ISSN 2581-4834

VOL. I ISSUE 1

CASIHR

Journal on Human Rights Practice

A Bi-annual Journal of
Centre for Advance Studies in Human Rights

RAJIV GANDHI NATIONAL UNIVERSITY OF LAW, PUNJAB

CASIHR JOURNAL ON HUMAN RIGHTS PRACTICE

CONTENTS

MASS SURVEILLANCE PROGRAMS AND RIGHT TO PRIVACY IN INDIA

Prof. (Dr.) Nishtha Jaswal[*] & Dr. Lakhwinder Singh[**]

I. INTRODUCTION

David Lyon says, "Surveillance is the monitoring of the behaviour, activities, or other changing information, usually of people for the purpose of influencing, managing, directing, or protecting them."[1] Government surveillance enables the government authorities to provide security to the lives and liberties of the individuals. Indian Constitution empowers the Parliament to make laws on the subject matters of surveillance while protecting the fundamental rights of the individuals. India has enacted various surveillance laws including Indian Telegraph Act, 1885, Indian Telegraph Rules, 1951, Information Technology Act, 2000, Information Technology (Amendment) Act, 2008, Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009, Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules, 2009, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, Information Technology (Intermediaries Guidelines) Rules, 2011, Information Technology (Guidelines for Cyber Cafe) Rules, 2011, Code of Criminal Procedure, 1973, Indian Penal Code 1860, National Investigation Agency Act 2008, etc. India executes its surveillance legislations with the help of various law enforcement agencies including National Investigation agency, Research and Analysis Wing, Intelligence Bureau, Central Bureau of Investigation, States' Police, Central Reserve Police Force, and other paramilitary forces. However, the rise in extensive, surreptitious, opaque, unlimited and unaccountable use of the surveillance techniques and mass surveillance projects by the law enforcement agencies without having adequate privacy protected legislations involves serious repercussions of violating the individuals' right to privacy.

Since ages, the autocrat authoritarians have been known for using surveillance methods to settle down their personal animosities, to persecute and punish political opponents, political

[*] Professor, Department of Laws, Punjab University, Chandigarh, Punjab, India.
[**] Assistant Professor, National Law University Delhi, New Delhi, India.
[1] DAVID LYON, *SURVEILLANCE STUDIES: AN OVERVIEW*, (2007). First published, Polity, Cambridge.

dissidents, etc. Survey operations in British India were a part of the "scientific 'panoptican' designed to provide the colonizers with a comprehensive network of surveillance and control over the Indian countryside and population."[2]During colonial rule, the British notified certain categories of people as dangerous and born criminals on the basis of their birth, creed and caste. The tribes to which they belonged were branded as criminal tribes. In order to regulate and monitor the behavior of these people, the British colonists passed Criminal Tribes Act 1871. The legislation notified 150 castes as "hereditary criminals" and subjected them to police surveillance. The list was inclusive one. Any person intended to speak against the British administration, was an offender under this legislation. Under the legislation of 1871, the police had uncontrolled discretionary powers to arrest anyone in order to maintain law and order in the society. The arrested persons' names, finger prints, and other identification were being recorded.[3]

If the modern welfare state misappropriates the modes of surveillance for satisfying its own political purposes and persecuting political dissents, it would not be incorrect to say that such so called 'welfare governments' shares the same characteristics as that of 'totalitarian and authoritarian regimes.'

II. GOVERNMENT'S MASS SURVEILLANCE PROGRAMS THROUGH THE USE OF ADVANCED SURVEILLANCE TECHNOLOGIES

Long years ago, when the government had very few resources and techniques of surveillance, the authorities were bound to collect limited amount of information on the individuals. But today's government has broadened its power of surveilling the people, and is making dozens of personal dossiers on almost every individual while using the extreme capabilities of the most sophisticated surveillance technologies. Observation of physical activities, once reliant on naked eye observation and simple devices like binoculars, can now be carried out with night scopes and thermal imagers, sophisticated telescopic and magnification devices, tracking tools and "see-through" detection technology. Records of transactions with hospitals, banks, stores, schools, and other institutions, until the 1980s usually found only in file

[2]Kapil Raj, "*Circulation and the Emergence of Modern Mapping*", in Claude Markovitset. al. (Eds.), Society and Circulation, , 23-54 at 24, (2006).
[3]S. Viswanathan, "*Suspects forever: Members of the "denotified tribes*" continue to bear the brunt of police brutality," Frontline, Volume 19 - Issue 12, June 8-21, 2002, available at http://www.frontline.in/static/html/fl1912/19120450.htmaccessed on 13-6-15.

cabinets, are now much more readily obtained with the advent of computers and the Internet.[4] In contemporary times, privacy destroying technologies, like video surveillance, location tracking, data mining, wiretapping, bugging, thermal sensors, spy satellites, X-ray devices, and more, have made a State, an Argus State. The government has become habitual in watching peoples' behaviour, actions, tastes, preferences, choices, psychology, ideology, etc. Therefore, the mass surveillance has disturbed the equilibrium of privacy, disclosure, and surveillance.[5]

The law enforcement forces through sophisticated surveillance technologies are able to search our body, person, places, papers, documents, etc. from any place. While exploiting the extreme capabilities of the modern surveillance technologies, the law enforcement agencies can see us through our clothes, read our minds, know our whereabouts, listen conversations, know about our tastes, preferences, ideas, and opinions, political or religious ideologies, know about web history, chat history, etc. The law enforcement agencies also have a very easy access to the databases of the telecom service providers or other service providers, which store every detail of the subscribers. Increasingly, the law enforcement agencies have got wide, uncontrolled and unguided discretionary powers after the passage of legislations like the USA PATRIOT Act 2001 in the United States and the National Investigation Agency Act 2008 read with Information Technology (Amendment) Act 2008 in India. The law enforcement agencies do not need to show any probable cause in front of any court of law for obtaining the so called 'third party information' which is stored in the gigantic databases of the service providers. Not surprisingly, the new ways of surveillance by the government agencies have diluted the 'due process clause'.

a. DEOXYRIBONUCLEIC ACID (DNA) SURVEILLANCE

Scientists say that genetic testing provides information about one's behavior, diseases, traits, etc. They say that genes' influence passes on from generation to generation. And such information can be collected from even a tiny tissue sample like hair, saliva left on drinking glass, blood stains, etc. The tissue specimens are collected and stored for research, medical treatment, law enforcement, military identification, blood and tissue banking, fertility treatments and, increasingly, commercial purposes. Familial Deoxyribonucleic Acid (DNA) testing is a new criminal investigative technique, in which police watch for a close but

[4]CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK*, 3 (2007). USA: University of Chicago Press.
[5]DANIEL J. SOLOVE, *NOTHING TO HIDE*, 2 (2011). USA: Yale University Press.

imperfect match between the Deoxyribonucleic Acid (DNA) left at a crime scene by an unknown offender, and the Deoxyribonucleic Acid (DNA) of a known convicted person in a forensic Deoxyribonucleic Acid (DNA) database. If police find such a match, they may investigate the relatives of the convicted person.[6]

In India, Deoxyribonucleic Acid (DNA) Profiling Bill is pending before Parliament. Once it becomes law, all convicted criminals across the country will have to undergo mandatory Deoxyribonucleic Acid (DNA) tests. The bill will also grant the authority to collect vast amount of sensitive Deoxyribonucleic Acid (DNA) data of citizens even if they are 'suspects' in a criminal case. A person detained for even a minor offense would be subjected to DNA testing.

However, the DNA legislation, without having adequate data protection laws, should be seen in the light of British India originated legislation Criminal Tribes Act, 1871 under which they notified certain categories of people as "hereditary criminals" on the basis of their birth, creed and caste. These people belonged to different tribes, which were named as criminal tribes. The police was given wide uncontrolled discretionary powers of search, arrest and seizures under the guise of the stated purpose of the Act of 1871 i.e. "to ensure peace, law and order". Whenever any offence was committed, the police used to arrest the members of the community as prime suspects. Their names, finger prints, and any other sort of identification were registered with the Superintendent of Police. Although the Criminal Tribes Act was repealed in the post-independent era, the people belonged to such categories are yet to be emancipated from the stigma of criminality. Many argued that the attitude of the law-makers as well as the police towards these communities has not changed post-Independence. The Habitual Offenders Act (HOA) and Prevention of Anti-Social Activity Act (PASA) contain the same draconian provisions as in the repealed Act. Indiscriminate detention, arrest without warrant, taking photographs and fingerprints of people belonging to De-notified tribes and custodial torture of the people continue in different parts of the country.[7]

[6]Ofelia Casillas, "*Familial DNA Testing Raises Privacy and Civil Rights Concerns*", availableat http://www.aclu-il.org/familial-dna-testing-raises-serious-privacy-and-civil-rights-concerns/ accessed on June 6, 2012.

[7]S. Viswanathan, "*Suspects forever: Members of the "denotified tribes*" continue to bear the brunt of police brutality," Frontline, Volume 19 - Issue 12, June 8-21, 2002, available at http://www.frontline.in/static/html/fl1912/19120450.htm ,accessed on 13-6-15.

Increasingly, the pending DNA legislation does not contain provisions to allow individuals to bring a private cause of action for the unlawful collection, use, or retention of Deoxyribonucleic acid (DNA). Under the legislation, the individuals do not have the right to access their own information stored on the database. These are significant gaps in the proposed legislation as it restricts the privacy rights of the individual.[8]

b. AADHAAR CARD OR UNIQUE IDENTIFICATION NUMBER IN THE ERA OF SNOWDEN'S DISCLOSURES ABOUT UNITED STATES INTELLIGENCE SECRET FILES

India has introduced biometric system in the form of *Aadhaar* card i.e. Unique Identification Number which would store an individual's photograph, fingerprints and iris prints. However, India lacks strong data protection laws. Questions like how this information is protected, how and for what purpose the data is processed, who has access to the data, how the information will be shared between government agencies, etc. are yet to be answered by the Indian government. The strong laws are also needed to redress issues like theft of biometric ID, misuse of data by third party, etc. India's planning to attach *aadhaar* card with every government service has also been halted by the Supreme Court of India. In 2015, the apex court again reiterated its earlier order given in 2013 and said that the *aadhaar* card is not mandatory and no person should be denied any benefits or suffer for not having aadhaar card. Despite the court's order, many of the government agencies insist upon aadhaar. The agencies usually ask for the aadhaar without mentioning the fact that it is optional. It misleads the Indian citizens, who afraid of being suffered. Therefore, nobody questions the government's action, especially in the remote villages. Moreover, the aadhar card should be seen in the light of the pending DNA profiling Bill, 2012.

Increasingly, the Unique Identification Number, demographic data and Biometric data including DNA databases will be attached with the National Population Register (NPR), which has to be maintained by the Registrar General and Census Commissioner of India, Ministry of Home Affairs under Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003.[9]

[8]Elonnai Hickok, *"Rethinking DNA Profiling in India,"* Economic & Political Weekly, Vol - XLVII No. 43, October 27, 2012. Available at http://www.epw.in/web-exclusives/rethinking-dna-profiling-india.html?ip_login_no_cache=31879a622b15edd79514f1053d813666accessed on December 20, 2012, at 1:00 p.m. IST.

[9]"*E-Governance Initiatives-Changing Lives for the better,"*PRESS INFORMATION BUREAU, 24-January, 2011 18:09 IST, available at http://pib.nic.in/newsite/erelease.aspx?relid=69324accessed on January 29, 2012.

It is also pertinent to note that the Unique Identification number (UID) Authority has selected three United States companies for making the whole *aadhaar* database without taking into consideration the fact that these United States companies can be forced by the United States government to provide them easy access to such database under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).[10]

c. CENTRALISED MONITORING SYSTEM

Indian government has set up Centralized Monitoring System to automate the process of lawful interception and monitoring of telecommunications. It has made the process of interception government friendly. All communications can be put on automatic surveillance mode under this system. The agencies that will have access to this system include Research and Analysis Wing (R&AW), Central Bureau of Investigation (CBI), National Investigation Agency (NIA), Central Board of Direct Taxes (CBDT), Narcotics Control Bureau, and the Enforcement Directorate (ED).

d. NATIONAL INTELLIGENCE GRID (NATGRID)

Indian government is also intending to launch the National Intelligence grid (NATGRID) for investigating the suspected cases of terrorism. It is an integrated intelligence network. It will connect and have access to different databases like railway and air travel, income tax, bank account details, credit card transactions, visa and immigration records, land records, internet logs, phone records, gun records, driving license, property records, insurance, etc. The database would be accessible to authorised persons from different lawful agencies.

e. DEFENCE RESEARCH AND DEVELOPMENT ORGANISATION (DRDO) AND NETRA (NETWORK TRAFFIC ANALYSIS)

It is again a software network designed to intercept internet communications. It has the ability to analyse voice traffic on Skype, Google talk, etc., and intercept messages containing specific keywords like 'bomb', 'blast', etc. Unmanned aerial vehicle or drone, which has been developed for monitoring anti-terrorist activities in India, has also given the same name i.e. Netra.

[10]"*How NSA hacks the whole world,"* http://www.frontline.in/cover-story/how-nsa-hacks-the-whole-world/article4849218.eceaccessed on August 29, 2013.

f. LAWFUL INTERCEPT AND MONITORING PROJECT

Lawful Intercept and Monitoring project is another surreptitious mass surveillance model, which is developed for intercepting records of voice, SMSs, GPRS data, etc. It further monitors emails, web history, and other online activities of the subscribers.

g. NATIONAL CYBER COORDINATION CENTRE

Indian government constituted expert group recommended to set up National Cyber Coordination Centre for effective execution of online cyber crime reporting, cybercrime monitoring, setting up of forensic units, capacity building of police, prosecutors & judicial officials, promotion of Research & Development, awareness creation etc.[11]

h. TELECOM ENFORCEMENT RESOURCE AND MONITORING (TERM) CELLS

TERM cells monitor the networks of telecom service providers in India. The cells perform vigilance, monitoring and security functions.[12] Besides, TERM Cells also operate the Central Monitoring System (CMS).

III. SIGNIFICANCE OF RIGHT TO PRIVACY

Privacy is an indispensable part of the human life since it fulfils the inner and outer contents of an individual. It ensures one's freedom of speech and expression, freedom of carrying any kind of idea, freedom of having dissent, freedom of association, freedom to remain anonymous, etc. Privacy also protects an individual's personal autonomy over his or her personal decisions including right to marry, to or not to procreate children, to have any kind of sexual orientation, etc. According to Alan F. Westin, the functions of privacy in democratic societies are: (a) personal autonomy (b) Emotional release (c) Self-evaluation and (d) Limited and Protected communication.[13] Alan F. Westin defines Privacy as the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.[14]Daniel J Solove says, "privacy harms affect the nature of society and impede individual activities that contribute to the greater

[11]National Cyber Crime Coordination Centre, PRESS INFORMATION BUREAU, Government of India, Ministry of Home Affairs, 23-December-2015 19:12 IST, http://pib.nic.in/newsite/PrintRelease.aspx?relid=133895.
[12]Telecom Enforcement, Resource and Monitoring (TERM) Cells, Department of Telecommunications, MINISTRY OF COMMUNICATIONS & INFORMATION TECHNOLOGY, http://www.dot.gov.in/term/term-security
[13]ALAN WESTIN, *PRIVACY AND FREEDOM*, 32 (1967). Ist Publishing New York.
[14]*Id.*, at 7.

social good.[15] Furthermore, he says, "privacy enhances social interaction on a variety of levels." A society without privacy, according to Solove, is a 'suffocating society.'[16]

Without privacy, the impact of unreasonable surveillance on human behaviour is catastrophic. Excessive surveillance involves serious psychological repercussions. Alan Westin says, "if surveillance does not provide necessary space to a person for his actions and thoughts, he would face certain schizophrenic implications".[17]

In the United States, YasirAfifi, a victim of warrantless search, experienced psychological torture. On mere suspicion, the innocent person was subjected to continuous surveillance. Yasir was warrantlessly monitored by GPS tracking device for many years. After being surveilled by the FBI, Yasir has now become extremely cautious. He has stopped meeting friends. He has stopped using Facebook except for playing a few games. He avoids conversations about politics or religion. He works at office with different name. He has stopped laughing at jokes. He spends most of the time with his family only. He is afraid of writing or posting anything on his social networking sites because he feels that he is still under continuous surveillance.[18]

IV. IMPLICATIONS OF EXCESSIVE SURVEILLANCE

Government's practice of collecting extensive amount of personal information on all individuals has the significant potential to violate individual's freedom of association, right to speak freely, right to speak anonymously and other privacy rights. It has been said that a powerful government can punish anyone at his own sweet will.[19] Roger Clarke argues that men in power do not want innovations, change, or dissidence because they feel afraid of doing any by change, and believe that risks need to be suppressed rather than managed. The progress of every society demands the protection of the individuals' feeling, ideas, dissents,

[15]Daniel J. Solove, *"A Taxonomy of Privacy*," University of Pennsylvania Law Review, Vol. 154, No. 3 (Jan., 2006), pp. 477-564 at 488. Available at http://www.jstor.org/stable/40041279 accessed on August 28, 2012, at 7:16 p.m. IST.
[16]Daniel J. Solove, *Understanding Privacy*, (2008). Quoted in DeCew, Judith, "Privacy", The Stanford Encyclopedia of Philosophy (Fall 2013 Edition), Edward N. Zalta (ed.), available at http://plato.stanford.edu/archives/fall2013/entries/privacy/ accessed on August 24, 2013, at 8:48 p.m. IST.
[17]ALAN WESTIN, *PRIVACY AND FREEDOM*, 58 (1967). Ist Publishing New York.
[18]Julia Angwin, *Dragnet Nation: A Quest for Privacy, Security, and Freedom in a World of Relentless Surveillance*, (2015). Reprint, St. Martin's Press.
[19]DANIEL J. SOLOVE, *THE DIGITAL PERSON*, 177 (2004). London: New York University Press.

expressions, articulation, etc.[20]For example, Edgar Hoover (First Director of the Federal Bureau of Investigation) used to blackmail the political dissenters by intercepting their communications.[21] Harry S Truman wrote during his presidency, "We want no Gestapo or secret police. Federal Bureau of Investigation (FBI) is tending in that direction. They are dabbling in sex-life scandals and plain blackmail… Edgar Hoover would give his right eye to take over, and all congressmen and senators are afraid of him." Moreover, for half a century, the Federal Bureau of Investigation (FBI) director waged war on homosexuals, black people and communists.[22] Glenn Greenwald said that the governments would always try to demonize the personality of the political dissenters or whistleblowers in order to distract the people's attention from the substantial matter. Evidently, the dissenters were maliciously prosecuted and discredited when the Pentagon papers relating to U.S.-Vietnam war revealed the negative face of the United States. Nixon White House officials broke the Daniel Ellsberg's psychoanalyst's office so that they could find anything important relating to the psyche of the Daniel Ellsberg. By doing so, they were intending to harm the reputation of the Daniel Ellsberg in the eyes of general public. Again, efforts were made in depicting both Bradley Manning and Julian Assange as mentally unstable outcasts with serious personality deficiencies.[23] More recently, the United States government tried to demonize the personality of Edward Snowden in order to distract people's attention from the substantial issue.[24]

In the contemporary social set up, private entities are in better position than public bodies in receiving individuals' personal information. But the public agencies have force of law to get easy access to those private databases. Service providers, internet intermediaries, other social networking sites, etc. are bound under law to provide individuals' personal information including the web history, Chat history, online purchases, etc., to the law enforcement agencies. Such information could decipher the individual's tastes, ideas, preferences, ideology, etc. It has been seen that, in general, people gets disturbed whenever they come to know certain unconcerned personal things about an individual like his or her sexual

[20]Roger Clarke, "*Dissidentity*," Identity in the Information Society Journal, 10.7, (2009), available at http://link.springer.com/article/10.1007/s12394-009-0013-7/fulltext.html,accessed on March 12, 2012.
[21]Mark Ellis, "*J. Edgar Hoover and the "Red Summer"* of 1919," Journal of American Studies, Vol. 28, No. 1, 39-59 (Apr., 1994), available at http://www.jstor.org/stable/27555783 accessed on March 12, 2012.
[22]Anthony Summers, "*The secret life of J Edgar Hoover*," The Observer, Sunday 1 January 2012, available at http://www.theguardian.com/film/2012/jan/01/j-edgar-hoover-secret-fbiaccessed on May 12, 2012.
[23]Glenn Greenwald, *"How Noam Chomsky is discussed: The more one dissents from political orthodoxies, the more the attacks focus on personality, style and character,"* THEGUARDIAN.COM, Saturday 23 March 2013, available at http://www.theguardian.com/commentisfree/2013/mar/23/noam-chomsky-guardian-personality, 2014. accessed on December 3, 2014.
[24]GLENN GREENWALD, *NO PLACE TO HIDE*, (2014). London: Hamish Hamilton.

orientation, sexual behavior, private behavior over morals, etc. They create an image in their own minds about the individual's whole personality, and declare him a guilty person while considering themselves as the real deciders of all morals. Paradoxically, such kind of people also carries the same impugned behavior in their own private zone. Therefore, it is quite possible that the government would try to make people uncomfortable by disclosing any private behavior of the dissenter or opponent, e.g. an individual's online activities done in his or her private zone could be publicized in a fraction of second. American law enforcement agencies are accused of exploiting the individuals' online sex chats or porn sites' visits or any other online surreptitious activity to spoil the reputation of the innocent suspects. Increasingly, political goons could join the ruling governments to frighten political opponents. They could suppress individuals' free speech and expression. Under such circumstances, individuals would feel hesitated in writing even a fair comment on the social networking sites or anywhere. Therefore, in such situations, a dissenter might feel an apprehension of being identified, and falsely prosecuted.

An innocent individual's online or offline personal information becomes more vulnerable in cases where some members of society take law into their own hands.

Following are some incidences, happened in India, where the mob took law into their hands and challenged the rule of law:

i. An individual was killed by the mob because he was suspected of having beef in his house.[25] Had he not been killed and got convicted under Cow Slaughter legislation, he would have been imprisoned for maximum 6 or 7 years.

ii. Members of a political party abused and persecuted two girls because they made a fair criticism comment on the leader of the party. Later on, girls were arrested by police for the online comment.[26]

iii. An individual was prosecuted under the law of sedition. The law enforcement agencies relied upon a video which was doctored one. The court released the accused

[25]"*Indian man lynched over beef rumours,"* BBC News, 30 September 2015, available at http://www.bbc.com/news/world-asia-india-34398433 accessed on 30 September 2015.
[26] "*Two Mumbai girls arrested for Facebook post against Bal Thackeray get bail*," India Today November 19, 2012 , available at http://indiatoday.intoday.in/story/2-mumbai-girls-in-jail-for-tweet-against-bal-thackeray/1/229846.html.

on bail. However, members of general public beaten up the individual and refused to believe in the criminal justice system.[27]

iv. Where people opt acts of violence without knowing the authenticity of any instigating videos or pictures.[28]

In 2011-2012, Adam Goldman and Matt Apuzzo of the Associated Press revealed that the New York Police Department along with the Central Intelligence Agency (CIA) had been targeting ethnic communities since 9/11 attacks. The department appoints undercover officers and informers, known as 'rakers' and 'mosque crawlers', to monitor daily lives of American Muslims even when there's no evidence of wrongdoing.[29]

These types of harms can inhibit individuals from associating with particular people and groups and from expressing their views, especially unpopular ones. This kind of inhibition is a central goal of Orwell's Big Brother. Although it certainly does not approach the same degree of oppressiveness as Big Brother, it reduces the robustness of dissent and weakens the vitality of our communication.[30]

Mass surveillance affects an individual's freedom of association severely. Past histories suggest that categorizing people by their associations is a favorite tactic of repressive regimes. The Stasi used to find anyone who was in association with West Germany. The Nazis were after the associations of the Jewish blood. The Iranians strictly scrutinize people who are related to the United States. The Chinese do not want any kind of dissidence, and therefore, punish political opponents.[31]

[27]"*The Kanhaiya Kumar case raises many troubling questions*," Hindustan Times Mar 03, 2016, available at http://www.hindustantimes.com/editorials/the-kanhaiya-kumar-case-raises-many-troubling-questions/story-Gd2R9NcQCliwsIMg5kxLNM.html.

[28]"*REVEALED: 'Fake video' that sparked riots in Muzaffarnagar originated in Pakistan*," Tarique Anwar, Dailybhaskar.com, Sep 10, 2013, available at http://daily.bhaskar.com/news/UP-fake-video-that-sparked-riots-in-muzaffarnagar-originated-in-pakistan-4369406-NOR.html accessed on september 13, 2013.

[29]Matt Apuzzo and Adam Goldman, "*With CIA help, NYPD moves covertly in Muslim areas*," Associated Press, Aug. 23, 2011, available at *http://www.ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas* accessed on June 15, 2015.

[30]DANIEL J. SOLOVE, *THE DIGITAL PERSON*, 177 (2004). London: New York University Press.

[31]JULIA ANGWIN, *DRAGNET NATION: A QUEST FOR PRIVACY, SECURITY, AND FREEDOM IN A WORLD OF RELENTLESS SURVEILLANCE*, (2015). Reprint, St. Martin's Press.

Foucault argued that spread of the idea of 'Panoptican', in the society, makes the governments more powerful. It is so because of the fact that people internalize the surveillance and behave in ways that conform to the requirements of power. In such process, people are constructed as subjects or objects for whom information is collected and collated. The individuals' personal information is utilized as per according to the requirements of power.[32]

The growing surveillance inevitably influences the behavior and value systems of the individuals. The person who finds he is not trusted tends to strike back by becoming indeed untrustworthy. A person, who knows that he is being continuously watched, electronically or otherwise, becomes cautious and careful in all of his activities.[33] In such conditions, a person struggles to develop his own ideas and thoughts. Ubiquitous surveillance would condition individual's mind as per according to the social requirements, irrespective of their validness.

Mass surveillance by the state is repressive, irrespective of its use or abuse. The limits it imposes on freedom are intrinsic to its existence.[34]

V. LEGAL PROTECTION TO THE RIGHT TO PRIVACY IN INDIA

In India, the Telegraph Act 1885 empowers the Central Government or the State Government or any authorized officer to intercept communication messages for the purpose of protecting the sovereignty and integrity of India, the security of the state, friendly relations with foreign state, Public order, or for preventing incitement to the commission of an offence. However, such power of intercepting communication is not an absolute one. Rule 419A of the Indian Telegraph Rules 1951 provides the procedural safeguard against the phone tapping.

Similarly, under the Information Technology Act 2000, the law enforcement agencies are authorised to intercept any computer communication when the interception is necessary in the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence. For such purposes, the agencies can compel intermediaries or any person in charge of computer resource to help them in decrypting the messages. But the whole

[32]MICHEL FOUCAULT, *DISCIPLINE AND PUNISH*, 24 (1977). Second Edition, Reprint, New York: Knopf Doubleday Publishing Group.
[33]VANCE PACKARD, *THE NAKED SOCIETY*, 11 (1964). New York: David McKay Co.
[34]GLENN GREENWALD, *NO PLACE TO HIDE*, (2014). London: Hamish Hamilton.

mechanism of interception is being regulated under the Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009.

However, the Information Technology Act is an incomplete code. The Act provides the limited protection to one's personal data, which is stored electronically. There are no regulations which would protect privacy of individuals for all personal information that may be available with private entities.[35]

The Constitution of India is the supreme law of the land. The Constitution of India contains the fundamental provisions to protect an individual from the government's surveillance powers. The State is bound to observe the basic principles of the Constitution while imposing any kind of restriction on an individual's freedom. The Preamble of the Indian Constitution assures the dignity to every individual. It also secures justice, liberty and, equality of status and of opportunity to all of Indian citizens. By securing one's liberty of thought, expression, belief, faith and worship, the Preamble recognizes individuals' personal autonomy and self-respect.

Principles of fairness, non-discrimination and non-arbitrariness, being the indispensable parts of Articles 14 (Right to Equality), 19 (Fundamental Freedoms) and 21 (Right to Life and Personal Liberty) of the Indian Constitution, protect human rights and fundamental freedoms, and regulate every government action. In fact, Indian judiciary has always taken the assistance of these principles to review arbitrary and discretionary powers. The Hon'ble Supreme Court of India, in its numerous decisions, has confirmed that the administrative authorities should always follow the concept of 'fairness' in its every action.

Article 21 protects an individual's right to life and personal liberty. Right to life does not mean mere animal existence but includes all those rights which are able to develop an individual's inner and outer contents.[36] Considering the sacred motives of Human Rights, the Indian judiciary has liberally interpreted the concept of Right to life and personal liberty and included the fundamental right to privacy within its ambit.

[35]*Shortcomings of Data Privacy Legislations in India: Some Observations and Suggestions made in the "Approach Paper for a Legislation on Privacy*," No. 17/1/2010-IR, available on the website of the Government of India, MINISTRY OF PERSONNEL, PG & PENSIONS, Department of Personnel Training. Available at *http://ccis.nic.in/WriteReadData/CircularPortal/D2/D02rti/aproach_paper.pdf* accessed on May 2, 2013 at 11:00 a.m. IST.

[36]*Maneka Gandhi* v. *Union ofIndia*, AIR 1978 SC 597.

In *Kharak Singh* v. *State of UP*,[37]it was alleged that the appellant was being harassed by the police domiciliary visits at night. The Supreme Court held that domiciliary visits were violation of right to life and personal liberty under Article 21 of the Indian Constitution.

In another case, *Govind* v. *State of M.P*,[38] in which Mathew, J. further developed the law on right to privacy. This case was also related to domiciliary visits. The Supreme Court laid down that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that acclaimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.[39] Similarly, the Hon'ble Supreme Court of India again ruled in*Malak Singh* v. *State of Punjab*[40], that while exercising surveillance over reputed bad characters, habitual offenders, and potential offenders the police should not encroach upon the privacy of a citizen.[41]

It was the Indian judiciary which considered phone tapping as a serious invasion of one's right to privacy. Such argument is based on the principle that the 'State' cannot impose unreasonable restrictions on one's right to life or personal liberty. In *People's Union for Civil Liberties* v. *Union of India,*[42] the Supreme Court held that wiretapping is a serious invasion of an individual's privacy. The court observed that telephonic conversation is a part of a man's private life. And certainly, right to privacy includes telephonic conversation in the privacy of one's home or office. Thus, telephone tapping under S. 5(2) of Telegraph Act, 1885 would violate an individual's right to privacy unless it is permitted under the reasonable procedure established by law. For this, the court laid down certain guidelines to regulate the government's action of wiretapping.

In *Selvi* v. *State of Karnataka*[43],the Supreme Court held that compulsory administration of any of the techniques, like narcoanalysis, polygraph examination and brain Electrical Activation Profile(BEAP) test, is an unjustified intrusion into the mental privacy of an

[37]*Kharak Singh* v. *State of UP* ,AIR 1963 SC 1295.
[38]*Govind* v. *State of M.P* ,1975 SCR (3) 946.
[39]*Id.,* at 953.
[40]*Malak Singh* v. *State of Punjab* ,AIR 1981 SC 760.
[41]*Id.,* at 323.
[42]*People's Union for Civil Liberties* v. *Union of India,* AIR 1997 SC 568.
[43]*Selvi* v. *State of Karnataka* ,2010(4) SCALE 690.

individual.[44] It was also recognized that forcible intrusion into a person's mental processes is also an affront to human dignity and liberty, often with grave and long-lasting consequences.[45]

The Hon'ble Supreme Court of India declared section 66A of the Information Technology Act, relating to the online offensive speech, unconstitutional since it gives unguided and uncontrolled powers to the law enforcement agencies in tackling offensive speeches online.[46]

In 2015, the government of India contended that right to privacy is not a part of fundamental right to life and personal liberty in India because the judgments recognising fundamental right to privacy in India have been delivered by the smaller benches and not by the larger bench of the Hon'ble Supreme Court of India. The government said that the earlier judgments, refusing to recognise fundamental right to privacy, have been delivered by eight and seven judges' benches. Considering it serious, the Supreme Court of India referred the matter relating to right to privacy to the larger bench. The court also ordered the government not to make aadhar card i.e. Unique Identification Number, mandatory. The whole matter is still pending before the apex court. However, the Indian government has passed the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Bill, 2016 and made the aadhaar card mandatory.

In the process of constitutional recognition to right to privacy, it is pertinent to note that the Indian Constitution empowers the Centre to legislate on privacy or data protection. Such competence has been granted under Article 246(1) of the Indian Constitution. Under the provision, the Parliament has power to make laws on matters enlisted in List I of the Seventh Schedule of the Constitution. Although the Centre list i.e. List I does not contain the entry regarding data protection laws or privacy laws, Entry 97 provides that the Parliament has the authority to legislate on any matter which has not enumerated in List II of the Seventh Schedule (the State List) and List III of the Seventh Schedule (the Concurrent List). In the absence of entries regarding specific data protection in the other lists, entry 97 grants the

[44] *Id*., at 783.
[45] *Id*., at 778.
[46] *Shreya Singhal*v. *Union of India*, Writ Petition (Criminal) No.167 Of 2012, decided on March 24, 2015.

Parliament the residuary powers to make laws on any matters in the national interest, including the power to legislate on 'right to privacy' and the data protection.[47]

In the present global world, the international bodies and foreign countries want India to make strong and effective data privacy laws.[48] Under Article 253 of the Indian Constitution, the Parliament has clear powers to make any law for implementing any international treaty or convention.

Currently, India is not Party to the Optional Protocol to the International Covenant on Civil and Political Rights. Again, India is not a signatory to the Organisation for Economic Co-operation and Development guidelines. However, India's obligations towards international bodies are being reflected from its ratification of the International Covenant on Civil and Political Rights on April 10, 1979 which obliges the member states to fulfill Article 17 i.e. provision of right to privacy.

Moreover, the Honorable Supreme Court of India in its many judgments have applied international law in the absence of any domestic law on the subject. In the case of *Vishaka*v. *State of Rajasthan,*[49]the Supreme Court said that the international conventions and norms should be read with the fundamental rights mentioned under Part III of the Indian Constitution, in the absence of enacted domestic law occupying the field when there is no inconsistency between them.[50]

Mass surveillance projects in India for intercepting communication messages are being regulated under the Information Technology (Amendment) Act, 2008 and Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009. However, such clandestine surveillance projects have been initiated without being properly debated.

[47]The Constitution of India, 1949, Entry 97 of List I provides, "Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."
[48]Phil Muncaster, " *EU Justice Department stalls India's security clearance Without a 'data secure destination' cert India's locked out of $30bn euro-sourcing market,"* The Register, 19th June 2013. Available at http://www.theregister.co.uk/2013/06/19/india_outsourcing_data_security_woes_eu/accessed July 20, 2013, at 1:00 p.m. IST.
[49]*Vishaka*v. *State of Rajasthan*, AIR 1997 SC 3011.
[50]*Id.*, at 3015.

A committee headed by Justice AP Shah published a report in October 2012, which dealt comprehensively with privacy laws across jurisdictions. The object of said report was to provide a set of recommendations on the right to privacy in light of expanding State and corporate surveillance capabilities in the digital age. The report identified nine National Privacy Principles that serve to establish safeguards and procedures over the collection, processing, storage, retention, access, disclosure, destruction, and anonymization of sensitive personal information, personal identifiable information, sharing, transfer, and identifiable information, along with the rights of the data subject in relation to such information.

The Privacy (Protection) Bill, 2013 has been drafted in order to protect the privacy of all persons and their personal data from Governments, public authorities, private entities and others, to set out conditions upon which surveillance of persons and interception and monitoring of communications may be conducted.

However, the Bill could not define the term 'informed consent' clearly. Where people are unaware of any implications of their data violation, they would hardly give the informed consent. The Bill does not possess any provision regulating closed circuit television cameras (CCTV). It also failed to mention any code of conduct for mobile camera users. No limitation has been prescribed on the use of technical capability of most advanced intrusive surveillance technologies. In Bill of 2013, the words 'public order' or 'preventing incitement to the commission of an offence' are still vague and broad in nature. It gives enormous authorization to law enforcement agencies to intercept anyone's communication without showing any probable cause. Moreover, the whole mechanism of interception of communication requires judicial cognizance. Unregulated surveillance is itself dangerous for our privacy rights.

VI. DISCUSSION

This exploration concludes that Modern Surveillance techniques are being used by the government agencies, in the absence of any strong and effective data privacy legislation, for those purposes which are broadly worded and are never defined such as 'security of state,' 'public order' and 'for prevention of any commission of crime.' After 9/11 U.S. and 26/11 Mumbai attacks, the whole world has seen drastic changes in the modes of government surveillance. The law enforcement agencies have attained the wide range of uncontrolled and unguided discretionary powers in case of preventing any commission of offence under the

National Investigation Agency Act 2008 read with Information Technology (Amendment) Act 2008 in India. India's mass surveillance project is based upon the Central Monitoring System Project, DRDO NETRA Defence Research and Development Organisation (Network Traffic Analysis), Lawful Intercept And Monitoring Project, National Cyber Coordination Centre (NCCC), Telecom Enforcement Resource and Monitoring Project, National Intelligence Grid or NATGRID, and *Aadhar* Biometric Identity Card. Surveillance technologies including Closed-Circuit Television cameras (CCTV), biometric devices, Deoxyribonucleic Acid (DNA) tests, Global Positioning System (GPS) and Radio Frequency Identification (RFID) devices, computer software applications or software agents, social networking sites and drones, have enabled the law enforcement agencies to access, collect and store unlimited amount of the individuals' personal information in a clandestine manner. It means that the government agencies' modern ways of collecting personal information about the individuals from telecom service providers, internet companies, social networking sites, app developers etc. are completely uncontrolled and untraceable, and the individuals are in no position to find out whether they are being watched or not, and for what purposes their personal information is being collected and used by the law enforcement agencies. Since the government agencies know that the extreme capabilities of the surveillance technologies would not let them be traced at any time while intercepting communication messages, they would not even bother to follow any procedural safeguards mentioned under the current legislations like Telegraph Act and Information Technology Act. It may allow the law enforcement agencies to conduct any number of suspicion less searches for all lawful and unlawful purposes. Therefore, impact and utility of new technologies are needed to be reconsidered through proper legislations as these have potential to invade our private lives.

Furthermore, the law enforcement agencies' clandestine mass surveillance projects without having strong and effective procedural safeguards are discriminatory, arbitrary, unaccountable and disproportionate in nature, especially when the past practices have shown that the governments had been accused of using surveillance techniques for political purposes, for demonizing the political dissidents, for imposing political ideology forcibly, for moral policing, for acting discriminatorily against the minorities, etc. David Kaye (US), special rapporteur on the protection and promotion of the right to freedom of opinion and expression, said that threats of mass surveillance include "attacks on free and independent media, including journalists and bloggers; attacks on political dissent and unpopular opinion; repression of civil society; attacks on the expression of members of vulnerable groups,

especially religious and ethnic minorities and persons who identify as lesbian, gay, bisexual or transgender (or LGBT); and widespread undermining of the right to seek, receive, and impart information online, regardless of frontiers."[51]

Mass surveillance has also failed to prevent terrorists' attacks. The recent decision, given by the U.S. Court, declared mass surveillance as unconstitutional. There is no justification in collecting huge amount of personal information on every individual. There is a strong need to avail individuals with privacy-enhancing technologies against the surreptitious uses of privacy-destroying technologies.

Increasingly, mass surveillance projects in India suggest as if all the traditional modes of surveillance have been failed. The law enforcement agencies are trying to investigate everything on internet communications. After studying terror attacks, Dr. Erik Dahl discovered that the traditional law enforcement tools have been most effective in stopping attacks. According to Dahl, Electronic surveillance like the NSA's metadata program have not proven to be effective in stopping domestic plots.[52]

It has become necessary that the India should adopt National privacy principles, which require notice, choice and consent, collection limitation, purpose limitation, access and correction, disclosure of information, security, openness, and accountability, in its data protection legislation as soon as possible. It is also suggested that the Data Privacy legislation in India should encourage a system of co-regulation through self regulating organizations (SROs). It should provide the adequate remedy in case of privacy violations. The law should prescribe the stringent punishments for privacy violations. Alternate Dispute Redressal mechanisms should be encouraged in the complaints against the private sector businesses. It would provide speedy justice to the victims of the privacy violations. For that matter, the Privacy Commissioner or special Courts should be constituted at different levels in India.

The principles of Constitutionalism require that the government's surveillance should be conducted reasonably and within defined limits. The courts in the United States have declared that mass surveillance is not in public interest, and does not even prevent or reduce terrorists'

[51]Quoted in William New, "*UN Expert Urges Encryption, Anonymity Online To Preserve Freedom Of Expression,*" Intellectual Property Watch, 18/06/2015, available at http://www.ip-watch.org/2015/06/18/un-expert-urges-encryption-anonymity-online-to-preserve-freedom-of-expression/ accessed on 19 June, 2015.
[52]ABOUT ERIK DAHL. Available at http://www.brennancenter.org/about-erik-dahl.

attacks. The extensive and surreptitious use of the surveillance technologies for the unclear or broad-worded purposes such as ‘security of state,’ ‘public order’, ‘for any crime prevention,’ etc., involves serious repercussions of violating the individuals’ right to privacy and other fundamental freedoms. The excessive collection of the individuals’ personal information is being done even without informing the individuals. The individuals are in no position to find out whether they are being watched or not. They are totally unaware about how their information is being processed and for what purposes it is being used. In the absence of an informed consent, an individual is compelled to lose control over his or her personal information and personal decisions.

Current mass surveillance projects using extreme capabilities of the modern surveillance technologies have raised serious issues. Such clandestine surveillance without having strong and effective privacy protected legislation is unconstitutional. It violates the individuals’ privacy rights including freedom of speech or expression, freedom of association, freedom of religion, right to live anonymously, right to be forgotten, etc. Existing legal framework is not sufficient if the government agencies use the surveillance technologies to act discriminatorily against the innocent individuals, political dissidents, marginalised population, religious minorities, gender minorities, etc. Considering the social, cultural, political and ethical aspects of our society, development of the law is needed in order to create a balance between the individuals’ right to privacy and the use of Emerging Surveillance Technologies by the Law Enforcement Agencies in India.

LEGAL CONTROL OF CATTLE GRAZING IN NIGERIA

Oladele Grace Abosede[*]

I. INTRODUCTION

Herdsmen have over the years enhanced the economy of Nigeria through the production of meat, dairy products and other useful products gotten from cattle. The main cattle rearing tribe in Nigeria is the Fulani tribe. They have sustained the production and sale of cow meat and its products across the country for many years.[1] Their style of cattle grazing is nomadic, which involves going from place to place in search of pasture and water for their cattle. They graze their cattle through thick bushes, farmlands in rural areas and even on fields in urban areas in search of rich pasture.[2]

Over the years this method of cattle grazing has led to clashes between Fulani herdsmen and farmers due to the destruction of planted crops by the cattle. In the 1960s, frequent clashes between Fulani herdsmen and farmers led to the enactment of a Grazing Reserve Law in 1965 in the Northern region and also the establishment of the National Livestock Development Project (NLDP) which developed grazing reserves in Nigeria. These grazing reserves were however poorly managed. And this forced the Fulani herdsmen back to nomadic cattle grazing method resulting in more conflicts between herdsmen and land owners.

In recent times, the Fulani grazing method has created serious conflicts and bloodshed than ever before. The herdsmen are now armed with sophisticated weapons and have become a terror to farmers and villagers. These herdsmen graze their cattle on cultivated farmlands, destroying valuable crops which are the mainstay of host communities. When confronted or told to leave, they put up a stiff resistance by shooting at the farmers and villagers. Sometimes the attacks are launched at night when the villagers are asleep and unlikely to get

[*] Lecturer, Private Law Department, Faculty of Law, Olabisi Onabanjo University, Ago-Iwoye, Ogun State, Nigeria.

[1]Olayoku P.A., *Trends and Patterns of Cattle Grazing and Rural Violence in Nigeria (2006 – 2014,)* (6 April 2016), *http://www.ifra-nigeria.org/IMG/pdf/cattle-grazing-rural-violence-nigeria.pdf* .

[2]Iro, I., *Grazing Reserve Development: A Panacea to the Intractable Strife Between Farmers and Herders*, (26 May 2016), *http://www.gamji.com/fulani8.htm* .

help, killing them, stealing and destroying their properties.[3]The Northern part of Nigeria is the worst hit particularly communities in Plateau, Nassarawa, Benue and Kogi States. Other affected States areTaraba, Borno, Jigawa, Kaduna,Ondo, Ekiti, Enugu and Anambra States.[4] To address this problem, Northerners in Nigeria are advocating for the establishment of grazing reserves and stock routes across the country. At the Senate Chamber of the National Assembly of Nigeria, there is currently a Bill for an Act to provide for the establishment, preservation and control of National Grazing Reserves and Stock Routes and the creation of National Grazing Reserve Commission and for purposes connected therewith, which was sponsored by a Northerner- Senator Zainab Kure from Niger State.[5] This agitation is obviously without proper consideration of the past failures of established grazing reserves, the peculiarities of our political and cultural/tribal system and it's ability to destroy the fragile peace existing in the country.

This paper examines the activities of cattle grazing in Nigeria and the incidences of clashes between Fulani herdsmen and land owners. It considers the evolution of grazing reserves, their management and the problems associated with the use of grazing reserves in Nigeria. This paper concludes with recommendations on the appropriate model of cattle grazing which is in line with best practices in developed countries using the grazing system in the United States of America as a model.

II. HISTORICAL BACKGROUND AND TRENDS OF CATTLE GRAZING BY THE FULANIS IN NIGERIA

The Fulanis originate from Senegambia[6]. They are spread across West Africa, the Sahel, Western Sudan and the Central African Republic[7]. The Fulanis integrated into the Hausa ethnic group in Northern Nigeria after the Uthman Dan Fodio Jihad.[8] Their main occupation is livestock production.

[3](28 May 2016), https://www.change.org/p/the-federal-govt-of-nigeria-tell-the-fulanis-and-others-to-ranch-their-cattle/u/13830107.
[4]Ochonu M.E., *The Fulani Herdsmen Threat To Nigeria's Fragile Unity* ,(28 May, 2016), *http://saharareporters.com/2016/03/08/fulani-herdsmen-threat-nigeria%E2%80%99s-fragile-unity-moses-e-ochonu*.
[5] "A Bill for an Act to provide for the establishment, preservation and control of National Grazing Reserves and Stock Routes and the creation of National Grazing Reserve Commission and for purposes connected therewith", *http://nass.gov.ng/document/download/879*, (28 May 2016).
[6] "Fulani herdsmen", (accessed 25 August 2016), *http://buzznigeria.com/news/fulani-herdsmen*.
[7]Olayoku, P.A., *Trends and patterns of cattle grazing and rural violence in Nigeria (2006 – 2014*) *Supra* note 1.
[8] "Fulani herdsmen" *Supra* note 6.

In Nigeria, they are the mainstay of cow meat and dairy products, rearing different species of cattle such as the *Keteku, Muturu,Kuri,* and *Zebu*.[9]They also supply skins, bones and horns, all gotten from cattle. They engage in nomadic cattle rearing method which involves moving from one place to another depending mainly on the availability of pasture and water for their cattle.

In the Northern part of Nigeria, during the dry season, there is limited water and pasture for cattle to drink and feed on. At such times, Fulani herdsmen move to other parts of the country in search of pasture and water for their cattle. They graze their cattle in the bushes and on farmlands, thereby destroying planted crops. This has led to repeated clashes and violence between the herdsmen and farmers.[10]

During the rainy season, the herdsmen return to the north with their cattle. However, with time, they no longer returned to the north during rainy season, they settled in comfortable and accessible communities. The reasons for settling in such communities include- (1) a healthy environment for rearing livestock (2) availability of sufficient forage, rich pasture and water for the herds all through the year; (3) ease of herding on cleared land and (4) available market for the sale of cattle and other dairy products.[11]

In time past, the host communities allowed the herdsmen to live among them and graze their cattle. The relationship between herdsmen and members of the host communities was cordial until the cattle began to eat up planted crops and destroy cultivated farm lands. The farmers resist the Fulani herdsmen, insisting they stop grazing on their farmland. In reaction, the herdsmen, usually armed with weapons such as guns, shoot at the farmers, killing and injuring them. The herdsmen also attack the surrounding villages, destroying lives and properties.[12]

There are several reported incidences of violent clashes between Fulani herdsmen and farmers.[13]Affected States include- Taraba, Nasarawa Benue, Borno, Jigawa, Kaduna, Delta,

[9]*Supra* note 1.
[10]*http://www.premiumtimesng.com/news/headlines/199447-agatu-massacre-nigeria-deploys-troops-ban-cattle-villages-cities.html* . (last accessed 26 May 2016).
[11]*Supra* note 1.
[12]*https://www.change.org/p/the-federal-govt-of-nigeria-tell-the-fulanis-and-others-to-ranch-their-cattle/u/13830107*, (accessed 6 April 2016).
[13]*Ibid*

Enugu, Cross River and Ogun States and also Abuja (Federal Capital Territory).[14]For years there has been serious conflicts arising from the grazing of cattle on farmlands which has led to the death of many people and destruction of properties. In the year 2016 alone, there has been series of such conflicts. In January 2016, Fulani herdsmen killed 30 people in Adamawa State, including a Divisional Police Officer.[15]In March 2016, Fulani herdsmen massacred 300 people in several Agatu villages in Benue State, burning down houses, food barns, and churches, displacing thousands of Agatu people.[16] In April 2016, about 40 people were killed by Fulani herdsmen at Nimbo in Uzo- Uwani Local Government Area of Enugu State.[17] Also in April year 2016, the former secretary to the Federal Government, Chief OluFalae was kidnapped by Fulani herdsmen on his farmland in Akure, Ondo State.[18] He was however released after 72 hours. Kidnapping violates the right to liberty and security of persons under section 35(1) of the Constitution of the Federal Republic of Nigeria and article 6 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act of Nigeria.[19]

In June 2016, Fulani herdsmen attacked four Benue communities killing over 26 people, injuring many others and destroying properties. In August 2016, Muslim Fulani herdsmen attacked Christian villages in Kaduna State, killing about 13 Christians.[20] These attacks violate the right to life under section 33(1) of the Constitution of the Federal Republic of Nigeria[21] and article 4 of the African Charter on Human and Peoples' Rights (Ratification and

[14]*Supra* note 4.
[15]"One, two, many: Nigerian Fulani herdsmen among the five deadliest terrorist groups in the world" *http://venturesafrica.com/terror-groups-one-two-many-nigerian-fulani-herdsmen-are-one-of-five-deadliest-terror-groups-in-the-world/,* (accessed 26 May 2016).
[16]*Supra* note 4.
[17]Vanguard, "*Bloodbath in Enugu as Fulani herdsmen kill 40*", (April 26, 2016), *http://www.vanguardngr.com/2016/04/bloodbath-enugu-fulani-herdsmen-kill-40/.*
[18]Vanguard *"Again! Fulani herdsmen invade Falae's farm, kill security guard", (19 August 2016) www.vanguardngr.com › News.*
[19]African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A9 Laws of the Federation of Nigeria 2004, Article 6 thereof provides that every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.
[20]"At least 13 Christians Killed in Muslim Fulani Herdsmen Attacks in Kaduna State, Nigeria", (19 August 2016), *http://morningstarnews.org/2016/08/at-least-13-christians-killed-in-muslim-fulani-herdsmen-attacks-in-kaduna-state-nigeria/.*
[21]Constitution of the Federal Republic of Nigeria Cap. C23 Laws of the Federation of Nigeria 2004 (as amended), Section 33(1) thereof provides that (1) every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

Enforcement) Act of Nigeria.[22]The attacks also constitute offences under the Criminal Code Act applicable in the Southern part of Nigeria and Penal Code applicable in the Northern part of Nigeria.

