lakh)	81,049.1
13	Number of Community Resource Persons developed	1176221
14	Amount of credit mobilized through banks (in Rs. Lakh during FY 2013-14)	291,729.5
15	Number of youth provided self-employment training under RSETI during 2013-14 (in Lakh)	
16	Number of Mahila Kisans supported under MKSP (in Lakh)	
17	Number of Producer Group promoted	
18	Net cropped area brought under sustainable agriculture (in Lakh Acres)	

Table 03: Source; National Rural Livelihoods Mission (NRLM): MIS, Version-01

1.7 Skill Development and Sustainable Livelihood Promotion through Micro-Finance.

'India is often characterized as an emerging economic super power. The huge demographic dividend, the high quality engineering and management talent, the potent Indian diaspora and the emerging Indian transnational - knelling the optimism. In contrast, there is another profile of India that is rather gloomy. This is the country with the largest number of the poor, illiterates and unemployed in the world' (Kurian, 2007, pp. 374-380). 'Skill building may be viewed as an instrument to improve the effectiveness and contribution of labor to the overall production.

It is as an important ingredient to push the production possibility frontier outward and to take growth rate of the economy to a higher trajectory.

Skill building may also be seen as an instrument to empower the individual and improve his/her social acceptance or value'[4] India lags far behind in imparting skill training as compare with other countries. Only 10% of the total workforce in the country receives some kind of skill training (2% with formal training and 8% with informal training). Further, 80% of the entrants into the workforce do not have the opportunity for skill training' (ILO, 2011, p. 7).

NSSO 61st Round data also indicate that the percentage of persons (15–29 years) who received formal vocational training was around 3 percent for the employed, 11 percent for the unemployed and 2 percent for persons not in the labour force. To link skills developed into definite productive usage there of comprise self-employment, stages have taken into consideration in the Eleventh Five Year Plan by providing enough incentives, not necessarily financial but in skill and entrepreneurship development through Micro-Finance.

The focus was on creating a pool of skilled personnel in appropriate numbers with passable skills, in line with the requirements of the last users such as the industry, trade, and service sectors. Such an effort is necessary to support the employment expansion envisaged so of inclusive growth, including in particular the shift of surplus labour from agriculture to non-agriculture. This can take place if this part of the labour force is sufficiently skilled associated with Micro-Enterprises through Micro-Finance. During the Eleventh Plan a major 'Skill Development Mission' (SDM) with an outlay of Rs 22800 crores was proposed. Provision of micro-finance has helped the groups to achieve a measure of economic and social empowerment.

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[4] *http://12thplan.gov.in/12fyp_docs/9.pdf/* retrieved on 26/09/14 15:43 hrs.

It has developed a sense of leadership, organizational skill, management of various activities of a business right from acquiring finance, identifying raw material, market and suitable diversification and modernization. Economic institutions, training and development services, technical and vocational training institutes, employers unions and local traders and micro-enterprises are associates in sustainable livelihood promotion. **Livelihoods promotions through Micro-finance** target to safeguard the skills and dynamic assets that individuals (youth) transmit with them, to recuperate those have been lost, and to shape the capabilities and widen the prospects that individuals need.

Assets include individual skills and inanimate, animate assets (i.e. financial and physical capital); and support groups networking through micro-enterprises (i.e. social capital).

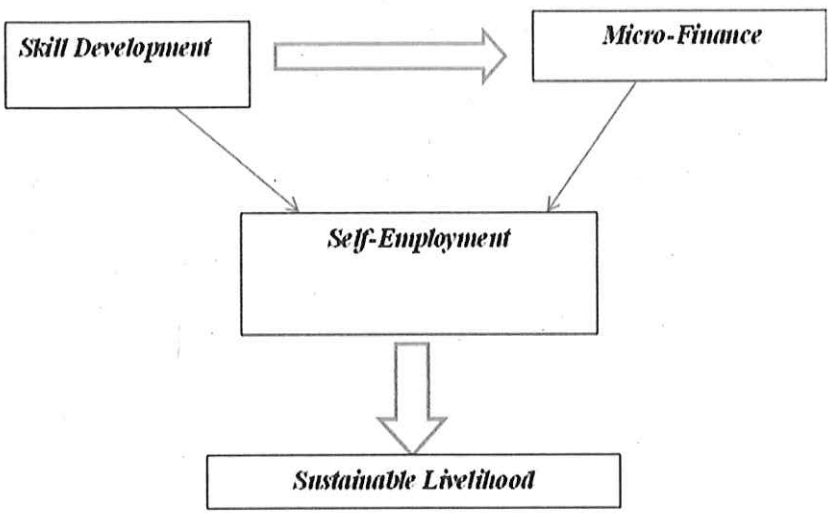

Figure: 02; Depicting Linkages among Skill Development, Self-Employment and Sustainable Livelihood through Micro-finance

Microfinance is providing monetary facilities such as savings, credit, cash transfers and micro insurance to economically poor and low-income people. These facilities are usually intended to care following purposes:

1. Emphasis on the skilled people: This is a procedure of providing of services to low-income people, who are skilled and have ability to generate a livelihood but lacking access to financial services.

2. Peoples suitable lend services: It is modest and expedient admittance to small, short-term and repeat lends, with the use of guarantee (e.g. group guarantees or compulsory

savings) to stimulate repayment. Informal assessment of borrowers regularly built on references and modest cash stream inquiry rather they extended use processes.

3. Protected Volunteer Investments: These amenities that help minor credits, suitable collections, and ready admittance to capitals – also autonomously or with other body.

