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CHANGING CONTOURS OF FEDERALISM IN INDIA*

Prof. Dr. P. Ishwara Bhat**

Introduction

The transformation potentiality of Indian Constitution has influenced its concepts and mechanisms to adapt themselves to the changing circumstances and make them work for fulfilling the constitutional aspirations.[1] Federalism being one such concept and mechanism could not stand stagnant. In response to challenges of political change, demands of economic forces, pressures of diversities and thrusts of globalization it has undergone far reaching changes exploring for realization of its potentialities and contributed to social transformation. Its robust growth is towards making it full-fledged to shoulder the constitutional responsibility attached to the concept, a growth reminding of a metaphor of 'living tree'.[2]

Basically, federalism arises from prevalence of two layers of government on the same population of a territory.[3] While national government is the larger spectrum and ensures national unity, at regions governments vary and reflect the interests of regional identity. The division of power provides for vertical relation between central and state government, and horizontal relation between various federating units. Hence, hierarchic and sibling relations shape the working of federalism on constitutional lines. While division of power is a means of control,[4] it is also a purposive device.[5] Purposes such as maintaining unity in diversity, reaping the advantage of larger economy and planned development, tapping the benefits of strategic strength, steering the diplomatic and international relations on the one hand, accommodating the pluralist interests, political participation of people on local issues and economic development at the regional level on the other hand, mould the working of federalism.[6]

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* Revised version of the Key Note Address to the National Seminar on 'Changing Contours of Federalism in India' at Bangalore University on 15/12/2018

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1 P Ishwara Bhat, Law and Social Transformation (EBC, 2009) 194

2 In *Edwards* v. *A-G Canada* (1930) AC 124, 136 Lord SankeyJ gives a metaphor of "a living tree capable of growth and expansion within its natural limits" to depict a Constitution.

3 According to D DBasu, "Federalism constitutes a complex governmental mechanism for governance of a country. It has been evolved to bind into one political union several autonomous, distinct, separate and disparate political entities or administrative units." D DBasu, Comparative Federalism(Nagpur: Wadhwa, 1986, 2008) 5-6.

4 Franz L. Neumann, 'Federalism and Freedom: A Critique' in John Kincaid (ed), Federalism vol. I I I (SAGE: Los Angeles, 2011) 129-143 argues by citing Lord Acton and Montesquieu that check against abuse of power protects freedom.

5 P W Hogg, *Constitutional Law of Canada* (3rd ed. Toronto: Carwell1992) 773

6 Regarding the issue, Why Federate, see Wayne J Norman, 'Towards a Philosophy of Federalism' in John Kincaid (ed) Federalism III (SAGE Publications, 2011) 257-275 at 259-260. Referring to three models of federalism viz., economic federalism, cooperative federalism and democratic (majority rule) federalism, Inman and Rubinfield view that balancing between competing goals of economic efficiency, political participation, and the protection of individual rights and liberties should guide selection of the model. See Inman and Rubinfield, 'Rethinking Federalism' in John Kincaid (ed), Federalism vol. III (SAGE: Los Angeles, 2011) 23-47 at 40.

Along with the interaction and balancing among these purposes, federalism's connections with other constitutional values, concepts and mechanisms such as fundamental human rights, social welfare, democracy and judicial review also come into play influencing the march of federalism. Thus constitutionalism supplies live energy for federalism, and at times, tries to rectify through constitutional amendments and judicial review the slipshod and shortfalls in federalism's functioning. The constitutional amendments and judgments relating to emergency powers, panchayati raj, nagarpalika, cooperative societies, educational right, fiscal relations, Goods and Services Tax have changed the landscape of Indian federalism.[7] Interpretations of constitutional provisions on legislative, administrative and financial relations, by bringing out meanings out of words, silences or relations, have also shaped federalism.[8]Extra-constitutional factors like replacement of single party's dominance by coalition politics, eruption of terrorism, and impact of globalisation, climate change and natural calamities also alter the mode of its functioning. Hence, any discussion on changing contours of Indian federalism should address the reasons behind, and the means and consequences of changes in the federalism's facets.[9] The present paper focuses on these issues.

The Development

Historically, the attempt to devolve some powers of the Centre upon the provinces started with the Government of India Act 1919 whereas concrete effort of bringing three-fold division of legislative powers and formation of Federal Court took place in the Government of India Act 1935. The Act did not reflect State right theory of federalism; princely states were given discretion to opt out of the federal union; and central government's interference was suiting to the colonial policy.[10] Although the Act of 1935 failed to receive popular acceptance, it worked as a model in the constitution making process. But analogy stops there because federalism that has to operate under the constitution has to respond to the values of democracy, human rights, welfare, and development.

The Constitution Makers adopted a pragmatic and suitable approach relating to federalism by integrating with it the aspects of democracy, welfare,

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7 The Constitution (Forty-fourth Amendment) Act 1978 The Constitution (Sixty-fourth Amendment) Act 1990 to Article 356; The Constitution (Seventy-third Amendment) Act, 1992; The Constitution (Seventy-fourth Amendment) Act, 1992; The Constitution (Ninety-seventh Amendment) Act, 2011 cooperative societies; The Constitution (Forty-second Amendment) Act, 1976 transferring 'education' and 'forest' into Concurrent List; The Constitution (Eighty-sixth) Act, 2002 Article 21-A; The Constitution (Sixth Amendment) Act, 1956; The Constitution (Sixtieth Amendment) Act, 1988; The Constitution (One Hundred First Amendment) Act, 2016.

8 *Jindal Stainless* v. *State of Haryana*, *S R Bommai* v. *Union of India*, *State of Karnataka* v. *Union of India*, also see for interpretation of silences and relations, Matthia Klatt, Making the Law Explicit: The Normativity of Legal Arguments (Hart Publishing, 2008) 89

9 *Punchchi* Commission Report

10 K L Bhatia, *Federalism and Frictions in Centre-State Relations: A Comparative review of Indian and German Constitution*s (New Delhi: Deep & Deep Publications, 2001) 28-32

development and human rights.[11]The design and working of Indian federalism under the republican constitution has been admirable as it is successful in bringing national integration, in maintaining national unity against severe challenges, in satisfying pluralist interests in the matter of language, ethnicity, regional considerations and religion, and helping systematic national planning for economic development. Merger of princely States and re-organization of States called for systematic approach based on suitable formula. Language as the sole basis of territorial organization of States was feared as resulting in balkanization whereas people's agitation for linguistic organization of States was becoming violent. An objective and democratic solution consisted in multiple factor approach initiated by the State Re-organization Committee and appropriate policy for a multilingual society. For two decades since 1950 same political party ruled at both the layers, and the Centre-State conflicts were settled at party level. With the emergence of multi-party system and coalitions, different political parties prevailed in Centre and the States and real federalism started functioning. Demand for more State power, more financial resource, protest against Centre's intervention and dissatisfaction against abuse of emergency powers in 1970s raised new issues for debate on federalism. Post-emergency amendments provided effective safeguards against abuse of power. S R Bommai and other judgments restored the federal balance. The growth path of federalism had witnessed frequent challenges. Inter-State river disputes became complex problems disturbing social harmony. Serious challenge to federalism was outbreak of separatist and terrorist movement in Punjab. Restoration of democracy from turbulent days is the achievement of federalism. Restoration of secularism and communal harmony in 1990s was another challenge successfully handled by federalism.

In contrast to the collapse of federalism in Soviet Union, which was supposed to be strong with iron hand discipline, and other examples of breakdown in Europe, Asia and Africa, the Indian experiment with asymmetric federalism has provided an example of amazingly successful model of federalism in keeping the national unity intact along with maintaining the federating units, ethnic communities and language groups mostly satisfied. Its strength consists in dynamism for integrated and balanced development. Not only the third world countries but also unitary states try to gather from Indian lessons about the way in which creative combination of democracy and federalism could be forged through asymmetric federalism and multiculturalism.[12] Overarching of the values of participative democracy and making it meaningfully workable is another notable factor. Making fiscal federalism a forum for just and equitable distribution of revenue resources and imaginative planning of centrally sponsored schemes for supporting welfare

11 See Constituent Assembly Debates Vol. IX pp 116-125, 972-981; Vol. I, 93-99. Especially the views of K M Munshi, T TKrishnamachari, Dr B R Ambedkar, Jawaharlal Nehru, K Santanam.

12 JayampathyWickramaratne, *Towards Democratic Governance in Sri Lanka* (Institute of Constitutional Studies, 2014) 29-30

rights is another factor that has made the Indian model worth-emulating. Economic justice and equitable growth without regional disparity are the core values that invigorate horizontal federalism in sharing the natural resources like inter-state river and responsibilities of ecology attached to them.

Conceptual analysis

Indian federalism does not reflect any specific rigid theoretical framework as it neither recognises parity between the centre and the states in the matter of autonomy[13] nor parity amidst the states in terms of their representative ability at the central level.[14] It is dynamic and flexible, and involves intensive process of balancing through cooperative effort amidst the participating components.[15]Traditional understanding of federalism contemplated that the central and state governments were each within their sphere coordinate and independent.[16]William Riker viewed US federalism as a product of bargain, a coming-together for the purpose of constraints to promote blessings of liberty.[17] Calling this as "Demos-constraining model", Alfred Stepan refers to the other model of federalism shaped by countries like India as one of holding-together through asymmetric scheme, which he calls as "Demos-enabling model".[18] The latter model of federalism places equal responsibility upon the central and state governments to uphold the values of liberty, equality, justice and fraternity and render both the level of governments interdependent for economic and overall development. Collaborative federalism, which is a reflection of such an approach, means that they are "mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government."[19]'Cooperative federalism', which is alternatively used to refer to this arrangement, contemplates according to Geoffrey Sawer, reasonable degree of autonomy on the part of federating units

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13 In extreme circumstances of need recognised in the Constitution, the Central Government may assume legislative power of the State (Articles 249, 250, 252 and 253), issue directions to the states (Article 256), and take over state administration in case of breakdown of constitutional machinery in the State (Article 356)

14 The composition of Council of States, which is the federal second chamber, is such that the number of representatives from the states to it is not uniform but partly varies with population. Article 80 read with Fourth Schedule.

15 See for discussion, M P Jain, *Indian Constitutional Law* Fifth Ed (Nagpur: Wadhwa, 2005) 477-8, 706-7, 724-7

16 K C Wheare, Federal Government

17 William H Riker, *'Federalism' in Nelson W Polsby et al (eds) Handbook of Political Science* vol 5 (Reading, Massachusetts, 1951) 93-172

18 Alfred Stepan, 'Federalism and Democracy' in John Kincaid (ed) Federalism III (SAGE Publications, 2011) 193-207.

19 E S Corwin, Constitution: What it means?; according to Cameron and Simeon, it is "The process by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behaviour through the exercise of its spending power, but by some or all the governments and the territories acting collectively" cited in paragraph 113 of the judgment, Government of NCT *Delhi* v. *Union of India* MANU/SC/0680/2018; According to Martin Painter, it involves bringing all governments at all levels together as equal partners based on negotiated cooperation for achieving the common aims and resolving outstanding problems.

to bargain about cooperation.[20] Thus negotiation and coordination, avoidance of conflict and promotion of concerted efforts to achieve the constitutional goal become essential aspects of cooperative federalism. Scholars like M P Jain and Granville Austin have described Indian Constitution as providing for cooperative federalism where two levels of governments cooperate through the process of discussion, persuasion and compromises and not by show of power.[21] The Constitution Makers had paid their thoughts about avoidance of too much centralization which reduces the States into municipalities and were convinced that central and state governments were not co-equal sharers of power.[22] In S R Bommai case[23] Justices A M Ahmedi, P B Sawant, K Ramaswami and B P Jeevan Reddy have engaged in discussion of the nature of Indian federalism. P B Sawant J refers to independent constitutional existence of states to perform an important role in political, educational and social life of the nation. Ramswami J considers federalism as basic structure of the Constitution, which gives no scope for secession by the states from the union. Jeevan Reddy J views that since states are supreme within the spheres allotted to them, the Centre cannot tamper with their powers. Dipak Misra J in NCT Delhi case views that maintaining federal balance is the responsibility of the judiciary.[24] Thus academic debate about proper characterisation of Indian federalism with nomenclatures such as quasi-federalism, federalism with strong unitary bias, etc, is now replaced by analysis of integrated functioning of the two layers of government.

National unity

The objectives of keeping the national unity intact and using the federal economy as driving force of development have tilted the balance in favour of strong centre.[25] The very territorial organization of federal units can be unilaterally shaped by the Parliament by making ordinary law,[26] although in practice stable public opinion and persuasive demand of the people influence drawing of internal map.[27] The factors of linguistic and ethnic diversities, administrative convenience and developmental considerations are addressed by adherence to the policy of unity in diversity. Flexibility in territorial organization of States on linguistic or ethnic lines by merger of 560 Princely States and various Provinces and centrally administered territories became possible with this approach. Creation of autonomous ethnic pockets through

20 Paragraph 112; A H Birch views that cooperative federalism provides for partial dependence of regional governments upon central government's grants and central governments depending upon regional governments to promote developments. (Federalism p. 305)

21 Supra n 3

22 Dr B R Ambedkar, Shri T TKrishnamachari

23 S R Bommai v. Union of India, (1994) 3 SCC 1

24 Paragraph 131; also see *UCO Bank* v. *Dipak Debbarama* (2017) 2 SCC 585

25 Ibid 477; P Ishwara Bhat, '*Promoting the Unity and Integrity of the Nation while maintaining Diversity and Pluralism under the Constitution' in N R Madhava Menon, Nehru and Indian Constitutionalism* (Mumbai: Indus Source book, 2015) 68-9

26 Article 3

27 P Ishwara Bhat supra n 7 p 74-83

the Fifth and Sixth Schedule in some States where indigenous people have notable concentration, and special provisions governing some States including Jammu and Kashmir have produced asymmetric federalism, which has been instrumental in maintaining national unity.[28] By satisfying sub-national emotional considerations and by rationally compelling them to be loyal to the nation cooperative federalism has supported the cause of national unity.

Emergency powers against situations of external aggression, armed rebellion and breakdown of constitutional machinery in the states have great potentiality of maintaining national unity. Secessionist movement could be successfully dealt in 1960s by strong hand of federalism through maintenance of rule of law. Constitutional amendment to enable restriction on freedom of speech, expression and assembly for protection of sovereignty and integrity of India has further added to this competence. State emergency power under Article 356 could effectively deal with separatist movement for Khalistan in Punjab and bring normalcy. Thus coercive side of federalism also safeguards national unity.

Looking at the palliative and coercive sides of the mission to keep national unity intact, and the experience of the nation that the working of constitutional scheme has successfully contributed to the goal of national unity, it is possible to appreciate the inherent strength of the federalism's scheme.

Federalism's contribution to Fundamental Rights and Social Welfare

Unlike US where federalism had initially obstructed incorporation of Bill of Rights against the States, and it took more than a century for judiciary to rectify its own errors,[29] in India the Constitution obligates the Union government, Parliament, State Governments, Legislatures, local and other authorities to respect Fundamental Rights and implement the Directive Principles of State policy.[30] The collaborative efforts of the Union and States are implicit as the Union laws made under Article 35 are to be implemented by the States and the centrally sponsored schemes for giving effect to the directives are to be implemented by the States. The mandate of Article 38 (1) and (2) operates upon both the levels of Government. Fundamental rights to food, health, environment, education and means of livelihood become meaningful when States fulfil their responsibilities under the laws and administrative schemes (such as Sarv Shikshan Abhiyan, MNREGA, Food Security, Janani Suraksha Yojana etc,) on these matters. Failure of States in implementing them results in regional disparity, inequality and denial of rights. Lack of development and unequal facilities in States make inroad to rights. Acute variation of human development index and disparity in poverty alleviation programmes in States shows unequal access to basic necessities of life. The Supreme Court's

28 Articles 370, Kashmir; 371-A, Nagaland; 371-B, Assam; 371-C Manipur; 371-D Andhra Pradesh; 371-F Sikkim; 371-G Mizoram; 371-H Arunachal Pradesh; 371-I Goa and 371-J Karnataka

29 *Brown* v. *Board of Education*, 347 US 483 (1953)

30 Articles 12, 13, 36 and 37

approach in PUCL (janani suraksha yojna) in compelling the states to effectively implement centrally sponsored schemes of welfare establishes the importance of cooperative federalism in ensuring welfare rights.[31] Any feeling that to be born in a particular State is a curse or blessing does not speak well about the relationship between federalism and human rights or social welfare.[32]

Deliberate denial of rights and privileges or any discrimination in their access to people having domicile of other states on account of place of birth, language, caste, residence violates right to equality. The judgment in V N Sunanda Reddy case[33] to the effect that language based discrimination in access to public employment is unconstitutional is an example of rectifying the errors of State government in not following the imperatives of multicultural federalism. When identification of backwardness is according to the social and other relevant conditions prevalent in that State, the State-specific identification alone becomes appropriate to identify the beneficiaries, as decided by the Supreme Court recently. It is not clear whether negation of power of the State to go for inner reservation within the Scheduled Castes as laid down in E V Chinnaiah is rectified.[34] Possibility of abuse or failure of federalism is to be made good by collaborative efforts of States. A series of cases relating to domicile based discrimination by States in the matter of access to public employment has shown tendency towards upholding right to equality. But in matters relating to access to professional education, State's expectation of encashing the benefits of its investments for the advantage of people of its domicile has been recognised within limits.

Maintenance of law and order, which is a responsibility of States, is a pre-requisite for enjoyment of fundamental rights. Central Government's interference to set right the things through constitutional means adds to better protection of rights. As federalism cannot be tyrannical, but only be democratic both the layers of government have to respect human rights.[35]

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31 *PUCL* v. *Union of India*, AIR 2008 SC 495

32 The Supreme Court in *Jindal Steel* v. *State of Haryana* AIR 2016 SC 5617 paragraph 182 observed (per N V Ramana J) citing from NITI Ayog's statement, "India that is Bharath is said to be a Country with economic unity. But such assertion cannot be sustained for the reason that 82.° Meridian or Indian Standard Time line seems to starkly divide India broadly as affluent West and destitute East. Top 5 states share 44.87% of India's total economy.Five states of South India share 25.98%. Eight States of North-East India share only 2.64% of economy. 13 States/UTs have Gross State Domestic Product less than Rs. 1 lakh Crore.While the growth in 2013-14 in Maharashtra was pegged at 8.71% while Rajasthan recorded mere 4.6% growth at 2004-2005 prices. As per Tendulkar formulation Bihar has 54.4% population below poverty line while Jammu Kashmir has only 13.2%. Population in Uttar Pradesh was pegged at 199,812,341 while Kerala is 33,406,061, as per Census 2011.Literacy Rate in Kerala is 94% while in Bihar its 61%.Sex ratio in Kerala is 1084 while in Haryana is 879. In Andhra Pradesh 12.04% live in slums whereas in Assam only 0.63% live in slums." Also see, P Ishwara Bhat, '*Why Federalism Matters in Elimination of Disparities and Promotion of Equal Opportunities for Positive rights, Liberties and Welfare?*' 54 Journal of Indian Law Institute (2012) 324, 335

33 *V N Sunanda Reddy* v. *State of AP* AIR 1995 SC 914

34 *E V Chinnaih* v. *State of Andhra Pradesh*, (2005) 1 SCC 394

35 M P Singh, '*Federalism, Democracy and Human Rights: Some Reflection'* 47 Journal of Indian Law Institute (2005) 429- 446 at 445

For availing special protections to land reforms and economic reforms laws against constitutional challenges, getting President's assent to the concerned Bills under Articles 31-A and 31-C and getting incorporation into the Ninth Schedule (Article 31-B) are the constitutional requirements.[36]Cooperative federalism has greatly contributed by successfully arranging for the dynamism of economic reforms. The Supreme Court in Jindal Stainless has viewed that Directive Principles of State Policy should be utilized for interpreting every part of the Constitution.[37]

The special status for Jammu and Kashmir under Article 370 and non-applicability of fundamental rights to equality and property to persons outside Kashmir under Article 35-A had created an anomaly. If criteria of constitutional morality are applied by invoking the concepts of equality, dignity and fraternity the temporary character of Articles 370 and 35-A comes to the surface. The Article 35A gives protection to existing laws in force in the State and to any law enacted after 1954 by the State legislature, defining the classes of 26 persons treated as permanent residents of the State, conferring on permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects employment in the State Government, acquisition of immovable property in the State, settlement in the State or right to scholarship and other aids granted by the State. Removal of both by a combined action of the Executive and Legislature is claimed to bring greater equality to people outside Kashmir.[38] The fact that some of the social justice oriented constitutional amendments such as those provided for reservation in promotion to the Scheduled Castes and Scheduled Tribes is not applicable to the people of Jammu and Kashmir[39]or that State of Jammu and Kashmir can discriminate between the residents and non-residents of Jammu and Kashmir in payment of compensation[40]exhibited excessive and arbitrary nature of special status. Undoing of both the Articles 370 and 35-A by Presidential order based on an Act of Parliament[41] speaks about federalism's rectifying role for favouring fundamental rights.

On the whole, federalism's relation with human rights and social welfare calls for collaborative efforts from the side of States and the Union.

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36 See for a discussion of range of legislations incorporated into Ninth Schedule under Article 31-B, see I R *Coelho* v. *State of Tamil Nadu*, AIR 2008 SC

37 *Jindal Stainless* v. *State of Haryana* AIR 2016 SC 5617 Paragraph 186

38 The Constitution (Application to Jammu and Kashmir) Order, 2019 (C.O. 272) issued on 7/8/2019 on the basis of resolution by 2/3 majority in both Houses of parliament passed on 5th August 2019.

39 *Ashok Kumar* v. *State of Jammu and Kashmir* AIR 2016 Jammu and Kashmir1

40 *Sudesh Dogra* v. *Union of India* AIR 2014 SC 1940; but see *State Bank of India* v. *Santosh Gupta* AIR 2017 SC 25 where the Court observed that even qua the State of Jammu and Kashmir, the quasi federal structure of the Constitution of India continues, but with the aforesaid differences. The court rejected the argument that the Constitution of India and that of Jammu and Kashmir have equal status. Article 1 of the Constitution of India and Section 3 of the Jammu and Kashmir Constitution makes it clear that India shall be a Union of States, and that the State of Jammu and Kashmir is and shall be an integral part of the Union of India.

41 Parliament's session in July 2019 had adopted such a course of action.

Overarching democracy and federalism

Bridging of the relations between the two great value matrices of the Constitution, viz., democracy and federalism, has shown enormous potentiality of strengthening both of them through mutual support. Democracy is not only compatible with federalism but is also an imperative to it. So also, is vice-versa. The proposition that democracy protects federalism by countervailing fissiparous tendencies is true in US, Canada and India.[42] Equally true is the experience of Australia and India that both the concepts grow together. Diversity is the essential feature of federalism whereas equality is the driving force of democracy. Respecting the equal worth and equal opportunities of diverse geographical units is the path of federal democracy. Both rely on constitutionalism and both aim at realization of objectives stated in the preamble.

In the Indian context, states (whether Princely or Provincial) were not in a bargaining position in front of waves of democratic struggle for freedom and also the popular thrusts for linguistic organisation of States. Originated as "Demo-enabling", combination of democracy and federalism was implicit in the very texture of federalism.[43] That was the reason for avoiding over representation and under representation of States in the federal second chamber. James Buchanan considers federalism as an inclusive political order to democratically realise the advantage of market, inter-state and international trade and commerce.[44] Rose-Ackerman views strong local level government as a source of inter-governmental bargains[45] whereas John Kincaid considers that inter-jurisdictional and inter-government competitions bring all issues relating to marketplace, property right, religious and ethnic questions into interplay, which call for democratic process to operate. Political parties and pressure groups join their hands in this process.[46]Further, accommodation of interests of ethnic minorities through 'ethno federalism' keeps democracy, federalism and national unity duly satisfied.[47]Jared Sonnicksen views that coupling of democratic intra governmental and federal intergovernmental division of powers has generated compounded representation and converted tense relationship into political dynamism.[48]Thus, theoretically and historically

42 Protection against secession and successful handling of civil war through assertion of democratic forces was possible in these countries.

43 Alfred Stepan, '*Federalism and Democracy' in John Kincaid (ed) Federalism III* (SAGE Publications, 2011) 193-207.

44 James M Buchanan, '*Federalism as an ideal Political Order and an Objective for constitutional Reform' in John Kincaid (ed) Federalism III* (SAGE Publications, 2011) 13-22.

45 Susan Rose-Ackerman, '*Does Federalism Matter? Political Choice in a Federal Republic' John Kincaid* (ed) Federalism III (SAGE Publications, 2011) 36-61; also see Albert Baton, 'The existence of Stability of Jurisdictional Competition' in John Kincaid (ed) Federalism III (SAGE Publications, 2011) 63-79.

46 John Kincaid, 'The Competitive challenge to Federalism: A Theory of Federal democracy' 81-105

47 Henry E Hale, 'Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse' in John Kincaid (ed) Federalism III (SAGE Publications, 2011) 315-341.

48 Jared Sonnicksen, Federalism and Democracy: a Tense Relationship' https://www.researchgate.net/publication/324454785

compatibility between federalism and democracy is well established.

When participative democracy at grass root got neglected, federalism picked it up through 73rd and 74th constitutional amendments and made democracy strong by empowering women, scheduled castes and scheduled tribes, and by making periodical election, accountability, social justice programme and gramasabha a compulsory feature. Reliance on Grama Panchayat for implementation of the centrally sponsored measures such as MNREGA, Sarvashikshan Abhiyan etc, speaks about the federalism's close links with grass root democracy. Similarly, federalism came to the rescue of cooperative societies by making the basic principles of cooperation, periodic election, and practice of social justice mandatory for the states in their governance. Even the formality of ratification by states to the constitutional amendment under Article 368 (2) was not taken seriously.[49] Accommodation of diverse ethnic interests in North Eastern States through recognition of indigenous self governance system and security of their social customs, property rights and opportunity for jhum cultivation points out federalism thriving on the basis of democracy at the local levels.[50] When parliamentary form of government was getting crushed under the weight of naked immorality of political defection at various states, and state governments were tottering like unstable dry leaves,[51] restoration of democracy through constitutional amendment was the task undertaken by the initiative of federalism.[52] Thus, in bringing new and wide varieties of players of constitutional game to the stadium of democracy, the role of federalism is made substantive. Further, the populist approaches in the States to please the local communities at the cost of other communities or non-domiciles are set right by the mechanism of federalism.

On the other hand, we cannot forget what democracy has done to federalism. In the process of territorial organization of States the power vested in the Parliament was applied in response to mass movements and stable pressurising. It has become almost a convention that when the demand for separate state becomes mature through consistent agitation by people and it is administratively and politically viable Parliament bestows statehood the territorial entity. Language, ethnicity, economic development, and administrative convenience have emerged as the criteria for casting and recasting the political map of India. The Supreme Court in S R B ommairelied upon democratic principle in checking the abuse of power under Article 356 to impose President's rule.[53] The view of Dr B R Ambedkar that President's rule is an exception, to be rarely used and should vanish from practice in course of

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49 *Rajendra N Shah* v. *Union of India*, (2013) 3 SCC Guj 2242

50 See for discussion, Harihar Bhattacharyya, '*Federalism Over Democracy in India: Dialectics of Diversity Claims over Equality Claims'* 14 US-China L Rev 531 (2017)

51 Subhash C Kashyap, *Anti-Defection Law*

52 The Constitution (Fifty-second Amendment) Act 1986

53 *S R Bommai* v. *Union of India*, AIR 1994 SC 1918

time in view of democracy in States[54] helped the Court in this reasoning. Again in Government of NCT of Delhi case the Supreme Court engaged in discourse on democracy while confining the scope of Lieutenant Governor's discretionary power to public order, police and land, and ensuring principles of cabinet form of government in rest of the domain.[55]Democratic debates in National Development Council not only provide for participative approach on crucial matters of economic development but act as buffer against impact of globalisation.

Division of legislative powers

The Constitution envisages distribution of legislative powers between the Centre and the States[56] by creating three functional areas: an exclusive domain for the Centre; and exclusive sphere for the States; and a concurrent area where both may operate simultaneously subject to superiority of the Centre over the States. List I contains legislative subjects of national importance where uniformity of legal policy is required. List II contains matters of regional importance where diversity and local variation are necessitated. List III has subjects of common importance where desirable national policies coexist with regional variation.[57] Absence of strict bifurcating categories and use of general words in legislative entries have facilitated flexibility.[58] Residuary legislative power vests with the Union.[59] Overall subjection of state legislative power to that of the Centre,[60] and clear provision for prevalence of central law in case of repugnancy with State law in the Concurrent area unless the State law obtains the assent of President,[61] is the constitutional arrangement. Territoriality principle is applicable.[62] Authorisation by the States to the Centre to enact laws in State List and the power of the Council of states (Second Chamber of Parliament) to authorise the Parliament by special majority to enact laws in the State List for a limited duration of one year have provided for further flexibility.[63]

The Central legislative power to implement the international treaties or conventions even by enacting laws in State List has been another source of shift of power.[64] In light of fast growing areas of international environmental law and human rights law through international treaties, this position has great

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54 Constituent Assembly Debates, Vol. IX p 133

55 *Government of NCT of Delhi v. Union of India*, MANU/SC/0680/2018

56 Article 245 read with Article 246 and Seventh Schedule

57 Such characterization of powers can be found in *Cooley v. Board of Wardens*, 53 US 299[1852]; M P Jain, p. 482

58 *Harakchand Ratanchand Banthia* v. *Union of India*, AIR 1970 SC 1453; *M/s. Hoechst Pharmaceuticals Ltd.* v. *State of Bihar*, AIR 1983 SC 1019

59 Article 248

60 Article 246 (1)

61 Article 254

62 *Union of India* v. *Azadi Bachao Andolan*, AIR 2004 SC 1107; *Bharat Aluminium Co*. v . *Kaiser Aluminium Technical Services* Inc., AIR 2012 (Supp) 444

63 Articles 252 and 249 respectively

64 Article 253; see for example Environment Protection Act, 1986

implication. Federalism becomes a funnel to receive what Malcom Shaw considers, 'the human and social side of international law'.[65] While this is a positive scenario, problematic situation arises when the Central Government signs international treaties on trade and other related matters whose implementation makes inroad to state's traditional power to regulate production and distribution of goods and services. India witnessed adverse impact of WTO upon agriculture, traditional marketing system and investment sector. The National Commission to Review the Working of the Constitution has expressed desirability of bringing the components of cooperative federalism in the treaty making and implementation process by consultation with States and by involvement of States in treaty negotiation.[66] When a composite nation like UK as a whole participates in Brexin and Brexit policy decisions, a modest airing of views about agriculture related trade or foreign direct investment and retail market by Indian states can be regarded as an imperative of cooperative federalism. Such participation gives legitimacy and moral bond for international policies as in Canada.[67] In the era of globalization federalism's ability to absorb shock and act as a punch bag for providing solution in making the international treaties acceptable to people or prepare for new international scenario is a challenging task. The process of cooperative federalism underlying the India-Bangladesh Land Border Agreement speaks about creative ability for collective decision at the national level in consultation with federating units.[68]

Trends in fiscal federalism

In the matter of financial relation, which is the heart of federalism, a Constitution ought to aim at equilibrium between resources and functions at both levels. But the Indian constitutional scheme fails to provide for ready-made equilibrium but relies on cooperative federalism to fulfil the task.[69] The Centre has much stronger financial capacity than the States due to lucrative tax heads (income tax, corporate tax, customs and excise) at its disposal and vast geographical area for netting the tax.[70] This is in order to meet heavy commitments for defence and centralised planning other services of national importance. On the other hand, States in spite of their vast responsibilities of welfare, social service and development have tax heads of lesser taxable capacity (agricultural income, land revenue, property tax) that too within their narrow territorial areas.[71]Since Central coffer is rich, regional imbalance in

65 Malcolm N Shaw, *International Law (*Fourth ed. 1998) 51

66 Report of the National Commission to Review the Working of the Constitution 2000

67 Peter W Hogg, *Canadian Constitutional Law* (1992)

68 The Chief Minister of State of West Bengal was invited and involved in various levels of negotiations.

69 M Govinda Rao and Tapas K Sen*, Fiscal Federalism in India: Theory and Practice (*Macmillan, 1996) 14-19.

70 Income tax other than agricultural income tax, custom and export duties, corporation tax, tax on capital assets, estate duty, service tax, tax on inter-state trade transaction, tax on negotiable instruments, terminal tax on goods and passengers etc., come under the domain of Central law.

71 State tax resources mainly include land revenue, agricultural income, land and building, mineral rights, excise duty on alcoholic products, entry tax for goods, and tax on sale or consumption of electricity.

development can be taken care of through equitable approach. There are inbuilt schemes within the Constitution providing for sharing of revenues and devolution through grants and loans. Constitutional amendments (80th, 88th and 101st) have expanded the opportunities of States for larger share in the revenue. The process of bringing constitutional change involved negotiation, deliberation and debate from different perspectives from the side of the Union and states, reflecting their collaborative efforts. Cooperative federalism has been working dynamically in the sphere of collection and sharing of revenue in spite of some limitations and irritations.

The constitutional bodies like Finance Commission and GST Council and administrative bodies like Planning Commission (presently NEETI Ayog) and National Development Council have significant role in the working of fiscal federalism.[72]Since these bodies have representation of States andare expected to act objectively and best interests of the nation, equitable approaches can be perceived.[73]In addition, the centrally sponsored schemes make the States to overcome the problem of the inadequate fund for varieties of welfare programmes.[74]

Two types of fiscal imbalance arising from skewed situation of financial powers are vertical fiscal imbalance and horizontal fiscal imbalance. M Govinda Rao states that the former had a predicament of States depending upon central fund to the extent of 57 % of their total expenditures in 2000-01.[75] The latter had a situation of vast difference between advanced State and poorest State in Gross State Domestic Product to the tune of 4. 8 times (Punjab Rs 23,254: Bihar Rs 4813). This called for equitable gap filling approach from the side of Finance commission and Planning Commission. The Finance Commission launched a scheme of pooling 15 % of revenue deficit grants and adding equal amount to it to create incentive fund depending upon population of the State. The Planning Commission earmarked 30 % of the funds to special category States; 90 % of the earmarked funds was to be distributed as grants and the rest as loan. Out of the rest of the fund, viz., 70 %, 30 % was to be given as grants and the rest as loan in accordance with a given formula. Another source of transfer was distribution from Centrally Sponsored Schemes for specific purposes with or without matching grant. SarvShikshan Abhiyan, Janani Suraksha Yojna and in total 262 schemes were open for such distribution. According to Rao, 40% of the total plan assistance was available for such distribution. Imposition of conditions for complying with the scheme, offer with disincentives, and failure of states to avail the benefit were obstructing transfer.

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72 M Govinda Rao and Tapas K Sen, 27-9, 143-4

73 See Article 280

74 M Govinda Rao and Nirvikar Singh, *Political Economy of Federalism in India* (New Delhi: Oxford University Press, 2005) 205

75 M Govinda Rao, *Changing Contours of Fiscal Federalism in India*

The passing of constitutional amendment in 2016 to introduce GST, the scheme and mechanism for its working, enactment of GST law and its commencement – all were outcomes and means of cooperative federalism. Goods and Services Tax is destination based indirect tax subsuming all types of indirect taxes of central and state governments. GST Council, headed by Union Finance Minister and participated by Finance Ministers or delegates of all the States as members is a decision making body.[76] Fixation of GST for various products and services payable to central and State governments is to be done by GST Council.[77]Special provisions can be made by the GST with respect to hilly States.[78]It is hoped that in setting right federal imbalances, this development is likely to make substantive contribution. On the whole the trend is clearly towards filling the financial deficits of states, elimination of regional disparities by empowering the States lagging behind in the developmental front.

Administrative relations: gentle or coercive?