Under the Criminal Code Act, violent attacks carried out by Fulani herdsmen constitute the offence of (1) assault under sections 252 and section 253 punishable with an imprisonment term of three years under section 355 of the Criminal Code Act; (2) wounding under section 338 punishable with imprisonment term of three years. Where the herdsmen kill people, the offence committed is murder under sections 306, 308, 315, 316 and 320 of the Criminal Code Act and punishable with a death sentence under section 319(1) of the Act.[23] An attempt to commit murder constitutes an offence under section 320of the Criminal Code Act punishable with imprisonment for life.

Under the Penal Code, the attacks constitute the offence of hurt under sections 240 241 and 242 of the Penal Code. Where grievous hurt is carried using a weapon or harmful thing, as it is done by the Fulani herdsmen, the punishment is a maximum of fourteen years imprisonment term and a fine under section 248(2) of the Penal Code. Killing a human being constitutes the offence of murder under sections 220 punishable with death under section 221 of the Penal Code.

Apart from grazing on cultivated farmlands in rural areas, Fulani herdsmen also graze their cattle in urban areas- on school playground vegetation, golf courses, residential areas and railway sidings thereby obstructing traffic flow, endangering street users, and causing urban congestion. These animals litter the ground with faeces which attracts flies and produce stench, making the environment unhealthy posing health challenges to host communities.[24] This violates the right to health under article 16 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act[25] and right to live in a generally

[22]African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act *op cit* note 19, Article 4 thereof provides that human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

[23]Criminal Code Act Cap. C38 Laws of the Federation of Nigeria 2004, Section 314 thereof provides that a person is deemed to have killed another if the death of that other person takes places within a year and a day of the cause of death. Such period is reckoned to include the day on which the last unlawful act contributing to the cause of death was done.

[24]*Supra* note 2.

[25]African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*op cit* note 19, Article 16 thereof provides that (1) every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

satisfactory environment favourable to human development under article 24 of the same Act.[26]

Nomadic cattle grazing has also threatened the peace and security of Nigeria. Some herdsmen cross national boundaries, from Chad, Republic of Niger and Republic of Benin into Nigeria, thereby undermining our national security. Arms and ammunitions are moved in and around the country by the herdsmen without detection and used against farmers and community members. Some of these herdsmen are reported to be members of the Boko Haram terrorist group, hiding under the guise of being herdsmen and perpetrating their evil acts.[27]

III. CATTLE GRAZING AND THE DEVELOPMENT OF GRAZING RESERVES IN NIGERIA

Cattle grazing in Nigeria is mainly nomadic. Herdsmen graze their cattle by moving from one place to another in search of pasture and water for their cattle. However, efforts were made by the government in the 1960s to establish grazing reserves and stock routes where herdsmen can graze and produce livestock by paying a fee. A grazing reserve is an area of land protected by law, on which range resources are exclusively reserved for livestock.[28] The land is acquired and developed by the government and released to herdsmen.[29] The aims of establishing grazing reserves are- to produce and protect pasture-space for herds, boost livestock population, reduce the difficulties associated with herding, and enhance peaceful interaction among farmers, herdsmen and rural dwellers.[30]

The establishment of grazing reserve began in the early 1960s, when the government of the then Northern region of Nigeria established the Zamfara, RumaKukarJangarai, Wase and Udubo Reserves.[31]These reserves were established with the Financial and Technical support

[26]*Ibid*, Article 24 thereof provides that all peoples shall have the right to a general satisfactory environment favourable to their development.
[27]Vanguard, "Fulani Herdsmen Confess to Membership of Boko Haram", (25 August 2016), *http://www.vanguardngr.com/2014/04/fulani-herdsmen-confess-membership-boko-haram/*.
[28]Federal Ministry Of Agriculture And Rural Development, Kaduna, "*National Livestock Development Project's Position Paper On "Bill For An Act To Provide For The Establishment, Preservation And Control Of National Grazing Reserves And Stock Route And The Creation Of National Grazing Reserves Commission And For Purposes Connected Therewith***"** submitted at a Public Hearing on Wednesday on 3rd July, 2013<*https://ah4fs.wordpress.com/2013/09/04/national-livestock-development-projects-position-paper-on-bill-for-an-act-to-provide-for-the-establishment-preservation-and-control-of-national-grazing-reserves-and-stock-route-and/*, (6 May 2016).
[29]*Supra* note 2.
[30]*Ibid*.
[31]Federal Ministry Of Agriculture And Rural Development, Kaduna, "*National Livestock Development Project's Position Paper On "Bill For An Act To Provide For The Establishment, Preservation And Control Of National Grazing Reserves And Stock Route And The Creation Of National Grazing Reserves Commission And For Purposes Connected Therewith***"** *op cit* note 28.

of the United States Agency for International Development (USAID).[32]Basic Infrastructure were provided including watering facilities, pasture, veterinary clinic, milk collection centers etc were developed at the reserves. The reserves attracted many pastoral Fulanis, leading to overcrowding and this strained the reserves' infrastructure and facilities.

In 1965, a Gazing Law was enacted by the Northern Nigeria Legislative Assembly which gave legal backing to the existing reserves.[33]The Federal Ministry of Agriculture also initiated the National Livestock Development Project (NLDP).[34]Later on when States were created from Regions, management of the reserves were taken over by the respective States where the reserves were situated.[35]The management of the reserves was however, affected by the Civil War from 1966 to1970.[36]

In 1975, USAID withdrew it's financial and technical assistance and this caused a collapse of the facilities in the reserves.[37] The dams and fences broke down. The implements rusted and roads were washed away. The school meant for the children of the herdsmen wasclosed. This forced the Fulani herdsmen in the grazing reserves to revert back to their nomadic cattle grazing method.[38]

In 1976, the Federal Government implemented the first and second phases of the National Livestock Development Project. During the First phase, six new grazing reserves were established namely, Udubo, Guyaku, KukarJangarai, Kachia, GidanMagajiya and Soraureserves located in Bauchi, Adamawa, Katsina, Kaduna, Kwara and Borno States respectively.[39] During the Second phase- from 1985 to 1995, more grazing reserves were established in the following locations - Bobi (Niger State), Abejukolo (Kogi State), Gayan (Kaduna State), Iri (Niger State), Keana and Awa (Nassarawa State), KimbaRitawa (Borno State), Lata (Kwara State) and Augie (Kebbi State).[40] Activities carried out on the reserves were: (1) retracing and demarcation of grazing reserves boundaries; (2) provision of

[32]*Ibid*.
[33]*Ibid*.
[34]Jibrin, I., *"Pastoralist Transhumance and Rural Banditry", (25 May 2016), http://www.premiumtimesng.com/opinion/157305-pastoralist-transhumance-rural-banditry-jibrin-ibrahim.html*.
[35]Federal Ministry of Agriculture And Rural Development, Kaduna, "*National Livestock Development Project's Position Paper on "Bill For An Act To Provide For The Establishment, Preservation And Control Of National Grazing Reserves And Stock Route And The Creation Of National Grazing Reserves Commission And For Purposes Connected Therewith***"** *op cit* note 28.
[36]*Ibid*.
[37]*Supra* note 2.
[38]*Ibid*.
[39]*Supra* 28.
[40]*Ibid*.

infrastructural facilities such as earth dams, boreholes, fire traces, network of access roads (3) pasture development using improved indigenous and exotic species of grasses and legumes; (4) provision of livestock production inputs such as salt lick, supplementary feed and veterinary drugs; (5) introduction of modern livestock production techniques through extension delivery; (6) provision of settlement for herdsmen in Kachia, GidanMagajiya, Sorau, Guyaku and Bobi grazing reserves.

In 1992, the Federal Government identified twenty-eight million hectares of land suitable for the establishment of grazing reserve. However, only about 600,000 hectares of these lands were gazetted,[41] and just 225,000 hectares were fully established. The reserves were only able to host 350 out of the projected 950 pastoral families and only 11,600 of the planned 46,000 cattle could graze on the reserves, thereby shattering the hopes of enthusiastic herdsmen willing to quit nomadic cattle grazing for organized grazing on grazing reserves.[42]Presently, most herdsmen are nomadic in grazing their cattle.

In spite all these failures, there is a fresh move by Northerners for the establishment of new grazing reserves. This is backed by the Bill on the establishment of grazing reserves and stock routes in Nigeria sponsored by Senator Zainab Kure (from Niger State in the Northern part of Nigeria) at the National Assembly. The Bill empowers the National Grazing Reserve Commission (established under the Bill) to acquire land anywhere in Nigeria (through purchase, assignment or any means whatsoever) for the creation of grazing reserves and stock routes across the country. A stock route is a land corridor established solely for the movement of livestock to and from grazing, watering points and markets.[43]This implies that government can take over anyone's land at anytime and anywhere in the country, if it is considered suitable for use as grazing reserve or stock route whether or not it is being productively used by the person. In addition, if Fulani herdsmen who now terrorize other Nigerians are allowed to legally occupy land across the country, they would render greater havoc. Terrorism and other forms of insurgency will be rife, as terrorists and insurgents would have a hiding place.

Clearly, the Federal Government of Nigeria has failed in its effort to develop and maintain grazing reserves in the past. Thus, the agitation for the establishment of new grazing reserves and stock routes across the country by Northerners is unfounded, unjustifiable and unwise

[41]*Supra* note 2.
[42]*Ibid.*
[43]*Supra* note 28.

considering the poor management of previous ones. Development of grazing reserves in Nigeria, has so far failed and there is no positive indication that it would work bearing in mind the state of economic recession the country is in at the moment. Building new grazing reserves is a costly venture which would further deplete the already low revenue of the nation. The Federal and State Governments are presently short of revenue due to a fall in the price of crude oil[44] and worse still some State Governments are unable to meet up with their financial obligations (including payment of workers' salaries),[45]hence release of adequate funds for the development of grazing reserves is completely impracticable. The situation is further complicated by the fact that members of the Boko Haram terrorist group now pretend to be herdsmen, in order to perpetrate their evil acts.[46]This development indicates that grazing reserves will simply constitute hide outs for terrorists and other insurgents, thereby constituting security risk to host communities and the country at large.

It is suggested that rather than venturing into a failed measure, the Federal Government of Nigeria should research into what obtains in developed countries such as the United States of America, in terms of cattle and livestock production and development methods. In the United States of America, cattle grazing is carried out on rangelands existing in sixteen States and not across the whole country.[47]

IV. CATTLE GRAZING IN THE UNITED STATES OF AMERICA

In the United States of America (USA), cattle grazing is carried out on range lands. A rangeland is a land area used primarily for raising and grazing livestock.[48]Prior to 1934, cattle grazing was unregulated in the United States and this caused tremendous damage to soil, plants, streams and springs.[49] However, in 1934, Taylor Grazing Act was enacted to regulate livestock grazing on public lands.[50] The Act was passed in order to eliminate nomadic

[44] The Guardian*, "Nigeria: FG Suffers Revenue Shortfall of N423 Billion to Low Oil Prices, Pipeline Vandalism*", (21 August 2016), http://allafrica.com/stories/201607280606.html.

[45]Punch, *"No Bailout for States, says Finance Minister",* (August 6, 2016*),* http://punchng.com/no-bailout-states-says-finance-minister/.

[46]Vanguard, "Fulani Herdsmen Confess to Membership of Boko Haram" available at<*http://www.vanguardngr.com/2014/04/fulani-herdsmen-confess-membership-boko-haram/*> (last accessed 25 August 2016).

[47] Public Rangelands Improvement Act 1978 available at<*https://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1803.pdf*>(accessed 21 September 2016), Section 3(a) and 3(i) thereof.

[48]*Ibid*, Section 3(a) thereof.

[49] U.S. Department of the Interior, "Fact Sheet on the BLM's Management of Livestock Grazing" available at<*http://www.blm.gov/wo/st/en/prog/grazing.html*> (accessed 21 August 2016).

[50]Taylor Grazing Act enacted on 28 June 1934, available on <*http://legisworks.org/sal/48/stats/STATUTE-48-Pg1269.pdf*> (accessed 20 August 2016).

herding and indiscriminate grazing of livestock. It has since been amended a number of times. The Act authorizes the Secretary of Interior to divide public lands into grazing districts excluding Alaska, national forests, national parks and monuments, Indian reservations, reverted Oregon and California Railroad grant lands, or reverted Coos Bay Wagon Road grant lands.[51]The first grazing district was Wyoming Grazing District Number 1 created on23 March, 1935.[52]Section 2 of the Act empowers the Secretary of interior to regulate the occupancy and use of grazing districts and to preserve them from destruction or unnecessary injury, and to also provide for the orderly use, improvement, and development of the districts. Section 3 of the Act empowers the Secretary of Interior to issue permits for grazing livestock on grazing districts to settlers, residents, and other stock owners or business entities, upon the payment of annual fees which is subject to modification from time to time. Such people must however be citizens of the United States or business entities or associations authorized to conduct business in the United States in the area in which the grazing district is located. The permit is valid for a period of ten years subject to renewal. The Act permits the building of fences, wells, reservoirs, and other improvements necessary for the care and management of livestock by the users.[53]

Some years later, the Division of Grazing was established under the Department of Interior by the Secretary.[54]This division later became the United States Grazing Service. In 1946, the Grazing Service was merged with the General Land Office to become the Bureau of Land Management which now manages grazing districts under the authority of the Secretary of interior.[55] Violation of the provisions of the Taylor Grazing Act is punishable by a fine.[56]

The powers of the Bureau of Land Management were further strengthened through the enactment of the Federal Land Policy and Management Act in 1976under Title 43 of the United States Code.[57]Section 301(b) of the Act provides that subject to the discretion granted to the Secretary of Interior by Reorganization Plan Numbered 3 of 1950 (43 U.S.C. 1451), he shall carry out through the Bureau, all functions, powers, and duties vested in him and relating to the administration of laws which were carried out by him through the Bureau

[51]*Ibid*, Section 1 thereof.
[52] U.S. Department of the Interior, "Fact Sheet on the BLM's Management of Livestock Grazing" available at<*http://www.blm.gov/wo/st/en/prog/grazing.html*> (accessed 21 August 2016).
[53] Taylor Grazing Act 1934, *op cit* note 51, Section 4 thereof.
[54]U.S. Department of the Interior, "Fact Sheet on the BLM's Management of Livestock Grazing"*op cit* note53.
[55]*Ibid*.
[56]Taylor Grazing Act 1934, *op cit*note 51, Section 2 thereof.
[57]Federal Land Policy and Management Act (as amended) was originally enacted on 21 October 1976, available at <*http://www.blm.gov/or/regulations/files/*FLPMA.pdf> (accessed 30 August 2016).

of Land Management established by section 403 of Reorganization Plan Numbered 3 of 1946.

The Act mandates that public lands must remain under federal ownership.[58]The Act defines public lands as any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, except– (1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts, and Eskimos.[59]

The Act provides that public lands must be managed in line with the principles of multiple use and sustained yield.[60]It defines "multiple use" as the management of public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people.[61]The term "sustained yield" is defined as the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use principle.[62]Any person who knowingly and willfully violates the provisions of the Act will be punished with a fine of not more than $1,000 or imprisoned for not more than twelve months, or both.[63]Also, at the request of the Secretary of Interior, the Attorney General may institute a civil action in any United States district court for an injunction or other appropriate order to prevent any person from utilizing public lands in violation of regulations issued by the Secretary under the Federal Land Policy and Management Act.[64]

A similar provision on the issue of permits under the Taylor Grazing Act 1934, exists under section 402(a) of the Federal Land Policy and Management Act. Section 402(a) of the Federal Land Policy and Management Act provides that the Secretary of interior has the power to issue permit and lease to any person who wishes to use public land for the purpose of grazing livestock for a period of 10 years subject to such terms and conditions the

[58]*Ibid*, section 102(a)(1) thereof.
[59]*Ibid*, section 103(e).
[60]*Ibid*, Section 102(a)(7).
[61]*Ibid*, section 103(c).
[62]*Ibid*, section 103(h).
[63]*Ibid*, Section 303(a).
[64]*Ibid*, Section 303(b).

Secretary deems appropriate and consistent with the governing law.[65] The Act empowers the Secretary of Interior to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.[66]Whenever a permit or lease for grazing livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, the permittee or lessee must receive reasonable compensation from the United States Government.[67]Cattle owners on the rangeland are expected to monitor the condition of their cattle regularly for early detection and treatment of cattle disease, which may threaten the health of both cattle and human beings.[68]Bureau of Land Management's overall objective is to ensure the long-term health and productivity of grazing land and also maintain environmental standards.[69]

Bureau of Land Management charges federal grazing fee which is calculated using a formula set out in the Public Rangelands Improvement Act of 1978 (as amended by Presidential Executive Order of 1986).[70]The initial grazing fee under the Act was a minimum of $1.23 per AUM which was for the grazing years of 1979 to 1985.[71] This was amended by an Executive Order on 14 February 1986, to a minimum of $1.35 per AUM which is still the amount charged.[72]An increase or decrease in the grazing fee is allowed but it must not exceed 25 percent of the previous year's fee.[73] AUM is the amount of forage is the amount of forage used by an adult sheep, cow, bull, steer, heifer, horse, or mule in a month.[74]The grazing fee for the year 2016 is $2.11 per AUM, while that of the year 2015 was $1.69.[75]The Federal grazing fee is adjusted annually based on three factors, which are-(1) the rental charge for

[65]*Ibid*, Section 402(a).
[66]*Ibid*, Section 402(a).
[67]*Ibid*, Section 402(g).
[68] Wikipedia, "Beef Cattle" available at <*https://en.wikipedia.org/wiki/Beef_cattle*> (accessed 21 August 2016).
[69] U.S. Department of the Interior, "Fact Sheet on the BLM's Management of Livestock Grazing" *op cit* note 53.
[70]Public Rangelands Improvement Act 1978 (as amended), Section 6(a) thereof, available at <*https://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg1803.pdf*> (accessed 21 September 2016). sect
[71]*Ibid*.
[72]Carol Hardy Vincent, "Grazing Fees: Overview and Issues" available at <*https://www.fas.org/sgp/crs/misc/RS21232.pdf*> (accessed 26 September 2016).
[73]*Ibid*.
[74]Bureau of Land Management, "Animal Unit Months" available at <*http://www.blm.gov/nv/st/en/prog/grazing/animal_unit_months.html*> (accessed 30 August 2016).
[75] U.S. Department of the Interior, "Fact Sheet on the BLM's Management of Livestock Grazing" *op cit* note 53.

pasturing cattle on private rangelands, (2) the sales price of beef cattle, and (3) the cost of livestock production.[76]

The collected fees are divided among the Treasury, States, and federal agencies.[77] In 2012, a Bill was introduced to amend the Public Rangelands Improvement Act 1978 to establish new criteria for calculating the fees charged for grazing livestock on public rangelands.[78]The proposed amendment Bill states that grazing fees must set the fee at a level that is comparable to the rate charged by private landowners in the area or region in which the public range land is situated.[79]

V. CONCLUSION

Nomadic cattle grazing system is an age long practice in Nigeria, however, with modernization, population increase and expansion of agricultural production, this technique of cattle rearing is no longer acceptable. It has given rise to series of conflicts between herdsmen and farmers and other land owners. Establishment of grazing reserves which was supposed to be a panacea to the problems of nomadic cattle grazing, failed to effectively address the problem. Rather, it has forced herdsmen into cattle grazing accompanied by violence, leading to bloody attacks on farmers, and villagers.

There is therefore an urgent need for the Federal Government of Nigeria to fashion out a solution framework that would put an end to the problem of nomadic cattle grazing and its attendant conflicts in Nigeria. Such measures should however, create a lasting solution to the problem and not further complicate issues. A way out is to consider and adopt cattle raising techniques available in developed countries such as the United States of America.

VI. RECOMMENDATIONS

It is suggested that Federal Government of Nigeria should adopt cattle grazing and livestock production methods used in the United States of America by creating grazing reserves in the Northern part of Nigeria on lands suitable for livestock grazing. Establishing grazing reserves and stock routes across the country is not the solution to nomadic cattle grazing in Nigeria. If this is done stiff resistance will be put up by Southerners (who are already grieved by the

[76]*Ibid*.
[77]Carol Hardy Vincent, "Grazing Fees: Overview and Issues"*op cit* note 73.
[78] "A Bill to amend the Public Rangelands Improvement Act of 1978 to establish criteria for the rate of fees charged for grazing private livestock on public rangelands", available at <*https://www.congress.gov/bill/112th-congress/senate-bill/3374/text*> (accessed 21 September 2016).
[79]*Ibid*, Section 1 thereof.

violent attacks from Fulanis herdsmen) and these will further create crisis and instability in the country. Since Fulani herdsmen are from the northern part of Nigeria and previous grazing reserves exist in the north with large expanse of land, the Federal Government should resuscitate and adequately equip existing reserves and issue permits and lease to interested herdsmen for a fee which would be subject to periodic review. Such land should have terms and conditions attached to their use and these must be complied with. Non-compliance, should lead to a revocation of the permit or lease. Grazing land should be located in the outskirts, particularly rural areas and the lands must be situated on rich soil and in an environment conducive for grazing livestock and growing rich forage. Modern methods of growing rich forage suitable for livestock grazing should be used. High and proper environmental standards should be maintained and enforced on the grazing reserves.

Before leasing out grazing land, proper investigation should be carried out about the intending lessee so that land is not leased to terrorist groups or other criminal gangs, pretending to be herdsmen, who want to use the property as a hide out. All these measures should be backed by effective and enforceable legislation.

On the other hand, herdsmen may acquire land suitable for cattle grazing and production with proper maintenance. Such herdsmen should employ modern techniques of growing rich and adequate forage, providing good and sufficient water and proper healthcare for their cattle. These should be backed by effective and enforceable legislation there should be proper monitoring by relevant government officials to ensure full compliance.

Government should give credit facilities to genuine herdsmen who wish to acquire grazing land for the purpose of cattle production. This will help them meet up to the expected standards. Also, Government should adequately compensate people whose lands were compulsorily acquired for the purpose of establishing grazing reserves.

All footpaths leading in and out of Nigeria should be manned by well-armed and properly trained law enforcement agents, so that nomadic herdsmen from neighbouring countries do not freely cross into Nigeria with their herds.

TACKLING GENDER-BASED VIOLENCE IN THE AGRICULTURAL SECTOR: THE SUCCESS OF THE FAIR FOOD PROGRAMME

Justin Jos[*]

I. INTRODUCTION

This article argues that the state of female immigrant farmworkers has changed drastically due to the endorsement of campaign for fair food by the workers and corporations. The deplorable conditions of the immigrant farmworker women in Immokalee was not widely documented amongst scholars and this article endeavours to review how the Coalition of Immokalee workers created a successful mechanism in order to tackle sexual harassment on the agricultural fields. Part I of the article provides an insight into the depth of the problem of sexual harassment on the fields which was faced by immigrant agricultural women workers. This part provides a comprehensive overview of the problem of sexual harassment on the agricultural fields and how the brunt of sexual harassment became the norm. Part II of the article details as to how the Fair Food Program (hereinafter FFP), which grew out of the Coalition of Immokalee Workers' (hereinafter CIW) Campaign for Fair Food, helped these vulnerable women as well as other immigrant agricultural workers to overcome the gender based harassment on the agricultural fields. This part will analyse the different mechanism through which the businesses contributed to promoting zero tolerance policies on sexual harassment thereby making FFP, one of the most successful business-human rights achievement. Part III is a case study of an international food chain called Wendy's and their rejection to join the FFP. This case study will detail the official response from Wendy's as to why they declined joining the FFP and then analyse how Wendy's Code of Conduct to Suppliers is at best 'aspirational' and lacks cogent framework regarding sexual harassment.

The model of FFP received recognition from several sectors[1] and is relevant to the UN Guiding Principles on Business and Human Rights (hereinafter UNGPs)which was endorsed

[*] Research Fellow, Centre for Health Law, Ethics and Technology, O.P Jindal Global Law School, Sonipat, Haryana, India.

[1] President's Advisory Council on Faith-based and Neighbourhood Partnerships, *Building Partnerships To Eradicate Modern-Day Slavery: Report of Recommendations To The President*, WHITE HOUSE RELEASE(April 2013),https://www.whitehouse.gov/sites/default/files/docs/humantrafficking_wcover.pdf; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Statement of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the 26th Session of the Human Rights Council*, OHCHR, (June 11,2014).

by States at the UN Human Rights Council in 2011.[2] This model effectively addressed the issue of sexual harassment faced by women farmworkers and acts as a guiding light of labour justice for agriculture workers. This research article also highlights the achievements of the overall FFP, the limitations for globalization of this model and finally some suggestions. The research methodology for this article is doctrinal in nature with use of primary as well as secondary sources. Due to absence of scholarly writing of this specific issue, this paper relies on official figures and data provided by the concerned entities on their websites. The scope of the paper is limited to the FFP as implemented in Immokalee, Florida, United States of America (hereinafter US).

II. US AGRICULTURAL FIELDS: STILL THE 'HARVEST OF SHAME'[3] ?

Maria Concepcion, 27, crossed the Mexican border as an illegal immigrant by swimming across the Rio Grande. Despite being injured by this perilous journey her husband left her after they reached the US territory. She is now a single mother living in Florida with a family back in Mexico and she is now working as a tomato picker in Florida.[4]Agriculture ranks among the US most hazardous industries, occupational health and safety violations are widespread on the fields.[5] U.S. Department of Labour (hereinafter DOL) has described farmworkers as "*a labour force in significant economic distress…*" noting that farmworkers are subjected to "*low wages, sub-poverty annual earnings, [and] significant periods of un- and underemployment….*"[6] The DOL also notes that while "*production of fruits and vegetables has increased ... agricultural worker earnings and working conditions are either stagnant or in decline*".[7] More recently, the U.S. Department of Agriculture reaffirmed that farmworkers "remain among the most economically disadvantaged working groups in the United States."[8]

---

[2] Office of the High Commissioner on Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNITED NATIONSUN Doc. HR/PUB/1 1/04, (June 16 2011).

[3]Edward R. Murrow's searing 1960television documentary which exposed the plight of immigrant farmworkers in the US agricultural fields.

[4]Mary Bauer et al, Southern Poverty Law Centre, *Injustice on Our Plates: Immigrant Women in the U.S. Food Industry*, SPLC (November 2010).

[5] US Government, *Occupational Safety & Health Administration Fact Sheet*, US DEPARTMENT OF LABOUR, (September 2005),http://www.osha.gov/OshDoc/data_General_Facts/FarmFactS2.pdf.

[6]US Government, *U.S. Department of Labour Report to Congress: The Agricultural Labour Market- Status and Recommendations*, US DEPARTMENT OF LABOUR(December 2000), http://migration.ucdavis.edu/rmn/word-etc/dec_2000_labor.htm.

[7]*Ibid.*

[8] William Kandel, *Profile of Hired Farmworkers: A 2008 Update*, US DEPARTMENT OF AGRICULTURE (July 2008),http://www.ers.usda.gov/media/205619/err60_1_.pdf.

a. STATISTICS

Immigrant farm working women comprised approximately twenty percent of the agricultural workforce in the late 1990s.[9]According to the recent National Agriculture Workers Survey (NAWS) 2009-2010 data, about 24 percent of farmworkers are estimated to be female.[10]Women, according to recent statistics, are far outnumbered by men in the agricultural industry and constitute an estimated 20-25 percent of the total farmworker population.[11]About three percent are under 18 and many of these children are girls.[12]Thousands of such illegal immigrant farmworker women face the grave threat of sexual harassment[13] on the agricultural fields where they end up being employed. Sexual assault and harassment is by no means unique to agriculture, but female farmworkers are 10 times more vulnerable than other workers.[14]Although few studies have investigated sexual harassment and the exploitation of female immigrant farmworkers,[15] a recent study found that 80% of female farmworkers were subjected to sexual assault and harassment.[16]

b. UNDERSTANDING THE CAUSES AND ABSENCE OF REPORTING

The women who fall victim (97% of respondents experienced gender harassment from co-workers and superiors)[17] to such acts of gender discrimination and sexual harassment do not usually report the issue to the local police or any other available superior authority due to several systematic barriers— lack of legal status being one of the primary reason. It was found that of the many obstacles arrayed against them— fear, poverty, shame, lack of access to legal resources, language barriers, immigration status and cultural pressures — few immigrant women ever come forward to speak out against the wrongs committed against them.[18] Too often, they are forced to compromise their dignity — to endure sexual harassment and exploitation — to obtain a better life and a measure of economic security for

[9] Greg Asbed& Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. Pa. J.L. & Soc. Change 39, 42 (2013).
[10]Grace Meng et al,*Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, HUMAN RIGHTS WATCH, (May 15, 2012).
[11]Sara Kominers, *Working in Fear: Sexual Violence Against Women Farmworkers in The United States*, OXFAM AMERICA, (2015), https://www.northeastern.edu/law/pdfs/academics/phrge/kominers-report.pdf.
[12]*Supra* Note 10 at p. 21.
[13]Definition of sexual harassment, US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.un.org/womenwatch/osagi/pdf/whatissh.pdf.
[14] Rebecca Clarren, *Ploughing under the fields of shame*, HIGH COUNTRY NEWS, April 14, 2008 at p. 1.
[15] Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farm working Women*, 16(3) VAWA237-261(2010).
[16]Debora Ortega &Noel Busch-Armendariz, *In the Name of VAWA*, 28(3)J.O. W. & SOC. WK.225, 227 (2013).
[17]MORALES WAUGH, *supra* note 15.
[18]BAUER,*supra* note 4 at 42.

themselves and their families.[19]In another study of the "constant menace" of sexual harassment and violence in the fields conducted by the Southern Poverty Law Centre, a female farmworker described the sexual harassment norm in the fields succinctly: "You allow it or they fire you."[20]However, the picture is not grim in all dimensions and there are a few instances which shine as a glimmer of hope.

Lawsuits were filed by immigrant women who were harassed by their respective supervisors during their employment. DiMare Ruskin, Inc., a Florida-based tomato grower and produce provider, had to pay $150,000 to two female farm workers and take other steps to prevent and address unlawful harassment and retaliation at its farms and facilities nationwide as part of a three-year consent decree in order to resolve a lawsuit brought by the U.S. Equal Employment Opportunity Commission (hereinafter EEOC).[21] These are however rare cases of lawsuits being decided favourably for immigrant farm working women.

Sexual harassment in the agricultural workplace are fostered by a severe imbalance of power between employers and supervisors and their low-wage, immigrant workers.[22]Human Rights Watch's investigation found that, in most cases, perpetrators are foremen, supervisors, farm labour contractors, company owners, and anyone else who has the power to hire and fire workers as well as confer certain benefits, such as better hours or permission to take breaks.[23] This resulted in many women farmworkers suffering daily sexual harassment especially by these 'men in power' who are usually male supervisors.[24]The supervisors in the farms have total impunity, dominate the farm and the companies preferred to turn a blind eye to such discriminatory acts. Workers who speak up about conditions or report abuses routinely experience retaliation, up to and including termination.[25] Sub-poverty wages make farmworkers doubly vulnerable to retaliation for whistleblowing - therefore making

[19]*Ibid.*
[20]*Ibid* at p.46.
[21]Annie Waldman, *DiMare Ruskin to Pay $150,000 And Furnish Nationwide Relief to Settle EEOC Sexual Harassment Lawsuit*, EEOC NEWS, July 18, 2012 at 1.
[22]MENG, *supra* note 10 at p. 8.
[23]*Ibid* at p. 9.
[24]Cathy Dubois et. al, *An empirical examination of same- and other-gender sexual harassment in the workplace* 39*Sex Roles*, 731, 733 (1998).
[25]Bruce Goldstein et al., *Weeding out Abuses: Recommendations for a Law-abiding Farm Labour System*,FARMWORKER JUSTICE & OXFAM AMERICA (June 17, 2010) http://www.oxfamamerica.org/publications/weeding-out-abuses.

whistleblowing significantly less likely than in other occupations, even though the abuses are often significantly more egregious in the fields elsewhere.[26]

c. US STATE LAWS AND THE HOFFMAN CASE

The current H-2 program, which provides temporary farmworkers and non-farm labourers for a variety of U.S. industries, is rife with labour and human rights violations committed by employers who prey on a highly vulnerable workforce.[27]In 2011, Georgia and Alabama approved the catastrophically ill-considered immigration laws-Georgia's Illegal Immigration Reform and Enforcement Act of 2011 (better known as HB 87) and Alabama's Beason-Hammon Alabama Taxpayer and Citizen Protection Act (better known as HB 56)[28]— which were modelled after Arizona's infamous crackdown legislation, SB 1070.[29]Under these laws, "employers [are] required to use the federal E-Verify system ... to determine their employees' legal status."[30] In Georgia, for example, "any worker who uses false documents to get a job could face up to fifteen years in prison and $250,000 in fines [and] businesses that do not comply risk losing their licenses."[31] These laws also broadened police's power to investigate people's immigration status during routine stops.[32]

The plight of immigrant agricultural workers had already received a setback in the legal decision of US Supreme Court in *Hoffman.*[33] The Court in this case had held that an undocumented worker who was fired for union organizing was not entitled to back pay. In the Supreme Court's majority opinion, Chief Justice Rehnquist wrote that awarding back pay to Castro (the petitioner) would conflict with the Immigration Reform and Control Act of 1986 employer sanctions scheme.[34] He added further that "the employees must be deemed unavailable for work (and the accrual of back pay therefore tolled) during any period where they were not lawfully entitled to be present and employed in the United States."[35]

[26]ASBED& SELLERS, *supra* note 9 at p. 42.
[27] Southern Poverty Law Centre, *Close to Slavery: Guest worker Programs in the United States,* SPCL (Feb. 18, 2013), https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states.
[28]ASBED& SELLERS, *supra* note 9 at p. 39.
[29]*Ibid.*
[30]*Ibid.*
[31]*Ibid.*
[32]BAUER,*supra* note 4 at 51.
[33]Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).
[34]*Ibid* at 149-50.
[35]*Ibid* at 145 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-93 (1984).

These farmworkers ought to be protected both under international human rights law and US laws.[36] They have a right to be protected from sexual harassment and similar other abuses at the workplace. The International Covenant on Civil and Political Rights (ICCPR), ratified by the US in 1992, declares, "*Everyone has the right to liberty and security of person*" and it prohibits discrimination on "*any ground such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status.*" The state of female immigrant farmworkers cannot be looked at in isolation. On a superficial analysis it might appear as just another human rights issue with only women being the effected stakeholders but if we scrape through we can understand that the issue of sexual harassment against women ought to involve the buyers i.e., the companies. The successful FFP model emerged when the CIW entered into legally binding agreements with the Participating Buyers which resulted in formation of a proper redressal system for sexual harassment on the field.

III. FAIR FOOD PROGRAM: HOW IT TACKLED THE PROBLEM OF SEXUAL HARASSMENT ON THE FIELDS?

During the early 1990's, farmworkers got together to lay the foundation of a community organization which could challenge the human rights issues faced by the immigrant farmworker community. The issues were not limited to sexual harassment on the fields but also included forced labour, workplace violence, human trafficking, retaliation, and wage theft in South Florida's tomato fields which can be argued to have been exacerbated due to systemic exploitation. This movement gave birth to the Coalition of Immokalee Workers (CIW). The CIW understood that any change in the conditions of the farmworkers is not possible if those at the top of the industry do not support their fight. They also realized their poor working conditions and squeeze on wages were directly shaped by the multi-billion dollar brands on the retail end of the industry, who are able to leverage their volume purchasing power to demand ever-lower prices, which resulted in the downward pressure that ultimately created the deplorable conditions under which they laboured.[37]

CIW started the Campaign for Fair Food in 2001 and by 2011 it was established over 90% of Florida's fields.[38]The CIWs FFP is a unique partnership among farmers, farmworkers, and retail food companies that ensures humane wages and working conditions for the workers

[36]Title VII of the Civil Rights Act of 1964, 42 USC, Ch. 21, § 2000e et seq.

[37] Note prepared by the Coalition of Immokalee Workers, *Multi-stakeholder engagement across all three pillars (case studies)*,UN FORUM ON BUSINESS & HUMAN RIGHTS SESSION, (Nov. 18, 2015, 15:00–16:20) Room XX.

[38] Coalition of Immokalee Workers (CIW), *Extreme Makeover: Florida tomato industry edition…* (Mar. 31, 2014), http://www.ciw-online.org/blog/2014/03/extreme-makeover-intro/.

who pick fruits and vegetables on participating farms.[39] It harnesses the power of consumer demand to give farmworkers a voice in the decisions that affect their lives, and to eliminate the longstanding abuses that have plagued agriculture for generations.[40]

a. THE WORKER ORIENTED MODEL: A SUCCESS

The FFP is based on Worker-driven Social Responsibility model. The three essential elements for the success of this model are:

i. Workers have a prominent say in the drafting of the code of conduct and design of the FFP;
ii. Efficient monitoring which is handled by the participation of the workers on the fields whose rights are threatened;
iii. Enforcement along with market consequences which are provided for in binding agreements with the multi-million dollar brands present at the top of the whole supply chain.

DIAGRAM 1: MECHANISMS OVERVIEW[41]

Under the FFP, Participating Growers have agreed *inter alia*:

i. *"Compliance with the human rights-based Code of Conduct, including zero tolerance for forced labour, child labour and sexual assault;*[42]

[39]Website, Fair Food Program,http://www.fairfoodprogram.org/.
[40]*Ibid.*
[41]Website, About Fair Food Program,http://www.fairfoodprogram.org/about-the-fair-food-program/.
[42]*Ibid.*

ii. *A worker-triggered complaint resolution mechanism leading to complaint investigation, corrective action plans, and, if necessary, suspension of a farm's Participating Grower status, and thereby its ability to sell to Participating Buyers;*[43]

iii. *Health and safety committees on every farm to give workers a structured voice in the shape of their work environment;"*[44]

b. THE FAIR FOOD CODE OF CONDUCT

The Fair Food Standards Council (FFSC) monitors the development of a sustainable agricultural industry that advances the human rights of farmworkers, the long-term interests of growers, and the ethical supply chain concerns of retail food companies through implementation of the FFP.[45] The Fair Food Code of Conduct[46] adheres to all the basic fundamental human rights and prohibits child labour[47], sexual harassment[48], wage violations[49], undignified working conditions[50] and forced labour[51]. The code of conduct also includes corrective action plans, complaint resolution, and consequences for violations for participating growers, crew leaders or other supervisory personnel. The FFP agreement till date has 14 retail food companies as participating buyers[52] and growers representing over 90 percent of the Florida tomato industry have committed themselves to this program. This model which is market-driven, in a brief period of four years, has halted the impunity for harassing female farmworkers and involved the participating buyers to help stop the perpetration of sexual harassment against them. There have been no cases of sexual harassment or sexual harassment with physical contact reported at FFP farms over the last two years.[53] Cases of discrimination, whether based on national origin, gender or sexual preference have also been dealt with promptly and effectively through the program's complaint mechanism, without retaliation against complainants.[54]

[43]Website, About Fair Food Program,http://www.fairfoodprogram.org/about-the-fair-food-program/.
[44]*Ibid.*
[45] Fair Food Program, *Supra* Note 39.
[46]Website, Code of Conduct, Fair Food Program,http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct/.
[47]*Ibid* atArticle III Clause 1, Article I Clause 2.
[48]*Supra* Note 46 at Article II Clause 3, Clause 7 & Clause 8.
[49]*Supra* Note 46 at Article III Clause 2.
[50]*Supra* Note 46 at Article III Clause 6.
[51]*Supra* Note 46 at Article I Clause I.
[52] Partners, Fair Food Programme, http://www.fairfoodprogram.org/partners/.
[53]Judge Laura Safer Espinoza,*Written Testimony of Judge Laura Safer EspinozaExecutive Director,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www1.eeoc.gov//eeoc/task_force/harassment/10-22-15/espinoza.cfm?renderforprint=1.
[54]*Ibid.*

i. Zero tolerance on sexual harassment

The code of conduct[55] is formulated by workers themselves and therefore imposes liability for sexual harassment on the supervisors which reflects a shift from impunity to accountability. The code makes any act of sexual harassment which involves physical contact an event which bears economic and market consequences for the employer. The employer is restricted from acquiring any produce from the participating buyer until and unless the guilty molester is fired and simultaneous corrective actions is to be taken if the incident is found out to be true. For example, there is a bar on a supervisor who is found to have committed an Article I violation of the code to work for any other Participating Grower.[56]Also, the supervisor has to undergo training as decided by FFSC.[57] Such a clause helps to self-regulate an industry where the efficiency of the supply chain effects the conditions of workers. The firing of supervisors along with education of workers sends a very powerful preventive message to everyone who is involved in act of sexual harassment. 90% of all Participating Growers have implemented company-led trainings on the prevention of sexual harassment and discrimination for both workers and supervisors.[58] Supervisors are trained on their responsibility to ensure a respectful work environment and immediately report any complaints pertaining to sexual harassment or discrimination.[59]

ii. Educating workers

The worker education module is created by the farmworkers themselves which makes it highly effective. The FFP education is received by the workers at the participant growers on the moment when they are hired. All workers receive the Know Your Rights and Responsibilities booklet (in English, Spanish and Haitian Creole) and watch the accompanying video.[60] Absence of knowledge about sexual harassment had led to generating sexual harassment among female farmworkers. With the aid of the worker education module over 125,000 workers have received FFP education on their rights, including the right to work free of discrimination and sexual harassment.[61]

[55]*Supra* Note 46.
[56]*Supra* Note 46 at Part III, Clause B.
[57]*Supra* Note 46 at Part III Clause B.
[58]Fair Food Program, *2014 Annual Report*: *Worker Driven Social Responsibility,* FAIR FOOD COUNCIL(August 2015) http://fairfoodstandards.org/cms/wp-content/uploads/2015/08/14SOTP-Web.pdf.
[59]*Ibid.*
[60]*Supra* Note 41.
[61]*Supra* Note 53.

iii. Creation of worker monitors and Audits

Worker monitors are created by the efforts of worker education. These monitors enforce and uphold the rights of workers in the workplace and they also interact continuously with the FFSC. The council monitors and enforces the rights of the farmworkers in the agricultural field and is solely dedicated to this program. Judge Spinoza has reiterated on the Annual Women's Forum for the Economy and Society 2015 that "*Our audits include interviews with more than 50 percent of workers at any given farm, providing a snapshot of conditions, while our 24/7 complaint line, answered live by the same auditors who know and understand the situations workers are calling about, provides an ongoing video feed.*[62] *We have resolved over 1,000 complaints, normally within days and almost always within a few weeks."*[63]During the 2013-2014 season, FFSC received no worker reports of sexual harassment or discrimination at over 70% of all Participating Growers.[64]There is also a robust enforcement mechanism which provides effective market consequences in case the Participating Growers do not comply with the code of conduct. For example, they are not allowed to sell to participating buyers if any of the conditions and compliance measures in code remain unfulfilled.

iv. Complaint Mechanism

The success of the FFP also depends heavily on a working and responsive complaint mechanism. The communication lines which connect the workers in the fields and the growers who oversee the whole process is an essential element which contributes to the successes of FFP. Since the workers are educated about the potential violations of the Code of conduct whenever they encounter an untoward incident, the FFP provides access to a fast, effective and proven complaint procedure and upon investigation, strict liability is imposed on those who retaliate against the worker reporting the incident. For example, when one participating grower failed to respond appropriately to a complaint of sexual harassment, it was removed from the Program.[65] Determined to continue its participation in the Program, and thereby regain its lost sales, the grower chose to engage in corrective action, including firing the crew leader, formulating a sexual harassment policy and conducting trainings.[66] On

[62]CIW, *Fair Food Program front and centre at international Women's Forum*, WOMEN'S FORUM FOR THE ECONOMY AND SOCIETY(July 9, 2015, Milan) http://www.ciw-online.org/blog/2015/07/womens-forum-milan/.
[63]*Ibid.*
[64]*Supra* Note 58.
[65]CIW, *Fair Food Program Changes the Norm: Confronting Sexual Violence and Harassment in the Fields*, (March 14, 2012)http://www.ciw-online.org/blog/2012/03/ffp_sexual_harassment_brief/.
[66]*Ibid.*

another occasion, the grower involved didn't wait to be removed from the program.[67] Rather it took quick action to fire the crew leader responsible for the violation and instituted changes designed to avoid similar problems in the future.[68]

The toll-free complaint line is answered by a bilingual Fair Food Standards Council investigator, 24 hours a day, and 7 days a week.[69] Complaints are investigated and resolved by FFSC, normally in collaboration with growers.[70] Whenever possible, complaint resolutions include an educational component, consisting of meetings with relevant supervisors and crews, so that all workers on the farm can see that complaints are heard and resolved without retaliation, and the farm's commitment to the Program is reconfirmed.[71] All steps in the complaint process are documented in the FFSC database, resulting in an important compilation of information on the conduct of individuals, as well as company practices.[72]

c. OUTCOMES

In separate training sessions with Haitian workers and Spanish-speaking female workers at the farm in April 2014, both groups confirmed that the company had already conducted trainings on discrimination and sexual harassment and that the work environment had greatly improved since the previous season.[73] Workers stated that they now understood how to report confidential complaints, and would feel comfortable approaching farm staff with sensitive complaints.[74]In addition to all the above unique methods to provide justice to female farmworkers, the FFP has also introduced other measures to ensure proper wages to all the farmworkers. For example, nearly $20 million 'penny per pound' in Fair Food Premiums was paid by Participating Buyers to improve workers' wages.[75] Health and Safety Committees on every farm give workers a structured voice in shaping a safer, more humane work environment[76] which further bolsters in restraining instances of sexual harassment of female farmworkers. In June 2015, after four seasons of successful implementation across the

[67] *Ibid.*
[68] *Ibid.*
[69] Complaint Mechanism, Fair Food Program, http://www.fairfoodprogram.org/about-the-fair-food-program/.
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] *Supra* Note 58 at p. 20.
[74] *Supra* Note 58 at p. 20.
[75] Fair Food Program, *2015 Annual Report*: *Worker Driven Social Responsibility*, FAIR FOOD COUNCIL (October 2015) http://fairfoodstandards.org/15SOTP-Web.pdf.
[76] *Ibid.*

Florida tomato industry, the FFP expanded to several tomato operations in Georgia, North and South Carolina, Virginia, Maryland and New Jersey.[77]Beyond this, workers in other sectors as diverse as dairy workers in Vermont, construction workers in Texas, and those seeking to implement the Bangladesh Fire and Safety Accords are looking to the FFP as a model.[78] The Coalition of Immokalee Workers, Whole Foods Market, and Sunripe Certified Brands recently announced a ground-breaking initiative, expanding the Fair Food Program into the strawberry industry and debuting the beautiful new Fair Food Program label in Whole Foods produce aisles.[79]By offering Fair Food strawberries, Whole Foods Market has agreed to pay an additional amount for each case of strawberries it purchases, with the additional money being passed on to farmworkers to supplement their income.[80]CIW continues to work with EEOC in pursuing justice for the aggrieved workers, until it is possible to prevent such abuses altogether.