The terms microfinance and microcredit used interchangeably. Both represent to credit transactions and loan fundability's but different in that the former complements credit transactions with saving and insurance. In most instances this discussion will center on microfinance because of its accuracy in presenting the relationships of credit financing institutions and its clients[5]. 'Microfinance provides credits for the poor to carry out developmental projects for their better lives instead of expect a trickle-down effect which often, does not reach them. It is my contention that those living in poverty, very much understand their problems better. Given the right resources, they definitely will improve the quality of their lifestyles and improve their standards of living'[6]

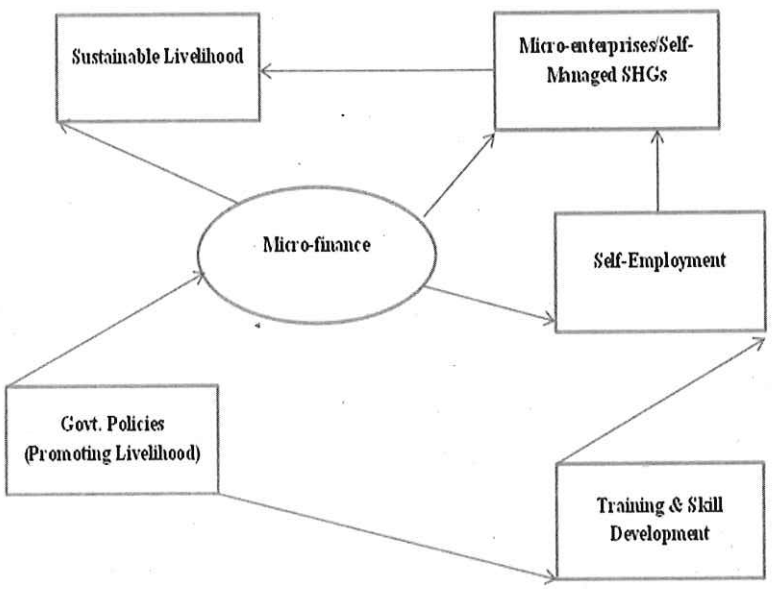

Figure: 03; Conceptual frame on Skill Development, Self-Employment and Sustainable Livelihood through Micro-finance.

5 *http://www.microcapital.org/microcapital-brief-muhammad-yunus-nobel-laureate-and-founder-of-microfinance-institution-grameen-bank-promotes-social-business-fund-* / retrieved on 26/09/14 14:23 hrs.

6 *http://www.grameen-info.org/index.php?option=com_content&task=view&id=1283&Itemid=1058* retrieved on 26/09/14 14:43 hrs.

Rural youth are usually intact source for improving their livelihoods and altering the skills. One prospect is to empower one's shift from the agricultural employment.

Youth are generally more able and willing, as auxiliary income earners, to develop non-traditional skills. In the hopes of using youth as a dynamic resource for development, the Rural Livelihoods government has to develop youth strategy. The broad aim is to equip rural youth with necessary skills through training, to provide employment opportunities, and help to access financial services for those who wish to be self-employed entrepreneurs.

Poverty can be reduced by providing credit along with the inputs such as skill development, training and other support facilities to the poor' (Karmakar, 2008, p. 14). This one will move towards commercial activities thus pavement the way for self-employment. This is likely to generate income base that in turn should empower the people. The surplus income generated from the self-sustaining activities would facilitate the holistic development of the rural poor. Sustainable Livelihood Promotion needs **tactical plans, with sequenced and battered interferences**, in keeping with changes in people's attitudes to working, investing and hiring. They must also be flexible enough to cope with changes in the societal structures and in local policies, and build on and contribute to development plans. Microfinance support and form the fiscal capital of individuals or households, to develop their livelihood chances and sustenance their socio-economic wellbeing. Microfinance has subsequently arisen as a paradigm change to development process.

According Professor Muhammad Yunus ***'father of microfinance'*** poverty makes poor population to appear stupid and without initiative. If you give them credit, they slowly come back to life, even those who seemingly have no conceptual thoughts, no ability to think about yesterday or tomorrow are in fact quite intelligent and expert in the art of survival. 'Sen classifies a capability as a type of freedom that enables one to choose a lifestyle one wants to live. Sen also suggests that freedom is both the end and the means to development,[7]

[7] *http://trevorcoffrin.hubpages.com/hub/Amartya-Sens-Capabilities-Approach* retrieved on 26/09/14 14:43 hrs.

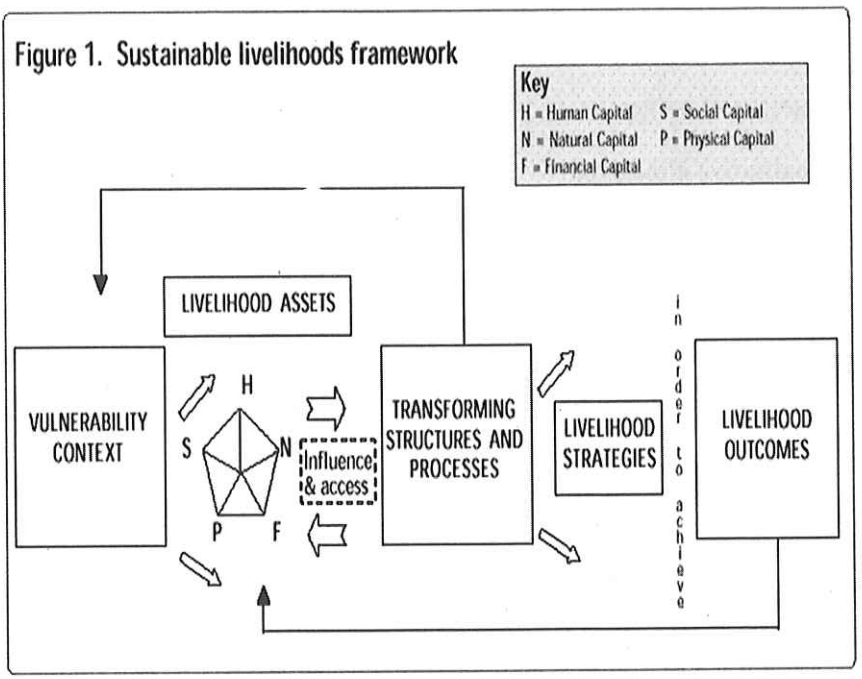

Figure: 04; 'Sustainable Livelihood Framework'
(Development & DFID, 1999, p. 10).