Administrative relations focus on constitutionalism, and employ coercive mechanism like issuing of directions to the States,[79] and imposition of President's rule for restoration of governance in accordance with the Constitution.[80]Keeping in mind the asymmetric feature of federalism the constitutional contemplation about Centre giving binding directions to states in the matter of linguistic harmony, human rights, tribal development or communal harmony has great implications and potentialities for constitutionalism. But direction mechanism is less employed for these purposes.[81]In times of national emergency, the federal structure gets altered into unitary features.[82]Judiciary as an impartial umpire has consistently insisted on objectivity, non-abuse of power and minimal use of Article 356.[83]Appointment of Governor by the Centre has given scope for peripheral intervention in State politics.[84] But on matters like centre's power expropriating State's property[85] or inquiry into State Ministry's conduct,[86] judicial approach has tilted in favour of centre. Courts consider federalism as basic structure, which is beyond the amending power. Only with the ratification by not less than half the number of States that amendments affecting legislative relations

76 Article 279-A (2)
77 Article 279-A (4)
78 Article 279 –A (4) (g) States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttar Khand.
79 Articles 256, 257
80 Article 356
81 K L Bhatia, loccit 97-98
82 Article 353 (1)
83 *S R Bommai* v. *Union of India*, AIR 1994 SC 1918; *Rameshwar Prasad* v. *Union of India*, AIR 2006 SC 980
84 Articles 153 and 156; Chapter V of the Report of the Commission on Centre-State Relations (1988) 111-137
85 *State of West Bengal* v. *Union of India*, AIR 1963 SC 1241
86 *State of Karnataka* v. *Union of India*, AIR 1978 SC 68

and judicial powers or institution would be permissible under Article 368.[87] Opportunity for participation of States in the amendment process has added to the strength of federalism and limits the unilateral power of the Union. The negotiation with States for ratification of 101st Constitutional Amendment Act on GST has shown great potentiality of cooperative federalism. Co-ordination between States through the functioning of Inter-State Council is contemplated subject to President's satisfaction about its need in the public interest.[88]

Horizontal federalism

Horizontal relation with neighbouring states due to their geographic location within a river basin and the need to protect environment through integrated efforts has called for functioning of horizontal federalism. Maintenance of law and order situation due to the challenges spread of naxalism, terrorism etc across the nation has also called for cooperation among States and also the union Government.[89] Regarding inter-state water dispute on sharing of resource judiciary has developed substantive law in course of time partly taking into consideration the internationally established principles and the constitutional principles relating to equity, development and justice.[90] Almost all states have faced the problem of inter-state water dispute about quantification of availability of water, their share, protection of existing use, heightening of dams, rehabilitation of people, ecological balance, inter-basin transfer, prioritisation of use etc.[91]Unfortunately negotiation, agreement and settlement are not yielding results.[92] Litigations before tribunals and the Supreme Court on various issues last for long duration.[93] The binding character of the awards is sometimes questioned[94]or obstructed through political interference, sometimes by enacting legislations neutralising the effect of tribunal award.[95]Sometimes, Supreme Court's jurisdiction is challenged.[96]In view of recommendations by the Centre- State Commission Report (Sarkaria Commission) the awards of Inter-State River Water Dispute Tribunals were

87 Article 368 (2) Proviso

88 Article 263

89 Punchchi Commission has dealt on this issue.

90 *State of Karnataka* v. *State of Tamil Nadu*, AIR 2018 SC (Supp) 2621 Paragraphs 362 to 379

91 *State of Karnataka* v. *State of Andhra Pradesh*, (2000) 9 SCC 572; AIR 2001 SC 1560; *State of Orissa* v. *State of Andhra Pradesh*, (2010) 5 SCC 674; *State of Punjab* v. *State of Haryana*, (2011) 12 SCC 726; *Narmada BachaoAndolan* v. *Union of India*, (2000) 10 SCC 664; AIR 2000 SC 3751

92 P Ishwara Bhat, '*Constitutionalism's Challenges and Responses in the Domain of Inter-State Water Dispute Law; An Analysis Towards Enhancement of Social Acceptability'* in P Ishwara Bhat (Ed) Inter-State and International Water Disputes: Emerging Laws and Policies (Eastern Book Co: Lucknow, 2013) 27-58

93 For example resolution of Cauvery river dispute took 30 years.

94 *State of Karnataka* v. *State of Tamil Nadu*, AIR 2018 SC (Supp) 2621

95 Karnataka Cauvery Basin Irrigation Protection Ordinance 1991 had indirectly impeded the implementation of interim award given by the Cauvery Tribunal. The Supreme Court in its advisory opinion In the matter of Cauvery Water Dispute Tribunal AIR 1992 SC 522 declared the Ordinance and Act as unconstitutional as being inconsistent with the Inter-State Water Dispute Act 1956 and the constitution. Also see *State of Haryana* v. *State of Punjab,* AIR 2002 SC 685; (2002) 2 SCC 507; Kerala Irrigation and Water Conservation (Amendment) Act, 2006 relating to Mullaperiyar dam

96 *State of Karnataka* v. *State of Tamil Nadu*, AIR 2018 SC (Supp) 2621

made binding through amendment to the Inter-State Water Disputes Act. Experience has taught that treating river basin as single entity irrespective of political boundaries, and developing through integrated efforts by paying due regards to ecology and distributive justice is the imperative of water constitutionalism which is a facet of collaborative federalism.[97] Pollution of Interstate River by upper riparian State has also caused serious problems as experienced in the matter of Ganga and Cauvery rivers.[98]Similarly, the air pollution occurring from burning of stubbles and industrial activities in Punjab and Haryana resulting in further deterioration of air quality in National Capital territory of Delhi is asking for horizontal federalism's constructive intervention to prevent and remediate air pollution.[99] Public trust theory demands the states to preserve common natural resources free from pollution. Another problem occurred in horizontal federalism is disputes regarding boundaries of States.[100] There is need for avoiding such disputes by self restraints.

Conclusions

Federalism dwells in relations. It grows strong and fulfils its mission by relating its actions with other concepts and mechanisms. Well planned federalism is a fort of protection against nation's disintegration. Harnessing its social, cultural, economic, and developmental and welfare dimensions by integrated efforts of various components of federal system along with democracy has potentiality of realizing the basic aspirations of the polity.[101] Symmetry or parity is not a critical factor when socio-political reality is different. A multicultural society with different levels of economic achievements and problems in its vivid geographical areas calls for an approach of justice and equity. A multi-layered federalism is a dynamic phase truly representative of complex polity. The mechanisms of inner control of federal polity need to be used with care and perspective of purpose. Continuous vigilance, self-restraint and proportionality in exercise of power – economic, social and political – add to the quality of federalism. Using federalism as an instrument of overcoming regional imbalance by effective implementation of centrally sponsored programmes relating to education, employment, food, health, housing and social security is a new challenge in order that federalism would really matter in a big way for welfare and socio-economic rights.[102] In view of the drastically varying human development index in various states

97 *Connecticut* v. *Massachusetts*, 282 US 660 (1931); *Kansas* v. *Colorado,* 206 US 46 (1907)

98 Krishnadas Rajgopal, 'TN moves SC against Karnataka for polluting Cauvery' The Hindu, June 05, 2015. http://www.indiaenvironmentportal.org.in/content/17/purifying-the-ganga/ 31/10/2019

99 https://timesofindia.india times.com/life-style/health-fitness/health-news/top-8-main-causes-for -air-pollution-in-delhi/articleshow/61626744.cms visited on 4/11/2019. The Hindu, 3/11/2019 and 4/11/2019.

100 State of Maharashtra has contested the boundary settlement with Karnataka.

101 P Ishwara Bhat, supra n 7

102 See for discussion, P Ishwara Bhat, '*Why Federalism Matters in Elimination of Disparities and Promotion of Equal Opportunities for Positive rights, Liberties and Welfare*?' 54 Journal of Indian Law Institute (2012) 324, 335

federalism has a great responsibility towards equitable growth. Federalism matters a lot both in international relations and inner arrangements for wholesome and harmonious society. Along with devolution of power devolution of responsibility has to work for better governance. In dealing with the challenges of globalization, Indian federalism has, by and large, anchored to the constitutional values along with keeping the forum of discussion open between central and state governments. The wholesome experience of system of relations, comparable to that occurring in nature between the mango tree and the koelbird or the mountain gooseberry and the sea salt,[103] acts on and on, for building the mansion of happiness and harmony.

103 Allama Prabhu Vachana translated and extracted in AK Ramanujan, *Speaking of Shiva* (Penguin Classics, 1973, 1985) 149

The Concept of Industry: The Devil Still Allowed To Haunt

***Dr.Venugopal B.S.**

The concept of industry is one concept in the whole spectrum of industrial law which perplexed the judiciary at all levels including the highest court of the land. A common man is bewildered to understand whether the activity undertaken by him is industry or not. The turbid controversy surrounding the concept of industry was tentatively set at rest by the Supreme Court in Bangalore Water Supply case[1] making it categorical that the decision was only a working solution and the legislature was to take a call on the matter to end the conflict once for all. The sweeping interpretation of the definition of industry in that case brought all most all the activities barring a few exceptions with in the fold of the definition of industry as contemplated in Sec.2 (j) of the Industrial Disputes Act, 1947. As observed by the Supreme Court in Bangalore Water Supply Case,[2] the parliament in 1982 intervened to amend the definition of industry to whittle down the scope of the decision in Bangalore Water Supply Case[3] to exclude many activities from the purview of the concept of industry which otherwise fell within the gamut of the decision of the above case. But unfortunately the amended definition has not come into force. In effect the law relating to the concept of industry is the law that was laid down in Bangalore Water Supply Case allowing the devil of muddle to continue to haunt. In this article an attempt is made to critically analyze the concept of industry in three phases Viz., the concept of industry before, as laid down in Bangalore Water Supply Case and thereafter, in the pursuit offinding out solutions to drive out the devil, to use the words of Justice Krishna Iyer who delivered the majority judgement in the above case, to narrow down the twilight zone of turbid controversy leading to some sure characteristics of industry.[4]

Meaning of Industry: The conventional interpretation of the term industry manifests it as any business, trade or manufacturing activity which is a sole endeavour of an employer, even though undertaken in association with workmen to earn profits.[5] Legally industry means any trade,business, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, industrial occupation or avocation of workmen.[6] The first part of the definition defines industry from the point of view of the employer and by virtue of the inclusive part the workmen are considered as an integral part of an industry for the purpose of an industrial

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1. AIR 1978 SC 548
2. *Ibid.*
3. See the amended definition of industry. But it has not come into force.
4. See supra n.1
5. Mishra S.N., *"Labour& Industrial Law,"* Central Law Publication, Allahabad, 27th Edn. P.29 (2013)
6. The old definition of industry under Sec. 2(j) of the Industrial Disputes Act, 1947

dispute breaking from the conventional proposition that an industry is a sole endeavor of an employer.[7] The modern trend is to recognize industry as a joint endeavour of employer and workmen and consider the emerging industrial relation as human relation where the state has to play a dominant role in the greater public interest with a focus on economic growth breaking away from the non-intervenist policy dictated by the laisses faire doctrine. The judicial interpretation of the above legal definition at various times with respect to various activities in examining their characterization as industry or not, has been inconsistent. It can be traced under the following three heads.

I Judicial Response prior to the decision in Bangalore Water Supply Case

Position of Municipal and City Corporations

The question whether a municipal corporation was an industry or not arose before the Supreme Court in *D.N. Banerjee v. P.R. Mukherjee*.[8] In this case the issue was whether Budge Budge Municipality was an undertaking as contemplated in sec. 2(j) of the Industrial Disputes Act, 1947.The municipality contended that it was not an undertaking as contemplated above. Holding it as an undertaking it was observed that words having wider import had been deliberately used in the definition and it was more so which could be inferred from the inclusive part of the definition.[9] The court has further observed that what might not be trade or business in the conventional sense could be characterized as an industry and nothing preventes the legislature from using words having wider import that more and more activities were brought into the fold of the definition of industry to promote industrial progress as well as adjustment of the relationship between labour and capital.[10]

As per the above decision municipality falls within the ambit of the term undertaking so as to characterize it as an industry though traditionally it is not so. Logically then a city corporation which discharges similar function on a larger scale should fall within the ambit of the definition of industry. The question whether a city corporation is an industry arose before the Supreme Court in *City Corporation of Nagpur v.It's Workmen*.[11]Holding a city corporation as an industry the following principles have been laid down.[12]

a. The phrase analogues to trade or business signifies an organized activity which is implicit in trade or business, but not every activity that can be equated with trade or business.

b. Regal (sovereign) functions qualify for exemption

c. If an activity is an industry in the hands of an individual it does not cease to be so by reason of it being undertaken by the state

7. See supra n.5.
8. AIR 1958 SC 53.
9. *Ibid.*
10. *Ibid.*
11. AIR 1960 SC 675
12. *Ibid.*

d. Profit motive is not the sine qua non of an industry

e. If an undertaking engages in multifarious activities some of which are industrial in nature, the predominant nature of the activity needs to be taken into consideration to characterize the undertaking as an industry. If predominantly the activity is industrial in nature the whole undertaking falls into the coil of the definition of industry.

f. If the undertaking is an industry the employees employed in administrative or finance department who fall into the definition of workman can avail the benefit of the Industrial Disputes Act,1947

The above decisions make it obvious that any activity to be styled as an industry it need not be a trade or business or a manufacturing activity. If it is organized in the way in which any trade or business is organized that would be suffice to bring that activity into the gamut of the definition of industry. Accordingly if it is a habitual activity propelled by the co-operation between employer and workmen for the production, distribution or rendering of material goods or service, it attracts the definition of industry irrespective of the fact whether it is pursued with a view to earn profits or not

Position of Hospitals

A common man would certainly perceive it as something grotesque to consider a hospital an industry keeping aside the fact of its commercialization. The basic nature of the activity and commercialization are two different issues which cannot be mixed up. The judicial mind moves in a different direction to bring hospitals within the purview of the definition of industry. This question arose *in State of Bombay v.Bombay Hospital Mazdoor Sabha*.[13] In this case the question was whether the State of Bombay when it ran a group of hospitals whether would tantamount to running an industry. The facts of the case show that two workmen in Jaslok Hospital were terminated from service. They raised an industrial dispute. The management contended that hospital was not an industry and in effect reference of the dispute to industrial tribunal was bad. The Supreme Court recording a verdict in favour of the workmen held that hospital was an industry. The following principles have been laid down to determine whether an activity is an industry or not.[14]

a. The activity must be habitually undertaken by the co-operation between employer and workmen for the purpose of production, supply or distribution of material goods and services to the community

b. The activity should not be undertaken for oneself nor for pleasure

c. The activity must be analogues to trade or business

d. Profit motive is irrelevant.

13. AIR 1960 SC 610
14. *Ibid.*

e. Capital is not an essential ingredient of an industry

The above decision was overruled in *Safdarjung Hospital v. Kuldeep Singh Sethi&others,*[15] to hold that hospital was not an industry.[16] It was observed that hospital was a place where to people went for ailments and the service rendered by a hospital was not commercially productive.[17] It follows that hospitals do not undertake any economic activity aimed at generation of profits. In effect they hardlyfall into the definition of industry.

Position of Solicitor's Firm

The question whether solicitor's firm was an industry arose before the Supreme Court in *M.R. Mehr& Others v. National Union of Commercial Employees*.[18] It washeld that a solicitor's firm was not an industry. The reasoning is that an advocate to render service to the clients depends upon his own skill and knowledge of law. He does not depend upon the legal acumen of his employees. The end product i.e., rendering of legal service is not the result of any joint endeavour of an advocate and his employees. It is an exclusive endearvour of an advocate. Hence it follows that to characterize any activity as an industry it is essential that that rendering of any material goods & service to the community or a part thereof should be the result of a direct nexus between the employers andworkmen. But this proposition did not cut ice with Supreme Court in *Bangalore Water Supply & Sewerage Board v. A. Rajappa & Others*.[19]

Position of Education

The Supreme Court in *University of Delhi v. A. Ramanath&Another*[20] was called upon to decide whether education was an industry. In this case Delhi University was constrained to terminate the bus service extended to the students of a women's college affiliated to it as it was not economically viable. In effect the two drivers employed for that purpose were to be terminated from service. They raised an industrial dispute. The Delhi University raised a preliminary objection that an educational institution was not an industry accordingly no dispute was there to be settled. The court found it for the University based on the following reason.[21] Education is not a trade or business. It is a mission. The very object of education is to impart knowledge tothe students to enable them to develop their personality to its perfection. Educational institutions impart knowledge to the students with the help of teachers who cannot walk into the definition of workman to avail benefits of the Industrial Disputes Act, 1947. If aneducational institution is declared as an industrial undertaking those who render ancillary service can avail the benefits

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15. AIR 1970 SC 1403; See also Management of Hospitals, *Orissa v. Workmen,* AIR 1971 SC 1259; Dhanrajgiri Hospital, AIR 1975 SC 2032
16. This decision was overruled in Bangalore Water Supply Case. For a discussion see infra
17. See supra n.15
18. AIR 1962 SC 1080.
19. See supra n.1.
20. AIR 1963 SC 1873
21. *Ibid.*

under the above said Act as they fall into the definition of workman. It would result in grave injustice to the teachers who play a key role in imparting education to the students.

The ratio of the above case is that as teachers are not workmen, education cannot be brought into the fold of the definition of industry. This reasoning was not accepted in *Bangalore Water Supply Case.*[22]

In *Osmania University v.The Industrial Tribunal*,[23] it was held that Osmania University was not an industry as it did not undertake any economic activity in the pursuit of wealth.

In *Brahmo Samaj Education Societyv. West Bengal College Employees Association*,[24] educational institutions have been bifurcated into two categories viz. one in which students seek admissions relying on the intellectual capacity of individual teachers and the other where it is not so and produce certain products for sale adding to their profits. It was held that the former did not and the latter fell into the ambit of the definition of industry.

Position of Clubs

It is common scenario in any country to establish clubs to promote sports, games, social and cultural activities. The turbid controversy what is being discussed here haunted such clubs also. In *Madras Gymkhana Club Employees Union v. The Management of Madras Gymkhana Club,*[25] the question before the court was whether Madras Gymkhana Club which was established to promote sports and games was an industry or not. The Madras Gymkhana Club was established to provide venue for sports and games. Providing recreational facility to its members was another object. The club was running a catering department for the benefit of its members and catering service was extended to the outsiders on certain occasions like tournaments. But as a matter of right outsiders were not permitted to claim catering service. The club had at that point of time large number of members and employees. The employees of the catering department raised some industrial disputes. The club raised a preliminary objection that it was not an industry and as such there was no dispute to be referred. Upholding the contention of the club it was held that it was not an industry on the following reasoning. The object of the club is to promote sports and games. It does not undertake any economic activity. No outsiders could claim catering service as a matter of right. During tennis and badminton tournaments, snack bars were run for their smooth conducting. So running of the catering department was ancillary to its primary object. The gymkhana club is a members' self- serving club and as such cannot be characterized as industry.

It follows from the above decision that a member's self-serving club is not

22. See supra n.1
23. (1960) I LLJ 593(AP).
24. (1960) I LLJ 472(Cal).
25. AIR 1968 SC 554

an industry. The largeness of the membership and employees cannot alter the position to arrive at an otherwise conclusion. On similar reasoning in *Cricket Club of India v. Bombay Labour Union,*[26] the cricket club of India which was established for the purpose of promoting the game of cricket was held to be not an industry.

Position of Research Associations

Research institutions broadly fall into two categories viz. one catering to the material needs and the other to the intellectual needs. The former is and the latter is not an industry. In *Ahmedabad Cotton Textile Research Association v. State of Bombay,*[27] the question was Ahmedabad Cotton Textile Research Association which was established primarily to carry out research in cotton textile, incidentally in allied areas, whether an industry. Held, it is an industry. The reasoning is that the research activity is habitually undertaken by the co-operation between the association as an employer on one hand and its employees on the other hand. The inventions made are used in the cotton textile industry to provide quality products to the needy. It caters to the material needs of the people. More over the employees have no say over the fruits of the invention which is the property of the Association. It follows that if the employees have a say over the fruits of invention, then the Research Association ceases to be an industrial undertaking. But any research association which caters to the intellectual needs of the people does not attract the definition of industry notwithstanding the fact that it earns profits by sale of research publications. For exampleresearch associations involved in research in literature, culture & tradition, science, social sciences etc. cannot be characterized as industry even though they sell their publications which is an incidental activity to the primary activity of research and the position of employees who render their services in such research associations is no better than the employees of a solicitors firm who render their assistance to the solicitors who extend their legal services to the needy clients.[28]

Position of Bombay Pinjrapole- an institution established for the welfare of sick and infirm cattle

In *Bombay Pinjrapolev. Theworkmen,*[29] the question was whether Bombay pinjrapole which was established for the welfare of sick and infirm cattle was an industry or not. The workmen of Pinjrapole raised some industrial disputes. The Pinjrapole contended that it was not an industry. The facts of the case revealed that the Pinjrapole was earning huge income from sale of milk. The proportion of sick and infirm cattle to the total no of milching cow was too meagre. The object of rearing of such cattle was only incidental to the other activities undertaken by the Pinjrapole. In the light of these facts the court did

26. AIR 1969 SC 276.
27. AIR 1961 SC 484.
28. *Asiatic Soceity v. State of West Bengal,* (1967)II LLJ 319(Cal)
29. AIR 1971 SC 2422

not have any hesitation to conclude that Pinjrapole was an industry. The reasoning is that the activities of the Pinjrapole were organized in the way in which any trade or business is organized. It is immaterial to delve on how an astute businessman organizes his business with a profit motive. It follows that it is sufficeif the activity is organized in the way in which any trade or business is organized though not strictly.

Position ofIndian Standard Institution

In *Workmen of Indian Standard Institution v. Indian Standard Institution*,[30] the question was Indian Standard Institution which was registered under the Indian Societies' Registration Act, 1860 whether an industry. It was established with the object of preparing and promoting the general standards of adoption of national and international basis pertaining to structures, materials, practice matters, operation and things. Standards are technical documents which contemplate the operational, constructional or technological requirements to be complied with in relation to a material, product or process for a given purpose. The Institution owns many laboratories to conduct necessary testing of products and process. It has a library and brings out annual bulletin regularly. It undertakes the above activities in the public interest to protect the consumers from unscrupulous traders enjoining an obligation that the products for sale should comply with the standards prescribed by it .The workmen working in various laboratories raised a few industrial disputes. On reference of the disputes the Institution raised a preliminary objection that it was not an industrial undertaking. The industrial tribunal concluded that ISI was not an industry. On appeal the Supreme Court held that ISI was an industry. The reasoning is that ISI undertakes its activities in a systematic way by the co-operation of its workmen for rendering material service to the community.

The above case was decided on the basis of the test laid done in *HMS Case,*[31] which was overruled in *Safderjung Hospital Case.*[32] According to the dissenting opinion in the above case ISI is not an industry for the reason that ISI undertakes activities in the public interest and not to swell its own exchequer or of any individual. It is compatible with the ratio of *Safderjung Hospital Case,*[33] which contemplates that any activity to be styled as an industry it must be commercially productive or an activity in the nature of trade or business undertaken in the pursuit of wealth.

Position of a Temple

It is common knowledge that a temple is a place of worship, spiritual institution or an abode of a deity. A common man's perception of a temple is not different from this. Even in his casual imagination he will not conceive the idea of a

30. AIR 1976 SC 145.
31. See supra n.12.
32. See supra n.14.
33. *Ibid.*

temple as an industry. Such a reasonable approach was adopted by the court in *Harihar Bahinipatt v.State of Orissa*.[34] The question before the court was when the Management Committee of Jaganath Temple engaged certain persons in preparation of sweets to be offered to the deity whether it was engaged in an industry. It was held that the management committee did not engage in an industrial activity. The reasoning of the court is that Sri Jaganath Temple being a spiritual institution its primary function is conferring spiritual bliss to the Hindus hailing from the breadth and width of the country. The above decision based on sound reasoninglays down the correct proposition of law. But the courts after the decision in *Bangalore Water Supply Case*,[35] took a break away position.[36]

Position of Agriculture.

Generally agriculture is not considered as an industry unless it is undertaken on commercial lines. In *Harinagar Cane Farm v. State of Bihar,*[37]it was held thatcarrying on agricultural operations by a company by employing workmen who contribute to produce agricultural produce resulting in profits to the company was an industry. It is obvious from the decision that if agricultural operations are undertaken on commercial lines or organized in the way in which any trade or business is organized, it is characterized as an industry. The same position does not hold good if it is undertaken as a part of one's bread and butter. Agricultural operations if undertaken in an integrated manner with any other activitywhich is an industry, then it cannot escape from the coil of industrial law. In *Thiru Arcoran Sugars Ltd v. Industrial Tribunal, Madras,*[38]a sugar mill owned a cane farm and there was evidence to show that the farm section was run with the sole purpose of feeding the mill. It was rightly held that the farm section was an industry being an integral part of the sugar mill which was an industry.

Position of some other entities

A co-operative milk society,[39]an oil distribution company,[40]a chamber of commerce,[41] a partnership firm of accountants,[42]a registered association of cloth merchants,[43] a business of loading and unloading of goods,[44] a book

34. (1965) I LLJ 501.
35. See supra n.1.
36. See for a discussion infra.
37. AIR 1960 SC 903.
38. (1970) II LLJ 249.
39. *Co-operative Milk Societies' Union Ltd. v. State of West Bengal,* (1958) II LLJ 61(Cal).
40. *Standard Vacuum Oil Company, Madras v. Gunasheelan M.G & Another,* (1960) II LLJ 233
41. *The Upper India Chamber of Commerce v. S.N. Agarwal,* (1951) II LLJ 200.
42. *Industrial Employers's Union, U.P. v. Price water House Peat and Co, Kanpur,* (1963) II LLJ 273
43. *Kanpur Kapra Committee Syndicate v. Registered Kapra Committee,* (1954) I LLJ 86
44. *Sri Duppada Venkateswaralu V. Seetharamaswami Naidu,* (1953) II LLJ 742
45. *P.C. Dwadesh Sheni and Co. v. Its Workmen,* (1954) II LLJ 539
46. *Central Hair Cutting Saloon v. HrishikeshPramanik,* (1961) I LLJ 569
47. *Somu Kumar Chatterji v. District Signal,* (1970) II LLJ 179
48. *Lalith Hari Ayurvedic College Pharmacy Philibet v. Workmen,* AIR 1960 SC 1261

shop,[45] a hair cutting saloon,[46]railways[47] and a pharmacy,[48] all were held to be an industry as contemplated in sec. 2(j) of the Industrial Disputes Act, 1947. All the entities mentioned above render material goods or service with the help of employees which is carried out systematically by reason of which they were characterized as industries.

The catena of cases discussed above depicts conflicting propositions of law laid down by the courts in their venture to lay down the characteristics of industry. It manifests the dilemma of the courts. The fix in the mind of the courts made the common man confusion confounded. At thatcritical juncture came the most revolutionary judgement of the century in *Bangalore Water Supply Case.*[49]

II The Concept of Industry as laid in Bangalore Water Supply & Sewerage Board v. A. Rajappa & Others.[50]

In *Bangalore Water Supply & Sewerage Board v. A. Rajappa & Others*,[51]the workmen of Bangalore Water Supply& Sewerage Board raised some industrial disputes. The question of law was the above Board which was a statutory Board whether an industry. The constitution bench of the apex court speaking through Justice Krishna Iyer held that BWSSB was an industry by rendering a widest possible interpretation to the term industry consequent upon which all most all activities were brought into the fold of industry barring a few exceptions.

It is necessary to throw light on a few important observations made by Justice Iyerin this case before discussing on what grounds the Supreme Court overruled many of its own earlier decisions and upheld a few to set at rest the controversy.

Justice Iyer observes that in order to have holistic hang of the Industrial Disputes Act, 1947 keeping away all canons of construction which are worn out by use, one must take recourse to all suggestive literatures and the international thought ways in order to accommodate all changes elsewhere as law is relativist sans which one slips into an error.[52]A look at the definition, earlier decisions in head, constitution in heart and dictionary in hand will lead to some sure characteristics of industry narrowing down the twilight zone of turbid controversy.[53] The directive principles of state policy envisaged in the part IV of the constitution and the Industrial Disputes Act ,1947 drive home the proposition that while interpreting the industrial law the key note thought must be a workman.[54] An industry is not a fleeting activity.[55] It is not a desultory

49. See supra n.1.
50. *Ibid.*
51. *Ibid.*
52. *Ibid.*
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*

excursion.[56] As a purposeful pursuit it is geared to utilities, not futilities.[57] No employer no industry, no work man no industry is not a dogmatic proposition of economics but the very postulate of the concept of industry.[58] When the birds of same feather flock together, commonsense dictates the need for application of the rule of nosciter -a- socciss.[59] But no one would torture the term undertaking to mean mushaira or any aesthetic activity.[60]

Hospitals: They were brought into the fold of the definition of industry on application of the triple test upholding the decision in *HMS Case,*[61] and the decision in *Safderjung Hospital Case,*[62] stood overruled. So it follows that service rendered by engaging in any activityneed not be commercially productive.

Municipal and City Corporations: They were also brought into the fold of the definition of industry upholding the decisions in *Budge Budge Municipality*,[63] and *City Corporation of Nagpur,*[64] reiterating the principles laid down in those cases.

Clubs: They were brought into the fold of the definition of industry overruling the decisions in *Madras Gymkhana Club*,[65] and *Cricket Club of India,*[66] on the following reasoning. Any activity which is undertaken by the co-operation between employer and employees where the focus is on the employer and employee relation it invites the application of the definition of industry.[67] The absence of such employer and employee relation can only extricate any activity from the coil of industrial law.[68] There is an element of truth in the proposition that for better service conditions the employees have to look to their employer. It is submitted that it cannot be accepted as a sound principle to bring an activity into the fold of the definition of industry unless by its very nature the activity qualifies to be an industry. It will create a negative impact that nobody would come forward to establish clubs to promote games, sports and cultural activities for the fear of getting entangled in industrial law.

An exception is created in favour of truly members' self-serving clubs which undertake activities with one or two menial employees in the monotony stricken faded society to enliven and fill fresh breath into the people who are in the lower rung of society.[69] The rationale is that there is no organized activity in

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58. *Ibid.*
59. *Ibid.*
60. *Ibid.*
61. See supra n.12.
62. See supra n.14.
63. See supra n. 7.
64. See supra n.10.
65. See supra n. 24.
66 . See supra n.25
67. See supra n.1
68. *Ibid.*
69. *Ibid.*

it to drag it to the definition of industry.

Education: It was brought into the fold of the definition of industry by overruling the decision in *University of Delhi v. A.Ramanath***.**[70]The reasoning is that education is the mother of all industries. Referring to the observation in *University of Delhi Case,*[71]the Supreme Court has observedthat undoubtedly education is a mission. Any person without a mission in life is still born. But its characteristics of being a mission should not compel one not to christen it as an industry.[72]The true focus is on the predominant nature of the activity**.**[73] If predominantly an activity is an industry, the question whether teachers are workmen or not does not arise.[74] Just because the workmen who render ancillary servicecan avail the benefits of the Industrial Disputes Act and teachers are so deprived is not a justification to seclude educational institutions from the purview of the definition of industry. According to the court in *University of Delhi Case,*[75]the error occurred by mixing up two distinct issues to arrive at a wrong conclusion.[76]Therefore the premise that teachers are not workmen cannot be a valid justification to extricate education from the definition of industry.[77]

It is submitted that the Supreme Court has carved out a very evasive premise to bring education into the fold of the definition of industry. Undoubtedly the knowledge gained by way of education is used to set up an industry. It is not sufficient to bring education into the definition of industry. It will not satisfy one of the elements of triple test, i.e. rendering material service even though it can be accepted that it satisfies the other two elements viz. systematic activity habitually undertaken and co-operation between employer and workmen those who render ancillary service excluding teachers who are not workmen. The service rendered by educational institutions caters to the intellectual needs of people. It is not a commercial service even though education is commercialized which cannot be a valid reason to style education as an industry.

Solicitor's Firm: Overruling the decision in *M.R.Mehr and Others v. National Union of Commercial Employees,*[78]solicitors firm was brought into the fold of the definition of industry. The reasoning in the above case could not cut ice with the court which has come with the proposition that direct nexus between employer and workmen in rendering material service ischimerical.[79]A

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70. See supra n.19
71. See supra n.19.
72. See supra n.1
73. *Ibid.*
74. *Ibid.*
75. See supra n.19.
76. See supra n. 1
77. *Ibid.*
78. See supra n. 17
79. See supra n.1
80. *Ibid.*

solicitor's firm is a joint endeavour of advocates and employees.[80] No doubt an advocate uses his own skill of law to render legal service, but equally true that an employee or clerk of a law firm contributes in his own way to its success.[81]

The above discussion reveals that there are two conflicting principles viz. one stressing the presence of direct nexus between the employer and workmen with respect to the end product and the other dispensing with the need for such direct nexus alleging it as illusiory on the premise that contribution of every employee of an organization though incidental is significant in its own way eventually leading to its success. It is submitted that the right premise is the direct nexus test. It does not require overemphasis that an advocate uses his own skill and knowledge of law to render legal service and only ancillary service is provided by his clerks. Further it should be noted that when the advocates join together as a firm to render legal service to the clients the advantages of economies of large scale operation can be reaped that service can be rendered to the needy at a relatively lower cost. If advocates firm is declared as an industrial undertaking no advocates would come forward to form a firm and ultimate sufferer is a client who can avail legal service only at higher cost. Even if they establish a firm they will restrict the no employees to one or two to escape from the coil of industrial law disentangling themselves from the potential industrial disputes in industrial tribunals. In effect, it cuts short the employment opportunities aggravating the unemployment problem.

The consequence of the decision is that all liberal professions were brought into the fold of the definition of industry.[82]But an exception has been created in favour of plying a profession to eke out ones livelihood with the help of one or two employees.[83]Hence an advocate or a doctor or an engineer practicing his profession to eke out his bread and butter with the help of one or two employees does not run an industrial undertaking for the reason of absence of organized activity consequent upon which it cannot be brought into the spectrum of industrial law.[84]

The net effect of the decision is thatit has created a dichotomy between profession undertaken as a means of livelihood and beyond that. Even where the legal professionals join together to establish a firm the primary object is bread and butter. The presence of an organized activity makes it stagger beyond to bring it to the net of the definition of industry. The underlying logic cannot be validated for the reason already cited above.

Charitable Projects: They were also brought into the fold of the definition of industry with an exception.[85] An undertaking where an employer and workmen join together to render material goods and service to the needy either free of

81. *Ibid.*
82. *Ibid.*
83. *Ibid.*
84. *Ibid.*
85. *Ibid.*
86. *Ibid.*

cost or at concessional rate qualifies to be an industry.[86] The rationale is workmen centric that from the point of view of workmen whether the employer is commercial minded or charitable hardly makes any difference that the rule applied to a workman is "toil, fill your till: work: have your wages: no work, no wages."[87] Charity for a workman begins at home and he is not a recipient of any charity.[88] The beneficiaries are those to whom material goods and services are rendered free of cost or at concessional rate.[89]

A group of people when join together for a noble cause to render service which they do, not because they are paid wages but as a common passion for such altruistic purpose.[90] Such activity cannot be characterized as an industry.[91] For example a few people join together to manufacture special type of shoes for leprosy patients which are made available to them either free of cost or at concessional rate as the case may be. The underlying notion is self- explanatory as otherwise it will act as a death knell to all charitable motives of an individual drying up the altruistic passion in him for all noble cause exposing the potential beneficiaries to hardship.

The logic through which charitable projects are brought into the fold of industry is one sided as it delves into the issue exclusively from the point of view of workmen. The negative impact of such an approach on society is that no employer would come forward to undertake any philanthropic work as a result of which the beneficiaries would suffer that an act of balancing is the need of the hour to examine the issue from the perspective of employers' vis-à-vis society. It is true that for better conditions of service workmen have to look to their employer.But workmen also need to do some sacrifice to the society of which they are a part. They do not by themselves constitute a separate class. It may be true that they are not the recipients of the charity. An examination of the issue from the prism of society warrants a strict interpretation to exclude a charitable activity without any distinction whatsoever from the gamut of the term industry.