IV. UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: REALIZATION AND CHALLENGES

The successful implementation of the FFP justifies the "Protect, Respect and Remedy"[81] framework aspired by the UNGPs on business and human rights. The emergence of CIW from a grass root organization and incorporating pillars II & III and applying them to create specific impacts and thereby generate sustainable solutions is commendable. It's the remedies, made possible through the market consequences for human rights violations, rooted in binding legal contracts between the worker organization and the retail purchasers, that ultimately squash the disrespect and vulnerability suffered by so many.[82] The FFP is an effective reflection of non-judicial grievance mechanism under UNGPs Business and Human Rights Principle 31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be: Legitimate, Accessible, Predictable, Equitable, Transparent, Rights Compatible, Source of learning whereas operational-level mechanisms should also be based on engagement and dialogue.[83] The FFP clearly covers all the said parameters and is one of the most effective ways to protect women

[77]*Ibid.*
[78]*Supra* Note 53.
[79] CIW, 'Strawberries! Get your Fair Food Program strawberries here!' (March 22nd, 2016) available at http://www.ciw-online.org/blog/2016/03/whole-foods-ffp-strawberries/ accessed on 17 April 2016.
[80]*Ibid.*
[81]Guiding Principles, supranote 2.
[82]NOTE PREPARED BY THE COALITION OF IMMOKALEE WORKERS,*supra* note 37.
[83]*Ibid.*

farmworkers in the agricultural fields. The FFP faces several challenges with respect to globalization. There is a lack of willingness from major companies to engage with the workers directly, loss of bargaining power of the companies, political dimensions of every country is different therefore raising awareness amongst the workers regarding their rights becomes a difficult task, resources required for an effective working of organizations similar to FFP might be higher in different countries, conflict with domestic laws are all challenges which are to be pondered over before creating a global model.

a. CASE STUDY: WENDY'S REFUSAL TO JOIN THE FFP

Wendy's is an international fast food restaurant chain which boasts of being the world's third largest hamburger fast food chain with approximately 6,487 locations. The company has refused to join the FFP and has recently, moved out of Florida[84]purportedly so that it can escape the growing pressure by the CIW to join the FFP. It is believed that they have moved from Florida to Mexico and this news was recently reported.[85]It is pertinent to note that Wendy's had issued an official response to the Campaign for Fair Food titled "A Conversation about Florida Tomatoes"[86] which outlined the reasons for the international food chain not joining the FFP. In this official response Wendy's clarified their stand and stated that:-

1) CIW is demanding money for payment to supplier companies who are not Wendy's employee;[87]

2) CIW is demanding an additional fees over the price paid to suppliers whereas they already pay premium to their Florida tomato suppliers;[88]

3) They directly negotiate with the suppliers – not third-party organizations — for the providing the best of products to their consumers and all of the suppliers participate in FFP.[89]

---

[84] CIW, *Running from Responsibility: Wendy's flees Florida rather than support Fair Food Program's human rights advances*, (March 16, 2015) http://www.ciw-online.org/blog/2015/03/wendys-running-responsibility/.
[85]*Ibid*; Jimmy Sherfey, *Tomato Workers Call for Wendy's Boycott after the Chain Shifts its Sourcing to Mexico*, CIVIL EATS(16 March 2016), http://civileats.com/2016/03/17/tomato-workers-call-for-wendys-boycott-after-the-chain-shifts-its-sourcing-to-mexico/; Andrew Cockburn, *Trump Tomatoes,*HARPERS BLOG,(March 16, 2016), http://harpers.org/blog/2016/03/trumps-tomatoes/.
[86] CIW, *Wendy's new twist on an old PR game: CIW's Fair Food Program un-American…*' (June 17, 2013) http://www.ciw-online.org/blog/2013/06/wendys-new-twist-on-an-old-pr-game-ciws-fair-food-program-un-american/.
[87]*Ibid.*
[88]*Ibid.*

The CIW responded to these claims on their official website stating that it was 'remarkable exercise in Public Relations spin'[90] and they replied affirming that:

i. The FFP, which the CIW urges Wendy's to participate in, requires the participating buyers to pay a small amount of Fair Food Premium for buying tomatoes from Florida. This premium is paid by the buyer not to the workers directly but is included in the final price of the tomatoes which is received ultimately by the growers and workers as bonuses. Therefore, Wendy's will not end up paying employees of other companies.

ii. CIW responded that 'Whatever premium Wendy's claims it is paying here, it is most definitely *not* the Fair Food Premium, it is *not* being monitored by the accounting systems of the Fair Food Program, and it is *not* going to address the grinding poverty suffered by the workers who have picked Wendy's tomatoes for decades.'[91]

iii. Since all participating buyers report their purchases to the FFSC which monitors the accounting of the premium therefore Wendy ought to report to the FFSC. Wendy's claim to purchase all of its tomatoes from participating growers rings hollow both because it is utterly unverifiable and because it is meaningless, even if true, as in the event that one of its suppliers is suspended from the Program, Wendy's is under no obligation to shift its purchases.[92]

The CIW also add that there is no worker participation in the drafting of Wendy's code of conduct to suppliers and unlike CIW, workers have no role in monitoring their own human rights in Wendy's supply chain and there is no strict consequences for non-compliance.[93]The company has also stressed that since they no longer buy tomatoes from Florida therefore the requirements under the FFP "no longer applies" them.[94] This means that Wendy's owes no responsibility to women farmworkers if they are harassed on the fields from where they procure tomato as the FFP "no longer applies" to them. One of the other argument which is

[89]*Ibid.*
[90]*Ibid.*
[91]*Ibid.*
[92]*Ibid.*
[93]CIW, *A Battle for the Soul of Social Responsibility* (January 14, 2016) available at http://www.ciw-online.org/blog/2016/01/wendys-code-of-conduct/.
[94]*Ibid.*

vocalized by Wendy's is that their code of conduct[95] is reliable. On an analysis of the Code, we observe that Wendy's over emphasizes on "expectations" and incorporate no practical measures in cases of non-compliance with human rights standards. For example:

i. "*Wendy's expects Suppliers to use best practices in all aspects of their operations…*"[96]

ii. "*All Suppliers, and their suppliers and contractors, are expected to comply with applicable local, state, and federal laws…*"[97]

iii. "*Suppliers are expected to affirm they have received and understand the specific outlined expectations of the Code…*"[98]

iv. "*Our Suppliers are expected to uphold the highest business ethics and demonstrate their business integrity at all times…*"[99]

v. "*As a condition of doing business with the System, each of our Suppliers is expected to comply with the provisions outlined in the Code and to reaffirm annually to Wendy's Quality Assurance their receipt and understanding of the Code*."[100]

However, throughout the Code of Conduct for suppliers to Wendy's there is not even a single mention of the word 'sexual harassment'. The company has effectively chosen not to intervene with any injustice which is faced by the women worker's on the fields. This code of conduct remains a hollow promise and Wendy denies any liability for such omissions by their suppliers. Pressure on Wendy's by various stakeholders along with making stricter local laws are necessary to deal with such codes of conduct.

V. CONCLUSIONS AND SUGGESTIONS

The problem of sexual harassment in the agricultural fields of US was effectively tackled by the FFP through active collaboration between the concerned corporations, on field agriculture workers and CIW. This program has created a new worker driven social responsibility model and has systematically incorporated a complaint mechanism where the grievances of the women workers can be addressed with confidentiality. The core learning from the successful

[95]Wendy's, Code of Conduct for Suppliers, https://www.wendys.com/redesign/wendys/pdf/Wendys_Code_of_Conduct_Final_web.pdf.
[96]*Ibid* at p. 2.
[97]*Ibid* at p.3.
[98]*Ibid* at p.3.
[99]*Ibid* at p. 4.
[100] *Ibid* at p. 5.

experience of the FFP is that the solutions for indirect or direct corporate human rights abuses cannot come without the effective participation of the workers on the field. The interaction between the businesses and workers through effective mediation by certain third party organizations, like CIW, is essential to stop corporate human rights abuses. The fall in the number of complaints relating to sexual harassment provides a clear picture as to how successful the FFP is. However, it can be proposed that a different model has to be implemented with respect to every other industry where problems of sexual harassment persist. This is because the dynamics of one industry is different from the other. The nature of sexual harassment faced by women in Florida's tomato industry is different from that of the dairy industry in Vermont or from the diamond industry in Sierra Leone. Therefore, the FFP model cannot be applied exactly as it is to other industries which is one of its major limitations. The challenges pertaining to globalization of this model are evident because collaboration from the governments is also essential for widening the participation among a range of corporate actors. The success of this model does reflect that worker driven social responsibility models can enhance the image, goodwill and brand value of the company. But there is a requirement of determined administrative as well as political will which can boost the collaboration between all the stakeholders. Any uncertain governments, like that of politically unstable Sierra Leone, might not be able to support such a model due to various political, social, cultural and financial reasons. Also, the victims might not be immigrant women but local female citizens of a state forced to work in vulnerable workplaces due to economic reasons. We observe that a newer model is necessary with every other industry and protection of female workers is one of the basic tenets of equality at workplace which ought to be respected by concerned communities. Participation from the government to provide free legal support to illegal immigrants through CIW can be an innovative solution to address the problem of sexual harassment on the fields. Despite the challenges faced, it is expected that this program will extend its hold beyond Florida's tomato industry and more corporations will eventually join in.

JUVENILES IN CONFLICT WITH LAW UNDER JUVENILE JUSTICE SYSTEM: A PSYCHO-LEGAL ANALYSIS

Dr. Vidushi Jaswal[*]

I. INTRODUCTION

The modern welfare State is bound under the rule of law to make special provision for protecting the interests of children, women and other disadvantaged sections of the society. So far as children are concerned, they always need special attention as they are considered to be the future of every society. Children cannot develop their mental faculties by their own. A child's tender mind requires education, training, orientation, etc. In order to regulate the child's behaviour, the State and parents and society has to inculcate the basic values into his or her mind. This is the reason why the Indian Constitution has made right to free education as a fundamental right (Art. 21A); providing conducive atmosphere a0nd sending children schools as fundamental duty Art. 51-A(k); prohibiting child labour and child/human trafficking (art. 23 and 24); and other directive principles recognising the interests of children. In India, considering its constitutional duty and sanctity of basic principles of criminal law, the State treats the children indulged in criminal activities differently and with proper care and caution.

II. SIGNIFICANCE OF REFORMATION OF JUVENILE OFFENDERS: PSYCHOLOGICAL IMPACT

'Juveniles in conflict with law' are being treated separately than adult offenders. Since reformative justice intends to reform and reintegrate the offender, it can well be executed in case of juveniles. The chances of getting reformed among young and tender minds are more than anything. "Dr. Delbert Elliott, former President of the American Society of Criminology and head of the Centre for the Study of the Prevention of Violence has shown that as many as a third of young people will engage in delinquent behaviour before they grow up but will naturally "age out" of the delinquent behaviour of their younger years. While this rate of delinquency among young males may seem high, the rate at which they end their criminal behaviour, (called the "desistance rate") is equally high. Most youth will desist from

[*]Assistant Professor, MCM, DAV College, Chandigarh, Punjab, India.

delinquency on their own. For those who have more trouble, Elliott has shown that establishing a relationship with a significant other (a partner or mentor) as well as employment correlates with youthful offenders of all races "aging out" of delinquent behaviour as they reach young adulthood. Whether a youth is detained or not for minor delinquency has lasting ramifications for that youth's future behaviour and opportunities. Carnegie Mellon researchers have shown that incarcerating juveniles may actually interrupt and delay the normal pattern of "aging out" since detention disrupts their natural engagement with families, school, and work."[1]

III. TREATMENT OF JUVENILES IN THE UNITED STATES

In the United States, confining juveniles with adult offenders amounts to cruel and unusual punishment. Juveniles, recognized by the United States Supreme Court as being developmentally different from adults and having diminished culpability, face grave dangers when confined with adults in prisons and jails.[2]

Obama's administration in 2016 banned solitary confinement for juveniles. President Obama said:

> Research suggests that solitary confinement has the potential to lead to devastating, lasting psychological consequences. It has been linked to depression, alienation, withdrawal, a reduced ability to interact with others and the potential for violent behavior. Some studies indicate that it can worsen existing mental illnesses and even trigger new ones. Prisoners in solitary are more likely to commit suicide, especially juveniles and people with mental illnesses. The United States is a nation of second chances, but the experience of solitary confinement too often undercuts that second chance. Those who do make it out often have trouble holding down jobs, reuniting with family and becoming productive members of society. Imagine having served your time and

[1]Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUSTICE POLICY INSTITUTE REPORT (October 15, 2016) http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf.

[2]*Roper* v. *Simmons*, 543 U.S. 551 (2005); *Atkins* v. *Virginia*, 536 U.S. 304 (2002); *Graham* v. *Florida*, 130 S. Ct. 2011 (2010).

> then being unable to hand change over to a customer or look your wife in the eye or hug your children.[3]

The United States Supreme Court in *Montgomery* v. *Louisiana*[4] retroactively applied *Miller* v. *Alabama*[5]which held that life imprisonment of juveniles without parole amounts to cruel and unusual punishment. It has given hope to many juveniles, who have been convicted for homicide offences, to get earlier release.

IV. LEGAL POSITION OF JUVENILES IN CONFLICT WITH LAW IN INDIA

In India, a child, who has not attained the age of 7 years, is being considered as *doliincapex* i.e. not capable of committing any offence.[6] A child, who falls in the age group of 7 to 12 years, will only be considered as 'child in conflict with law' if he or she is mature enough to understand the nature and consequences of his or her action.[7] These matured children (7-12 age group) and other children in conflict with law, who have not completed the age of eighteen years, would be treated as per according to the Juvenile Justice legislation in India.[8]

Any juvenile justice legislation needs to be read with the State's obligation towards child treatment under the Indian Constitution. The Indian Constitution recognises child's fundamental right to receive free and compulsory education under Article 21 A,[9] which is enforceable against the State. Under Article 51-A(k)[10] of the Indian Constitution, parents are also under the obligation to provide conducive atmosphere to their children at home and should ensure that their children attend the neighbourhood school easily. The State is further bound under the Indian Constitution to prohibit child labour and child trafficking. Despite all such efforts, if the State, society and parents fail to prevent the child from indulging into the criminal activities, the Indian Constitution gives another chance to the State to rehabilitate

---

[3] Anthony L. Fisher, *Obama Bans Solitary Confinement for Juveniles; Supreme Court Expands Parole for Juveniles Serving Life, A big day for the rights of minors in the criminal justice system,* REASON INSTITUTE, (Jan. 26, 2016 11:41 am) http://reason.com/blog/2016/01/26/obama-bans-solitary-confinement-kids.

[4]*Montgomery* v. *Louisiana*, 577 U. S. (2016).

[5]*Miller* v. *Alabama, 567* U. S. (2012).

[6] The Indian Penal Code, 1860, s. 82. It provides: "Act of a child under seven years of age.-Nothing is an offence which is done by a child under seven years of age."

[7]*Id*., s. 83. It provides: "Act of a child above seven and under twelve of immature understanding.-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."

[8] Juvenile Justice (Care and Protection of Children) Act 2000, s. 2(k). It provides: "juvenile" or "child" means a person who has not completed eighteenth year of age.

[9]INDIA CONST, art. 21A. It provides: "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

[10]*Id*., art. 51A(k). It provides: "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

and reintegrate the 'child in conflict with law.' India availed this chance by making special legislation for juveniles.

Juvenile Justice Act, 1986 defined a juvenile or child to be a person who in case of a boy has not completed age of 16 years and in case of a girl 18 years of age. The Act of 1986 was repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000. The repealing Act obliterated the distinction between a male juvenile and female juvenile. It brought uniform age of 18 years for every juvenile.[11] All the pending cases of the Act of 1986 were allowed to be dealt as per according to the beneficial legislation of 2000. The Juvenile Justice (Care and Protection of Children) Act, 2000 was enacted to fulfil the commitments which India promised to the United Nations while signing and ratifying the Convention on the Rights of the Child, 1989.[12]

For the purpose of punishing an individual for a criminal offence, one of the essential requirements is that such individual should have committed the offence with requisite cognitive capacity. However, the mental faculties of a child are not so developed. This is also one of the reasons that child should not be punished like adults. The age of majority i.e. eighteen years, in such circumstances, has been determined by the persons who are expert in child psychology. Therefore, Indian Constitution also gave approval to the determined age i.e. 18 years for treating the juveniles in India.

Juvenile Justice (Care and Protection of Children) Act of 2000, was to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to and disposition of delinquent juveniles. Indian juvenile justice system has recognised certain fundamental principles of juvenile

[11] *Supra Note* 10.

[12] The Juvenile Justice Act, 2000, Preamble. It provides: "...AND WHEREAS, the General Assembly of the United Nations has adopted the Convention on the Rights of the Child on the 20th November, 1989;
AND WHEREAS, the Convention on the Rights of the Child has prescribed a set of standards to be adhered to by all State parties in securing the best interests of the child;
AND WHEREAS, the Convention on the Rights of the Child emphasises social reintegration of child victims, to the extent possible, without resorting to judicial proceedings;a
AND WHEREAS, the Government of India has ratified the Convention on the 11th December, 1992;
AND WHEREAS, it is expedient to re-enact the existing law relating to juveniles bearing in mind the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (the Beijing rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and all other relevant international instruments."

justice and protection of children.[13] Rules under the Juvenile Justice (Care and Protection of Children) Act 2000 (56 of 2000) (as amended by the Amendment Act 33 of 2006) to be administered by the State[14] and Juvenile Justice (Care and Protection of Children) Act, 2015 make it obligatory for the Central government, the State Governments, the Board, and other agencies, as the case may be, to implement following fundamental principles while administering juvenile justice system in India:[15]

- Principle of presumption of innocence
- Principle of dignity and worth
- Principle of participation
- Principle of best interest
- Principle of family responsibility
- Principle of safety:
- Principle of non-stigmatising semantics
- Principle of non-waiver of rights
- Principle of equality and non-discrimination
- Principle of right to privacy and confidentiality
- Principle of institutionalisation as a measure of last resort
- Principle of repatriation and restoration
- Principle of fresh start
- Principle of diversion
- Principles of natural justice

Justice Altmas Kabir said that the purpose of Juvenile Justice Act 2000 is rehabilitative in nature. The authorized persons under the Act of 2000 should implement its purpose with true spirit.[16] Similarly, the Hon'ble Supreme Court of India in *Salil Bali* v. *Union of India*[17]said that the essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the

[13]*Ibid.*
[14]Ministry Of Women And Child Development, Notification, New Delhi, the 26th day of October , 2007, Rules under the Juvenile Justice (Care and Protection of Children) Act 2000 (56 of 2000) (as amended by the Amendment Act 33 of 2006) to be administered by the States, available at *http://harprathmik.gov.in/pdf/rte/jjrules2007.pdf* accessed on February 5, 2016.
[15]The Juvenile Justice (Care And Protection Of Children) Act, 2015, s.3, available at *http://wcd.nic.in/sites/default/files/JJ%20Act,%202015%20_0.pdf* accessed on February 5, 2016.
[16]*Hari Ram* v. *State of Rajasthan*, (2009) 13 SCC 211 at 213.
[17]In the Supreme Court of India, Civil/Criminal Original Jurisdiction, Writ Petition (C) No. 10 Of 2013, decided on July 17, 2013, available at *http://ncpcr.gov.in/show_img.php?fid=517* accessed on February 5, 2016.

Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and re-integration of children in conflict with law into mainstream society.[18]

It was prayed in *Salil Bali* v. *Union of India*[19]that Juvenile Justice (Care and Protection of Children) Act, 2000, should be declared ultra vires the Indian Constitution. But the Supreme Court dismissed the writ petition. In the absence of any proper data, the Supreme Court refused to challenge the collective wisdom of the Parliament, which is incorporated in the Juvenile Justice Act of 2000. While considering the significance of the Juvenile Justice Jurisprudence, the Hon'ble Supreme Court of India, with regard to the upper age limit of 18 years determined under the Juvenile Justice Act 2000, said:

> [T]he age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioural patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future. There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be reintegrated into mainstream society, but such examples are not of such proportions as to warrant any change in thinking, since it is probably better to try and re-integrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future.[20]

Again, in *Dr. Subramanian Swamy* v. *Raju Thr. Member Juvenile Justice Board*,[21] the Supreme Court declared the Constitutional validity of the Juvenile Justice Act. The court favoured the intention of the Parliament behind the Juvenile Justice Act 2000. The court recalled the limits of courts in case of testing the validity of any legislation. The Supreme Court said:

[18]*Id.*, para 48.
[19]In the Supreme Court of India, Civil/Criminal Original Jurisdiction, Writ Petition (C) No. 10 of 2013, decided on July 17, 2013, available at *http://ncpcr.gov.in/show_img.php?fid=517* accessed on February 5, 2016.
[20]*Id.*, para 48.
[21]In the Supreme Court Of India, Criminal Appellate Jurisdiction, Criminal Appeal No. 695 of 2014, (Arising Out of SLP (Crl.) No.1953 of 2013), decided on March 28, 2014, available at *http://ncpcr.gov.in/show_img.php?fid=519*accessed on February 5, 2016.

> [I]f the legislature has adopted the age of 18 as the dividing line between juveniles and adults and such a decision is constitutionally permissible the enquiry by the Courts must come to an end. Even otherwise there is a considerable body of world opinion that all under 18 persons ought to be treated as juveniles and separate treatment ought to be meted out to them so far as offences committed by such persons are concerned. The avowed object is to ensure their rehabilitation in society and to enable the young offenders to become useful members of the society in later years. India has accepted the above position and legislative wisdom has led to the enactment of the JJ Act in its present form. If the Act has treated all under 18 as a separate category for the purposes of differential treatment so far as the commission of offences are concerned, we do not see how the contentions advanced by the petitioners to the contrary on the strength of the thinking and practices in other jurisdictions can have any relevance.[22]

The Juvenile Justice Act, 2015 has replaced the Act of 2000. It allows children aged 16 to 18 years and in conflict with law to be tried as adults[23] in cases of heinous offences.[24] The Ministry of Woman and Child Development ordered to enforce it from January 15, 2016. The new Act of 2015 has replaced the earlier reformative Juvenile Justice Act, 2000. However, the Ministry has yet to draft new rules as per according to the new enactment. Under the Juvenile Justice Act 2015, a child who is in between 16 and 18 years of age and found guilty of committing heinous offences, will first be examined by the Juvenile Justice Board. In such preliminary assessment, the Board, while taking the assistance from experienced psychologists or psycho-social workers or other experts, would find out mental and physical capacity of the child. It will be determined that whether he understands the consequences of

[22] *Id.*, para 46.

[23] The Juvenile Justice Act, 2015, s. 15. It provides: "In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, 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 committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18: Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts."

[24] *Id.*, s. 2(33). It provides: ""heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more."

the offence or not.[25] If the Board thinks that such child should be tried as an adult, then his trial may be transferred to the Children's court. Such juveniles can be detained in a 'place of safety' until the child completes age of 21. If it is found that the child has not been reformed by the age of 21, such child can be sent to jails housing adults.

V. PSYCHOLOGICAL TREATMENT OF JUVENILES IN JUVENILE INSTITUTIONS

Therapeutic detention means supportive or therapeutic care, such as general support and counselling, more formal behavioural health care, or "treatment" of delinquency or violence. In the United States, National Commission on Correctional Health Care (NCCHC) recommended that (1) every detainee should be screened quickly for potential psychiatric problems and current medication; (2) treatment plans should be developed by qualified mental health staff and appropriately documented, reviewed regularly, and communicated to detention staff; (3) current medication regimens should not be interrupted, if possible; (4) acute psychiatric symptoms should be treated appropriately, either within the facility under the supervision of a qualified clinician or in an alternate clinical setting such as a hospital; (5) psychotropic medication should be used in accordance with scientific evidence and professional standards to treat psychiatric symptoms, not merely to control behaviour; (6) the facility should have appropriate suicide prevention measures in place; and (7) efforts should be made to provide links and referrals to mental health care in the community, as appropriate.[26]

Indian Juvenile Justice System is lacking in the infrastructure. It does not have requisite number of following institutions:

- Place of safety
- Special police juvenile unit
- Separate building for Juvenile Justice Board
- Observation Homes
- Probation officers
- Child psychologists and sociologists.

[25] The Juvenile Justice Act, 2015, s. 15.

[26]Desai RA, Goulet JL, Robbins J, *et al*, *Mental health care in juvenile detention facilities: A Review*, J Am Acad Psychiatry Law 34:204–14, 2006.

While taking its responsibility in the matter of Juvenile Justice Institutions, the Supreme Court of India in *Sampurna Behura* v. *Union of India*[27] issued some directions to the appropriate authorities and said:

> The Home Departments and the Director Generals of Police of the States/Union Territories will ensure that at least one police officer in every police station with aptitude is given appropriate training and orientation and designated as Juvenile or Child Welfare Officer, who will handle the juvenile or child in coordination with the police as provided under sub-section (2) of Section 63 of the Act. The required training will be provided by the District Legal Services Authorities under the guidance of the State Legal Services Authorities and Secretary, National Legal Services Authority will issue appropriate guidelines to the State Legal Services Authorities for training and orientation of police officers, who are designated as the Juvenile or Child Welfare Officers. The training and orientation may be done in phases over a period of six months to one year in every State and Union Territory.[28]

The court continued to say:

> The Home Departments and the Director Generals of Police of the States/Union Territories will also ensure that Special Juvenile Police Unit comprising of all police officers designated as Juvenile or Child Welfare Officer be created in every district and city to coordinate and to upgrade the police treatment to juveniles and the children as provided in sub-section (3) of Section 63 of the Act.[29]

Furthermore, in order to check the status of the existing infrastructure for rehabilitating the juveniles, the Supreme Court has recently in *Re - Inhuman Conditions In 1382 Prisons*[30] issued notice to the concerned Ministry. The court ordered:

[27]In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 473 OF 2005, decided on October 12, 2011, available at*http://ncpcr.gov.in/show_img.php?fid=513* accessed on February 5, 2015.
[28]*Id.*, para 3.
[29]*Id.*, para 4.
[30]In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.406/2013, ordered on February 5, 2016, available at *http://supremecourtofindia.nic.in/FileServer/2016-02-05_1454655606.pdf.*

> [W]e issue notice to the Secretary, Ministry of Women and Child Development, Government of India, returnable on 14th March, 2016. The purpose of issuance of notice to the said Ministry is to require a manual to be prepared by the said Ministry that will take into consideration the living conditions and other issues pertaining to juveniles who are in Observation Homes or Special Homes or Places of Safety in terms of the Juvenile Justice (Care and Protection of Children) Act, 2015.[31]

Another reason for the rise in the prevalence of mental illness in detention is that the kind of environment generated in the nation's detention centers, and the conditions of that confinement, conspire to create an unhealthy environment. Researchers have found that at least a third of detention centers are overcrowded, breeding an environment of violence and chaos for young people. Far from receiving effective treatment, young people with behavioural health problems simply get worse in detention, not better. Research published in Psychiatry Resources showed that for one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they began their incarceration.[32]

In *Brown* v. *Plata*,[33] the United States Supreme Court observed:

> The trial record documents the severe impact of burgeoning demand on the provision of care. The evidence showed that there were high vacancy rates for medical and mental health staff, e.g., 20% for surgeons and 54.1% for psychiatrists; that these numbers understated the severity of the crisis because the State has not budgeted sufficient staff to meet demand; and that even if vacant positions could be filled, there would be insufficient space for the additional staff. Such a shortfall contributes to significant delays in treating mentally ill prisoners, who are housed in administrative segregation for extended periods while awaiting transfer to scarce mental health treatment beds. There are also backlogs of up to 700 prisoners waiting to see a doctor

[31] *Id.*, para 59.
[32] Barry Holman and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUSTICE POLICY INSTITUTE, (October 15, 2016), *http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf* .
[33] *Brown* v. *Plata*, 563 U.S. (2011).

> for physical care. Crowding creates unsafe and unsanitary conditions that hamper effective delivery of medical and mental health care. It also promotes unrest and violence and can cause prisoners with latent mental illnesses to worsen and develop overt symptoms. Increased violence requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care. Overcrowding's effects are particularly acute in prison reception centers, which process 140,000 new or returning prisoners annually, and which house some prisoners for their entire incarceration period. Numerous experts testified that crowding is the primary cause of the constitutional violations.[34]

Finally, the United States Supreme Court held that overcrowding in prisons is cruel and unusual punishment and hence, violation of the Eight Amendment to the United States Constitution.

VI. CONCLUSION AND SUGGESTIONS

Mere fact that the government has brought new legislation for the juveniles, who have committed heinous offences, does not mean that the policy of providing individualized treatment to the offenders has been taken away. The Probation of Offenders Act 1958 provides special provision for young offenders under section 6.[35] The special provision requires that the court should record the reasons if it refuses to release the young offender (who is less than 21 years) on probation. The court should give reason if it does not adopt any of the alternatives to incarceration. Similarly, for every sentence, the court is bound to give reasons. The court has to balance the aggravating factors and mitigating factors. Every disproportionate sentence would be unreasonable and unfair, and is against the principles of criminal law. All of these methods of individualize treatment demands more attention towards the new category of young offenders i.e. offenders who are in between 16 and 21. Another questions arise i.e. are we prepared? Do we have proper infrastructure? These

[34] *Id.* at 19-24.

[35] The Probation of Offenders Act, 1958, s. 6. It provides: "Restrictions on imprisonment of offenders under twenty-one years of age.— When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so."

questions are needed to be answered because the techniques of rehabilitating and restoring the new young offenders, would increase the tasks of juvenile justice board, children's courts, probation officers, child psychologists, sociologists, health professionals, officers of place of safety or special homes, etc. Strong reasons are required if not granting probation to new young offenders. More rehabilitation and restoration would be done. Child psychology would be strong mitigating circumstances. For this, efficient probation officer, psychologists and sociologists are required. Therefore, strong infrastructure is required for rehabilitating these new young offenders. That means without having any proper infrastructure for these new young offenders, the government's action of treating them like adult offenders would be unreasonable and arbitrary under Article 14 of the Indian Constitution.

DISABILITY AND QUEST FOR JUSTICE: PROBLEMS FACED BY PEOPLE WITH DISABILITIES

Sunita Panth[*] & *Sachin Sharma*[**]

I. INTRODUCTION

Great Indian economist and thinker *Amratya Sen*, in preface of his book titled, *Idea of Justice*, illustrates the complexity of term justice. The author provides a hypothetical situation, where one flute is going to be shared among three participants[1]. He finally concludes that while providing the flute to one will amount to injustice against other two. The point is further justified by theories of legal philosophy[2]. As we know that ultimate objective of legal philosophy is to formulate the complete and a just proposition of law and justice. This is the one of the basic and *ultimate* requirement of law to achieve[3]. Here we can classify term justice into its three aspects that includes justice as welfare; justice as freedom and justice as virtue. The first aspect, highlight the component of utilitarianism, the second, highlights the libertarianism and third aspect highlights the Kantian idea of justice. In other words the said proposition can be simplified by dividing it into Consequencialism and Rationalism[4]. The both philosophical systems are functional in global law regime. The concept further gives rise to another ancient-modern debate about morality and law. Here many thinkers hypothetically gave different argumentative propositions about justice. Further in the light of the mentioned thoughts, philosophers tried to *jargonize* the term justice and provide its various names, highlighting its functionality. This includes corrective justice; distributive justice; individual justice; retributive justice; restitutive justice; reformative justice; restorative justice etc. These various terminologies might have different functioning, but their goal is same, i.e. *satisfaction*, more clearly, satisfaction of victims and society. All these components of Justice are interdisciplinary and interlinking in nature. The application of all these concepts various with time and situations, and it is decided after considering the

[*] Assistant Professor of Law, MATS Law School, Raipur, Chhattisgarh, India.
[**] Assistant Professor of Law, National Law University and Judicial Academy, Assam, Guwahati, India.
[1] AMRTYA SEN, IDEA OF JUSTICE, HARVARD UNIVERSITY PRESS, (3d ed.2009).
[2] According to Aristotle, definition of Justice depends upon the teleology. Hence according to him, it is *'telos'* (purpose) of the act which justifies its objective.
[3] As Legal philosophy provides us with an idea to frame law in a particular direction having particular structure. This is the main reason to study jurisprudence in law schools so that we learn thinking with an open horizons.
[4] According to consequencialist approach justice (rightness) has to be determined by the consequences of the act, whereas rationalism says that, rightness of the act is judged by the act itself irrespective of its consequences. The later idea represents the categorical imperative of German philosopher Immanuel Kant.

different interests of different stakeholders, at different times. Therefore, it can be said that there is no universal definition of justice, and as the term justice is always open to criticism it gives way forward to another theory of justice[5]. This entire processs is very well-articulated and deliberated upon in the wider spectrum of developing jurisprudence and legal philosophy .The concept of Restorative Justice is one of such development of our times which has the components of restitutive and corrective justice. It is aiming at the *internal* reformation of wrongdoer[6] and further facilitates the accused-victim interactions. This entire discipline is constituted while aiming to provide paramount importance to satisfaction of the victim.

With the descriptive understanding of term justice, now the focus is on central issue about justice and persons with disabilities. Justice plays a very important role in person's life and it is equally important in the life of Persons with Disabilities. It is the well placed argument that human dignity can only be achieved after prospering, propagating and protecting (*three Ps*) the basic human rights for persons with disabilities. The idea is very well recognized under UNCRPD[7]. The United Nations' Convention on Rights of Persons with Disabilities, 2006 (UNCRPD) recognizes the inherent dignity, worth and the equal and inalienable rights of all members of the human family as the foundation of freedom , justice and peace in the world. Further it agrees that everyone is entitled to all the rights and freedoms set forth in the Universal Declaration of Human Rights and in the International Covenants.[8] Though here from aforementioned propositions we are able to understand the basic link between justice and disability discourse, but the said understanding is incomplete without acknowledging the pros and cons of different theories of justice applicable in disability discourse. The idea of restorative justice (the main theme of this paper) is incomplete and inappropriate in disability jurisprudence. As the theory is based on the interaction mechanism. Hence it is difficult for a disabled persons specially persons with intellectual and mental disabilities. It is more problematic because of the reason that in countries like India we do not have developed system of supportive and communicative decision-making.[9]This is the main reason that researchers are skeptical about the application of theories of restorative justice, which is getting popularize in our legal system.

[5] This is what the idea of 'evolution' of civilization teaches us.
[6] Here idea highlights the virtuous component of justice as discussed above. Hence it has the aspect/characteristic of natural law.
[7] Here in after United Nations' Convention on Rights of Persons with Disabilities.
[8] Preamble of UNCRPD.
[9]This is further problematic because people with disabilities are still not recognized as the complete persons by society and laws (e.g. section 12 of Indian Contract Act, 1872).

II. BACKGROUND: UNDERSTANDING THE IDEA FROM A CASE STUDY OF SEXUAL ABUSE

In today's age of sexuality and technology disciplines, the sexual abuses in a country are increasing at its alarming pace. The point is well evident from the increasing registration of sexual assault cases, especially after *Nirbhya's* case. The said situation is affecting the persons with disabilities in its worse manner[10], as due to their innocence and vulnerability they are the soft target of sexual offenders. This is the main reason of increasing number of cases of sexual assault against the disabled persons. The situation is getting heinous, as it is resulting into assault on the right to life and dignity of the disabled persons. Chandigarh rape case of mentally disable women is one such glaring example.[11]In above situation, the application of present restorative justice system is highly doubtful. Here, is it justified to uphold the principle of restorative justice? In cases where victim is in need of special care, the success of this argumentative system is highly doubtful. Further researchers here firmly believe that it is philosophically and morally wrong to participate into such deliberations where exploiter is bargaining about his inhuman and ill-deeds.[12]

III. SEXUAL VIOLENCE AGAINST WOMEN WITH DISABILITIES: A SERIOUS QUESTION AGAINST RESTORATIVE JUSTICE

Earlier there is no place for women with disabilities in *right-jurisprudence*. It is only after UNCRPD there starts a rights-deliberation about persons with disabilities. They are commonly perceived as asexual, that means they are denied the possibilities of marriage etc. This is the main reason that, many times they were forced undergo sterilization. World Health Organization in its report on violence and health,2002, defines sexual violence as , '*any sexual act, attempt to obtain a sexual act, unwanted sexual comments, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship with victim, in any setting but not limited to home and work*. Further violence against women has been broadly defined in Article 1 of United Nation Declaration on the Elimination of Violence of against Women, 1993. According to it, *any act of gender*

[10] Brown H. Stein J. and Turk V., *The sexual abuse of adults with learning disabilities: Report of a second two-year incidence survey*; MENTAL HANDICAP RESEARCH, 152-157(1995).

[11] Chandigarh Administration v. Unknown 2009, C.W.P. No. 8760 of 2009, where after rape, a mentally retarded girl got pregnant and wanted to deliver the baby. The whole episode got struck in the complexity of the legal web where later, the verdict of the Supreme Court was awarded in her favor.

[12] Here author is of the opinion that this is the gross violation of the basic principle of natural law, which argues for equality and dignity, because here, in such practices, *one is using other as a mean.* It is the very opposite application of *categorical imperative* reasoning.

based violence that results in or is likely to results in physical, sexual or psychological harm or suffering to women, including threat of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Further the social context of disability including factors like in accessibility, support services, communicative skills, poverty and isolation has a very strong impact on individuals' increased risk for such violence. Historically women are not considered to be the realizable reporters of such abuses. This is due to narrow mind setup of our society about disability discipline and its main stakeholders.

The traditional approach in relation to protection of persons with disabilities has inadvertently kept them away from accessing the resources and tools available for their protection. There was functioning of substitutive method, which gives no importance to person with disabilities.[13]In this so called *modern* times of twenty first century there are long list of women atrocities. The process of this *irrational* discrimination starts right form female feticide to old age abandonment. This is well evident to understand the vulnerability of women with disabilities. This is the factor, due to which frequency of sexual assault against women is getting its momentum. The part of reality became worse because of the fact that there is no attention towards such complaints by disabled women.[14] Sexual abuse of women with disability is almost similar across the globe.[15]There is least chance of damage control because the main perpetrators of such abuses are spouses/ex-spouses followed by parents, relatives, neighbors, strangers and service providers.[16] Hence it is very difficult to protect and safeguard the interests of the women with disabilities. In a survey conducted by Disabled Women's Network Canada, less than half of the women reported abuse because of their fear and dependency on abuser. In another national survey by Nosek, Howland, Rintala, Young and Chanpong,[17] similar results were found, where overall abuses among women with or

[13] The substitutive method was criticized in disability study regime and was replaced by *supportive* method, where one has to support the decision making process for disabled person. But the success of the method is highly dependable on the attitude of the society, as in various cases/examples it is evident that still there is no autonomy for disabled persons. Ultimately it is *other* who are participating in the decision making process for person with disabilities.

[14] As discussed above that there is no reliability on their part. There are examples where mentally disabled women were sexually abused publically, but simply due to the *least bothered approach* of system towards mentally ill people, their attitude is ignorant. The proposition is based on the personal observation of the author.

[15] For example, the Disabled Women's Network of Canada surveyed 245 women; 40% of them were experienced abuse and 21% had been raped.

[16]Riddington, J. *'Beating the "Odds": Violence and Women with Disabilities'* (Position paper 2). VANCOUVER, BC: DISABLED WOMEN'S NETWORK CANADA (2000).

[17]Nosek, M.A., Howland, C.A., Rintala, D.H., Young, E.M., &Chanpong, G.F. *National Study of Women with Physical Disabilities: Final Report,*SEXUALITY AND DISABILITY, 5-39 (2007).

without disabilities were found, where 62% of reported life time abuses.[18] Further according to one another survey[19] of 200 women with physical and cognitive disabilities; 67% and 53% of women have suffered physical and sexual abuses respectively. The research further went on articulating that women with disabilities are more prone to sexual assault and abuse then men with disabilities and non-disabled.[20]

According to 2001 Census report, women constitutes the 42.457% of total population of persons with disabilities in India.[21] This highlights the approachability to their vulnerability, as they are easy targets for sexual assault.

Following are the few examples of sexual abuses of women with disabilities:
On Aug. 15, 2013, a twelve year old girl with mental disability was allegedly raped by her neighbor aged forty three years. When victim was playing, accused enticed her to follow him to a nearby go-down, where he raped her.[22] Further on Feb.2, 2014, a sixteen year girl with physically disability was molested by an auto driver in North Kolkatta's Cossipore.[23] During rescue, the victim was found tied up in a bed in a half-naked position. There was another incident where 'dump and deaf' women were gang raped by three accused. Here all the accused were juvenile.[24]Though number of times judiciary expresses its concern and anguish regarding the sensitivity of sexual assault cases against persons with disabilities. The court went on arguing that sexual or physical violence against persons with disability is 'exploitation of their helplessness'.[25]But at the same time it has been observed that number of times court is hesitant in considering the testimony of deaf and mute persons as competent and credible witness.[26]

[18] Further, here it is important to note that women with disabilities reported significantly longer durations of physical and sexual abuse, in comparison with the women without disabilities.
[19] L.E. Curry, M.A Oschwald, M. Maley, S. Saxton,M. Eckels,*Barriers and Strategies in Addressing Abuses: A Survey of Disabled Women's Experience*'. 68 (1), JOURNAL OF REHABILITATION, 4-13, (2002).
[20]Sobsey D. and Doe T., '*Patterns of Sexual Abuse and Assault'*, JOURNAL OF SEXUALITY AND DISABILITY, 243-249 (2006).
[21] Available at: http://www.censusindia.net/disability/disabled_population.html.
[22]Available at: http://articles.timesofindia.indiatimes.com/2013-08-15/delhi/41412689_1_disabled-girl-northwestdelhi-neighbour.
[23] Available at: http://timesofindia.indiatimes.com/city/kolkata/Impaired-girl-raped-by-auto driver/articleshow/29737228.cms
[24]RamdhanMeena v State of Rajasthan, AIR1981 WLN 124 (India).
[25] AIR 2004 SC 789 (India).
[26] State of Rajasthan vDarshan Singh, AIR 2012 5 SCC 789 (India), In this case court while acknowledging the testimony of a deaf and mute person on the ground that there is no law that prevent the testimony of deaf and mute person, but at the same time refused to consider the testimony of witness.

IV. RESTORATIVE JUSTICE AND DISABILITY JURISPRUDENCE: SAME SOURCE OF ORIGIN

It is interesting to note that both, concept of restorative justice and disability jurisprudence are the outcome or in other words, application of natural law theory. Natural law recognized individual autonomy, freedom and choice and according to it human beings are rational, worthy of dignity and respect. Hence any law to that extent, which curtails the human autonomy and dignity, is not a *just* law. The purpose of restorative justice is to facilitate the interaction among different stakeholders so that there arise a possibility of mutual respect and harmony between victim and wrongdoer.[27] Similarly on the other hand the disability jurisprudence also deliberates upon the idea of human agency and equal capacity,[28]according to it there should not be any discrimination with persons with disabilities on any ground. Any violation in this regard will be gross violation of their human rights.[29]Hence it can be articulated that above mentioned both systems are derived from the same source, which always uphold the principle of rationality, equality and justice. In this way there is *slight* possibility that one can facilitate the other in the process of service towards humanity. But at the same time they create barriers in achieving their respective goals.[30]Hence application of restorative justice is sensitive in this issue, because in India, we have still to achieve the stage, which functions on disability studies' celebrated slogan- '*Nothing About Us, Without Us*'. Here without going into further deliberations, let us consider the case of restorative justice and its relevance.

V. GENERAL IMPORTANCE OF RESTORATIVE JUSTICE AND ITS DIFFICULTIES IN DISABILITY DISCIPLINE

> *Restorative justice is fundamentally different from retributive justice. It is justice that puts energy into the future, not into what is past. It focuses on what needs to be healed, what needs to be repaid, what needs to be learned in*

[27] The idea is outcome of stoic philosophy of natural law, according to which one important goal of human life is the *fellowship* with other human beings. (J.G RIDDALL, JURISPRUDENCE, (Chapter 5, Oxford Publications, 2000).

[28] Article 12 of UNCRPD.

[29] The proposition itself is based on the basic principles of natural law.

[30] The proposition is based on the reason that disability jurisprudence is having its distinct way in respect of its application is concern, whereas theory of restorative justice is general for all criminal justice system. Hence one cannot apply it without altering its methods of functionality. This is the main reason that author is questioning the application of restorative justice system in disability discipline, where victim is in need of special care, as there are high chances of bargaining, substitutive decision-making, cheating with victim. Though the system works in the presence of experts, who facilitate the deliberations, but role is just of facilitation and not to completion.

> *the wake of crime. It looks at what needs to be strengthened if such things are not to happen again*[31].
>
> -Susan Sharpe

As discussed above that Restorative Justice is one of very important system of administration of justice. But the said proposition is not of universal applications as it has certain limitations, pertaining to certain aspects. The researchers will be elaborating the said proposition in second half of this paragraph, as firstly it is important to understand the concept. Here, if one questions on what is the final goal of criminal justice system? The probable answer will be that 'do justice', as indicative by term itself. Now, is imprisoning the wrongdoer is essential for a successful criminal justice? Here one has to see that, aim of law is to fulfill three important objectives i.e. Vindication; Deterrence and finally Appeasement.[32] Among these, it is the third objective which is of the utmost importance in restorative justice system. It simply means the satisfaction of the victim, the idea on which the entire jurisprudence of restorative justice is deliberated. Perhaps it is the one point where traditional criminal justice system is lacking. Refereeing back to the question asked above, one might say, yes, of course, imprisonment of the offender will not the way to serve the criminal justice system. There are various other criteria's that need to be fulfilled. The one biggest loophole in long imprisonment is that it creates huge monetary burden on states, with least success. For example in United States, there is highest rate of imprisonment per population in the world[33] and estimate expenses that may exceed thirty thousand US dollars, per year, per inmate.[34]

The point is well articulated by Daren Bush:

> *Given the decline in the value of additional years of imprisonment, it is questionable whether lengthy sentences will resolve the issue. The benefits of long-term incarceration will be outweighed by the costs under any analysis, given that it serves no deterrence purpose, increases societal costs, and leaves*

[31]SUSAN SHARPE, RESTORATIVE JUSTICE: A VISION FOR HEALING AND CHANGE, 59-76 (Oxford Publications 2000).
[32]WINFIELD& JOLOWICZ, TORTS, 7-8 (18h ed. 2004).
[33] Sara Sun Beale, *Still Though on crime? Prospects for Restorative Justice in the United States,* UTAH LAW REVIEW, 413- 15 (2004) (quoting the estimated imprisonment rate as 699 per 100,000 population). According to the Bureau of Justice Statistics Bulletin for 2003, the incarceration rate has increased to an estimated 714 per 100,000. Bureau of Justice Statistics, Press Release, U.S. Prison Population Rises 2.6 Percent During 2002 (July 27, 2016, 10:40 PM) http://www.ojp.usdoj.gov/bjs/pub/press/p02pr.htm.
[34] Darren Bush, *Law and Economics of Restorative Justice: Why Restorative Justice Cannot and Should Not Be Solely About Restoration*, UTAH LAW REVIEW, 439-56 (2003).

> *offenders who might otherwise be productive members of society without that ability.*[35]

The main aims of restorative justice is to restore the harm that has been done; repair relationships; address the needs of the offender and the victim; empower the community to address the future harms. The functioning of the system depends on the voluntary participation of all stakeholders. Though the system works on the supportive mechanism but it is difficult for persons with disability to participate as they need altogether different kind of support. The system promotes community living structure, which facilitate inclusion and minimize isolation.[36] The restorative system supports the victim-offender mediation as it encourages face to face meetings between them, so that they can understand each other's necessities etc. Such idea is based on the 'self-guilt' doctrine, where wrongdoer is realizing his mistake and takes the responsibility for his act. Here researchers are of the reservation that the said mechanism is not good for all.[37]The said meetings will preferably held in the presence of family members, relatives or friends of victim, hence there is always possibility of coloring of opinion.[38] Hence the application of said system will further exploit the vulnerability[39]of disabled person. Even in the present system of administration of justice of India, it is very difficult to safeguard the interests of disabled persons.

According to restorative method, it is participants who control the discourse, and further more broadly it is found that, citizen were more likely to comply with the law, when they saw themselves as treated fairly by the criminal justice system.[40] It gives importance to victims, who are always neglected in the traditional criminal justice system.[41]Lawrence Sherman[42] in 1993 reviewed subsequent supportive evidence on this question as did Tyler. One another

[35] Ibid.
[36] But without proper accommodation and accessibility such inclusion will act as a disadvantage for persons with disabilities, as it gives the chance to intruders to exploit them.
[37] For example in cases of sexual offences it is very difficult to face the offenders. Especially in Indian conditions, where women is already having a less status them male (this is the bitter truth), there are high chances of further mental harassment and emotional exploitation.
[38] The argument completely justified after exemplifying the cases of abortions in India, where due to family pressure, and women allowed female feticide.
[39] Here word vulnerability is indicating that person with disability become vulnerable in absence of proper accessible and accommodateble system of administration of justice and it is nowhere interpretating that persons with disabilities are vulnerable.
[40]TYLER, WHY PEOPLE OBEY THE LAW, 37-67 (1t ed. Penguin Books 1990).
[41]Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, JOURNAL OF DISPUTE RESOLUTION, Vol 2,349-392(2005).
[42] Lawrence W Sherman and Heather Strang, *Restorative Justice and Rule of Law*, RESTORATIVE JUSTICE: THE EVIDENCE, 44-48 (2007).

theory behind restorative justice is *theory of unacknowledged shame* by a criminologist. Sylvan Tomkins, according to this perspective shame can be a destructive emotion because it can lead one to attack other and oneself.[43] But the success of these ideas is always doubtful. Here one has to see the problems or shortcomings of restorative justice system.