Freedom leads towards empowerment that came through transformation from the state of subjugation by skill orientation and sustainable livelihood.

Sustainability in this framework denotes the ability of an individual that enhance through skill development and work together with Micro-finance. 'Microfinance has emerged as a tool 'to extend the same rights and similar services to low income households that are available to everyone else'[8]

Emerging Issues and challenges in Skill Development' (Singh R. L., 2009)

➢ **Quantitative dimension:**

- Entry into labour force - 12.8 million per annum

[8] *http://projekter.aau.dk/projekter/files/42679138/final_thesis_revised.docx* retrieved on 27/09/14 17:23 hrs.

- Training capacity - 4.3 million per annum
- Shortage of training institutions
- Less dispersal in rural areas, hilly & difficult areas
- Shortage of trainers.

➢ **Qualitative dimension:**

- Demand-supply mismatch

➢ **Relevance:**

- Low interface between Sectors
- Low linkages between formal and non-formal institution.

➢ **Systemic gaps:**

- Labour Market Information System
- Sector Skill Councils
- National Vocational Qualification Framework.

1.8 Discussion

1.3 billion Young age group 12-24 year's population present globally and in India it is 22.40crores. It is estimated that population increase globally as well as in India. Globally the contribution in Labour force of South Asia countries is 29 percent. This generates the crisis for jobs among this productive age group particularly in rural areas because globally as well as in India half of population lives in rural areas. If the politicians, policymakers and institutions not focused on generating employable training /skill development among youth, it remain the marginal issue of policy making and youth remain in vulnerable condition. The important feature of rural youth is that they have less/not having economic independency. In rural area joint-family households are persisting and proportionately rural youth are lesser people/population in the family. And in division of Labour, the issue gender is needed to look again, because autonomy among women is practically difficult in India. Hence it is required to look the policy perspectives concerning social groups and women.

1.9 Analysis and Conclusion

Today, youth across the world face serious challenges regarding skills and jobs. In the globalized economy, competition has become intensified between firms and industries in developing and developed countries alike, requiring their workers to have higher levels of skills to enable them to engage in innovation, improve the quality of products/services, and increase efficiency in their production processes or even to the point of improving the whole value chain process. 'Despite of development of youth at the national level, regional disparities as inequality still prevail in the society between social groups (SCs/STs) and communities across the region and set-ups i.e. rural-urban '(Jodhka 2014, 29). Even the "programs aimed at raising general or average well-being do not improve the condition of the least well-off, unless they go to work directly to improve the quality of those people's lives" (Nussbaum 2001, 56).

70 % of the population continue to be rural (Jodhka 2014, 28) and among them majority lives below poverty line (BPL). However there is increase in rural income, still a large number of populations living in rural area are lagging behind (Jodhka, 2014, p. 29). It is well known that rural poverty is far behind in many dimensions as not only encompassing low income but also landlessness, low achievement of education, poor health, no housing and lack of other facilities (Moodie, 2008, p. 455). It is no coincidence that these broad ranges of risk profile directly produce an effect on social and economic well-being of their rural household. It means that poor people's struggle daily to survive for their livelihood (Drèze and Sen 2002, Moodie 2008).

In turn, all these have changed the nature, contents, and kind of skills that industry demands' (Okada, 2012) Skill development is a means to harness the human resource potential of a region by equipping the prospective or the existing members of the workforce with marketable skills through vocational or technical training to requirements.

Developing a channel to procure skills and empowering the every section of the society by providing training and skills through institutional set-up, formulating programmes/policies and linking them only with formal and non-formal fiscal institution is the way of attaining sustainable livelihood and social development. Skill Development in a broader context need to be specific and it should highlight what is needed; why is needed and how it is achieved (i.e. through proper skill development, linkage of youth with MFIs/Microcredit/SHGs etc.). Rural area/ Community-based Skill development programme should acknowledges that after the training program people should

have the solution towards the problems arising in Agrarian social Structure. It also exhibits better standard of living of individuals and growth in HDI. Though Skills should be vendible and pertinent, so it results in creating employable otherwise it drives to be worthless skills that produce skilled unemployed and underemployment.

THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (THE SARFESI ACT, 2002) – AN ANALYSIS

Dr. Kavita Singh*

1.1 Introduction

The first structured asset securitization occurred in 1970 in the United States when the newly created Government National Mortgage Association began publicly trading in securities backed by a pool of mortgage loans. These securities, known as "mortgage pass through securities", facilitated the investors to purchase a fractional undivided interest in a pool of mortgage loans by providing for a share in the interest income and in the principal payments generated by the underlying mortgage.[1] In creating pools of mortgage, the lenders were careful to put together those assets with similar characteristics in regard to quality term and interest rate. The pool of mortgages placed with a trust was actually sold in the form of certificates to investors, either directly or through private placement. The assets backed securities market in the U.S., however, is dominated by securities backed by automobile loans, credit card receivables, computer and automobile leases, mortgaged home receivables, insurance premium receivables, etc. Securitization is a more recent development in U.K compared to U.S. A. The first mortgage securitization issue arranged in London for the international market was MINI, a 50 million refinancing of certain Bank of America Finance Ltd. U.K. Property mortgages launched in 1985.[2] Thereafter, the business has taken off in both variety and forms. The reason for the success of asset securitization in both the U.S.A and the U.K. has been simple legal proceedings in respect of mortgage and debt securitization.