The Supreme Court rendering a widest possible interpretation to the term industry bringing all , most all activities into the fold of the definition of industry barring a few exceptions laid down the following principles to determine whether an activity is an industry or not.[92]

a. There must be systematic activity propelled by the co-operation between employer and workmen for the purpose of production, supply or distribution of material goods and services calculated to satisfy human needs excepting any activity undertaken to satisfy spiritual wishes. But if a religious activity has an economic content it qualifies to be an industry. For

87. *Ibid*
88. *Ibid.*
89. *Ibid.*
90. *Ibid.*
91. *Ibid*
92. *Ibid.*

example preparation of prasadam on a large scale which is offered to the devotees at a price. The above principle sounds logical with respect to an activity undertaken to satisfy human wishes excluding one the purpose of which is satisfaction of spiritual wishes. It is submitted that a religious activity which has an economic content should not be brought into the fold of the definition of industry. A religious activity predominantly is not an economic activity. It is undertaken as a matter of faith for celestial bliss to seek the blessings of god. People find the almighty and blessings in prasadam which is not a commercial product pushed to market for sale. Preparation of prasadam involves expenditure which needs to be shared by the devotees. There is no compulsion to purchase prasadam. It is directory. If prasadam is prepared on a large scale it is for catering to the needs of large no of devotees. For example if in TirupatiVenkateshwara temple prasadam (laddu) is prepared on a large scale it is for the satisfaction of lakhs of people who visit the temple to invoke the blessings of Lord Venkateshwara. Hence it is submitted that there is no valid justification to create a dichotomy between a religious activity with and without economic content. The basic nature of activity undertaken by a temple is religious calculated to satisfy spiritual wishes of people and preparation of prasadam is only incidental.

b. The true focus is functional with special reference to the employer and employee relationship.Overruling the Madras *Gymkhana Club*[93] *and Cricket Club of India*[94]cases it was held that only absence of employer and employee relation could keep any activity away from the definition of industry. It is submitted that it should also satisfy the triple test.

c. Profit motive and capital are not essential ingredients of industry.

d. Philanthropy animating any object does not make it non-industrial.

e. Strict regal (sovereign) functions qualify for exemption. Functions of the state which can be severed from strict sovereign functions do not qualify for exemption.

f. Dominant nature of an undertaking must be taken into consideration.[95]

The Supreme Court Speaking throughJustice Krishna Iyer,has made it obvious that it has laid down only a set of working principles to set at rest the controversy[96] and it is for the legislature to intervene to lay down the legislative policy in this regard to emancipate the concept of industry from the muddle in which it is found. Accordingly legislature stepped in to amend the definition of industry.

III. Amended Definition of Industry

93. See supra n.24
94. See supra n.25
95. See supra n.1
96. *Ibid.*
97. See the amended definition of industry under sec. 2(j) of the Industrial Disputes Act, 1947.

Industry[97] means a systematic activity organized by the co-operation between employer and workmen for the purpose of production, distribution or supply of material goods and services calculated to satisfy human wishes excluding spiritual wishes. This is a re-iteration of triple test. The dichotomy of religious activity with or without economic content is done away with. It follows that a religious activity calculated to satisfy spiritual wishes in spite of economic content qualifies for exemption. The activity contemplated above whetherundertaken with a profitmotive or not, with or without capital, it is immaterial. This position has been already taken by the apex court earlier.[98]

Industry includes the activities of DockLabour Board constituted under the Dock Labour Board Act, sales promotion activities and plantation as contemplated in the Plantation Labour Act, 1951. It does not include the following.

a. Agricultural operation unless it is undertaken in an integrated manner with some other actvity and such other activity is predominant one. It follows that pure agricultural activity is excluded. But when it is undertaken with some other activity which is predominant in nature answering the description of triple test and it is incidental to the above activity, then it cannot claim exemption from the definition of industry. For example there is a sugarcane field attached to a sugar factory. The sugarcane cultivated therein is utilized in the sugar factory for manufacture of sugar. The predominant activity is manufacture of sugar which satisfies the triple test .Cultivation of sugar is incidental to it and as such ceases to be an agricultural operation. In effect the activity in its entirety falls into the ambit of the definition of industry. The rule that is applied under the Income Tax Act, 1961in such a situation to consider the income partly agriculture and partly non-agriculture cannot be applied in this context.

b. Village and khadi industries. The rationale is that they need to be promoted for rural development as the progress of villages much depends upon them being primary source of income to the rural population. If they are brought into the fold of the definition of industry no body in a village would come forward to set up such industries which would aggravate the already existing unemployment problem that the rural mass is exposed to hardship.

c. Hospitals and dispensaries.[99] The legislative wisdom, perhaps, lies in the justification that hospital is a place meant for treatment of patients and no economic activity is undertaken there to render commercially productive service. If hospitals are brought into the fold of the definition of industry the disastrous consequence finds an outlet to

98. See supra n.7 & 12
99. Hospitals and dispensaries were brought under the definition of industry in Bangalore Water Supply case.

decimate their serene ambience which is very much essential for treatment of patients. If industrial unrest is allowed to enter intohospitals, the frequent strikes and lockouts transform them as veritable hells jeopardizing theinterest of public in general and patients in particular.

d. Domestic service. Obviously the exclusion aims to promote employment opportunity to the domestic servants. If such service is brought into the fold of industry doors will be shut for all potential domestic servants depriving of their livelihood opportunity.

e. Sovereign functions.[100] There is no legislative and judicial clarity about what constitutes sovereign functions except the legislative, judicial and executive functions as could be seen in the discussion to follow.[101] Additionally the departments pertaining to space and atomic energy are also excluded from the clutches of the definition of industry. The exclusion of sovereign functions are quite understandable as otherwise it would prove fatal to the national interest. The activities of the space and atomic energy are matters of strategic importance that they need to be exempted.

f. Any activity being a profession undertaken by an individual or a group of individuals or association where the no employees employed is less than ten. This exception partially relaxes the rigidity created by the decision in *Bangalore Water Supply Case* [102]which has brought all liberal professions into the scope of industry barring a few exceptions. Any person who undertakes a profession will see that it does not fall into the trap of the definition of industry by employing less than ten employees. In effect, it depends upon his sweet will whether to bring profession into the coil of industrial law or not. In addition to that to determine the nature of an activity on the basis of no of employees employed sounds illogical. The legislative rationale perhaps is that if undertaken on a large scale it becomes an industry, otherwise not. Then the question is whether the numerical strength of ten is suffice to consider it as something large.

g. Any activity being an activity undertaken by a club or co-operative society unless the no of employees employed is not less than ten. The arguments raised in the context of profession holds good here also.

h. Any institution which is wholly managed or controlled by a charitable institution is exempted from the definition of industry. It can be inferred that charitable institutions are not industries. Accordingly the position taken in *Bangalore Water Supply Case*[103]stands nullified. It is a progressive step which will go a long way in motivating the people to undertake charitable projects in the greater interest of society. The lacuna in this provision is that if interpreted

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100. Sovereign functions were exempted from the definition of industry. Ibid.
101. See infra.
102. See supra n.1
103. All charitable activities barring a few were brought into the fold of the definition of industry. Ibid

literally any industrial undertaking owned or controlled by a charitable institution can claim exemption from the definition of industry which cannot be permitted. Exclusive charitable projects can only be allowed to claim such exemption. The amended definition has not come into force even after 34 years. The decision in *Bangalore Water Supply Case*[104] is still in force that law remains harsh to those who intend to embark upon charitable projects by bringing them into the coil of the definition of industry.

IV Judicial Response after Bangalore Water Supply Case

As the amended definition has not come into force the law relating to the concept of industry is the law laid down in *Bangalore Water Supply Case.*[105] Accordingly the controversy must be settled in the light of the principles laid down in the above case. The following discussion throws light on the judicial response after the above decision.

In *Om Prakash v. Executive Engineer S.Y.L. Canal Division*,[106] it was held that irrigation department of the state government was not an industry. The reasoning is that supply of water is not an activity which could be entrusted to private hands. Supply of water for a certain rate cannot constrain one to conclude that state is undertaking an activity in the nature of trade or business. It follows that any act in the nature of trade or business can only be termed as industry. But in *Desi Raj v. State of Punjab*,[107] the S.C. took a different position to hold that the irrigation department was an industry on application of the dominant nature test. Hence, it is obvious that the focus is not on whether theactivity is undertaken by the state or a private individual but on the dominant nature of the activity. It is submitted thatthe position taken in **Om Prakash** is correct as the irrigation department does not undertake any economic activity in the nature of any trade or business. It is immaterial that charges are levied for supply of water as it is inevitable to meet the administrative and maintenance expenses. Further the function of distribution of water must be undertaken only by the state in the public interest.

In *Chief Conservator of Forest v. JaganathMaruthiKondare*,[108] it was held that as the activities undertaken by the forest department did not amount to sovereign functions it could be characterized as an industry. But a contrary position was taken in *State of Gujarat v.Pratham Singh NarsinParmar.*[109] In this case a clerk employed in the forest department was terminated from service. The Gujarath High Court held that the forest department was industry and non-compliance with Sec. 25FF of the I.D.Act rendered the termination invalid. On

104. *Ibid.*
105. *Ibid.*
106. (1985) I LLJ 16(P& H).See also
State of Gujarath v. DeenanjiBidhaji Thakore, (2003) III LLJ 630(Guj.)
107. (1988) II Lab LJ 149 (SC).
108. (1996) I LLJ 1223 (SC)
109. (2001) I LLJ 1118 (SC). *See also Marathwada Sarva Shramik Sanghatan V. Assistant Director Department of Social Forestry,* (2002) III LLJ 820(Bom.)

appeal the apex court reversed the decision to hold that the respondent had failed to prove that forest department was an industry. It should be noted that the decision is not based on any sound reasoning. It is submitted that even the decision in the former case is also not correct as the forest department does not run any trade or business and selling of timber is only incidental, the main object of the forest department is conservation of forest to ensure ecological balance. It follows from the decision that all activities of state other than sovereign functions would amount to industry which is not correct.

The conflicting decisions regarding the positon of forest department throws light on the confused judicial mind when on one hand it is laid down that as the activities of the forest department do not fall within the ambit of sovereign functions, it is an industryand on the contrary holding the view that as the respondent has failed to prove that forest department is an industry, it is not an industry. This trend of beating hot and cold could be witnessed in many decisions for which the discussion made in this paper bears testimony.

In *H.K. Makwana v. State of Gujarat& Others*,[110]it was held that scarcity relief work undertaken by the government to offer employment to the people affected by natural calamities did not amount to industry. The reasoning is that it is the primary and inalienable function of the state to provide employment to such people. Further relief work is not a trade or business, nor it is a systematic activity, but is undertaken casually at different places taking into consideration the calamities there. It is submitted that the decision lays down correct proposition of law by stating that relief work is not a trade or business. It can be further added that even if it is undertaken systematically it cannot be styled as an industry as by its very nature it is not so.

In *All India Radio v. Santhosh Kumar,*[111]it was held that All India Radio and Doordarshan was an industry as it undertook commercial activity for profit by way of broadcasting and telecasting commercial advertisements which could not be called as pure sovereign functions of the state. It follows that pure sovereign functions qualify for exemption from the definition of industry.Broadcasting and telecasting of commercial advertisements for charges levied undoubtedly is an economic activity which cannot be exempted.

In *Mahesh Bhargavav. State of M.P.,*[112]it was held that Legal Aid Board was an industry. The justification is that rendering legal aid and legal advice are not inalienable function of the state as it can be undertaken by any private individual. Further the Legal Aid Board by rendering these services does not administer justice which is a pure sovereign function, but only assists to secure justice. This decision must be examined in the light of the function of a Legal Aid Board. Undoubtedly it does not administer justice. But it does the job of providing legal aid and an advocate to poor clients who cannot afford to hire the

110. (1995) I LLJ 801(Guj.)
111. AIR 1998 SC 941.
112. (1994) I LLJ 1113 (MP)
113. (1990) 4 SCC 472

services of an advocate. A responsibility is imposed on the state to ensure that any person is not deprived of knocking the doors of the courts for justice by reason of his financial constraints. The constitutional obligation so envisaged in the directive principles of state policy cannot be effectively delegated to private individuals. By rendering such service the Legal Aid Board does not undertake any economic activity in the nature of trade or business. The service rendered so needs to be treated as something incidental to administration of justice which is undoubtedly a sovereign function. Hence it is submitted that Legal Aid Board should not be considered as an industry. Otherwise one is at loss to understand how assisting to secure justice could be characterized as an industry. On principle it cannot be done. Hence it is obvious that Legal Aid Board was brought into the fold of industry in a grotesque way.

In *Karnani Properties Ltd v. State of West Bengal*, [113] the company was a real estate company and indulged in land developers. It had rented to the tenants several flats in building owned by it. It was rendering many services to the tenants for which fifty workmen were employed. The workmen raised some industrial disputes. The company raised a preliminary objection that it was not an industry. Rightly the reasoning of the court is that the company fits into the test laid down in *Bangalore Water Supply Case.*[114]

In *Inspector of Post, Vaikam v. Theyyam Joseph,*[115] it was held that the Post & Telecom Department was not industry. In this regard the court observed that providing telecommunication,an amenity to the general public was a sovereign function. According to the court the directive principles of state policy impose various duties on the state, the performance of which are constitutional functions. It follows that any activity undertaken in pursuance of constitutional obligation is not an industry. Constitutional functions are equated with sovereign functions adding to the hitherto held notion of sovereign functions as exclusively consisting of legislative, judicial and executive function. This proposition goes counter to the ratio of *Bangalore Water Supply Case*,[116] which exempted only pure sovereign functions bringing any activity that could be severed from such functions into the fold of the definition of industry. Hence the above decision has become per incuriam of the above case.

The ratio of above case was followed in *Bombay Telephone Canteen Employees Association v. Union of India,*[117] to hold that telephone department was not an industry.

In *Physical Research Laboratory v. K.G.Sharma*, [118] the question was Whether Physical Research Laboratory engaged in pure research in space and allied science was an industry or not. The very object of the research activity is

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114. See supra n.1
115. 1996 AIR SC 1271
116. See supra n.1
117. 1997 AIR SC 2817
118. 1997 AIR SC 1885

to acquisition of knowledge for the benefit of department of space. The inventions are not sold for any consideration. Though there is systematic activity organized by the co-operation between the employer and workmen, it is not undertaken to render material service to the community. Moreover the activity is not analogues to trade or business. Based on the above said reasoning it was held that Practical Research Laboratory was not an industry. More importantly it was observed that it was an institution discharging governmental function, a domestic enterprise and not a commercial enterprise. It follows that an activity to be characterized as an industry it should be a commercial endeavour.

In *Agricultural Produce Market Committee v. Ashok Harikuni,* [119]the question was theAgricultural Produce Market Committee , a body corporate established under the statute to regulate the marketing of agricultural products in the interest of both the agriculturist and public at large whether an industry. The Committee was charging fees to the service rendered to the traders of agricultural produce. The crucial question here is the Committee being a statutory body whether discharges sovereign functions. It was observed that the functions of the Committee could be discharged by private institutions and the functions did not fall within the ambit of primary and inalienable function of the state .As such the court concluded that the Committee was an industry on application of the ratio of *Bangalore Water Supply Case*, [120]In this regard thecourt observed ,[121]

"Sovereign function in the new sense may have very wide ramification, but essentiallysovereign functions are primary inalienable functions which only the state could exercise.Thus various functions of the state may be ramifications of sovereignty, but they allcannot be construed as primary inalienable functions. Broadly it is taxation, eminentdomain and policepower, which cover its field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law & order, internal and external security and grant of pardon. So the dichotomy between sovereign and non –sovereignfunction could be found by finding which of the functions of the state could be undertaken by any private person or body, the one which can beundertaken cannot be sovereign function."

Earlier, the Supreme Court in *Coir Board, Ernakulum, Kerala State v. Indira Devi P.S.,*[122]took a different view to conclude that Coir Board was not an industry. The justification is thatthe Board is established not to run an industry, but to promote coir industry, open up market for it and provide facilities to make the products of coir industry more marketable. According to the court the reason for continuing confusion is the sweeping interpretation given to the

119. 2000 AIR SCC 61
120. See supra n.1
121. See supra n.102
122. 1999 LLR 319
123. See supra n.1

definition of industry in *Bangalore Water SupplyCase,*[123] which is not at all warranted under the Industrial Disputes Act that the matter requires to be reconsidered by a larger bench. It is submitted that this observation deserves applause for reflecting a pragmatic approach.

The observation of the Supreme Court**in** *State of U.P. v. Jai Bir Singh,*[124] in unequivocal terms makes it categorical that there is dire necessity of judicial rethinking of the concept of industry by a larger bench by reason of the sweeping way in which it was interpreted in *Bangalore Water Supply Case.*[125]It was urged on behalf of the workmen that law laid down in *Bangalore Water Supply Case,*[126] had been precedent for no of years which was worked out for the satisfaction of everyone concerned with industry that there was no necessity of reference for a larger bench. The employers did not accept this contention and persisted for the enforcement of the amended definition of industry. The inference is that the employers are still dissatisfied with the decision in *Bangalore Water Supply Case,*[127]which has become a stare decisis because of lack of political willingness to enforce the amended definition.

It should be noted that the judgement in the above case was rendered in a hurried way to ensure that it was delivered before the retirement of the then Chief Justice.[128] The judgement was given just a day before his retirement.[129] Though the judges broadly concurred with the majority opinion delivered by Justice Krishna Iyer that Bangalore Water Supply and Sewerage Board was an industry, subsequently they rendered their individual opinion at different times which certainly was in conflict with the majority opinion.[130]The very next day after the retirement the C.J. mentioned above stated that there was no sufficient time at his disposal to examine all the cases especially one relating to sovereign functions.[131] According to him the term regal from which the term sovereign emerged is a misnomer that in a republic political sovereignty lies with a citizen so far as he has right to vote, irrespective of the limited role played by him.[132]Hence according to him, the more appropriate expression is 'governmental functions' notwithstanding the fact ofthe statewidening its frontiers in new fields.[133]Consequently only those services which are governed by independent rules and constitutional provisions like 310 and 311strictly qualify for an exclusion from the definition of industry.[134]

Justice Chandrachud who subsequently became C.J. placed an all the more

124. (2005)5 SCC 1
125. *Ibid.*
126. *Ibid.*
127. *Ibid.*
128. *Ibid.*
129. *Ibid.*
130. *Ibid.*
131. *Ibid.*
132. *Ibid.*
133. *Ibid.*
134. *Ibid*

sweeping interpretation even to include a few activities exempted from the definition of industry as contemplated in the majority opinion in *Bangalore Water Supply Case.*[135] His Lordship has opined that the definition of industry is of wider amplitude to include all activities where there is employer and employees relationship including the inalienable functions of the state and the activities which are undertaken for self and spiritual attainments.[136]

In the separate opinion which was delivered by Jaswanth Singh, J and Tulzapurkar , J much later , they held the view that the definition encompasses only such activities which are undertaken systematically and habitually on commercial lines for production of goods or providing material services to the community.[137] This view is diametrically opposed to their concurrence with the majority judgement that Bangalore Water Supply and Sewerage Board is an industry even though it is not run on commercial lines. The logical inference of the above opinion is that sovereign functions qualify for exemption as they are not commercial undertakings.

Likewise the abovesaid judges further expressed their opinion that liberal professions should be excluded from the ambit of industry as the end product is not the result of co-operation between a professional and his employees, that the latter render only marginal service, the end product exclusively is the brain child of the professional skill and expertise of the concerned professional.[138]

In *Sounder Rajan& others v. The Chief Secretary to Government of India,Ministry ofLabour,*[139] and the question was whether defenceproduction unit was an industry. The defence service and defence production units fall under the defence ministry. The defence service undoubtedly falls within the sovereign function of the state. But the controversy is about the defence production unit which manufactures ammunitions and other products required for military purpose. It was held that the activities of the defence productionunit were separable from the defence service unit to characterize it as an industry which aptly falls within the ratio of *Bangalore Water Supply Case.*[140] But it should be noted that the activities ofthe defence production unit are incidental the defence service unit. Any strike in the defence production unit will certainly paralyze the defence service unit. Both the units on a cursory glance may look distinct entities. But they share functional integrity. Therefore it is submitted that the above decision requires reconsideration without losing sight of functional integrity between the two units.

In *keraleeya Ayurveda Samajam Hospital and Nursing Home, Shoranur v. Workmen,*[141] an Ayurvedic Institution which was registered under the Societies'

135. *Ibid*
136. *Ibid.*
137. *Ibid*
138. *Ibid.*
139. (1994) II LLJ 648 (Mad).
140. See supra n.1.
141. (1979) I LLJ 115 (kerala).

Registration Act, 1860 was running a hospital, nursing home and an Ayurvedic School. The workmen raised a few industrial disputes. The Ayurveda Institution raised a preliminary objection that it was not an industry. The court overruling the objection reckoning the following factors held that it was an industry. a. In its various departments employees were employed.b. The place where Ayurveda medicines were prepared was registered under the Societies' Registration Act c. Treatment was rendered on payment of fee. d. Activity of the establishment was organized in the way in which any trade or business was organized.

It is obvious that the triple test as contemplated in Bangalore Water Supply case has been applied to arrive at the above conclusion. Hence it becomes immaterial to look for whether fee for treatmentis charged or not unless the activity is exclusively organized on charitable lines as contemplated in Bangalore Water Supply Case. However the decision does not hold good for the reason already discussed above.

In *Bharath Bhavan Trust v. Bharath Bhavan Artists Association*,[142] the trust was engaged in promotion of art and preservation of artistic talent. It was held that the trust was not an industry. The reasoning of the court is that it is not a systematic activity for large scale production of goods and service undertaken by the co-operation between employer and employees. Production of goods on large or small scale is immaterial so long as the activity answers the triple test. However the decision lays down the correct proposition of law.

The question whether a mandir or temple is an industry arose in a few cases. It may be recalled at this juncture that according to the ratio of Bangalore Water Supply Case a religious activity with an economic content qualifies to be an industry. In *Workmen of BaikuntaNathDebasthan Trust v. State of West Bengal,*[143] it was held that a mandir was an industry. The legal justification is that the pujari of the mandir is paid for his services regularly and after deducting the expenses incurred for preparation of prasadam, the balance sheet shows huge surplus that the activity is undertaken on commercial lines. The inference is that if the pujari is not paid regularly and the balance sheet does not show huge surplus after deducting the expenses connected with making of prasadam, the activity ceases to be commercial to enable it to keep itself away from the definition of industry. It is submitted that based on the arguments already raised above a religious activity cannot be distinguished as one undertaken on commercial line and the other on non-commercial line.

Likewise in *Mahamadhka Gajika Baloch v. Panchasara Jain Derasar,*[144] it was held that a jain temple was an industry.

In *Dattatraya Gopal Paranjape v. Rastriya Mill Mazdoor Sangh & Others*,[145]

142. (2001) II LLJ 1064 (SC)
143. (1991) I LLJ 145 (Cal).
144. (1994) II LLJ 1051 (SC).
145. (1995) II LLJ 913 (Bom).

the question before the court was whether a trade union was an industry. Applying the triple test the court concluded that a trade union was an industry. According to the court a trade union renders only material services and not any spiritual service that thereis no difference between the work done in trade union employment and any other employment. It is submitted that a trade union should not be considered as an industry as the very object of forming a trade union is collective bargaining on behalf of the workmen and espousal of their grievances. It does not run any economic activity in the pursuit of profits. It is true that a trade a trade union does not render any spiritual service. If the service is not spiritual ipso facto it will not become a material service. It is illogical to consider whatever is not spiritual as something material. The absence of difference in employment elsewhere is immaterial. Broadly speaking every service other than spiritual service is material. But somewhere there should be a cap on that to see that unnecessarily all the activities are not dragged into the definition of industry.

As *University of Delhi v. Ramanath*,[146] was overruled in *Bangalore Water Supply Case,*[147] universities in a limited sense were brought under the definition of industry consequent upon which the employees who fit into the definition of workman are permitted to avail the benefits of the Industrial Disputes Act, 1947. Accordingly in *Sumer Chand v. Labour Court*, *Ambala,*[148] it has been held that a university is an industry and a carpenter is a workman that the labour court has jurisdiction to decide the question pertaining to his termination. It is submitted that a university should not be considered as an industry for the reason already discussed above.

The judicial trend after *Bangalore Supply Case* has been to confer a wider interpretation to the term industry. But in *A.S. Production Agencies v. Industrial Tribunal,*[149] the apex court has cautioned that while ascertaining the gamut of the term 'undertaking' a narrower meaning must be assigned to it.

The impact of Bangalore Water Supply Case is that it has swayed the judicial mind to think that any activity whatsoever could be brought under industry. As law on this subject being what has been laid down there, the parameters laid down therein must be adhered to. Instances are not lacking where without such adherence inadvertently an activity has been brought under industry though subsequently the apex court cleared the mist. In *State of Rajasthan v. GaneshiLal*[150] the labour court concluded that law department of government was an industry which was affirmed by the High Court. On appeal the Supreme Court reversedit. The reason is that on arriving at such a conclusion the high court or the court belowhas not grounded its decision on

146. See supra n.19.
147. For a discussion see supra.
148. (1992) I LLJ 394 (P& H). See also
Suresh Chandra Mathe V. Jiwaji Univerity, Gwalior, (1994) II LLJ 462(MP)
149. AIR 1979 SC 170.
150. 2008 I LLJ 670(SC).

any sound premise rather they have relied upon the ground that some departments of the government are considered as industry. It should benoted that a case is decided on the basis of the facts. These facts vary from case to case. If a few departments are held to be industries, ipso facto it cannot be extended to other departments to consider them so. It is a well-established proposition of law that a case is an authority for what actually it decides.[151] It cannot be logically extended to all situations which are not contemplated by it.

Conclusion

The above discussion reveals that in the whole spectrum of industrial law if at all there is one concept which has haunted the judiciary at all levels like a devil is the concept of industry that the common man is exposed to hardship of keeping himself in speculation, the amended definition of industry remaining unenforced and the ratio of Bangalore water Supply Case becoming the stare decisisto continue as the law relating to the concept of industry. The enigma it is more so made to be has caused it to be an unnecessary thorn in the flesh of common man vis-à-vis employers more apparently. The reason for such sordid affair is the callous political attitude which is as obvious as the writing on the wall in at least not enforcing the amended definition of industry which has whittled down the scope of the decision in Bangalore Water Supply Case by excluding many activities from the purview of the definition of industry. The political unwillingness in this regard itself is the result of strong trade union lobbies. The trade unionsalso need to adopt a pragmatic approach. They must be made to realize that no employer, no industry that there cannot be an industry with only workmen. Both are two spokes in the hub of industry. Law's task is cut out here for a concrete balancing of interests of both the workmen as well as the employer. It should be noted that law is only a means to an end. On its own it cannot realize the end. It calls for positive action by the law enforcing agencies more importantly by the government. Hence it is submitted that whichever political party comes to power should manifest the willingness to clear the twilight zone of turbid controversy created by the zigzag course of judicial decisions regarding the very concept of industry, a hub around which the whole Industrial Disputes Act revolves.

The original definition of industryis vague which can be discerned from a catena of conflicting decisions. The legislature, when it enacted the Industrial Disputes Act, 1947, without applying its mind transplanted the Australian definition of industry. Judiciary cannot be blamed for the paradoxical confusion confounded situation. The function of the judiciary is to step into the shoes of the legislature to ascertain what swept the mind of the latter while enacting a particular provision. If the legislature has trodden an unalterable barren tract, the rigidity so created cannot be expected to be relaxed by the judiciary.

In plethora of cases it is re-iterated that in the definition of industry words

151. Quinn v. Leathem, (1901) UKHL 2

of wider import have been deliberately used as a justification for wider interpretation in the pursuit of social justice to the workmen putting into oblivion the genuine constraints of the employers. It should loom large in the eyes of both the legislative policy makers and interpreters of law that unwarranted wider interpretation of the definition of industry will certainly preclude the potential employers from taking up industrial activities which certainly would affect the employment opportunities and economic progress of the country.

The question whether the definition of industry warrants a wider interpretation is a debatable issue. In the initial years after independence the judicial trend has been to render wider interpretation keeping in mind the industrial progress of the country by bringing more and more activities into the fold of the definition of industry to which effect there are judicial observations. It is obvious that such wider interpretation is policy oriented rather than principle oriented. It is a mythat industrial progress can be achieved by stretching the definition of industry to encompass any activity whatsoever. Unless an activity by its very nature is industrial it should not be conferred the nomenclature of industry under the cover of wider interpretation attributing it to the legislative intention. Such policy oriented judicial exercise was done in cases like Budge Budge Municipality, City Corporation of Nagpur and HMS. But at the latter phase the judicial trend breaking away from the policy based approach swung to the principle based approach as depicted in cases like Cricket Club of India, Madras Gymkhana Club, Safder Jung Hospital, Delhi University and Solicitors Firm.

The decision in Bangalore Water Supply Case rendering widest possible interpretation to the concept of industry pushed it to its extreme and illogical limit extending it to all most all activities with a few exceptions. Honourable Justice Krishna Iyer who delivered the majority judgement on more than one occasion in the judgement stated that the court was venturing only a working solution and it was for the legislature to step into resolve the ever continuing controversy. The questionable issue is the scope of a working solution which has its limitation that it cannot introduce radical changes to render a sweeping interpretation as has happened in the above case perching the definition of industry on its illogical zenith. According to a few judges who were part of the majority judgement, as discussed above, wider interpretation of the definition of industry was uncalled for. According to them only an activity which is organized systematically and habitually on commercial lines for production of material goods or rendering material service alone constitutes industry. It is submitted that this opinion reflects the correct opinion of law contemplating a restricted interpretation of the term industry as much water has flown under the bridge manifesting the amelioration of the situation that existed before, during and after the years of independence. Hence it is submitted that profit motive and capital inter alia need to be considered as the essential elements of an industryto restore to its conventional sense.

Bangalore Water Supply myth has exploded very shortly after the decision was delivered. It is an open truth that just one day before the retirement of Justice Beg in a hasty way majority judgement was delivered. His Lordship with all humility stated that there was no sufficient time at his disposal to delve deep into the important issues. It was equally true of other judges also even though openly they did not admit it. Even though they concurred with the majority decision they gave their separate opinions later at different dates. Their opinions contradict with the majority decision. Hence with due respect it is submitted that the inherent deficiencies have weakened the binding force of the ratio of Bangalore Water Supply Case. An erroneous decision is a well-established exception to the doctrine of stare decisis. Even though the legislature intervened to wipe out the error by way of amending the definition, unfortunately it has not come into force for lack of political courage in putting it into the binding legislative space. In effect, the decision in Bangalore Water Supply Case has become stare decisis, but not because of its intrinsic worth it has stood the test of time. It is not a time tested ratio. It is not out of place to state that in a few cases the need for referring the matter to a larger bench than one which decidedthe Bangalore Water Supply Caseis re-iterated. But it has not happened sofor.

One reason for widest interpretation of industry is lack of alternative mechanism to deal with the service disputes that may arise in the activities which otherwise are kept outside its purview. The amended definition of industry excludes certain activities without providing for such alternative mechanism. Hence it is submitted that provision for alternative mechanism to deal with disputes that might arise between the employers and workmen in activities which should be excluded from the ambit of the concept of industry.

The proposition that sovereign functions qualify for exemption has garnered judicial support in many cases. There is no iota of doubt as to whether it should qualify for exemption. But still the debate is on as to what constitutes sovereign functions. Even the decision in Bangalore Water Supply Casedid not throw any deeper insight into the subject except qualifying it for exemption by creating a dichotomy between strict sovereign functions and activities severable from such functions, the former being exempted and the latter being non exempted. The transformation from police state to welfare state has resulted in a paradigm shift in the sovereign functions. During laisses faire era, of which police state is an off shoot, the functions of the state were strictly confined to maintenance of law and order. The welfare state concept has drastically changed the concept of sovereign functions that it has become the constitutional obligation of the state to provide for the necessities of people from cradle to grave. In effect state has to discharge multifarious functions. The question is whether all activities of the state which otherwise fall within the definition of industry qualify for exemption. It is said that all functions what the state discharges in pursuance of the directive principles of state policyto be

considered as sovereign functions that it should not be confined only to the traditional executive,legislative and judicial functions. The above proposition can be accepted as proper keeping in mind the need for restricted interpretation of the term industry that only those activities undertaken by the state on commercial lines for the purpose of rendering material goods and services should be brought under the fold of the definition of industry.

It is obvious from the above discussion that many activities have been brought into the fold of the definition of industry for want of alternative mechanism. In that process courts have laid down principles like triple test, activity analogues to trade or business, dominant nature test and employer and employee relationship. Due to lack of legislative policy and non-enforcement of the amended definition, the definition of industry is strained with activities which do not fall within the term industry in its conventional sense. Hence it is submitted that the need of the hour is to relieve the definition of industry from its unnecessary and unwarranted strain by restricting it to only those activities which are undertaken on commercial lines and create alternative mechanism to deal with other activities which strictly do not fall within the term industry in its conventional sense. The amended definition of industry which has not come into force also needs to be thoroughly revamped. A new definition of industry compatible with the suggestions made herein and more importantly its immediate enforcement will go a long way in liberating the concept of industry from the twilight zone of turbid controversy enabling the rationalization and concretization of law in this regard

Imperative for effective policy on aviation in Africa

***King James Nkum (PhD, BL)**

1.1 Current Institutional Framework

Part of the regional arrangement initiated at the international aviation scene was the establishment of the African Civil Aviation commission (AFCAC) by the ICAO, pursuant to Article 55 of the Chicago Convention[1]. The AFCAC was conceived by the Constitutive Conference convened by ICAO and the then OAU in Addis Ababa, Ethiopia in 1969. Subsequently, it was adopted as the Specialized Agency of African Union[2] in the field of civil aviation during the OAU Summit of 1975 at Kampala, Uganda. The Body located at Dakar, Senegal[3] eventually became OAU/AU Specialized Agency on 11 May, 1978. Accordingly, the Revised AFCAC Constitution 2009 re-enacted the purpose of the Commission as the Specialized Agency of the AU responsible for civil aviation matters in the African sub-region[4] as contained in the 1969 Constitution.

Like the ICAO, the AFCAC is saddled with the power of regulating the aviation sector in Africa. The Agency seeks to perform this onerous task based on its goal to foster a safe, secure, efficient, cost effective, sustainable and environmentally friendly civil aviation industry in Africa[5]. As such, the issue of facilitating cooperation and coordination among African states towards the development of an integrated and sustainable air transport system comes to the fore[6]. Connected to this goal is the need to ensure the implementation of ICAO Standards and Recommended Practices (SARPs), as well as the development of harmonized rules and regulations in tandem with global standards[7].

Membership of the Body is open to all African States with equal rights in terms of participation and representation at AFCAC meetings[8]. The smooth functioning of the Secretariat is carried out by the Secretary General who is appointed by the Plenary upon the Bureau's recommendation for a term of three (3) years, renewable for another single term[9].

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1 The others are Latin American Civil Aviation Commission (LACAC), Arab Civil Aviation Commission (ACAC) and European Civil Aviation Conference (ECAC).

2 The African Union (AU) is an organisation of African States formed to:
   (i) Accelerate the political and socio-economic integration of the continent;
   (ii) Promote and defend African common positions on issues of interest to the continent and its peoples;
   (iii) Achieve peace and security in Africa; and
   (iv) Promote democratic institutions, good governance and human rights.

3 Article 8 Revised AFCAC Constitution 2009.

4 *Ibid* Article 2.

5 See Woldeyohannes, Mesfin Fikru. Op Cit.

6 *Ibid*

7 *Ibid*

8 Article 5 AFCAC Constitution Op Cit.

9 See *Ibid* Article 14 (1) – (5).

In terms of its aims and functions, the Agency was set up under Article 3 of its Constitution for the following purpose:

(i) Coordinating civil aviation in the Continent and to cooperate with ICAO and all other relevant organizations and other bodies which are involved in the promotion and development of civil aviation in Africa[10].

(ii) Facilitating, coordinating and ensuring the successful implementation of the Yamoussoukro Decision by supervising and managing Africa's liberalized air transport industry[11].

(iii) Formulating and enforcing appropriate rules and regulations that give fair and equal opportunity to all stakeholders and promote fair competition[12].

(iv) Promoting understanding on policy matters between its Member States and states in other parts of the world[13].

(v) Fostering *inter alia*, the implementation of ICAO Standards and Recommended Practices for the safety, security, and environmental protection and regularity of the aviation sector[14].

(vi) Ensuring adherence to and implementation of Decisions of the Agency's Executive Council and Assembly[15].

Similarly, the functions of the Agency as outlined in Article 4 of AFCAC Constitution include the following gamut of responsibilities:

(i) Undertaking studies on technical regulatory and economic development in air transport, with particular focus on their implications for Africa;

(ii) Encouraging and supporting Member States to comply with ICAO Standards and Recommended Practices, as well as the regional air navigation plans;

(iii) Fostering and coordinating the programmes for the development of training facilities in Africa and encourage and support the training and development of personnel in all Fields of civil aviation;

(iv) Encouraging and supporting the creation of autonomous civil aviation entities;

(v) Developing collective arrangements to build the necessary resources for the promotion of international civil aviation, particularly those provided within the framework of bilateral and multilateral programmes for technical cooperation to member States;

10 *Ibid,* Article 3 (a).
11 *Ibid,* Article 3 (b).
12 *Ibid,* Article 3 (c).
13 *Ibid,* Article 3 (d).
14 *Ibid,* Article 3 (e).
15 *Ibid,* Article 3 (f).