The first most important worry about this system is that these practices can increase the victim fears or re-victimization. The research of Heather Strang and Kathy Daly shows that are possibility of re-victimization, as on various occasions the victims are shy, and broken hearted, can be easy target of physiological harassment.[44]Further the pressure to achieve speedy trial objectives for offenders can be quite contrary to the interest of victims. Further there are high chances to get influenced in such practices. The second objection is form offenders' point of view, which says that restorative justice can be a 'shaming machine' that worsens the stigmatization of offenders.[45] Restorative Justice is prone to capture by the dominant group in the restorative process. This is most important alarming drawback of the system. This highlights the influence in conferencing process, which will certainly affect the justice delivery system.[46] There is further concern regarding it can trample rights because of impoverished articulation of procedural safeguards. There is possibility of police malpractices, political influence. There are chances that one police or other interested influential persons made one to confess that he didn't done. Further there is possibility that rights can be trampled because of the inferior articulation of procedural safeguard in restorative justice in comparison with the traditional court functioning. There is also doubt that said principle will meet the rationale of rule of law, because there are always chances of biasness due to personal interest of the concern parties. Finally if parties are not satisfied with such proceedings, then it will further delay the process of administration of justice, as it will add on to the list of the cases. Hence this will result into grappling of justice.

VI. CONCLUSION

There are different theories and system of justice, developed with the need of time and circumstances. Each theory has its own merit and demerit. Further here it is clearly

[43]Nathanson's Compass of Shame (1992).
[44] Prof. K. Daly, *Sexual Assault and Restorative Justice*, Griffith University, Queensland (July 31, 2016, 11:30 PM), www.griffith.edu.au/dspace/bitstream/handle/10072/741/kdpaper11.pdf.
[45]Retzinger and Scheff, '*Strategy for Community Conference: Emotions and Social Bond'*, N.Y. Times, June 25, 1996.
[46] Maxwell and Morris's interviews states that many occasions people have casual behavior during conference process or there are high chances of domination during such conferences.

articulated through this paper that restorative justice is one of such famous system of administration of justice applicable in modern days. But the said system is not applicable in on universal basis and especially in cases involving sexual violations of disabled people, as there is high possibility of emotional distress and re-victimization of victims. Therefore researchers through this paper argues against the application of this system in disability discourse. Further, according to one philosophical thought, punishing the wrong doer is the only way to serve justice. According to Immanuel Kant's Theory,[47] the preeminent goal of criminal law is retribution. Punishment is an end itself, not an instrument for achieving other possible ends. Further elaborating the Kantian theory of punishment, Georg Hegel[48], argued that crime negates moral law, and only punishment can restore the neglected moral right. It is further argued that since restorative justice aims to reduce the number of offenders punished under old traditional system and this way it contradicts with the old system of punishment. The infliction of pain on convicted offenders is the correct medicine for the infringed 'moral right,' it may be completely irrational and irrelevant to introduce it as a common appropriate process for all cases.[49]Hence even philosophically there are counter thought to the restorative justice. But for the purpose of this paper, researchers' disapproves the application of restorative justice in disability discipline which is the extra sensitive. In order to apply the idea of restorative justice, there is need to work on the *facilitation*[50] of disabled persons. Perhaps this can only be possible by fulfilling the *basic capacity building*[51]for persons with disabilities. This is the same argument that is enshrined UNCRPD, the only way to achieve the three *P's* as defined in the introduction of this work. But this stage is perhaps the *struggling* phase, for policy makers as it is yet to achieve. Hence there is need to separate disability discipline form the application of theoretical restorative justice. At this level the application of the same will hamper the cause of justice for persons with disability and ultimately will go against the system of natural law, which professes the argument for universal human rights.

[47]Robert C. Solomon and Mark C. Murphy,*Immanuel KantOn Punishment*: *What is Justice,?*CLASSIC AND CONTEMPORARY READINGS, 252-56, (Springer Publications1990).
[48]GEORGE W. HEGEL, PHILOSOPHY OF RIGHTS, 218-20(Oxford University Press, 1967).
[49] Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, UCLA Rev. 1727 (1999),states that restorative justice is a social movement …that might just allow it to transform the criminal justice system by leading to the marginalization of punishment as the primary method of responding to wrongdoers.
[50] In the light of UNCRPD, Article 12, 13.
[51]MARTHA C. NUSSBAUM, CREATING CAPACITIES: THE HUMAN DEVELOPMENT APPROACH11-40 (3d ed. Oxford Publication, 2007).

"FROM CAVES UNTO WEB"-TRANSNATIONAL TERRORISM VIA SOCIAL MEDIA: UNDERSTANDING CHALLENGES AND SOLUTIONS FOR 'HUMAN RIGHTS' IN 21ST CENTURY

P. Arun[*]

"If terrorism is to have effect, it must be communicated."

- Philip Seib and Dana M. Janbek[1]

I. TERRORISM VIA SOCIAL MEDIA: EVOLUTION OF A NEW BATTLEGROUND

Advancements in digital technologies have not only emancipated lives of several individuals around the world but also created new spaces for communication via digital media. Digital media comprises of several examples which created a new milieu where data can be created, viewed, distributed, modified and preserved on digital electronics devices. Among them social media became a novel communicating space. However, such space along with several advantages has posed severe challenges, as it turned out as safe haven for terrorism.

Undoubtedly, among other definitions in social sciences, terrorism also remains a contested concept, with varied definitions. It almost took five decades to achieve an academic consensus among scholars. Instead of going into semiotics and definitional durability of terrorism, it is better to pursue Alex Schmid's revised academic definition of terrorism that refers "to a doctrine about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties."[2] It becomes more complicated due to "[t]he use, or threat of use, of anxiety-inducing extra-normal violence for political purposes by an individual or group, whether acting for or influence opposition to established governmental

[*] Research Scholar, Department of Political Science, School of Social Sciences, University of Hyderabad, Hyderabad, Telangana, India.

[1] PHILIP M. SEIB & DANA M. JANBEK, GLOBAL TERRORISM AND NEW MEDIA: THE POST-AL QAEDA GENERATION, 19 (2011).

[2] ALEX P. SCHMID, *THE DEFINITION OF TERRORISM* IN THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH, *86-87,* (Alex P. Schmid ed., 2011).

authority, when such action is intended to influence the attitudes and behaviour of a target group wider than the immediate victims and when, through the nationality or foreign ties of its perpetrators, its location, the nature of its institutional or human victim, or the mechanisms of its resolution its ramifications transcend national boundaries."[3] In post 9/11 scenario, terrorism acquired a new characteristic as it began to function and operate by transcending national boundaries.

It has been well identified that media plays a significant role because their success expands exponentially as reports and images of their act is transmitted to reach larger audiences, as mere terrorist attacks do not accomplish the purpose. Here the traditional news organizations lose their position of information gatekeepers owing to the developments in information and communication technology that allow terrorists to harness online venues to reach substantial audience. The relationship between terrorism and mass media according to Paul Wilkinson is symbiotic, he further says "when one says 'terrorism' in a democratic society, one also says 'media'. Terrorism by its very nature is a psychological weapon which depends upon communicating a threat to the wider society."[4]

For Francis Fukuyama and Caroline Wagner technology means tools which can extend our human capacities, but when it becomes little complex and advanced, it poses further challenges. Firstly, the developments in technology lead to "enhanced capacity of surveillance and a corresponding decrease in personal privacy" particularly under the major democratic regimes it is a major assault on the fundamental rights and freedom. Secondly, it also raises a potential threat of increased criminal and terrorist activity.[5]Several scholars along with them in the end of twentieth-century predicted issues and challenges where communication would act as a kernel for terrorism which is quite pertinent in the contemporary period.

The present truism is Internet allows fast, spontaneous and inexpensive medium for dissemination of even complex information to diverse constituencies, ranging from the

[3]EDWARD MICKOLUS, *TRENDS IN TRANSNATIONAL TERRORISM*, INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD, (Marius H. Livingston, Lee Bruce. Kress, & Marie G. Wanek eds., 1978).
[4]PAUL WILKINSON, *THE MEDIA AND TERRORISM* IN TERRORISM VERSUS DEMOCRACY: THE LIBERAL STATE RESPONSE, 149-162 (2011).
[5]FRANCIS FUKUYAMA & CAROLINE S. WAGNER, INFORMATION AND BIOLOGICAL REVOLUTIONS: GLOBAL GOVERNANCE CHALLENGES: SUMMARY OF A STUDY GROUP, (2000).

potential recruit to prospective partners in terrorist enterprises.[6]It is similar to the multi-functional Swiss knife. It created a complex situation as what Fukuyama and Wagner forecasted as imminent governance issues surrounding information and communication technology. This is relatively a new communication technology which is open, democratic, and a diffused cum decentralized interoperable network, where regulations are few in number which provides easier access in both technical and financial terms and with minimal constraints[7]that serves as a safe haven for terrorists to operate and function in virtual space. The most challenging aspect of this expansion of terrorism via social media is possible because virtual space gives resilience to their existence. Now the prevention and combating of terrorism is not merely confined within the conventional battleground, rather it greatly involves increased resources and effort devoted to monitoring the virtual battleground.[8] Philip Seib and Dana Janbek call it is a shift from caves and onto the web.

The major purpose which motivates terrorists is 'political' which drives them to become adept at utilizing the Internet and social media to facilitate their activities, including incitement to commit a terrorist act, radicalization to violence, recruitment and mobilization, training, planning and coordination, collection and sharing of information, publicity and propaganda, creating psychological warfare, preparation, financing and execution of attacks.[9] The objective purpose here is to convey their propaganda to larger audiences, mobilise larger support and to garner wider audience of supporters and sympathisers. There is a closed relationship and operational value of using social media, as young tech-savvy teenagers who

[6]Though, the first group which successfully harnessed the power of Internet were insurgent group Zapatistas in Mexico and later LTTE (Tamil Tigers). Meanwhile Al Qaeda also expanded in virtual arena. It not only devised secure methods of communication, but also created huge repository of training materials for potential recruits especially in post 9/11period. In present scenario, almost every terrorist organisation now has its own Internet Web sites. See BRUCE HOFFMAN, *THE NEW MEDIA, TERRORISM, AND THE SHAPING OF GLOBAL OPINION*, IN INSIDE TERRORISM, 174-197 (2006); Philip M. Seib & Dana M. Janbek *supra* note 1 at 22-42.

[7]PAUL J SMITH, THE TERRORISM AHEAD: CONFRONTING TRANSNATIONAL VIOLENCE IN THE TWENTY-FIRST CENTURY, 69-72 (2008); PHILIP M. SEIB& DANA M. JANBEK *supra* note 1 at 59.

[8]ISIS mounted a systematic and devastating campaign for hearts and minds on social media, most visibly and noisily on Twitter. See Jessica Stern & J M Berger, ISIS: The State of Terror (2015).

[9]See Gabriel Weimann, *Www.Terror.Net: How Modern Terrorism Uses The Internet: United States Institute Of Peace* (2004), http://www.usip.org/publications/wwwterrornet-how-modern-terrorism-uses-the-internet (last visited Sep 28, 2016); UN Security Council Counter-Terrorism Committee, special meeting clearly elaborated the varied levels of exploitation of social media for violent extremism. See Preventing Terrorists from Exploiting the Internet and Social Media to Recruit Terrorists and Incite Terrorist Acts, While Respecting Human Rights and Fundamental Freedoms, UN SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE (2015), http://www.un.org/en/sc/ctc/docs/2015/ict special meeting_ chair summary_ plan of action ver.pdf, (last visited Sep 28, 2016); Scott Gates and Sukanya Podder describes the social media recruitment machine and effectiveness of virtual propaganda machinery on the recruitment of foreign fighters. See Scott Gates & Sukanya Podder, *Social Media, Recruitment, Allegiance and the Islamic State*, 9 TERRORISM RESEARCH INITIATIVE (2015), http://www.terro rismanalysts.com/pt/index.php/pot/article/view/446/html (last visited Sep 29, 2016).

constitute a majority in social media, are easy to reach out to and recruit. They are targeted because "they do not have any paper trail of travel, arrests, or other personal history that might alert security services to their potential roles in terrorist activity."[10]

According to Jan Kleijssen using ICT to promote their ideologies of hatred and spread fear is a new "global brands of terrorism". Social media have provided terrorists with a reach beyond anything previously dreamt of, and the structure of the Internet has made it possible for them to move seamlessly between jurisdictions, thereby to a large degree making it impossible for state authorities to effectively block access to their websites. ICT are of course also being used for communications between terrorists and for the purposes of training for terrorism.[11]

II. CONUNDRUM OF 'LIBERTY' AND 'SECURITY'?

Major developments in social media (Facebook, Twitter, YouTube, WeChat etc.) created an unprecedented fervour and furore. It gave every individual the "power to create and share ideas and information instantly, without barriers"[12] and such a "power to share and make the world more open and connected"[13]further broadened the idea of freedom of speech and expression. In the era of information age, social networking has redefined our fundamental liberties and human rights. The existence of basic values of internet, regardless of frontiers, originates from the International Covenant on Civil and Political Rights which is a part of the International Bill of Human Rights. First, the protection of right to freedom of 'opinion' and 'expression' under Article 19 (which also involves freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, in any medium of his choice). There is significant difference as these rights being absolute or not because the former is without any interference, however the latter prescribes the special duties and responsibilities on the state to intervene and restrict under the conditions to protect national security or public order. Second, the protection of the right to privacy under Article 17, which prevents against any arbitrary or unlawful interference.

[10]PHILIP M. SEIB & DANA M. JANBEK *supra* note 1 at 61.
[11]Intervention by Director Jan Kleijssen: Technical Meeting of the Counter-Terrorism Committee Executive Directorate on "*Preventing Terrorists from Exploiting the Internet and Social Media to Recruit Terrorists and Incite Terrorist Acts, while Respecting Human Rights and Fundamental Freedoms Human Rights and Rule of Law*," https://www.coe.int/en/web/human-rights-rule-of-law/intervention-jk-2015-12-17 (last visited Sep 29, 2016).
[12] The Twitter Rules, TWITTER, https://support.twitter.com/articles/18311 (last visited Sep 29, 2016).
[13] Community Standards, FACEBOOK, https://www.facebook.com/communitystandards# (last visited Sep 29, 2016).

Jessica Stern asserts that "the advent of social media had opened the door to different types of interactions, exchanges that could involve daily or weekly conversation over the course of months. It brought out new risks, the danger of becoming too publicly or privately friendly with sources, at the risk of giving them a higher profile or being perceived as validating their views." With this opening of doors ISIS in last few years penetrated into virtual medium to embrace and gravitate for their innovative propaganda through unprecedented manipulation of social media. Therefore, with tremendous possibilities, it produced numerous challenges. In order to confront those abuses and violence, several countries are equipped with surveillance and monitoring mechanisms. Such innovations are counter-reactions to transnational terrorism. Therefore, these reactions and counter-reactions unfold a major debate of this century which is the conundrum of 'Security' or 'Liberty'.

It all began after the Sept. 11, 2001 attacks, that led to several legal changes occurring in that decade, which David Jenkins calls as a "long decade"[14] where legal systems evolved in reaction to global terrorism around the world. Several scholars have tried to understand the nature of surveillance state, and the conundrum between security and liberty. In this content, Jeremy Waldron cautions about giving up our civil liberties and striking a new balance between liberty and security as he states, "we must be sure that the diminution of the liberty will in fact have the desired consequence."[15] Reducing liberty consequently increases the power of the state, which may be used to cause harm or diminish liberty in other ways. The matter of suspicion of power under the state is seldom ever used only for emergency purposes and always liable to abuse. Instead of trading off liberties for purely symbolic purposes and a consequential gain, there should be assessments about the effectiveness of such trade-offs.

However, Adrian Vermeule and Eric Posner advance a trade-off thesis between security and liberty. They argue that both security and liberty are valuable goods that contribute to individual well-being or welfare, and neither good can simply be maximized without regard to the other. One of the characteristics of emergencies or terrorist attacks is the defensive measures wherein the government opts to increase intelligence gathering and monitoring. Also, during such a period, the executive which is swift and vigorous gets the institutional

[14]DAVID JENKINS, *THE LONG DECADE*, IN THE LONG DECADE: HOW 9/11 CHANGED THE LAW, 3-27, (David Jenkins, Amanda Jacobsen, & Anders Henriksen eds., 2014).
[15]JEREMY WALDRON, *Security and Liberty: The Image of Balance*, 11 JOUR POL PHIL, 191-210 (2003).

advantages along with their secrecy and decisiveness. In contrast, the judges are at sea and the evolved legal rules seem inapposite and even obstructive possessing limited information and limited expertise.[16]

In a similar vein Richard Posner contends that rights should be modified according to circumstance and that we must find a pragmatic balance between personal liberty and community safety. He finds the direct connection between liberty and security as there is an automatic direct balance between them- a 'fluid hydraulic balance.' It shifts continually as threats to liberty and safety wax and wane. According to him, "privacy is the terrorist's best friend" therefore, the government has a compelling need to exploit digitization in defence of national security. The dangers of data mining such as leaks should be prevented through sanctions and other security measures to minimize the leakage of such information outside the community of national security.[17]

The trade-off thesis sees the balance between security and liberty as a zero-sum trade-off. However, Daniel Solove finds this argument as completely flawed and argues that the balance between privacy and security is rarely assessed properly. Instead he argues that the real balance should be between "security measure with oversight" and "regulation and security measure at the sole discretion of executive officials."[18]It needs to be emphasized that restrictions must be necessary and proportionate within the legal framework. Here the proportionality requirement does not constrain rather allows the required framework to ensure ensuring restrictions on terrorist contents in communication. Moreover, it does not undermine anyone's right to access information and civic space which could have counter-productive effect. The concept of security need to be broadened and should be more realistic to accommodate contemporary threats.[19]

---

[16]ERIC A. POSNER & ADRIAN VERMEULE, *EMERGENCIES, TRADEOFFS, AND DEFERENCE*, IN TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS, 15-57, (2007); Adrian Vermeule, *SECURITY AND LIBERTY: CRITIQUES OF THE TRADEOFF THESIS*, IN THE LONG DECADE: HOW 9/11 CHANGED THE LAW, 31-45, (David Jenkins, Amanda Jacobsen, & Anders Henriksen eds.,).

[17]RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY*, IN NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY, 31-41, 143-145, (2006).

[18]DANIEL J. SOLOVE, *NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY*, IN NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY, 33-36 (2011).

[19]These views presented by David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in Technical meeting of the Counter-Terrorism Committee Executive Directorate on Dec. 16 2015. UN Live United Nations Web TV - Meetings & Events - (Part 1) Preventing Terrorists from Exploiting the Internet and Social Media, UN NEWS CENTER, http://webtv.un.org/meetings-events/watch/part-1-preventing-terrorists-from-exploiting-the-internet-and-social-media/4665962159001 (last visited Sep 28, 2016).

Particularly in the U.S. and the West in general, the role and responsibility of judiciary in times of counter-terrorism and surveillance is considered to be crucial. Despite criticisms from few quarters, it is held as the guardian of constitutionalism and human rights. It was regarded as their inherent constitutional responsibility to protect procedural fairness against government limitations by strengthening judicial review[20] and in order to play a greater role it needs to counter the 'pull of deferentialism' which erodes the particular responsibility of judges.[21] In this scenario one of the fundamental problem is that judiciary around the world is to strike a balance between security and liberty, in other words making cautious calibration to protect human rights.

III. CONFRONTING TRANSNATIONAL TERRORISM: CHALLENGES AND SOLUTIONS ON HUMAN RIGHTS

> *"There are tire marks all over the highway. Electronic trails create unprecedented possibilities for knowing where a person is, whom they are communicating with and what is being expressed, and what information they are accessing."*
>
> *_Gary T Marx*[22]

Since the mid 2015 alone, Twitter claims to have suspended over 360,000 accounts for threatening or promoting terrorist acts, primarily related to ISIS.[23] With the intensifying sophistication of terrorist network in social networking, the private companies altered its rules and guidelines. Earlier in 2014, the Twitter Rules on 'violence and threats' were vague, later it was amended by defining it as direct or indirect threats and clearly covers the threat or promotion of terrorism.[24] In similar ways Facebook also responded to proliferating transnational terrorism in its network.

---

[20]DAVID JENKINS, *PROCEDURAL FAIRNESS AND JUDICIAL REVIEW OF COUNTER-TERRORISM MEASURES*, IN JUDGES AS GUARDIANS OF CONSTITUTIONALISM AND HUMAN RIGHTS, (Martin Scheinin, HelleKrunke, & Marina Aksenova eds., 2016).

[21]MARTIN SCHEININ, *THE JUDICIARY IN TIMES OF TERRORISM AND SURVEILLANCE: A GLOBAL PERSPECTIVE*, IN JUDGES AS GUARDIANS OF CONSTITUTIONALISM AND HUMAN RIGHTS, (Martin Scheinin, HelleKrunke, & Marina Aksenova eds., 2016).

[22]GARY T MARX, *DATA SUPERHIGHWAYS: THE ROAD TO THE FUTURE*, IN SCIENTIFIC AMERICAN: TRIUMPH OF DISCOVERY A CHRONICLE OF GREAT ADVENTURES IN SCIENCE, (1995).

[23] Twitter says "We condemn the use of Twitter to promote terrorism and the Twitter Rules make it clear that this type of behaviour, or any violent threat, is not permitted on our service." See An update on our efforts to combat violent extremism, TWITTER (2016), https://blog.twitter.com/2016/an-update-on-our-efforts-to-combat-violent-extremism (last visited Sep 29, 2016).

[24] The Twitter Rules mentions in the section of 'Violent threats' (direct or indirect) that "you may not make threats of violence or promote violence, including threatening or promoting terrorism." See TWITTER (2016), https://support.twitter.com/articles/18311 (last visited Sep 29, 2016).

With the growing menace of transnational terrorism in social media United Nations Counter-Terrorism Committee on December 17, 2015 conducted a special meeting on "Preventing terrorists from exploiting the internet and social media to recruit terrorists and incite terrorist acts, while respecting human rights and fundamental freedoms" by bringing several countries, stakeholders, partners and organisations. It was held that appropriate legal, institutional and administrative frameworks are required to respond to the threat along with the rights to be free from arbitrary or unlawful interference with privacy and the freedom of expression should be protected by law. Also, it was held that there is an urgent need to promote dialogue between all stakeholders, including industry and civil society representatives, and seek to develop policies that favour the free flow of information along with security.[25]

Whether the means of addressing terrorism is through military, law enforcement, or politics, the technologically sophisticated milieu in which many terrorists operate makes them both more elusive and more ubiquitous. The sophistication lies beneath the encryption techniques which puts law enforcement agencies around the world in a "darkplace"[26]. Here one of the major dilemmas, as mentioned above among all democratic states around the world, on the one hand is to safeguard human rights (includes the rights to privacy and the right to freedom of expression) and on the other hand is to monitor and confront incidents of inciting terrorism and violent extremism in social media. In such a precarious situation, the states are strengthening their capacity to monitor and surveil, and their aim is to confront without violating international human rights. However, their capacity seems limited due to technological sophistication developed by private enterprises. Any efforts to undermine to disabling terrorist may not circumvent restrictions because the terrorists are not getting whacked and as they easily discover ways which is a whack-a-mole situation according to

[25]Special meeting of the Security Council Counter-Terrorism Committee and its Executive Directorate 16-17 December 2015, UN (2015), https://www.un.org/sc/ctc/blog/2015/11/19/special-meeting-of-the-counter-terrorism-committee-and-technical-sessions-of-the-counter-terrorism-committee-executive-directorate-on-preventing-and-combating-abuse-of-ict-for-terrorist-purposes-new/ (last visited Sep 29, 2016).

[26]Encryption a Matter of Human Rights (AMNESTY INTERNATIONAL) 19 (2016), https://www.amnesty.org/en/documents/pol40/3682/2016/en/ (last visited Oct 28, 2016): The genesis of encryption lies behind the novel idea to provide secure communications and data transmissions in virtual world. The companies (Telegram, WhatsApp) initiated offering end-to-end encryption to retain and succeed in competitive market share, such proliferation give competitive edge to the agencies. See *Social Media and the Encryption Challenge* in INSTITUTE FOR DEFENCE STUDIES AND ANALYSES, http://www.idsa.in/idsacomments/social-media-and-the-encryption-challenge_arul-r_220416 (last visited Oct 27, 2016).

Stern.[27]

The limitations and ineffectiveness produce two significant attractions; firstly, the existence of an entirely unregulated medium of communication and secondly it is extremely difficult, if not impossible, to identify the source of a message and to authenticate its real authorship.[28] Hence, tackling violent extremism in a new battleground needs cooperation among different stakeholders, especially when terrorism is trans-jurisdictional. While these emerging issues are not entirely covered by treaties, hence greater amount of trust and mutual cooperation among these parties need to be nurtured. In recent years, the limited success in curbing violent extremism in social media is due to insufficient cooperation between different stakeholders. Hence it becomes essential to build trust at three levels; among countries, private enterprises and civil society. Even twitter believes that there is no one "magic algorithm" for identifying terrorist content on the Internet.[29] There is only a thin line between freedom of speech and hate speech, hence it needs to be clearly defined to maintain balance.

There is an urgent need to build cooperation among cross-government intelligence agencies among different countries due to trans-jurisdictional operations of terrorism. Stern poignantly points out that "the debate over terrorist suspensions frequently revolved around the intelligence question, and terrorist content on social media was a business issue first and a cultural issue second. Intelligence concerns were, at best, a distant third. The reason is social media is run by private companies for-profit, which are neither government services nor philanthropic endeavours."[30] The values under which social networking emerged is under peril, hence cooperation is indispensable for its very own existence which is in danger. A robust partnership is required especially from the private sector and among the states to assist in providing their technical expertise, software tools and provide evidence for prosecution.

In India, to address challenges of national security and terrorism, new innovations in data-collection efforts were introduced such as Central Monitoring System (CMS) and NETRA (Network Traffic Analysis). It gave a technological edge to intelligence agencies in post 26/11 scenario. The CMS was launched to carrying out deep search surveillance including the

[27] JESSICA STERN & J M BERGER *supra* note 8.
[28] *supra* note 4 at 162.
[29] *Supra* note 23.
[30] *Supra* note 8.

facility to monitor mobiles, SMS, fax, website visit, social media usage, and much more.[31] An even more lethal surveilling mechanism is NETRA, an internet monitoring system capable of keyword-based detection, a monitoring, and pattern-recognition system for packetized data and voice traffic in virtual world. [32] It is all being carried out without any assurance of a matching legal and procedural framework, because it is held that under ordinary operation of the law, individuals could hide behind the law to avoid prosecution for their illegal behaviour.[33]The Indian government is constantly monitoring cyberspace[34] and the first cyber terrorism case in India appeared in 2014 when 24-year-old Mehdi Masroor Biswas, was arrested for aiding and abetting an ISIS terrorist organisation through his Twitter account @ShamiWitness. [35]Apart from his case there were several other cases of radicalization through social media which are under investigation processor chargesheets has been filed in special National Investigation Agency courts.[36]

IV. CONCLUSION

The evolution of social media with novel aims, turned out to be embraced for exploitative and illegal purposes by violent extremist and radicalized groups. Its unique characteristic of being trans-jurisdictional gives a competitive edge to agencies where as it provides advantageous position for terrorism. At present the twenty-first century is orchestrating a difficult future, which will test the trust and cooperation among multiple partners. Such cooperative endeavours would be successful if counter-terrorism efforts are carried out without subduing

[31]CMS was setup to automate the process of lawful interception and monitoring of telecommunications. Kiren Rijiju, *Centralised surveillance and interception system*, April 10, 2015, Rajya Sabha Debates; *Government's call intercept system to be ready by end of fiscal year*, THE HINDU, December 3, 2015, http://www.thehindu.com/business/central-monitoring-system-to-be-ready-by-end-of-fiscal-year/article7941946.ece (last visited Sep 29, 2016).

[32]*Govt to launch internet spy system 'Netra' soon*, TIMES OF INDIA, January 6, 2014, available at http://timesofindia.indiatimes.com/tech/tech-news/Govt-to-launch-internet-spy-system-Netra-soon/articleshow/28456222.cms (last visited Sep 13, 2016).

[33] Lisa Austin, *Surveillance and the Rule of Law*, 13 SURVEILLANCE & SOCIETY 295-299 (2012).

[34]According to Indian government "a borderless cyberspace coupled with the possibility of instant communication and anonymity, the potential for spread of terror through the use of social media is higher than ever, posing a threat to sovereignty and integrity of the country. The Security / Intelligence agencies are regularly monitoring social media sites." See Ravi Shankar Prasad, *Spread of Terrorism Via Social Media*, March, 16 2016, LOK SABHA DEBATES, available at http://164.100.47.190/loksabhaquestions/annex/7/AU3178.pdf (last visited Sep 13, 2016).

[35]*Mehdi Biswas, ISIS's voice on Twitter, arrested in Bengaluru*, TIMES OF INDIA, December 14, 2014, http://timesofindia.indiatimes.com/india/mehdi-biswas-isiss-voice-on-twitter-arrested-in-bengaluru/articleshow/45509074.cms.

[36] There were total eight ISIS/ISIL related cases registered in various Police Stations of NIA, few of them are State (NIA) v/s Mohamed Naser and Others (2015), State (NIA) v/s Areeb Ejaz Majeed (2016), State (NIA) v/s Moahammed Sirajuddin (2016). See NIA Cases, http://www.nia.gov.in/nia-cases.htm (last visited Oct 14, 2016); Aftermath of several cases of radicalisation, account information and removal requests typically in connection with criminal investigations increased sporadically. See Twitter transparency report on India (2016), TWITTER https://transparency.twitter.com/en/countries/in.html (last visited Sep 29, 2016).

and violating principles of international human rights. It is a critical moment where efforts to undermine encryption in one way may do more harm to individuals than disabling terrorist who can easily discover ways to circumvent restrictions. In other words, insecurity in one place leads to insecurity across networks, therefore undermining encryption may do little to prevent terrorist activity, but it disproportionally interferes and abridges human rights. With regard to this liberty and privacy, the laws and proposals for communication surveillance need to meet the standards of legality and proportionality. Under this precarious situation the expansion of transnational terrorism via social media poses a dilemma between liberty and security, in which state does not hold the monopoly to protect. The collective endeavour of state, private partners and civil society would show the nature of society in upcoming times.

HUMAN RIGHTS CENTRIC LAW FOR CONTROLLING TB IN INDIA: AN URGENT GLOBAL NEED

*Dr. Raj Kumar**

I. INTRODUCTION

"TB for which effective interventions exists remains an orphan and the world should be ashamed" *– Kevin De Cock*[1]

In 19th Century, TB killed an estimated one quarter of the adult population of Europe.[2] About one third of the world's population is infected with TB bacteria.[3] In 1993, World Health Organization declared TB as a global emergency.[4] The annual total of new TB cases, which had been about 5.7 million till 2013, rose to slightly more than 6 million in 2014 (an increase of 6%). This was mostly due to a 29% increase in notifications in India, which followed the introduction of a policy of mandatory notification in May 2012, creation of a national web-based reporting system in June 2012 and intensified efforts to engage the private health sector.[5]

In 2014, there were an estimated 9.6 million new TB cases: 5.4 million among men, 3.2 million among women and 1.0 million among children. There were also 1.5 million TB deaths (1.1 million among HIV-negative people and 0.4 million among HIV-positive people), of which approximately 890 000 were men, 480 000 were women and 140 000 were children.[6] In 2014, there were an estimated 480 000 (range: 360 000–600 000) new cases of MDR-TB worldwide, and approximately 190 000 (range: 120 000–260 000) deaths from MDR-TB. Among patients with pulmonary TB, who were notified in 2014, an estimated 300 000 (range: 220 000–370 000) had MDR-TB. More than half of these patients were in India,

*Human Rights Consultant, LL.M. (Human Rights & Duties Education), Ph.D., Uttar Pradesh, India.

[1]De Cock, K. M. Editorial: *"TB control in resource-poor settings with high rates of HIV infection", ICMR BULLETIN*,.33, No.3 March, 2003.

[2]Laura Hakokongan (Ed), *Care in Running Out of Breath? TB 21st Century*, Mary Moran, March 2005, 4.

[3]10 facts about TB, Reviewed March 2015, WORLD HEALTH ORGANISATION, http://www.who.int/features/factfiles/TB/en/, Aug 15,2015.

[4]World Health Organization, "*TB Advocacy a Practical Guide, Global TB Programme*" (1999.WH0). 24.

[5]*Global Tuberculosis Report 2015*, 20th Edition, WORLD HEALTH ORGANIZATION, WHO/HTM/TB/2015, 22, 2.

[6]*Ibid, 5*.

China and the Russian Federation.[7]Extensively drug-resistant TB (XDR-TB) had been reported by 105 countries by 2015. An estimated 9.7% of people with MDR-TB have XDR-TB.[8]

Involvement of the law has a long history in the control of infectious diseases.[9] Today, in the era of globalization, no sphere of the life of an individual has remained unaffected by the law and human rights and emerged as one of the most effective tools to regulate every sphere of life of human beings. It may be wrong in saying that the law is always being used for punishing the offenders only while, law also plays a key role in protecting and promoting human rights of individuals as well as groups. There are various kinds of International, National and local laws, which have been drafted and enacted to achieve some goals in the society and also to resolve the various social, economic, political, and legal and human rights based problems.

For exploring the question as what is the need of law for controlling TB in India? we have to know the answer of the question, what is the need of TB control in different aspects such as socio-economic, security, drug-resistant, epidemiological, human rights and legal? The paper raises another question as why the strategy of bio-medical approach for controlling TB in India is used while other effective approaches exist. This includes human rights and legal approach? The paper also emphasizes to have a human rights centric legislation and its contribution in controlling TB rather than having an ordinary legislation. The paper concludes with suggestions regarding the utility of human rights centric legislation as a new tool/approach to make TB free India and world.

II. INDIAN TB SCENARIO

TB is an infectious disease caused in most cases by micro-organism called *Mycobacterium TB.*[10] Despite every aspect of TB being well known, yet it continues to be one of the major health problems.[11] Public health seldom has clear and simple answers.[12] World Health

[7]*Ibid, at 54*.
[8]*Global Tuberculosis Report 2015*, 20th Edition, WORLD HEALTH ORGANIZATION, WHO/HTM/TB/2015, 22, 2.
[9] Cocker R J., "*Civil liberties and public good: detention of TB patients and The Public Health Act 1984*", Med Hist 2001; 45, 341-358.
[10]Ait-Khaled N, Alarcon E, Armengol R, et al., *Management of TB: a guide to the essentials of good practice*, Paris, France: International Union Against TB and Lung Disease, 2010, 5.
[11]Presidential address delivered by Prof. Rajendra Prasad ,President, National Conference on TB & Chest Diseases, 2012 and Director, Vallabhbhai Patel Chest Institute, University of Delhi, Delhi, during *67th National*

Organization (WHO) promoting DOTS as the solution of TB. For instance, in 1997 WHO announce that, "For the first time in 6000-year of TB we have the tools, strategies and medicines to defeat the epidemic in all part of the world.[13] Like the common cold, it spreads through the air.[14] It is estimated that about 40% of Indian population is infected with TB bacillus[15]. There is a strong chance that of them, at least 10% will develop TB disease during their life time.[16]. In TB, the challenge is a prevalence of close to 211 cases and 19 deaths per 100,000 populations and rising problems of multi-drug resistant TB. Though, these are significant declines from the MDG baseline, India still accounted for 27% of global TB notifications in 2014.[17]

India's Revised National TB Control Programme is the largest TB Control Programme in the world, placing more than 100,000 patients on treatment every month[18]. Today, TB is a completely curable disease but due to the emergence of multi-drug resistant TB (MDR-TB) and extensively drug-resistant TB (XDR-TB), it has become a serious public health and security concern all over the world including India. Drug-resistant TB, including multi-drug resistant and extensively drug resistant TB, is associated with poor prescribing, irregular drug supply, inadequate access to quality care, mandatory treatment or confinement and inability to complete treatment.[19]India, which houses 25% of the world's MDR-TB cases,[20] is a serious concern from the perspective of epidemiology as well as human rights. Because, moreover, MDR-TB patients often live a number of years before succumbing to the disease[21].Therefore,

---

Conference on TB & Chest Diseases, organized by Bihar TB Association under the joint auspices of The TB Association of India, held on 8th -10th February, 2013 at Mahavir Cancer Sansthan, Patna., India ,3.

[12]Edward P et al, (Editorial), "*The Role of Police Power in 21st Century Public Health, Sexually Transmitted Diseases"* The University of Missouri Kansas City, School of Law, Kansas City, Missouri, 26, No.6, 1999, 350-357.

[13]Ogdan J at al, *"The Politics of Branding in Policy transfer: The case of DOTS for TB Control"*, Social Service & medicine, 57, 2003, 185, As cited by Laura Hakokongan (Ed), "*Running Out of Breath? TB Care in 21st Century*" *A* Report based on research by Mary Moran, March 2005,.4-5.

[14]Fact Sheet No.104, Revised August 2002, WORLD HEALTH ORGANISATION, http://www.who.int/mediacentre/factsheets/who104/en/print.html, Apr 11, 2014.

[15]*TB India, 2012, RNTCP Annual Status Report*; Central TB Division, Directorate General of Health Services, Ministry of Health and Family Welfare Government of India, New Delhi,8.

[16]*TB India, 2007, RNTCP Annual Status Report;* Central TB Division, Directorate General of Health Services, Ministry of Health and Family Welfare Government of India, New Delhi,11.

[17]*Global Tuberculosis Report 2015*, 20th Edition, WORLD HEALTH ORGANIZATION, WHO/HTM/TB/2015.22,2.

[18]*TBC India*, Directorate Centre of Health Services, MINISTRY OF HEALTH AND FAMILY WELFARE , Government of India, http://www.tbcindia.nic.in/, Sept 19, 2015.

[19]*Global Fund Information Note: TB and human rights, the Global Fund to Fight AIDS, TB and Malaria*, (Feb 2013).

[20]Somita Pal, "*But very few pvt docs write correct prescriptions, DNA - Daily News & Analysis, Mumbai*" Mar 24,2011, http://www.drzarirudwadia.com/pdf/zarir_udwadia_TB.pdf,Sept 29, 2013.

[21]*Revised National TB Control Programme, DOTS-Plus Guidelines*, Central TB Division, Directorate General of Health Services, Ministry of Health & Family Welfare, Nirman Bhavan, New Delhi,5.

MDR-TB prevalence may be three times greater than its incidence[22].If these cases left undiagnosed, poorly treated or remained untreated, these patients transmit MDR-TB continuously till they alive. These facts clearly reflect epidemiological concern of MDR-TB for India. The pool of missed cases posed a serious threat to TB control programme because it continuously disseminates TB infection in the society without any barriers. TB remains a significant public health threat in India despite taking a long-standing public health prevention measures at various levels of government.

III. NEED OF TB CONTROL IN INDIA

It is well established that TB is a devastating disease. Besides the diseased burden, TB also causes an enormous socio-economic burden upon India.[23] TB is a disease which preferentially affects the most vulnerable and marginalized populations in all countries.[24] Its direct cost as well as indirect cost can be devastating to individuals as well as families. The direct and indirect cost of TB to India amounts to an estimated $23.7 billion annually.[25]

A review of studies investigating the economic impact of TB shows that, on an average, 3 to 4 months of work time are lost if an adult has TB resulting in the loss of 20-30% of annual household income and an average of 15 years of income is lost if the patient died from the disease.[26] It also leads to increased debt burden, particularly for the poor and marginalized sections of the population[27]. In India, Over 70% of the cases occur in the economically productive age group (15-54).[28]A report of the Stop TB Initiative, 2000, clearly indicates that, "The workforce is reduced, productivity falls, revenues drop and markets are

[22]Blower SM, Chou T., " *Modelling the emergence of the "hot zones": TB and the amplification dynamics of drug resistance." Nat Med* 2004: 10 (10), 1111-1116, As Cited in "*Revised National TB Control Programme, DOTS-Plus Guidelines"* (Central TB Division, Directorate General of Health Services, Ministry of Health & Family Welfare, Nirman Bhavan, New Delhi,2010), 6.

[23]*TB India 2011,RNTCP, Annual Status Report*, Central TB Division ,Directorate General of Health Services, MINISTRY OF HEALTH AND FAMILY WELFARE, Nirman Bhawan, New Delhi,India,9.

[24]Porter J D H, Ogden J. *" Social inequalities in the emergence of infectious disease"* In Shetty P and Strikland S. (ed.) *"Biology and Social Inequality*" Cambridge University Press. 1997 As Cited in B. Anshu *"The need for a multi-sectoral approach in TB control for enhancing community participation"* Health Administrator Vol: XV, Number: 1-2, 19-28.

[25]*TB India 2011, RNTCP, Annual Status Report,* Central TB Division ,Directorate General of Health Services, MINISTRY OF HEALTH AND FAMILY WELFARE, Nirman Bhawan, New Delhi,India,9.

[26]Ahlburg D, *The Economic impacts of TB.* Geneva, WORLD HEALTH ORGANIZATION, 2000, WHO/CDS/STB/2000.5; Stop TB Initiative series. As cited in Tomans's TB, Chapter-53, *What is the health, social, and economic burden of TB?* I. Smith, Medical Officer, Stop TB Department, World Health Organization, Geneva, Switzerland, 235.

[27]*TB India 2012, RNTCP, Annual Status Report*, Central TB Division, Directorate General of Health Services, MINISTRY OF HEALTH AND FAMILY WELFARE, Nirman Bhawan, New Delhi,India,11.

[28]*TB India, 2007, RNTCP Status Report,* Central TB Division, Directorate General of Health Services, MINISTRY OF HEALTH AND FAMILY WELFARE, Government of India, New Delhi.10.

lost.[29] Report also stated that, "TB is a serious obstacle to sustainable development."[30]TB robs people of opportunities, limits their choices, and ultimately, slows national development.[31] This leads to increased debt burden, particularly for the poor and marginalized section of the population.[32] TB traps people in a vicious cycle of poverty and disease. It exacts serious psychological and social costs particularly in societies where people and families with TB face discrimination, including loss of jobs, education opportunities and marriage prospects.[33] A study carried out by the All India Institute of Medical Sciences found that genital TB was responsible for close to 50% of the cases of infertility.[34] A common consequence of female infertility is the expulsion of women from their home with or without divorce and also polygamy in the desire to have children.[35]

Apart from above mentioned facts, the emergence of Multi Drug-Resistant TB (MDR-TB), Extensively Drug-Resistant TB (XDR-TB)[36] has posed a serious socio-economic & security threat before the Country. The emergence of XDR TB in India and across the world raises the possibility that the current TB epidemic of mostly drug susceptible TB will be replaced with a form of TB with severely restricted treatment options.[37] The economic, social and health security of countries and communities with a high prevalence of TB would be threatened by virtually untreatable TB among the bread-winners, presents and economically productive age groups.[38]

The severity of XDR-TB may be understood by a fact given here that, "Nunn informed that 52 of the 53 patients with XDR-TB in South Africa died within 210days. Between (January

[29]*TB & Sustainable Development*, The Stop TB Initiative, 2000 Report, Ministerial Conference, Amsterdam, 22-24 March 2000,WHO/CDS/STB/2000.4,5.
[30]*Ibid.*
[31]*Ibid.*
[32]*TB India 2012, RNTCP, Annual Status Report*, Central TB Division ,Directorate General of Health Services, MINISTRY OF HEALTH AND FAMILY WELFARE, Nirman Bhawan, New Delhi,India,11.
[33]*TB & Sustainable Development, The Stop TB Initiative, 2000 Report*, Ministerial Conference,Amsterdam,22-24 March 2000,WHO/CDS/STB/2000.4,5.
[34]Srivastava .M.L, et al., *TB in India, Status and Socioeconomic Aspects,* (CBS Publishers & Distributers Pvt Ltd, New Delhi,2012), 10.
[35]Kumar. R., "*TB –A Threat to Women's Fertility & Human Rights: An Overview*", 83-89, Dr. Jitender Kaur(Ed.), *Commitment & Betrayal: Re-Visiting Human Rights,* Twenty first Century Publications, Patiala, India, 2013.
[36]"Extensive drug resistance: resistance to any fluoroquinolone and to at least one of three second-line injectable drugs (capreomycin, kanamycin and amikacin), in addition to multidrug resistance" as mentioned in *The Definitions and Reporting Framework for TB – 2013 revision*, WORLD HEALTH ORGANIZATION, 2013, WHO/HTM/TB/2013.2.
[37]Chauhan .L.S., *" Drug Resistant TB-RNTCP Response*," Indian J Tuberc, 2008; 55, 5-8.
[38]*Ibid.*

2005 to March 2006), the deaths occurred on an average within 25 days even in those HIV patients who were taking anti-retroviral drugs.[39] Even in the United State[40], which has the best medicines available, a third of those who were diagnosed with XDR-TB have died. Once drug resistance has developed, treatment results can be expected to 0be poor, and the death rate high.[41] During the late 1985 and 1990s outbreaks of MDR-TB in North America and Europe killed over 80% of those who contracted it.[42] Drug –resistant TB poses a major threat to control of TB worldwide.[43]

Thus it can be said that TB control is very essential for protecting country's human resource as well as maintaining sustainable development. All the above mentioned devastating effects of TB on individuals as well as society have posed a serious concern of human rights and stimulated the need of TB control in India.

IV. NEED OF LAW FOR CONTROLLING TB

As Franklin D. Roosevelt stated, "Nothing can be more important to a state than its public health, the state's paramount concern should be the health of its people."[44]All the member states have an obligation towards the promotion and protection of human rights including the right to health. The obligation of the state is based on the broad three human rights principles and these are respect, protect and fulfill of human rights. To fulfill human rights means that governments must take measures that move toward the realization of human rights and legislative measure may be one of other measures. When a government ratifies a treaty, it agrees to ensure that its national-level laws, policies, and actions will be compatible with the rights defined in that treaty. In, *State of Punjab and Others v. Mohinder Singh*[45] "It is now a

[39]M. M. Singh, *"Editorial, XDR-TB –Danger Ahead*" Indian J Tuberc , 2007; 54, 1-2.
[40]*Trends in TB in United States*, 1998-2003, MMWR, Morb Mortal Weekly Rep, 2004; 53, pp.200-2014, As cited by M .M. Singh, "*Editorial, XDR-TB –Danger Ahead*," Indian J Tuberc, 2007; 54, 1-2.
[41]R.Coninx, et al., "*Drug Resistant TB in Prisons in Azerbaijan: Case Study*, " British Medical Journal 1998, 316, 1423-1425, and R.Coininx & M. Debacker et al., "*TB in Prisons :Limited Effectiveness of First-line Therapy in a setting with High Levels of Drug-Resisistance*," Lancet, 1999, 353, 969-973. As cited in Michael H., et al, *"Coninx, Overwhelming Consumption in Prisons: Human Rights and TB Control,"* Health and Human Rights, An International Journal, Vol.4, No.1., Haeward School of Public Health, Francois-Xavier Bagnoud Centre for Health and Human Rights, 2001, 176.
[42]*Bulletin of the World Health Organization*, 2000, 78(2), 239.
[43]*Global TB Report, 2014*, WORLD HEALTH ORGANIZATION, WHO/HTM/TB/2014.08.
[44]Institute of Medicine. *The Future of the Public's Health in the 21st Century*. Washington, DC: National Academies Press; 2003.
[45]*State of Punjab and Others v. Mohinder Singh*, AIR 1997 SC 1225.

settled law that right to health is integral to right to life. Government of India has a constitutional obligation to provide health facilities."[46]

A host of compulsory measures to combat the spread of TB can be documented from the mid-1890s, beginning almost directly after Koch's discovery of the causative agent of TB. The scope of state interventions was wide and included case identification (mandatory testing, physical examinations, reporting, TB registries, and contact tracing), disinfection or closure of premises, confinement (isolation and civil commitment), and criminal prosecutions for endangering the public[47].Before antibiotics, quarantine was important in preventing the spread of infection. Since it was not possible to attack bacterial causes of disease directly, sources of disease had to be kept away from other people[48].

One sputum positive patient can infect 10-15 persons in a year if left untreated.[49] Therefore, to break the cycle of transmission of TB infection is a fundamental element in TB control. There are two fundamental mechanism existed all over the world for breaking the cycle of the transmission of TB infection. First is by identifying the source of infection without any delay and treating the same. Second is to use of law for involuntary isolation/quarantine the source of TB infection for the purpose of diagnosis or treatment.

First mechanism also known as bio-medical approach, which has been used for controlling TB in India, just after the effective antibiotics against TB were developed in the 1950's.[50] Second mechanism has never been used for controlling TB in India, while, several countries of the world are using it from that time, when anti-TB drugs were not been developed. India's National TB Control Programme is based on bio-medical model and running since 1962 with some changes from time to time.

---

[46]Dr. Archana Gadekar, *Right to Health: A myth or a reality?* Dr (Mrs.) Snehal Fadnavis (Ed), *Journal of the Institute of Human Rights*, Vol.XII,No.2,December,2009, Institute of Human Rights ,Jaripatka, Nagpur, India.

[47]Lawrence 0. Gostin, *"Controlling the Resurgent TB Epidemic: A 50- State Survey of TB Statutes and Proposals for Reform,"* 269 JAMA 255 (1993).

[48]Quarantine is used in more than one sense. It may mean the isolation of infected or exposed persons. It may also refer to the court-ordered removal of infected persons to treatment facilities (also called commitment). The following definition comes from In *re Halko:* "The verb 'quarantine' means 'to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community.'" 54 Cal. Rptr. 661,664 (1966),As cited in *"Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States,"* 10 J.L. & Health 403 (1995-1996).