In Indian Scenario the picture is different from the world before introducing of such Special act the process of recovery was slow in progress or very minute in comparison to other nation. There is a need felt in the Banking system to convert

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1 Justice B.P.Banerjee, *Guide to Securitisation Reconstruction of Financial Assets & Enforcement of Security Interests* (Wadhwa Nagpur, New Delhi, 1st edn.,2008)

2 M.L.Tannan, *Tannan's Banking Law & Practice in India* (Lexis NexisButterworthsWadhwa, Nagur, New Delhi 23rdedn., 2012).

such Non-performing Assets (NPA) into realization. The growth in NPAs of the banking system in last 5 years has been as under [3]

Rs. in crore					
	Mar-09	Mar-10	Mar-11	Mar-12	Mar-13
Gross NPAs	68,973	84,747	97,922	142,300	1,94,000
Incremental Gross NPAs over previous year	12,538	15,774	13,175	44,378	51,700

Source: Reserve Bank of India publication 'Report on Trend and Progress of Banking'

Gross NPAs of the Banking system are estimated to have reached around Rs 2,63,100crore as on March 2014, recording nearly 36% growth over March 2013.Add to this, the Gross Restructured Assets of the banking system (which include restructuring of assets by banks themselves and through CDR) are estimated to have crossed Rs. 3,66,000crore as on March 2014 -- approximately around 6% of the total advances.

"Banks have been making all efforts to reduce their non-performing assets through various legal channels like resolutions through Lok Adalats, Debt Recovery Tribunals (DRTs) and invocation of SARFAESI. However, the amount recovered by all SCBs during 2015-16 reduced to `227.68 billion as against `307.92 billion during the 2014-15. PSBs, which are burdened with a high proportion of the banking sector's NPAs, could recover only `197.57 billion as against `278.49 billion during the previous year. The deceleration in recovery was mainly due to a reduction in recovery through the SARFAESI channel by 52 per cent from `256 billion in 2014-15 to `131.79 billion in 2015- 16. On the other hand, recovery through Lok Adalats and DRTs increased."[4]

2.1 How Securitization takes Place?

Securitisation of assets involves a lending institution, termed as the originator, whose loans and receivables will be converted into securities, and a trust or a Special Purpose Vehicle (SPV), through which the former will liquefy its assets.

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[3] International Asset Reconstruction Company, available at:http://www.iarc.co.in /content.php?cid=MjM=&mid=NA (Last visited on 10th September, 2015).

[4] https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/0FRTP16A120A29D260148E58B484D4 A60E38BB.PDF visited on 31.12.16

The originator in fact, picks up a pool of assets of homogeneous nature, lifts them from its balance sheet and passes them on to the SPV through, what is called, a pass through transaction. The latter in turn converts them into appropriate form of marketable securities for investment. The resultant cash flow SPV to the originator would enable the latter create further assets, while the periodical cash flows from the underlying collaterals by way of repayment of loans and interest payments will enable the SPV pay off its obligation of principal and interest to its debtors.

A variety of receivables or loan could be used for asset securitization. Thus, housing loans, loans, credit card loans, vehicles, trade receivables finance etc. of varying maturities can be converted into securities of appropriate duration. However, it is absolutely necessary to pool assets of *homogenous* nature together to ensure follow up.

The major parties involved in the process of securitization are the originator , the SPV, the merchant or investment banker, the credit rating agency, a serving agency, and of course the original borrowers and the buyers of the securities. The originator may be a financial institution or a bank which decides to its select pool of securitized loans and receivables with a view to creating liquidity. It identifies the loans and receivables from its portfolio to form a basket or pool of *homogenous* assets for securitization.

After making such a pool, the originator passes on the assets to the SPV by way of a pass through transaction, which is an outright sale for consideration or for a collateralized loan. The SPV is normally an organization distinct from the originator. Its main tasks are, structuring the deal, raising proceeds by issuing pass through certificates, as they are known, and arranging for payments of interests and principles would not fail, as the SPV is an extended arm of the originator and its entire activities are controlled by the former.

Pass through certificate directly confer ownership rights over the underlying assets, repayment pattern, interest rates with a spread etc. the issuer normally has little freedom to restructure cash flow from receivables into payments on several debts with varying maturities. There are also pay through certificate, which are more flexi cable in nature permitting sequential retirement of bonds, higher collateralization of assets where needed, thus raising the quality of instruments.

Merchant Bankers have key role to play as they advise timing of sale, their pricing, arrangements and incidental therewith. Where the securities are publicly issued credit rating may be obtained to make transaction. The credit rating

provides a message to the investor that the property is worth of buying. Under the asset securitization system, the role of the originator reduces to that of a collection agent on behalf of the Special Purpose Vehicle (SPV) in respect of the assets pooled and sold. In fact, the seller, as collection agent, will be acting as an agent for the purchaser retains the freedom to appoint itself or any other person as collection agent, in place of the originator or the seller of assets.

3.1 Asset Securitisation in Banks

Before going into the details of the Act and discussing its pros and cons, it would be helpful for the reader that they should clarify few understanding regarding the securtisation in banks. Debt or asset securitization is one of the latest techniques which financial market has commenced witnessing. Under asset securitization, a financial institution pools and packages individual loans and receivables, creates securities against them, gets them rated and sell them by investors in a market. Thus, asset securitization is nothing but simulating assets into securities and securities into liquidity on ongoing basis, increasing thereby turnover of business and profits. While also providing for flexibility in yield, pricing, pattern, size, risk and marketability of instruments.[5]

The Act was enacted with a view to formalize the operations of the securitization market in India, and to ensure financial discipline and control in respect of the rights and obligation of the players. The legislature has enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (here referred as SARFESI Act). The Preamble of the SARFESI Act, 2002 states as under "An Act to regulate securitization and reconstruction of financial assets and enforcement of security interest and for the matters connected therewith or incidental thereto."

The title of the Act is lengthy and is indicative of the intentions of the legislature. The Act embraces three major aspects namely, Securitization, asset reconstruction and the enforcement of the security interests. The enforcement of the security has been made simple in the cases where there is incidence of continued default by the borrowers and their accounts has been classified as non-performing assets (NPA) in the books of banks/ financial institutions which have provided the financial assistance. The Act is a special legislation. It has been enacted for reducing the level of NPA. It is also likely to redefine the relationship of borrower and the secured creditors. The Act has also help in keeping a check

[5] Ibid.

on the NPAs in future as well and has bring in new financial culture in the system.