(vi) Ensuring advocacy and defense of common positions of Member States at international for a relating to civil aviation;

(vii) Ensuring seamless and close cooperation with various Regional Economic Communities (RECs)[16] as well as those of other African Organizations concerned with civil aviation matters;

(viii) Advising Member States on all civil aviation matters;

(ix) Examining specific problems which may hinder the development of and operation of the Continent's civil aviation industry, and where possible, take corrective and/or preventive actions in coordinating with Member States as required;

(x) Acting pursuant to provisions of Article 9 of the Yamoussoukro Decision to discharge its duties of Executing Agency[17] of the Air Transport in Africa;

(xi) Developing and harmonizing common rules and regulations for the safety, security, environmental protection, fair competition, dispute settlement and consumer protection, amongst others;

(xii) Increasing and coordinating synergies in the fields of search and rescue, salvage and accident investigation;

(xiii) Coordinating the development and implementation of plans in the fields of aviation infrastructure;

(xiv) Coordinating the election of African States into the ICAO Council and of African experts into Air Navigation Commission after receiving approval of AU;

(xv) Support and facilitating the appointment of Africans into ICAO, its organs and other international civil aviation bodies; and

(xvi) Performing such other functions as may be conferred upon it by the Executive Council or the Assembly of the AU to fulfill its objectives[18].

Realizing the imperative for a common civil aviation policy capable of promoting the development of African airlines and thereby projecting the continent on the global map of air transport at the international scene, AFCAC in line with its objective, outlined five strategic objectives[19] namely: air

16 RECs bring together countries in sub- regions for economic integration. Currently, there are eight RECs recognized by the AU, each established under a separate regional treaty. They are:
(i) Arab Maghreb Union (UMA)
(ii) Common Market for Eastern and Southern Africa (COMESA)
(iii) Community of Sahel-Saharan States (CEN-SAD)
(iv) East African Community (EAC)
(v) Economic Community of Central African States (ECCAS)
(vi) Economic Community of West African States (ECOWAS)
(vii)Intergovernmental Authority on Development (IGAD)
(viii) Southern Africa Development Community (SADC)

17 The Body referred to in Article 9 (4) of the Yamoussoukro Decision. \

18 *Ibid* Article 4 (a) – (p).

19 The strategic objective is for the five year period of 2011 - 2016.

transport, safety, security, human resources development, and rule of law[20].

With particular reference to the goal of ensuring sustainable human resource development for African aviation, AFCAC unequivocally asserts that it has organized, coordinated and hosted meetings, courses and seminars in the technical fields aimed at the improvement of aviation safety in Africa and the development of human resources vide technical cooperation[21]. The different technical sessions are said to have covered deliberations on regional challenges and initiatives, training, lack of adequately trained and skilled personnel, safety of air transport, development of sustainable aviation security, capacity building and need for Government and Industry cooperation, regional and national planning and cooperation. Similarly, courses were organized to train personnel in aviation safety in collaboration with training institutions in order to enhance safety level in conformity with ICAO standards[22]. In the same vein, AFCAC has taken additional initiatives and activities in the technical fields including the signing of new Memoranda of Understanding (MOUs) and amending the existing ones to reflect the current situation of the aviation industry in Africa[23]. According to the Agency, the aim is to prioritize aviation training and the provision of technical support to strengthen aviation training institutions[24].

The Plenary is the supreme organ of the AFCAC, composed of duly accredited representatives of Member States responsible for civil aviation in Africa[25]. In terms of functions, the Plenary plays the following constitutional roles:

(i) Issuance of policy guidelines through resolution and recommendations;
(ii) Election of the President and Vice-President of AFCAC to serve as members of the Bureau;
(iii) Approval of the organizational Structure of the Agency as well as the appointment of Secretary General upon the recommendation of the Bureau;
(iv) Approval of the work programmes, business plan, budget, rules and regulations of AFCAC
(v) Establishment of committees and working groups, as necessary to undertake special assignments or tasks on civil aviation in Africa, with such functions as may be specified, and appoint their members;

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20 Woldeyohannes, Mesfin Fikru. Op Cit.
21 Highlights of the Policy Statements, Objectives, Strategies and Concepts on Aviation Training and Human resource Development as contained in the African Civil Aviation Policy (AFCAP) adopted by the Conference of African Ministers for Transport held in Luanda in November 2011 (CAMT 2) and endorsed by the AU Heads of State Assembly, held in January 2012.
22 *Ibid*
23 AFCAC has concluded Memoranda of Understanding with the governments of China, India, Korea, Singapore, Turkey, United Arab Emirates Indonesia and others.
24 Woldeyohannes, Mesfin Fikru. Op Cit.
25 Article 10 (1) – (3) AFCAC Constitution Op Cit.

(vi) Approval of such other activities, rules and procedures as deemed appropriate, to meet the objectives of the Body;
(vii) Appointment of External Auditors of the Agency;
(viii) Consider and take appropriate action on the External Auditors report;
(ix) Ensure the effective implementation of the Yamoussoukro Decision, principally the liberalization of air transport services;
(x) Adoption of the financial rules and regulations, accounting and auditing rules and regulations for AFCAC;
(xi) Submit its tri-annual report on the State of implementation of the Yamoussoukro Decision to the Assembly of Heads of States and Governments through the Executive Council;
(xii) Adoption of its rules of procedure, including the establishment of committees as deemed appropriate as well as the Rules of Procedures of the Bureau; and
(xiii) Undertake such other functions as may be requested or conferred upon it by the relevant Organs of the AU.

The AFCAC Bureau is composed of the President and five (5) Vice-Presidents elected by the Plenary in accordance with the AU geographical representation formula. The Coordinator of the African Group at ICAO Council is authorized to attend meetings of the Bureau in the capacity of an ex-officio. The Presidency of AFCAC is based on a rotation, each region serving a single term of three (3) years[26]. The functions of the Bureau are constitutionally outlined including:

(i) Convening the ordinary and extraordinary plenary sessions, subjects to the relevant provisions of Article 10, and determine the provisional agenda;
(ii) Ensuring the implementation of the AFCAC work programmes and other resolutions of the AFCAC Plenary;
(iii) Supervising and coordinating the activities of the Secretariat and any committee or working group;
(iv) Preparing its own rules and procedures and summit same to the Plenary for approval;
(v) Implementation of the resolution, directives and decisions of the Plenary and discharge the duties and obligations which are conferred upon it in the constitution;
(vi) Selection and recommendation from a short-list to the Plenary, candidates for the position of Secretary General;
(vii) Supervision of the administrative and financial management of the Secretariat;
(viii) Submission of periodic reports on its activities to the Plenary; and
(ix) Carrying out any functions that may be assigned to it by the Plenary[27].

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26 *Ibid,* Article 12 (1) – (3).
27 *Ibid,* Article 13 (a) – (i).

Apart from AFCAC, there are other regulators concerned with the regulation of civil aviation on the African continent. These Civil Aviation Authorities (CAAs) are the national bodies vested with the regulatory and oversight responsibility of the aviation industry. The CAAs ensure compliance by the industry with national policies and ICAO SARPs. Some States have pooled their resources together to form Regional Safety Oversight Organizations (RSOOs) in order to increase their regulatory and oversight capabilities, such as the Civil Aviation Safety and Security Oversight Agency (CASSOA) of the EAC and the Banjul Accord Group Aviation Safety Oversight Organization (BAGASOO)[28].

1.2. Current Legal Framework

Apart from the national and international legal instruments which regulate civil aviation in Africa, there exists some regional legal framework in this regard. These include the several Resolutions, Declarations and Action Plans adopted by various conferences of African Ministers of civil aviation.

As earlier observed, the AFCAC Constitution 1969 established the African institutional framework on civil aviation. Prior to this time, the Convention on International Civil Aviation (or Chicago Convention) of 1944 formed the sole legal framework on the continent as far as regional civil aviation was concerned. The Chicago Convention was made in view of the need for the development of safe and orderly air transport services within and international scene on the basis of equality of economic and operational opportunity.

The AFCAC Constitution was followed by the Abuja Treaty[29] of 1991 adopted by the heads of States and Governments of the member States of the then OAU. The Treaty established the African Economic Community with the aim of *inter alia* deriving mutual benefit, coordination and integration of policies for the social and economic development of Africa more particularly in civil aviation.

Similarly, the Yamoussoukro Decision of Cote D'Ivore on 14 November 1999 relating to the implementation of the Yamoussoukro Declaration for the liberalization of access to air transport markets in Africa was subsequently endorsed by the Assembly of heads of States and government of the then OAU[30]. It was adopted in Lome, Togo on 12 July, 2000.

The Constitutive Act of the African Union (AU) adopted in Lomé, Togo, on 11 July 2000, particularly Articles 14, 15 and 16 thereof entrust the African Union Commission with the role of coordination in the transport, communication and tourism sectors.

Subsequent to the above, the African Civil Aviation Policy (AFCAP) was adopted by the Second Conference of the AU Ministers of Transport, in

28 Woldeyohannes, Mesfin Fikru. Op Cit.

29 The Abuja Treaty means the Treaty establishing the African Economic Community adopted at Abuja, Nigeria on 3 June, 1991 which entered into force on 12 may, 1994.

30 Vide Decision AHG/OAU/AEC/Dec.1 (iv).

Luanda, Angola on 25 November 2011 and the strategies and commitments outlined therein.

The 2007 Addis Ababa Declaration on civil aviation security in Africa is an important milestone in aviation safety. Five years later, the Abuja Declaration on Aviation Safety in Africa was signed in 2012. The Declaration envisages that member States shall ensure that Aviation Training organizations in Africa attain reputation as international centers of excellence.

The Ministerial Decision of the third African Union Conference of Ministers responsible for transport entrusting AFCAC with the responsibility[31] of being the Executing Agency[32] for the Yamoussoukro Decision constitutes another legal framework.

Finally, other initiatives exists which were developed for and implemented in Africa by other States and organizations. These include *inter alia*:

(i) ICAO African Regional Comprehensive Implementation Plan and COSCAPs, IATA IOSA and ASET,
(ii) World Bank Project for Sustainable Air Transport in Africa,
(iii) US Safe Skies for Africa Initiative, etcetera.

1.3. Imperative for Effective African Civil Aviation Policy

The economic contribution of air transport to the Gross Domestic Product (GDP) of many nations is huge, owing to the fact that the sector is an innovative industry that drives economic and social progress. It connects people, countries and cultures; provides access to global markets and generates trade and tourism. Aviation provides the only rapid worldwide transportation network, which makes it essential for global business and tourism thus facilitating economic growth, particularly in developing countries.

Statistics shows that there are over 2,000 airlines around the world operating a total fleet of over 23,000 aircraft and serving about 4,000 airports through a route network of several million kilometers managed by around 200 air navigation service providers. Air carriers transport almost three billion passengers annually. The total value of goods transported by air represents 35% of all international trade. Over 40% of international tourists now travel by air. The air transport industry directly generates 5.5 million jobs globally and directly contributes USD 408 billion to global GDP. The industry contributes USD 1.1 trillion to world GDP through its direct, indirect and induced impacts – equivalent to 2.3 % of world GDP. The air transport industry, in 2008, generated a total of 32 million jobs globally, through direct, indirect, induced and catalytic impacts. Aviation's global economic impact (direct, indirect, induced and catalytic) is estimated at USD 3,560 billion, equivalent to 7.5% of world Gross Domestic Product (GDP)[33].

31 The Decision was adopted in Addis Ababa, Ethiopia on 11 May, 2007 and subsequently endorsed by the Assembly of heads of States and Government in Accra, Ghana on 29 June, 2007
32 Op Cit.
33 *Ibid*

Unfortunately the above bright prospect does not represent the African dream of a prosperous civil aviation industry. According to Woldeyohannes the air transport industry in Africa generated around 430,000 jobs in 2006 and contributed more than USD 9.2 billion to African GDP (direct, indirect and induced impacts). On a global level, Africa represents 10% of total jobs and 2% of GDP generated by the air transport industry, including catalytic impacts operates well below its share of the international civil aviation market[34].

Bad leadership remains the bane of Africa's underdevelopment. African airlines are generally under-capitalized; they operate narrow route networks, in addition to deploying small and ageing aircraft fleet. These airlines are weak and unable to compete with the global mega carriers. To reverse this trend and facilitate the growth of its civil aviation, Africa's leadership must continue to create enabling and conducive environment that attracts private sector capital investment in the industry. This underscores the urgent need for African States to forge a common approach to civil aviation towards the goal of realizing the full potential.

The imperative for achieving the cardinal objective of the African air transport is not in dispute. The issue is whether the stakeholders are committed to the goal of achieving this mission. There are numerous and complex problems faced by Africa's civil aviation which requires political will to be addressed. Some of these challenges as enumerated hereunder calls for a more effective legal and strategic policy framework.

Security and safety constitutes the major challenge bedeviling the continent's aviation sector. This quagmire is informed by the fact that most of the states lack effective safety oversight mechanisms. The high degree of deficiencies in airport and air navigation systems *inter alia*, collectively conspires to rob the continents of its vast economic potential in the sector. The overall effect of these inadequacies is the unacceptable accident rates that are many times higher than the global average[35]. The safety problem is compounded malpractices due to lack of harmonized corrective measures. The Continent is faced with daunting aviation security challenges especially due to limited systems to mitigate the new and emerging threats against civil aviation including the menace of terrorism and insurgency. In addition, there is the need to initiate measures targeted at minimizing the impact of air transport on the environment, as tighter international standards are being imposed. Moreover, there is a growing insufficiency in qualified personnel that is worsened by attrition to other markets commonly referred to as "brain drain" and high turnover of middle and senior managers particularly in government owned institutions[36]. Manpower development and training is a basic necessity for the aviation business in the light of the current displacement of local technical

34 *Ibid*
35 *Ibid*
36 *Ibid*
37 *Ibid*

personnel by expatriates. With the high level of expatriates taking over positions of local technical personnel, the next decade could spell doom for the Africa's aviation industry if nothing is done to reverse the trend. Aviation practitioners unanimously agree that the lack of sufficiently trained and type-rated technical personnel in the Continent's aviation sector would incessantly give rooms for expatriates to take over the jobs of African personnel. It is not surprising that several pilots trained from different aviation colleges on the Continent and beyond are roaming the streets without jobs especially in a country like Nigeria. This implies that local airlines are getting dispensation for expatriate quota, which is already affecting affect Nigerian professionals.

Of course, the policy thrust of African aviation is based on the desire of member States for the promotion of a harmonized approach to manage the various aspects of civil aviation including safety, security, efficiency and environmental protection, among other objectives. Accordingly, the Policy Statement of African civil aviation encourages all member States to pursue the development of institutions for basic, advanced and refresher trainings to meet the current and future needs of the African aviation industry[37]. The African Civil Aviation Policy (AFCAP) is a concise overarching policy framework document forming the basis of which African Regional Programmes, Action Plans and common Rules, Regulations and Guidelines should be formulated[38].

However, in spite of the numerous initiatives and good efforts to improve civil aviation in Africa, overall success has been too little and too slow mainly because of lack of political will as well as institutional and procedural constraints[39]. In formulating these guidelines, Woldeyohannes, Director of Safety and Technical Service at AFCAC is of the view that a well thought out and implementable policies requires a coherent policy framework which inter alia outline and solicit the necessary political commitment[40]. As such it would be imperative for all entities, bodies as well as other stakeholders in African aviation sector to ensure that their States abide by the AFCAP in policy formulation and execution in ensuring complementarity, focus, harmonization and uniformity on issues pertaining to Safety, Security and Sustainable Development of Air Transport in Africa[41].

In this regard, it would be instructive to pursue the realization of the Comprehensive Regional Implementation Plan for Aviation Safety in Africa (AFI Plan) adopted by the 36th ICAO Assembly to address the aviation safety deficiencies in Africa. The ICAO/AFI Plan is meant to be implemented through three focus areas namely:

(i) Enabling States to establish and maintain effective and sustainable safety oversight systems;

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38 *Ibid*
39 *Ibid*
40 *Ibid*
41 *Ibid*

(ii) Assisting States to resolve identified deficiencies within a reasonable time;
(iii) Enhancing aviation safety culture of African aviation service providers[42].

Hence, the time has indeed come for Africa to formulate and implement a comprehensive policy which uniquely provides a framework and the platform for the formulation, collaboration and integration of national and multinational initiatives/programmes in various aspects of civil aviation. This roadmap is expected to position the Continent's air transport in the global economy. For such a policy to succeed it must provide for the appropriate empowerment of national and regional technical bodies to enable them carry out their responsibilities effectively towards national and regional development. Thus, as aptly affirmed by Woldeyohannes, the policy document should address, inter alia, the following issues:

(i) The vision and strategic objectives for African civil aviation,
(ii) Specific targets to bring Africa at par with the rest of the world, particularly in safety, air traffic and economic statistics,
(iii) Common objectives, policy statements and strategies for the management of the various aspects of civil aviation: - safety, security, airspace management, air transport, etcetera,
(iv) Linkage with other socio-economic sectors, e.g. tourism, trade, to enhance demand for air transport,
(v) Common approach to external relations and foreign operations,
(vi) Procedure for periodic review and monitoring of implementation of the policies and adoption of regulations and Action plans as may be required,
(vii) Delegation of authority from Heads of Government to conference of Ministers, AU commission, AFCAC as appropriate, etcetera[43].

By forging a paradigm shift in focus, from national to common regional market; from inter-state to intra-African operations, Africa will be better positioned to respond to the intricacies of globalization and ultimately gravitate from regional competition to global competition in the grand scheme of things.

1.4. Conclusion

In conclusion, a number of policies plans and programs have been formulated for the African aviation industry both at the national and regional levels. Unfortunately, most of these policies and programs are the *causus belli* for the woes in the sector by virtue of their retrogressive and harmful nature. It is therefore imperative for policy-makers in the sector to make decisions that are concise and coordinated. Policy direction should be projected to the next 50 to 100 years in Nigeria as obtainable in other climes[44]. Moreover, beyond policy formulation is the need for its implementation to the letter.

42 *Ibid*
43 *Ibid*
44 *Ibid*

Is live-in relationship, the escape route to avoid the commitments of marriage?

*Dr.Rajashree S Kini

Introduction

The era of globalisation and the development related to that is changing the concept of morality. The words, 'right or wrong' is defined by each person according to his own understanding of the concept of morality. But the marriage is still holding a sacramental place in Indian society.

The word marriage sounds very attractive. But the responsibilities and commitments tagged along with that makes one to repel to the sacred institution of marriage. The concept of family, as the basic unit of the society is withering away. The live-in relationship is developed as an alternative to marriage. It is considered as immoral and against the basic unit of the society. At the same time considered as most convenient and comfortable.

Marriage

Marriage is a social institution, which is the foundation of any good society. It is the basis for the family. Marriage is considered as very sacramental. Even though marriages are between two individuals, it binds two families together. The society and the Indian Legislatures, attempt to protect marriage.

The functions of marriage include regulation of sexual behavior, reproduction, nurturance, protection of children, socialization, consumption, and passing on of the race[1].

Hinduism

Hinduism considers life of a human being into 4 ashramas: Brahmacharya, Grahastashram, Vanaprasta and Sanyasa. The second stage Grahastashrama is marriage. Marriage is very important for a Hindu man as without wife he cannot conduct many rituals and also without marriage one cannot have a son, who helps him to attain moksha and rebirth as a human being. As divorce is not an acceptable event in Hinduism, marriage gives social security to the whole family.

Christianity

Marriage in Christians is the covenant of love. The bonding of love between a man and a woman becomes strong and secure with the marriage. They consider God himself is the author of marriage and marriage is needed to get many benefits and to achieve many purposes.

Islam

Marriage in Islam is to give rise to family. The offspring without the

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1. Nambi, S., "*Marriage, mental health and the Indian Legislation. Presidential Address*" 47 *IJP* 3 –14 (2005).

wedlock is not respected in the society. They claim marriage for spiritual tranquillity and peace. They believe marriage is a divine mandate which dictates cooperation and partnership between husband and wife in life.

Indian Judiciary

The legal definition of marriage can be given in *Hyde v Hyde and Woodmansee,* where Lord Penzance defined marriage as the 'voluntary union for life of one man and one woman, to the exclusion of all others'[2].

Live-in Relationship

The birth of live-in relationship, its origin, can be traced back to the western countries where the youngsters were sharing the accommodation and other facilities in an accommodation only to cut down the cost of living. This cost cutting measure is considered as the new trend and is followed by India.

The lack of commitment, the disrespect for permanent social bonds, economic freedom, lack of tolerance in relationship has made its transition from marriage to love marriage to live-in relationships[3]

In western countries live-in relationship is common as the marriage is not so sacramental and considered as contract between a male and female only. There unmarried male and female live under one roof for their happiness. The USA, Sweden and Denmark are given equal rights to couples in live-in, as marriage. In U.K, live-in is governed by Civil Partnership Act, 2004. But in 2010, it is given by House of Commons that, the couples do not get right in each other's houses if they break up. Australia considers de-facto relationship between a man and a woman even if they are not married and just living-in together.

In India, a male and a female start living together to check their compatibility before getting committed to marriage, before taking up the responsibilities of family. Whatever reasons are given, this relationship is still not recognised easily by the society as it is considered as immoral act. Live-in relationship is mainly practiced in metropolitan cities and is difficult to have in small towns as people are not broadminded and most of them are known to each other. But it is seen that, there is a gradual transition in India from the sacrament of arranged marriages to love marriages and ultimately to live-in relationships, due to many reasons like lack of tolerance, financial insecurity, commitment etc. The trend is good or bad, only time can decide as any other revolutionary changes happened in India.

Historical Outline

The live-in relationship was prevalent in ancient India too as 'maitri-karar' (friendship agreement), where a boy and a girl entered into agreement to live together and take care of each other. There are many reasons to go for live-in relationships than getting married, which is legal and socially secure:

2 (1886) L. R. 1 P & D, 130

3 Varun, "*The Socio-Legal Dimensions of Live-in Relationships*" (2018). www.lawyersclubindia.com, accessed on 4/10/2019..

1. The youngsters going to western countries for study purpose or for job, get into this relationship for emotional or financial support.
2. Some are trying to understand their partners before they get into the permanent wed lock.
3. Some are in love and want to spend more time with their partners but may not be ready for marriage commitments due to various reasons.
4. The main reason is to avoid the responsibilities coming along with marriage.
5. The new trend in the society is, economically independent male or female have a tendency to show that they are modern and so they follow western culture.

Indian Judiciary on Live-in Relationship

In India, till date there is no specific legislation enacted to deal with live-in relationship. The Protection of Women from Domestic Violence Act, 2005 provides some kind of protection to the aggrieved parties from any kind of atrocities faced by the females living in relationship in the nature of marriage. Act defines an 'aggrieved person' covered under this Act as "any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent". The Act further defines a 'domestic relationship' (S. 2(f)) as "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family". The 'domestic relationships' are not restricted to marital context alone[4]. The Supreme Court validated long-term relationships as marriages. Supreme Court opined Live-in or marriage like relationship is neither a crime nor a sin though socially unacceptable in this country. The decision to marry or not to marry or to have a heterosexual relationship is intensely personal[5].

This Supreme Court judgement was followed by suggestions from National Commission for Women (NCW), and sought a change in the definition of 'wife' in Section 125 of the Criminal Procedure Code (Cr P C), dealing with maintenance. The NCW recommended that women in live-in relationship should be entitled to maintenance if the man deserts her.

On 23.03.2010 the Hon'ble SC in *Khushboos case*[6] opined that if a man and woman are living together without marriage, then it cannot be considered as an offence. The court said even Lord Krishna and Radha lived together according to mythology. The court also held that living together is a part of the right to life u/Art.21 of the Indian Constitution and it is not a "criminal offence".

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4 Nelasco Shobana, "*Status of Women in India*" (Deep and Deep Publications Pvt. Ltd, New Delhi, 2010).

5 *Indra Sarma V. V K V Sarma*, AIR 2014 SC (309).

6 *S. Khushboo Vs Kanniammal* (2010) 5 SCC 600

In the cases prior to independence like A *Dinohamy v Blahamy*[7], the Privy Council laid down a general rule – if a man and a woman are proved to have lived together, the law will presume that they were living together with a valid marriage and not like concubinage, unless the contrary is proved.

In ***Radhika v. State of M.P.***[8] the SC observed that if for a long time a man and woman are in live in relationship, then they are treated as a married couple and their child would be considered legitimate.

Badri Prasad v Dy. Director of Consolidation[9], was the first case came up before court after independence. Here the Supreme Court recognized live-in relationship as valid marriage as partners lived together for 50 years.

In *Payal Katara v. Superintendent Nari Niketan Kandri Vihar Agra and Others*[10] the Allahabad High Court ruled out that "a lady of 21 years of age is a major and therefore has the right to go anywhere and can live together with a man or a woman".

In Patel and others[11] case the apex court observed that live- in –relation between two adult without formal marriage cannot be construed as an offence.

In *Lata Singh v State of UP & Anr.*[12] the Apex Court held that live-in relationship was permissible only between unmarried major persons of heterogeneous sex. If a spouse is married, the man could be guilty of adultery punishable under section 497 of the IPC.

In ***Abhijit Bhikaseth Auti v.State of Maharashtra and Others***[13] on 16.09.2009, the SC observed that it is not necessary for woman to establish marriage in case of live-in relationship to claim maintenance under sec. 125 of Cr.P.C.

Joseph Shine V Union of India[14]**,** The Supreme Court has declared that Section 497 is unconstitutional. Adultery is not a crime. The court declared that Section 497 of the Indian Penal Code - the adultery law - was unconstitutional. The Section reads: *"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery".*

Rights of the Children of Live-in Relationship

Property rights refer to the inheritance rights of children. Under the *Hindu Succession Act, 1956,* a legitimate Child, both son and daughter form the Class-I heirs in the Joint Family Property. On the other hand, an illegitimate child

7 AIR 1927 P.C. 185
8 AIR 1964 Madh Pra 307
9 AIR 1978 SC 1557
10 C.M.H.C.W.P. Appeal No. 16876 of 2001 Decided On, 17 May 2001
11 (2006) 8 SCC 726
12 AIR 2006 SC 2522
13 2009 (1) AIR Bom 212
14 WP (Crl.) No.194/17

under Hindu Law inherits the property of his mother only and not the putative father.

In the case of *SPS Balasubramanyam v. Sruttayan*[15] the SC had said, "If a man and woman are living under the same roof as husband and wife and cohabiting for few years, there will be a presumption under *Section 114* of the Evidence Act, of wedlock and the children born to them will not be illegitimate. This was a case wherein the apex court for the first time upheld the legitimacy of the children born out of a live-in relationship. The court interpreted the statute of such a child to be in concurrence with *Article 39(f)* of the Constitution of India which lays down the responsibility of the State to provide the children with adequate opportunity to develop in a normal manner and safeguard their interests.

Legitimacy has always formed a pre-requisite for the inheritance rights under Hindu law. Consequently, the Courts have always ensured that any child who is born from a live-in relationship of a reasonable period should not be denied the right to inheritance and this practice is in sync with *Article 39(f)* of the Constitution of India[16]. The Supreme Court in *Vidyadhari v Sukhrana Bai* [17] observed a landmark judgment where the Court granted the right of inheritance to the children born from a live-in relationship and ascribed them with the status of "legal heirs".

In 2010, live-in relationship suffered a setback, in a family dispute case, *Bharatha Mata V R Vijeya Renganathan*[18]. Here Supreme Court held that, a child born out of a live-in relationship was not entitled to the rights of inheritance in Hindu Ancestral Coparcenary Property. This appears to be a general law but its root lies in the facts, specific to this case. This ruling cannot be construed as a general law, as it is only justified in this peculiar case. If, in case, it is applied to all live-in relations having long term, then it would result in gross miscarriage of justice.

In his criticism of the *Bharata Matha case*[19] Justice Ganguly discussed on the issue of live-in relationships and property rights of a child born out of such a relationship. He stated that the legislature has used the word "property" in *Section 16(3)* of the *Hindu Marriage Act, 1955*[20] and is actually silent on whether such a property is meant to be an ancestral or a self-acquired property

15 1994 AIR 133, 1994 SCC (1) 460

16 Article 39 (f) of Constitution of India - children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

17 AIR 2008 SC 1420

18 (2010) INSC 413

19 *Ibid*

20 *Section 16(3)* of the *Hindu Marriage Act, 1955* - Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

and in light of such an uncertainty, the concerned child's right to property cannot be arbitrarily denied.

Clauses (1) and (2) of *Section 16 of HMA, 1955*[21] expressly declare that children of void and voidable marriages should be deemed as legitimate children in the eyes of the law. Thus, such discrimination against them and unequal treatment of other legitimate children who are legitimately entitled to all the rights in the property of their parents, both self-acquired and ancestral will amount to an amendment made to this section.

In, *Parayan Kandiyal Eravath Kanapravan Kalliani Amma (Smt.) & Ors. Vs. K. Devi and Ors*[22] the judge observed that the *HMA, 1955***,** a beneficial legislation, has to be interpreted in a manner which advances the objective of the law.

The intention of the *HMA, 1955* with respect to *Section 16* and the subsequent amendment eliminating the distinction between children born out of valid/void/voidable marriages is to bring about social reforms and conferment of the social status of legitimacy on innocent children which would actually be undermined by imposing restrictions on rights guaranteed under the said section.

Revanasiddappa & Anr. vs Mallikarjun & Ors.[23]*,* the court stated that irrespective of the relationship between parents, birth of a child has to be taken independently. It is clear that a child born out of such relationship is innocent and is entitled to all the rights and privileges available to children born out of valid marriages. This is the crux of Section 16(3) of the amended Hindu Marriage Act, 1955.

In the modern days, cases like *Tulsa v Durgatia*[24] have held that a child born from such a relationship will no more be considered as an illegitimate child.

The crucial pre-condition for a child born out of a live-in relationship to be not treated as illegitimate is that the parents must have lived under one roof and co-habited for a significantly long time for society to recognize them as husband and wife and "it should not be a "walk in and walk out" relationship, as the Supreme Court has pointed out in its 2010 judgment of *Madan Mohan*

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21 *Clauses (1) and (2)* of *Section 16 of HMA, 1955* - Legitimacy of children of void and voidable marriages:

(i) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(ii) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

22 (1996) 4 SCC

23 2011(2)UJ 1342(S.C.)

24 2008 SC 1193

Singh and Ors v Rajni Kant & Anr[25].

Maintenance

Maintenance is often explained as the obligation to provide for another person. It forms a very important aspect in the case of a child born out of a live-in relationship. Under the *Hindu Adoptions and Maintenance Act, 1956, Section 21*, a legitimate son, son of a predeceased son or the son of a predeceased son of a predeceased son, so long he is a minor or/and a legitimate unmarried daughter or unmarried daughter of a son or the unmarried daughter of a pre-deceased son of a pre-deceased son shall be maintained as dependants by his/her father or the estate of his/her deceased father. A child born out of live-in relationships had not been covered under this Section of the given Act and consequently had been denied the right to be maintained under this statute.

The Indian judiciary used its power to achieve the ends of social justice in the landmark case of *Dimple Gupta v Rajiv Gupta*[26] held that even an illegitimate child who is born out of an illicit relationship is entitled to maintenance under *Section 125* of the *Cr P C (Code of Criminal Procedure, 1973)* which provides maintenance to children whether they are legitimate or illegitimate while they are minors and even after such a child has attained majority if he/she is unable to maintain himself/herself. Even though there have been quite some cases that have upheld the maintenance rights of live-in partners where the statutes were interpreted in a very broad manner to include female live- in partners as "legally wedded wives".

However, in the case of *Savitaben Somabhai Bhatiya v State of Gujarat*[27] made an exception where the live-in partner had assumed the role of a second wife and was not granted any maintenance, whereas the child born out of the said relationship was granted maintenance.

The denial of providing maintenance to a child born out of a live-in relationship can also be challenged under *Article 32* (Remedies for enforcement of rights) of the Constitution of India amounting to a violation of the fundamental rights which guarantees under *Article 21* which provides for the Right to Life and Personal Liberty. Such a denial can deprive an individual of his/her right to lead his/her life with dignity, and this has been upheld by the Kerala High Court in *P V Susheela v Komalavally.*[28]

The unequal treatment of a child born out of a live-in relationship and a child born out of a marital relationship even though both are perceived as legitimate in the eyes of law can amount to a violation of *Article 14* which promises Equality before Law[29]. Adding feather to the cap, the Supreme Court of India in

25 AIR 2010 SC 631
26 AIR 2010 SC 239
27 AIR 2005 SC 1809
28 (2000)DMC376
29 Supra Note 17 at 6

D.Velusamy v D.Patchaiammal[30] differentiated between "live-in relationship" and "relationship in the nature of marriage" and laid conditions for women seeking maintenance in live-in-relationship. In the judgement Justices Markandey Katju and T S Thakur opined that in order to get maintenance, a woman, even if not married, has to fulfil the following four requirements: (1)The couple must hold themselves out to society as being akin to spouses (2)They must be of legal age to marry (3)They must be otherwise qualified to enter into a legal marriage including being unmarried (4)They must have voluntarily cohabitated and held themselves out to the world as being akin to spouses for a significant period of time. The court further stated that a "relationship in the nature of marriage" under the Domestic Violence Act 2005 must also fulfil the above requirements, and in additions the parties must have lived together in a "shared household" as defined in Section 2(S) of the Act. Merely spending weekends together or a one night stand would not make it domestic relationship. Justice Katju further elaborated, "In our opinion not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a "keep" whom he maintains financially and uses mainly for sexual purpose and or as a servant, it would not, in our opinion, be a relationship in the nature of marriage. No doubt the view we are taking would exclude many women who have had a live-in relationship from the benefit of the 2005 Act, but then it is not for this court to legislate or amend the law".

Live-in Relationship and Marriage – Socio-Legal Impact[31]

Age

People in live-in relationship are very young when they enter into relationship, but as they grow old, relationship fades away unlike the case of marriage, where people are committed and will be together for the fear of the society.

Compatibility

Normally a man and a woman are living together to have good compatibility between them, so that they can think of getting married in future. But as no one is perfect, after some the partners will lose interest in each other and start finding negative aspects of the behaviour of each other.

Social Acceptance

Whatever said and done, live-in relationship is not whole heartedly accepted by the Indian society, it is just tolerated, to accommodate the freedom of the people. But marriage is considered very sacramental and gets society's approval.

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30 (2010) 10 SCC 469

31 Gaur Sanjay, *Live-in-Relationship* (Yking Books, Jaipur, 2011)

Children

Children are not welcomed in live-in relationships as the purpose of live-in relationship is enjoyment without any commitment. Even if children are born, they are not secured as both male and female are not ready to take responsibility. Kids from wedlock are recognised as legitimate and get all the legal rights by birth.

Emotional Trauma

As there is no security in live-in relationship, partners develop serious emotional issues, if there is no compatibility between them. Because there is no consent from the family and no acceptance from the society, they cannot discuss their emotional state with anybody and thereby get into emotional instability. In Marriage couple are supported by family and society for any emotional instability.

Health Issues and Old Age Problems

As there is no commitment to take responsibility in live-in relationship, the partners are not bothered enough to take care of each other, on health issues and at old age. In the case of marriage, whole family will take care of each other.

Legality

Law in India has not recognised live-in relationship as a whole. Women and kids are given some protection under some legislation. But, as it is, there is no direct law on live-in and the male and female will not get legal protection for all the legal problems, unless they are able to prove their long term relationship and intention to stay together.

Analysis

Based on the judgements of Apex Court on live-in relationships, one can analyse that live-in relationship can be considered for the protection of women in kids, only if the partners are able to prove certain aspects. Here, one needs to understand that in case a couple is not able to prove the relationship, they do not get the security under law. But in many cases, live-in relationships are considered far better than or equal to marital relationships.

Duration of living together

If the partners are not able to prove their living together for some reasonable period, then they do not get any security under law. As there is no specific law, reasonable period is to be understood from case to case basis by the courts.

Shared household

Living together means, sharing a household, and not any arrangement of meeting at a decided place at specific interval of time or on weekends only. But there are many couples who for different reasons do not share the household but live together for years.