[49]*TB Advocacy a Practical Guide, Global TB Programme 1999*. WORLD HEALTH ORGANISATION, 6.

[50]Rosemary G. Reilly, *"Combating the TB Epidemic: The Legality of Coercive Treatment Measures*", 27 Colum. J.L. & Soc. Pros. 101 (1993). ,p.104, As cited *"Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States,"* 10 J.L. & Health 403 (1995-1996).

Indian TB control policy does neither reflect any legal provision regarding second mechanism i.e. Involuntary isolation/quarantine of the source of TB infection nor reflect any provision to resolve the dilemma over patients' rights vis-à-vis public health. Early diagnosis and complete treatment of TB is the key principle to prevent and control strategy. Patients who do not complete treatment contribute to the development and spread of MDR-TB.[51] In India, the high default rate 14% as an outcome of retreatment cases registered in 2012 has been an area of concern.[52] Missed TB cases are also a serious concern for TB control authorities of India. Globally, bout 75% of the estimated 2.9 million missed cases – people who were either not diagnosed or diagnosed but not reported to NTPs – were in 12 countries and out of total numbers, 31% of the global total was belongs to India.[53] It has also boosted the challenge before Indian TB Control authorities so far as the perspective of epidemiology is concerned.

No doubt Revised National TB Control Programme (RNTCP) in India provides the guidelines to ensure adherence through the intervention of retrieval mechanism. Retrieval mechanism refers a process through which health care worker provides the counselling to the non-adherent TB patient, so that, patients may return on their treatment. But retrieval mechanism, which is an important action under the RNTCP have no legal force. Suppose, if a person suspected of or suffering from infectious TB putting the public at risk by infection transmission refuses to TB diagnostic test or treatment, in that situation, health officials have no alternative to retrieve the patient. So, not much can be done in India while in New York City, which confronted an outbreak of multidrug resistant TB (MDR-TB), the health department adopted regulations that permitted the confinement of those, who it believed could not or would not complete their TB treatment[54]. TB is transmitted through the air, so restricting the movements of carriers would restrict the spread of contagion.[55] The use of detention as a public health tool to control TB is increasingly being used internationally.[56]

[51]271 HCPR (BNA) No. 39, *CDC. TB Control Laws-United States, 1993: Recommendations of the Advisory Council for Elimination of TB (ACET). MMWR* 1993; 42 (No. RR-15): 1, at D-39.
[52]*TB India, 2014, RNTCP Status Report*; Central TB Division, Directorate General of Health Services, MINISTRY OF HEALTH AND FAMILY WELFARE, Government of India, New Delhi.
[53]*GlobalTBReport*,2013,WHO/HTM/TB/2013.11,x,http://apps.who.int/iris/bitstream/10665/91355/1/9789241564656_eng.pdf, Sept 29 , 2015.
[54] Ronald Bayer, (Module: 5), *Ethics and Infectious Disease Control: STDs, HIV,TB*,142.
[55]Josephine Gittler, *Controlling Resurgent TB: Public Health Agencies, Public Policy and the Law,* 19J. HEALTH POL. POL'Y & L. 109 (1994).
[56]D. Weiler-Ravell, A. Leventhal, R.J. Coker, D. Chemtob, *" Compulsory detention of recalcitrant TB*

But, above condition of non-adherent boosts MDR-TB and spread of TB infection into public without any obstacle. Therefore, these situations generate a strong demand for a legal intervention such as involuntary isolation, for the purpose of patient's treatment or for protecting public health from TB infection transmission.

A fundamental function of government is public health protection.[57]This requires formulation and implementation of public health policies in order to prevent diseases such as TB, underpinned by legal regulation authorizing public health interventions.[58] India has a Revised National TB Control Programme (RNTCP) for controlling TB since 1993.Under the RNTCP, the government has adopted DOTS strategy recommended by World Health Organization (WHO) and provides health care services to the suspect TB cases as well as confirm TB cases. Policies are the set of statement of government, those are however not enforceable in the court of law. National TB control policy of India does not have the status of law, therefore, it is not binding on the court and also not enforceable in courts. The TB control policy of Indian Government too does not address various other issues associated to TB Control, such as protection of privacy and confidentiality of patients, protection of public from TB infection, detention of TB patients who posed a serious risk to others etc. Such issues are very significant from human rights perspective. Thus, it clearly appears that current TB control policy is purely outdated and inconsistent with international human rights norms and standards and present need and situation in India.

It is well established that, "TB is not (only) a health problem, it is a social, economical, and political disease. It manifest wherever there is neglect, exploitation, illiteracy and widespread violation of human rights".[59] The nature of TB disease makes it a multifactor complex social problem. Thus, it may clearly be said that the issues related to TB may not be tackled only

patients in the context of a new TB control programme in Israel," Public Health ,January 2004, 118, 323-328.

[57]Dute J., *"Affected by the tooth of time: legislation on infectious diseases control in five European countries",* Med Law 1993; 12,101-8. and Gostin L O., "*Public health law in new century: part II: Public health powers and limits",* JAMA 2000;283, 2979-84. As cited by R. J. Coker., et al., " *Public Health Law and TB Control in Europe*", Public Health (2007) 121,266-273.

[58]R. J. Coker, et al., " *Public Health Law and TB Control in Europe*," Public Health , (2007) 121 ,266-273.

[59]Kunda Dixit, Director, Panos Institute, South Asia .Speech at 1999 tb.net Conference on "*TB and Human Rights*", Kathmandu. As cited in *A Human Rights Approach to TB, Stop TB Guidelines for Social Mobilization*, WORLD HEALTH ORGANIZATION, 2001, WHO/CDS/STB/2001 .9.

through the application of medical approach or Bio-Medical concept for controlling TB.[60] While, law as an effective tool for controlling TB has got recognition by the World Health Organization and also law might be framed to fulfill human rights under the state obligations. Therefore, in the present days' changing scenario, physicians need to understand the social implications and the over-arching role of law.[61]

India has the largest private health care sector in the world. The result from the National Family Health Survey-3 reveals that the private sector was the preferred source of healthcare (70% of urban households and 63% of rural households) for patients diagnosed with TB.[62] Even today, India has had no reliable TB database. Dr A P J Abdul Kalam, former President of India had shown his concern regarding TB control and stated that halting of spread of TB must become a priority[63] and our vision should be eradicating, before or by 2020, the TB disease. He emphasized that there is an immense need to develop a reliable TB database.[64] To collect reliable database, Government of India declared TB a notifiable disease on 7th May 2012.[65] But, even after passing four years after the issuance of notification of TB cases order, the outcome is not received as per expectation. In 2013, Total TB cases notified under RNTCP were 14, 10,880, whereas, total TB cases notified under private sector 38599[66] that is only 3.1% and clearly reflects the poor notification rate in private health care sector.

Sale of non-standard drugs and misuse of anti-TB drugs also posed a big barrier before TB control in India. Weak regulation of health products is another area of concern[67]. No doubt,

[60]Bio-medical concept is based on germ theory of diseased. In this sense, health means an absence of disease, i.e. when there is a bio-chemical change in the body due to any germ/virus/bacteria, etc, normal functioning is disturbed. As mentioned by DR. SURENDER SINGH & DR. P.D. MISRA, *HEALTH AND DISEASE, DYNAMICS AND DIMENSIONS*, New Royal Book Company, Lucknow, Edition 2000, 5.

[61]S. Hazarika, et al., " *Public health law in India: A framework for its application as a tool for social change, Medicine and Society,"* The National Medical Journal of India, 22, No. 4, 2009.

[62]Ministry of Health and Family Welfare, *National family health survey (NFHS-3), 2005-06.* http://www.measuredhs. com/pubs/pdf/SR128/SR128.pdf , Sept 16 2013.

[63]A. P. J. Abdul Kalam & Y. S .Rajan, *India 2020: A Vision for the New Millennium,* Penguin Books, New Delhi, India,1998.

[64]*Ibid.*

[65]*Notification of TB Cases, letter No.Z-28015/2/2012/TB* issued by Government of India, MINISTRY OF HEALTH AND FAMILY WELFARE, Nirman Bhavan, New Delh, India, http//www.tbcindia.nic.in, Sept 26,2014.

[66]*TB India 2014, Revised National TB Control Programme, Annual Status Report*, Central TB Division, Directorate General of Health Services , MINISTRY OF HEALTH AND FAMILY WELFARE, Nirman Bhavan, New Delh, India, http// www.tbcindia.nic.in, Sept 26,2014.

[67]Pai M., TB *Control in India: Time to get dangerously ambitious?* National Medical Journal of India 2011; 24(2): 65-68. As cited by Anurag Bhargava & Lancelot Pinto*, "Mismanagement of TB in India: Causes*

government of India's National Health Policy Draft 2015, which is being placed in public domain for comments, suggestions, feedback clearly indicates the government's efforts towards drafting and enacting new legislation namely National Health Rights Act[68] for providing the right to health for every citizen of India but it seems unable to resolve various important issues associated to TB control.

Historically, several evidences of the best utilization of law in solving the complex social, economical, civil and political problems may be observed easily. Thus, it can be said that there is an urgent need of a new specific statutory legislation to address the problem of TB control in India for several reasons such as to address the issue of discrimination, privacy, gender, issues not address under the National TB control policy, protecting patient's rights, protecting public health from TB infection, etc. It is already mentioned that TB is a complex social problem, so, law as an effective tool for controlling TB may be a useful tool and may also be utilized by the government of India

V. HOW HUMAN RIGHTS CENTRIC LAW CONTRIBUTES IN CONTROLLING TB?

"Human Rights Centric Law" may be referred as a law drafted with the consonance of International Human Rights norms and standards. A human rights-based approach to TB prevention, treatment and care includes addressing the legal, structural and social barriers to quality TB prevention, diagnosis, and treatment and care services.[69] Human rights approaches emphasize appropriate treatments that meet patients' needs to prevent the development of drug resistance, patients' right to be free from discrimination (including in health care settings) and to be free from forced or coerced treatment.[70]

Law cannot make a person healthy, but law can definitely protect a person from being unhealthy by providing proper health care facilities. It can also play a significant role in protecting a group or society from being unhealthy by providing adequate health care infrastructure including health care services as well as healthy working atmosphere.

,*Consequences, and the way forward*,", Hypothesis Journal, Department of Epidemiology and Biostatics , 9, 1 McGIill University, H3A1A2, Montreal, Canada.

[68]*National Health Policy Draft, 2015, Placed in Public Domain for Comments, Suggestion, Feedback*, MINISTRY OF HEALTH & FAMILY WELFARE, December, 2014, http://www.mohfw.nic.in/showfile.php?lid=3014,Sept 26,2015.

[69]Global Fund Information Note, *TB and human rights the Global Fund to Fight AIDS, TB and Malaria*, Feb 2013.

[70] *Ibid.*

Although, it certainly cannot cure disease but can reduce suffering or ailments of individuals.[71]Human rights centric law can also play a key role in providing mandatory health care services free of cost to the poor's and marginalized section of the society and also can protect the right to health of homeless, migrants, internally displaced, women and children suffering from TB.

Law provides legal force to ensure some specific activities or actions directly associated to TB control. Thus, it may be assumed that human rights centric law may play a crucial role in controlling TB by ensuring several activities required for breaking the chain of tuberculosis infection and also various other activities.

Genevieve Pinet, a senior health lawyer, Global Programme on Evidence for Health Policy, WHO, rightly noted in 2001 that, "legislation and regulation must protect public health and as well as safeguard the legal rights of individuals".[72] The dilemma of balancing the rights of individual vis-à-vis public in public health may be easily tackled through the use of specific human rights centric legal framework.

VI. IMPACT OF LAW ON TB CONTROL: SOME EVIDENCES FROM THE WORLD

Only few countries all over the world have been using law as an effective tool for controlling TB since long ago. To prevent the international spread of disease, the International Health Regulation, 2005 adopted by World Health Assembly in May 2005 and entered into force in June 2007.[73] It includes several provisions that may apply to the detection and control of TB during International travel.[74] Few examples of successful application of law in controlling TB are given as follows:

a. EVIDENCE FROM JAPAN

The TB related statistics of Japan clearly shows the success story of the utilization of the revised law for TB control in Japan. In 2007, when the TB Control Law was revised and

[71]Sharmila Ghuge, *Right to Health :New Challenges*, Dr(Mrs.) Snehal Fadnavis (Ed),Journal of the Institute of Human Rights, .XII, No.2, December, 2009, Institute of Human Rights,Jaripatka, Nagpur,18.
[72]Pinet G, *Good practice in legislation and regulations for TB control: an indicator of political will.* Genewa, Switzerland, WORLD HEALTH ORGANIZATION, 2001, 3.
[73]*International Health Regulation, 2005*, WORLD HEALTH ORGANISATION, http:www.who.int/csr/ihr/en/, Sept 29, 2015.
[74]*TB and air travel ,Guidelines for prevention on and Control*, Second Edition, WORLD HEALTH ORGANIZATION, HO/HTM/TB/2006. 636.

merged into the Infectious Disease Control Law, the subsidy for this program was abolished because the program became mandatory by law. Since the initiation of TB control as discussed above, the incidence of infection has declined steadily, with the case rate dropping from 698 per 100,000 to 19.8 per 100,000 by 2008, and TB mortality dropped from 110 per 100,000 to 1.7 per 100,000 over the same period.[75]

b. EVIDENCE FROM NEW YORK CITY

After an increase in the number of cases of TB, New York City passed regulations to address the problem of non-adherence to treatment regimens. The commissioner of health can issue orders compelling a person to be examined for TB, to complete treatment, to receive treatment under direct observation, or to be detained for treatment. On the basis of a review of patients' records, we evaluated the use of these legal actions between April 1993 and April 1995. New York City's TB-control program has been highly successful; new cases decreased by 54.6 percent and cases of multidrug-resistant disease by 87.3 percent between 1992 and 1997.[76]We evaluated the first two years of the regulatory program, focusing on the use of detention and less restrictive measures to ensure the completion of treatment and the risk factors for detention.[77]

c. EVIDENCE FROM OHIO

Quarantine measures under Ohio Law included isolating people in their own homes as well as removing them to public facilities. Ohio law has several provisions which govern quarantine generally. One of the provisions says that quarantined persons may not attend school, place of worship or other public gatherings. They may not be sent to any institutions such as jail, children's home, or institution for the blind or mentally ill without notice of their illness or exposure.**[78]** In 1953, the rate of TB cases per 100,000 populations was 53, with a death rate of

[75]Toru Mori and Noriko Kobayashi, "*TB Treatment in Japan: Problems and perspectives —How to expand the Japanese version of DOTS*" JMAJ 52(2), 2009,112–116.
[76]Bureau of TB Control. Information summary, 1997. New York: New York City Department of Health, 1998. As cited by M.Rose .Gasner., et al., "*The Use of* Legal Action in New York City to Ensure Treatment of TB" , N Engl J Med 1999; 340, 359-366.
[77]M.Rose .Gasner., et al., *"The Use of Legal Action in New York City to Ensure Treatment of TB*" N Engl J Med 1999; 34, 359.
[78]Ohio .Rev. Code ANN .3707 (Anderson 1993). As cited in *"TB Quarantine: A Review of Legal Issues in Ohio and Other States"*, 10 J.L.& Health 403(1995-1996).

12.4/100,000.In 1991; the case rate has gone down to 10.4/100,000 and the death rate to 0.7.**[79]** The above figures clearly indicate the positive impact of law on TB control.

d. EVIDENCE FROM ESTONIA

The Estonian experience in the area of involuntary isolation and treatment presented below is also documented in the compendium, Best practices in prevention, control and care for drug-resistant TB, recently published by the WHO Regional Office for Europe.

In Estonia, the option of involuntary isolation is only used when it is possible to treat the patients, the purpose being to treat them not isolate them from the rest of the society. In the case of patients with XDR-TB, and in other special circumstances, it is possible to ask the court to extend the isolation period beyond 182 days. Involuntary isolation was introduced in 2004. After that, 140 TB patients have been involuntarily isolated in the hospital, currently there are 7. Treatment results for these patients are as follow: Drug-susceptible TB: 98.2% success rate; only one death; MDR/XDR-TB and other drug-resistant forms of TB: 66.7% success rate; 8.3% defaults; 23.6% deaths (from TB or other causes); 11 patients still on treatment; all treatment interruptions and majority of deaths occurred after discharge.[80]

VII. CONCLUSION

No doubt, the biomedical approach has played very pivotal role in breaking the chain of TB infection transmission but it is not much more effective in breaking the chain of TB infection transmission in case of non-adherent TB suspects or infectious TB patients. The instance of non-adherence, as an obstacle in TB control, generates various complex legal and ethical issues and these issues cannot be tackled through the only use of biomedical approach. The biomedical approach for controlling TB in India has been used continuously since 62 years but country is not able to achieve the goal of TB control, while, to achieve the goal of eliminating TB, some new strategies are required. It is concluded that time has come before all the persons engaged in the battle against TB in their different capacity and they should realize, understand and accept the reality that TB epidemic should not exclusively be seen

[79]Centers for Disease Control and Prevention (CDC), Reported TB in the United States, 1993. October. As cited in "*TB Quarantine: A Review of Legal Issues in Ohio and Other States*," 10 J.L.& Health 40, 3(1995-1996).

[80]Dara M &, Acosta C, (Eds). *"Best practices in prevention, control and care for drug-resistant TB. Copenhagen, WORLD HEALTH ORGANISATION; 2013"* http://www.euro.who.intl/__data/assets/pdf_file/0020/216650/Best-practices-in prevention, control-and-care-for-drugresistant-TB-Eng.pdf, Jan 26, 2014.

from biomedical perspective approach but it should also be seen from the multidimensional perspective such as social, economical, cultural, legal and human rights etc.

No attempt has been made so far to incorporate the problem of TB within Indian laws while India has approximately three dozen a well equipped public health laws. The problem of TB has not been addressed by government under any statutes enacted before or after the independence of India. The case laws are also silent on the issues related to TB problem. In 2007, a case of Andrue Speaker, suffering from a drug-resistant case of TB, traveled abroad to several countries before returning to the US has made TB as an issue of global concern. The slogan "TB anywhere is TB Everywhere" release on World TB Day, 2007 clearly reflects the global TB concern and also raises a message of urgent & shared global responsibility for controlling and eliminating TB from each and every part of the world.

Finally, it becomes evident that a comprehensive legislation covering different public health aspects i.e. social, economic, cultural, legal including human rights associated to TB are needed to include in re-looking the problem of TB and efforts for its control in India. Laws have important contributions to solve the several public health problems and had already achieved a just and problem free society but, despite this, the conceptual framework for its effective application has not been fully explicated.[81] Therefore, to achieve an aim of TB free India as well as TB free world, a specific legislation for controlling TB is much-much necessary and needed to frame in consonance with currently recommended medical practices as well as international norms and standards of human rights. Only by doing so, we will hope and look forward to become a witness to not only India as TB free country but also the world too.

[81]Mensah GA, Goodman RA, Zaza S, et al., "*Law as a tool for preventing chronic diseases: Expanding the spectrum of effective public health strategies,"* Prev Chronic Dis 2004;1: A11., http://www.cdc.gov/ pcd/issues/2004/jan/03_0033.htm, July 10, 2008, As cited in S. Hazarika, A. Yadav, K. S. Reddy.,et.al, " *Public health law in India: A framework for its application as a tool for social change*", Medicine and Society ,the National Medical Journal of India, Vol. 22, No. 4, 2009, Apr 9, 2014.

THE PREDICAMENT OF MANUAL SCAVENGERS AND DISABILITIES ARISING OUT OF IT: AN OVERVIEW

Trisha Sharma[*] *& Vidhatri Bharti* [**]

I. INTRODUCTION

"It is clear that impure work was done by the slaves and that the impure work included scavenging".

Dr. B.R.Ambedhkar

Dr. B.R. Ambedkar spoke these words decades ago but the tragedy they depict echoes even to this date. Manual scavenging has been a widespread practice since time immemorial which involves removing, lifting and carrying human excrements manually on the heads to dispose the night-soil kilometres away from the actual defecation areas. This despicable vocation which is a disgrace to humanity continues to exist in the present day society despite it being legally outlawed more than two decades ago with the Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

The institutionalization of scavenging as a profession finds its roots in the advent of the Muslims in India where the captives were forced to clean latrines, bucket privies and throw off the night-soil at distant places. Once they were freed, the society refused to imbibe them again, hence, leading them to form a separate caste which specifically practised scavenging. However, scavenging as a practice is not a recent development, rather it dates back to the beginning of civilization and can be traced in one of *Naradiya Samhita*'s fifteen duties for slaves which was disposing human excreta. In *Vajasaneyi Samhita,* the *Chandals* and *Paulkasa* have been referred to as slaves for the disposal of night-soil. During the British period, when the army cantonments and municipalities started being set up, a large number of people were required to do these services on a regular basis.[1]In today's times, scavengers and sweepers still carry out the basic sanitary services in the so called "developed" cities and towns. Some are employed by local urban authorities to clean the sewers, while a significant number still work in their traditional occupation which involves cleaning latrines by hand and

[*] Student, B.A LL.B (Hons.), Army Institute of Law, Mohali, Punjab, India.
[**] Student, B.A LL.B (Hons.), Army Institute of Law, Mohali, India.
[1]B.N. SRIVASTAVA, MANUAL SCAVENGING IN INDIA: A DISGRACE TO THE COUNTRY 15-17 (1997).

carrying night-soil in baskets on their heads. As their occupation renders them permanently polluted, according to Hindu society, scavengers are treated untouchable even by other untouchable castes.[2]

In today's era, even though successive governments have tried to put an end to this discriminatory practice, however it has not been so feasible due to obstinate discrimination and local complicity. Even if the manual scavengers wish to leave their job, they are put in a precarious position due to threats of violence and eviction from local residents and also threats of harassment, and unlawful withholding of their wages by the local authorities. Not only are the sufferers' rights abused but their health faces severe consequences including constant nausea and headaches, respiratory and skin problems, anaemia, diarrhoea, vomiting, jaundice, trachoma, and carbon monoxide poisoning. These conditions are augmented by widespread malnutrition and inability to access health services.[3]

Due to the lack of comprehensive and extensive government surveys that account for the prevalence of manual scavenging in the country, this practice unabatedly continues and is far from seeing its cessation. Despite India's Constitution banning caste-based discrimination of untouchability and the Supreme Court declaring that manual scavenging violates international human rights law in March 2014, the programs and laws are far from succeeding as implementation and assessment continue to be carried out half-heartedly and unenthusiastically.

Thus, the basic aim of this paper is to give a holistic analysis of this grotesque face of the caste system and to analyse previous legislations and schemes and their effectiveness. This paper also intends to propose recommendations for the rehabilitation and welfare of manual scavengers.

II. MANUAL SCAVENGING AS A HUMAN RIGHTS VIOLATION

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all

[2]Siddaramu. B, *Liberation and Rehabilitation of Manual Scavengers*, 1 IJRHAL 29, 29 (2013).
[3]Digvijay Singh, *India: Caste Forced to Clean Human Waste*, HUMAN RIGHTS WATCH, (Sept. 14, 2016), https://www.hrw.org/news/2014/08/25/india-caste-forced-clean-human-waste.

interrelated, interdependent and indivisible[4]. This being said, not everyone is fortunate enough to secure their human rights and live a life where freedom and equality become one's prerequisites to self-actualization and self-righteousness. People like the scavenging communities are stripped off of all their basic human rights and are not treated with the same respect and dignity that any citizen of a State with constitutional safeguards would normally be entitled to.

The human rights scholars classify five broad categories of rights-civil, political, social, economic and cultural which are outlined in the 1948 Universal Declaration of Human Rights.[5] With a broader interpretation of the concept of human rights being seen as a recent development, the status of economic and social rights have seen themselves on an elevated position. Considering the importance associated with these two dimensions of human rights, infringing upon them seems to be of grave concern to the communities practising scavenging as a livelihood and a forced profession. The right to be unshackled from the clutches of manual scavenging is an economic, social and cultural right and it imposes a duty on the State to terminate the system of manual scavenging and provide reprieve and rehabilitation to the scavengers and their family members by implementing legislation which is suitable for this agenda.[6]

The following section will expatiate on:

- How the human rights violations have affected the manual scavengers' social rights;
- How scavenging as a profession has taken away key economic rights.

III. SOCIAL RIGHTS VIOLATIONS

The conditions that the manual scavengers and their children are exposed to is an undeniable evidence of the fact that public servants and community members in India- i.e. state as well as non-state actors- abrogate a number of human rights that are protected by domestic laws

[4]Office of the United Nations High Commissioner for Human Rights, *What Are Human Rights*, UNITED NATIONS, (Sept. 15, 2016), http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx.
[5]Emily Badger, *Are Economic Rights Fundamental Human Rights*, PACIFIC STANDARD, (Sept. 16, 2016), https://psmag.com/are-economic-rights-fundamental-human-rights-524ede71ed88#.jla5h9410.
[6]Publications, *Know Your Rights, Human Rights and Manual Scavenging*, NATIONAL HUMAN RIGHTS COMMISSION, (Dec. 26, 2016), http://nhrc.nic.in/Documents/Publications/KYR%20Scavenging%20English.pdf.

and international human rights treaties.[7] The below mentioned is a summary of the more pertinent social rights that are infringed:

a. THE RIGHT TO EDUCATION: The right to education has been solemnised as a fundamental right under the Universal Declaration of Human Rights, under Article 26 saying "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit".[8]

A newly passed law requires that every local authority should ensure that children belonging to disadvantaged groups "are not discriminated against and prevented from pursuing and completing elementary education on any grounds." A number of international treaties pose as protectors of the right to education and outlaw discrimination in access to education. However, it is evident that the teachers, school administrators and fellow students deny the Dalit children access to education by treating them as inferiors which often results in an ultimate rejection from school altogether and forcing them to drop out. While India has in recent years drastically reduced dropout rates for all Indian youth, the difference in dropout rates between Dalit youth and all Indian youth has actually grown from 4.39 % in 1989 to 16.21 % in 2008.[9]

b. THE RIGHT TO HEALTH: The International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The upper-caste community members and teachers force *Dalits* and their children to work in an unhealthy and harmful environment that includes cleaning human faeces and disposing the bodies of dead animals, thus, sabotaging their right to health.[10]

[7]The Centre for Human Rights and Global Justice and the International Dalit Solidarity Network, *Dalit Children in India-Victims of Caste Discrimination*, INTERNATIONAL DALIT SOLIDARITY NETWORK, (Sept. 19, 2016), http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/India/Dalit_children_in_India_-_victims_of_caste_discrimination.pdf.
[8]*The Universal Declaration of Human Rights*, UNITED NATIONS, (Sept. 16, 2016), http://www.un.org/en/universal-declaration-human-rights/.
[9]*Ibid*.
[10]*Ibid*.

Furthermore, the right to health has been recognized by the Supreme Court of India as part of the right to 'life' under Article 21 of the Indian Constitution. Article 47 also mentions the right to health by stating that it is the "duty of the state to raise the level of nutrition and the standard of living and to improve public health".[11]

c. THE RIGHT TO FOOD AND FREEDOM FROM HUNGER: In the absence of a regular income, the food handouts that the womenfolk receive for their work serves as salvation for the families. This basic food security is the only thing that keeps people like Shanti from *NaglaKhushal* in Manipuri District, Uttar Pradesh, from leaving scavenging because they receive not more than two *rotis* as a remuneration for the filth they clean.[12]

It becomes a vicious cycle out of which it becomes nearly impossible to leave the practice of scavenging because when the womenfolk or even men remain absent from work for even a day, the stale *rotis* and left-over food is refused, therefore, leaving the victims under pressure to obtain food for their families and continue scavenging.

d. THE RIGHT TO ADEQUATE HOUSING**:** Even though the living conditions of the scavengers are very poor, there is no provision whatsoever for the housing of *Bhangis* or payment of house rent to those workers who aren't provided with free quarters. The above-mentioned do not also find a place in all Municipal Acts.[13]

e. THE RIGHT TO WATER AND SANITATION: The water facilities for both drinking and washing are inadequate for scavengers. Even with the provision of storage tanks and water taps, the supply of water becomes non-existent after particular hours which is very harrowing for the scavengers. There are no latrines in the areas where they dwell and they reside in noxious localities which are in proximity to open drains and dumping grounds.[14]

32.2% of Dalit families have access to drinking water from tap as compared to 40.1% of the general population. With respect to sanitation, 23.7% of Dalit families have access to latrine

[11]Prof. Victor John K, *Manual Scavenging- A Flagrant Violation of Human Rights,* ACADEMIA, (Sept. 17, 2016), http://www.academia.edu/5166719/Manual_Scavenging_-A_Flagrant_Violation_of_Human_Rights.
[12]Special Report, *Cleaning Human Waste "Manual Scavenging," Caste, and Discrimination in India,* HUMAN RIGHTS WATCH, (Sept. 17, 2016), https://www.hrw.org/report/2014/08/25/cleaning-human-waste/manual-scavenging-caste-and-discrimination-india.
[13]B.N. SRIVASTAVA, MANUAL SCAVENGING IN INDIA: A DISGRACE TO THE COUNTRY 107 (1997).
[14]*Ibid.*

facility as compared to 42.3 % for the general families. There have been various studies to show the discrimination in the provision of water services. A study carried out by Action Aid across 11 states suggests that out of all the villages surveyed, in 48.4% of the villages, water services were denied.[15]

f. THE RIGHT TO JUSTICE: The sanitary workers or scavengers face impediments not only to a dignified and humiliation-free life but also face obstacles in accessing the criminal justice system. Due to insidious discrimination, *Dalits* require significant succour in accessing the criminal justice system when they are victims of crime. Due to police complacency and unequivocal refusals to investigate complaints of ordinary people, these problems are further compounded for the socially and economically weaker sections.

Due to the sustenance of caste bias by the police and administrative officials, the manual scavenging communities continue to be meted out with this treatment. The Human Rights Watch were told by activists and rights groups that police regularly neglect registering and investigating the complaints of various crimes meted out to *Dalits*, specifically when these atrocities are inflicted by a superior caste.[16]

IV. ECONOMIC RIGHTS VIOLATIONS

Article 23 of the Universal Declaration of Human Rights encompasses all the key economic rights that a citizen of any state should be entitled to by the virtue of being a human being. The following basic economic rights are jeopardized of the scavenging communities:

a. THE RIGHT TO FREE CHOICE OF EMPLOYMENT AND FAVOURABLE CONDITIONS OF WORK: *Panchayats* have recruited people to clean latrines and open defecation areas solely on the basis of caste and have even denied them jobs for which they are qualified within the *panchayat.* Since the practice of manual scavenging is caste-based, the work-force comprises of forced labour and the only thing that prevents manual scavengers to leave scavenging is the "menace of penalty".[17]

[15]Hannah Johns, *Stigmatization of Dalits in Access to Water and Sanitation in India*, NATIONAL CAMPAIGN ON DALIT HUMAN RIGHTS, (Sept. 17, 2016), http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/UN/HRC/Stigmatization_of_dalits_in_access_to_water_sanitation.pdf.
[16]*Supra* note 12.
[17]*Ibid.*

b. THE RIGHT TO EQUAL PAY FOR EQUAL WORK: Instead of following the principle of equal wage for equal work, these workers are firstly coerced to work as daily wagers and furthermore, are paid much diminished wages as compared to permanent workers.[18]

c. THE RIGHT TO ADEQUATE INCOME: Manual scavengers earn as less as one rupee a day. They are paid less than the required minimum wages and are often left with no choice but to borrow money from upper-caste households in order to make ends meet and consequently they end up reinforcing the relationship of bondage.[19]

V. TRANSGRESSION OF CONSTITUTIONAL PROVISIONS

The framers of the Indian Constitution provided for with certain constitutional safeguards which would obstruct the practice and perpetuation of any sort of disabilities arising out of discrimination and in particular, untouchability. However, these articles are being transgressed due to the practice of manual scavenging. The following articles being violated are:

a. ARTICLE 14: Equality before law (Right to Equality): This Article is being violated because even though equality in the eyes of law and equal protection of law have been guaranteed, yet the scavenging community are still not being treated equally, neither are they getting equal protection of their rights;

b. ARTICLE 16(1): Equality of opportunity in matters of public employment: The manual scavengers are trapped in a vicious cycle of their undignified occupation because the ones perpetrating such practises make sure that the former never pave their way out of such occupational structures and continue subduing their very little protests as well;

c. ARTICLE 17: Abolition of Untouchability: Practising manual scavenging is the most pertinent and conspicuous dimension of untouchability, which even though is forbidden and punishable by law, is still very prevalent;

[18]RK Misra, *Ahmedabad's sanitation workers, on strike, forced to do manual scavenging at 200 spots in city: NGO survey*(Sept. 18. 2016), http://www.counterview.net/2016/08/ahmedabads-sanitation-workers-on-strike.html.

[19]*Manual Scavenging*, INTERNATIONAL DALIT SOLIDARITY NETWORK, (Sept. 18, 2016), http://idsn.org/key-issues/manual-scavenging/.

d. ARTICLE 19(1)(A): Right to practice any profession, or to carry on any occupation, trade or business: As has been mentioned above, the communities that carry out scavenging have only this occupation as their sole means of sustenance and have no freedom to shift to any other either;

e. ARTICLE 21: Protection of life and personal liberty: Article 21 is direly jeopardized as neither the scavengers' right to life and neither their personal liberty is guaranteed in the real sense as they are exposed to unwanted and detrimental circumstances in their livelihood;

f. ARTICLE 21(A): Right to education: Dalit children do not get access to education even when schools have been opened up for this purpose since they are forced to provide assistance to their parents and other family members in scavenging;

g. ARTICLE 23: Prohibition of traffic in human beings and forced labour etc.: Manual scavenging is in stark contrast and in gory violation of Article 23 which prohibits forced labour and trafficking for any kind of purposes;

h. ARTICLE 41: Right to work, to education and public assistance in certain circumstances: The scavenging communities do not reap the benefits provided under Article 41 since they do not get any relief in old age or in sickness or unemployment, so this Article is merely a farce for them;

i. ARTICLE 42: Provision for just and humane conditions of work: The working environment of these menial employees are worse than can be categorized as 'inhumane' since they are subjected to harmful gases, and are prone to different communicable and degenerative diseases;

j. ARTICLE 46: Promotion of educational and economic interests of scheduled castes, scheduled tribes and other weaker sections: No economic and educational interests of these communities is in any way being stimulated despite many efforts since the problem is extremely deep rooted and the efforts do not match in magnitude;

k. ARTICLE 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health: Even though Article 47 provides that the State shall endeavour to provide a decent standard of living and public health, yet the members of these communities and sections of the society are emaciated and deprived of even the bare minimum levels of nutrition and healthcare facilities.

VI. THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK AND THEIR LACUNAE

The current part of the paper will briefly trace out the history of legislations regarding manual scavenging and analyse in detail the major legal framework today, it's effectiveness and the lacunae.

a. BRIEF BACKGROUND

After almost 70 years of an independent India, a lot of scientific and technological advancement and world integration, our country fails to liberate and rehabilitate around 1.3 million of people caught in the grip of this inhuman practice.[20] The Indian government since independence has made efforts to improve the lives of the untouchables in India. Despite official abolishment of all forms of untouchability with the framing of the Constitution itself, it took 24 years more for India to introduce Section 7A[21] into the Protection of Civil Rights Act, 1955 which made compelling any person to scavenge on grounds of untouchability, a cognizable offence.[22] However, it was only after the coming up of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 that this practice was illegalised. While the Act received the assent of the President in June, 1993, it took almost four years for the issue of the notification bringing the Act into force in six States and all Union Territories in January, 1997.[23]

The following States and Union Territories have of late embraced this Act/Have Acts of their own for this purpose:[24]

[20]Jyoti Kumari, *Anti-Manual Scavenging Efforts in India: An Evaluation with respect to Labour Welfare*, 6 Pac Bus Rev Intl, 52, 54 (June 2014).
[21]§7 (a) prevents any person from exercising any right accruing to him by "untouchability".
[22]Avinash Pandey, *Caste based discrimination - the continuing curse of manual scavenging*, AHRC (2009), 27.
[23]N. Meenakshisundaram, *Manual Scavenging Act and Municipal Waste Water Workers in India - Policy and Practice*, PGDEL, National Law School of India University, May 2012, p.17.
[24]*Supra* note, 6 at 3.

- Andhra Pradesh
- Assam
- Bihar
- Chhattisgarh
- Gujarat
- Haryana
- Jharkhand
- Karnataka
- Kerala
- Madhya Pradesh
- Maharashtra
- Orissa
- Rajasthan
- Jammu & Kashmir
- Tripura
- Uttar Pradesh
- Uttarakhand
- West Bengal
- Andaman & Nicobar Islands
- Delhi
- Arunachal Pradesh
- Manipur
- Punjab
- Tamil Nadu
- Himachal Pradesh
- Sikkim

Some of the States have not adopted the law on the ground that there were no manual scavengers in the State and that they do not retain dry latrines, despite evidence to the contrary.

The following States and Union Territories have claimed the aforementioned:[25]

[25] *Ibid*.

- Nagaland
- Goa
- Meghalaya
- Mizoram
- Dadra & Nagar Haveli
- Lakshadweep
- Puducherry
- Chandigarh

Thus, despite this major legislation, the struggle of these scavengers continued. The Government of India in its efforts towards expanding the scope of rehabilitation of manual scavengers also implemented rehabilitation schemes enlisted below:

i. National Scheme for Liberation and Rehabilitation of Scavengers, 1992. The objective of the scheme was to liberate the scavengers and their dependents from their existing hereditary and obnoxious occupation.[26]

ii. Government of India had set up National Safai Karamcharis Finance And Development Corporation in January, 1997 with the objective to promote economic development and self-employment for the rehabilitation of the Safai Karamcharis besides providing training in technical and entrepreneurial skills and extending loans to students from Safai Karamchari community for pursuing higher education.[27]

iii. The Self Employment Scheme for Rehabilitation of Manual Scavengers(SRMS) was introduced in January,2007, with the objective to rehabilitate the remaining manual scavengers and their dependents in alternative occupations by March, 2009. However, as this could not be done by the target date, the Scheme was extended up to March, 2010, with a provision for the coverage of spill-over of beneficiaries even thereafter, if required.[28]

[26]Scheme for Liberation & Rehabilitation of Scavenger, VIJAYA BANK, https://www.vijayabank.com/Loans-and-Advances/Government-Sponsored-Schemes/Scheme-For-Liberation-and-Rehabilitation-of-Scavenger.
[27]*National Scheme of Liberation and Rehabilitation of Scavengers and Their Dependents*, Govt. of India, 19, (Sept. 18, 2016), http://www.ncsk.nic.in/Reports%20NCSK/4RE%201998-99%20&%201999-2000/CHAPTER IV%20NATIONAL%20SCHEME%20OF%20LIBERATION%20AND%20REHABILITATION%20OF%20SCAVENGERS%20AND%20THEIR%20DEPENDENTS.pdf.
[28]Self-employment scheme for rehabilitation of manual scavengers (SRMS) – 2013.

iv. The National Action Plan for Total Eradication of Manual Scavengers and Integrated Low-Cost Sanitation (ILCS) scheme were also enforced.[29]

The National Human Rights Commission then, recommended, inter alia, that the presence of too many agencies is delaying the elimination of the practice of manual scavenging and their rehabilitation work. It further recommended that both water scarcity and space scarcity in certain pockets of some states needs to be addressed by adopting appropriate technology and methodologies.[30] However, no spectacular improvements were achieved in the lives of the untouchables.[31]

b. CURRENT SCENARIO

The major existing law for this iniquitous practice today is The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013. This Act came in as a replacement to the existing Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 as it appeared to be ineffectual.[32] The main criticism based on this Act was that it was purely made from the sanitation perspective and was made by the Ministry of Housing and Poverty Alleviation. But the actual objective of this Act should have been to restore human dignity and was liable to talk about rehabilitation of manual scavengers.[33]

As a result of these drawbacks, the new Act was formulated for preventing atrocities against manual scavengers. Firstly, a bill was drafted in the year of 2012 named "Prohibition of Employment as Manual Scavengers and their Rehabilitation". It was passed by both the houses on September 7th, 2013 with two main objectives: Prohibition of employment as manual scavengers and rehabilitation of the existing manual scavengers.

[29]*Supra* note 25.
[30]*NHRC Recommendations on Manual Scavenging and Sanitation*, NATIONAL HUMAN RIGHTS COMMISSION (Dec. 26, 2016), http://nhrc.nic.in/disparchive.asp?fno=1711.
[31]Dr Aparajita Baruah, *The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013: A Review*, Baruah. Space and Culture, India 2014, 11-13.
[32]*Supra* note 15.
[33]Swetha Maria John &AkhilSasidharan, *Microbes of our society: Story of Manual Scavengers*, The Rights, Vol-1: Issue-II, Dec. 2015, p.7.

c. LIMITATIONS OF THE PROHIBITION OF EMPLOYMENT AS MANUAL SCAVENGERS AND THEIR REHABILITATION ACT, 2013:

i. The Act fails to consider rehabilitation programmes for those who were liberated from manual scavenging before the Act was implemented in 2013. This has been a major shortcoming of the Act as it excludes a large number of scavengers from the rehabilitation process. The definition for the term 'Manual Scavengers'[34] means a person who is engaged in this practice during the commencement of the Act or thereafter, thereby limiting the scope of rehabilitation for those who suffered before the Act.

ii. The Act has also failed to incorporate Non-Scheduled Caste scavengers such as Dalit Muslims and Dalit Christians. The exclusion of Dalit Muslims and Dalit Christians means they are not entitled to provisions under the rehabilitation and assistance programmes. Liberated manual scavengers often face atrocities or violence. Non-Scheduled Caste scavengers (Dalit Muslim and Dalit Christians) are not protected under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the new Act and rules again fail to mention any provision for the protection of these communities.

iii. Neither the State nor the Centre is mandated under the Act to provide financial assistance for the conversion of insanitary latrines. This may adversely impact the implementation of this Act. Moreover, the Act lays the burden of demolishment or conversion of insanitary latrines on the occupier.[35]

iv. Section – 13 of the new law provides for provisions related to the rehabilitation of the liberated manual scavengers, such as scholarships for children, residential plot and financial assistance for house construction or a ready–built house, training in a livelihood skill with monthly stipend, subsidy and concessional loans for taking up an alternative occupation on a sustainable basis and other legal and programmatic assistance. But The Prohibition of Employment as Manual Scavengers and their Rehabilitation Rules 2013 do not provide for any of the provisions mentioned in the legislation.

[34]§1(g), The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013.
[35]§4(b) r/w §5(2), The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013.

v. Rule – 3 states: "No person shall be engaged for hazardous cleaning of a sewer or a septic tank" and at the same time rule – 4 states: "Any person engaged to clean a sewer or a septic tank shall be provided by his employer the following protective gear and safety devices like safety body clothing/ safety body harness/ safety belt, normal face mask, safety torch, hand gloves, safety helmet, etc." This rule is in total violation of the provision of total eradication of manual scavenging and contradicts its own preceding rule.[36]

Thus, the above mentioned limitations and lack of bona-fide implementation of government policies become reasons for non-achievement of results in assuaging this deplorable practice.

VII. JUDICIAL PRONOUNCEMENTS

The Indian judicial system has always played an active role in strengthening the cause of socio-economic welfare and dispensing justice across the nation. This part of the paper will analyse the role of judiciary in acknowledging this practice of filth and stench and its unconstitutionality in light of the decided cases.

With regard to the present issue of manual scavenging there have been two major judicial responses which have laid onus on the State authorities to eliminate this practice *viz.* Safai Karamchari Andolan v. Union of India, Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage& Allied Workers

a. SAFAI KARAMCHARI ANDOLAN V. UNION OF INDIA[37]

The Apex Court in response to a number of campaigns, protests and rallies finally passed this landmark judgment to end the perpetuating practice of manual scavenging. The major issues that were raised in this case can be broadly classified as:

i. The petitioners in their claim had sought for declaring continuance of manual scavenging as violating Articles 14,17, 21 and 23 of the Constitution, and

ii. The proper implementation of the (EMSCDL) Act,1993, and eradication of dry latrines.

The following points have been highlighted in the judgment:

i. The three judge bench including Justice (P. Sathasivam), J. (Ranjan Gogoi), J. (N.V. Ramana) stressed on the rehabilitation of manual scavengers in accordance with part IV of

[36]Catarina de Albuquerque, *Violations of the right to water and sanitation*, (RGA), (NCDHR), (IDSN), Feb. 2014, p.7-8.

[37]Safai Karamchari Andolan v. Union of India,2014 (4) SCALE 165.

the PEMSR Act, 2013. The Supreme Court also directed the State Governments and Union Territories to fully implement various provisions of PEMSR Act, 2013 and take appropriate action for non-implementation as well as violation of provisions contained in PEMSR Act, 2013.

ii. The judgment has also posed stress on the fact that there has been failure to achieve the objective of eradication of manual scavenging for which an initial investment of 600 crores was made. Further, holding the importance of the Act and various other directions and rules issued by the court previously, the court directed all the State Governments and the Union Territories to fully implement the same.

iii. The Supreme Court in its decision had also observed that the Act required no further monitoring by this Court. However, they reiterated that the duty is cast on all the States and the Union Territories to fully implement and take action against the violators. Henceforth, permitting the persons aggrieved to approach the authorities concerned at the first instance and thereafter the High Court having jurisdiction.[38]

On one hand, the judgement has been successful in propelling a movement against this heinous practice, while on the other hand it fails to completely acknowledge certain key issues pertinent to eradication of manual scavenging, for instance, the administrative loopholes and also insufficient provisions for women especially since majority of manual scavengers are women.[39]

b. DELHI JAL BOARD V. NATIONAL CAMPAIGN FOR DIGNITY & RIGHTS OF SEWERAGE & ALLIED WORKERS[40]

The above case was a petition which was filed to highlight the plight of sewerage workers in Delhi, who are exposed to maximum risk against numerous toxic and harmful substances. This appeal was filed by the Delhi Jal Board to set aside an interlocutory order passed by the Delhi High Court.

[38]*Ibid.*
[39]Report of the National Round Table Discussion, *Social Inclusion of Manual Scavengers,* Organised by United Nations Development Programme and UN Solution Exchange (Gender Community of Practice) New Delhi, 21 December 2012.
[40]Delhi Jal Board V. National Campaign for Dignity & Rights of Sewerage & Allied Workers,2011 (8) SCC 568.

The case highlights that there has been no appropriate mechanism for protection of persons who are employed by or through the contractors, to whom services meant to benefit the public at large, are being outsourced by the State and/or its agencies/instrumentalities like the appellant, for doing works which are inherently hazardous and dangerous to life. Neither there is any provision for payment of reasonable compensation in the event of death.[41]

The Supreme Court has criticised the government and the State apparatus on being insensitive to the safety and well-being of those who are, on account of sheer poverty, compelled to work under most unfavourable conditions and regularly face the threat of being deprived of their basic human rights.

The Supreme Court also snubbed the elitist mind-set of the wealthy class with regard to public interest litigation/Pro Bono litigation. The Supreme Court not only directed to pay higher compensation to the families of the deceased, but also directed the civic bodies to ensure immediate compliance of the directions and orders passed by the Delhi High Court for ensuring safety and security of the sewerage workers.[42]

VIII. CONCLUSION AND RECOMMENDATIONS

Manual scavenging as an extreme manifestation of the contemptible caste system remains an unaccepted occupation in the country. The above discussion, however is an evidence to the fact that despite being a degrading activity, it continues to engulf the country and by the virtue of this dehumanizing practice, the socio-economic status of the scavengers continues to victimize and marginalise them in the society. Change cannot be expected to take place solely out of the formation of new legislations and schemes. Such a grotesque occupation which is deeply seated in the mentalities of the masses can only be made to languish through social growth and awareness drives that uproot the stigma associated with this practice from the grassroots.

However, the subsequent recommendations throw light on the shortcomings in the current methods and legislations and shall touch upon and elucidate various ways through which the

[41]Delhi Jal Board V. National Campaign for Dignity and Rights of Sewerage and Allied Workers & Others, http://www.hrln.org/hrln/dalit-rights/pils-a-cases/678-delhi-jal-board-versus-national-campaign-for-dignity-and-rights-of-sewerage-and-allied-workers-a-others.html#ixzz4kderoqhf.
[42]*Supra* note 18.

savagery of manual scavenging can be curbed and levelled down to the maximum extent possible.

a. RECOMMENDATIONS**:**

i. The scavenging communities throughout the country need to be mapped out and earmarked across the different states, routinely, through the method of government surveying so as to streamline the households in rural and urban areas that practice scavenging in reality. This needs to be done because the State governments are reluctant to reveal the actual number of people involved in this practice.

ii. The newly liberated scavenging households need to be provided with justified compensation, housing, land grants in proper localities and vocational competence for future employment so as to mitigate the abuse to the best possible extent and help them to conglomerate more systematically and effortlessly in the mainstream milieu.

iii. The working equipment for the septic tank cleaners needs to be modernized with the use of protective technology that shields them from the pernicious environment that they are exposed to with additional remuneration to be given to the more physically harrowing work.

iv. Nation-wide monitoring committee needs to be established by the Government of India which periodically monitors and analyses the progress and practice of manual scavenging. This monitoring committee needs to comprise of representatives of the concerned Ministries, public servants, state representatives, community representatives as well as representatives from civil society organizations.[43]

v. Since the Indian railways is the largest user of the dry latrines, the Ministry of Railway must step in to curb the perpetuation of this practice and provide the Parliament with routinely reports on the advancement and eventual cessation of this practice. This should take place so that the Government of India can be kept abreast with the progress of the Ministry and assist in the ultimate abolition of the use of dry latrines and manual scavenging in Indian railways.