4.1 Salient Feature of the Act:

- Registration and regulation of securitization companies or reconstruction companies by the Reserve Bank of India.
- To allow banks and FIIs to take possession of securities and sell them without intervention of court.
- Defining 'security interest' as any type of security including mortgage and change on immovable properties given for due repayment of any financial assistance given by any bank or financial institution.
- Systemic bottlenecks in recovery and management of NPAs removed.
- New law is complementary to all the existing laws and hence does not debar banks\FIs from invoking other remedies available to them.
- Non-application of the proposed legislation to security interests in agricultural lands, loans, not exceeding rupees one lakh and cases where 80% of the loans are repaid by the borrower.

5.1 Constitutional Validity of the SARFESI Act, 2002

The Constitutional validity of the securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been upheld by the Supreme Court. The Hon'ble Supreme Court, in the case of *Mardia Chemicals Ltd. and Others v. Union of India and Others*[6], upheld the validly of the provision of the said Act except that of sub-section (2) of section 17 which was declared *ultra vires* Article 14 of the Constitution. The said sub- section provides for deposit of seventy-five per cent of the amount claimed before entertaining an appeal (petition) by the Debts Recovery Tribunal (DRT) under section 17. The court observed that in cases where a secured creditor has taken an action under sub-section (4) of the section 13 of the said Act, it would be open to the borrowers to file appeals under section 17 of the Act within the limitation as prescribed therefore. It also observed that if the borrower, after service of notice under sub-section (2) of section 13 of the said Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. The reasons so communicated shall only be for the purpose of the

[6] (2004) 4 SCC 311 relied in *Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporation*, (2009) 3 BC 539 (SC).

information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at any stage. Borrower would get reasonably fair deal and opportunity to get matter adjudicated upon before DRT. Impugned provision of the Act were not unconstitutional as the object of the Act is to achieve speedier recovery of dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of people in general to save public interest.[7]

6.1 Interpretation and Construction

The Provisions of the Securitisation or SARFESI Act, 2002 are intended to lay down a procedure. The provisions in the Act giving a remedy of enforcement of security interest in secured assets, not through the court but by the secured creditor directly with the intervention of the Tribunal (DRT) and the Appellate Tribunal (DRAT) are not relevant for holding that the Act is not of Procedural nature. The provisions of the Act have been held to retroactive in nature. Therefore, merely because in Section 13(2) of the Act there is a use of words "makes in default", it cannot be read that the SARFESI Act would not apply to the loan transaction and security interest created prior to the Act came into force. It is well settled that all procedural laws providing for remedial measures, either of realization of money or for imposition of penalty are retrospective to the extent for covering the conditions for applying the remedy already accrued earlier or retroactive.

Sales tax, dues of the ESIC, workmen's dues in winding up and all public dues would have first charge on the sale proceeds of securities in the bank. Banks and Financial Institutions cannot claim priority over public dues. The Recovery of Debts Due to Banks and Financial Institution (RDB) Act, 1993 also known as the DRT Act and the SARFESI Act, 2002 have been enacted to provide for expeditious adjudication and recovery of debts due to banks and financial institutions and not to give any precedence or priority of dues to banks and financial institutions.[8] Special Act overrides other Acts operative in the field covered by it. The SARFESI Act, 2002 is a special Act and overrides the DRT

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7 *Authorized Officer, Indian Overseas Bank v. Ashok Saw Mill,* (2009) 3 BC 640 (SC): AIR 2009 SC 2420.

8 *State of MP v. State Bank of Indore,* (2002) 108 Comp. Cas. 622 (SC); *Central Bank of India v. State of Kerala,* (2010) 153 Comp. Cas. 497 (SC): (2009) 1 BC 705 (SC).

Act, 1993.[9] The remedy provided under the SARFESI Act, 2002 is in addition to the remedy and therefore, the doctrine of election does not apply.[10]

7.1 RBI guideline and SARFESI proceedings is at cross road

It is very clear that the Banks should follow RBI guidelines on Asset-Classification before classifying any loan account as 'Non-performing Asset (NPA)'. There were judgments saying that it is mandatory for the Banks to follow RBI guidelines while classifying an account as 'Non-Performing Asset (NPA)' and any deviation in this regard can vitiate the proceedings initiated under SARFAESI Act, 2002. While RBI guidelines are detailed when it comes to Asset Classification and related issues; the Bank officials or the Banks may have to make a subjective assessment of certain issues. It is understood from the reading of RBI guidelines on Asset-Classification that genuine borrowers facing temporary difficulties may be treated separately and based on reasonable assurance of recovery.[11] Guideline 4.2.4 of RBI guideline deals with the issue of 'accounts with temporary deficiencies' and narration of few of the temporary deficiencies in the said guideline appear to be 'inclusive' in nature allowing the Bank to make certain subjective assessments on case-to-case basis. Obviously, no creditor and especially secured creditor want to harass a genuine borrower having a good track-record with the Bank for a considerable time. However, with constant emphasis on the issue of reduction of NPAs, it seems that the Banks are very strict while getting the accounts classified as 'NPAs'. The most important thing about the issue of recovery by the Bank is that they are allowed to proceed against the borrower for default in any of the facilities availed by him when a borrower avails multiple credit facilities. Banks are asked to initiate recovery proceedings 'Borrower-Wise' and not 'Facility-Wise' and it is very clear in the RBI guideline 4.2.7. Again, Banks are not supposed to lay complete focus on the value of the security available with the Bank as such while initiating the recovery proceedings and it is very clear in RBI guideline 4.2.3. The extract of the said RBI guidelines are as follows:

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9 *GarlonPolyfab Industries Ltd* v. *State Bank of* India, (2003) 3 BC 626 (ALL- DB).

10 *Ishrat Enterprise Pvt. Ltd. v. Punjab and Sind Bank,* (2008) 4 BC 35 (DRAT-Delhi). See also, *Fortune International Ltd v. Central Bank of India,* (2008) 4 BC 35 (DRAT- Delhi).