Domestic tasks

Domestic responsibility is given to women or shared between both the couples will happen both in marriage and live-in. In live-in sharing is more as both the couples are economically independent or respect each other.

Pooling of resources

Supporting each other and the kids financially, sharing bank accounts, acquiring immovable properties in joint names, long-term investments in business, shares in separate and joint names are the few factors shows the intention of staying together. But there are many instances where two people live together on their individual income and do not share any finances.

Sexual Relationship

The religious scriptures have validated marriage for procreation. Sexual relationship between husband and wife is promoted for getting offspring. In live-in relationships sexual relationship between a male and a female is for pleasure. One cannot say that they do not have intimate, emotional relationship and caring like marriage and it is known factor that marriage does not guarantee the emotional support to the partner.

Children

Children, in marriage are for long lasting relationship. But in live-in relationship couple may decide not to have kids or if they have kids law can say that both the parents should maintain the kids as in western countries, even though they do not live together later or get married to different persons later.

Public socialisation

Marriage gives the right to the couples to go out in public. But as it is the globalisation era, one need not interfere in the matter of others. As such, even live-in couples have right to public places as human beings and society need not criticise them for not getting married.

Intention of the couple

As there is no proof that marriage will last till the end, and as divorce cases are increasing on the basis of non-compatibility of the partners, one cannot say that live-in relationship will not last long. In fact, it is said that the compatibility and intimacy is more in live-in than in marriage as the couples are free from any kind of responsibility towards each other.

Need for a New Legislation

There is a need to enact a law to govern live-in relationships. If the existing family laws are modified then the legislation need to consider the above factors into consideration. It would be very difficult to incorporate all the matters in existing family laws. Then all the related enactments are also to be modified to give strength to the family laws.

If not, a new law on live-in relationship is to be enacted. Then all the aspects of

a family - marriage, domestic care, divorce, maintenance, kids care and property rights, inheritance, succession, burial rights etc. need to be looked into along with religion and impact on society. Again live-in between lesbians and gays too need to be looked in to. Once legal sanction is given to live-in relationship, the concept of marriage may be at trouble or it may totally vanish from the society. It may lead to all the ill-developments in society, which are the drawbacks of live-in relationships. It can be said that marriage and live-in will merge and become one.

Conclusion

Ruling by the court supporting live-in relationship should not be misunderstood and wrongly interpreted by the younger generation to their advantage. Judiciary is not supporting the live-in relationship; it is protecting the rights of women and children of such happened relationships.

Marriage should not turn out to be a mirage to those who honestly vouch for it. Going by the number of cases· filed for divorce relentlessly and the pending cases for divorce before different family courts, it can be predicted that, the institution of marriage is getting diluted and live-in relationship is growing more rigorously than the institution of family.

The existing laws are not effective enough to protect the rights of live-in-relationship partners. In India, the concept of live-in relationship is not common. It is a tendency to emulate the West. To marry or just to live together without getting married is totally a matter of personal choice. In both cases, the most essential elements are happiness, mutual understanding, trust, adjustments and commitment. Without these elements, no relationship, be it a marriage, can run in long term.

As far as Indian judiciary is concerned, the understanding of marriage and the notion of live-in relationship has gradually moved from the traditional view to the modern life of the changing society. Live-in relationship is gaining momentum amongst the educated and economically independent groups. There are serious concerns about such changing trends in the society i.e., the rights and obligation which such couples have towards each other and the status of children born out of such a tie is vague. No law on the subject has been formulated. The judiciary is just accommodating certain aspects of live-in relationships. It also understood that there is no statute postulating that live-in relationships are illegal.

Though the intentions in live-in relationships are noble, in practicality it is more a disaster than a relief as the experiences from the west clearly manifest that no arrangements are as worthy and binding as that of marriage.

Economic diplomacy and indo-sino trade relations: There is a lot more than what meets the eyes

By Sneha Singh*

I. INTRODUCTION

Two most populous nations, China and India are also considered as economic powerhouses and are often asserting their global profiles. According to the United States National Intelligence Council Report titled "*Mapping the Global Future*" by 2020, the international community will have to confront the military, political and economic dimensions of the rise of China and India[1]. The trajectory is complex and difficult even in the background of positive developments in the preceding years. States respond to their structural conditions and do their best to tackle the challenges or threats to security. India however, has, in contrast to the norm set by the standard realist theoretical paradigm in international relations, adopted a coherent or callous approach against China- keeping enough margins to foster healthier economic relations despite the security threat, a key consideration for economic diplomacy.

For year's India's economic diplomacy has been depicted by the begging bowl. With the recent influx of foreign direct investment in the country and the improved credit lines across the globe, the pre-set image is about to be modified. To reap maximised benefits of such improved economic diplomacy, the leadership has to be decisive in breaking the traditional and old mindset while segregating the issues of national security and trade policy with the help of bureaucratic coherence and political purpose.

Indian Business enterprises play a crucial role in advancing the economic interests of the nation abroad. The private sector anticipates deeper engagements of the nation in economic diplomacy to open newer avenues and boost India's International Investments. The current government (NDA government led by Shri Narendra Modi as Prime Minister) has encouraged the interest of the business community through myriad ways and improved interactions with trade rich countries such as China. One of the key elements of the foreign policy as highlighted by the government was Economic Diplomacy. China has been one of the primary targets as well as concerns for the policy makers of the country. While in certain areas of South west China, which relatively remoter than the thriving commercial centre of the East-North-East China[2], India has the advantage to penetrate economically and forge useful trade and economic links. This paper elaborates on the principle of economic diplomacy and the phases through which Sino-Indian Relations

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1 Indian Foreign Policy and China as published by the Institute for Defence Studies and Analyses in 2006 and As available at https://idsa.in/strategicanalysis/IndianForeignPolicyandChina_hvpant_1006 Last accessed on 27.07.2019.

2 Read Shanghai, Tienjing, Beijing as the cities to be considered to establish the relation.

have passed in terms of such diplomacy to understand what to expect in terms of deviations and variety of relations between these two countries. Any political and economic dynamics in between these countries affects the economy and growth in general and for India it is specifically a situation worth paying attention to given the changes in global scenario in between United States and China.

II. ECONOMIC DIPLOMACY

Diplomacy often indicates political diplomacy in its traditional sense and indicates engagement of diplomats to foster and nurture either existing or prospective political relations in between states or nations. Economic relations are also a part of the strategy but often take the back burner of events and progression. However, economists have rightly pointed out as to how Economic relations nurture political relations acting as adhesives. Economic Diplomacy was also known as Trade diplomacy and is one of recent origin. With no exact or precise definition, it is a phenomenon described to understand, mean and include formulation and advancing of policies relating to production, movement or exchange of goods, services, labour and investment in other countries. One of the features of the phenomenon is private sectors are involved in the decision-making process to influence negotiating position to remain in the global or regional competitive market[3].

Economic diplomacy can only be ensured by the steady growth of trade, technology and investment flows along with communication links with the steady and growth oriented countries. Some of the basic objectives of Economic diplomacy are promotion of trade and investment in multilateral trade negotiations, energy security and realisation of political objectives through economic action. According to the Economic Diplomacy division of the Ministry of External Affairs, New Delhi in August, 2017[4], 100% Foreign Direct Investment was allowed in 92% of sectors including Industrial Parks, Construction Development, Railways, Airports, Non- Banking finance Companies, Pharmaceutical, mining and trading. India was declared to be the most open economy in the world for investment.

III. PHASES OF ECONOMIC DIPLOMACY BETWEEN INDIA AND CHINA

As a focused continent should be, China's foreign policy has always been aimed at enhancing economic and military prowess while attaining regional hegemony in Asia while ensuring overall social and economic internal

3 One of the reasons of such piqued interest is that the market developments of any economy are rigorously monitored by the private sectors and secondly because they are the market players with the expertise knowledge of the field and trade barriers. As available at https://crawford.anu.edu.au/acde/asarc/pdf/papers/conference/CONF2005_04.pdf Last accessed on 27.07.2019.

4 As available at https://www.eoimadrid.gov.in/archives/documents/whatsnews/Aug-2017-India-Surging-Ahead.pdf last accessed on 27.07.2018

growth[5]. As a country, it has showcased readiness to negotiate with other regional states and be an economically responsible power with realistic portrayal of benefits for allies in the making. It also substantially focuses on making its economy's internal social and economic growth higher than the allies. The global player that China is, regional cooperation is expected as a part of its strategized economic diplomacy. United States considers China as an important ally and expects such levels of cooperation as from none. Sino-Indian dynamics are hard to be missed with the competitive rivalry which both the countries share as well as the shifts evoked because of the decision makers of these nations.

Despite the deep and enduring, geo-political rivalry in between these two countries often termed as one which is "*decades long, multilayered and frequent*", these two natural competitors compete while equally increasing their powers and influence. The mutation extends to economic and military capabilities continue to mushroom while the amicability in approach is competitive as well as progressive. George Tan Ham while studying the Indian Strategic Thought against its Chinese counterpart deeply discussed and pointed out the short-sightedness of India. He pointed out as to how the evidence leads to lack of proper political structure and little evidence on the national strategy being coherent and systematic. According to Ham, the lack of long-term planning and strategy owes to the nation's historical and cultural development patterns. Tan ham argues that India has been on the strategic defensive throughout its history, reluctant to assert itself except within the subcontinent.

Around, 2015, a dramatic shift in the Chinese Foreign policy was one of the concerns of India. The policy since 1990's was to keep a low profile and achieve something. Nevertheless the paradigm shift in the recent past has been towards a peaceful, anti-hegemonistic power initiated by a number of multilateral groupings to promote cooperative, collective growth and harnessing the goodwill with neighbouring countries like Russia and India. This can be aptly referred to as the countries conformist approach towards the progressive trends and being open to changes. This was in furtherance of the strategic and economic interests of the country envisaging cooperation to the industrial production capacity of the country. However, at a point with the South China sea and the building tension with Japan and Taiwan, China adopted aggressive foreign policy. India decided to play along as long as it did not cross roads with the overall interests of the nation. This aspect of political diplomacy also overshadowed the economic diplomacy of the latter. India as a nation was cautious yet optimistic to foster further financial and advanced trade prospects with China to make most of the situation to favour the country's interest.

In the year 2018, India and China initiated a refresh mechanism towards each other. The dialogue between Modi and Xi Jinping led India to a *"season of mists and mellow fruitfulness"* with China. Prime Minister Modi met

counterpart Xi more than any other leader in his tenure and the fruitfulness of such meetings can be well conceived from the change in trade behaviour of the nation with China importing Sugar, Rice and pharmaceutical products.

The Militaries of these countries organised and conducted counter terror exercises. On the political front, India agreed to re-naming of Taipei[6] and entered into deals against Pakistan with Beijing to counter the former at the Financial Action Task Force (FATF)[7]. Indo-Sino relations have always been of siblings who are similar but with their own share of stories and motivations for and against each other. China is thus considered as India's biggest challenge as well as opportunity. It is a challenge to keep the currents controlled and maintain the diplomacy through the Indo-Pacific strategy. Opportunity, however, is to create interdependency of nations on each other through trade and ironed political relations than a skewed one. It has been often argued that the myopic vision of Indian politicians in terms of trade and expanded foreign policy mars the scope of reduced skewed relations with the neighbouring developing country i.e. China. It has also been a reason why the nation has failed to tap in most out of the US- China trade confrontation to its advantage during the Trump regime[8]. The need of the hour is a strategic approach to cultivate the positives and ensure that the stress between United States and China can be utilised for the growth of India and its economic features.

IV. IMPACT ON TRADE RELATIONS IN BETWEEN INDIA AND CHINA

One of the primary tensions between politics and economics can be understood from the basic fact that the State is a political entity and thus there is a considerable encroachment into the economic field. If there is a tension between the two, political consideration outweighs economic interests. It is

5 As available at https://www.mofa.go.jp/files/000177725.pdf; https://www.etsg.org/ETSG2014/Papers/105.pdf ; https://www.nbr.org/publication/indias-economic-diplomacy/; https://mea.gov.in/Portal/ForeignRelation/China-January-2012.pdf Last accessed on 08.08.2019.

6 In an attempt to appease China, the nation agreed to rename the Air India Carrier Taiwan as Chinese Taipei in its displays. Air India being a government airline is seen as an arm of the State and foreign ministry caving in to the pressures of the Chinese Government agreed to accept the name Chinese Taipei to adhere to "international nomenclature" as a strategic move towards diplomacy and a tactics to further larger interests. News excerpts on the same can be accessed on https://www.dailyo.in/politics/air-india-taiwan-china-chinese-taipei-dalai-lama/story/1/25316.html; Also available at https://timesofindia.indiatimes.com/india/taiwan-name-change-by-air-india-in-line-with-global-practices-govt/articleshow/64890103.cms last accessed on 27.02.2019.

7 The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a *"policy-making body"* which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. As available in details at their website http://www.fatf-gafi.org/about/whoweare/ Last accessed on 27.07.2019.

8 As available at https://timesofindia.indiatimes.com/blogs/Globespotting/looking-ahead-to-2019-indian-foreign-policy-faces-new-challenges-and-opportunities-in-a-transformed-world/ Last accessed on 27.12.2018

often noticed that countries are not willing to engage in trade because of their individual political considerations. For instance, many Muslim majority countries have yet to establish economic or trade relations with Israel. When governments choose policies, the effort is to strike a balance between politics and economics[9].

China's foreign policy has always been aimed at enhancing economic and military prowess while attaining regional hegemony in Asia. It ensures that the overall social and economic internal growth of the nation is not affected by its intergovernmental policies or restrains the progress of the economy. This is evident from the fact the nation has always shown the readiness to negotiate with other regional states and be an economically responsible power with realistic portrayal of benefits for allies in the making. However, the relations and the readiness in policies remain on shifting plates when it comes to India. The global player that China is, regional cooperation is expected as a part of its strategized economic diplomacy. Foreign policy of India towards its Sino neighbour has been the interest of economists and international lawyers due to the dynamics depending on the how the super power of United States of America expresses its interest. United States of America considers China as an important ally and expects such levels of cooperation as from none. Sino-Indian dynamics are hard to be missed with the competitive rivalry which both the countries share as well as the shifts evoked because of the decision makers of these nations. Each government in India once formed has the liberty to decide on the foreign policy of the nation and depending upon the policy the level of economic diplomacy varies. China remains one of the biggest challenges in terms of strategising the Indo-pacific trade relations while moulding itself to the changes in trade routes and behaviour of China as per the current global trade requirements. India votes for its government in the year 2019. The foreign policy, hypothetically even if every other aspect remains constant, is bound to be affected. With such expected twists and turns, it will be interesting to note the fate of economic diplomacy encouraged by the current government. Thus, with the unfolding of the changing relations and the aftermath of the elections in India the lurking question is -what extent can India expect reciprocity in economic diplomacy by its ally, China to foster trade relations? The China appeasement mode of India should be rationalised with the focus on the overall growth and development of the Nation. It is ripe to conclude that India is in a beneficial position due to the US- China trade confrontations being the closest ally that the latter would look forward to collaborating in terms of trade benefits and fostered negotiations.

India and China's bilateral trade hit a historic high in the year 2017 with $84.44 billion which was a rise of 18.63 per cent year -on-year while in the same year

9 For example, when Taiwan private business office was opened in Dhaka (Bangladesh) in 2004, there was a hue and cry from a section of media that Bangladesh's relations with the People's Republic of China would be adversely affected. However government of Bangladesh managed the situation in such a way that commercial interests with both China and Taiwan continue in a robust way, while confirming strongly "one-China policy" (meaning Taiwan is a part of China).

Indian exports to China saw nearly 40% rise.[10] India emerged as the seventh largest export destination for Chinese products and the 24th largest exporter to China. Exports to India in China decreased to 5945500 USD THO in February from 6119309 USD THO in January of 2019. Exports to India in China averaged 5047850.24 USD THO from 2014 until 2018, reaching an all time high of 6546000 USD THO in December of 2017 and a record low of 2326991 USD THO in February of 2014[11]. The peaks and valleys of the trade dynamics can also be associated with the periods of distraught and the differences between the political opinions and biases of these two countries respectively.

V. WAY FORWARD

Economic relations can act as adhesive to the political relationships of the countries. The impact is directly proportional and therefore ripples in political relations directly and severely affects the trade regime. The distinctive feature of economic diplomacy wherein private sectors are involved in the decision-making process to influence the negotiating position can be used to the advantage of developing countries because they can consider the growth of both global and regional competitive markets for their profit maximisation process.

Economic diplomacy is seen primarily as intergovernmental in nature and is conducted by Foreign Service officials. It is also considered as a means for advancing the economic interests of the state in foreign countries and the world economy. The conventional view of Economic Diplomacy sees a constitutive relationship between diplomacy and state sovereignty, as well as a constitutive relationship between diplomatic systems and an anarchic system of sovereign states. Chinese and Indian Economies rose in the 2000s providing evidence of the high stakes involved in international economic relations as well as their political and social importance. However, economic dimensions of diplomatic practice continue to attract little attention. Economic diplomacy seeks to explain the everyday impact of diplomacy in the economic sphere and the role of diplomats in the development and regulation of markets recognition and is significant to explain the inter-state government or non-government actors.

Economists predict the forthcoming years in India and for the government formed herein to be of economic diplomacy in between India and China. Such phenomenon of Economic Diplomacy also known as Trade Diplomacy is considered to be way forward to foster the political as well as trade relations of these countries. Interesting is to understand the effect and the impact of such behaviour on trade in the backdrop of the long standing competition of these countries. India and China have often been considered as comrades competing to prove their worth. It can be rightly said that the undercurrents are high to sail

10 As available at https://timesofindia.indiatimes.com/india/india-china-bilateral-trade-hits-historic-high-of-84-44-billion-in-2017/articleshow/63202401.cms Last accessed on 23.05.2019; Also see the report of the World Bank as available at https://wits.worldbank.org/CountryProfile/en/CHN Last accessed on 23.05.2019.

11 As available at https://tradingeconomics.com/china/exports-to-india Last accessed on 21.05.2019.

a ship and there is no denying to the fact that diplomacy in trade can help. Economic diplomacy can only be ensured by the steady growth of trade, technology and investment flows along with "*live*" communication links. Economic relations nurture political relations acting as adhesives and the term '*economic diplomacy*' sans a precise definition emphasises on the need of policies and formulation thereof in relation to production, movement or exchange of goods, services, labour and investment in other countries.

A Study on Nuclear Energy and Sustainable Development in India

***Shubhalakshmi P**

"Energy is the golden thread that connects economic growth, social equity, and environmental sustainability." – Former Secretary-General of the UN, Ban Ki-moon

Introduction

Sustainable development is key principle which shows the path of progress with harmony between different generations. The development which meets the needs of present generation without compromising the ability of future generations to meet their needs can be called as sustainable development.[1] Human beings are said to be at the center of concerns for sustainable development; they are entitled to a productive and healthy life in harmony with nature. Because nature is mother for allno one can use it with selfish motive. It belongs to everyone. Once Mahatma Gandhi said, earth provides enough to satisfy every man's needs, but not every man's greed. Earth is there to settle human needs not selfish desires. Whenever states use their resources, they should see to it that the rights of other states and environment should not be affected. So the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations.

The concept of sustainable development came up as policy guidelines for alleviation of the pressure for both humanity and the global ecosystem[2]. In 1970's the word sustainable development was coined and got prominence after publication of the World Commission on Environment and Development's report. It was also referred in Declaration on International Economic Cooperation adopted by the UN General Assembly in 1990, which recognizes that economic development must be environmentally sound and sustainable.[3]Even in Earth Summit meeting at Rio in 1992, similar opinion is formulated. So the sustainable development is a process of social and economic betterment, which satisfies the needs and values of all interest groups without foreclosing future options.

Keeping in view the importance of sustainable development, energy is the major requirement for the agricultural, industrial and socio-economic growth of any country or society. So, there is an ever-increasing demand for energy in its various forms.[4]

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1 World Conference on environment and Development Brundtland Commission Report 1987

2 Dr. VidhyaBhagathNegi, *Environmental Laws issues and concerns*, (New Delhi: Regal Publications, 2011)

3 United Nations General Assembly, nineteenth special session-Agenda item ,available at <http://www.un.org/documents/ga/res/spec/aress19-2.htm>last visited, 12th June 2019.

4 Himani, *Environmental Conservation and Sustainable Development, policy analysis and administration*, (New Delhi: Anamika Publishers and distributors pvt ltd, 2002)

Development of Nuclear Energy and its importance in India

Industrialization and the rising concern over climate change have put India and other emerging economies in a unique position where these countries will have to negotiate a middle path between economic development and environmental sustainability. To alter its existing energy mix, which is currently dominated by coal, to accommodate a greater share of cleaner and sustainable sources of energy would be one of the primary challenges for India. Among the various sources of clean energy that have been explored, nuclear energy is perhaps the only strong and sustainable source of energy for large scale and continuous industrialization and urbanization. At present, only 3 percent of India's total electricity comes from nuclear power plants. An assessment of India's nuclear sector, especially after the Indo–U.S. Nuclear Deal suggests that nuclear energy could be a sustainable and a strong alternative to fossil fuels in India which could also reduce India's increasing dependence on petroleum imports.[5]The Planning Commission had recognized the seriousness of rural energy crisis as well as its complex nature. The National Rural Energy Planning exercise was started in 1981 to formulate developing approach for planning and implementation of Integrated Rural Energy Planning Programme[6].

Striking a balance between economic growth, quality of life and the exploitation of natural resources is necessary to provide decent energy services for growing population of developing regions. India's power sector is one of the most diversified power sectors in the world. The main source of energy is conventional such as coal, lignite, natural gas, oil, hydro power nuclear power etc., and non-conventional sources such as wind, solar, energy from agricultural and domestic waste in the form of biogas, etc. To supply power especially electricity which is highly demanded in the country power generation from different sources is required.

The growing population of India and rapid expansion of its economy has led for faster energy consumption than the country's energy affordability. So effective measures must be taken to conserve and rationalize the energy sources to maintain the gap between demand and supply of energy to prevent the problem of energy crisis in in near future.[7]

India's energy consumption is growing at an exponential rate. The sustained and unprecedented economic growth in the country has placed an uncontrolled demand on the country's energy resources. While India's energy basket has a mix of all sources of energy, including renewables, 59% of its energy supply is fueled by coal. This forces India to import large amounts of coal to balance the

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5 Development of Nuclear Energy Sector in India, *IDSA Task Force Report,* Institute for Defence Studies and Analyses, New Delhi publications, 2010

6 *Supra* note 4.

7 Sanjay Upadhyay and Videh Upadhyay, *Handbook on Environmental Law – Environment Protection, Land and Energy Laws*, First edition, Vol. 3, (New Delhi: Lexis Nexis, Butterworths: 2002).

domestic production deficit.[8]

Nuclear program started before independence in India especially in 1944 when Homi J. Bhabha founded the Tata Institute of Fundamental Research. Later India passed Atomic Energy Act of 1948 focused on peaceful development of nuclear technology. In the year 1954 Department of Atomic Energy established and India reached a verbal understanding with the United States and Canada under the Atoms for Peace program by which US and Canada co-operated with India for establishment of CIRUS reactor.In 1955 construction began on India's first reactor, Apsara research reactor, with British assistance.The Atomic Energy Establishment, Trombay was inaugurated in 1957 which acquired its present name Bhabha Atomic Research Centre on 12 January 1967.[9]

So, India was one of the first countries to adopt nuclear power technology with the commissioning of the Tarapur power station in 1969.But India's nuclear energy programme began in the 1950's with a great deal of involvement of the US through the Atoms for Peace programme. It also helped to build and provide nuclear fuel for the nuclear reactors in Tarapur as well as through scientific cooperation. India tested its first nuclear device in 1974 and even the US formed the Nuclear Suppliers Group to oversee sales of nuclear material. Even after passing Nuclear Non-proliferation Act in the US Congress it continued to provide some nuclear fuel to India until 1980. France used to provide nuclear fuel to India till 1996. China and Russia have supplied nuclear fuel after 1996.[10]

Energy is the most fundamental requirement of every society or nation as it progresses through the ladder of development.Nuclear energy has to play an important role in India's energy scenario from three angles. First is that unlike renewables, nuclear sources can provide bulk energy in a certain manner to the base load. The Kudankulalm power projects' two reactors have added 2000 MW electricity to the southern states. Secondly, nuclear energy is a clean energy source and hence is very important to attain carbon free energy economy. Thirdly, nuclear energy enhances energy independence and energy security especially with the potential use of domestically available thorium input use. Nuclear energy production in the country is estimated to be at 6780 MW from the seven sites and twenty-two reactors.[11]

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8 South Asia Programme at Hudson Institute, India's Energy Challenge, available at <http://www.southasiaathudson.org/indias-energy-challenge/>last visited 25th May 2019.

9 Nuclear power in India, Civil service-General studies and daily current affairs, available at <http://www.careerride. com/view/nuclear-power-disadvantages-and-various-international-treaties-for-arms-reduction-19439.aspx> last visited, 20th February 2019.

10 S.V. Ranade, 'Environmental Information system-technology training and project management', available at <http://www.envis.org/posts/post/5/nuclear-energy-a-must-for-sustainable-development-of-india >last visited 24th June 2019.

11 Tojo Jose, 'Why nuclear energy is important for India?available' at http://www.indianeconomy.net /splclassroom/265/why-nuclear-energy-is-important-for-india/>last visited, 27th June 2019.

The target is to triple nuclear energy production to 17.3 GW by 2024. A long-term target of realizing 25% share for nuclear energy in total power production is on mission mode.

Shortage of nuclear fuel is the hurdle in limiting production in most reactors. The Plant Load Factor is around 60% for several plants because of unavailability of inputs.[12]

Energy produced from radio-active minerals like uranium, thorium etc is called nuclear power. Nearly 10000 tons of coal produces power that is produced by only 1 tine of uranium. Though India has plenty of uranium and thorium reserves lack of technical know-how causes low production of nuclear power. In India only 2% to 3% of the energy produced comes from nuclear power.[13]

Nuclear energy and sustainable development

Energy is the basic need for the development of any nation. Energy is indeed for agriculture, industry, technology, transport, communication and all other tertiary sectors which demand progress for all round development of any country. Minimum power supply has become basic need as food, shelter and clothing for the comfortable life of an individual in the society. So energy is the essence of progress of a nation.

The study indicates that most of the prosperous nations are extracting about 30-40 percent of power from nuclear power and it constitutes a significant part of their clean energy portfolio, reducing the burden of combating climate change and the health hazards associated with pollution. Meanwhile in India, we are not generating even 5000 MW of nuclear power from the total of about 150 GW of electricity generation, most of it coming from coal.[14]

The place of nuclear power in sustainability issues has generated substantial controversy so far because of its trade-off between low carbon electricity and the concerns related to the risk of accidents as well as environmental and human health issues associated with radioactive waste management. During the 9th session of the United Nations Commission on sustainable development in 2001, member states had a debate to consider nuclear power an essential component of their sustainable development strategies. They have decided that choice of nuclear energy rests with countries. But in 2002, the plan of the implementation of World Summit on sustainable development called for a series of actions to promote the wide spread availability of clean and affordable energy specifically the promotion of renewable energy resource, efficiency improvements and advanced energy technologies including cleaner fossil fuel technologies. In this context, nuclear energy belongs to the category of

12 *Ibid.*

13 Vishal Sharma, 'Nuclear Power in India', available at http://www.importantindia.com/11170/short-paragraph-on-nuclear-power-in-india/last visited, 19th June 2019.

14 P. K. Agrawal, *India's move towards sustainable development'* First edition, (New Delhi: MD Publications Pvt Ltd. 1996).

advanced energy technologies.[15]

Energy has become increasingly acknowledged as one of the key issues in sustainable development culminating in the declaration by the UN General Assembly of 2012 development agenda as the International Year of Sustainable Energy for all. In September 2015 the international community approved the post 2015 development agenda with a new set of sustainable development goals fully recognizing energy as a fundamental pillar on its own.[16]Energy is inevitable and now seen as precondition for sustainable economic growth and improved human well-being. It has an effect on healthcare, education, job or business etc. Production and consumption of energy in a proper manner is another genuine need for sustainability.

Energy is at the heart of most critical economic, environmental and developmental issues facing the world today. Clean, efficient, affordable and reliable energy services are indispensable forglobal prosperity.The current energy systems are inadequate to meet the needs of the world's poor and are jeopardizing the achievement of the Millennium Development Goals (MDGs). For instance, inthe absence of reliable energy services, neither health clinics nor schools can function properly.[17]

Since nuclear energy is a nearly carbon-free electricity generation source and benefits from a large and diversified fuel resource base, many countries, including some that have been historically skeptical, are now expressing a renewed interest in it. The sustainability of nuclear energy is at the heart of the debate regarding its potentially increased role in a future sustainable energy mix. This question of sustainability should be examined in three dimensions: economic, environmental, and social.[18]

Earlier days energy sustainability was calculated in terms of availability of energy for the purpose of use. But in the ethical context of sustainable development it includes about global warming, environmental effects and question of waste management etc. The nuclear energy is one of the important sources of energy which has its own sustainability and problems pertaining to it. To consider nuclear energy or any form of energy for that matter as sustainable, it should possess the quality of durability, accessibility, availability as well as affordability. Production of energy for consumption is inevitable but it should not make any disastrous effects on environment.

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15 Nuclear power and sustainable development, International Atomic Energy Agency, Vienna 2016 IAEA in Austria publishers, available at http://www-pub.iaea.org/MTCD/Publications/PDF/Pub1754web-26894285.pdf last visited, 10th February 2019.

16 United Nations General Assembly Declares 2014-2024 Decade of Sustainable Energy for All, Meetings coverage and press releases, 2012 available at <https://www.un.org/press/en/2012/ga11333.doc.htm > last visited, 10th February 2019.

17 The Secretary-General's Advisory Group on Energy and Climate Change (AGECC) Energy for a Sustainable Future, Report And Recommendations April 2010 New York, available at <http www.un.orgmillenniumgoals pdfAGECCsummaryreport> last visited, 6th March 2019.

18 Thierry Dujardin, Is Nuclear Energy Sustainable?,Harvard International Review, 2007 available at http://hir. harvard.edu/article/?a=1473 last visited, 4th March 2019.

Energy should have the quality to be used for present and in future.

IAEA, classified nuclear energy scenario sustainability as follows-

a. Safe, secure, economical and publicly acceptable nuclear power with security of supply which addresses conditions necessary for newcomers to deploy nuclear energy.
b. Safe disposal of all nuclear wastes in a complete once-through fuel cycle with thermal reactors.
c. Initiate recycling of used nuclear fuel to reduce wastes. Limited recycle that reduces high-level waste volumes, slightly improves Uraniumutilization and keeps most of the Uranium more accessible. It is a once-through breed and burn option, providing significant improvement in resource utilization.
d. Guarantee nuclear fuel resources for at least the next 1000 years via complete recycle of used fuel.
e. Reduce radio toxicity of all wastes below natural uranium level.[19]

Nuclear Risk and Energy Security

Every nation and the environment is potentially affected by the possibility of the radioactive contamination, the spread of toxic substances derived from nuclear energy and long-term consequence on health because of exposure to radiation will be there. So nuclear risks pose certain cautions to take up for nuclear security whenever is required otherwise the level of injury will be severe.[20]The Stockholm Conference in 1972 had called for a registry of emissions of radioactivity and international cooperation on radioactive waste disposal and reprocessing. The 1994 Nuclear Safety Convention and the 1997 Joint Convention are the first global treaties to commit states to control the risks of nuclear energy for environmental objectives.[21] From a national perspective, the security of future energy supplies is a major factor in assessing their sustainability. Whenever objective assessment is made of national or regional energy policies, security of supply is a priority.

There are certain risks with regard to using nuclear energy. The main risk related to nuclear energy is plant safety. Throughout the history of nuclear power generation there have been four major incidents of plant failure. The Kyshtym accident in fuel reprocessing in 1957 in Russia, the relatively smaller Three Mile Island meltdown in United States, the much bigger Chernobyl Plant accident in Ukraine in 1986 and at the Fukushima Daiichi plant of

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19 World Nuclear Association, sustainable energy, available at <http://www.world-nuclear.org/information-library/energy-and-the-environment/sustainable-energy.aspx> last visited, 3rd June 2019.

20 Patricia Birnie, Alan Boyle, & Catharine Redgwell, '*International Law and the Environment*' Third edition (Oxford: Oxford University Press, 2009).

21 *Ibid,* p. 508.

Japanese in 2011. The first accident was purely due to underdeveloped technology, and much of the blame for the next two disasters is attributed to human error. Even in the case of the Fukushima disaster of 2011, there were extraordinary natural forces in action, the rare occurrence of the tremendous stress load of an earthquake coupled with the unprecedented shear load of a tsunami. There is a need for better technology and more stable plant design across the world, but the occurrence of four failures in six decades cannot be made out as a case for completely disbanding the technology, which is one of our foremost keys to graduating beyond the fossil fuel-based low-end energy. The best of technological progress, while being the biggest ally of mankind, does come at an incremental risk. The key is to learn and evolve to mitigate the risk, rather than use the first incident as an excuse to disband science.[22] There is a need for better technology and more stable plant design across the world, but the occurrence of four failures in six decades cannot be made out as a case for completely disbanding the technology.

Nuclear energy produces both operational and decommissioning wastes, which are contained and managed. Although experience with both storage and transport over half a century clearly shows that there is no technical problem in managing any civil nuclear wastes without environmental impact, the question has become political, focusing on final disposal. In fact, nuclear power is the only energy-producing industry which takes full responsibility for all its wastes and costs this into the product – a key factor in sustainability. Ethical, environmental and health issues related to nuclear wastes are relevant and their prominence has tended to obscure the fact that such wastes are a declining hazard, while other industrial wastes retain their toxicity indefinitely. There is a clear need to address the question of their safe disposal. If they cannot readily be destroyed or denatured, this generally means that they need to be removed and isolated from the biosphere. An alternative view asserts that indefinite surface storage of high-level wastes under supervision is preferable. This may be because such materials have some potential for recycling as a fuel source, or negatively because progress towards successful geological disposal would simply encourage continued use and expansion of nuclear energy. However, there is wide consensus that dealing effectively with wastes to achieve high levels of safety and security is desirable in a 50-year perspective, ensuring that each generation deals with its own wastes.[23]

The inherent risks of nuclear power are made greater in India by the structure of the country's nuclear establishment. The Atomic Energy Regulatory Board is the organisation in charge of safety in all nuclear facilities, which shares staff with the organisations it is supposed to be regulating and

22 A.P.J Abdul Kalam, Srijan Pal Singh, *'Nuclear power is our gateway to a prosperous future',* available at http://www.thehindu.com/opinion/op-ed/nuclear-power-is-our-gateway-to-a-prosperous-future/article2601471.ece last visited, 10th January 2019.

23 Dean Kyne & Bob Bolin, *'Emerging Environmental Justice Issues in Nuclear Power and Radioactive Contamination'* in Jayajit Chakraborty, Sara E. Grineski & Timothy W. Collins (eds), *International Journal of Environmental Research and Public Health,* Vol.13, Issue-7, (PMC, July, 2016).

provides fund to them. This compromises its ability to act independently and enforce vigorous safety regulations.[24]

Energy security is a high priority of all societies. It includes a set of concerns such as the vulnerability of primary fuel supplies to physical interruptions, possible unanticipated movements in the price of primary or secondary energy forms and the reliability of the supply of energy to end users.[25]There are certain guidelines and there are many efforts by the International Atomic Energy Agency (IAEA) to take this training aspect of nuclear security to all member states, but the member states also have a significant role to play.In terms of energy security, NITI Aayog,has proposed a group which is now looking at energy security plans for the next 100 years. The proposal entails the creation of a central body, the National Energy Commission, to work with all ministries that deal with any matter related to energy to construct a common strategy for energy security.[26]Various efforts are made in national and international level to develop the nuclear energy generation reactors more economical, safe, sustainable, and more resistance to proliferation of weapon grade plutonium which is a part Global Nuclear Energy Partnership.[27]

Nuclear energy insecurity leads to barriers on its sustainability. Nuclear energy is somewhat sustainable but few factors turn it as insecure and even though there is contribution of nuclear energy to the sustainable development, the possible risks, problems of radioactive waste management etc. decreases its credibility towards sustainable development. Whenever we speak about utility of energy the question of safety and security comes in to picture. Nuclear reactors have operated worldwide enviable safety records except for few mishaps. Today more than 425 power reactors are operating in the world producing 1/6th of the world's electricity. Important safety issues are radiation effects, radioactive waste management, decommissioning and accident risks in reactors. These have been adequately addressed and improvements continue.[28] The radiation doses to operating personnel and the public during normal operation are well within limits prescribed by the Atomic Energy Regulatory Board (AERB). Nowhere in the world have the effects of radiation been noticeable in normal operation of nuclear facilities.