[43] *Supra* note 34.

vi. The Dalit Muslims and Dalit Christian manual scavengers are not included in the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 and are thus not entitled to the benefits under this Act. These communities need to be incorporated urgently.

Thus, with a pragmatic approach and zest to be proactive, this abhorrent practice should be put to anend through remedial legislations and with progressive and active participation on part of the community members who are entrenched in this stereotypical and oppressive structure as well as the ones who can do every bit to alter it.

HUMAN TRAFFICKING: LEGAL FRAMEWORK WITH SPECIAL REFERENCE TO THE TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) BILL, 2016

Dr. Shruti Goel[*]

I. INTRODUCTION

Human trafficking is a group of crimes involving trafficking in person of men, women and children for sexual exploitation or for financial gains or other exploitation of trafficked persons. Trafficking means when a person for the purpose of exploitation is recruited, transported, harbored, transferred or received by using threats; or by force or any other form of coercion; or by abduction; or by practicing fraud, or deception; or by abuse of power; or by inducement, including the giving or receiving of payments or benefits in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received.[1] The expression 'exploitation' includes any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.[2] That is, trafficking is not limited to sexual exploitation of the trafficked person only but also includes exploitation for the purposes of slavery, servitude, forced labour or forced removal of organs. Thus, trafficking is an umbrella term encompassing multiple acts that together can be viewed as a process with different phases[3]: (i) 'an act'[4]; (ii) a 'means'[5]; and (iii) an exploitative purpose[6]. Trafficking can be done of a male or female of any age. The consent of the victim is immaterial in determination of the offence of trafficking.[7]

Trafficking is one of the gravest violations of human rights. Truly speaking, in this twenty first century no human being can be allowed to be treated as a chattel. However, the menace

[*] Assistant Professor of Law, Rajiv Gandhi National University of Law, Punjab, Patiala, India.

[1] Section 370 (1) of the *Indian Penal Code*, 1860 as substituted by the *Criminal Law (Amendment) Act*, 2013.

[2] Explanation 1 attached to Section 370 (1) of the *Indian Penal Code*, 1860.

[3] Janie Chuang, The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking, *Michigan Journal of International Law*, 2005-2005, Vol. 27, pp.437-493 at p. 443

[4] Act is recruiting or transporting or harboring or transferring or receiving.

[5] Means employed are using (i) threats or (ii) force or any other form of coercion or (iii) abduction or (iv) practising fraud, or deception or (v) abuse of power; or (vi) inducement, including the giving or receiving of payments or benefits in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received.

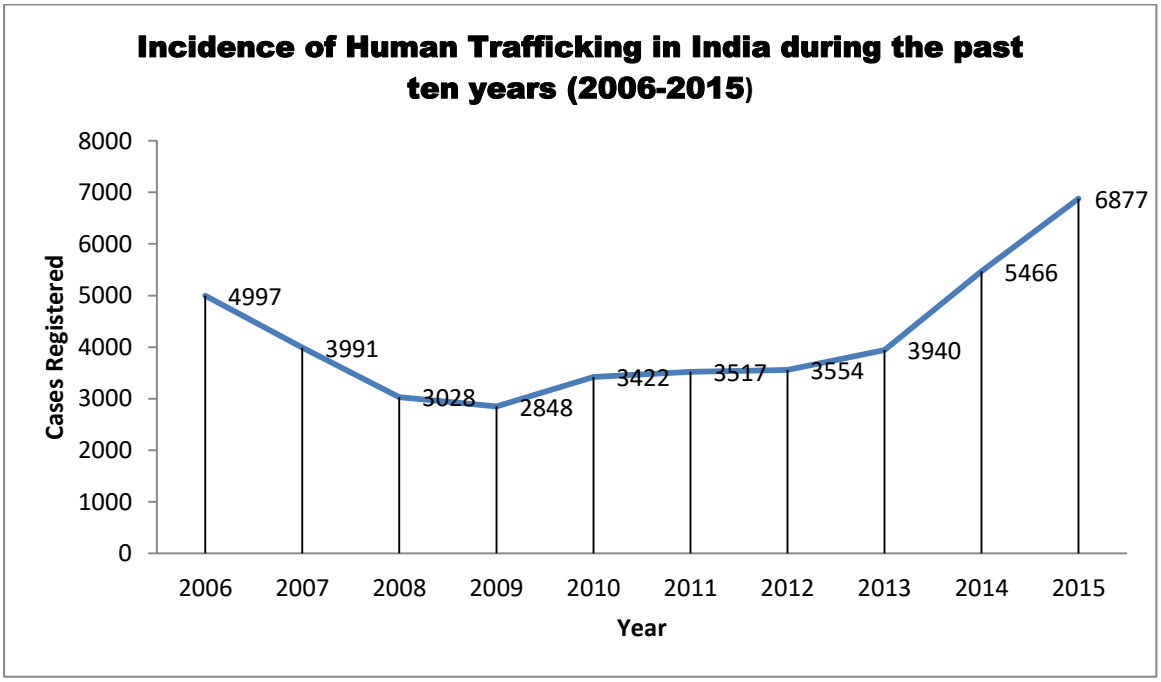
[6] Exploitative purpose may be (i) any act of physical exploitation or (ii) any form of sexual exploitation, or (iii) slavery or practices similar to slavery, servitude, or (iv)the forced removal of organs.

[7] Explanation 2 attached to Section 370 of the *Indian Penal Code*, 1860.

is not only prevalent but is further growing. The author in this article has studied the magnitude of the problem along with the existing laws that are in place to curb this menace. In 2016, the Union Minister for Women and Child Development has released a draft Bill for addressing this problem comprehensively. The researcher in this article has analysed the provisions of this newly released Bill along with the suggestions that should be incorporated in the draft Bill before it sees the light of the day.

II. MAGNITUDE OF THE PROBLEM

The victims of human trafficking are lured or abducted from their homes and subsequently forced to work against their wishes. The National Crime Record Bureau in India is responsible for collection of data related to crime.



Source: Data compiled from Crime in India (2006-2015) available at ncrb.nic.in

The above graph shows that the incidents of human trafficking are showing a rising trend since 2009. In 2009, 2848 cases of trafficking were registered. In 2010, 3422 cases were registered. This number further rose to 3517 in 2011. In 2012 and 2013, 3554 and 3940 cases of trafficking were registered respectively. In 2014 there was a steep rise in the number of incidents reported. In 2014, 5466 cases of crime relating to human trafficking were registered in India. In 2015, this number further rose to 6877. There is an increase of 25.8% during 2015 over 2014.

It is horrifying to note that the crime under human trafficking during the year 2015 has increased by 95.5% over 2011.[8] Thus, there is a need to see the laws that are in practice for curbing human trafficking.

III. EXISTING LEGAL PROVISIONS IN INDIA TO CURB TRAFFICKING OF PERSONS

a. CONSTITUTION OF INDIA

Article 23 of the Constitution of India provides 'right against exploitation' as a fundamental right. It specifically prohibits trafficking in human beings and further provides that contravention of this provision shall be an offence punishable under law.

Article 39 of the Constitution lays down Directive Principles of State Policy. Clause (e) and (f) of the Article provides that the state shall direct its policy towards securing that the childhood and youth are protected against exploitation and against moral and material abandonment and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

b. IMMORAL TRAFFIC (PREVENTION) ACT, 1956

The flagship statue which aims at preventing immoral traffic is the Immoral Traffic (Prevention) Act, 1956.[9] The Act aims to curb prostitution. A person on the basis of age is classified into (i) child, (ii) minor and (iii) major. Child means a person less than sixteen years.[10] Minor means a person who has completed the age of sixteen years but has not completed the age of eighteen years.[11] Major means a person who has completed the age of eighteen years.[12] However, it is pertinent to note that prostitution is per se not an offence under the Act. The Act criminalizes the procurers, traffickers and profiteers of trade.

Section 4 prescribes punishment for keeping a brothel or allowing premises to be used as brothel. Any person who keeps or manages or acts or assists in the keeping and management of a brothel shall be liable for punishment which shall not be less than one year but may extend to three years and fine up to two thousand rupees. Any person who being tenant, lessee, occupier, owner, lessor, landlord knowingly allows any other person to use such premises as a brothel or lets it with the knowledge that the same is intended to be used a s a

[8] Crime in India-2015, p.103 available at ncrb.nic.in
[9] Preamble of the *Immoral Traffic (Prevention) Act*, 1956.
[10] Section 2(aa) of the *Immoral Traffic (Prevention) Act*, 1956.
[11] Section 2 (cb) of the *Immoral Traffic (Prevention) Act*, 1956.
[12] Section 2(ca) of the *Immoral Traffic (Prevention) Act*, 1956.

brothel or is wilfully a party to the use of such premises as a brothel shall be held liable for punishment with imprisonment up to five years and fine.

Section 5 of the act prescribes punishment for procuring, inducing or taking person for the sake of prostitution: This section provides that any person who (i) procures or induces any person for the purpose of prostitution or (ii) takes, causes or induces any person for the sake of prostitution shall be held liable. The punishment is rigorous imprisonment for a period not less than three years but up to seven years and also with fine which may extend to two thousand rupees. If the offence is committed 'against the will' of any person or against a 'minor' then the offender shall be liable to be punished for seven years which shall extend to fourteen years. If the person against whom the offence is committed is a 'child' then the minimum punishment shall be rigorous imprisonment for not less than seven years and maximum is life imprisonment.

Section 6 of the Act prescribes punishment for detaining a person in premises where prostitution is carried on. This section provides that any person who detains any person with or without his consent in a brothel or in premises where such person may have sexual intercourse with a person who is not the spouse of such person shall be held liable under this section. The punishment is imprisonment of either description for a term of not less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine. However, the court may for special reasons impose a sentence of less than seven years.

In addition to above provisions, the Act criminalises persons who carry on prostitution in the vicinity of public places;[13] seduces or solicits for the purpose of prostitution;[14] seduces a person in custody for prostitution.[15]

c. INDIAN PENAL CODE, 1860

In addition to the Immoral Traffic (Prevention) Act, 1956, the Indian Penal Code also prescribes punishment for different types of trafficking. Section 370 of the Code defines trafficking and provides punishment for the same. This section was substituted in 2013 and it was for the first time that the word "trafficking" was defined in the Indian statue.[16] The

[13] Section 7 of the *Immoral Traffic (Prevention) Act*, 1956.
[14] Section 8 of the *Immoral Traffic (Prevention) Act*, 1956.
[15] Section 9 of the *Immoral Traffic (Prevention) Act*, 1956.
[16] For details on definition, see the first part of the article.

punishment for the offence of trafficking is rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and fine.[17] In cases where more than one person is trafficked, the punishment is imprisonment for not less than ten years which may extend to life and fine.[18] When a public servant or a police officer is involved in the trafficking of any person then such public servant or police officer shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and fine.[19] The Code prescribes enhanced punishment for trafficking a minor. In case the offence involves trafficking of one minor, the punishment is imprisonment for a term not less than ten years which may extend to life and fine.[20] In cases where the offence involves trafficking of more than one minor, the punishment is imprisonment for a term not less than fourteen years which may extend to life and fine.[21] In cases where the person is convicted for the offence of trafficking on more than one occasion, then such person shall be punished with imprisonment of life which shall mean the remainder of that person's natural life and fine.[22]

Section 370 A of the Code prescribes punishment for sexual exploitation of a trafficked person.[23] Under this section, a person shall be held liable for exploiting a trafficked person if (i) he has the knowledge or reason to believe that a person or a minor has been trafficked and (ii) engages such person or minor for sexual exploitation in any manner. The punishment for exploiting a trafficked person is imprisonment for a term which shall not be less than three years but which may extend to five years and fine.[24] In cases where a minor is trafficked and sexually exploited the punishment is imprisonment for a term which shall not be less than five years but which may extend to seven years and fine.[25]

Section 371 of the Code prescribes punishment for habitual dealing in slaves. If any person habitually imports, exports, removes, buys, sells, traffics or deal in slaves, then he shall be punished with imprisonment for life or imprisonment for a term not exceeding ten years and fine.

[17] Section 370 (2) of the *Indian Penal Code*, 1860.
[18] Section 370 (3) of the *Indian Penal Code*, 1860.
[19] Section 370(7) of the *Indian Penal Code*, 1860.
[20] Section 370(4) of the *Indian Penal Code*, 1860.
[21] Section 370(5) of the *Indian Penal Code*, 1860.
[22] Section 370 (6) of the *Indian Penal Code*, 1860.
[23] Section 370 A was added by the *Criminal Law (Amendment) Act*, 2013.
[24] Section 370A (2) of the *Indian Penal Code*, 1860.
[25] Section 370A (1) of the *Indian Penal Code*, 1860.

Section 372 and 373 prescribes punishment for selling or buying minor for purposes of prostitution respectively. A person shall be held liable for selling minor for the purposes of prostitution etc. if: (i) he sells or lets to hire or disposes any person and (ii) such person is under the age of eighteen years and (iii) the intention or knowledge is that such person shall be employed at any age for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose. A person shall be held liable for buying minor for the purposes of prostitution etc. if: (i) he buys or hires or obtains possession of any person and (ii) such person is under the age of eighteen years and (iii) the intention or knowledge is that such person shall be employed at any age for the purpose of prostitution or illicit intercourse with any person or any unlawful and immoral purpose. The punishment for selling or buying minor for the purposes of prostitution etc. is imprisonment for a term which may extend to ten years and fine.

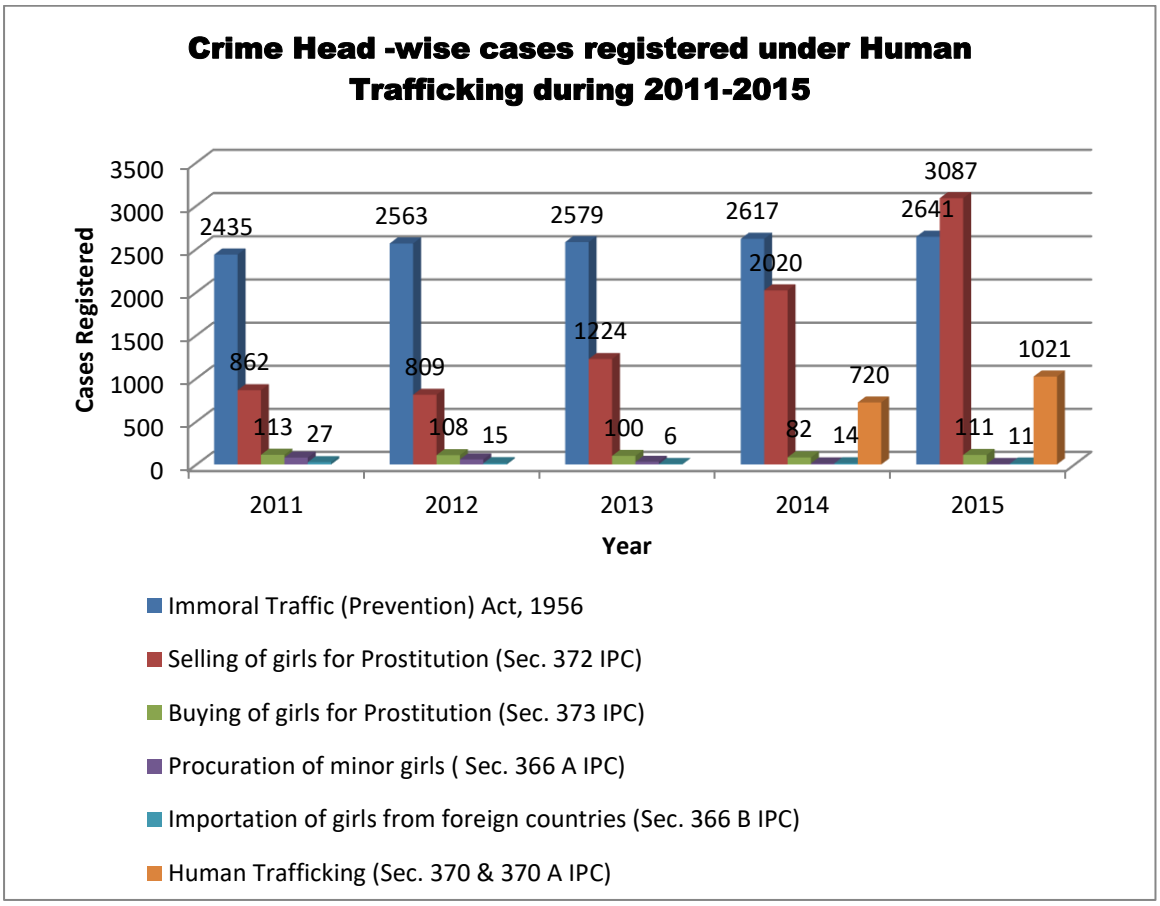
366A prescribes punishment for procuration of minor girl. If any person by any means induces any minor girl under the age of eighteen years to go from any place or to do an act with the intention that such girl may be or knowing that she will be forced or seduced to illicit intercourse with another person shall be held liable. The punishment is imprisonment which may extend to ten years and fine.

366B prescribes punishment for importation of girl from foreign country. If any person imports into India from any country outside India or from the State of Jammu and Kashmir any girl under the age of twenty-one years with intent that she may be or knowing that it to be likely that she will be forced or seduced to illicit intercourse with another person then he shall be punishable with imprisonment which may extend to ten years and fine.

	Immoral Traffic (Prevention Act) 1956	Selling of girls for prostitution (Sec. 372 IPC)	Buying of girls for Prostitution (Sec. 373 IPC)	Procuration of minor girls (Sec. 366 A IPC)	Importation of girls from foreign countries (Sec. 366 B IPC)	Human Trafficking* (Sec. 370 and 370 A IPC)
2011	2435	862	113	80	27	-

2012	2563	809	108	59	15	-
2013	2579	1224	100	31	6	-
2014	2617	2020	82	13	14	720
2015	2641	3087	111	6	11	1021

*Data on Human Trafficking is collected from 2014.



Source: Crime in India-2015

The above graph shows the head wise cases registered under human trafficking during 2011-2015. It is pertinent to note that the collection of data on human trafficking specifically under section 370 and 370 A of Indian Penal Code, 1860 started from 2014 only. The graph reveals that 44.9% cases were registered against procuration of minor girls. 38.4% cases were registered under the Immoral Traffic (Prevention) Act, 1956 and 14.8% cases of human trafficking were registered. Selling of minors for prostitution was 1.6% of the cases registered

whereas buying of minors for prostitution was 0.2%. The importation of girls from foreign countries accounted for only 0.1% of the cases.

d. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

Juvenile Justice Act, 2015 targets sale and purchase of a child. Child means a person who has not completed eighteen years of age.[26] The Act criminalizes the commoditization of a child. Section 81 of the Act prescribes punishment for the sale and procurement of children for any purpose. It is for the first time that buying and selling of a child *per se* has been criminalized without taking into account the purpose of such buying and selling. Till 2015, the buying or selling of minor was penalized only if it was for some illegal purpose, for example, for physical or sexual exploitation,[27] or slavery or servitude or prostitution[28] etc. The punishment prescribed under the Act for buying or selling of a child is imprisonment for a term which may extend to five years and fine of one lakh rupees. The Act provides that if the offence is committed by a person having actual charge of the child including employees of a hospital or nursing home or maternity home then the term of imprisonment shall not be less than three years which may extend up to seven years.

e. PROHIBITION OF CHILD MARRIAGE ACT, 2006

The Prohibition of Child Marriage Act, 2006 prohibits solemnisation of child marriages. It does not directly curb trafficking. However, section 12 of the Act provides circumstances under which marriage of a minor child shall be held void. It says that a marriage of minor shall be void if the minor is sold or trafficked or used for immoral purposes after marriage. The Act does not specifically penalizes trafficking for the purpose of marriage or trafficking after marriage but prescribes punishment for male adult marrying a child,[29] solemnizing a child marriage[30] and for promoting or permitting solemnization of child marriages.[31]

---

[26] Section 2(12) of the *Juvenile Justice (Care and Protection of Children) Act*, 2015.
[27] Sections 370 and 371 of the *Indian Penal Code*, 1860.
[28]Sections 372 and 373 of the *Indian Penal Code*, 1860.
[29] Section 9 of the *Prohibition of Child Marriage Act*, 2006 lays punishment for male adult marrying a child: Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.
[30] Section 10 of the *Prohibition of Child Marriage Act*, 2006 lays punishment for solemnising a child marriages: Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.
[31] Section 11 of the *Prohibition of Child Marriage Act*, 2006 lays punishment for promoting or permitting solemnization of child marriages: (1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including

f. BONDED LABOUR SYSTEM (ABOLITION) ACT, 1976

In addition to the above mentioned statues, the Bonded Labour System (Abolition) Act, 1976 also helps in curbing trafficking. Very often the trafficked person is used for bonded labour. The Bonded Labour System (Abolition) Act of 1976 abolishes bonded labour so as to prevent the economic and physical exploitation of the weaker sections of the society.[32] The Act prescribes punishment for enforcement of bonded labour. Under section 16 if any person compels any person to render bonded labour then he shall be liable for punishment with imprisonment which may extend to three years and fine up to two thousand rupees.

g. CHILD AND ADOLESCENT (PROHIBITION AND REGULATION) ACT, 1986

The Child and Adolescent (Prohibition and Regulation) Act, 1986 specifically prohibits the engagement of children in all occupations[33] and engagement of adolescents in hazardous occupations and processes.[34] Child means a person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009 whichever is more.[35] Adolescent means a person who has completed his fourteenth year of age but has not completed his eighteenth year.[36] If any person permits any child or adolescent to work in contravention of the provisions of the Act then he shall be punishable with imprisonment for a term which shall not be less than six months but may extend to two years or fine which shall not be less than twenty thousand rupees but may extend to fifty thousand rupees or both.[37]

h. TRANSPLANTATION OF HUMAN ORGANS AND TISSUES ACT, 1994

Trafficking is also done for the purpose of trading in human organs. The Transplantation of Human Organs and Tissues Act, 1994 regulates the removal and transplantation of human organs and tissues and prohibits commercial dealing of the same.[38] The Act lays down

---

any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees.

[32] Preamble of the *Bonded Labour System (Abolition) Act*, 1976.

[33] Section 3 of the *Child and Adolescent (Prohibition and Regulation) Act*, 1986.

[34] Section 3A of the *Child and Adolescent (Prohibition and Regulation) Act*, 1986.

[35] Section 2(ii) of the *Child and Adolescent (Prohibition and Regulation) Act*, 1986.

[36] Section 2(i) of the *Child and Adolescent (Prohibition and Regulation) Act*, 1986.

[37] Sections 14(1) and 14(1A) of the *Child and Adolescent (Prohibition and Regulation) Act*, 1986. 14(1) and 14(1A)

[38] Preamble of the *Transplantation of Human Organs and Tissues Act*, 1994.

specific procedure for removal of human organs and tissues.[39] If any person renders his service for removal of organs or tissues without authority[40] or commercially deals in human organs[41] and human tissues[42]

IV. PROPOSED TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) BILL 2016

Although there are various laws to curb trafficking, however the menace is growing. Moreover, the existing laws treat the trafficked person as offender in certain situations.[43] In addition to it, there is a need to rescue, repatriate and rehabilitate the trafficked person. Therefore, in order to bring effective anti trafficking regime the Ministry of Women and Child Development brought out a draft of Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016.[44] The provisions of the draft Bill are as follows:

a. OBJECTIVE OF THE BILL

The Bill seeks to achieve three-fold objective. That is, firstly, to prevent trafficking of persons; secondly, to provide protection and rehabilitation to the victims of trafficking; and thirdly, to create a legal, economic and social environment against trafficking of persons.

b. AUTHORITIES ESTABLISHED UNDER THE BILL

In order to prevent trafficking of persons and provide protection and rehabilitation to the victims, the Bill seeks to establish different authorities at the district, state and central level. These authorities are:

i. District Anti Trafficking Committee

The appropriate government has been empowered to constitute a District Anti-Trafficking Committee for every district.[45] This committee shall consist of the following members (i) the District Magistrate or District Collector; (ii) two social workers out of which one shall be a woman to be nominated by the District Judge; (iii) one representative from the District Legal

[39] Sections 3 and 9 of the *Transplantation of Human Organs and Tissues Act*, 1994.
[40] Section 18 of the *Transplantation of Human Organs and Tissues Act*, 1994.
[41] Section 19 of the *Transplantation of Human Organs and Tissues Act*, 1994.
[42] Section 19A of the *Transplantation of Human Organs and Tissues Act*, 1994.
[43] For example, Section 7 and section 8 of the *Immoral Traffic (Prevention) Act*, 1956 prescribes punishment for carrying on prostitution in the vicinity of public places or for seducing or soliciting for the purposes of prostitution in any public place.
[44] The draft of the Bill is available at http://wcd.nic.in/acts/trafficking-persons-bill-2016-draft.
[45] Section 3(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

Services Authority nominated by the District Judge; and (iv) District Officer of the Social Justice or Woman and Child Development Department of the concerned state or U.T.[46] The District Magistrate or District Collector shall be the chairman of the committee and the District Officer of the Social Justice or Woman and Child Development Department of the concerned state or U.T shall be the member secretary. The District Anti- Trafficking Committee shall meet at least once in three months.[47] It shall have the power to regulate its own procedure for conducting its meetings.[48]

The committee shall exercise powers and perform such functions and duties in relation to prevention, rescue, protection, medical care, psychological assistance, skill development, need based rehabilitation of victims as may be prescribed.

ii. State Anti- Trafficking Committee

The appropriate Government has been empowered to establish State Anti–Trafficking Committee for a state/ U.T.[49] This committee shall consist of the following members: (i) the Chief Secretary; (ii) Secretary to the Department of the State dealing with Women and Child; (iii) Secretary of the State Home Department; (iv) Secretary of the State Labour Department; (v) Secretary from State Health Department; (vi) Director General of Police of the concerned State; (vii) Secretary of the State Legal Services Authority; and (viii) two social workers out of which one shall be a woman and to be nominated by the Chief Justice of the High Court. The Chief Secretary shall be the chairperson of the committee.[50]

The function of the committee shall be to oversee the implementation of this Act and advice the State/UT Government and District Anti-Trafficking Committee on matters relating to prevention of trafficking, protection and rehabilitation of victims of trafficking in persons and to perform such other functions and duties as maybe prescribed.[51]

iii. Central Anti- Trafficking Advisory Board

The Central Government has been empowered to constitute a Central Anti–Trafficking Advisory Board. The Board shall be headed by the Secretary, Ministry of Women and Child

[46] Section 3(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[47] Section 3(3) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[48] Section 3(4) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[49] Section 5(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[50] Section 5(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[51] Section 5(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

Development and shall have representatives from the concerned Ministries, State/UTs and members from civil society organizations as may be prescribed.[52]

The function of the Advisory Board shall be to oversee the implementation of the Act and it shall also advise the appropriate Government on matters relating to prevention of trafficking, protection and rehabilitation of victims in a manner as maybe prescribed.

c. SUPPORT SERVICES

In order to provide support and rehabilitation to the victims of trafficking, the Bill provides for the establishment of following support services:

i. Protection Homes

In order to provide immediate care and protection to the victims of trafficking, the Bill provides for the establishment of protection homes. "Protection homes" mean a home established or maintained by the appropriate government directly or through voluntary or non-government organization in every district or a group of districts.[53]The aim of protection homes shall be to provide immediate care and protection to the victims of trafficking. They shall provide shelter, food, clothing, counselling, medical care that is necessary for the rescued victims and such other services as may be prescribed.[54] These protection homes shall be registered in the manner as prescribed by the appropriate government.[55]

ii. Special Homes

In order to provide long term institutional support to the victims of trafficking, the Bill provides for the establishment of special homes. "Special homes" mean an institution established or maintained in every district or two or more districts by the appropriate Government either directly or through a voluntary or non-Governmental organization.[56]The government can also use the existing special homes. The aim of the special homes is to provide long term institutional support for the rehabilitation of the victims.[57] These special homes shall be registered in the manner as prescribed by the appropriate government.[58]

[52] Section 6(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[53] Section 2(j) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[54] Section 8(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[55] Section 10 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[56] Section 2(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[57] Section 9 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[58] Section 10 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

iii. Schemes and Programmes

In addition to the establishment of the protection homes and special homes, the appropriate government has been entrusted with the responsibility of framing scheme and programmes for the purpose of providing rehabilitation, support and after care services necessary for the social integration of the victims into the mainstream society and also to prevent re-trafficking.[59]

The state government has also been entrusted with the responsibility to create specialized schemes for victims especially for women engaged in prostitution or any other form of commercial sexual exploitation. These schemes shall enable the woman to come forward and reintegrate into mainstream society.[60]

iv. Anti-Trafficking Fund

Funds are the backbone for effective implementation of the law. Therefore, the appropriate government has also been entrusted with the responsibility of creating an anti-trafficking fund for the effective implementation of the Act and for the welfare and rehabilitation of the victims.[61]

d. INVESTIGATION OF OFFENCES

In order to conduct investigation of offences under the Act, the central government has been entrusted with the responsibility of setting up a special agency.[62] Further, section 28 authorizes the State Government to designate a police officer of the rank of Gazetted Officer for investigating offences under the Act and under sections 370-373 of the Indian Penal Code.

e. OFFENCES AND PENALTIES

i. Punishment for non- registration of 'protection home' or 'special home'

If any person in-charge of 'protection home' or 'special home' providing shelter to the victims does not get registered as provided under the provisions of section 10, then he shall

[59] Section 11(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[60] Section 11(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[61] Section 29 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[62] Section 7 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

be liable for punishment with imprisonment which may extend to one year or with a fine not less than one lakh rupees or with both.[63]

ii. *Punishment for non-registration of placement agency*

Every placement agency needs to be registered under the provisions of the Bill.[64]If any person contravenes this provision then he shall be punishable with fine which may extend to one lakh rupees.[65]

The period of registration and the conditions of registration are to be prescribed by the appropriate government.[66] If any person contravenes this provision then he shall be liable for punishment with imprisonment for a term which may extend to 3 years or with fine which may extend to fifty thousand rupees or with both.[67]

iii. *Punishment for disclosure of identity*

The Bill provides that no report or newspaper or magazine or audio-visual media or any other form of communication shall disclose the name, address, or any other particulars which may lead to the identification of a victim or witness of a crime of trafficking in persons under this Act or any other law for the time being in force regarding any investigation or judicial procedure. The Bill also forbids the publication of the picture of any such victim.[68]Therefore, if any publisher or owner of the media or studio or photographic facilities or any person in-charge of publication who contravenes this provision, then he shall be liable for punishment with imprisonment for a term which may extend to six months or with fine which may extend to one lakh rupees or both.[69]

iv. *Punishment for using narcotic drugs, psychotropic or alcoholic substances for trafficking*

The Bill provides that if any person uses any narcotic drug or psychotropic substance or alcohol for the purpose of trafficking then he shall be liable for punishment with imprisonment for a term which shall not be less than seven years but may extend to ten years

[63] Section 13 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[64] Section 12 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[65] Section 14 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[66] Section 12(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[67] Section 14 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[68] Section 15(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[69] Section 15(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016

and shall also be liable to fine which shall not be less than one lakh rupees.[70] This offence is cognizable and the special court trying the offence shall presume that such person has committed the offence, unless the contrary is proved.[71]

A person accused of an offence under this shall not be released on bail or on his own bond unless: (i) the Special Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Special Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.[72] These limitations on granting of bail are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. [73]

v. *Punishment for using chemical substance or hormones for the purpose of exploitation*

The Bill provides that if any person administers any chemical substance or hormones to a trafficked woman or a girl or a child for the purpose of early sexual maturity and exploitation, then he shall be liable for punishment for a term which shall not be less than seven years but may extend to ten years and shall also be liable to fine which shall not be less than one lakh rupees.[74] This offence is cognizable and the special court trying the offence shall presume that such person has committed the offence, unless the contrary is proved.[75]

A person accused of an offence under this shall not be released on bail or on his own bond unless: (i) the Special Public Prosecutor has been given an opportunity to oppose the application for such release; and (ii) where the Special Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.[76] These limitations on granting of bail are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail. [77]

[70] Section 16 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[71] Section 24 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[72] Section 19(1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[73] Section 19(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[74] Section 17 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[75] Section 24 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[76] Section 19 (1) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[77] Section 19(2) of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

vi. *General Penalty*

In addition to the specific offences mentioned above, the Bill contains a clause for general penalty. That is, if any person violates any of the directions given by the appropriate government under this Act, then he shall be liable for punishment with imprisonment for a term which may extend to three months or fine which may extend to twenty thousand rupees or both.[78]

f. SPECIAL COURTS

In order to conduct speedy trial for offences committed under this Bill and under sections 370 to 373 of Indian Penal Code the Bill provides for establishment of special courts. The State Government shall in consultation with the Chief Justice of High Court specify a Court of Sessions as special courts for each district.[79] This special court shall be deemed to be a Court of Sessions and the appropriate government shall appoint special public prosecutors for conducting prosecution before these special courts.[80]

The court shall follow the procedure as laid down in the Code of Criminal Procedure while conducting proceedings under the Act.[81] However, if the person convicted under the Act is above the age of eighteen years then he shall neither be released on probation of good conduct or admonition as provided under section 360 of the Code of Criminal Procedure nor he shall be benefitted by the provisions of Probation of Offenders Act.[82]

The Bill also provides that if on preliminary inquiry, Special Court or District Anti-Trafficking Committee finds that any amount is due to the victim as back wages or any other loss, then it shall order the recovery of the same. The special court while convicting an accused can also order him to pay additional fine which shall not be less than five lakh rupees for each victim engaged by the trafficker.[83]

g. REGISTRATION OF PLACEMENT AGENCIES

[78] Section 18 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[79] Section 23 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[80] Sections 25 and 26 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[81] Section 25 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[82] Section 40 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[83] Section 27 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

The Bill provides for compulsory registration of placement agencies in the manner as may be prescribed. It also provides for suspension, cancellation or revocation of placement agency in case the conditions prescribed for registration are violated.[84]

h. PROCEDURE IN RELATION TO VICTIMS OF TRAFFICKING

A victim after being rescued has to be produced before the member secretary of the district anti trafficking committee. The victim may be produced by investigating officer or any police officer or any public servant or any social worker or public spirited person or by the victim himself.[85]

i. PROCEDURE FOR MANDATORY REPORTING

The Bill casts a mandatory duty of reporting offences. Any police officer or public servant or any officer of employee of protection home or special home who finds or takes charge of or who is handed over the custody of a victim shall mandatorily report the same to the nearest police station or district anti trafficking committee within twenty four hours. In case the victim is a child, then the case has to be reported to a child welfare committee or a child care institution registered under the Juvenile Justice Act of 2015.[86]

j. REPATRIATION

The Bill provides provisions for repatriation of the rescued victim to the home state or another state for increased protection. The order can be passed by the special court or by the District Anti-Trafficking Committee.[87] In case the victim is from foreign country and the State Anti-Trafficking Committee is of the opinion that the victim needs to be repatriated to the country of origin, then it may deal the matter in accordance with the law in force at that time.[88]

k. CONFISCATION, ATTACHMENT AND FORFEITURE OF PROPERTY

The Bill contains provisions for attachment and confiscation of property. Where a person accused of having committed an offence under section 16 and 17 of the Act or under sections 370-373 of Indian Penal Code is likely to conceal or transfer his property which may result in

[84] Section 12 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[85] Section 4 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[86] Section 30 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[87] Section 31 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[88] Section 32 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

frustrating the proceedings under the Act, then the Special Court has the power to order attachment or confiscation of the property. The property shall be liable to forfeiture to the extent it is required for the purpose of realization of fine imposed by special court. The special court may also make an order for forfeiting the property that has been used for commission of offence or has accrued thereby.[89] The burden of proving that the property is not acquired or used for the commission of the offence is on the accused.[90] The appropriate government has the power to file an application for attachment of property if it has reason to believe that the accused has committed any offence under the Act. The application is to be filed to the District Judge within the local limits of whose jurisdiction the said person ordinarily resides or carries on business. [91]

V. SHORTCOMINGS OF THE BILL

The Bill is a laudable step taken by the Government. However, there are some shortcomings of the Bill which should be re-drafted so that the Bill becomes an effective anti -trafficking tool in order to curb trafficking.

The shortcomings of the Bill are as follows:

Firstly, the draft bill does not define the term 'trafficking'. Even if we look into the definition of trafficking as given in section 370 of the Indian Penal Code, it is pertinent to note that Section 370 of the Indian Penal Code does not specifically talks about 'forced labour'. As a result, trafficking of persons for the purpose of forced labour may be excluded from the purview of trafficking law. Forced labour should be specifically included in the definition of trafficking.

Secondly, the draft Bill talks about the setting up of Anti Trafficking Committee at the district and state level and Advisory Board at the central level. However, no time limit is prescribed for setting up of these committees. A time limit should be set up in the Act itself. Moreover, an official from the police should also be a member of the committees at the district and state level. Further, a victim is to be produced before the member secretary of district anti-trafficking committee. It is not clear that what type of orders shall be passed at that time.

[89] Section 20 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[90] Section 21 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.
[91] Section 22 of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill*, 2016.

Thirdly, the Bill talks about the constitution of a special agency for investigation. However, it does not enlist the powers, duties and functions of this agency. Thus, the role and responsibility of this agency should be clearly engrafted in the Act. Moreover, the Bill says that the investigating officer shall also be responsible for investigating offences under sections 370-373 of Indian Penal Code. There is no clarity regarding investigation of other offences committed under the Indian Penal Code or under other Acts like the Immoral Traffic (Prevention) Act, 1956.

Fourthly, the Bill provides for setting up of protection homes and special homes in order to provide support services to the victim and their registration. However, there is no clarity regarding the rules governing their establishment, the funds available and the manner of monitoring these support services. These provisions need to be clearly laid down in the Act. Moreover, the Bill does not clarify how these shelter homes will function in relation to similar homes set up under other laws such as the Immoral Traffic Prevention Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2015.

Fifthly, the Bill talks about the creation of anti-trafficking fund. There should be provisions that the money earned from the property forfeited by the government should also be deposited in this anti-trafficking fund.

Sixthly, the trafficked child is also a 'child in need of care and protection' as provided under section 2(14)(viii) of the Juvenile Justice Act, 2015. There is no clarity that whether he will be produced before the Child Welfare Committee as envisaged under section 27 of the Juvenile Justice Act, 2015 or before the member secretary of the district anti trafficking committee as envisaged under the provisions of the Bill.

Seventhly, the existing laws create structures like anti human trafficking units constituted under the Ministry of Home Affairs, Child Welfare Committees established under the Juvenile Justice Act, 2015. The Bill does not address the issue of coordination between these structures.

To sum up, a comprehensive law to deal with the problem of human trafficking is the need of the hour. There are certain shortcomings in the Bill. These shortcomings must be removed so that the new law complements the existing law in place of adding confusion to it

DECRIMINALIZING OF SEX WORK: AN INTERNATIONAL HUMAN RIGHTS APPRAISAL

Ashray Behura[*]

I. INTRODUCTION

"We say that slavery has vanished from European civilization, but this is not true. Slavery still exists, but now it applies only to women and its name is prostitution."[1]

Amnesty International voiced a rather contentious view by appealing to the wide array of governments worldwide to not only decriminalize consensual sex work and other related incidental activities such as solicitation, buying etc.[2] but to also recognize sex work as a human right.[3] The chief rationale for the same is that the extremely marginalized group of individuals who constitute as sex workers and who often work beyond the confines of the law, are not adequately protected by their countries municipal laws and that their interests were scarcely safeguarded. It was further asserted, that as these sex workers are compelled to work covertly, they are often denied any protection or support from their Government, leaving them hapless and often extremely susceptible to exploitation.[4] A wide extent of indignities and human rights abuses are suffered by them ranging from the stigma of the nature of their work which is often considered immoral, social inequalities, social persecution and discrimination leading to Amnesty International to urge the governments for the decriminalization of all aspects of consensual sex work. Amnesty International also draws a distinction from the very get-go that they only advocate for the decriminalization of only those forms of sex work, which takes place between the parties consensually, and immediately excludes those forms of sex work involving coercion, exploitation or abuse from the very definition of "sex work" as can be evinced from the definition as extended in the

[*] Student, B.A LL.B (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow, Uttar Pradesh, India.

[1] MEHR A. KALAMI, SLAVERY CONTINUES: HOPE OF BREAKING THE CHAINS 88 (Universe 2014).

[2] Catherine Murphy, *Sex Workers' Rights are Human Rights*, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/latest/news/2015/08/sex-workers-rights-are-human-rights (accessed on Sept. 5, 2016).

[3] Jessica Neuwirth, *Amnesty International says prostitution is a human right – but it's wrong*, THE GUARDIAN, https://www.theguardian.com/sustainable-business/2015/jul/28/amnesty-international-prostitution-sex-work-human-trafficking (accessed on Sept. 5, 2016).

[4] *Amnesty International publishes policy and research on protection of sex workers' rights*, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/ (accessed on Sept. 5, 2016).

Amnesty International Policy.[5] The definition adopted by Amnesty International is based upon the definition espoused by UNAIDS, and defines "sex work"[6] as a term which compulsorily imputes an exchange between the two consenting adults.[7]

These views were presented in a nascent and embryonic form by Amnesty International in a Draft Policy of 2013 which was later developed into a Final Policy/Resolution on May 26th, 2016 after receiving and garnering considerable support from countries worldwide, with 500 delegates representing 80 countries voting in favour of and supporting Amnesty International's policy of decriminalizing sex work.[8]

At this juncture, it is pertinent to mention that the resolution adopted by Amnesty International is in gross contradiction with the existing Human Rights instruments, namely the *Palermo Protocol*[9], the *1949 United Nations Convention on the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others*[10], the *Convention on the Elimination of All Forms of Discrimination Against Women*[11], the *Universal Declaration of Human Rights*[12] and the *Charter of the United Nations*[13] and subsequently causes significant and far-reaching inconsistencies in regards to the settled position of the law, all of which shall be individually analysed in the forthcoming chapters. To highlight the stark contrast of the position adopted by Amnesty International and that of UNESCO, the Special Rapporteur iterated that prostitution was a "form of slavery", which was more adverse than slavery in its traditional form, what was being "alienated was intimacy, rather than labour", as opposed to Amnesty International's unwavering support for the decriminalization of sex work.[14]

---

[5]Amnesty International Policy On State Obligations To Respect, Protect And Fulfil The Human Rights Of Sex Workers, POL 30/4062/2016 (2016).
[6]Draft Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers, pg. 1,AMNESTY INTERNATIONAL, available at https://amnestysgprdasset.blob.core.windows.net/media/10243/draft-sw-policy-for-external-publication.pdf (accessed on Sept. 5, 2016).
[7]*Supra* note 5, at 1.
[8]Emily Bazelon, *Why Amnesty International Is Calling for Decriminalizing Sex Work*, NY TIMES, http://www.nytimes.com/2016/05/25/magazine/why-amnesty-international-is-calling-for-decriminalizing-sex-work.html (accessed on Sept. 5, 2016).
[9]UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2237 U.N.T.S. 319 (2000).
[10]25 July 1991, 96 U.N.T.S. 271 (1991).
[11]3 September 1981, 1249 U.N.T.S. 13 (1981).
[12]10 December 1948, United Nations Doc. A/810 at 71 (1948).
[13]24 October 1945, 1 U.N.T.S. 16 (1945).
[14]Report of Jean Fernand-Laurent, Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 17 March 1983, U.N. Doc. E/1983/7.

II. THE FINAL POLICY ADOPTED BY AMNESTY INTERNATIONAL: A MYOPIC AND INEFFECTIVE RESOLUTION INCAPABLE OF PROTECTING SEX-WORKERS

The Final Policy titled as the "*Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*"[15] was adopted as part of Amnesty International's efforts to reduce the risk of human rights abuses against the highly marginalized group of individuals who provide services in the nature of sex work. This policy is based upon research conducted by Amnesty International independently, without resorting to, or even mentioning reports or studies which provide a divergent viewpoint resulting in the position which is adopted by them being contrasting and discrepant with the established International Human Rights instruments.

a. THE SUBSTANCE AND CENTRAL THEME OF THE FINAL POLICY: EXAMINING THE VIEWPOINT OF AMNESTY INTERNATIONAL

What the policy aims to bring about through decriminalization of sex work is not the evolution or the development of human rights which either permit individuals to buy or to procure sex, nor to create human rights to receive financial benefits from the sale of sex of another person.[16] However, it must be mentioned at the very outset, that though the intent behind such a stand is noble, it would not go hand-in-hand with the final outcome arising from the establishment of such human rights. Often prostitution stems from the coercion exerted by third-parties, desperate and dire financial situations, sexual abuse, susceptibility and the lack of a government support system.[17] However, if decriminalization of sex work and other ancillary activities occurs, acts of criminal force or coercion being employed by pimps towards the prostitutes immediately becomes legitimized.[18] This is because the requisite threshold of consent which has been myopically laid down in the definition adopted by Amnesty International only requires the existence of consent between the two participating adults and does not take into consideration the factors leading to such consent (such as coercion by pimps; leading to such coercion being legitimized, as such coercion would result in the prostitute providing her consent).

[15]AMNESTY INTERNATIONAL, Available at https://www.amnesty.org/en/documents/pol30/4062/2016/en/.
[16]*Supra* note 5, at 3.
[17]GEETANJALIMISRA, AJAY MAHAL & RIMA SHAH, *PROTECTING THE RIGHTS OF SEX WORKERS: THE INDIAN EXPERIENCE*, 5 Health & Hum. Rts. 92 (2000).
[18]Neuwirth, *supra* note 3.

The policy also calls for the decriminalization of all aspects of consensual sex work between adults, which by extension would also cover third-party individuals who facilitate or procure such sex work, such as pimps, brothel owners etc. However, it must be noted, that more often than naught the principal perpetrators of abuse, crimes and violence against the sex workers.[19] This position would ultimately entrap sex workers reporting crimes against them as it would expose them to further retaliation from such third parties.[20] Hence, sex workers are ultimately caught between a rock and a hard place, as if they eventually report crimes committed by third parties, they would have to bear the wrath and retribution of such third-parties, or would have to suffer the onslaught, silently, with a marked resignation.[21]

b. THE DEFINITION OF "SEX WORK"

The definition of "sex work" work has been espoused in the Policy, which was further adopted from the definition as laid down by the Joint UN Programme on HIV/AIDS (UNAIDS). Sex work is understood to mean the exchange of sexual services for some form of remuneration.[22] The Policy also provided the divergent views as to whether "sex work" and "prostitution" can be used interchangeably or not. While some argue that use of the term "prostitution" is used to reclaim and de-stigmatize the term and practice, many sex workers are of the view that that the term "prostitution" is disparaging, deprecating and misogynistic due to which organized sex worker groups prefer the term "sex worker" or "person in the sex industry". The author of this article subscribes to and ardently supports the former view, due to which the terms "sex work" and "prostitution" have been used interchangeably from hereon.

c. DECRIMINALIZATION OR LEGALIZATION? : THE RATIONALE BEHIND AMNESTY INTERNATIONAL'S STAND

The resolution (or policy) adopted by Amnesty International advocates for the decriminalization of all aspects relating to sex work based upon the consent of both the adult parties involved. The chief rationale driving this stand forward is that Amnesty International asserts that such decriminalization would by itself remedy the array of human rights

[19]Alexandre Lutnick& Deborah Cohan, *Criminalization, legalization or decriminalization of sex work: what female sex workers say in San Francisco, USA*,17 REPROD. HEALTH MATTERS 38-46, 44 (2009).
[20]*Addressing Violence against Sex Workers*, WORLD HEALTH ORGANISATION, http://www.who.int/hiv/pub/sti/sex_worker_implementation/swit_chpt2.pdf (accessed on Sept. 7, 2016).
[21]Cheryl Overs &BebeLoff, *Toward a Legal Framework that Promotes and Protects Sex Workers' Health and Human Rights,* 15 HEALTH & HUM. RTS. 190 (2013).
[22] Sex work and HIV/AIDS, UNAIDS Technical Update (2002), p. 3.

violations and indignities as suffered by prostitutes.[23] However, this being said that the model which Amnesty International proposes to adopt does not call for the legalization of prostitution, hence discerning between "legalization of prostitution" and "decriminalizing of prostitution". What Amnesty International is working towards is the removal of any legal hindrance leading to sex workers to desist from providing services, rather than the introduction of any laws and policies specific to sex work to formally regulate it.[24] Such a view is ardently supported by a magnitude of prostitutes, who believe that legalization (which is invasive in nature) would be akin to legalised abuse as it would be tightly curtailed and regulated by the state, and in turn the police.[25] Hence, decriminalization would remove such shackles (legal and otherwise) from the prostitutes rather than introduce them, which would occur with the legalization of prostitution.