11 Reserve Bank of India, Master Circular on directions/ instructions issued to the Securitisation Companies/Reconstruction Companies, RBI/2013-2014/55 DNBS (PD) CC. No. 33/ SCRC/26.03.001/ 2013-2014, available at: www.rbi.org (Lasted visited on 12th September, 2015).

7.1.1 Asset Classification to be borrower-wise and not facility-wise

i) It is difficult to envisage a situation when only one facility to a borrower/one investment in any of the securities issued by the borrower becomes a problem credit/investment and not others. Therefore, all the facilities granted by a bank to a borrower and investment in all the securities issued by the borrower will have to be treated as NPA/NPI and not the particular facility/investment or part thereof which has become irregular.

7.1.2 Availability of security / net worth of borrower/ guarantor

The availability of security or net worth of borrower/ guarantor should not be taken into account for the purpose of treating an advance as NPA or otherwise, except to the extent provided in Para 4.2.9, as income recognition is based on record of recovery.Again, dealing with the issue of temporary deficiencies in adhering to the terms of the loan agreement, RBI guideline 4.2.4 says as follows:

7.1.3 Accounts with temporary deficiencies

The classification of an asset as NPA should be based on the record of recovery. Bank should not classify an advance account as NPA merely due to the existence of some deficiencies which are temporary in nature such as non-availability of adequate drawing power based on the latest available stock statement, balance outstanding exceeding the limit temporarily, non-submission of stock statements and non-renewal of the limits on the due date, etc.

The problems for many borrowers or the Small Businessmen availing the loan facilities from the Bank comes from the issue that the Banks are asked to initiate recovery proceedings 'borrower-wise' and not 'facility-wise'. Borrowers availing facilities from the Bank with the complex commercial arrangements and agreements face problems with this discretion available with the Banks or the Bank Officials. Many complain that there is no effective redressel mechanism to raise all these issues even when the borrower has a very good case for restructuring or for questioning the judgment of the Bank in classifying a particular account as a 'Non-Performing Asset'. In most cases, the borrowers are driven either to approach the High Court under Article 226 of Constitution of India challenging the classification of an account as NPA or the borrower may have to inevitably file an Appeal before the Debt Recovery Tribunal under section 17 of SARFAESI Act, 2002. Even-though Banks can consider the proposal for restructuring of a loan account upon certain conditions and re-negotiating the terms, Banks do exercise great discretion in this regard. Coupled

with this situation, as the Banks can argue that the value of security has got nothing to do while classifying an account as NPA, genuine borrowers or borrowers/small businessmen with temporary/genuine/understandable problems face lot of pressure and problems. For example, an industry may have a very valuable property lying with the Bank as a security and may be facing some problems in its business with the obvious reasons which are beyond its control, and in such cases also, if the Bank is not convinced, the borrower becomes remediless. Emphasis has always been laid on the issue of recovery and establishing an efficacious internal system by the Banks and Guideline of RBI guidelines says as follows: Banks should establish appropriate internal systems to eliminate the tendency to delay or postpone the identification of NPAs, especially in respect of high value accounts. The banks may fix a minimum cut off point to decide what would constitute a high value account depending upon their respective business levels. The cutoff point should be valid for the entire accounting year. Responsibility and validation levels for ensuring proper asset classification may be fixed by the banks. The system should ensure that doubts in asset classification due to any reason are settled through specified internal channels within one month from the date on which the account would have been classified as NPA as per extant guidelines.RBI guidelines on 'Asset Classification' are well-balanced and the Banks are asked to make many subjective decisions and RBI guidelines do focus on the issue of not harassing genuine borrowers while emphasizing at the need of speedy and efficacious recovery. Along with the provisions dealing with the restructuring of loans or advances, RBI guidelines also deal with the issue of up-gradation of loan accounts classified as NPAs and the relevant RBI guideline in this regard is as follows:

7.1.4 Up gradation of loan accounts classified as NPAs:

If arrears of interest and principal are paid by the borrower in the case of loan accounts classified as NPAs, the account should no longer be treated as nonperforming and may be classified as 'standard' accounts. With regard to up gradation of a restructured/ rescheduled account which is classified as NPA contents of paragraphs 11.2 and 14.2 in the Part B of this circular will be applicable. On certain issues, RBI guidelines are very clear as to when an account should be treated as NPA. But, with regard to providing relaxation or understanding the temporary difficulties of the borrower while considering up gradation of loan account or regularizing the loan account, Banks do exercise lot of discretion. If at all the borrower feels that the Secured Creditor or the Banks are unfair in dealing with his loan account or loan accounts, he can do nothing

except approaching superior officers, approaching Banking ombudsmen or approaching High Court under Article 226 of Constitution of India. Though, even the DRT (Debt Recovery Tribunal) can consider all objections raised by the borrower while entertaining an Appeal under section 17 of SARFAESI Act, 2002. DRT may not have power to analyze a particular case in the light of RBI guidelines in its entirety though DRT can certainly look into the guideline dealing with the criteria for classifying a particular loan account or accounts as 'Non-performing Assets'. Normally, Banks do not commit any mistakes in classifying an Account as NPA applying the RBI guidelines strictly. Apart from the criteria, the DRT can look into the issue of 'debt', objections regarding debt and the correctness of the procedure followed by the Bank under SARFAESI Act, 2002. Normally, Banks do not commit mistakes in the procedure and the borrower will have objection to the classification on the basis that he is not a willful-defaulter and the deficiency in making payment is temporary in nature. However, these things are not considered by the DRT normally as I think and they may not have power to consider all these issues in-spite of various judgments of the Constitutional Courts from time to time emphasizing at the powers of the Tribunal under section 17. Only due to the judgments of the Courts, the borrowers are allowed to question every measure initiated by the Banks under SARFAESI Act, 2002 now and technicalities are normally ignored while entertaining appeals under section 17. It is also clear that they can look into all objections pertaining to the loan account or even raised by the third-party if he is connected. The Civil Court may be having limited jurisdiction to look into the issues connected to the SARFAESI proceedings and the jurisdiction of the High Court under Article 226 of Constitution of India is largely dependent on the facts of the case, and the discretion of the Court.