Radioactive waste management is an important issue in the nuclear program although radioactive waste quantities are very small. Radioactive waste is isolated from the biosphere while the gases from fossil plants are enter the

24 India's nuclear ambition, Greenpeace of India, available at http://www.greenpeace.org/india/en/What-We-Do/Nuclear-Unsafe/Nuclear-Power-in-India/ last visited on 20th March 2019.

25 Nuclear power and sustainable development , International Atomic Energy Agency, VIENNA 2016, IAEA in Austria publishers, available at *<http://www-pub.iaea.org/MTCD/Publications/PDF/Pub1754web-26894285.pdf>last visited on 8th September 2018)*

26 South Asia Programme at Hudson Institute, India's Energy Challenge, available at *<http://www.southasiaathudson.org/indias-energy-challenge/>last visited on 10th September 2018)*

27 Ashish Ghosh, *Environmental Conservation-Challenges and Actions*, (New Delhi: A.P.H. Publishing Corporations, 2008) p.168.

28 Godfrey Boyle, *'Energy systems and sustainability-Power for a sustainable future'* in Bob Everett (eds), *Business and Economics,* (Oxford: OUP Oxford, 2012) at p 405.

atmosphere. India developed the technology for radioactive waste management well in time and new breakthroughs are not required. Further developments are expected in the technology of partitioning and actinide burning which will considerably reduce the storage time.Decommissioning is neither a hazardous nor a costly operation. The cost of decommissioning is included as a small fraction of generation cost itself.

Though assimilating facts regarding nuclear technology is difficult not only for laymen but for the educated elite, efforts to educate the public should continue. Public acceptance of nuclear energy is important for its growth and transparency in all aspects of nuclear technology is basic for confidence building.[29]

Challenges of Energy Generation in India

India currently possesses 21 operational nuclear power reactors, which account for a nominal 3 percent of the country's energy generation. This paper provided a review and analysis of the challenges that nuclear power must overcome inorder to meet the requirements of just sustainable development. The results make it clear that there are two fundamental challenges. First, innovative technical solutions need to be discovered for the fundamental inherent environmental handicaps of nuclear energy technology. Second, the nuclear industry must also address difficult issues of equity both in the present and for future generations.[30]

India's dependence on imported coal and subsequent high energy prices has continued to hurt India's energy sector. There is a need for diverse and sustainable energy resources, increased investment in domestic resources and efficient delivery to the consumer. India's economic future depends on its ability to aggressively expand renewable investment and cut back on energy imports, while focusing on energy diversification and the reduction of the current massive account deficit. It is also necessary for the government to develop bilateral and regional strategic partnerships to enhance innovation and technology in the energy sector. With the strategic implementation of reforms, India can draw upon its untapped energy potential. The drop in global oil prices gives the government the opportunity to cut back on fuel subsidies and increase certain energy prices. In addition, the government has proposed many projects for the advancement of renewable energy sources, especially solar energy. Most significantly, in this regard National Energy Commission can potentially play a big role in protecting India's energy security.[31]

India has chosen to pursue nuclear energy as a source of energy and is planning a rapid expansion of the nuclear power sector in the coming decades.

29 S.B. Bhoje, & S. Govindarajan, *'The need and the role of nuclear energy in India',* available at <http www.iaea.orginiscollection NCL Collection Store_Public3106031060524.pdf> last visited, 11th September 2018.

30 Joshua M. Pearce, *'Limitations of nuclear power as a sustainable energy source',* available at www.mdpi..com/journal/sustainability last visited, 20th January 2019.

31 S*upra* note, 26.

The Green scenarios should be considered.Development deficits and lack of sufficient energy are also issues, that can create their own security problems over time.India has chosen to develop a closed fuel cycle because of its limited domestic sources of uranium.[32]

India faces many acute challenges of energy development, which has caused the country's leaders to consider India's indigenous energy sources and how it can increase energy supply to better meet the exponentially expanding energy demand. Given this demand, India has chosen to pursue nuclear energy as a source of energy and is planning a rapid expansion of the nuclear power sector in the coming decades.[33]Coal, fossil fuels add more carbon dioxide into the air, but while nuclear energy is carbon free, there are associated challenges, such as security threats and other risks.We have to use some modern techniques through which we can supply nuclear energy required to the consumption in the country. We must calculate how much uranium would be required to meet a scenario of nuclear power as part of the overall energy supply. For this particular scenario, by 2025 there would not be enough additional uranium to commit to a new nuclear power plant. Depending on the scenario, this may shift to 2035 or 2040, within the next 20 to 25 years there will not be sufficient uranium to move away from fossil fuels to a reasonable extent, particularly when uranium is used in a once-through mode, which is most common today.[34]

Even though the coal reserves of India are still the life line of major energy production, it is a finite source and increasing dependency on coal can never be a model for sustainable development at the current pace of its utilization. Other than future crisis in coal-based energy production, the issue of global warming and climate change makes it compulsive to look for clean energy, curb carbon emission and contribute to the global cause[35].

There is international pressure to reduce greenhouse gas effect in atmosphere for which need of clean energy came to limelight for energy security and sustainable development. Nuclear energy is one of the sustainable solutions to overcome the environmental problems.[36]

Even though India is fourth largest energy consumers of the world the presence energy crisis in India is much severe in nature.Production of energy for consumption is inevitable but it should not make any disastrous effects on environment. Other than these, the energy should have the quality to be used

32 Committee on India-United States Cooperation on Global Security: *'Technical Aspects of Civilian Nuclear Materials Security',* National Academy of Sciences, National Institute for Advanced Studies, Bangalore, India *National Academies Press*, 2013 available at https://books.google.co.in/books?id last visited, 13th December 2018.

33 *Ibid.*

34 Manu V Mathai, '*Nuclear Power, Economic Development Discourse and the Environment-The case of India*', (New York: Routledge-Taylor and Francis Group, 2013) p.137.

35 *upra* note 27, at 153.

36 Nuclear energy option for energy security and sustainable development in India, available at <https://www.researchgate.net/publication/251574313_Nuclear_energy_option_for_energy_security_and_sustainable_development_in_India>, last visited, 20th September 2018.

for present and in future. Sonew avenues for energy production without threat to environment quality are the need of the hour.

It also helped to build and provide nuclear fuel for the nuclear reactor at Tarapur as well as through scientific cooperation. India tested its first nuclear device in 1974 and even the US formed the Nuclear Suppliers Group (NSG) to oversee the sales of nuclear materials. Even after passing Nuclear Non-Proliferation Act in the US Congress it continued to provide some nuclear fuel to India until 1980. France used to provide nuclear fuel to India till 1996. China and Russia have supplied nuclear fuel after 1996[37].

India has planned to set up four nuclear power parks to house 25 reactors capable of producing 45,000MW of energy through a public private partnership. The main target was to reach 60,000 MW of nuclear power by 2026. They have selected four sites in West Bengal, Orissa and Andhra Pradesh in East coast andGujarat in the West.[38]

In the US, there are four principal challenges which are correctly laid down which remain equally valid in India. They are:-

a. Nuclear power remains economically competitive in the world energy market, to be specificenergy companies must better control capital costs.

b. In order to satisfy the public's expectations of exceptional safety performance, current plants must continue to operate safely and future plants must continuously improve safety in expanding world markets.

c. Nuclear power and its fuel cycle must be viewed by the public and by the national leaders as sustainable: in particular, nuclear fuel must be managed in a manner that is cost effective and safe for the extended period of time that used fuel remains highly radio-active, and the nuclear fuel supply must be extended for centuries in the face of depleting fossil fuels.

d. The nuclear materials from the fuel cycle must be protected from proliferation and misuse for non-peaceful purposes. [39]

Requirements to Achieve Sustainability of Nuclear Energy

India has a flourishing and largely indigenous nuclear power programme and expects to have 14.6 GWe nuclear capacities on line by 2024 and 63 GWe by 2032. It aims to supply 25% of electricity from nuclear power by 2050.Due to earlier trade bans and lack of indigenous uranium, India has uniquely been developing a nuclear fuel cycle to exploit its reserves of thorium. Early in 2016 India had 300 GWe installed capacity, 210 GWe being fossil fuel-fired. There was 40 GWe of large hydro, 43 GWe of other renewables and less than 7 GWe

37 S.V. Ranade, *Environmental Information system-technology training and project management,* available at http://www.envis.org/posts/post/5/nuclear-energy-a-must-for-sustainable-development-of-india last visited, 14th December 2018.

38 S*upra* note 27, at p. 166

39 *Supra* note 27, at p.167.

of nuclear. The government's 12th five-year plan for 2012-17 targeted the addition of 94 GWe over the period, costing $247 billion. Three-quarters of this would be coal- or lignite-fired, and only 3.4 GWe nuclear, including two imported 1000 MWe units planned at one site and two indigenous 700 MWe units at another. By 2032 total installed capacity of 700 GWe is planned to meet 7-9% GDP growth, and this was to include 63 GWe nuclear. The OECD's International Energy Agency predicts that India will need some $1600 billion investment in power generation, transmission and distribution to 2035.[40]

There are lots of challenges which are standing as obstacles while producing nuclear energy and even after production in relation to waste management. So, sustainability of all forms requires many reformations in the process of production of nuclear energy and in the end process.Sustainable nuclear energy system requires few important points. They are-

a. Radical improvement in Green House Gas emissions intensity-The embodied energy of the entire nuclear energy life cycle must be reduced. To improve the GHG emissions of the nuclear energy life cycle should be given a high priority such as-

   (i) transitioning to enrichment based on gas centrifuge technology(ii) utilizing nuclear plants in combined heat and power (CHP) systems to take advantage of the 'waste' heat, (iii) using nuclear power for thermal processing with the attendant increases in efficiency (iv) down blending nuclear weapons stockpiles for nuclear power plant fuel (v) utilizing only the highest concentration ores.

b. Elimination of nuclear insecurity- On technical grounds, this requirement entails making nuclear power plants that cannot physically melt down. Again, this requirement does not mean reduce the probability that it can happenbut it must be physically impossible for it to happen by improved reactor design. This would also enable additional increases in efficiency. For example, following suggestion above (ii) nuclear power plants could be placed in the middle of population centers and act as district heating utilities in addition to providing electricity.

c. Eliminate radio-active waste and minimize environmental impact during mining and other operations- In order to prevent future humans from being forced to care for current energy-generated waste products a means of eliminating all radioactive waste from the generation of nuclear energy is needed. Using techniques that recycle waste may also reduce the amount of mining necessary and thus could also cut down on environmental impact. In addition, a method to recycle water or the use of other cooling fluids such as air and eliminate all thermal pollution needs to be developed and deployed.

40 World Nuclear Association, *'Nuclear Power in India'* available at <https://www.world-nuclear.org/information-library/country-profiles/countries-g-n/india.aspx> last visited, 20th August 2019.

d. The nuclear industry must gain the public trust- In many countries, the public does not trust the nuclear energy industry and the government bodies that oversee it. For example, the radioactive releases from Pennsylvania's Three Mile Island have been contentious and there is substantial evidence that the releases were under-reported to the public by officials by at least an order of magnitude.[41]

Advantages of Nuclear Energy

1. Lower greenhouse emission-it's an emission free energy as it produces less greenhouse gases so preserve the Earth's climate.
2. No air pollution- As it do not emit carbon dioxide, sulfur dioxide, or nitrogen oxides as part of the power generation process.
3. It avoids ground-level ozone formation and prevent acid rain.
4. Throughout the nuclear fuel cycle, the small volume of waste byproducts actually created is carefully contained, packaged and safely stored.
5. Water discharged from a nuclear power plant contains no harmful pollutants and meets regulatory standards for temperature designed to protect aquatic life.
6. Nuclear energy does not depend on natural aspects which is main disadvantage of renewable energy.[42]
7. One of the major social advantages using nuclear energy is that it greatly increases the security of energy supply. It helps to reduce dependence on fossil fuels, especially oil and gas.

Key economic features of the existing nuclear power plants are their low and stable marginal production costs as well as very low sensitivity to fuel costs. Natural uranium accounts for less than 5 percent of the total cost of electricity generated from nuclear power plants. Total nuclear fuel cycle costs, primarily for enrichment, fuel fabrication, and spent fuel treatment and disposal, amount to 15 percent to 20 percent of total costs. In contrast, the cost of coal amounts to roughly 45 percent of the total cost of electricity generated by coal-fired power plants and the cost of gas amounts to at least 75 percent of costs for gas-fired power plants. In other words, increasing the current price of uranium by 100 percent would increase nuclear electricity cost by 5 percent while increasing the price of gas by 100 percent would increase gas-fired electricity cost by 75 percent. Needless to say, this is an advantageous asset for nuclear energy in these times of high volatility of fossil fuel prices, nuclear energy can compete favorably with alternatives for base-load electricity

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41 Joshua M. Pearce, *Limitations of nuclear power as a sustainable energy source,* available at www.mdpi..com/journal/sustainabilitylast visited on 25th December 2018.

42 Nuclear power in India, Civil service-General studies and daily current affairs, available at <http://www.careerride.com/view/nuclear-power-disadvantages-and-various-international-treaties-for-arms-reduction-19439.aspx> last visited, 15th September 2019.

generation.[43]

As for a contribution to climate change, the expert committee on an integrated energy policy set up by the planning commission takes a vague view of nuclear power prospects: 'They have noted that even if a 20-fold increase takes place in India's nuclear capacity by 2031-32, the contribution of nuclear to the energy mix is at best expected to be 5-6 percent.In contrast, renewable energy does not pollute the environment, nor produce greenhouse gases. It is the true solution to climate change.[44]In July 2017, eight reactors – 2400 MWe (gross) – of nuclear capacity was fueled by indigenous uranium and being operated close to their rated capacity. The 14 units (4380 MWe gross) under safeguards were operating on imported uranium at rated capacity.[45]

Disadvantages of Nuclear Energy

There are certain disadvantages or drawbacks in nuclear energy and its generation.

a. Risk of Nuclear accidents – Chernobyl, Three Mile Island accident and Fukushima. Major impact on human life.
b. Meltdowns can render areas uninhabitable for very long periods.
c. Difficulty in the management radioactive nuclear waste which takes many years to eliminate.Radioactive wastes take almost 10,000 years to get back to the original form.
d. Expiration date of nuclear reactors – they have to be dismantled.
e. Nuclear plants have a limited life. The energy generated is cheap compared to the cost of fuel, but the recovery of its construction is much more expensive.
f. Nuclear power plants have threat from terrorist organizations. It undergoes vulnerability of nuclear plants to attack.
g. Nuclear power plants generate external dependence if a country does not sufficient have uranium mines.
h. If a country has uranium mines it might not have nuclear technology.i. Current nuclear reactors work by fission nuclear reactions. These chain reactions are generated, if control systems fail generating continuous reactions causing a radioactive explosion that would be virtually impossible to contain.
j. Use of the nuclear power in the military industry that world has witnessed after two nuclear bombs were dropped on Japan during World War II. This was the first and the last time that nuclear power was used in a military attack. The risk that nuclear weapons could be used in the future will always

43 *Thierry Dujardin, Is Nuclear Energy Sustainable?* Harvard International Review, 2007 available at http://hir.harvard.edu/article/?a=1473 last visited, 20th January 2019.

44 India's nuclear ambition, Greenpeace India, available at <http://www.greenpeace.org/india/en/What-We-Do/Nuclear-Unsafe/Nuclear-Power-in-India/> last visited, 23rd February 2019.

45 Science and Technology-BARC Trombay and IGCAR, available at<http://www.mitrasias.com/barc-trombay-and-igcar/> last visited, 21st August 2019.

exist.[46]

Conclusion

We and we alone will decide what is the best needed action for our economic prosperity, based on our context and resource profile. We should not be carried by the words of other nations if we have potential with us to achieve. India is blessed with the rare and very important, nuclear fuel of the future – Thorium. We cannot afford to lose the opportunity to emerge as the energy capital of the world, which coupled with the largest youth power, will be our answer to emerge as the leading economy of the world. India has the potential to be the first nation to realise the dream of a fossil fuel-free nation, which will also relieve the nation of about $100 billion annually which we spend in importing petroleum and coal. It is noteworthy that in 2010-11, India imported about 82 billion tonnes of coal, a large fraction of which was for the thermal power plants. Governments have a major role to play in these two areas in order to realize a future of sustainable energy.

46 *Supra* note, 42.

Impact of Code on Wages, 2019 on Informal Workers in India

***Sheena Thomas**

I. INTRODUCTION

India rose on the global index of ease of doing business and however, further increased the unemployment level to its highest in 45 years. Ever since the introduction of market reforms in 1990s, general critics of government regulations, investors, and international organizations have demanded serious measures to be taken regarding the labour market. The number of jobs in the private and public sectors is falling. The young people are entering the labour market in growing number especially in the towns and cities – due to the rural exodus and demographic growth. This kind of outlook raises a series of urgent economic, social and political problems. We are in the midst of jobless growth.[1] Of course, the workers in the informal sector,[2] unlike permanent employees enjoy the freedom and flexibility of choosing their hours and employers. Minimum wage legislation for them is likely to meet with stiff resistance.

The effort of Indian Parliament to legislate the four labour codes is intended for better compliance and implementation.[3] These codes are based on the recommendations of the Report of the Second National Commission on Labour in 2002. To increase the ease of living, the central government recently moved two Bills to legislate on the Code on Wages (2019)[4] and the Occupational Health, Safety and Working Conditions Code (2019)[5]. The entire working class in the informal sector is being covered in these codes.

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1 Legal restrictions and changing work patterns often make it difficult and sometimes impossible to organize workers in the informal economy. Without the application and protection of law and collective representation these workers remain extremely vulnerable. The foreseeable rise in unemployment and poverty pose a serious threat to democracy. In fact, we are on the verge of a crash course for economic and social disaster. The deterioration of employment is likely to weaken labour productivity. Tragically it leads to increase in the wage gap between the formal and informal sectors. All these factors led to encourage the continued survival of abuses and discriminatory policies targeting workers in this sector.

2 The vast majority of workers operating in the informal economy are at the bottom of the economic and social ladder. They undergo precarious and irregular work and tolerate insecure income and little or no access to social security.

3 As a part of the legislative reform, since 2014, the central government has taken initiatives to codify and amalgamate 44 central labour laws into four codes in order to simplify them. In 2017, the four codes such as (1) Code on Wage, (2) Code on Industrial Relations, (3) Code on Occupational Health, Safety and Working Conditions, and (4) Code on Social Security, placed before the Parliament could not be implemented.

4 The Code on Wages Bill, 2019 seeks to amalgamate and amend the four laws covering minimum wages, payment of wages, bonus, and equal remuneration.

5 The Occupational Health, Safety and Working Conditions Bill, 2019 tends to amalgamate and amend thirteen laws including the Factories Act, the Contract Labour (Regulation and Abolition) Act, the Inter-state Migrant Workers Protection Act, and several sector-specific laws covering beedi workers, domestic workers, construction workers, cinema workers, dock workers, plantation workers, motor transport workers, working journalists and other unorganized sector workers.

This work would help in understanding whether the code is favourable to workers or if it disadvantages the included minority from the formal economy as well as the excluded majority from the informal economy. The objective of this article is to examine whether the unification of labour codes was a serious exercise carried out by the government by cautiously dropping redundant provisions, adding fresh provisions, and judiciously overhauling the existing provisions in order to make benefits available to labour class in a quicker, simpler, and effective manner, or whether it simply managed to codify laws through an amalgamation of existing laws.

II. CONSTITUTIONAL MANDATE AND RECENT LABOUR REFORMS

The question is whether this code antithetical to the very idea of statutory protection of labour and dignified standard of living for workers? It needs to be stated here that the original labour laws, enacted after decades of struggle, were meant to ensure certain dignity to the working-class people. Article 43 imposes an obligation towards ensuring the provisions of a 'living wage'[6] in all sectors as well as acceptable conditions of work.[7] To provide social justice to the unorganised labour and to prevent exploitation, the Minimum Wages Act, 1948 was enacted. The very Act has been characterised 'just the first step' in the direction of fulfilling the mandate given under Article 43. The provisions of both the Minimum Wages Act and the Payment of Wages Act used to apply on workers below a particular wage ceiling working in Scheduled Employments only.[8]

The earlier idea, as propounded in the Constitution as well as in the enactment of labour legislations is now a thing of the past, signalling the victory of neo-liberalism in economic as well as welfare policies.[9]Recent labour reforms in terms of Code on Wages may tend to make the labour market more flexible for capital to invest and realise their profit.

III. BRIEF SUMMARY ABOUT THE CODE ON WAGES, 2019

1. Floor Wage

According to the Code, the central government will fix a floor wage, taking

6 A living wage is such wage as enables the bread winner to provide for himself and his family not merely the bare essentials of food, clothing, and shelter, but includes education for children, protection against ill- health, requirements of essential social needs, a measure of insurance against the more important adversities including old age.

7 Article 43 requires the state to endeavour to secure, by suitable legislation, or economic organization, or in any other way, to all its workers, agricultural, industrial, or otherwise, work, a living wage, conditions of work, ensuring a decent standard of life and full employment of leisure and social and cultural opportunities.

8 Scheduled employment means an employment specified in the Schedule to the Minimum Wages Act, 1948. The Part I of the Schedule originally had 12 entries. Part II relates to employment in agriculture. As it was realised that it would be necessary to fix minimum wages in many more employments in course of time, the appropriate governments were empowered to add employment to the Schedule by following the procedure laid down in section 21 of the Act. The appropriate government may review at such intervals not exceeding five years.

9 Kannan K.P, "*Growth, Employment and Labour through a Budget Lens", Economic and Political Weekly*, Vol. 54, Issue No.33, 17Aug 2019, p. 40.

into account living standards of workers. Further, it may set different floor wages for different geographical areas. Before fixing the floor wage, the central government may obtain the advice of the Central Advisory Board and may consult with state governments. The minimum wages decided by the central or state governments must be higher than the floor wage. In case the existing minimum wages fixed by the central or state governments are higher than the floor wage, they cannot reduce the minimum wages.

2. Fixing of Minimum Wage

The Code prohibits employers from paying wages less than the minimum wages. Minimum wages will be notified by the central or state governments. This will be based on time, or number of pieces produced. The minimum wages will be revised and reviewed by the central or state governments at an interval of not more than five years. While fixing minimum wages, the central or state governments may take into account factors such as: (i) skill of workers, and (ii) difficulty of work.

3. Overtime Wages

In case employees work in excess of a normal working day, they will be entitled to overtime wage, which must be at least twice the normal rate of wages.

4. Payment of Wages

Wages will be paid in (i) coins, (ii) currency notes, (iii) by cheque, (iv) by crediting to the bank account, or (v) through electronic mode. The wage period will be fixed by the employer as either: (i) daily, (ii) weekly, (iii) fortnightly, or (iv) monthly.

5. Deductions

Under the Code, an employee's wages may be deducted on certain grounds including: (i) fines, (ii) absence from duty, (iii) accommodation given by the employer, or (iv) recovery of advances given to the employee, among others. These deductions should not exceed 50% of the employee's total wage.

6. Bonus

All employees whose wages do not exceed a specific monthly amount, notified by the central or state government, will be entitled to an annual bonus. The bonus will be at least: (i) 8.33% of his wages, or (ii) Rs 100, whichever is higher. In addition, the employer will distribute a part of the gross profits amongst the employees. This will be distributed in proportion to the annual wages of an employee. An employee can receive a maximum bonus of 20% of his annual wages.

7. Against Gender Discrimination

The Code prohibits gender discrimination in matters related to wages and recruitment of employees for the same work or work of similar nature. Work of

similar nature is defined as work for which the skill, effort, experience, and responsibility required are the same.

8. Advisory boards

The central and state governments will constitute advisory boards. The Central Advisory Board will consist of: (i) employers, (ii) employees (in equal number as employers), (iii) independent persons, and (iv)five representatives of state governments. State Advisory Boards will consist of employers, employees, and independent persons. Further, one-third of the total members on both the central and state Boards will be women. The Boards will advise the respective governments on various issues including: (i) fixation of minimum wages, and (ii) increasing employment opportunities for women.

9. Offences

The Code specifies penalties for offences[10] committed by an employer, such as (i) paying less than the due wages, or (ii) for contravening any provision of the Code. Penalties vary depending on the nature of offence, with the maximum penalty being imprisonment for three months along with a fine of up to one lakh rupees.

IV. IMPACT OF THE CODE ON WAGES, 2019

The stated intent in bringing this labour code is to simplify and rationalise the law with the objective of removing the multiplicity of definitions and authorities. The Code on Wages seeks to amalgamate and amend the four laws covering minimum wages, payment of wages, bonus, and equal remuneration. By streamlining the multiple labour laws into a set of four labour codes, our Finance Minister reiterated,[11]"These codes will ensure the process of registration and filing of return will get standardised and streamlined. Various labour related definitions getting standardised, it is expected that there shall be less dispute." Despite the rhetoric in the budget speech of the finance minister, the larger picture emerging from the recent data is a slowdown in growth and a net decline in employment.[12]

The budget is persuasive in stating that during the last five years the government has followed the centre–state dynamic and cooperative federalism. However, a close examination of the proposals shows that the intention is exactly the opposite. The problems that the states will face in their budget management in the event of shortfall in tax revenue have already been pointed out. The central government continues to encroach on the states' subjects by expanding the centrally-sponsored schemes (CSS). Despite the high rate of growth of GDP at around 7% per annum, there is a declining trend

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10 Bill Summary on the Code on Wages, 2019, Bill No. 184 of 2019, www.prsindia.org , visited on 9th September 2019.

11 *"Budget 2019–20: Speech of Nirmala Sitharaman, Minister of Finance,"* 5 July 2019, Ministry of Finance, Government of India, New Delhi.

12 Infra note, Kannan K.P, p. 40.

in a number of crucial macroeconomic variables such as savings, investment, exports and imports, etc. A lack of studied response to the findings of the employment and unemployment survey casts a shadow on the government's claim of India being the fastest-growing economy.[13]

The Government has notified the Code after it received assent from the President of India on August 8.[14] The Code seeks to universalise the provisions of minimum wages and timely payment of wages to all employees irrespective of the sector and wage ceiling. There were 12 definitions of wages in various labour laws, leading to litigation besides difficulty in its implementation. Under the Code, the definition has been simplified and is expected to reduce litigation and also reduce compliance cost for employers. According to the new law, a tripartite committee comprising representatives of trade unions, employers and the state government would fix floor wages for workers throughout the country.[15]It would also ensure that there is no discrimination between men and women as well as transgender in getting wages.

The Code on Wages has faced criticism. Far from promoting decent jobs along with the much plugged high growth route, this labour code is now perceived by almost all trade unions, impartial scholars and media as a comprehensive assault on the workers, especially those who work as insecure or informal workers in both the informal sector (employing less than 10 workers) and in the formal sector.

There is no clarity on who constitutes an 'employer', an 'employee' or an 'enterprise', giving the owner greater discretion to interpret the provisions while making it more difficult for the worker to draw any benefits from them. There is a deliberate ambiguity maintained on wording and definitions. 'Apprentices' be no longer considered employees, at a time when evidence indicates that apprentices are made to do jobs of contractual as well as permanent employees. The code even has a provision on "employees below fifteen years of age", which can be construed as legalisation of child labour. The code on wages legitimises and promotes contract labour, instead of abolishing it, by insulating the principal employer from liabilities and accountability in the case of irregularities on the part of the contractors.

The wage code also brings back the draconian provision of "recoverable advances", a system that the Supreme Court clearly linked to coercive and bonded labour, wherein distressed and vulnerable migrant labourers could be bonded to work through advance payments. This is akin to modern forms of

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13 *Ibid.* The former chief economic adviser (CEA) Arvind Subramaniam questions the credibility of the statistics placed by the government. See also in Subramaniam, Arvind (2019): "India's GDP Mis-estimation: Likelihood, Magnitudes, Mechanisms, and Implications," CID Faculty Working Paper No 354, Harvard University.

14 The Lok Sabha on July 30 had cleared The Code on Wages Bill, 2019, followed by the Rajya Sabha's nod on August 2.

15 S.8 of the Code on Wages, 2019.

slavery, also encountered in rural labour markets. Similarly, the eight-hour workday shift has been done away with, and multiple provisions of increased overtime have been inserted. The code also gives ample alibis to employers to evade bonus payments. Further, seeking justice against unfair practices of employers has become even more difficult now as non-payment of wages will now not be a criminal offence and penalties in case of non-compliance have been reduced. The government wants to provide a "facilitative" rather than a regulatory and punitive environment for the owners, with "facilitators-cum-inspectors" replacing the "inspectors" who used to ensure implementation of various labour laws to aid employees.

Take the case of minimum wage fixation. In principle, the Code on Wages mandates a national minimum wage (that could be taken as a floor wage) below which no state or the central government should fix sector-specific or state wise minimum wages. However, the issue of fixing the minimum wage has been left to the government which is contrary to the principle of "need-based" propounded by the Supreme Court and demanded by the Indian Labour Conferences. But, this lofty principle has been followed within days by announcing a pitiable Rs. 178 as the national minimum wage by the Ministry of Labour and Employment that is higher by Rs. 2 from the previous year's recommended national minimum wage.[16] The most glaring instance of the government's failure to support labour standards is the Ministry of Labour's proposal to fix the national minimum floor wage at Rs. 178, without any defined criteria or method of estimation. This could lead to a dangerous race to the bottom by individual States, in a bid to attract capital and investments. This is rightly being called 'starvation wage', especially given that the Ministry's own committee recommended Rs. 375 as the minimum.

Another concerning issue is that the four codes exclude over 95% of the workforce employed in informal units and small enterprises, who in fact are in greater need of legal safeguards.[17]It would have been better to include provisions in the new code for the workers in the gig economy keeping in mind the peculiar nature of their work.[18] The new code also takes away the workers' right to judicial remedy because of the creation of a quasi-judicial appellate authority.[19] For the overwhelming majority of informal workers who do not have an identifiable employer, the path to remedy for non-implementation is further complicated because a claim can only be filed by an appropriate authority, employee or trade union. The OSH Code has also faced severe

16 The central government did not accept the recommendations of its own committee called Satpathy Committee which recommended for a minimum wage of Rs. 375 per day in 2018. Of course, this was considerably lower than the demand of the 15th Indian Labour Conference for a national minimum wage of Rs. 692 per day or Rs. 18,000 per month.

17 Bhatia Akruti and Kumar Chandan, "*Code Red for Labour*," https://www.thehindu.com/opinion/op-ed/code-red-for-labour/article28826940.ece , visited on 03-09-2019.

18 Gig economy include app-based taxi drivers, delivery persons, etc who receive a lot of directions through apps. See Kumar Alok Prasanna, "*Code on Wages and the Gig Economy*", *Economic and Political Weekly*, Vol. 54, Issue No.34, 24thAug 2019.

19 S. 49 of the Code on Wages, 2019.

criticism from the trade unions.[20]

There is much to appreciate about the Code on Wages which is the first in a series of four labour codes proposed in the government's labour reform initiative. It will bridge the gap between organized and unorganized sectors. The code addresses to regional disparities and to fix a national minimum wage. The minimum wage is now fixed by the centre which will be based on geography and skills and no longer be on employment.[21] The code ensures to universalise the provision of minimum wage along with timely payment of wages to all employees and workers irrespective of the sectors. The minimum wage will be computed based on minimum living conditions. It is envisaged that states will notify payment of wages to workers through digital mode. It is a positive effort. The code also provides uniform definition reducing the number of authorities and changes the nature of inspection. Hence, the code is better viewed as a bold step forward in reforming wage laws to bring them in sync with the requirements of the modern economy. All workers in the organized and unorganized sectors, full time, part-time, across skill levels, and on contract will be offered the protection of the wage laws. The unorganized workers in agriculture, construction, restaurants, hotels, dhabhas, etc were outside the ambit is now assured of legislative protection after this code. Besides, this law will ensure that workers are getting a monthly salary paid every seventh of the following month. Likewise, those working on a weekly basis will be paid on the last day of the week and daily wagers should get them on the same day. The code also fixes the overtime rate at twice the current wage rate even as international organizations recommend that overtime should be 1.25 times the regular wage.

The section 2(k) of the Code on Wages contains a definition of 'employee' far wider than any of the laws it repeals. In fact, EPF and ESI laws deal with social security for workers, minor differences in the definition of 'employee' can have vastly different outcomes. If we look at the case laws, earlier in M/S PM Patel case,[22] piece workers, specifically beedi workers have been held to be 'employees' for the purpose of EPF Act. On the contrary, in CESC Ltd case,[23] it was held that workers working under the supervision of a contractor in execution of a work contract could not be considered the employee of the

20 The Contract Labour (Regulation and Abolition) Act of 1979, now merged with this new OSH code, has provisions that promote contract labour by relaxing licensing norms that cannot distinguish between perennial and non-perennial jobs and taking away the responsibility of the principal employer. There are provisions for extending the working hours, with the consent of the worker. This tendency would lead to a return to the pre-independent days of slavery and long-working hours. Safety norms have also been relaxed in the proposed code. Workers in the informal sector or those who work as informal, often as casual workers in the formal sector (for example, construction) are at a loss as to what will happen to the welfare boards and funds created on an industry-wide basis. In sum, the message is loud and clear. The path to high growth needs to be paved with cheap, elastic and flexible labour for the private corporate sector.

21 Yogna Seth Sharma, Economic Times, August 2, 2019, viewed on 01-09-2019 http://economictimes.indiatimes.com/news/ economy/policy/rajya-sabha-passes-wage-code-bill/articleshow/70501009.cms

22 *M/S PM Patel and Sons & Others v. Union of India and Others, etc,* 1987 AIR 447.

agency for which such work contract was being carried out. This decision was arrived on giving emphasis on the term 'supervision' which occurs in the definition for 'employee' in the ESI Act to hold that they were not employees of the principal employer.

However, a thirty year long litigation battle was ended in approving the claims of women garment workers in the Godavari Garments' Case.[24]This case is the most emphatic rejection of the idea that an employee-employer relationship requires the employer to work at the employer's premises in any way. When the women garment workers organised to sought EPF benefits, they were rebuffed by the employers contending that they were not employees for the purposes of the EPF Act, since they worked from home. The apex court judgment hold that women worked from home doing piece work would be considered 'employee' of the company which had engaged them to do so, even if there was no direct contract of employment between the two.

Though these codes were initiated so as to simplify institutional mechanisms, these are fall short of this claim. In fact, there is separate definition of 'employee' and 'worker' that run into each other. However, the expanding coverage to all workers and addressing wage inequalities require improved compliance. This broad initiative can be implemented only through subsequent legislative efforts. The effectiveness of sheer consolidation is doubtful as the implementation of the code will be a challenge looking at the vast coverage of beneficiaries with minimal focus laid on the creation of systems to manage a huge number of accounts.[25]

V. CONCLUSION

These developments gain significance at a time of jobless growth. Discussion, policy assessment and study are required to ensure that reforms in the labour laws achieve the desired goal of protection of workers, opportunities for industries and enterprises and economic growth for all. Assessment of the efficiency of interventions such as national minimum wage is still under dilemma. Not only is this a case of jobless growth, but also one of job-displacing growth. Men have gained and women have lost. The rural economy has suffered the most. In the meantime, there is a process of downgrading the rights of labour. There is very little to cheer about the economy. To conclude, the code is highly ambitious, and is in dire need of a reality check concerning its genuine implementation. Simplification may squeeze the existing provisions in laws to such an extent that nuances are overlooked, leading to ambiguity at every step of implementation. A new labour code should improve the lives of informal sector workers, and not leave them in the lurch with its makeshift.

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23 *CESC Limited v. Subhash Chandra Bose and Ors,* 1992 AIR 573.

24 The Officer in charge, *Sub-Regional Provident Fund Office v. Godavari Garments Ltd*, 24th July 2019, www.indiankanoon.org, visited on 9th September 2019.

25 Sarkar Santanu, "*Amalgamation of Existing Laws or Labour Reforms?"Economic and Political Weekly*, Vol.54, Issue No.28, 13 July 2019.