It is argued that to safeguard that human rights of the susceptible prostitutes, the governments should do away or repeal all laws by virtue of which not only is the sale or solicitation of sex work illegal, but also those laws which makes buying or procurement of sex work illegal. Such a drastic move would ensure that not only would prostitutes not be compelled to work underground or covertly which in turn would compromise their wellbeing, but would also facilitate governments to implement support systems and safeguards to ensure their protection. Furthermore, drawing reference to the *Human Rights Council Report of 2010*, the health of sex-workers could also improve with the decriminalization of sex work as it would instil or inculcate a form of "right-to-health approach" to sex work.[26] Lastly, such a view is prevalent in other prostitution movements, that sex workers should be permitted to provide services on their terms and conditions and not on the terms of the state, the police, pimps and other third parties. [27]

III. CRIMINALIZATION OF SEX-WORK : A SOCIO-LEGAL ANALYSIS WITH REFERENCE TO THE MODEL ADOPTED IN NORWAY AND GERMANY

[23] *Supra* note 5, at 2.
[24] *Q&A: policy to protect the human rights of sex workers*, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/qa-policy-to-protect-the-human-rights-of-sex-workers/ (accessed on Sept. 7, 2016).
[25] Anne McClintock, *Sex Workers and Sex Work: Introduction*, 37 Soc. Text 1-10 (1993).
[26] Report by Anand Grover focussing on right to health and criminalization of same-sex conduct and sexual orientation, sex-work and HIV transmission, 27 April 2010, U.N. Doc. A/HRC/14/20, ¶ 46.
[27] MCCLINTOCK, *supra* note 25.

The vehement supporters of a prohibitionist system advocate that the criminalization of prostitution should occur on the basis of moral grounds and to preserve traditional values.[28] Public health would also not deteriorate with criminalization as with lesser instances of services being provided, there would be a curb on the spreading of STD's.[29]

Furthermore, with reference to countries which have criminalized sex work, such as Norway (buying of sex services is criminalized), there was a marked decline or reduction of human trafficking, hence evincing a causal link between criminalization and trafficking.[30] In Norway, the purchase of sex-services was criminalized in 2009 by virtue of Section 202(a) of the Norwegian Penal code, following Sweden's cue. By criminalizing sex work, the profitability of the market tanks[31], which in turn leads to a decrease in trafficking in those areas where harsher laws are present against prostitution. As the demand for buying sex decreases, the market becomes less lucrative from a financial point-of-view, halting individuals form trafficking. Countless reports (both from scholars and the Norwegian Government) reiterate the view that criminalization not only leads to a decrease in sex work, but also indirectly affects human trafficking.[32] To conclude, testimonies as provided by sex workers and independent studies carried out indicate a conspicuous absence (though not wholly) of the functioning of traffickers as driven by profit motives, areas which implement harsher laws against prostitution are not as viable or lucrative as other areas where it is legalized or decriminalized.[33]

Concerns have also been voiced by a multitude of prostitutes, aggrieved by criminalization, wherein varying rationales have been enunciated. Predominantly featuring amongst them is

[28]J.A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE(University of Chicago Press 1987) (finding that modern laws criminalising prostitution have their origin in medieval canon law); B.M. HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION(University of Chicago Press 1987); See also M.H. SOMMER, SEX, LAW, AND SOCIETY IN LATE IMPERIAL CHINA 210-303 (Stanford University Press 2000).

[29]E. Coughlan, *Male clients of female commercial sex workers: HIV, STDs and risk behaviour*, 12 INT. J. STD AIDS 665 - 659 (2001).

[30]NiklasJakobsson&Andreas Kotsadam, *The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation*, 35 EUROP. J. L. & ECON. 87 (2013).

[31]*Evaluation of Norwegian legislation criminalising the buying of sexual services*, NORWAY MISSION TO THE EU, http://www.eu-norway.org/Global/SiteFolders/webeu/Evaluation.pdf (accessed on Sept 12, 2016).

[32]G. Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187-1218 (2004); C. Friesendorf, *Pathologies of Security Governance: Efforts Against Human Trafficking in Europe*, 38 SECURITY DIALOGUE 379-402 (2007); See also, J. Kousmanen, *Attitudes and Perceptions about Legislation Prohibiting the Purchase of Sexual Services in Sweden*, EUR. J. OF SOC. WORK 1-17 (2010).

[33]Coughlan, *supra* note 29.

the loss of independence, due to an increased role played by the government with fears of harassment at the hands of the various functionaries of the government.[34] Excessive (not to mention compulsory) health checks of the prostitutes follows as a close second.

IV. THE DECRIMINALIZATION OF SEX WORK: A STAND INCONSISTENT WITH THE ESTABLISHED HUMAN RIGHTS LAW

Apart from the age-old assertions that decriminalization of sex work would progressively lead to the eradication of the stigma intrinsically linked with this nature of services, it has also been brought forth instances of cases reported of rape along with instances of the transmission of STD's (namely Gonorrhoea) had diminished rapidly (by a third) with the introduction of decriminalization.[35] Decriminalization would also lead to a greater independence being bestowed upon to sex workers ranging from to whom they provide services and in which location, which would in turn lead to a decrease of offences being committed against them and hence would also lead to sex workers being more cooperative with the police and reducing opportunities of police corruption.[36] This deterrent effect which would be established with due to the greater cooperation between police and sex workers would not only increase the number of offences being reported against sex workers but would also offer them with greater protection, hence leading to the eradication of an adversarial system which exists between the sex workers and the police in regimes of criminalization.

An indirect benefit also arises with decriminalization is that the allocation of government resources (which were used to combat sex work) could be applied elsewhere which could result in other offences also dwindling.[37]

Amnesty International also seeks support from certain International Human Rights instruments to sustain the stand of decriminalization. Referring to Article 6 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), which enunciates that states have to adopt such measures so as to "suppress all forms of traffic in women and exploitation of prostitution of women"[38], however Amnesty International argues

[34]Lutnick, *supra* note 19.
[35]Lutnick, *supra* note 34, at 41; Decriminalization resulted in a decrease of reported cases of Rape by 31% and a decrease of female gonorrhoea cases by 39%, therefore establishing a causal link between decriminalization and rape offences and the incidence of STD's.
[36]ROSEMARY GARTNER & BILL MCCARTHY THE OXFORD HANDBOOK OF GENDER, SEX, AND CRIME, 644, (OUP 2014).
[37]Lutnick, *supra* note 19.
[38]CONVENTION THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1249 U.N.T.S. 13 (1981), Article 6.

that the aforementioned Article would not by itself prohibit prostitution. To support their own stand, Amnesty International has contorted the essence of Article 6, by averring that even though measures have to be adopted so as to eradicate the exploitation of prostitution of women would not by itself prohibit prostitution. However, to extend such an argument in itself would be grossly fallacious, especially in reference to the aforementioned reports which establish a causal relationship between criminalization and trafficking.

In the policy paper, emphasis has also been placed upon the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (or the *Palermo Protocol*), which criminalizes the trafficking of persons[39], though Amnesty International claims that sex work would not fall within the ambit of trafficking as defined within the Palermo Protocol. This flawed and unsound view stems from Amnesty International's reluctance to concede that criminalization and elements of trafficking, such as recruitment, harbouring etc. by employing means such as force, fraud or deception are intrinsically and fundamentally linked.

Lastly, Amnesty International places reliance upon two non-binding legal instruments namely the *Report of the UNAIDS Advisory Group on HIV and Sex Work* and the troublesome report prepared by the erstwhile Special Rapporteur Anand Grover titled as the *"Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"*.[40] In the latter of the instruments, a right-to-health approach was employed wherein it was reasoned that criminalization of certain conducts would drastically decrease an individual's self-worth, ultimately resulting in their of right-of health.[41] This conclusion was based upon the testimonies of a handful of interviewees, without any reference to any empirical data to support the claim, with reports suggesting the contrary (such as the ones abovementioned) not even mentioned. The former instrument prepared by the UNAIDS Advisory committee was also riddled with issues and was subsequently withdrawn in 2012, barely three months from when it was first conceptualized and was to be made available once certain revisions were incorporated.[42]

[39]PALERMO PROTOCOL, 2237 U.N.T.S. 319 (2000), Article 3(a).
[40]Grover, *supra* note 26.
[41]*Id* at 5.
[42]Neil McCulloch, *The Report of the UNAIDS Advisory Group on HIV and Sex Work*, NSWP, http://www.nswp.org/news/the-report-the-unaids-advisory-group-hiv-and-sex-work (accessed on Sept 12, 2016).

V. AN ANALYSIS OF INTERNATIONAL LEGAL INSTRUMENTS SEEKING TO ERADICATE PROSTITUTION AND HUMAN-TRAFFICKING

The premise which the predominant the International Law instruments[43] lay down is unequivocal: sex work undermines human dignity due to which sex work and all ancillary activities constitute as a violation of human rights. Hence, the exploitation pertaining to prostitution, along with the different and the contrasting forms of human-trafficking can only be eradicated by adopting abolitionist practices. Instruments such as the UDHR, the Palermo Protocol[44] and the 1949 UN Convention constitute as Customary International Law which are considered as *jus cogens*[45] due to which they are non-derogable.[46] By achieving the status of *jus cogens*,the non-derogability which so arises can be understood to signify that there is no justification for non-compliance except perhaps by reference to other *jus cogens* norms.[47] Due to the contrasting position adopted by prominent, well-established instruments such as the Palermo Protocol, which criminalize sex work (though not explicitly) and other instruments merely suggesting decriminalization, it can be conclude that the latter of the instruments are anomalies with respect to the former instruments. Lastly, unlike the instruments upon which Amnesty International's fallacious stand is based upon, these instruments are not only binding but also non-derogable.

a. THE 1949 UN CONVENTION R/W UDHR AND UN CHARTER

Before referring to provisions of the 1949 Convention it would be amiss if other ancillary provisions of the *UDHR* (Universal Declaration of Human Rights) and the Charter of the *U.N. (United Nations Charter)*. Firstly, though the UDHR does not create legally-binding obligations upon the member states, it constitutes as Customary International Law and hence "may by custom become recognized as laying down rules binding upon States".[48] Not only that but many of the articles of the *UDHR* (which themselves are adopted from legally-binding antecedents) are reiterated and reaffirmed in other legally binding instruments such as the *International Convention on the Elimination of Discrimination Against Women*, by

[43]The array of instruments as mentioned on Pg. 4 ¶3 of the manuscript.
[44]*Prosecutor* v. *Kunarac*, Judgment, IT-96-23-T, ¶ 537, 541-42 (ICTR Trial Chamber, February 22, 2001).
[45]Lindsey King, *International Law and Human Trafficking*, 8 TOPICAL RESEARCH DIGEST: HUMAN RIGHTS AND HUMAN TRAFFICKING 88, 90 (2008).
[46]M. CherifBassouni, *International Crimes: Jus Cogens and ObligatioErgaOmnes*, 59 L & CONTEMP. PROBS. 63, 69.
[47]John Tasioulas, *Custom,JusCogens, and Human Rights*, 81 AJIL 146 (1987).
[48]Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 N. W. J. OF INT'L HUM. RTS. 10 (2004).

virtue of which it creates a legally-binding effect.[49] Furthermore, the *1968 United Nations International Conference on Human Rights* advised that the Declaration "constitutes an obligation for the members of the international community" to all persons.[50] Secondly, as the UN Charter is the constituent treaty of the UNO, all members are bound by its articles[51], hence, this instrument too creates a legally-binding effect. Thirdly, both these instruments namely the *UDHR* and the *U.N Charter* contain explicit provisions requiring the protection of human dignity. The Preamble of the UDHR recognizes the "inherent dignity of humans" and reaffirms "the dignity and self-worth of a human person". Additionally, the *U.N. Charter*, within its Preamble reiterates the aforementioned principle and also seeks to protect the dignity and self-worth of humankind. Lastly, the UDHR lays down several other provisions pertaining to servitude and human dignity such as : Article 1 , ("All human beings are born free and equal in dignity and rights"), Article 4 ("No one shall be held in slavery or servitude"), and Article 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

Switching attention to the *1949 U.N. Convention*, which in itself is also a legally-binding document[52], states at the very outset that prostitution (the term "sex work" finds no mention in this document) is incompatible with the human dignity and the worth of a human person and so endangers the welfare of such individual, the family and the community.[53] This document highlighted the need to switch from a "regulationist" regime to an "abolitionist" system so as to eradicate prostitution, which was regarded as not only a vice but an evil.[54] Article 1 of the Convention sought to penalize the procurement of prostitution and exploitation of prostitution from another person. Article 2 punished the different forms of brothel-keeping while Article 6 sought the abolition of any law implemented by the state parties to regulate prostitution or any law which required any special identification to be in the possession of the prostitutes. Article 16 is the essence of the instrument and the most pertinent of the Articles, wherein the member states were required to prevent prostitution through multifarious services ranging from health, education and social services and to also

[49]*Id* at 14.
[50]O.P DHIMAN, UNDERSTANDING HUMAN RIGHTS AN OVERVIEW111 (Kalpaz Publications 2011).
[51]BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS168 (3rd ed. OUP).
[52]*Addressing Trafficking in Persons since 1949*, UNODC, http://www.unodc.org/unodc/en/human-trafficking/2010/addressing-trafficking-in-persons-since-1949.html (accessed on Sept. 18, 2016).
[53]1949 United Nations Convention on the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271 (1991), Preamble.
[54]Laura Reanda, *Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action*, 13 HUM. RTS. Q. 202, 209 (1991).

provide for the rehabilitation and the social adjustment of the victims of prostitution. To conclude, not only is a prohibition laid upon ancillary services pertaining to sex work, such as procuring, running of brothels to facilitate sex work and pimping but also the exploitation of individuals for prostitution would also be rendered to be illegal under this Convention.

Therefore, when the *UDHR*, the *1949 U.N. Convention* and the *U.N. Charter* are read harmoniously the premise which is established is that prostitution and human dignity (along with self-worth) cannot co-exist as they are distinctly incompatible, due to which prostitution by its very nature constitutes as a flagrant violation of established human-rights. Echoing the essence of the 1949 Convention, the States have an obligation, and a binding one at that to eradicate/eliminate prostitution[55] conspicuously contrary to what Amnesty International is advocating for. UNESCO has also categorically and unequivocally detailed that prostitution is a direct violation of the *1949 U.N. Convention*, and constitutes a violation of Article 1, Article 4 and Article 5.[56] Another element of the 1949 U.N. Convention which also does not receive appropriate attention is it also imposes an obligation upon state members to rehabilitate those victims involved in prostitution and for their social adjustment along with obliging employment agencies of such member states to prevent persons (who are susceptible and vulnerable) seeking employment from being exposed to prostitution.[57] To conclude, the 1949 U.N. Convention addresses the concerns (at the time) of jurists worldwide by labelling prostitution as a "state of servitude" and by also recognizing that such servitude is often established by means of coercion, threats, physical and mental abuse, application of force, etc. and that it is seldom that individuals enter and continue to provide services in the sex industry by their own volition and accord, without the influence of any external factor.

b. The U.N. Convention on the Elimination of Discrimination Against Women (CEDAW)

Originally a declaration by the name of the *Declaration on the Elimination of Discrimination against Women* was drafted by the Commission on the Status of Women ("CSW") and was subsequently adopted by the U.N. General Assembly on 7th November 1967. However, it was found that the object which it sought to implement i.e. the equal rights of men and women

[55]1949 United Nations Convention on the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271 (1991), Article 16.
[56]Reanda, *supra* note 57, at 205.
[57]1949 United Nations Convention on the Suppression of the Trafficking in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271 (1991), Article 20.

was becoming increasingly difficulty due to its non-binding nature, leading it to ultimately become obsolete in 1981. To remedy this, it was observed that it was the need-of-the-hour to prepare a single binding document, which would give a binding effect to the provisions laid down in the original Declaration.[58] CEDAW was conceived of and conceptualized at the 25th session of the CSW and was subsequently prepared by working groups part of the CSW and was finally adopted by the U.N. General Assembly in 1979, as a legally-binding instrument.[59]

One of the driving forces behind the Declaration as well as the Convention was that drafters recognized that importance of eradicating prostitution as they viewed it as a stumbling-block and obstacle to equality between men and women.[60] This Convention not only lends support to the 1949 Convention but also reinforces the central principle established which is that the exploitation of individuals for prostitution is incompatible with recognized human rights. Objectifying an individual, selling them as a commodity, performance of services by them without their consent and volition not only constitutes as an annihilation of their dignity but also of their human rights. Most women are forced/coerced into sex work by way of exploitation, poverty, a paucity of education and a lack of employment opportunities, which is why it cannot be said that these individuals give provide their consent by their own volition.[61] Due to this the law established by binding treaties is uniform, holding sexual exploitation to be indivisible and intrinsic not only within sex work but also in human trafficking, with *CEDAW* also following suit.[62]

CEDAW addresses various aspects pertaining to the advancement and equality of women, varying with provisions relating to the discrimination of women, guaranteeing basic and fundamental rights and freedoms, health and education of women and prostitution of women. Article 6 is the only provision within *CEDAW* directly addressing prostitution. This Article links human trafficking along with prostitution and the rationale behind it is that trafficking and sex work are so intrinsically related, and conjointly are incompatible with the equal enjoyment of rights by women and puts women at a special risk of violence and abuse.[63]

[58]*Short History of CEDAW Convention*, U.N., http://www.un.org/womenwatch/daw/cedaw/history.htm (accessed on Sept. 18, 2016).
[59]Innocenti Research Centre, *Domestic Violence against Women and Girls*, Innocenti Digest No. 6 (2000) at 9.
[60]Reanda, *supra* note 57, at 217.
[61]*WILLIAM D. ANGEL*, THE INTERNATIONAL LAW OF YOUTH RIGHTS*897 (MartinusNijhoff 1995).*
[62]OVERS, *supra* note 21.
[63]Annette Lansink ,*Human Rights Focus on Trafficked Women: An International Law and Feminist Perspective*, 1 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 45-56, 48 (2006).

Article 6 prohibits sex work and requires all member states to suppress the trafficking in women and exploitation of the prostitution of women, essentially reiterating what was established by the *1949 U.N. Convention*.

Due to the high number of party states of the Convention, it could be said that is has a far greater reach and applicability than other treaties. The Convention received 189 member states by way of ratifications and accessions[64] as opposed to a mere 82 state parties to the *1949 U.N. Convention*.[65] However, one predominant issue which arises is the vagueness of the Article. Only a single provision was developed to counter human trafficking and prostitution which in itself is riddled with ambiguities. The provision fails to mention the nature of measures which the member states have to adopt so as to counter prostitution and human trafficking and only alludes to legislative measures. Another ambiguity which arises is that it does not indicate the kinds of practices which are prohibited and rather lethargically prohibits the broad categories of prostitution and human trafficking.[66]

The U.N. Committee on the Elimination of All forms of Discrimination against Women, released General Recommendation No. 19 in 1992[67] to supplement the original draft of *CEDAW*. Therein, expanding the scope of Article 1 which lays down the definition of discrimination against a woman, to include sexual harm or suffering, threats of such acts and coercion.[68] The aforementioned forms of discrimination can be found to be implicit in sex work, where hapless women are preyed upon not only by their pimps but also those who receive their services. Focusing on Article 6, the Committee laid down elaborate guidelines to remedy the deficiencies of the original instrument. The Committee noted that sex work was assuming new forms by the day, one conspicuous example being the advent of sex tourism and organized marriages by way of "mail-order brides". The Committee reiterated that such forms are incompatible with the human rights and dignity of women and further put them at a risk of abuse and violence. It was also brought to attention that poverty and unemployment often drive women to engage in prostitution due to which the Governments are burdened with

[64]Convention on the Elimination of All Forms of Discrimination against Women, UNITED NATIONS TREATY SERIES, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (accessed on Sept. 26, 2016).
[65]*Ibid.*
[66]Reanda, *supra* note 57, at 219.
[67]*General recommendations made by the Committee on the Elimination of Discrimination against Women*, U.N. WOMEN, http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm (accessed on Sept. 25, 2016).
[68]General Recommendation No. 19 (11th session, 1992), Violence against women, General Comments ¶6.

a greater obligation to provide additional provisions to protect women, to ensure that they are not left to fend for themselves. Lastly, the Committee documented that times of war, domestic unrest and armed conflicts resulted in increased prostitution along with trafficking of women and sexual assault being carried out on women, which would require specific protective and punitive measures.

Lastly, Amnesty International has blatantly and erroneously sought support from Article 6 of *CEDAW*, by asserting that though the states are obliged to protect individuals from the exploitation of prostitution, prostitution and sex work by themselves are not prohibited.[69] However, Amnesty International has overlooked and disregarded the central theme prevalent in *CEDAW*, especially Article 6, which is that since prostitution is completely irreconcilable with human dignity and human worth and which also constitutes as a form of violence against women, can only be countered through criminalization, which *CEDAW* also calls for. Though, *CEDAW* does not criminalize sex work directly, as it calls for suppression of the same, particularly by way of legislations, the effect of criminalization would be established though imputation.

c. PALERMO PROTOCOL OR THE UN TIP AGREEMENT OR THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

The *Palermo Protocol* was entered into force on the 25th of December, 2003 and was by 170 member-states.[70] Not only does the Palermo protocol constitute as a binding instrument[71] but also holds the honour of being the first legal instrument expounding the world's standard trafficking definition.[72] The Protocol requires the member states to adopt such legislative measures (along with others) so as to eradicate the demand which culminates in the exploitation of women.[73] From the text of the Palermo Protocol, it can be clearly established that the drafters felt that exploitation of women for sex work formed an ineradicable part of human trafficking, resulting in the need of addressing both evils simultaneously. A binding

[69]Summary of the proposed policy on sex work by AMNESTY INTERNATIONAL, pg. 3.
[70]UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO, UNODC, https://www.unodc.org/unodc/treaties/CTOC/ (accessed on Sept. 26, 2016).
[71]*Palermo* Protocol, EUROPEAN COMMISSION, https://ec.europa.eu/anti-trafficking/legislation-and-case-law-international-legislation-united-nations/united-nations-protocol-prevent_en (accessed on Sept. 28, 2016).
[72]Kaethe Morris, *A Response To Sex Trafficking Chicago Style: Follow The Sisters, Speak Out*, 158 HOFFER U. OF PA. L. REV. 1834 (2010).

instrument which definitively laid down the definition of "human trafficking" and which addressed the causes behind it was need of the hour, and this role was fulfilled by the *Palermo Protocol*.

Trafficking of individuals especially women and children takes place due to an array of motives. Predominant amongst them are of, sexual exploitation, labour purposes, illegal body organ trafficking and illegal adoptions.[74] The *Palermo Protocol*, by virtue of Article 3(a) prohibits and defines human trafficking as the "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." It is further elaborated that the term "exploitation" shall also contain within in its purview exploitation of prostitution of others along with other forms of sexual exploitation. The protocol therefore, proscribes all conduct prevalently carried out by third-parties in prostitution. The cumulative effect is such that it empowers those who are vulnerable as if any individual consents to any conduct which is proscribed by the *Palermo Protocol*, the consent of such an individual becomes irrelevant.[75]

Another benevolent provision empowering trafficking prostitutes or sex workers which warrants mentioning is Article 6 of the Protocol which mandates that the member-states must employ such measures providing not only for the physical, psychological and social recovery of victims but to also provide them with housing facilities, medical services, employment and education opportunities and lastly to inculcate such provisions within their municipal laws which enables the victims to receive compensation for the physical harm and the mental and psychological trauma suffered.

Amnesty International, once again has erroneously placed reliance upon the definition of human trafficking enshrined within the Protocol by maintaining that sex work which does not contain the elements of human trafficking (such as the receipt or harbouring of persons by employing means such as force or coercion for their sexual exploitation) would not fall

[74]Carol S. Brusca, *Palermo Protocol: The First Ten Years after Adoption*, 2 GLOBAL SECURITY STUD. 8, 10 (2011).
[75]Rhacel Salazar Parreñas, Maria Cecilia Hwang & Heather Ruth Lee, *What Is Human Trafficking? A Review Essay*, 37 SEX: A THEMATIC ISSUE 1015 (2012).

within the definition of human trafficking and hence would not be criminalized.[76] Not only is this view naïve but adopts a very rudimentary interpretation of the definition. Prostitutes engaging in sex work through their own volition without the influence of any outside factors such as coercion is virtually unheard of (apart from European countries, where the figures are substantially higher than Asian and African countries). Due to this basic fallacy present in Amnesty International's viewpoint, it has resorted to distorting the plight suffered by sex workers to enable them to be excluded from the definition of "human trafficking".

d. THE VIENNA DECLARATION AND PROGRAMME OF ACTION (VDPA)

Though the *VDPA*[77] was fashioned as a non-binding legal instrument, however as it reiterates the principles established by the UDHR and U.N. Charter, due to which it can attain a binding status due to it constituting as a part of Customary International Law. Even non-binding agreements, such as the aforementioned one, can be authoritative and controlling for the parties.[78] A non-binding document may reflect one or more legal norms that are recognized in customary law, some authoritative legal instrument or both[79] and the *VDPA* does contain such recognized legal norms. To conclude, the *VDPA*, reflects or restates customary norms of International Law and hence the same forms a part of CIL and therefore is becomes unimportant whether the given provision is itself binding.[80]

The VDPA further supplements the law established through *CEDAW* and the *1949 Convention* by stating that exploitation of individuals along with sexual harassment resulting through human trafficking, is incompatible with human dignity. To counter the aforementioned evils, the Declaration urges States to implement and adopt legal measures coupled with the prioritization of the development and expansion of educational facilities, social support and health care. The *VDPA* categorically and unequivocally pronounces that the "human rights of women and children (especially the girl-child) are inalienable, integral and indivisible part of universal human rights."[81]

[76]*Supra* note 72.
[77]VIENNA DECLARATION AND PROGRAMME OF ACTION, U.N. Doc. A/CONF. 157/23 (1993).
[78]Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296 (1977).
[79]Myres S. Mcdougal,*Human Rights and World Public Order*, 14 THE VA. J. OF INT'L L. 387 (1974).
[80]Anthony D'Amato, *The Concept of Custom in International Law*, 63 AM. J. INT'L L. 153, 153-54 (1971).
[81]ANDREW CLAPHAM, STUART CASEY-MASLEN, GILLES GIACCA, & SARAH PARKER, THE ARMS TRADE TREATY: A COMMENTARY89 (OUP 2016).

Even though the existence of its non-binding character is well-known, countries such as the United States have called upon other States to honour their obligations laid within the *VDPA*, thereby reaffirming the rights of women and children as an integral part of human rights.[82]

VI. CONCLUSION: THE GROWING (IR)RELEVANCE OF THE CONSENT OF SEX-WORKERS

Time and time again, the drafters of various International Instruments intended to pursue the development and protection of the rights and dignity of women, have unequivocally established that exploitation of women and children for prostitution is utterly incompatible not only with the established International Law but also with human dignity and human rights. It has been reaffirmed by a vast multitude of instruments that women's rights forms an essential and indispensable part of human rights and has recognized a dire need to protect the same. By holding prostitution is a violation of human rights, these instruments strive to protect a broader category of women who endure countless and innumerable misery (be it physical or psychologically) as against the minuscule amount of women who provide such services by their own free will without the influence of any external factors.

Amnesty International's stand is rife with fallacies as the basic premise upon which it is based upon is itself flawed. It has to be understood that a vast majority sex workers indulge in providing such services only upon the basis of some form of violence, coercion, threat or use of force and abuse. Due to this, they get caught in a vicious cycle with a marked absence of any viable exit option. Amnesty International has adopted a myopic and juvenile view by calling upon decriminalization of all aspects of consensual sex-work between adults. This stand is short-sighted as it lays down only two pre-requisites which must be satisfied i.e. sex between adults and consent of both parties involved. It does not look beyond as to what lead to such consent to be provided, prominent examples being of abject destitution, social conditions, application of force, sex-workers being the object of a pimp's violence etc. Therefore, merely considering the presence of consent without appreciating the factors involved due to which such consent was provided can only be interpreted as Amnesty International taking the easy way out, without truly addressing and working towards women empowerment and enhancement of women's rights.

[82] *U.S. Urges States to Honour Their Obligations under the Vienna Declaration on Human,* U.S. MISSION TO SWITZERLAND, Rightshttps://geneva.usmission.gov/2011/09/27/vdpa-item18/ (accessed on Sept. 28, 2016).

Lastly, the aforementioned International Instruments[83] pave the way for the establishment of an abolitionist regime worldwide as the not only endeavour to eradicate the exploitation of women for prostitution but also lay down that prostitution in itself constitutes as a flagrant violation of women's rights. These instruments have also adopted a "striking at the roots" method of countering the scourge of human trafficking. These instruments (along with the reports aforementioned[84]) recognize the indivisibility and the existence of an intrinsic link between prostitution and human trafficking and seek to end both forms of human-rights violation by criminalizing sex-work. An implementation of the Nordic Model would be the most effective method of countering most of the intervening evils prevalent with sex work such as violence against sex-workers, trafficking, abuse etc.[85] The Nordic Model criminalizes the buying or procurement of prostitution but does not criminalize the sale of sex,[86] with numerous reports indicating that such a model is the most efficacious in curbing trafficking and violence against women, providing them with greater autonomy and independence.[87]

To conclude, it has to be understood that a sex-worker's consent is often driven by factors independent of her control, and by decriminalizing all aspects based merely upon "consensual" sex-work would in itself not contribute in any manner to negative the recurrent atrocities that sex-workers face. The causal link established between sex work and human trafficking also evinces the growing need to criminalize certain aspects of sex work i.e. the buying of sex, following suit of the premise laid down by the instrument aforementioned. A common premise is established by these instruments that prostitution constitutes as a form of violence against women and is wholly incompatible with the existing human rights. To cover these violations up by stating that once consent is provided (without acknowledging the factors due to which such consent is provided) further puts sex workers at risk leaving them susceptible, highlighting the growing irrelevance of consent in sex work and revealing the erroneous view espoused by Amnesty International.

[83] *Supra* note 46.
[84] EKBERG, *supra* note 32.
[85] MAY-LEN SKILBREI AND CHARLOTTAHOLMSTROM, PROSTITUTION POLICY IN THE NORDIC REGION157 (Routledge 2013).
[86] *Supra* note 31.
[87] GARTNER, *supra* note 39.

ENFORCEMENT OF INDIVIDUAL CRIMINAL RESPONSIBILITY ON INDIVIDUAL MEMBERS OF ARMED NON-STATE ACTORS UNDER INTERNATIONAL CRIMINAL LAW

Mohd. Saad *Khan*[*]

I. INTRODUCTION

International Criminal Law (ICL) is a branch of public international law. It criminalizes the violations of international norms, including International Humanitarian Law (IHL) and International Human Rights Law (IHRL) by imposing criminal responsibility on individual human beings whether part of state actors or Armed Non-State Actors (ANSAs). According to the International Criminal Law Manual; "[i]nternational criminal law is a body of international rules prescribing international crimes and regulating principles and procedures governing the investigation, prosecution and punishment of these crimes. International criminal law imposes on perpetrators direct individual criminal responsibility for international crimes."[1] However, the origin of ICL is based on various sources[2] in addition to public international law.[3] The aim of this article is to examine the development of ICL in

[*] Student, B.A LL.B (Hons.), Faculty of Law, Jamia Millia Islamia, New Delhi, India.

[1] MIŠA ZGONEC-ROŽEJ, INTERNATIONAL CRIMINAL LAW MANUAL 24((Int'l Bar Association's Human Rights Inst. ((IBAHRI) 2010) [hereafter M. ZGONEC-ROŽEJ (2010)].

[2]As pointed out by M.Cherif Bassiouni:

International Criminal Law (ICL) is a complex legal discipline that consists of several components bound by their functional relationship in the pursuit of its value-oriented goals. These goals include the prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal justice. Each of these components derives from one or more legal disciplines and their respective branches, including international law, national criminal law, comparative criminal law and procedures, and international and regional human rights law. These legal disciplines are distinguished on the basis, inter alia, of their subjects, contents, scope, values, goals, and methods. Thus, they cannot be easily reconciled. Nevertheless, the different components that make up ICL constitute a functional whole, even though lacking in the doctrinal cohesiveness and methodological coherence found in other legal disciplines whose relative homogeneity gives them a more defined systemic nature. Thus, there is something that can be called the system of ICL, which derives from the functional relationship that exists between the different components of this discipline and the value-oriented goals it seeks to achieve. This is evident in the scholarly writings on ICL,

in M.CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW: SECOND REVISED EDITION 1 (Martinus Nijhoff 2013) (footnote omitted) [hereafter M. CHERIF BASSIOUNI (2013)].

[3]According to Article 38 of the Statute of International Court of Justice(ICJ), the public international law's sources are:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

criminalizing the serious violations of IHL and the cross violation of IHRL by ANSAs in Non-International Armed Conflicts (NIACs)[4] and to study the practice of international and ad hoc judicial bodies in enforcing individual criminal liability on individual members of ANSAs for the commission of International Crimes.[5] In order to achieve it, this article is divided into three parts. The part one of this article studies the development of individual criminal responsibility of the individual members of ANSAs. The part two identifies the international crimes, while the final part of this article briefly examines the practice of international and ad hoc judicial bodies in prosecuting individual members of ANSAs for their involvement in committing international crimes.

II. DEVELOPMENT OF INDIVIDUAL CRIMINAL RESPONSIBILITY OF INDIVIDUAL MEMBERS OF ARMED NON-STATE ACTORS

Like IHRL, ICL is also a recent trend in international law and was first internationalized following the establishment of the Nuremberg and Tokyo tribunals after World War II. As a reaction to the atrocities committed by the Axis powers, the Allied powers established these international military tribunals to prosecute major Axis war criminals for the violations of IHL and custom in the World War II.[6] These tribunals applied existing international norms such as the Geneva Conventions relating to the protection of victims of armed conflict of 1929 and the Hague Convention Respecting the Laws and Customs of War on Land to prosecute war criminals. However, these documents do not contain any criminal liability.[7]

While the above-mentioned tribunals imposed individual criminal responsibility on offenders (states) of the World War II, Article 9 of the Charter of the Nuremberg tribunal addresses individual criminal responsibility of any group by providing, "[a]t the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."[8] The inclusion of this provision in the Charter is

[4]A NIAC means armed conflict between the armed forces of the government and organised ANSAs or between such groups within the territory of a State.

[5]*See* below for the definition of international crimes.

[6]*See* M.CHERIF BASSIOUNI (2013), *supra* note 2, at.50. *See* also ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 111-5 (2nd ed. Cambridge Univ. Press 2010).

[7]KRIANGSAK KITTICHAISAREE, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 18-9 (2nd ed. Oxford Univ. Press 2001). *See* also William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L.J.917(2002) [hereinafter W.A. Schabas, 2002].

[8]Charter of the International Military Tribunal, Nuremberg Trial Proceedings, Vol.1, art.9 (Nov. 9,2012) http://avalon.law.yale.edu/imt/imtconst.asp.

very important in the sense that, it shows the possibility of prosecuting individual members of any group. Article 9 was:

> *'First, it aimed to outlaw certain organizations the purpose of which was military government or occupation. A second aim was to punish membership of criminal organizations, in particular the SS (SchutzStaffen) Officers. Third, it intended to control the assets of such criminal organizations, partly with the purpose of making reparations or of paying damages for violations of international law'*.[9]

It is necessary to stress that, although the tribunal acknowledged a number of Nazi organizations as criminal in nature, these organizations were state associated organizations. This was the first attempt of international law to impose individual criminal responsibility on members of criminal groups[10] but received condemnation as being 'victor's justice' because they were created by the Allied powers.[11] It should be noted that there was no international criminal responsibility for the violations of IHL in NIACs during that period.[12] These tribunals are touted to have contributed to the development of criminal justice and the concept of universal jurisdiction in international law.

Further, the Nuremberg and Tokyo tribunals influenced the codification of the Genocide Convention of 1948[13] and the four Geneva Conventions of 1949.[14] Article 4 of the Genocide Convention provides, "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or *private individuals*."[15] However, this Convention does not stipulate the crime of genocide of ANSAs in NIACs. Subsequent codification of IHL such as the four Geneva

[9]JORDAN J. PAUST, ET AL., INTERNATIONAL CRIMINAL LAW – CASES AND MATERIALS 73-4 (Carolina Academic Press 1996).
[10]LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 56(Cambridge Univ. Press 2002) [hereinafter L ZEGVELD (2002)].
[11]M. ZGONEC-ROŽEJ (2010), *supra* note 1, at 50.
[12]W.A. Schabas (2002), *supra* note 7, at 917.
[13]Prevention and Punishment of the Crime of Genocide, Sep.12, 1948, 78 U.N.T.S [hereinafter Genocide Convention].
[14]Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug.12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T.3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug.12, 1949, 6 U.S.T.3316, 75 U.N.T.S. 135 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug.12, 1949, 6 U.S.T.3516, 75 U.N.T.S. 287 [hereinafter Four GCs].
[15]Genocide Convention of 1948, *supra* note 13, art. IV (emphasize added).

Conventions of 1949 and their Additional Protocols (APs)[16] also criminalized only violations of these Conventions by incorporating "grave breaches" provisions in International Armed Conflicts (IACs).[17] The state-centric perception excluded "grave breaches" provisions either in Common Article 3 or APII to impose individual criminal responsibility in NIACs.[18] Thus, individual members of ANSAs can escape from the individual criminal responsibility as "grave breaches" provisions were not included in the law of NIAC.

That said, many atrocities in internal armed conflicts were not punished either in the national or international courts due to the imprecise nature of ICL with respect to the violations of IHL by ANSAs. To some extent, individual members of these groups were not prosecuted in the situation of regime change, form a new government or granted amnesty by their parent government through peace agreements or deals.[19] In addition, traditionally ANSAs were excluded in being held accountable for violations of IHRL and IHL. As such, even gross violations of human rights by ANSAs were merely defined as 'domestic crime' and dealt as such by the national courts of individual states. Gradually, the development of international law has come to include members of ANSAs in ICL enforcement mechanisms.

ANSAs inclusion was necessitated by the numerous crimes such as genocide, crimes against humanity, war crimes and torture that were committed in NIACs after the Cold War era. As these atrocities threatened world peace and security, the international community saw the dire need to impose ICL obligation on individual members of ANSAs in NIACs too.[20] The international community has focused great attention on creating several ad hoc international institutions to address these atrocities committed following the Post-Cold War periods. For instance, the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court (ICC) and a number of other mixed or internationalized criminal courts and tribunals.[21] Both universal values and

[16]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125, U.N.T.S. 3 and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977, 1125, U.N.T.S. 609 [hereinafter APII).

[17]*See* Four GCs, supra note 14, GC I, art.50; GC II, art. 51; GC III, art. 130; GC IV, art.147 and API, *supra* note 16, art.85.

[18]*See* Four GCs, *supra* note 14, Common art. 3 and APII, *supra* note 16. *See* also W.A. Schabas (2002), *supra* note 7, at 917-8.

[19]*See* W.A. Schabas (2002), *supra* note 7, at 918.

[20]*See*, *id* W.A. Schabas, at.918.

[21]*See* M.CHERIF BASSIOUNI, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights,* in POST- CONFLICT JUSTICE 383 (M.CHERIF BASSIOUNI, eds., Int'l Inst. of Higher

the importance of international criminal accountability, together with the desire for world order and restoring the peace have all been motivations in the creation of these international mechanisms.[22]

The ICTY and ICTR were established through the United Nations Security Council (UNSC) resolutions adopted under Chapter VII of the Charter of the UN in order to investigate the crime of genocide and atrocities committed in the former Yugoslavia and Rwanda. Pursuant to Paragraph 2 of the UNSC resolution 827, the ICTY was established to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991."[23] The ICTR established through the UNSC resolution 955 to prosecute:

> '*[P]ersons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto*.'[24]

Both Statutes criminalize the violations of IHL and IHRL in NIACs. Article 4 of the ICTR Statute criminalizes serious violations of Common Article 3 and APII,[25] while Article 5 of the ICTY recognizes the need to prosecute individuals for crimes against humanity.[26] Therefore, these two international ad hoc tribunals institutionalized the violations of relevant IHL norms of NIACs to prosecute individuals whether they belong to states actors or ANSAs. The establishment of these tribunals contributed in the development of ICL and is an important innovation in international law. [27]

Studies in Int'l Criminal Sci.2002) [hereinafter M. C. Bassiouni (2002)]. A number of mixed tribunals have been established to prosecute individuals for the violations of IHL and custom in NIACs. It is necessary to keep in mind that these tribunals have their unique characteristics.

[22]*Id*, M. C. Bassiouni (2002), at 383.

[23]S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25,1993).

[24]S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955(Nov.8, 1994).

[25]*See* Statute of the International Criminal Tribunal for Rwanda, *adopted by*, S.C. Res.955, art.4, U.N.Doc. S/RES/955, annex (Nov.8, 1994) [hereinafter ICTR Statute].

[26]Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art.5, U.N. Doc. S/25704, annex (1993), *adopted by* S.C.Res.827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

[27]"[T]he Security Council explicitly extended international legal obligations and criminal responsibilities directly to individuals for violations of international humanitarian law. In doing so, the Security Council provided an important innovation of international law . . ." in Virginia Morris, *Prosecutor V. Kanyabashi, Decision on Jurisdiction, Case No.ICTR-96-15-T, 92* AM. J. INT'L L. 69 (1998).

Another milestone in the development of ICL is the creation of a permanent court of the ICC in 1998[28] with the assistance of the ICTY and ICTR. The United Nations General Assembly (UNGA) in its Fifty-Second Session decided to hold the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC. Following the conference in Rome, Italy, on 17 July 1988, 120 States adopted the Rome Statute and it came into operation in July 2002.[29]The ICC criminalizes the serious violations of Common Article 3 to the Four Geneva Conventions of 12 August 1949, other serious violations of law and customs applicable to NIACs. Thus, member states and ANSAs are subjected to individual criminal prosecution for the commission of crimes outlined in Article 8 (c) (e) of the ICC Statute for the different modes of participation under Article 25 (3) and Article 28 of Statute.

The jurisprudence of these tribunals developed the individual criminal responsibility of individual members of ANSAs in NIACs. As pointed out by Theodor Meron, "these developments warrant a fresh examination of the present state and future direction of the criminal aspects of international humanitarian law applicable to non international armed conflicts."[30] Therefore, "international criminal tribunals are concerned with individuals rather than group accountability."[31]

After the 1990s, there was a development of a number of IHL conventions such as individual criminal liability of war crimes for serious violations of those conventions. These Conventions include Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects(and Protocols) of 1996,[32] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 1999[33] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-

[28]M.ZGONEC-ROŽEJ (2010), *supra* note 1, at 61.
[29]Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90[hereinafter Rome Statute] *See* also ICC, Establishment of the Court (Nov.13,2012) http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Establishment+of+the+Court.htm.
[30]Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L.554 (1995).
[31]L. ZEGVELD (2002), *supra* note 10, at 19-20.
[32]Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), art.14, Oct.10, 1980, 1342 U.N.T.S. 137.
[33]Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, arts.15 & 16, Mar.26,1999, 2253 U.N.T.S.172.

Personnel Mines and on their Destruction of 1997[34] and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000.[35] For this reason, individual liability of the parties is now obviously recognized in the Conventions of the law of NIACs. The practice of the international bodies also recognizes the individual liability of the member of the parties to the NIAC for war crimes.[36]

III. INTERNATIONAL CRIMES

Although it is not the purpose of this article to define each international crime, it will briefly identify some international crimes and narrow down their specific importance to the study of this article. First and foremost, it is necessary to understand the concept of international crimes as asserted by Terje Einarsen:

> "'Universal crimes' are certain identifiable acts that constitute grave breaches of rules of conduct usually committed, organised, or tolerated by powerful actors; and that, according to contemporary international law, are punishable whenever and wherever they are committed; and that require prosecution and punishment through fair trials, or in special cases, some other kind of justice, somewhere at some point."[37]

The powerful actors comprises of governments and ANSAs as they have the capacity to commit these crimes[38] in times of war and peace.[39] States have a primary responsibility to prevent the commission of international crimes. As specified by William Schabas:

> "Definition of an act as an "international crime," as opposed to simply an "ordinary" crime against the person, has a number of consequences, whose objective is to facilitate prevention and punishment of the act. In the case of international crimes, there may be a duty upon States to ensure prosecution of offences committed elsewhere, should they obtain custody of a suspected offender. States guarantee that these crimes are adjudicated either by trying the accused person themselves, or by extraditing him or her

[34]Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art.9, Sep. 18, 1997, 2056. U.N.T.S.211.
[35]Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art.4, May 25, 2000, 2173. U.N.T.S. 222.
[36]On several occasions, UN bodies such as the UNSC, UNGA and Human Rights Council called, urged and strongly condemned the serious violations of the law of NIACs and human rights in NIACs. For instance, *see* Nadarajah Pushparajah, *Emerging Trend in Applying International Human Rights Law to Armed Non-State Actors Beyond the State-Centric System*, 1 INT'L J. OF L. & LEGAL JURISPRUDENCE STUD (2014).
[37]TERJE EINARSEN, THE CONCEPT OF UNIVERSAL CRIMES IN INTERNATIONAL LAW 135 (Torkel Opsahl Academic EPublishers 2012) [hereinafter T.EINARSEN (2012)].
[38]*Id*, at 68.
[39]W.A. Schabas (2002), *supra* note 7, at 920.

> to another State that is prepared to do so. This is often known by the Latin expression *aut dedere autjudicare* (literally, "extradite or prosecute"). The principle is designed to ensure that perpetrators of particularly serious crimes are brought to justice".[40]

IHL and IHRL treaties impose obligations on states to prosecute or extradite offenders of international crimes.[41] As affirmed in the preamble of the ICC Statute "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[42] Thus, states should take the necessary steps to criminalize violations of international crimes at the domestic level. This is "the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes."[43] International crimes are considered customary international law and therefore binding on all parties as held by Cherif Bassiouni:

> '*International crimes that rise to the level of jus cogens constitute obligations erga omnes which are non-derogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including heads of state, the non-applicability of the defense of "obedience to superior orders" (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under "states of emergency," and universal jurisdiction over the perpetrators of such crimes.*'[44]

However, there is no common list of international crimes as each international court and tribunal has different lists in accordance with their mandate. Further, existing international tribunals and courts are not universal in nature as they have limited jurisdiction.[45] Scholars have identified various international crimes which are considered as threats to international peace and security. Chrif Bassiouni categorizes *jus cogens* international crimes based on existing legal literatures. These include aggression, genocide, crimes against humanity, war

[40]*Id*, at 912-3.
[41]As mentioned above, a number of IHL treaties relevant to the international armed conflict address about the obligations of states with respect to international crimes. IHRL treaties also impose the same obligations on states. For instance, *see* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.5(2), Dec.10, 1984, 1465. U.N.T.S.85.
[42]Rome Statute, *supra* note 27, Preamble, ¶ 4.
[43]*Id*, Preamble, ¶ 6.
[44]M.C. Bassiouni (2002), *supra* note 21, at 390.
[45]*See* M. ZGONEC-ROŽEJ (2010), *supra* note 1, p. 26.

crimes, piracy, slavery and slave-related practice.[46] Pursuant to Antonio Cassese, war crimes, crimes against humanity, genocide, torture, aggression and international terrorism are international crimes.[47] Cassese does not however consider piracy, illicit trafficking such as narcotic drugs, unlawful arms trade, smuggling of nuclear and other potentially deadly materials, money laundering and apartheid as international crimes.[48]

In some other cases, international crimes are listed in a broader sense. They include piracy, torture, terrorism, slavery, international trafficking with illicit drugs, certain offences committed on board of the aircraft and certain unlawful acts against air traffic security, trading of women and children, excessive fishing, pollution of the seas, offences against submarine cables and pipelines, offences against a person protected by international law, serious apartheid offences, international hostage taking, international postal offences, circulation and trafficking in obscene materials and falsification and counterfeiting.[49]

The ICC Statute incorporated only four categories of international crimes: crimes of genocide, crimes against humanity, war crimes and the crime of aggression[50] which are considered a threat to the peace, security and well-being of the international community.[51] The practices of the ICTY, ICTR, ICC as well as scholarly writings have all asserted that these lists of international crimes are 'core' in ICL. Indeed, these lists of crimes fall under the narrower definition of international crimes. This article relies on war crimes, crimes against humanity and genocide only. It can be said that the development of international crimes and its inclusion in the statutes of international courts and tribunals were impacted by factual situations of conflicts, atrocities and expectations of the international community.

According to William Schabas:

> '*It is now beyond any doubt that war crimes and crimes against humanity are punishable as crimes of international law when committed in non-international armed conflict. Non-State actors, who may be members of guerrilla movements, armed bands, and even provisional governments, are subject to prosecution on this basis. Where, for whatever reason, trials are not possible or desirable before the courts of the territory where the crimes have taken place, justice systems of other States may assume their*

[46]M.C. Basiouni (2002), *supra* note 21, at 393 (footnote omitted).
[47]ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 24(Oxford Univ. Press 2003).
[48]*See id*, at 24-25.
[49]M. ZGONEC-ROŽEJ (2010), *supra* note 1, at 28 (footnote omitted). (Oxford Univ. Press 2003).
[50]Rome Statute, *supra* note 27, art.5.
[51]*Id*, preamble, ¶ 3.

> *responsibilities and prosecute on the basis of universal jurisdiction. Amnesty or some other measure of impunity applicable in the State where the crime has taken place, is no obstacle or bar to trial elsewhere. These developments in the law - most of them quite recent - mean that perpetrators of serious violations of human rights during non-international armed conflicts, including non-State actors, are far less likely to escape justice than they were in the past.* '[52]

It is undoubtedly accepted that individual criminal responsibility can be held against individual members of states and ANSAs for the commission of international crimes.