Now, if the Bank takes a decision to classify an account as NPA and rejects the objections or the request by the borrower, then, apart from writ remedy, the remedy available to the borrower is to file an appeal under section 17 of the SARFAESI Act, 2002. Based on the merits of the case, the DRT will grant interim relief and finally, only when it is established that there is a procedural irregularity, the DRT will allow the SARFAESI Appeal and can order the restoration of property if the physical possession has already been taken by the Bank pursuant to steps taken under section 13 (4) or by taking assistance of the police etc. using the mechanism provided under section 14 of SARFAESI Act, 2002. In many cases, DRT can insist on payment of some deposit while granting an interim-relief when the borrower approaches the Tribunal under section 17 of the Act challenging the proceedings initiated by the Bank under SARFAESI Act, 2002. If the Bank proceeds with the proceedings even during the pendency of the

Appeal under section 17, then, it becomes further more complicated to the borrower and it is very often heard that the borrower is asked to file another appeal literally instead of looking into all developments in the pending Appeal itself by way of entertaining affidavits or petitions in the pending Appeal. Filing an Appeal against the order of the DRT to the DRAT under section 18 is another big process and many normally get discouraged to do this in-view of pre-deposit condition. In each and every step, the borrower is discouraged and made to run from pillar to post even in cases with some merit and it is the view of many of the professionals or the borrowers facing SARFAESI proceedings. There is no reason as to why Appeals can't be speeded-up, additional Tribunals can't be set-up. If Appeals are speeded-up and if sufficient Tribunals and Appellate Tribunals are constituted, then, at-least genuine borrowers seeking remedy may feel protected and at-present, every case of so-called default is treated in a same way.

The SARFAESI Act, 2002 (The Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002) seems to be proceeding on the basis that the Banks or the Bank officials do not commit any mistakes. It is quite possible to ensure speedy recovery through special legislations like SARFAESI Act, 2002 and also giving confidence to the borrower that he will be heard fairly especially when the borrower has got a very good track-record and long standing relation with the Bank along with having valuable and marketable security lying with the Bank. It is quite possible. Now, it seems that there is an amendment or the provision allowing the Authorized Officers to bid for the property when there were no bidders initially and the reason given for this step is that it will allow the Banks to clean-up their balance-sheets. But, this kind of provisions can harm the borrowers and already it has become extremely difficult for the borrowers to establish or state his case and coordinating with the Banks. If there is too much pressure from the Banks when the businesses are not doing well for the reasons beyond their control, then, small business may be suffering irreparable loss if the Bank doesn't understand their concerns reasonably and sympathetically. Normally, at-times, taking note of industry specific problems, the Finance Ministry may come-up with some kind of directions to the Bank to be lenient or understandable while insisting on the speedy recovery in-respect of some specific industries and Banks also are asked at-times to post-phone the recovery process also. Instead of discouraging the borrower to get any remedy or forum to advocate his problems, the legal frame-work governing recovery of secured loans can still be very fair, few more Tribunals and Appellate Tribunals can be constituted and well-drafted powers are to be conferred on the Tribunals to even give directions to the Bank when needed and in-favour of the borrower. For example, if the loan to be recovered is only 10 lakh and the security lying with

the Bank is worth 50 lakh admittedly, and if the borrower seeks for payment of outstanding loan amount with interest and charges seeking regularization, then, DRT should be able to give direction to the Bank to accept the proposal. Delays in adjudication can certainly be curtailed and technicalities can be ignored while entertaining pleas from the Borrower. Admittedly, on the issues of reduction of interest, acceptance of OTS etc., Banks will have their own internal systems and DRT may have little role in this regard.

8.1 The Amendment of SARFESI Act, 2013- An Analysis

The Act was amended in January 2013 by *The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act*, 2011. The act brought about the following major changes in the SARFAESI Act:

8.1.1 *The lenders will be allowed to convert any part of the debt of the defaulting company into equity. Such a conversion would imply that lenders would tend to become an equity holder rather than being a creditor of the company.*

8.1.2 *It allows banks to bid for any immovable property (of the defaulting borrower) they have put out for auction themselves, if they do not receive any bids during the main auction. In such scenario, banks will be able to adjust the debt with the amount paid for this property.*

8.1.3 *Multi state Co-operative Banks are now included within the meaning of "a bank" under this Act.*

8.1.4 *A securitization or reconstruction company may have its name substituted in place of the name of the original lender in any pending suit in the D.R.T. or D.R.A.T. This may be done either by the company or the tribunal suomoto.*

8.1.5 *In case of multiple creditors, Rights can be exercised by the individual creditors only if that creditor represents at least 60% of the debt amount.*

8.1.6 *The Amended Act allows a secured creditor to file a Caveat in the D.R.T., if an appeal is expected to be preferred against it based on of the proceedings of the lender under the Act. Once such caveat has been filed, the borrower has to inform the creditor details about the appeal that he will be filing/already filed.*

8.1.7 *The Act provides that the secured creditor can seek the assistance of the District Magistrate to take possession of a secured asset. The amendment has laid down certain guidelines as to when such assistance can be asked for. The creditor has to furnish an affidavit stating that the debt is proportional to the property being possessed, the borrower has indeed defaulted in payment of the debt, the borrower has created a security interest over the property, the borrower has been served a 60 day notice before taking any action under the act etc. These requirements have been laid down to ensure that there is no action on the part of the bank which is not*

justified. If the bank takes any action with the assistance of the District Magistrate based on false allegation, it can be held accountable later on.

If the lender fails to inform the Central Registry/Central Government about the securitization of an asset as laid down in Sections 23, 24, 25 of the Act. The Court can take cognizance of such an offence only with the approval of the Reserve Bank of India or the Central Registry. Also such cognizance can be taken only by a court not inferior to a Metropolitan Magistrate/Judicial Magistrate. Also if there has been a defect in filing details about creating security interest, the same can be rectified at a later date by the applicant on application to the Central Registry.