Role of judiciary in expanding the horizons of freedom of Speech and Expression

Dipa Gautalair*

INTRODUCTION

Speech and expression is a nature's gift to mankind. Through speech and expression a human being conveys thoughts, sentiments and feelings to others. Hence freedom of speech and expression is natural right which a human being acquires by birth. Therefore, it can be considered as a basic right. The Supreme Court in *Ramlila Maidan Incident re*[1] held that, Freedom of speech and expression is a basic "human right", "natural right" and it as the mother of all liberties. Apart from this, it plays very crucial role in the formation of public opinion on social, political, and economic matters[2].

Freedom of expression is vital in a democratic State where people are the Sovereign rulers. As said by Laski "Democracy is a Government by discussion", a democratic State could be successful only when there is effective participation of the people in the Government. Further, Iver Jennings says, "Without freedom of speech, the appeal to reason which is the basis of democracy cannot be made". It includes the expression of one's ideas through any communicable medium or visible representation, such as gesture, sighs and writing. Now media internet and social media has become a vital communications medium through individual's exercise their right of freedom of expression and exchange information and ideas. Hence in modern times the right to freedom of speech has taken a new dimension where in need has aroused to bring new medium of communications within the meaning and scope of freedom of speech and expression as dealt under Article 19(1) (a) *the Indian Constitution*.

LAW OF FREEDOM OF SPEECH AND EXPRESSION UNDER INDIAN CONSTITUTION

On 26th day of November 1950 the people of India gave to themselves, the *Constitution of India*, with a view to make India a Sovereign, Democratic, Socialistic, Secular and Republic state. The main object of the *Constitution of India* is to secure for the citizens of India, liberty of thought and expression[3]. With the intention to give effects to objectives mentioned in the Preamble, the Constitution makers have incorporated freedom of speech and expression as fundamental right. In order to give effect to these objectives mentioned in the preamble by Constitutional framers, a "freedom of speech and expression" has been guaranteed as fundamental rights under Article 19(1) (a) available to all citizens, subject to restrictions which may be imposed by the State under clause (2) of Article 19.

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1 (2002) 5 SCC 1

2 *Ramlila Maidan Incident, re* (2002) 5 SCC 1.

3 Preamble to the Indian Constitution.

The freedom of speech and expression guaranteed under Article 19(1) (a) has been maintained and preserved by the judiciary time and again by expanding the scope of the said freedom. The judiciary has upheld the freedom of speech and expression keeping in mind the limits and restrictions imposed on it under article 19 (2). Before analyzing the tremendous role played by the judiciary it is pertinent to analyse the curbs placed on this freedom for the maintenance of social order. Article 19(2) imposes a reasonable restriction on the exercise of the said freedom in the interest of security of the state, friendly relations with foreign states, public order, decency, morality, sovereignty and integrity of India or in relation to contempt of Court, defamation or incitement to an offence. Judiciary has taken note of reasonable restrictions and preserving the basic norms of Indian culture. Following are the restriction as laid in Article 19(2).

a) Security of state and public order

A disturbance of an aggravated form which threatens the foundation of the state or overthrows the state falls within the scope of **security of the State**[4]. In *State of Bihar v. Shailabala Devi*[5] it was held, that any speech or expression in any form words, signs or visible representations which incites or encourages the commission of offence of murder or violence, undermines the security of the State and falls within the ambit of Article 19(2). The speech tending to overthrow the state comes within scope security of the state[6].

The term **public order** covers a small riot, an affray, breaches of peaces or acts disturbing public tranquillity. In *Srishti School of Art, Design and Technology*[7] the film "*Had Anhad"* recounted the demolition of the *Babri Masjid* and communal riots in its aftermath. The central board of films certification had insisted on extensive excisions to the film. The excision was held to be justified on the ground that it was against the public order and security of the state.

b) Sovereignty and Integrity of India:

This ground has been added as a ground of restriction on the freedom of expression by the 16th Amendment of the Constitution with effect from October, 1963. The object was to enable the State to combat cries for secession and the like from organization such as the Dravida Kazhgam in south and the plebiscite front in Kashmir, and activities in pursuance thereof which might not possibly be brought within the fold of the expression "Security of State". The amendment enabled the enactment of laws such as the criminal amendment act, 1961 and unlawful activities

4 M. P. Jain, *Indian Constitutional Law*, seventh edition, (Nagpur: lexis Nexis Butterworths; 2014) p.1038
5 AIR 1952 SC 329
6 *Santokh Singh v. Delhi Administration*, AIR 1973 SC 1091
7 (2011) 46 PTC 221

(prevention) Act, 1967 which made any act or words towards the cession of any part of the territory of India or the secession of the territory of India. *In peoples union for civil liberties v. Union of India*[8] Supreme Court upheld the prevention of terrorism act, 2002 on the ground that parliament has power to legislate on the subject of terrorism which was threat to the security and sovereignty of the nation. However this act is repealed subsequently.

c) Friendly Relations with Foreign States

The object of this exception to the freedom of speech and expression is to prevent libel against foreign State in the interest of maintaining friendly relations with them.

d) Decency or Morality

This exception has been en-grafted for the purpose of restricting speeches and publications which tend to undermine public morals[9]. Decency or morality is not confined to sexual morality alone. Decency indicates that the action must be in conformity with the current standard of behaviour or propriety[10].

e) Defamation

Just as every person possesses the freedom of speech and expression, every person also possesses a right to his reputation which is regarded as property. Hence nobody can so use his freedom of speech or expression as to injure another person's reputation. Laws penalizing defamation do not constitute infringement of the freedom of speech[11]. In *Subramaniam Swamy v. Union of India*[12], Subramaniam Swamy, petitioner, is a politician from the State of Tamil Nadu. The petitioner has challenged provisions of the Indian Penal Code that criminalize defamation in India, namely Section 499 (defines defamation[1]) and Section 500 (provides punishment for the offense[2]) before the Supreme Court of India. The petitioner also challenges Section 199(2) of the Criminal Procedure Code, which provides that a Court may take cognizance of an offense relating to defamation on a mere complaint made by a public prosecutor when an offense is alleged to have been committed against the President of India, the Vice- President of India, the Governor of a State, the Administrator of a Union Territory or a Minister of the Union or of a State or of a Union Territory, or any public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharged of his public functions. According to the petitioner these provisions cast an unreasonable restriction on free speech, one that falls

8 (2004) 9 SCC 580
9 *Ramesh Yeshwant Prabhoo (dr.) v. Prabhakar Kashinath Kunte*, A.I.R. 1996.
10 *Ranjit D. Udeshi v. State of Maharashtra,* A.I.R. 1965 S.C. 881
11 *Namboodripad E.M. Sankaran v. Narayan Nambiar T.* A.I.R. 1970, S.C. 2015
12 (2016) 7 SCC 221

beyond Article 19(2) of the Constitution of India.

The Court observed that the State had chosen the criminal law as one of the avenues to protect reputation under Article 21. The Court found that it was difficult to subscribe to the view that criminal defamation has an undue chilling effect on the right to freedom of speech and expression. Finally, the Court held that the penal code provision is not disproportionate. The reasonableness and proportionality of a restriction is examined from the stand point of the interest of the general public, and not from the point of view of the person upon whom the restrictions are imposed. Applying this standard, the Court judged the criminal defamation laws to be proportionate. The Court rejected the contention that defamation is fundamentally a notion of the majority meant to cripple the freedom of speech and expression as too broad a proposition to be treated as a guiding principle to adjudge the reasonableness of a restriction

f) Incitement to an Offence.

This ground will permit legislation not only punish or prevent incitement to commit serious offences like murder which lead to breach of public order, but also commit any offence[13], which according to *the General Clauses Act*, means any act or omission made punishable by any law for the time being in force. Hence, it is not permissible to instigate another to do any act which is prohibited and penalized by any law. But mere instigation to not to pay a tax may not necessarily constitute incitement to an offence[14].

g) Decency or morality:

The way to express something or to say something should be decent one. It should not affect the morality of the society adversely. Our constitution has taken care of this view and inserted decency and morality as a ground. The words 'morality or decency' are words of wide meaning. Sections 292 to 294 of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency or morality. These sections prohibit the sale or distribution or exhibition of obscene words, etc. in public places. No fix standard is laid down till now as to what is moral and indecent. The standard of morality varies from time to time and from place to place.[15]

h) Contempt of Court

In the exercise of one's right of freedom of speech and expression, nobody can be allowed to interfere with due course of justice or to lower

13 *Santokh Singh v. Delhi Administration*, A.I.R 1973, S.C. 1091 112.

14 *Kedar Nath Singh v. State of Bihar* A.I.R. 1962, S.C. 955

15 *Dheerajendra Patanjali*, "***Freedom of Speech and Expression*** *India v America - A study ", India Law Journal, available at* <http://www.indialawjournal.org/archives/volume3/issue_4/article_by_dheerajendra.html> *visited on04/06/2019*

the reputation or authority of the court[16]. However, in the free market place of ideas, criticism about the judicial system or the Judges should be welcomed, so long as criticisms are concerned do not impair or hamper the "administration of justice"[17].

Apart from the above restrictions imposed by the *constitution of India,* judiciary has evolved further restrictions on freedom of speech and expression .

i) Noise pollution

Indian courts have been very conscious of environment pollution and are playing active role in environment protection. The emerging judicial view is that a person can exercise freedom of speech keeping the level of noise pollution within the bearable limits[18]. The court is of the opinion that under Article 19(1)(a) read with Article 21 the citizens have a right of decent environment, have a right to live peacefully, right to sleep at night and right to leisure which are all necessary ingredients of the right to life guaranteed under Article 21[19]. In *P. A. Jacob v. Supt. of police, Kottayam*[20], the Kerala High Court has said that, the right to speech implies the right to silence. It implies freedom not to listen and not to be forced to listen.

j) Trial by media

Media has now reincarnated itself into a public court (Janta Adalat)[21] and has started interfering in to court proceeding. When the media divulges on the legal process, freedoms and privileges collide. Media sort off attains formal prerogative powers to decide the cases and make them look true in the eyes of public. Restriction on such act of the media does not constitute an unreasonable restriction. *In M. P. Lohia v. State of west Bengal*[22], a wife had committed suicide on account of dowry harassment. The husband applied for bail which was rejected by the court. An appeal was made to High Court. During pendency of the proceedings for bail before the court, the magazine had published an article wherein the father of the accused had stated his version of tragedy which was interference for the court to deal with the bail petition pending before it. Hence the court cautioned the publisher editor and the journalist who were responsible for the said article against indulging in such trial by media when issue was *sub judice*.

k) No Monopoly on Electronic Media:

In Secretary, *Ministry of I & B v. Cricket Association of Bengal*[23] held that

16 *Namboodripad E.M. Sankaran v. Narayan Nambiar T*. A.I.R. 1970 S.C. 2015.
17 *Duda P.N. v. Shivshankar P*. AIR. 1988, S.C. 1208
18 *Supra* note 4, p.1050
19 *Free Legal Aid cell v.Delhi*, AIR 2001 DEL 455
20 AIR 1993 Ker 1
21 Devika Singh1 , Shashank Singh "*Media Trial: Freedom of Speech VS. Fair Trail* ", *IOSR Journal Of Humanities And Social Science,* Volume 20, Issue 5, (May. 2015), PP 88-94, p. 89
22 (2005) 2 SCC 686
23 (1995) 2 SCC 161

the government has no monopoly on electronic media and a citizen has, under Article 19(1) (a), a right to telecast and broadcast to the viewers/listeners through electronic media.

HORIZONS OF FREEDOM OF SPEECH AND EXPRESSION: THE ROLE OF JUDICIARY.

The freedom of speech and expression under Article 19(1)(a) is a concept with diverse facets, both with regard to the content of the speech and expression and it is a means through which communication takes place. It is also a dynamic concept that has evolved with time and advances in technology and because of this nature of the freedom of speech and expression, Indian Judiciary has expanded the horizons of freedom of expression whenever the situations demanded.

a) Pre-Censorship on Print Media:

In *Romesh Thapar v state of Madras*[24] and *Bhrij Bhushan v. The State of Delhi*[25], a pre-censorship order against the paper "Organizer" was challenged. The full court ruled that the imposition of pre-censorship on a journal is a restriction on the liberty of the press, which is an essential part of the right to freedom of speech and expression under Article 19 (1)(a). It said the freedom of speech and expression is one of the most valuable rights guaranteed to a citizen by the Constitution and should be jealously guarded by the courts. The verdict added that free political discussion is essential for the proper functioning of a democratic government.

b) Right to expression beyond national boundaries

The question whether an Indian citizen's right to freedom of speech and expression extends beyond geographical limits of India was considered by the Supreme Court in *Maneka Gandi v union of India*[26]. The court held that the freedom of speech and expression was not confined national boundaries and a citizen and the right to exercise that right abroad.

c) Right to Circulate

The right to free speech and expression includes the right not only to publish but also to circulate information and opinion. Without the right to circulate, the right to free speech and expression would have little meaning. The freedom of circulation has been held to be as essential as the freedom of publication. In *LIC v. Manubhai Shah*[27] the Supreme Court held that the freedom of speech and expression must be broadly construed to include the freedom to circulate one's views by word of mouth or in writing or through audio visual media. This includes the right

24 1950 AIR 124
25 1950 AIR 129
26 (1978) 1 SCC 248
27 1992 (3) SCC 637

to propagate one's views through the print or other media.

d) Right to Know:

The freedom to know, receive and impart information has also been declared as a part and parcel of freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information. In *Prabha Dutt v. Union of India*[28], the Supreme Court directed the Superintendent of the Tihar Jail to allow the representatives of a few newspapers to interview two death sentence convicts however, cautioned that it is not an absolute right, nor indeed does it confer any right on the press to have an unrestricted access to means of information. The right to information was consistently recognized by the Court in number of cases as an essential aspect of freedom of speech and expression until finally it was incorporated in the Right to Information Act, 2005.

e) Freedom to Criticize Government:

Kedar Nath Singh v. State of Bihar[29] arose out of a constitutional challenge to Section 124-A of Indian Penal Code, 1860 which penalizes attempts to excite disaffection towards the Government by words or in writing and publications which may disturb public tranquillity. The Supreme Court dismissed the challenge but classified that criticism of public measures or comments on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression.

f) Freedom of Silence:

In a landmark judgement dealing with the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the National Anthem in the morning assembly though they do stand respectfully when the National Anthem is sung, the Apex Court in *Bijoe Emmanuel v. State of Kerala*[30] declared it against the fundamental right to freedom of expression and freedom of conscience and freely to profess, practice and propagate religion. Setting aside the judgment of the High Court, this court directed the respondent authorities to re-admit the children into the school, to permit them to pursue their studies without hindrance and to facilitate the pursuit of their studies by giving them the necessary facilities. Justice Chinappa Reddy ended his judgment with following lines: "our tradition teaches tolerance; our philosophy preaches tolerance; our constitution practices tolerance; let us not dilute it".

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28 (1982) 1 SCC 1
29 AIR 1962 SC 955
30 (1986) 3 SCC 615

g) Freedom of Press:

The fundamental right of the freedom of press understood in the light of the freedom of speech and expression is essential for the political liberty and proper functioning of democracy. In the famous *Sakal Papers v. Union of India*[31] the Supreme Court observed the importance of press very aptly and held that it is implicit in the freedom of speech and expression and held that the State could not make laws which directly affect the circulation of a newspaper for that would amount to a violation of the freedom of speech.

h) Right to Fly National Flag

The Supreme Court in *Union of India v. Naveen Jindal*[32] held that right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19(1) (a) of the Constitution, being an expression and show of his allegiance and feelings and sentiments of pride for the Nation, so long as the expression is confined to nationalism, patriotism and love for motherland. It cannot be used for commercial purpose or otherwise. The same is not an absolute right but a qualified one, subject to reasonable restrictions under clause (2) of Article 19 of the Constitution. The Emblems and Names (Prevention of Improper Use) Act, 1950, and the Prevention of Insults to National Honor Act, 1971, regulate the use of the National Flag.

i) Commercial Advertisements:

Commercial advertisements at one stage were considered outside the protection of freedom of speech and expression. But later in *Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.*[33], the Supreme Court held that a commercial advertisement or commercial speech was also a part of the freedom of speech and expression, which would be restricted only within the limitation of Article 19(2). The court however made it clear that the government could regulate the commercial advertisements, which are deceptive, unfair, misleading and untruthful. Examined from another angle the Court said that the public at large has a right to receive the "Commercial Speech". Art. 19(1) (a) of the constitution not only guaranteed freedom of speech and expression, it also protects the right of an individual to listen, read, and receive the said speech.

j) Right to online speech and expression (Challenges of Technology)

The tremendous growth of science and technology brings in its wake new problems. It promotes the freedom of expression. Communication is facilitated and the exercise of the right is made easier. But it also facilitates the abuse of the right and freedom. Newer forms of misuse and

31 AIR 1962 SC 305
32 A.I.R. 2004 S.C. 1559
33 (1995) 5 SCC 139

abuse of this precious freedom emerge posing threat to privacy, dignity, reputation and even national interests and security. These problems will have to be addressed efficaciously. This again highlights the needs for balance and restraint which will have to be from within and also to be imposed by law as the need and circumstances demand. This is another challenge of modern times.

Internet (right to online speech and expression):

Internet is a revolution in communication. It is a medium of instantaneous and long-distance communication. It takes no longer for a message to travel for thousands of miles across the globe than it takes to travel next door. It is a medium that facilitates free speech and the exchange of ideas like no medium has before. The internet is an important means of expression and communication but equally important is its role as a source of information. The role of internet as a source of information an important facet from the standpoint of Article 19(1)(a). Finland became the first country in 2010 to make broadband a legal right for every citizen[34].

Internet, though it is amenable to misuse. It has become an engine for rampant piracy of copy righted music, for pornography an obscenity for defamation, for hate speech and for terrorist planning and propaganda. In India internet is regulated by *the Information Technology Act, 2000*. In 2012 section 66A[35] was challenged in the Supreme Court for being arbitrary and excessive. It was challenged in *Shreya Singhal v Union of India*[36]. This case is magnum opus decision of the Indian Apex Court as it sustains the splendid bliss of basic right of the citizens of India to freedom of speech and expression against incompatible attempts under Information Technology Act, 2000 to regulate it online.

In *shreya Singhal's*[37] case, the petitioner i.e. Shreya Singhal a law student filled a writ petition challenging the constitutionality of section 66A of the Information Technology Act, 2000 on being shocked by the arrests of two

34 Madhavi Goradia Divan, *Facets of Media Law,* second Edition (Lucknow: Eastern Book Company; 2018) p.33

35 66A. Punishment for sending offensive messages through communication service, etc. Any person who sends, by means of a computer resource or a communication device,—
(a) any information that is grossly offensive or has menacing character; or
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,
(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine. *Explanation*.— For the purpose of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message.

36 (2015) 5 SCC 1.

37 *Shreya Singhal v Union of India* (2015) 5 SCC 1

young girls in Maharashtra for posting comments critical of the total shutdown in Mumbai after the death of Shiv Sena supremo Shri Bal Thackeray. The section continued to be misused by arrests in West Bengal and Pondicherry. It was because the section had the potential to criminalise any and all content that was uploaded to the internet, merely because a reader found something annoying or of menacing character[38]. The section was challenged for vagueness and its chilling effects on freedom of speech and hence violative of fundamental right to free speech.

The supreme court of India keeping in mind the importance of freedom of speech and expression from the point of view of liberty of individual in democratic form of government and the restrictions under Article 19(2) came up with its decision. The Apex court referring to *Abrams v United States*[39] stated that freedom of speech and expression requires for the flow of opinions and ideas essential to sustain the collective life of the citizens. The Apex Court also referred to the *whitney v. California*[40] to arrive at just ends of freedom of speech and expression in the context of section 66A. Through this the apex court identified three concepts of the content of "freedom of speech and expression" i.e. discussion, advocacy, and incitement. If the discussion and advocacy reaches the level of incitement then Article 19(2) comes in. So at this stage the freedom of speech may be curtailed on the basis of restrictions imposed in Article 19(2).

The Information Technology Act in its section 66A refers to "any information" that means all kinds of information has been roped in it, it may be scientific, literary or artistic value current event or it may be obscene or seditious. The section does not make any distinction in information between discussion or advocacy or incitement and only focuses on view which annoying, inconvenient, grossly offensive etc. So the section creates an offence against person who uses the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of citizen. The offences created under section do not have any proximate connection with the restrictions mentioned in Article 19(2) as the section has nothing to do with public order, defamation, decency and morality and incitement of an offence. Hence section 66A of *the Information Technology Act, 2000* was held to be constitutionally infirm because it destroys the geneses of free speech and expression under Article 19(1)(a).

CONCLUSION

Expression through speech is one of the basic guarantees provided by civil society. However, in modern world Right to freedom of speech and expression is not limited to express ones' view through words but it also includes

38 Dr. K.L. Bhatia, *Cases and Material on Constitutional Law Of India- Fons Juris Of Foundational Fundamentals*, first Edition, (Haryana: Universal Law Publishing; 2016) p.639
39 (1918) 250 US 616
40 (1926) 274 US 357

circulating one's views in writing or through audiovisual instrumentalities, through advertisements and through any other communication channel. It also comprises of right to information, freedom of press etc. It is a right to express and self realization. Now in the digital era the freedom of speech and expression can be exercised beyond the territorial boundaries within restrictions imposed under Article 19(2) of the constitution. Freedom of speech cannot be taken away by mere vague provisions of law which are not at all connected to the restrictions imposed under Article 19(2). Seeing the trend of opinions delivered by the Supreme Court since the *Romesh Thaper*[41] and *Brij Bhusan*[42] cases to *Shreya Singhal v Union of India*[43] it would not be an exaggeration to say that the free speech clause has always been an engaging the Supreme Court in preserving the fundamental right to speech and expression since its inception.

41 *Romesh Thaper v. State of Madras* 1950 AIR 124
42 *Bhrij Bhushan v. The State of Delhi* 1950 AIR 129
43 *Shreya Singhal v Union of India* (2015) 5 SCC 1

Secularism in India – An Insight in to Law Regulating Temples

***Karthik Anand**

Introduction

After 42nd Amendment of the Constitution of India in 1976 the Preamble to the Constitution provides that India is a secular nation and recognise and accept all religions, enforce parliamentary laws instead of religious laws, and respect pluralism. India does not have an official state religion. In matters of law in modern India, however, the applicable code of law is unequal, and India's personal laws - on matters such as marriage, divorce, inheritance, alimony - varies with an individual's religion. Muslim Indians have Sharia-based Muslim Personal Law, while Hindu, Christian and Sikh Indians live under common law. It is further complicated by the fact that many Hindu temples of great religious significance are administered and managed by the Indian government.[1] The attempt to respect unequal, religious law has created a number of issues in India such as acceptability of child marriage, polygamy, unequal inheritance rights, extra judicial unilateral divorce rights favourable to some males, and conflicting interpretations of religious books.[2]

Secularism as practiced in India, with its marked differences with Western practice of secularism, is a controversial topic in India. See also pseudo-secularism Supporters of the Indian concept of secularism claim it respects. Supporters of this form of secularism claim that any attempt to introduce a uniform civil code, that is equal laws for every citizen irrespective of his or her religion, would impose majoritarian Hindu sensibilities and ideals.[3] Opponents argue that India's acceptance of Sharia and religious laws violates the principle of Equality before the law.[4]

Brief History before Independence

During colonial rule in India, England was not a secular country with a Jeffersonian wall of separation between church and state. Instead, the Church of England was the established church. The "Act of Supremacy" enacted in 1534 declared that the monarch was the "Supreme Head of the Church of England". The Archbishop of Canterbury and other high-level church officials were appointed by the government. New monarchs were crowned by a senior member of the clergy, and senior bishops were represented in the House of Lords. Much of this remains true today. How, then, did the idea of secularism

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1 *"The Constitution (Forty-Second Amendment) Act, 1976"* Government of India. Archived from the original on 28th March 2015. Retrieved 1 December 2010.

2 Gerald James Larson (2001), *Religion and Personal Law in Secular India: A Call to Judgment,* Indiana University Press, ISBN 0-253-33990-1

3 Craig Duncan, *Shah Bano: The Dilemma of Religious Liberty and Sex Equality,* Cornell University, Ithaca, 2009

4 John H. Mansfield, *"The Personal Laws or a Uniform Civil Code"* in Robert D. Baird, ed., Religion and Law in Independent India (Manohar Press, 1993), pp. 139-177

take root in India, which derives many of its institutions and practices from England?

Initially, the East India Company (EIC) got itself intricately entangled with the administration of religious institutions. Temple employees were appointed by government officials. Royal salutes were fired from the batteries of Fort St. George in Madras, at the celebration of Pongal, and at Ramzan. Under the orders of the public officer of the district, a religious offering was made at temples for a good monsoon. Laws were enacted which said that the "general superintendence of all lands granted for the support of Mosques and Hindu temples" was vested in the colonial government[5].

A change of policy

All this annoyed Christian missionaries and members of the clergy in England and India who put pressure on the government. Consequently, in 1833, the Court of Directors of the EIC sent instructions to the colonial government outlining its policy towards India's religions. The Directors wrote that all "religious rites" that were "harmless… ought to be tolerated, however false the creed by which they are sanctioned." However, they wrote: "The interference of British Functionaries in the interior management of native temples, in the customs, habits and religious proceedings of their priests and attendants, in the arrangement of their ceremonies, rites and festivals, and generally in the conduct of their interior economy, shall cease."

It was in this manner that the seeds of secularism were sown in India. The colonial government was directed to disentangle itself from "superstitious" Indian religious institutions, because Indian religions were considered heathen and false. However, the Church of England in India was still established for a long time.

The wall of separation between temple and colonial state in India was achieved in 1863, when a law was enacted which said that it would no longer be "lawful" for "any Government in India, or for any Officer of any Government" in his official capacity, to take over the "superintendence of any land or other property" belonging to a "Mosque, Temple, or other religious establishment", to take part in the "management or appropriation of any [religious] endowment", to nominate or appoint any trustee in a religious institution, "or to be in any way concerned therewith". Referring to this law in the legislative council, the Lieutenant Governor of Bengal said that it would "rid" the government of a "burden".

The Missing Clause

However, this colonial vision of secularism was rejected by India's founding fathers. After the Government of India Act, 1919, Indian legislators

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5 https://www.thehindu.com/opinion/op-ed/temple-and-state/article24175670.ece Last visited on 24.06.2019

came to power at the provinces. Indian political leaders enacted the far-reaching Madras Hindu Religious Endowments Act, 1926, which virtually took over the management and administration of Hindu temples in the province. It established "boards" appointed by the government. Temple trustees had to furnish accounts to and obey the instructions of the boards. Temples' surplus funds could be spent by the boards themselves, on any "religious, educational or charitable purposes not inconsistent with [their] objects".

The entanglement of the government with religious institutions in India would be impermissible in the U.S. The first amendment to the Constitution there prohibits Congress from making any law "respecting an establishment of religion". In the Constituent Assembly, B.R. Ambedkar drafted an establishment clause which said that "the State shall not recognize any religion as State religion." K.T. Shah's draft said that the government would be "entirely a secular institution", which would "maintain no official religion [or] established church". If these clauses found their way into the Constitution, the Madras Hindu Religious Endowments Act, 1926, could possibly have been found unconstitutional.

Then, something odd happened. In April 1947, the sub-committee on fundamental rights in the assembly discussed the establishment clause, and K.M. Munshi and K.M. Panikkar promised that they would re-draft it, "so as to provide for those cases where religion is already accepted as a State religion." A few days later, when the sub-committee presented its report on fundamental rights, the establishment clause unceremoniously vanished. Later, H.V. Kamath tried to move an amendment in the Constituent Assembly to introduce an establishment clause into the draft constitution to the following effect: "The State shall not establish, endow, or patronize any particular religion." However, his amendment was put to vote and rejected.

The Supreme Court has allowed governments to heavily regulate Hindu temples on the theory that the freedom of religion does not include secular matters of administration which are not essential to the religion. Sometimes, the court has perhaps gone a little too far since the line between integral religious practice and non-essential secular activity is often hard to draw. For instance, though the government cannot interfere with rituals and prayers at temples, it can regulate the amount that temples spend on such things. Even the appointment of priests in Hindu temples has been held to be a secular activity, which the government can regulate.

In a letter written in 1802, President Thomas Jefferson advanced the idea of a "wall of eternal separation between church & state" in the U.S. The wall of separation between temple and state in India was first constructed by a colonial government which wanted to distance itself from religions that it considered heathen and false. That wall was then pulled down by Indian leaders who felt that government entanglement in religious institutions, especially Hindu

temples, was essential, even in a secular state.[6]

Religious faith is continuously providing the passion to preserve in the way of life and if it declines, obedience degenerates into habit and habit slowly withers way. Therefore laws, customs, conventions and fashions etc. are not the only means of social control but the religion and morality also formulate and shape the human behavior. Religion and morality are the most influential forces of social control as well as the most effective guides of the human behavior. The social life of a man in addition of its economics, political, philosophical, scientific and other aspects, has also religious aspects. Religion is the major concern of man. Man is always having religious quest which makes him able to become a restless creature even beyond the satisfaction of his physical needs. Religion revolves around man's faith in the supernatural forces. Religion is concrete experience which is associated with emotions, especially with fear, awe or reverence. Many societies have a wide range of institutions connected with religion and a body of special officials, with forms or worship, ceremonies, sacred objects titles, pilgrimages, and the like. Looking at the definition of religion by Ogburn, "Religion is an attitude towards super human power, it may be submitted that religion explains the relation of man with god and also elaborate rules of conduct." Further Maxmuller defines, "Religion as a mental faculty or disposition which enables man to apprehend the infinite." Maxmuller has attempted to define religion as a matter of belief in supernatural forces. Man believes that he is at the mercy of the supernatural forces and shows his subordination to them by means of prayers, hymns, and other acts, man believes that his disrespect and negligence towards religion would bring disaster so he engaged in endless endeavor to adjust himself with the supernatural. He attempts to do only the acts which are righteous and sacred to please the supernatural. Behaving in accordance with the norms laid down by religion is righteous and going against them is 'sinful'.
The same approach can also be seen in the views expressed by the supporters of 'functional theory'. According to Kingslay Davis, Religion is the part of society. It is common to the group; its beliefs and practices are acquired by each individual as a member of the group. The worship of gods is a public matter supported by the community and performed for communal purposes. The other supporters of functional theory also confirm the same view that religion is a universal, permanent, pervasive and perennial institution and it has a vital function in maintaining the social system as a whole The are many religions in the world and the questions at this juncture arise-

- Which religion should be followed by a person?

- Can a State compel its citizens to follow a particular religion?

- Can a State have its own religion?

- Can a Government of a State give preferential treatment to the followers of a

6 Abhinav Chandrachood, Article on 'Temple and State', Advocate, Bombay High Court, updated on June 16,2018

particular religion?

The answer to all these questions is negative if the has adopted the theory of secularism. A secular state is neither supposed to compel its citizens to adopt a particular religion nor it can give preferential treatment to the followers of particular religion. Secularism eliminates God from the matters of the state.

India is a secular country. The term 'secular' denotes the threefold relationship among man, state and religion. The word Secular has not been defined or explained under the Constitution in 1950 or in 1976 when it was made part of the preamble. A Secular State means that the one that protects all religions equally and does not uphold any religion as the State religion. Unlike in England where the Queen is the Head of the Protestant Church in India there is no provision to make any religion the 'established Church'. The state observes an attitude of neutrality and impartiality towards all religions. It is assumed that the secular state, howsoever constructed, will minimally have to contend with and respond to each of the demands of equality, liberty and neutrality. The liberal claim rests on the impossibility of different religious communities in the same democratic polity to live together in harmony, without some model of secularism that embodies the normative force of liberty, equality and neutrality. Random House Dictionary defines the term secularism As a system of social or political philosophy that rejects all forms of religious faiths. In the words of Asgar Ali Engineer, Secularism means liberation of politics from the hegemony of religion. Oxford Advanced Learner's Dictionary defined the term secularism, as Belief that morality and education etc. should not be based on religion.

Donald E. Smith, Professor of Political Science in Pennsylvania University provided what he regarded as a working definition of a secular state. This was in his book India as a Secular State. "The secular State is a State which guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion, nor does it seek to promote or interfere with religion".

The definition given by Smith reflects three aspects of secularism in the form of inter-related relations as:

- Religion and Individual
- Individual and State
- State and Religion

These relations can be comprehensively elaborate by this triangle. These three associates are the three sides of a tri-angle, touching each other necessarily at three points and creating their mutually related angles. These three sets of angular relationship contain the total of religious freedom available in a society.

First of all these three angles, reflects the relationship between the religion and individuals. This relation contains' positive freedom of religion' which implies 'reasonable unrestrained liberty of believing & practicing one's religion.' In other words, every person should be free to follow any religion, and to act upon its teachings and reject all other without any interference from the state. Religious freedom is the soul of principle of liberty enshrined in the Preamble to the Constitution of India. The second angular relation reflects the relationship between the state and individual. It contains 'negative freedom of religion.' By 'negative freedom of religion' mean 'absence of restrains, discriminations, liabilities and disabilities which a citizen might have been otherwise subject to.'

The third angular relation which emanates from the relationship between the state and its religion. It contains 'neutral freedom of religion.' It implies that state has no religion of its own and attitude of indifference towards all the religions by the state.

India is a secular state. The idea of secularism is one of the basic features of the Indian constitution. The Supreme Court in St. Xavier's College Vs. State of Gujrat observed, India is a secular state, secularism eliminates god from the matter of the state affairs, and ensures that none shall be discriminated against on the ground of religion.

Positive freedom of religion: Religion and Individual. One of the basic civil liberties of an individual is the liberty of his mind and his conscience. Preservation of liberty of the mind, conscience and thought being the greatest liberty alone can make possible and meaningful other liberties. If the mind and conscience of human is in chain, all the other liberties would become meaningless. A free mind and a free conscience, therefore is the essential, integral and indispensable foundation of all other civil liberties.

The Constitution of India, being the supreme law of the nation recognizes the religious liberty of both the individuals as well as associations of individual united by common beliefs, practices & discipline. The individual and collective aspects of freedom of religion can be summarized in this order:

Individual Freedom of Religion- The Constitution of India recognizes the freedom to profess, practice and propagate the religion under Article 25. Part (1) of Article 25 secures to every freedom of conscience: and the right to (i) profess religion; (ii) practice religion; and (iii) propagate religion. The term 'religion' has not defined in the constitution but the meaning given by the Supreme Court of India to the religion can be referred here, the Supreme Court in Commissioner, H.R.E. Vs. L.T. Swammiar held:

Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in a system of beliefs or doctrines, which are regarded by those who profess that religion as conducive to their

spiritual well being. A religion may not only lay down a code of ethnical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship, which are regarded as integral parts of religion and these forms and observance might extend even to matters of food and dress.

The freedom of religion guaranteed under Indian constitution is not confined to its citizens but extends to 'all persons including aliens.' This point, was underlined by the Supreme Court in *RatiLal Panchand Vs. State of* Bombay as it is very important because substantial number of foreign Christian missionaries in India were engaged at that time in propagating their faith among the adherents of other religions.

The Constitution thus declares that every person has a fundamental right not only to hold whatever religious belief commend themselves to his judgement, but also to express his beliefs in such overt acts, as are prescribed by his religion and propagate its tenets among others. The exercise of this right is, however subject to 'public order, morality and public health.' Here the constitution succinctly expresses the limitations on religious liberty that has been evolved by judicial pronouncements in the United States and Australia. In fact, the framers of the Indian constitution attempted to establish a delicate balance between 'essential interference and impartial interference' on the part of the state. They kept in consideration the possibilities of arising out of circumstances in which the government may have to impose restraints on the freedoms of individuals in collective interests.

Accordingly Article 25 (2) provides broad sweeping power of interference to the state in religious matters. This Article imposes drastic limitations on the rights guaranteed under Article 25(1) and reflects the peculiar needs of Indian society. It is important to mention here that law providing for the very extensive supervision by the state about temple administration has been enacted by virtue of this provision. Here it would not be out place to state that the extensive modification Hindu personal law (marriage, divorce, adoption, succession etc.) has been effected by legislation based on the provision permitting measures of social welfare and social reform. There is an interesting case on the validity of the Bombay Prevention of Hindu Bigamous Marriages Act of 1946, where the validity was upheld by the Bombay High Court. Chief Justice Chagla (Muslim, later appointed as Indian Ambassador to US) delivered his judgment as follows: it is only with very considerable hesitation that I would like to speak bout Hindu religion, but it is rather difficult to accept the proposition that polygamy is an integral part of Hindu religion. It is perfectly true that Hindu religion recognizes the necessity of a son for religious efficacy and spiritual salvation. That same religion also recognizes the institution of adoption. Therefore the Hindu religion provides for the continuation of the line of a Hindu male within the framework of monogamy.