IV. PRACTICE OF INTERNATIONAL AND AD HOC JUDICIAL BODIES IN PROSECUTING INDIVIDUAL MEMBERS OF ARMED NON-STATE ACTORS

As discussed in the part one, after the establishment of the international ad hoc tribunals, the ICC and other mixed tribunals, the enforcement of individual criminal responsibility on individual perpetrators of ANSAs has been well developed for the commission of core international crimes in NIACs.

The armed conflict in the former Yugoslavia itself constituted both international and NIAC in nature and this explains why the ICTY handled the crimes of individual perpetrators. Interestingly, the first judgment of the ICTY was *Dusko Tadic Appeal Judgement* concerning the individual liability of Dusko Tadic (member of an ANSA) in a NIAC. Tadic was a leader of SDS (Serbian Democratic Party (Bosnia and Herzegovina)) and participated in the armed conflict between May and December 1992 in the Prijedor region. The nature of the conflict in Bosnia and Herzegovina was non-international in nature after 19 May 1992.[53]

In this case, the Appellant argued that individual criminal responsibility is not applicable since the armed conflict is non-international in nature and the law of NIAC does not explicitly contain any provisions to do so.[54] However, the Appeal Chamber dismissed this argument and stated that "customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental

[52]W.A. Schabas (2002), *supra* note 7, at 922.
[53]*Prosecutor* v. *Dusko Tadic*, Case No. IT-94-1-A, ICTY, Judgement of the Appeal Chamber, para.86 (Int'l Trib. for the Former Yugoslavia, July15, 1999).
[54]*Prosecutor* v. *Dusko Tadic* aka "Dule," Case No. IT-94-1, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para.128 (Int'l Trib. for the Former Yugoslavia, Oct.2, 1995).

principles and rules regarding means and methods of combat."[55] In addition, the Appeal Chamber reassured its jurisdictional power to impose the individual criminal responsibility in NIACs as follows:

> '*In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied*.'[56]

This approach has further been expanded by the ICTR. The creation of the ICTR and its jurisprudence proved the prosecution of individual perpetrators in NIAC. The ICTR was vested with "the power to prosecute persons responsible for *serious violations of international humanitarian law* committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States,"[57] including the "*serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977*."[58] Thus, serious violations of Common Article 3 and the APII in NIAC are considered "a breach of a rule protecting important values (which) must involve grave consequences for the victim."[59]

Further, the Trial Chamber of the ICTR in the *Prosecutor v.Jean-Paul Akayesu* stated that the list of guarantees provided in Article 4 of the ICTR Statute are taken from Common Article 3 to the four Geneva Conventions and Article 4 of the APII and therefore "comprises serious violations of the fundamental humanitarian guarantees."[60] This has also been recognized as part of customary international law and hence "the authors of such egregious violations must incur individual criminal responsibility for their deeds."[61] Indeed, "criminal responsibility covered by Article 4 of the Statute does not depend on any particular

[55]*Id,* para.134.
[56]*Id,* para.137.
[57]ICTR Statute, *supra* note 25, art.1. *See* also art. 7(emphasize added).
[58]*Id,* art.4 (emphasize added).
[59]*Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of the Trial Chamber, para.616 (Int'l Cri. Trib. for Rwanda, Sep.2, 1998).
[60]*Id,* para.616.
[61]*Id,* para.616.

classification of the alleged perpetrator"[62] and therefore perpetrator subject to the individual criminal liability regardless of their status.

The first prosecution of the ICC's was that of Thomas Lubanga Dyilo, a leader of the Patriotic Force for the Liberation of the Congo (FPLC), an armed group that operated in Ituri of the Democratic Republic of Congo (DRC). Lubanga Dyilo was charged with "crimes of conscripting and enlisting children under the age of fifteen into the FPLC and using them to participate actively in hostilities within the meaning of Articles (8) (2)(e)(viii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003."[63]

There are some other impending cases on some leaders of ANSAs at the ICC. For example, Yoweri Museveni, the President of Uganda referred the LRA to the ICC in December 2003 for the perpetuation of crimes against humanity and war crimes that resulted in the killing of thousands of civilians, abduction of an estimated 20,000 children and forcing them to be sex slaves and child soldiers in Northern Uganda.[64] To this end, the ICC issued an arrest warrant for five leaders of the LRA after the prosecutor's satisfaction with respect to the grounds for the crimes.[65]

Furthermore, the SCSL was established to investigate the commission of international crimes in NIACs by both state actors and ANSAs. So far, some members of the Revolutionary United Front (RUF) have been prosecuted for committing some international crimes in Sierra Leone.[66] For instance, the RUF in Sierra Leone were accused under different modes of liability as follows:

> '*ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, by their acts or omissions, are individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this*

[62] *Prosecutor* v. *Laurent Semanza* , case No.ICTR-97-20-T, Judgment and Sentence, para.362 (Int'l Cri. Trib. For Rwanda, May 15, 2003). (Chacha Murungu & Japhet Biegon ed., Pretoria Uni. Law Press (PULP) 2011).
[63] *Prosecutor* v. *Thomas Lubanga Dyilo*, Case No. ICC- 01/04-01/06, Trial Chamber Judgement Pursuant to Article 74 of the Statute, para.1358, (Int'l Cri. Court, Mar.14, 2012).
[64]ICC, President of Uganda Refer Situation Concerning Lord's Resistance Army (LRA) to the ICC, Case No. ICC-20040129-44, Press Releases (2004). See also Cristopher Mbazira, *Prosecuting International Crimes Committed by the Lord's Resistance Army in Uganda, in* PROSECUTING INTERNATIONAL CRIMES IN AFRICA 197-220(Chacha Murungu & Japhet Biegon ed., Pretoria Uni. Law Press (PULP) 2011).
[65]*See* ICC, Situations and Cases- Situation in Uganda, ICC-02/04 and ICC, Prosecutor of the ICC Opens an Investigation into Northern Uganda, Case No.ICC-OTP-20040729-65, Press Releases (2004).
[66]*Prosecutor* v. *Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (the RUF accused), Case No. SCSL-04-15-T, Trial judgment (Special Court for Sierra Leone, Mar.2, 2009).

> *Indictment, which crimes each of them planned, instigated, ordered, committed or in whose planning, preparation or execution each Accused otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated.*'[67]

Indeed, ICL and the law of NIACs have been extensively developed by the jurisprudence of the international ad hoc, other international and mixed tribunals. This caused the law of NIACs to be given a precise outline in the *Tadic* jurisdiction among others.

V. CONCLUSION

It is now beyond doubt that ICL imposes individual criminal liability on individual members irrespective of their status. It is clear that the post-Cold War ICL mechanism contributed to the development of individual criminal responsibility in NIACs. ANSAs inclusion was necessitated by numerous crimes such as genocide, crimes against humanity, war crimes and torture that were committed in NIACs after the Cold War era. The international community has focused great attention on creating several ad hoc international institutions to address these atrocities committed following the Post-Cold War periods. It is undoubtedly accepted that individual criminal responsibility can be held against individual members of states and ANSAs for the commission of international crimes.

Notwithstanding these 'feats' there are foreseeable challenges ahead which incapacitate the ability of the ICL to prosecute some alleged perpetrators. Some contemporary practice illustrates granting of amnesty to persons (ANSAs as well as state actors) involved in international crimes through peace agreements as a part of conflict resolution and reconciliation by governments. The Belfast Agreement is an example of such a practice.[68] It is necessary to stress here that granting amnesty for committed international crimes has been disapproved. Indeed, by granting amnesty to ANSAs, the state could easily escape from owning up to its own abuses committed during war times. Further, the ICC has been sharply criticized for its inability to prosecute perpetrators from non-member states stemming from

[67] *Id*, para.1970.
[68] W.A. Schabas(2002), *supra* note7, at 918.

its dependence on the decisions of the United Nations Security Council.[69] It has also been alleged that the UNSC has been exercising its power of referring cases to the ICC quite selectively due to members' political interest and Sudan is a named example.[70] For instance, present crimes in Syria and Sri Lanka are yet to be referred due to individual permanent members' interest in those states. Further, the ICC faces several challenges in implementing its decisions, leading to inevitable dead ends. For instance, the ICC has not able to bring Sudan's President and Defense minister as well as five leaders of the LRA of Uganda to the court ever since they were issued arrest warrants.

Nevertheless, the works of the international and ad hoc judicial bodies are crucial to the development of the law of NIACs towards maintenance of peace and security. Appreciably, it can be said that these judicial bodies have altered the traditional state-centric view by investigating and prosecuting some perpetrators of international crimes in NIACs.

[69]Article 13 of the Rome Statute enumerates how the court can exercise its jurisdiction. The first scenario is when a state party refers a situation, the second one is where the UNSC acting under the Chapter VII of the UN Charter and lastly where the prosecutor has initiated investigation on his own motion.

[70] Robert Cryer, *Sudan Resolution 1593,* and *International Criminal Justice,* 19 LEIDEN J. OF INT'L L.17 (2006).

TRITIYA PRAKRITI: A NARROW-MINDED LAW STORY

Satish K. Rai[*] *& Aman Anand*[**]

I. INTRODUCTION

> *"Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."*[1]

No better words nor any quote or combination of words can describe the state and position of transgender community in the country. The severity and magnitude of such social scenario befall more grave when such words happen to be the introductory paragraph of the judgment delivered by the Hon'ble Supreme Court of India. Asian nations cart along with them epoch old narration of transgender males with gender variance, popularly termed as transgender women in the present era. India being inclusive of such Asian countries possess the same account. In fact, Kama Sutra contains vibrant portrayal of sexual life of Tritiya Prakriti (Third Gender). Despite of the tolerance, acceptance and respect for diversity and democratic principles by Indian people, the graph with regards to the warmth towards the transgenders shows no increase from nullity. This is evidenced by numerous Human Rights violations against sexual minorities, trans-genders being a subset of the same. Transgender as a community is perhaps one of the most exposed communities in India. The stigmatic life in every aspect including health, employment, social security and recognition is what they are blessed with. Social exclusion has been one of the major threats to the transgender community as it questions the very fundamental existence of the community. Not only is it a social stigma, even the law has nothing with itself to provide and act as a sheath for this

[*] Student, B.A LL.B (Hons.), Indian Law Society (ILS) Law College, Pune, India.
[**] Student, B.A LL.B (Hons.), Indian Law Society (ILS) Law College, Pune, India.
[1] *National Legal Services Authority* v. *Union of India & Ors*., AIR 2014 SC 1863 [hereinafter NALSA].

community. Rights for trans-genders is a farfetched idea for there has been a tussle as to which category shall constitute the term "transgender" and who all shall be excluded from this definition. This multi-faceted essay, in divisions, firstly, articulates and analyzes the negative correlation between law and social change with respect to transgender community and goes on to narrate the categories of people for which law recognizes the umbrella term "Trans-gender", their status, recognition and position before *NAZ Foundation*[2] judgment of the Apex Court of India , change in position after *NALSA* judgment as well as its intersection with the *NAZ*'s judgment and its implications in length on the transgender community. This essay further discusses about the on-ground work and progress by various government agencies and the current social position of the third genders apart from mere legal recognition.

II. TRANSGENDER: HOW BIG IS THE UMBRELLA

J. Radhakrishnan speaking in his judgment in *NALSA* identified and defined transgender as an umbrella term for person whose gender identity, gender expression or behaviour doe not conform to their biological sex. The term transgender may also take in persons who do not identify with tier sex assigned at birth which include Hijras/ Eunuchs. He went on further to include persons who *intend to or have* undergone Sex Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female (transsexual persons). Transvestites, i.e. persons who like to cross-dress in clothing of opposite gender were also within the meaning of the judgment of J. Radhakrishnan. Consequentially, the term "transgender", as per the verdict of J. Radhakrishnan has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people, who strongly identify with the gender opposite to their biological sex; male and female.

III. SOCIAL CHANGE OR LAW: WHAT LAGS BEHIND

Law has been both independent as well as dependant variable i.e. cause as well as effect in society and has a great inter-reliance with other social systems. The advantages of law as an instrument of social change are attributed to the fact that law in society is seen as legitimate, more or less rational, authoritative, institutionalized, generally not disruptive, and backed by mechanisms of enforcement. While the term is usually applied to changes that are beneficial

[2] *Suresh Kumar Koushal & Anr.* v. *NAZ Foundation& Ors.*, Civil Appeal No. 10972 of 2013, 11th Dec , 2013.

to society, it may result in negative side-effects or consequences that undermine or eliminate existing ways of life that are considered positive.[3] Law, indisputably both in cause and effect, in case of Transgender community has led to a negative social change eliminating existing ways of life for them.

Historically, The Members of transgender community have played a prominent in Indian culture and were treated with great respect. They find mention in the ancient Hindu scriptures and were written about in greatest epics of Ramayana & Mahabharata. Concept of Triitya Prakriti or Napunsaka has also been an integral part of Vedic and Puranic literatures. In the Mahabharata, the Pandavas used Shikhandi, a eunuch, to defeat Bhishma Pitamah in the battle of Kurukshetra. Also, in Ramayana, when lord Ram was leaving for his 14 years exile, he asked all men and women who had come to mourn his separation from homeland to return to the city. Amongst then was a group of eunuchs who decided to stay as they did not feel bound by direction being neither men nor women. Impressed by their devotion Ram sanctioned them powers to bless people on auspicious occasions.[4] Jain Texts also make a detailed reference to Transgender community which mentions the concept of 'psychological sex'. In Medieval India too, Hijras played a prominent role in the royal courts of the Islamic world, especially in the Ottaman empires and the Mughal rule. Eunuchs were normally employed in Imperial palaces by Muslim rulers as servants for female royalty, as guards of the royal harem, and as sexual mates for the nobles. A section of Eunuchs also enjoyed high social status and one such example is a eunuch named Malik Kafur, a Hindu boy captured and enslaved during the raids of the Delhi Sultanate into Gujarat. Eunuchs in Imperial palaces were ordered in a hierarchy, often with a senior or chief eunuch (Urdu: *Khwaja Saras*) who used to direct junior eunuchs underneath him.[5] Eunuchs were highly valued for their strength, ability to provide protection for ladies' palaces and trustworthiness, allowing eunuchs to live amongst women with fewer worries. This enabled eunuchs to serve as messengers, watchmen, attendants and guards for palaces. Often, eunuchs also doubled as part of the King's court of advisers.[6]

[3] *Social change*, NEW WORLD ENCYCLOPAEDIA available at: http://www.newworldencyclopedia.org/entry/Social_change.

[4] Ramanuj Mukherjee, *The Third Gender And The Indian Law – A Brief History* available at: http://blog.ipleaders.in/the-third-gender-and-the-indian-law-a-brief-history/.

[5] K.S. LAL, MUSLIM SLAVE SYSTEM IN MEDIEVAL INDIA 79 (Aditya Prakashan 1994).

[6] Mahanarayan, Lata'if-e Akbar, *Hissah pahli: Birbar namah* (1888) available at: http://www.columbia.edu/itc/mealac/pritchett/00urduhindilinks/txt_akbar_birbal.html.

All these historical tales point out to the social inclusion of eunuchs in the early and medieval India, which in turn indicate the positive social order with respect to the transgender community. The law playing a destructive role, in Modern India, disturbed the already existing positive social order by accelerating a negative social change of social exclusion of the transgenders which, with time, has been adapted well by the society. One such blow to the existing positive social status of transgenders by law was the Criminal Tribes Act, 1871, which deemed the entire community of Hijras persons as innately "criminal" and "addicted to the systematic commission of non-bailable offences". The Act provided for the registration, surveillance and control of certain criminal tribes and eunuchs and had penalized eunuchs, who were registered, and appeared to be dressed or ornamented like a woman, in a public street or place, as well as those who danced or played music in a public place. Such persons also could be arrested without warrant and sentenced to imprisonment up to two years or fine or both. Under the Act, the local government had to register the names and residence of all eunuchs residing in that area as well as of their properties, who were reasonably suspected of kidnapping or castrating children, or of committing offences Under Section 377 of the Indian Penal Code, or of abetting the commission of any of the said offences. Under the Act, the act of keeping a boy under 16 years in the charge of a registered eunuch was made an offence punishable with imprisonment up to two years or fine and the Act also denuded the registered eunuchs of their civil rights by prohibiting them from acting as guardians to minors, from making a gift deed or a will, or from adopting a son.[7] The Act although been repealed in August 1949, had a long lasting effect of almost 80 years, which changed the perspective of the society towards the transgender community.

The aforementioned Act strengthened the process of discrimination against the transgenders which was already initiated through Section 377 of the Indian Penal Code that found a place in the Indian Penal Code, 1860, prior to the enactment of Criminal Tribes Act that criminalized all penile-non-vaginal sexual acts between persons, including anal sex and oral sex, at a time when transgender persons were also typically associated with the prescribed sexual practices. Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras and was used as an instrument of harassment and physical abuse against Hijras and transgender persons. This law is still in place and has been declared constitutional in the *NAZ* verdict and prohibits LGBT communities to have sexual

[7] NALSA, *supra* note 1.

intercourse, despite of the fact that Section 377 is based on Judeo-Christian moral and ethical standards which does not even find a place in the Indian society prior to the British Rule in India.

It is hence, pretty lucid that, though rare, the law has played a negative role in pulling down the social status of the transgender community from a flamboyant past to a shade of non-recognition. Let alone equal status, Transgenders were not given even a legal recognition as a third gender but lately by the Supreme Court in a judgment where the Hon'ble Apex Court of India showed and bestowed some sensitivity on the most vulnerable class or section of the society.

IV. NALSA VERDICT: EXCAVATION OF BURIED RIGHTS AND SOCIAL STATUS

The activist movements led by social activists and leaders finally led to the legal recognition of transgenders by the Apex Court of India lately in 2014 through its verdict in *National Legal Services Authority* v. *Union of India*[8]. The spark to such *legal change by social force* ignited almost ten years prior to the verdict when in 2005 gender-sensitivity within the Indian bureaucracy took a small step, with eunuchs being given the option to enter their sex as 'E' instead of either 'M' or 'F' in passport application forms.[9] This was furthered by India's Election Commission by allowing transgenders to choose their gender as "other" on ballot forms in 2005 and this recognition came 15 years after the third sex was granted the right to vote in 1994 by a directive of the Commission.[10]

The case in *NALSA*[11] was about the grievances of the members of Transgender Community who sought a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth. They prayed that non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. Hijras/Eunuchs, who also fall in that group, claimed legal status as a third gender with all legal and constitutional protection.

The petitioners pleaded that TGs are deprived of social and cultural participation and hence restricted access to education, health care and public places which deprives them of the Constitutional guarantee of equality before law and equal protection of laws. Further, it was also pointed out that the community also faces discrimination to contest election, right to

[8] NALSA, *supra* note 1.

[9] *'Third Sex' Finds A Place On Indian Passport Forms*, Info Change Human Rights available at: http://infochangeindia.org/human-rights/news/third-sex-finds-a-place-on-indian-passport-forms.html.

[10] *India recognises 'other' gender in voter lists*, Info Change Human Rights available at: http://infochangeindia.org/human-rights/news/india-recognises-other-gender-in-voter-lists.html.

[11] NALSA, *supra* note 1.

vote, employment, to get licenses etc. and, in effect, treated as an outcast and untouchable. The Hon'ble Court speaking through the quorum of Hon'ble Mr. Justice K.S. Radhakrishnan and Hon'ble Mr. Justice A.K. Sikri gave directions for the welfare of the transgenders and laid down a detailed judgment in favour of the community.

V. GENDER SENSE OF SEX IDENTITY: INTRINSIC

The Court laid emphasis on Gender identity and described it as one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation.

The Court distinguished Gender Identity with Sexual Orientation by laying down that Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category while Sexual orientation refers to an individual's enduring physical, romantic and/or emotional attraction to another person. Sexual orientation includes transgender and gender-variant people with heavy sexual orientation and their sexual orientation may or may not change during or after gender transmission, which also includes homosexuals, bisexuals, heterosexuals, asexual etc.

VI. VERDICT: RIGHTS IDENTIFIED[12]

Constitutional problems cannot be studied in a socio-economic vacuum, since socio-cultural changes are the source of the new values, and sloughing off old legal thought is part of the process the new equity-loaded legality. This principle has been well applied by the Court in its verdict in *NALSA* by going against the traditional binary gender system and recognizing

[12] NALSA, *supra* note 1.

transgenders as third gender. The Rights involved in the judgment shall be understood in Court's terms in order to analyze the consequences of such judgment.

a. *Article 14*

The Court laid down that Article 14 provides the right to equality to every "person". Article 14 does not restrict the word 'person' and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression 'person' and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

b. *Article 15 and 16*

Articles 15 and 16 sought to prohibit discrimination on the basis of sex. According to the verdict, both gender and biological attributes constitute distinct components of sex and discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex" used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female. Giving the term "sex" a wide meaning to include transgender, the Court directed to take affirmative action as Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the Transgenders could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.

c. *Article 19*

The court read the concept of self-determination of gender in Article 19(1 and laid down that it includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form and no restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution. The Court emphasized that Gender identity, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation

and State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality.

d. *Article 21*

The Court said that Right to Dignity is envisaged into Article 21 and Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

Giving all the Fundamental Rights, the court in its judgment gave the right of 'self determination' of gender to Transgenders by upholding the Psychological Test over Biological Test. The Court in its operative Part gave directions to the Centre and the State Governments to take steps to treat them as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments. Court also ordered Centre and State Governments to operate separate HIV Sero-survellance Centres since Hijras/ Transgenders face several sexual health issues and further, to address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal. Centre and State Governments were directed to take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities. This judgment is the first step for the recognition of the transgenders and to restore their status as it was prior to the British Rule and its Ideologies.

VII. VERDICT: IMPLICATIONS AND GATEWAYS

a. Defining Transgender: Unclear Thoughts

The *NALSA* Verdict vacillate between a broad definition of 'transgender' as an 'umbrella term' for a variety of gender non-conforming identities and practices, and a more restricted definition based largely on hijra and trans women identities.[13] The judgment has been argued and criticized that trans men and trans masculine identities (i.e. masculine-identified people assigned female at birth) have been insufficiently represented in the judgment as well as the

[13] Aniruddha Dutta & Raina Roy, *Decolonizing Transgender in India: Some Reflections*, 1(3) TRANSGENDER STUDIES QUARTERLY 2014.

Report of the Expert Committee on the Issues relating to Transgender Persons issued by the Ministry of Social Justice and Empowerment.[14] In fact, in *Jackuline Mary* v. *Supt. of Police,*[15] the *NALSA* verdict has been interpreted as only applying to the male-to-female transgender spectrum and not to female-to-male trans people, thus potentially excluding a huge number of trans people from the ambit of the social justice.

Justice Sikri in contradiction to J. Radhakrishnan gives a very narrow definition to the term transgender and goes on to state that transgender, for the purposes of the judgment, would particularly denote hijras:

> *"Therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to TG community i.e. hijra etc., as explained above."*[16]

He also presumes that hijras would be generally identified as a 'third gender'. This has lead to probable exclusion of other trans or gender variant groups such as trans masculine people, as already discussed.

b. Self-Determination or Compulsion

While the second directive of the operative part of the *NALSA* judgment upholds the right to decide the self-identified gender of the transgender persons with no mention of surgery such as Sex Re-Assignment Surgery (SRS), the fifth directive makes it more clear by saying that any insistence for SRS [sex reassignment surgery] for declaring one's gender is immoral and illegal. These two directives therefore give right of self-determination to the transgenders. But, this is in contradiction with the first directive which directs that that Hijras are to be treated as 'third gender' for the purpose of safeguarding their rights, which means that they have no right to self-identify as 'female' or even 'male'. Therefore, there is a contradiction between the directives itself.

c. Safeguard to Whom?

The Verdict in its operative part, gives safeguards to all the transgenders including a direction to the Centre and States to treat them as Other Backward Class. But, the judgment does not clarify as to who shall be able to avail such safeguards. It does not answer if a transgender

[14] Gee Imaan Semmalar, *Gender Outlawed: The Supreme Court Judgment on Third Gender and its Implications, Roundtable India*, 19-4-2014 [hereinafter Semmalar].
[15] Jackuline Mary v. Supt. of Police, WP No. 587 of 2014, Orinam, judgment dated 17th April 2014.
[16] NALSA, *supra* note 1.

has to declare itself as third gender so as to avail the safeguards. This also creates a confusion regarding whether one would have to be categorized as 'third gender' in order to access the safeguards and affirmative action promised by the judgment, or whether these would still be available if someone legally identified as the 'opposite' gender.[17]

d. Sex under Article 15 and Contradicting Concepts 16

While interpreting what the term 'sex' means under Article 15 and 16 laid down that the discrimination on the ground of 'sex' under Articles 15 and 16 includes discrimination on the ground of gender identity and that the expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female. This runs counter to the reigning understanding of both the terms: sex, as the biological or physiological features of a person, and gender as the socio-cultural construction of what it means to be masculine or feminine.[18]

e. Gateways for Other Vulnerable Groups

The Court noted that in accordance with Article 253 and 51, any international conventions that are not inconsistent with fundamental rights must be read into those provisions of the Constitution, which greatly enlarges the scope of fundamental rights. This will lead to gateways to a range of international commitments including Yogyakarta Principles dealing with gender identity and sexual orientation, till there is no contradicting legislation already in place in the country regarding the same.

VIII. GATEWAY TO ELIMINATE SECTION 377: THE RESIDUE LEFT AGAINST TRANSGENDER

a. Inclusion of Sexuality in NALSA: Contradiction to NAZ

While dealing with Article 14, J. Radhakrishnan noted and laid down that any "discrimination on grounds of *gender* or *sexuality*" goes against the Constitutional measures for "equality by the law or equal protection by laws guaranteed under our Constitution". Now, in this, the inclusion of the term *'sexuality'* along with gender lays down the base for the LGBT activists to advocate and campaign legal rights for and thwart gender/sexuality-based discrimination against a broad spectrum of LGBT communities and people. LGB

[17] Semmalar, *supra* note 14.
[18] Mukherjee, Anindita, *SC landmark transgender judgment: What it says, what is good and what it muddled up*, avaialble at: http://www.legallyindia.com/201404154605/Legal-opinions/sc-landmark-transgenderrights-judgment-what-it-says-what-is-good-and-what-it-muddled-up.

people may also be gender variant, and since the definition of transgender includes 'transvestites', means that gay or lesbians who cross-dress without essentially recognizing as the 'opposite' sex would also be come under the ambit of the verdict.

b. Section 377: Impliedly violating Article 14

As already stated while discussing Right to Equality to the transgenders in the section above, the Court laid down that any kind of discrimination on the basis of gender identity or sexual orientation is contravenes Article 14 and noted that transgenders are extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police. The Court also, while discussing the history of Section 377, noted by quoting *Queen Empress* v. *Khairati*[19] that 377 is used to harass and physically abuse transgender persons and highlighted certain identities, including Hijras were used as an instrument of harassment and physical abuse against Hijras and transgender persons. Now, by linking both the findings of the court in *NALSA*, it can clearly be inferred that Section 377 is violating Article 14, which in turn is against the *NAZ* verdict.

c. Section 377: Impliedly violating Article 19(1)(a)

The Court in *NALSA* verdict while dealing with Article 19(1)(a) noted that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc. This means gender identity and expressing that identity through conduct, such as dress and speech, are inseparable. On the other hand, while the court in *NAZ* verdict rejected the argument that S. 377, insofar as it criminalises same-sex intercourse between consenting adults, violates their rights under Articles 14 and 15, and held that all S. 377 did was to classify not persons, but acts – acts of carnal intercourse against the order of nature, and those in accordance with the order of nature. Therefore, the Court in *NAZ*, relied upon a tight conceptual distinction between conduct and identity and here comes the contradiction between the two judgments. While *NALSA* noted that identity is inseparable from conduct, the *NAZ* verdict laid down the antithesis. To the extent that Article 19(1)(a) protects core expressions of our identity – including our sexual identity – as the Court holds today, it must necessarily protect homosexuals in expressing their identity. So even if the Court doesn't wish to collapse conduct and identity – even if it wishes to hold the two to be separate – the logic of *NALSA* leads inexorably to the conclusion that at the very least, in criminalising

[19] Queen Empress v. Khairati, (1884) ILR 6 All 204.

conduct, S. 377 criminalises the expression of homosexual identity, and therefore suffers from a 19(1)(a) problem.[20]

IX. CONCLUSION

The *NALSA* decision, recognised trans-genders as the third sex, allowing them equal access to education, healthcare and employment, and prohibiting discrimination against them. The move reflects a growing wave of recognition of the rights of trans-genders internationally. Though the age old problem of non-recognition of the transgenders have now on records been solved as per the judgment, yet the reality and on ground work and progress seems to be the same as before. In lack of any enforcement mechanism of the said verdict the situation and discrimination against the transgenders has seen no change. After an year of the verdict, The third gender category has been recognised in certain legal documents in certain states but there is no sign of recognition for them in hospitals and in education institutions neither the issue of separate bathrooms been solved. Therefore, introspecting the scenario makes one reach a conclusion that the practical and on ground implementation of the schemes is more important than just a verdict. Moreover, its contradiction with the *NAZ* verdict demands both the issues to be taken up together as deciding one of them exclusively will affect the other. Apart from the problems and contradictions already discussed the suggestions which need to be addressed are that the torture and exclusion of the transgenders especially by the government servant, departments and police has to be checked. This calls for the punishment for emasculation provided under Section 320 of the IPC to more rigorous. For a better implementation of the safeguards, all discriminatory legislations including Section 377 of IPC and the relevant sections of the Army and Air Force Acts have to be repealed. Enactment of civil rights legislations is a permanent solution for the social injustice against transgenders. The proposed uniform civil code or otherwise Special Marriage Act, shall allow and should have provisions related to the marriage of transgenders. Pt. JawaharLal Nehru while talking on the Constitution said that the only principle that Constitution follows is the principle of inclusion. The judgment on *NALSA* being first such step towards inclusion of the most secluded group of people, we need follow up to the same. There can be no better way to end this topic than with the lines "It's Only a Wee Wee":[21]

[20] Indian Constitutional Law and Philosophy Blog, NALSA *v. UoI: The Supreme Court on transsexuals, and the future of Koushal v.* NAZ available at: http://indconlawphil.wordpress.com/2014/04/15/NALSA-v-uoi-the-supreme-court-ontranssexuals-and-the-future-of-koushal-v-NAZ/.
[21] http://www.asexuality.org/en/topic/28937-only-a-weewee-song-lyrics/.

As soon as you're born, grownups check where you pee
And then they decide just how you're s'posed to be
Girls pink and quiet, boys noisy and blue
seems like a dumb way to choose what you'll do
Well it's only a wee wee, so what's the big deal?
It's only a wee wee, so what's all the fuss?
It's only a wee wee and everyone's got one
There's better things to discuss!
Now girls must use makeup, girl's names and girl's clothes
And boys must use sneakers, but not pantyhose
The grownups will teach you the rules to their dance
And if you get confused, they'll say "Look in your pants"
Now grownups watch closely each move that we make
Boys must not cry, and girls must make cake
It's all very formal and I think it smells
Let's all be abnormal and act like ourselves.
There's better things to discuss!

HUMAN RIGHTS AND ANTI – TERROR LAWS IN INDIA

Parikshit Goyal[*]

I. INTRODUCTION

Terrorism has become a global threat and India is not immune to its scourge. Both cross – border and home grown terror groups pose a significant threat to India's sovereignty, integrity and security. Terrorism refers to the use of violence, social threats, or coordinated attacks to generate fear, cause disruption and ultimately realising specified political, religious and ideological demands. Global Terrorism Index (2015), which attempts to systematically rank countries according to terrorist activities, puts India at number 6, just below Iraq, Afghanistan and Syria. Terror activities cause huge damage to life and property. Every nation state in this globalised age faces a terror threat. Various counter – terror measures are taken to protect itself and ensuring swift punishment for the offenders. India also framed a number of counter terror laws which aimed at curbing terrorist activities and ensuring justice. It is imperative that while punishing the guilty, the legitimate human rights of citizens are not violated and there is no arbitrary use of the special legal provisions.

II. HUMAN RIGHTS AND THEIR IMPORTANCE

Human rights are rights inherent to all human beings, irrespective of our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. These rights are all interrelated, interdependent and indivisible; and often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to preserve, protect and promote human rights and ensuring fundamental freedoms of individuals or groups.

The concept of human rights is of central importance in the development of modern democracy under Rule of Law. Human rights are not just obligations of a state which it may avoid in difficult times. These are inherent duties imposed by a social contract to which State owes its existence. State as an institution is nothing more than a representative of its citizens

[*] Student, Campus Law Centre, Faculty of Law, University of Delhi, New Delhi, India.

and acts on their behalf. Hence it cannot act against their interest, let alone violation of basic human rights. Ensuring a dignified and peaceful existence of all persons within its jurisdiction is the first and foremost responsibility of the state.

Terrorism, being an assault on a civilized society, is violation of human rights in the most basic terms and hence there is an inevitable need to entrust the law enforcement agencies with extra - ordinary powers to meet what is genuinely perceived as an extra ordinary situation of crime (terrorism). Human rights must be ensured at three distinguished stages by Protection of Human Rights, Preservation of Human Rights and Promotion of Human Rights.[1] However, citizens may have to sacrifice some of their rights so that State may fight terror. This need not be a zero sum game whereby State unleashes a reign of terror in its fight against terror as was noticed in America's 'War on Terror' which was soon derided as 'War of Terror'[2]. Observing basic minimum rules is a must and these rules are nothing more than respecting human rights of people all over the globe. While terror begets terror, human rights and terrorism mutually destruct each other. In order to fight the hydra headed monster of terrorism, respect for human rights is a must and anti terror laws should not be used to stifle legitimate social and political protest.

III. PROTECTION OF HUMAN RIGHTS

An act of terror is an assault on society. Hence first focus of every counter terrorism efforts of state is to protect innocent civilians. But in the zeal to safeguard civilians, basic human freedoms should not be sacrificed. Behind the veil of effective counter terrorism measures, many a regime has turned authoritarian and has invaded the privacy of citizens as well as using anti-terror laws against their political opponents. Maldives provides a recent example where former President Mohamed Nasheed was booked under terror laws. His trial has been questioned as sham by various international human rights organisations[3]. Egypt is another example where anti-terror legislations have been freely used against journalists, students and civil society organisations to stifle legitimate democratic demands in guise of safeguarding citizens[4]. While effective counter terrorism measures are a must for any nation state, these should not be in conflict with human rights. In fact, the two are mutually reinforcing aims.

[1] Lecture on 'Law, Terrorism and Human Rights' by J. Prakash Tatia, Chief Justice, High Court of Jharkhand available at http://calcuttahighcourt.nic.in/sesqui/lect2a.pdf
[2] Chomsky, Noam (2003) 'Wars on Terror', New Political Science available at https://chomsky.info/200303__/
[3] https://www.law.columbia.edu/media_inquiries/news_events/2016/may2016/amal-clooney-columbia
[4] https://www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights

IV. PRESERVATION OF HUMAN RIGHTS

A fair trial is a cardinal principle of our criminal jurisprudence. It is the *sine qua non* of a just society. It is, therefore, necessary that the rights of the persons accused of crimes, even heinous crimes, like terrorism are respected. It is the respect for rule of law that justifies use of violence by state and distinguishes it from the use of it by barbarians. This is imperative if justice is to be ensured. In every legal or judicial proceedings beginning from search and cordon operations, encounters, firing in crowded areas, registration of case, interrogation, investigation, charge sheet, trial and punishment fundamental rights of the accused must be respected. This obligation arises under our constitution as well as under UN Charter, Universal declaration of Human Rights, International covenant on Civil and Political Rights and various other international treaties.

V. PROMOTION OF HUMAN RIGHTS

The fight against terror should be at multiple levels and not just focussed on security and arms. For the elimination of terrorism, inclusive growth and participative governance is a must. Ensuring basic human freedoms, dignity of life, sources of livelihood, quality education, access to basic health and respect for minority rights is imperative to wean away youth from the charm of fundamentalists. The incoherence of philosophers of terror can only be defeated by rational and educated youth who feel at home in their society instead of feeling a sense of alienation. This requires cultural assimilation as well as accommodation of diverse ideas. Encouraging ground level democracy and citizen participation in development process is needed. The fight against terrorism can never succeed unless general respect for human dignity is ingrained in society.

If we look at breeding grounds of terror world over, it is prevalent in those places where the social fabric has collapsed and legitimate aspirations of people are being suppressed. War on terror can succeed only if human rights declared in various charters are effectively observed in practise and not seen as mere letters on paper.

VI. COUNTER TERRORISM EFFORTS IN INDIA: COMPLEMENTARY OR IN CONFLICT WITH HUMAN RIGHTS?

Independent India has a great constitutional tradition. It has long fought some of the most virulent forms of terrorist violence, yet maintained a long – term commitment to protect

fundamental rights. Post 26/11, India decided not to re – introduce a new law similar to the draconian POTA. Instead, it chose to upgrade the existing intelligence and judicial frameworks to punish the guilty. The Supreme Court very succinctly propounded in the *PUCL* vs. *Union of India* (2004), "the protection and promotion human rights under the rule of law is essential in the prevention of terrorism. If human rights violated in the process of combating terrorism, it will be self defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat the violations of human rights. The lack of hope for justice provides breeding grounds for terrorism. Terrorism itself should also be understood as an assault on basic human rights. ''[5] India's long fight against terror has led to what an expert terms as "a chronic crisis of national security that has become the very essence of India's being."[6] The Supreme Court in *Kartar Singh* **vs** *State of Punjab* (1994) observed that the country was in the firm grips of spiralling terrorist violence and caught between the deadly pangs of disruptive activities.[7]

Indian state has struggled to adopt a comprehensive approach to counter terror, which not only safeguards it citizens but also respects their basic human rights. Gujarat Control of Organised Crime Act, modelled on Maharashtra Control of Organised Crime Act, 1999 and awaiting Presidential approval is a case in point. It empowers police to tap telephonic conversations and submit them in court as evidence, makes confessions before police admissible in court and, inter alia, extends the period of probe from stipulated 90 days to 180 days before filing of charge sheet[8]. These controversial provisions show a tendency of securing conviction rather than ensuring that right person is convicted and rights of other citizens are not violated.

Terrorist and Disruptive Activities (Prevention) Act was the first specific anti-terrorism legislation enacted by the government in the background of Punjab insurgency. There were widespread allegations of abuse under the act which led to its increasing unpopularity. By mid 1994, roughly 76000 persons were detained under the act. Only 0.81 percent of the detained individuals had been convicted. Only 8000 individuals had been tried and only 725

[5] People's Union for Civil Liberties v Union of India (2004) 9 SCC 580 at page 596 available at http://nhrc.nic.in/documents/LibDoc/Terrorism_C.pdf
[6] http://www.india-seminar.com/2002/512/512%20k.p.s.%20gill.htm
[7] Available at https://indiankanoon.org/doc/1813801/
[8] http://www.thehindu.com/opinion/editorial/gujarat-must-give-up-terror-bill/article8175731.ece

were finally convicted[9]. The Act was widely criticised by human rights organisations as it criminalised free speech. Directly or indirectly advocating for cession or secession in any part of India was punishable under it[10]. Further, anyone could be detained up to 1 year without formal charges or trial against him[11]. Trial could be held secretly at any place and reversed the fundamental canon of criminal jurisprudence that everyone is presumed to be innocent until proven otherwise. Under Section 21 of the Act the burden was on accused to show he was innocent in specific circumstances; for instance in case of recovery of weapons from him, or confessions made to someone other than police officers etc[12]. Section 20 of the Act allowed police custody up to 60 days which increased probability of custodial torture for getting confessions[13]. Section 19 of the Act bars persons accused under the Act to appeal except to Supreme Court[14]. Finally, in 1995 this Act was allowed to expire under pressure from various civil society organisations.

Due to several terrorist attacks being carried out and specifically in response to attack on Parliament in 2001, the Prevention of Terrorism Act, 2002 (POTA) was enacted with the objective of strengthening anti-terror operations. This Act had various provisions similar to the draconian TADA and was defeated in Rajya Sabha due to human rights concerns. It was eventually passed in a joint session of Parliament; being only third time in the history of independent India that a joint session was called to pass a law[15]. Within a few months of Act coming into force, reports surfaced of its misuse. The Act was used to crack down on minorities and political opponents. Vaiko, a prominent Tamil politician, was controversially arrested under the POTA by the Jayalalithaa government for his support to Liberation Tigers of Tamil Eelam (LTTE)[16]. What is somewhat ironical is that Ms. Jayalalithaa, as Chief Minister of Tamil Nadu, in May 2014 proposed the release of all seven assassins of Rajiv Gandhi from jail, a request that was rejected by the Supreme Court[17]. This is an example of

[9] Kalhan, Anil (2007) 'Colonial Continuities : Human Rights, Terrorism and Security Laws in India', Columbia Journal of Asian Law available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970503

[10](The) Terrorist And Disruptive Activities(Prevention) Act, 1987 available at http://www.satp.org/satporgtp/countries/india/document/actandordinances/TADA.HTM

[11] ibid

[12] ibid

[13] ibid

[14] ibid

[15]Joint Sitting of The Houses of Parliament, Synopsis of Debates, March, 2002 available at http://parliamentofindia.nic.in/lsdeb/ls13/ses9/260302.html

[16]Malhotra, Inder (2003) 'The use and misuse of POTA', Opinion, The Hindu available at http://www.thehindu.com/2003/10/10/stories/2003101005721200.htm

[17]http://www.thehindu.com/news/national/centre-rejects-tn-proposal-to-free-rajiv-gandhi-killers/article8495286.ece

misuse of the Act for political gains. Crackdown against minorities was particularly severe, especially in Gujarat. While the government invoked POTA against 123 Muslims accused of burning kar sewaks in train, it refused to apply POTA against Hindus accused of riots against Muslims. The provision providing for detention up to 180 days without charge was used to round Muslim youth in jails without sufficient cause[18]. It was only in 2008 that Supreme Court stepped in and held that POTA provisions didn't apply to those accused in the Godhra train burning incident. It ordered the trial to resume under the relevant provisions of the IPC.[19] Though there were improvements over TADA by providing for a review committee for checking arbitrary detention under the act, but an effective review committee in practise never came into being. Sweeping powers of arrest and detention under POTA [20]were applied along communal and political lines as the Act gave a very broad definition of terrorism;

"*Whoever,—*

(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

[18]Malhotra, Inder (2003) 'The use and misuse of POTA', Opinion, The Hindu available at http://www.thehindu.com/2003/10/10/stories/2003101005721200.htm

[19] http://www.rediff.com/news/2008/oct/21godhra.htm

[20] Section 49(2) of POTA available at https://indiankanoon.org/doc/1178183/

Explanation.—for the purposes of this sub-section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism."[21]

After the general elections in 2004 the Act was repealed by the UPA government but 26/11 Mumbai terror attacks led to demands for reintroduction of POTA. Given the notoriety POTA had gained, UPA government under PM Manmohan Singh decided to apply Unlawful Activities (Prevention) Act, 1967 (UAPA) to deal with terror cases rather than re - introduce POTA. Most of the provisions of POTA had been incorporated in UAPA by an ordinance in 2004[22] and were further strengthened by the 2008 amendment.[23]

Another controversial counter – terror legislations are the Armed Forces (Special Powers) Acts which give Indian armed forces certain special powers in what each Act terms as 'disturbed areas'.[24] There are provisions which empower personnel to fire upon, arrest without warrant, search and seizure while providing legal immunity to the officers[25]. There is a vociferous demand for its repeal in the wake of instances of human rights violations in states of Jammu and Kashmir and Manipur. International bodies including United Nations, Human Rights Watch, and Amnesty International have criticised its alleged misuse.[26] A high power panel under retired Supreme Court judge Santosh Hegde was formed in 2013 to probe six encounter deaths in Manipur. The commission concluded that the victims did not have any criminal record[27]. It suggested that the AFSPA was an impediment to peace process in Jammu and Kashmir and north eastern states[28]. It also recommended a review of the law be made every six months to assess its necessity and efficacy in the states where it is in force[29]. A recent positive development is the July 2016 Supreme Court ruling according to which armed forces cannot escape investigation for excesses in course of discharge of their duties

[21]The Prevention of Terrorism Act, 2002 Act No. 15 of 2002 available at http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm

[22]The Unlawful Activities (Prevention) Amendment Ordinance, 2004 available at http://www.satp.org/satporgtp/countries/india/document/actandordinances/the_unlawful_activities__amendord2004.htm

[23] The Unlawful Activities (Prevention) Amendment Act, 2008 (35 of 2008)

[24]The Armed Forces (Special Powers) Act, 1958 available at http://nagapol.gov.in/PDF/The%20Armed%20Forces%20Special%20Powers%20Act%201958.pdf

[25] ibid

[26] 'An analysis of Armed Forces Special Powers Act, 1958' by The Asian Centre for Human Rights, PUCL Bulletin, March 2005 available at http://www.pucl.org/Topics/Law/2005/afspa.htm

[27]Report of The Supreme Court Appointed Commission headed by J. Santosh Hegde available at http://www.hrln.org/hrln/images/stories/pdf/hedge-report-manipur.pdf

[28] ibid

[29] ibid

even in 'disturbed areas'. It was of the opinion that the blanket immunities to security forces must be subservient to the larger principles of human rights[30].

VII. ANTI – TERROR LAWS IN OTHER COUNTRIES

Just as in India globally as well the counter terrorism efforts have been in conflict with human rights. Abuse of the Patriot Act passed in USA after the 9/11 attacks is well documented. While the stated purpose of the act is to "deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes"[31], it has been invoked to invade privacy of citizens and to deny due process of law to the accused. In the name of fighting terrorism gross human rights violations have been reported in western prisons such as Guantanamo Bay (Cuba) and Abu Ghraib(Iraq)[32]. One major criticism of the Act is that "other purposes" often include the detection and prosecution of non-terrorist alleged future crimes[33]. Recently Pakistan's lower house unanimously approved changes to the constitution to allow military courts to try civilian terrorism suspects, after the Peshawar massacre of school children[34]. The political leadership abdicated its democratic responsibilities, and by ceding space to Army, has allowed a soft coup of sorts. Breakdown of a law and order in Syria could also be attributed to its counter terror laws under which democratic aspirations were suppressed and political opponents and their family members targeted[35]. This largely explains lack of success in not being able to defeat the scourge of terrorism. Until human rights of individual are not respected and people are denied their fundamental rights, frustrations of people will mount and youth will feel alienated and fundamentalists will have free play.

VIII. THE WAY FORWARD

India should take the lead in adopting a multi-dimensional approach to terrorism whereby human rights of the individual are not sacrificed while simultaneously ensuring a safe political atmosphere in the country. While it may not be possible to define terrorism in exact

[30]'Ending impunity under AFSPA', Opinion, Editorial, The Hindu available at http://www.thehindu.com/opinion/editorial/editorial-on-supreme-court-order-on-afspa-ending-impunity-under-afspa/article8831739.ece

[31] 'The USA Patriot Act', Department of Government and Justice Studies, Appalachian State University available at http://gjs.appstate.edu/media-coverage-crime-and-criminal-justice/usa-patriot-act

[32]Klein, Naomi 'The true purposes of torture', The Guardian, May 2005 available at https://www.theguardian.com/world/2005/may/14/guantanamo.usa

[33] ibid

[34] http://www.bbc.com/news/world-asia-30598835

[35] 'Counter Terrorism Court in Syria : a Tool for War Crimes', Violations Documentation Center in Syria , April 2015 available at http://www.vdc-sy.info/index.php/en/reports/1430186775#.V7nwuJx97Dc

terms for every situation, few characteristics which distinguish terrorism from other crimes must be prima facie established before extra ordinary provisions of anti-terror laws are invoked. So by suitable amendments in the UAPA, a 5 member committee consisting of retired two High Court Judges, a retired DGP and two members having experience working for promotion of human rights must be set up at the state level to decide whether provisions of anti-terror cases must be invoked by looking for prima facie proof of 4 things;

i. Act of violence or threat to use violence
ii. Particular Cause(political, ideological or religious)
iii. Non state actors
iv. Premeditated act

Unless the above are prima facie proved, state should not invoke the anti-terror law provisions and accused should be tried under ordinary criminal law of the country. This will check arbitrary exercise of power by state and ensure that anti terror laws are not used to stifle dissent and legitimate political aspirations or for crackdown against minorities. Various separatist / regional self determination movements require a long term political solution. They should not be treated merely as law and order problems. Recent peace accord between the National Socialist Council of Nagaland and the Indian government is an example of far – sighted solution. India being a vibrant nation, consisting of diverse cultures, multiple religions and linguistic groups, must ensure inclusive growth so that any group doesn't feel alienated. Respect for individual freedoms and human rights must be ingrained in society and these must not remain dead letters. Human rights and terrorism mutually destruct each other and hence we must strive for a society where every individual leads a dignified existence and only then can we have a terror free world. A more nuanced view is necessary in counter terror efforts. Article 21 of Indian Constitution guaranteeing right to life will only remain a dead letter if state fails to recognize its responsibility not only in counter terror efforts but also to provide for rehabilitation of victims and their families of violence of terrorism. This is their inherent right, human right.

ABOUT CASIHR

The Centre for Advanced Studies in Human Rights ("CASIHR") is a centre for excellence established at one of the premier national law universities in India, Rajiv Gandhi National University of Law, Punjab to undertake and promote advanced study and research in emerging trends in Human Rights. CASIHR aims at conducting multi-disciplinary research in various human rights issues and create working documents serving as advices to policy makers, regularly organizing conferences, seminars and debates on the relevant topics. CASIHR also publishes a monthly newsletter titled The Human Rights Communique, aimed at highlighting human rights issues in India and around the globe.