The Act has been criticized till date because it does not take into account the interest of the borrower's, on account of it being arbitrary and biased towards lenders. Borrowers are however, allowed to appeal against the action taken by the lenders by virtue of Section 17 of the Act, which lays down circumstances in which such an appeal, can be preferred. The Courts through various judgments have interpreted the Section 17 of the Act in a liberal way so as to give relief to borrowers in many circumstances. In spite of that, appeals rarely get accepted and in certain circumstances banks even get the opportunity to rectify the matter against which the appeal has been preferred. The Amendment of 2013 to the Act has brought about many major changes in the procedure of recovery of nonperforming assets. However, the major amendment that was needed was putting in place more safeguards to protect the rights of the borrowers and curbing the arbitrary misuse of powers by the lenders. The same has not been done.

An in depth analysis of the new amendments, with respect to the rights of the borrowers reveals that the Section 18C of the new Act allows for the filing of a caveat by the lender in cases in which an appeal is expected, takes away a major portion of the rights of the borrowers, as they will be unable to procure an ex-parte order if a caveat has been filed and the tribunal will compulsorily be required to hear the lender. The Caveator in such a circumstance shall have full opportunity to oppose any order which might be adverse to its interests. Section 14 of the new Act can be considered to be a major safeguard for the rights of the borrower. According to this section the lender has to submit via affidavit exhaustive details of the property that is sought to be possessed. The details have to satisfy the conditions laid down in the Act which allows the lenders to take possession of a defaulting borrower's asset. This clause ensures that lenders do not proceed to take action based on partial satisfaction of the requisite conditions.

Strict adherence to provisions of the Act regarding taking possession is emphasized.

Once an asset has been securitized and the same has been registered with the Central Registry, the procedure to cure any default on the part of the securitization company, in the process of securitization is quite complicated and it requires approvals of the R.B.I. and can be head by a superior court only. Lenders are given full liberty to cure defects in securitiation applications at a later date which an added advantage is given to them to escape from penalties. This again allows for the suppression of borrowers interests, as the process of rectifying fallacies if any in the securitization process is quite complicated and it may be difficult to take action against defaulting securitization companies in most cases.

In the case of an unsuccessful auction of a nonperforming asset, banks are allowed to buy the said asset at the reserve price set by them, which is beneficial for them as they can satisfy that debt with their own money. This enables the bank to secure the asset in part or complete fulfillment of the defaulted loan. Banks can then sell off this property to a new bidder at a later date to clear off the remaining portion of the debt, if any. Previously there was almost always delay in the selling off of a property as buyers did not want to buy debt assets in auctions. This gave the defaulting lenders a window of opportunity to satisfy their debts and recover their property. However, now that the lenders themselves are allowed to buy out the assets, they may do so in most cases leaving the borrowers hardly any time to settle their debts.

The clause which allows the lender to acquire equity in the defaulting borrower's firm up to the extent of the debt allows the lender to effectively take control of the borrowers company in certain circumstances. This is again a serious drawback in the new law which greatly prejudices the interests of the borrower. In certain situations the lenders may end up procuring major controlling shares in the company in the event of a large loan default. On the other hand lenders in many situations may not want to exercise this right as it would involve buying taking control of equity of a company, whose share value may already have been greatly eroded due to the loan defaults on the part of the borrower.

9.1 The Amendment of SARFESI Act, 2016- An Analysis:

"The Act was amended in January 2016 by The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2016. The act brought about the following major changes in the SARFAESI Act:

9.1.1 Taking possession over collateral: *The SARFAESI Act allows secured creditors to take possession over collateral, against which a loan had been provided, upon a default in repayment. This process is undertaken with the assistance of the District Magistrate, and does not require the intervention of courts or tribunals. The Act provides that this process will have to be completed within 30 days by the District Magistrate. However, if the Magistrate is unable to pass an order within this time limit due to externalities, this limit would be extended to 60 days.*

9.1.2 Creation of database: *The Act creates a central registry to maintain records of transactions related to secured assets. The Act creates a central database to integrate records of property registered under various registration systems with this central registry. This includes integration of registrations made under Companies Act, 2013, Registration Act, 1908 and Motor Vehicles Act, 1988.*

9.1.3 Audit and inspection: *The Act empowered the Reserve Bank of India (RBI) to examine the statements and any information of Asset Reconstruction Companies related to their business. The Act further empowers the RBI to carry out audits and inspections of these companies on its own, or authorize specialized agencies to conduct these audits. The RBI may penalize a company if the company fails to comply with any directions issued by it.*

9.1.4 Stamp duty exemption: *The Act provides that stamp duty will not be charged on transactions undertaken for transfer of financial assets in favor of asset reconstruction companies. Financial assets include*

9.1.5 Presiding Officer and Chairman: *The RDDBFI Act established Debt Recovery Tribunals (DRTs) and Debt Recovery Appellate Tribunals (DRATs). The Act increases the retirement age of Presiding Officers of Debt Recovery Tribunals from 62 years to 65 years. Further, it increases the retirement age of Chairpersons of Appellate Tribunals from 65 years to 67 years. It also makes Presiding Officers and Chairpersons eligible for reappointment.*

The Act allows Presiding Officers of tribunals established under other laws (such as the National Company Law Tribunal) to also perform functions of Presiding Officers of DRTs. Similarly, it allows Chairmen of Appellate Tribunals established under other laws to additionally perform functions of Chairmen of DRATs."

11.1 Conclusion

The SARFAESI Act has been largely perceived as facilitating asset recovery and reconstruction. Since Independence, the Government has adopted several ad-hoc measures to tackle sickness among financial institutions, foremost through nationalization of banks and relief measures. Over the course of time, the

Government has put in place various mechanisms for cleaning the banking system from the menace of NPAs and revival of a healthy financial and banking sector. The Reserve Bank of India issued guidelines and directions relating to registration, measures of ARCs, functions of the company, prudential norms, acquisition of financial assets and related matters under the powers conferred by the SARFAESI Act, 2002.

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