The learned judge went on to argue, that even assuming that polygamy is a

recognized institution according to Hindu religious practice, the right of the state to enact this legislation could not be disputed. The enforcement of monogamy among Hindu is a measure of social reform which the state is empowered to legislate by Article 25 (2) (b) 'notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practice and propagate religion.

The same constitutional provision permits legislation opening Hindu religious institutions of a public character to all classes and sections of India. Harijan temple entry laws have been enacted by many of the state legislatures. The Central Untouchability (Offences) Act of 1955 provides that any attempt to prevent Harijans from exercising their right to enter the temple is punishable with imprisonment or fine or with both. Therefore it must be clear that a secular civil law is equally applicable to all Indian citizens.

Collective Freedom of Religion- Religious denominations as well as individuals have certain important rights spelt out under Article 26. The term 'religious denomination' has not been defined under the Constitution. The Hon'ble Supreme Court has accepted the definition given in Oxford Dictionary that defines as 'a collection of individuals classed together under the same name a religious sect of body having a common faith and organization and designated by a distinctive name.' The Supreme Court in number of cases held that Arya Smaj, Anandmarga, Vaishanave, The followers of Madhawacharya and other religious teachers, though not separate religions, yet these are separate religious denomination and enjoys the protection under Article 26 of the Constitution.

The right under Article 26(a) is a group right and is available to everhy religious denomination. Clause (b) of Article 26 guarantees to every religious denomination the right to manage its own affairs in matters of religion. The expression 'matters of religion' includes 'religious practices, rites and ceremonies essential for the practicing of religion.' An important case that involved the right of a religious denomination to manage its own affairs in matters of religion was Venkataramana Devaru Vs. Stae of Mysore . In this matter, Venkatramana temple was belonging to the Gowda Saraswath Brahman Community. The Madras Temple Entry Authorization Act, supported by Article 25(2)(b) of the Constitution, threw open all Hindu public temples in the state to Harijans. The trustees of this denominational temple refused admission to Harijans on the ground that the caste of the prospective worshipper was a relevant matter of religion according to scriptural authority, and that under Article 26(b) of the Constitution they had the right to manage their own affairs in matters of religion. The Supreme Court admitted that this was a matter of religion, but when it faces conflict with Article 25(2) (b), it approved a compromise arrangement heavily weighted in favor of rights of Harijans and a token concession to the right of a religious denomination to exercise internal autonomy. Further Article 26(c) and (d) recognize the right of a religious denomination to own acquire and administer movable and

immovable property in accordance with law. However it was held in Surya Pal Singh Vs. State of U.P. that this guarantee did not imply that such property was not liable to compulsory acquisition under the U.P. Abolition of Zamindari Act. Similarly in Orissa, land reforms resulted in the expropriation of a village and surrounding agricultural land dedicated to the maintenance of a Hindu deity. Since compensation was paid, the High Court held that there was only a change in the form of the property.

Article 30 deals with another aspect of collective freedom of religion:

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The object behind Article 29 & 30 is the recognition and preservation of the different types of people, with diverse languages and different beliefs, which constitute the essence of secularism in India.

Negative Freedom of Religion: Individual and State

The second component of secular state, the concept of citizenship is based on the idea that the individual, not the group is the basic unit. The individual is confronted by the state which imposes duties and responsibilities upon him; in return the state guarantees rights and grants privileges to the individual. The sum of these individual- state relationships constitutes the meaning of citizenship. There are numbers of provisions dealing with citizen's relations with state in social spheres. The provisions based on non discrimination in political functions have also been dealt with under the Constitution.

Neutral Freedom of Religion: State and Religion

Separation of state and religion is the third principle of secular state that preserves the integrity of the other two relationships, freedom of religion and citizenship. Here one must be conscious about the relationship of the religion and the state. The institution of religion came in existence prior to state. It came into being to establish a social order in ancient times because at that time there was neither any law nor any institution like state was in existence. The main purpose of institution of religion was to regulate the activities of individual on the basis of religion and religion was the supreme law. The institution of state came too much later- so in present scenario, the society is based on the delicate balance maintained between both of these institutions namely state and religion. Both are independent in their spheres and it must be so, Because centralization of powers in one agency would lead to anarchism. Once the principle of separation of state and religion is abandoned, the way is open for state interference in the individual's religions liberty, and for state

discrimination against him if he happens to dissent from the official creed.[7]

Apex Court and Hindu Religion

The story of the government taking interest in temple trusts in India goes back to around the 1840s when the British government - unable to control temples - asked several prominent mutts (religious orders) to administer temples and endowments. This was because while a temple was located in one place, a devotee might have donated his lands located far away to the temple. It was difficult for the tax authorities to reconcile ownership of lands with temple managements.

In the 1920s, the local legislature in Madras State (much of which later became Tamil Nadu) passed the Madras Hindu Religious Endowments Act, 1923 (Act of 1925). This led to the setting up of a Hindu Religious Endowments Board (Board) with the object of providing for better governance and administration of certain religious endowments. Its validity was challenged.

By 1926, the Madras Hindu Religious Endowments Act 1926 – ACT II of 1927 was passed thus repealing the Act of 1925. This was subsequently amended several times.

By 1939 the Madras High court ruled that the Board cannot undertake the notification process (for takeover of temple trusts) on frivolous grounds.

By December 1951, after independence, the Madras High Court Division Bench passed two orders questioning amendments and orders passed by the TN government in August 1951. Dikshitars (Brahmin priests and aretakers) are recognized as a religious denomination.

By 1954, the Supreme Court dismissed TN's appeals as the state itself decided to withdraw the earlier notifications.

In 1959, the state introduced the Act of 1959, Section 45, which empowered the state's authorities to appoint an Executive Officer to administer the religious institutions, but with safeguards.

On 31 July 1987, the commissioner of religious endowments appointed an Executive Officer for the administration of the Chidambaram Temple. The Dikshitars challenge this order by filing a writ petition. The High Court of Madras grants stay of operation of the order, but the writ petition was dismissed on **17 February 1997**.

After several more attempts at the High Court of Madras, the Digshitars along with Subramaniam Swamy, member of Parliament, file a writ appeal with the Supreme Court - appeal No 181 of 2009, followed by a civil appeal No 10620 of 2013 contesting that Article 26 of the Constitution confers certain fundamental rights upon the citizens and particularly on a religious denomination which can neither be taken away or abridged.

7 http://www.legalserviceindia.com/articles/ct.htm l last visited on 28.08.2018

On 6 January 2014, the Supreme Court upholds the contention. The apex court curtails the State's right to administer temples[8].

The recent Sabarimala episode has proved that too much of political or judicial interference in matters of faith not only creates chaos in a deeply religious society like India's, but also hits at the very root of secularism that was so close to the heart of the makers of the Indian Constitution. So is in the case of absolute state control over the places of worship. Ironically, in India, the affairs of around 25 lakh mandirs (temples) and maths (monasteries) belonging to the majority Hindu community are regulated by various state authorities, whereas the places of worship of other faiths in the country enjoy absolute freedom as they are owned by their respective communities and the governments have almost no say in their rituals and other matters.[9]

Government Control of Temples but not of Mosques or Churches

Many of the people do not know that while Hindu temples are under governmental control, mosques and churches are completely autonomous. The Hindu Religious and Charitable Endowment Act allows state governments to take over temples and control their vast properties & assets. Bizarrely, the state government can use the money generated by a temple (donations, income from assets etc.) for purposes that have absolutely nothing to do with not just the temple, or other temples but even those which have nothing to do with Hindus or Hinduism! Interestingly, none of this applies to mosques, churches or gurudwaras. The government has no legal authority to take over the management of a non-Hindu place of worship[10].

No Religion-Based Distinction under GST

Goods and Services Tax (GST) a major tax reform in India came into effect from 1st July 2017. GST is any supply of goods or services for a consideration, in cash or kind, in the course of business. It is applicable under different rates for different goods (0%, 5%,12%,18% and 28%), based on whether they are basic commodities or luxuries. Goods have different slabs, but all services attract a uniform rate of 18%.

On 3rd July 2017, Government of India had to put out a press release which stated, "There are some messages going around in the social media stating that the temple trusts have to pay the GST while the churches and mosques are exempt. This is completely untrue because no distinction is made in the GST Law on any provision based on religion. We request to people not to start circulating such wrong messages on social media. To investigate the issue further, Alt News reached out to some Muslim trusts and spoke to them about this issue. All of them confirmed that they are complying with the prevalent tax

8 https://www.firstpost.com/india/courting-god-the-supreme-court-attempts-to-rescue-indias-temples-2730860.html *Last visited on 28.08.2019*

9 https://www.sundayguardianlive.com/news/state-control-temples-failing-secularism-india

10 https://economictimes.indiatimes.com/news/politics-and-nation/why-india-is-not-a-secular-state/articleshow/50072294.cms?from=mdr *Last visited on 25.06.2019*

laws in the country and have already received provisional GST certificates. Usman H Qureshi, a member of Quresh committee, Mirzapur, Ahmedabad and also a member of Mirzapur Moti Quresh Jamaat (Trust) stated that they have already received the GST registration number and will be paying taxes according to the prevalent laws. They also sent across their provisional GST certificate to *Alt News*. Based on the PIB press release, tweets by Finance Ministry and the conversations that Alt News had with several minority religious trusts, it is clear that GST on religious institutions is not a function of religion and all the religious institutions will be uniformly taxed. The truth of the matter is that any business/body, religious or not, have to mandatorily register under Goods and Services Tax if its aggregate turnover is in excess of 20 lakhs. Religious places of all hues have various trusts associated with it. These religious trusts usually own several properties which they often rent out. Besides revenue via rent, religious places also often sell various items via Gift shops and more. This income from rent and sale has been taxable even before the introduction of GST and continues to be taxable after the introduction of GST. However, there are exceptions and certain religious goods have indeed been exempted from GST.[11]

The properties belonging to one religious community being accessed or managed by the members of other religious communities certainly goes against the basic tenets of the Indian Constitution. Moreover, targeting only Hindu religious institutions in the name of secularism has given rise to widespread resentment in the majority community. No doubt, anger is simmering among the Hindus across the country against the "injustices" meted out to them in their own country.

Conclusion - Is India a Secular State

Looking at the various constitutional provisions, the answer is 'Yes'. The ideals of secular state have clearly been embodied under the Indian Constitution and the provisions are being implemented in substantial measure. But the circumstances after independence have posed a challenge before secularism of India for a number of times. Sometimes it is also alleged that by Uniform Civil Code, the existence of minorities in India is in danger or it is an assault on the identity of minorities. India being still a traditional society that contains not one, but many traditions owing their origin in part to the different religions that exist here. While India carries with it many traditions it has managed to retain the secular character of its polity, while in many countries especially from the third world, a secular authority has crumbled in face of conflicting traditions. In sum up, it may be submitted that it is beyond the scope of this paper to outline the implications of the conceptual failings of secularism in India; nonetheless we must attempt to raise issues and questions for continuing study of the problem. Clearly the judiciary in India is a significant

11 https://www.newslaundry.com/2017/07/07/who-spread-the-rumour-that-churches-and-mosques-are-exempted-from-gst

site where contests under the banner of secularism have been taking place over the last fifty and odd year. Though the judiciary is trying to strike the balance in a harmonious way but the people of India should not forget the dream of framers of the constitution and the ancient philosophy of 'Sarva Dharma Sambhavah'.

A Critical Legal Analysis of Right to Self-determination in International Law: An Eye View

Chaitra H.P*

INTRODUCTION:

In International Law, Self-determination may be broadly defined as a right of people to exist and have the access to government. It would simply mean as the right of the people to freely determine their political future and to pursue their economic, social and cultural rights and its development. This right as created controversial issue in International Law, has many characteristics formulated by Cassese: (i) a criterion to be used in the event of territorial changes of sovereign States; (ii) a democratic principle legitimizing the governments of modern States; (iii) an anti-colonialist postulate; (iv) a principle of freedom for 'nations' or ethnic or religious groups constituting minorities in sovereign States[1]. The demand for self-determination have heard from many states- Kurds and Palestinians, Tibetans and Kashmiri, East Timorese, Eritreans and Zulus, Quebec, Ethiopia, Kosovo, Czechoslovakia, Sri Lanka ect., have implicitly or explicitly raised the question of self-determination. In these cases, communities have demanded for the international status and to have control over everyday political, social and economic rights[2]. Towards, the international peace and security every state has the obligation to "promote the realization of the right of self-determination" for all who claim, it.

Problems stem from interpretation of the term 'Self-determination'. The existence of the various interpretations is not merely of academic or theoretical interest. It can have a practical implication. As we have got a number of legal instruments that identify the principle of self-determination, and it's not clearly defined as it is surrounded with ambiguity, for whom it will apply and in case if it applied, whether it is internal or external self-determination. These can be identified by the case studies on self-determination.

The purpose of this article is to analyze the right to self-determination. It will focus on the dimension of self-determination, which defined as the right of the people, to determine the international status. A distinction will be drawn between the Internal and External Self-determination. This would remove the source of confusion, which stems from the fact that the two principles are different in nature and notwithstanding on each other. This relation of scope

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1 Antonio Cassese, *Self-determination of people- A legal reappraisal,* (Cambridge University Press, 1996), p. 32.

2 Robert McCorquodale, *Self-Determination: A Human Right Approach, The International and Comparative Law Quarterly*, Vol 43.No. 4 (Oct., 1994); Eric Kolodner, The Future of the Right to Self-Determination, Connecticut Journal of International Law, Vol.10:153,(1994).

may explain the relationship of internal and external self-determination, in the majority of cases the internal claim is recognized in international law.

Undoubtedly, as per the existing literature there is a conflicting interpretation on the self-determination, so in the next part of the article I would like to state the status of right to self-determination in the contemporary international law. Right to Self-determination in the light of jurisprudence evolved by the International Court of Justice. The final part would deal with the notion whether the prevailing understanding of the RSD is viable to solve the future problems of the States in an effective manner. In addition, this paper would attempt in suggesting solutions for the above mentioned problems.

AN OUTLINE OF RIGHT TO SELF-DETERMINATION IN HISTORICAL PROSPECTIVE:

IN COLONIAL CONTEXT:

Certain aspects of the principle of self-determination are as old as the nation state.[3] Self-determination in its original meaning is an open term. The origins of the concept are some-times traced all the way to the Peace of Westphalia in 1648.[4] The best known historical instances of self-determination are probably the American and French Revolution of 1776 and 1789 respectively. The American colonist's invoked natural law and the natural rights of man, embodied the ideas of John Locke. The Declaration of Independence of America-1776 sums it up:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights that among these are life, liberty and the pursuit of happiness. That to secure these rights Governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute new Government".[5]

Thus the rights of the individual in society are the right of communities to make choices of identity and form of government. The American Revolution 1776 proclaimed this not in explicit terms but, perhaps more effectively.[6] The history of self-determination is bound up with the history of the doctrine of popular sovereignty[7] proclaimed by the French Revolution-1789:

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3. M.K. Nawaz, *The Meaning and Range of the Principle of Self-determination*, Duke Law Journal, Vol,82(1965).
4. Matej Accetto, *The Right to Individual Self-Determination*, Slovenian Law Review , Vol.13(2004), accessed at Heinonline.
5. Dr. Ian Brownlie, *An Essay in the History of the Principle of Self- Determination*, Ed. by, C. H. Alexandrowicz, Grotian Society Papers 1968, Studies in the History of the Law of Nations, Pb by, Martinus Nijhoff/ The Hague/ 1970.
6. Id,. p.92
7. "Doctrine of popular sovereignty also called Squatter Sovereignty, in U. S. history, a controversial political doctrine that the people of federal territories should decide for themselves whether their territories would enter the Union as free or slave states", accessed at https:// www.britannica.com.

"government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to they belong should be able to secede and organize themselves as they wish. So in the context of the French revolution self-determination is a democratic ideal valid for all mankind".[8]

The next step in the historic evolution of self-determination does not occur until 1848. Then in the Bolshevik Revolution (1917-1923):

"the conception of individual self-determination as a corollary of democracy (the proposition that 'Ruritaians have a right to choose to what state they shall belong') to the conception of nationality as an objective right of nations to independent statehood (the proposition that 'the Ruritaian nation has a right to constitute itself an independent state'). The rights of man envisaged by the French revolution were transferred to nations".[9]

Based on these revolution the Polish, Italian, Magyar and German people claimed self-determination but also did other nationalities- the Danes, Czechs, Ruthenians, Slovaks, Croats and Slovenes- who lived in their midst.[10]

IN INSTITUTIONAL INSTRUMENT CONTEXT:

The development of the right to self- determination shows that, it has become one of the most important and dynamic concepts in contemporary international life and that it exercises a profound influence on the political, legal, economic, social and cultural planes, in the matter of fundamental human rights and on the life and fate of peoples and individuals[11]. Self-determination achieved greater prominence and wider recognition as a political-philosophical concept following the First World War. Nevertheless, international legal doctrine was slow to recognize the juridical significance of self-determination; *Woodrow Wilson* was, more than any other person, who first contributed to a theory of self-determination. He never precisely defined the principle of self-determination, but his predilections were manifested in his statement to the effect that "national aspirations must be respected; peoples may now be dominated and governed only by their own consent. 'Self-determination' is not a mere phrase it is an imperative principle of action….".[12]

Self-determination gained an official status after the Second World War, when the UN Charter proclaimed the principle of self-determination of people as one of it's fundamental right. The UN Charter[13] expressly mentions the

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8. A. Rigo Sureda, *The Evolution of the Right of Self-Determination- A study of United Nations Practice*, A. W. Sijthoff- Leiden- 1973.
9. A.Rigo Sureda, *The Evolution of the Right of Self-Determination- A study of United Nations Practice*, A. W. Sijthoff- Leiden- 1973, p.18.
10. *Id*,11. Mitchell A . Hill. *What the Principle of Self-Determination Means Today*,1 ILSA J.Int'l & Comp. L. 119 (1995)
12. *Supra* n. 1, p 83.
13. Signed at San Francisco on 26 June 1945 and amended on 17 December 1963, 20 December 1965,and 20 December 1971.

principle of self-determination in articles 1(2)[14] and 55.[15] The UN Charter also acknowledges the principle in Chapters XI, XII and XIII by imposing upon the [16]trustee states of Non Self-Governing and Trust Territories the obligation to help those territories achieve self-government, it nevertheless gave rise to further development of the concept. In 1960 the Declaration on the Granting of Independent to Colonial Countries and Peoples[17]was adopted, prior to the adoption of this declaration a numerous Resolutions expressing the right to self-determination were adopted by the General Assembly and some thirty Non-Self-Governing and Trust Territories had already been given independent. The development of self-determination into a right in customary international law had hence started even though it was not affirmed.

The development of an international human rights has helped to sharpen the focus on self-determination as a legal right. The link between human right and self-determination was clearly established by the two international human rights covenants and now self-determination is considered a human right under international law.[18] Both, 1966 Covenants (ICCPR) & (ICESCR) included the right to self-determination in Article 1.[19] Self- determination has also been treated as a human right in other international and regional treaties, such as the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States of 1970,[20] the Final Act of Helsinki of the Conference on Security and Cooperation in Europe of 1975,[21] and the African Charter on Human and Peoples Rights of 1981.[22] As a human right, the concept of self-determination offers a great opportunity to peoples who aspire to have a full measure of autonomy to exercise their democratic rights in different arrangements.[23]

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14. U N Charter Art. 1(2) states that one of the purposes of the United Nations is to " develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace". Accessed at, www.un.org.
15. U N Charter Art. 55 states with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations base on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:… universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Accessed at www.un.org.
16. See ,e.g., U N Charter Art 73(b) (explaining that members assuming the responsibility for the administration of a territory must assist the people in the "progressive development of their free political institutions"). Accessed at www.un.org.
17. G A Resolution 1514(XV), December 14, 1960.
18. Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 Colum. Hum. Rts. L. Rev 91(1997)
19. International Covenant on Economic, Social, and Cultural Rights, Dec. 16. 1966, 993 U.N.T.S.3; International Covenant on Civil, and Political Rights,Dec. 16, 1966, 99 U. N. T. S. 171. Article 1 of each covenant provides: "All peoples have the right of self-determination . By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development "
20. G A Resolution 2625(XXV), October 24, 1970.
21. Aug. 1, 1975,
22. OAU Doc. CAB/LEG/67/3 Rev. 5 (1981)
23. *Supra* n. 17, p 95.

Quite apart from the question of the law creating powers of the General Assembly by series of affirmative Resolutions,[24] it would be difficult to deny the legal status of self-determination after 24 October 1970 when the General Assembly passed its celebrated Resolution 2625(XXV). By this resolution the Assembly adopted the 1970 Declaration in accordance with the Charter of United Nations.[25] Of course, the reality of the concept stretches beyond treaty law and much of the content of self-determination has been crafted as customary law. Nevertheless, the interest of the States resulting in various treaty provisions and UN resolutions had provided the groundwork upon which the customary rules of self-determination have been built.

DEFINITION OF RIGHT TO SELF-DETERMINATION:

DEFINITION ON RIGHT TO SELF-DETERMINATION BY SCHOLARS:

Joseph Stalin: In his book *Marxism and the National Question* (1913), the author as given a broad definition of 'nation', the characteristics of it include national, language, territory, economic conditions; a nation can be constitute the combination of all these characteristics together. Stalin point out the following definition to self-Determination: "The Right to Self-determination means that only the nation itself has the right to determine its destiny, that no one has the right *forcibly* to interfere in the life of the nation, to *destroy* its schools and other institutions, to *violate* its habits and customs, to *repress* its language, or *curtail* its rights"[26].

Vladimir Lenin: He was the first person to insist the concept of right to self-determination to international community for liberation of people, in his *Theses on the Socialist Revolution and the Right of Nations to Self-Determination* (1916), according to him self-determination has three components: *Firstly*, it could be invoked by ethnic or national groups intent on deciding their own destiny freely, *Secondly*, it was a principle to be applied during the aftermath of military conflicts between sovereign States, for the allocation of territories to one or another Power and *Thirdly*, it was an anti-colonial postulate designed to lead to liberation of all colonial countries[27].

Woodrow Wilson: The concept Self-determination is originated from the Western Democratic Theory, according to him Self-determination was the logical corollary of popular sovereignty; it was synonymous with the principle that governments must be based on 'the consent of the government'. In the other words self-determination means it's the right of peoples freely to choose their government[28].

24. G A Resolutions 1514 (XV), 1541 (XV), 1654 (XVI), 637 (XVII), 1810 (XVII), 1956 (XVIII), 2105 (XX), & 2189 (XXI).
25. Subrata Roy Chowdhury, *The Stuts and Norms of Self-Determination in Contemporary International Law*, Ed, by, Essay on International Law and Relations in Honour of A.J.P.TAMMES, pb. Sijthoff-Leyden, 1977.
26 Antonio Cassese*, Self-determination of people A legal reappraisal*, (Cambridge University Press,1996), stated in p.14, footnote,7 .
27 *Ibid* p.16.
28 *Ibid,* p.19.

It is apparent that Lenin and Wilson's views differed in their respects. Firstly it says about the different political and ideological underpinnings of their theory of self-determination; Secondly it upholds the internal dimension of the self-determination (freedom to choice of their own government); Thirdly self-determination raised in the form revolutionary principle and liberation movements.

INTERNATIONAL INSTRUMENTS DEFINITION ON RIGHT TO SELF-DETERMINATION:

SELF-DETERMINATION AND UN CHARTER:

The expression of self-determination is explicitly mentioned in two articles of the UN Charter. Article 1(2) specifies the purpose of the UN "to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, and to take other appropriate measures to strengthen universal peace". Article 55, relating to economic and social co-operation, states that the UN shall promote certain objectives "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations base on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:… universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"[29]

Travaxux Preparatoires

The concept of self-determination as got initial approach before 1945 and it was materialized after the First World War[30]. It is been stated that; self-determination was "the touchstone for peacemakers at Versailles". The President of USA Woodrow Wilson have tried to incorporate self-determination into the Covenant of League of Nation in order to give right throughout the universal for the postwar settlement and it as failed, later on the principle would not get the legal status in that era[31]. In the words of Shaw's: "in the ten years before the second world war, there was relatively little practice regarding self-determination in international law"[32]. The basis of the UN Charter did not contain the concept of self-determination in any of the article which is originally stated in the proposal of Dumbarton Oaks, "after the amendment was made to the text by the Soviet Union; the words 'based on respect for the principle of equal rights and self-determination of people,'" was added for the first time at San Francisco Conference, by the four sponsoring powers i.e., China, UK, US and Soviet Union[33]but these sponsoring powers

29 Ram Prakash Anand, *Salient Documents in International Law*, Banyan Publications: New Delhi,(1994)

30 Malcolm N. Shaw, *International Law*, Fifth Edition (Cambridge: Cambridge University Press,2003), p.225

31 *Ibid*

32 *Ibid*

33 *Supra note* 26, p.38.

have not left the definite record for the principle of self-determination or the context meaning of articles 1(2) & 55. However, the Committee[34] was responsible for drafting & discussed the concept of self-determination had this to say: Concerning the principle of self-determination, the committee drafted four agreed provision, i. this principle corresponded closely to the will and desires of peoples everywhere clearly enunciated in the Chapter[35]; ii. The principle conformed to the purposes of the Charter only insofar as it implied the right of self-government not the right of secession[36]; iii. As one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely choose[37]; iv. An essential element of the principle is free and genuine expression of the will of the people…….,[38].

The preparatory work suggest that, the concept of self-determination upholds in the Charter only in the negative aspect that; it could only mean self-government were the people will have the power to choose its rulers and it will not include the right of secession of state. And based upon the debates on the committee, the principle of self-determination is deeply rooted in the context of the equal rights of peoples; these was considered to be farther development of friendly relations among states to maintain universal peace. The UN Charter does not define the right to self-determination nor it distinguished between 'external' and 'internal' self-determination, the Charter does not impose any direct and immediate legal obligation on Member States in the area; as the obligation lead down in Article 56 of the Charter is very loose and in any case it does not impose.

SELF-DETERMINATION AND INTERNATIONAL COVENANTS (1966):

The common Article 1 of both the International Human Rights Covenants provides that:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the

34 United Nation Conference on International Organization,(1945).
35 UNCIO, vol. VI, 296 (1945)
36 UNCIO, vol. VI, 298 (1945)
37 UNCIO, vol. VI, 704 (1945)
38 UNCIO, vol. VI, 445 (1945)

provisions of the Charter of the United Nations.[39]

The preparatory work of the Covenants, lead to a conclusion of the word 'peoples' in the Article 1 applies to: i. Entire populations living in independent and sovereign States; ii. Entire populations of territories that have yet to be independent; iii. Populations living under foreign military occupation. The rights of peoples to be free from any outside interference has already said above, with particular reference to (a) colonial domination and (2) military occupation.

Further the word 'self-determination' under article 1 as interpreted by the preparatory work and primary significance stating that: i. The people are free to choose their legislators and political leaders to form their own domestic model, in the other words it can be stated political self-determination; ii. The people of every sovereign state have the permanent right over natural wealth and resources and also the right to exploit the territory's natural resources, these benefits will lies within the inhabitants of that territory, in the other words it can be seen as economic self-determination; iii. The peoples of dependent territories have the right freely to decide their international status; likewise many colonial people have achieved independence.

ASPECTS OF RIGHT TO SELF-DETERMINATION:

The right to self-determination has been classified traditionally into two aspects: external and internal self-determination, the distinction is commonly made by the academic commentator-Janus[40]. The right to external self-determination means people to decide its international identity and "to be free from foreign interference which affects the international status of that state"[41]. The right to internal self-determination means people as to participate effectively in the decision-making process which affects the political, economic, social and cultural conditions under which it lives[42].

EXTERNAL SELF-DETERMINATION:

Historically, the international community has focused only upon the external self-determination that which concerns the international status of a people. It can be summarized as the recognition of that people has the right to constitute itself a nation-state or to integrate into, or federate with, an existing state, virtually coterminous with the right to secession. The legitimate exercise of external self-determination, can also result in a situation where people can coupled with another sovereign state; runs its own domestic affairs while relating to foreign relation to another state; merges entirely with the existing state or nation. For example, the territory of Ifnii chose to merges with

39 Ram Prakash Anand, *Salient Documents in International Law,* Banyan Publications: New Delhi,(1994)

40 *Supra note* 2. P.5.

41 Antonio Cassese, *The Self-Determination of People,* in THE INTERNATIONAL BILL OF RIGHTS 100 (Lou Henkin ed., 1981)

42 Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination,* 27 (1990), p.113.

Morocco in 1965; and the Mariana Island is been freely associated with US in 1975.

The external self-determination will be legitimated only when it passed traditional two-part test of the international community has states, the first part necessary to examine the "objective" elements of the aggrieved community as to ascertain the extent to which they share common racial background. Ethnicity, language, religion, history and cultural heritage and another "objective" factor is the territorial integrity of the area which the group climes. If the international community satisfies this traditional two-part test, its claims will be subject to additional criteria. This right was implemented in the case East Timorese in Indonesia, the Palestinians in the Occupied Territories, and the Tibetans living under the Chinese government[43]

Granting of right to secede in today's world in the form of external self-determination where alleged people, within peoples would petition for their independence from a multi-ethnic state. The international instruments would be fragmented, politically unstable, and incapable of addressing global problems and also economically unfit to provide the necessities of the life of inhabitants.

INTERNAL SELF-DETERMINATION:

In the era of decolonization, the international community gave more importance and focused upon external self-determination to promote human rights and to ensure international stability. In order to achieve these two aims, the international community has shifted its attention to the internal self-determination.

The right to internal self-determination means people are entitles to choose its political allegation, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical or territorial identity. The issue of the right to internal self-determination afforded to the *entire population of a sovereign State*[44] will be considered first. This right as been recalled by treaty law by virtue of article 1of the International Covenants. Movements for internal self-determination are, in fact, coterminous with movements for increased democracy, which have swept the globe from the former Soviet Union to Guatemala. By some of the observers stated that, internal self-determination as become a existing and emerging right to democratic governance which may create an obligation for the international community to promote and protect democracy[45].

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43 *Supra note* 2, p.159-161.

44 '*population of a sovereign state*' necessarily touches upon several diverse situations including: the internal self-determination of the whole people of the sovereign states- i. Right to have a representative and democratic government; ii. The rights of racial or religious groups which are discriminate against them; iii. The right of ethnic groups, linguistic minorities, indigenous populations, and national peoples living in federated states. *See* Cassese- Self-determination of People- A legal reappraisal, (1996), p.102.

45 *Supra note* 2, p.162.

In order to promote a right which is enforceable, in international community must require high level of deprivation of people's rights to internal self-determination is considered threatened. Such deprivation must be, particular people are incapable of exercising their political, economic, social, and cultural rights. For example, the Apartheid system in South Africa is the classic example for governmental deprivation[46]. The internal self-determination have applied in many issues, on behalf of *ethnic groups*, such as Kurds, Armenians and Basques; *indigenous people*, such as the native peoples of Latin America, North America, Australia, and New Zealand; *linguistic minorities*, such as Quebecois; and *religious groups,* such as Catholics in Northern Ireland.

SELF-DETERMINATION AND CONTEMPORARY INTERNATIONAL LAW:

The scope and purpose of the principle of self-determination has evolved significantly in the 20th century. In the early 1900's, international support grew for the right of all people to self-determination. This led to successful secessionist movements during and after World War I, World War II and laid the groundwork for decolonization in the 1960s.

The role of self-determination as got a legitimate and significant effect on how it is viewed in International Law. The prolonged controversy issues in the Contemporary International Law are legal status of self-determination: i. Principle/Right; ii. Legal Right/ Status of Self-determination.

i. PRINCIPLE /RIGHT:

The first issue is regarding the self interest of the States; right to self-determination in international law is whether it is properly expressed as a principle or a right. It is quite difficult to draw a line between two. Self-determination as a principle, being applied to a subject rather than being held by a subject or against an object and on the other hand self-determination as a right, is held by its subject, a people, against an object, states, which have the obligations towards that subject; it is being more self-empowering by the people rather then applied to them. Recognition of self-determination as a principle implies rights of people and obligation for states, each one being a different aspect of other[47].

Principle and Right are typically prefixes to self-determination. The Friendly Relations Declaration and Helsinki Final Act refer self-determination as both a principle and a right and in case of UN Charter the self-determination is a principle and also the twin Human Rights Covenants also implemented self-determination as a right in article 1. By the above statement one can understand that, in case of principle both the state and people's will be having a equal right to their independence, but in case of right only the people's will have the right of independence of their own and it become mandatory to give it.

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46 *Ibid*

47 James Summers, *Peoples and International Law*, Martinus Nijhoff Publishers (2014).

They have been used interchangeably or combined, for the promotion and protection of human right in the world[48].

Thus, the Canadian and Russian courts were equated principle and right in cases like *Re Secession of Quebec, Tatarstan, Chechnya,* the judiciary as interpreted that 'the existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond convention and is considered a general principle in international law and it is also one of the basic principle of international law'. The International Court of Justice, interpreted both in the cases, the *Advisory Opinion of Western Sahara,* the *Burkina Faso/Mali Frontier Dispute* case, *East Timor, Wall in Occupied Palestinian Territory,* the *Advisory Opinion on Namibia* case, *Kosovo* Opinion.

Thus, in all the periods when it was essentially political, primarily treaty-based and finally part of customary law, self-determination has been expressed both as a principle and a right.

ii. LEGAL RIGHT/ STATUS OF SELF-DETERMINATION:

The majority of scholar's of international law and the United Nations both mentioned that the principle of self-determination is the part of modern international law. After the principle has been confirmed, developed, and by consistent state practice and also embodied as a basic principle in Friendly Relations Declaration. The point at issue is what extent the principle as a legal right in contemporary international law.

The following instances may inform the principle of self-determination with a legal dimension:

i. The principle of self-determination is binding upon the parties, whether they have adopted it as the basis or as a criterion for the settlement of a particular issue or dispute. The peace treaties after the First World War, for example in the case of Algeria's were they struggle for independence, the principle of self-determination was chosen as a basis for negotiation and the Agreement on Ending War and Restoring Peace in Vietnam (1973), the parties of the treaties expressly recognized the right to self determination of South Vietnamese people's.

ii. The principle of self-determination as the legal foundation in the UN Charter, as a result of practice of the UN under Chapters XI(Non-Self-Governing Territories) and XII(International Trusteeship System) which clearly emerge as the legal foundation of the law of decolonization. As these was expressly affirmed by ICJ in *South West Africa* case and *Western Sahara* Case, it became applicable to non-self-governing territories, trust territories and mandates, notwithstanding the differences and the qualifications of the respective constituent

48 *Ibid*

instruments. As such, it includes the right of the population of a territory freely to determine its future political status.

iii. Self-determination might be considered to apply, as was suggested by the Commission of Reporters in the Åland Islands case in 1921, in situations where the existence and extension of territorial sovereignty is altogether uncertain.

iv. Self-determination includes the right of a people of an existing State to choose freely their own political system and to pursue their own economic, social, and cultural development. As such it does not, in light of the current state of international law, impose on all States the duty to introduce or maintain a democratic form of government, but essentially refers to the principle of sovereign equality of States and the prohibition of intervention which are already part of international law

INTERNATIONAL COURT OF JUSTICES AND SELF-DETERMINATION:

The law relating to self-determination of peoples is among the areas of international law where the Court's decisions figure rather prominently, albeit compliance with them has been less than adequate. Over a long period extending for some 60 years the Court has rendered a number of important decisions in this area of international law. Self-determination is a rather contentious issue; hence, it is not surprising that the Court still continues to be confronted with related disputes, albeit arguably the nature of such disputes has changed over time. Thus, a close look at the relevant cases would demonstrate, inter alia, the critical and major role of the Court in the development of the concept of self-determination and its recognition as a legal right[49]. Whenever, Court has taken out issues of self-determination in two ways: i. they have separated self-determination from the possible outcome of secession, and ii. They have somehow decline the right to self-determination as an enforceable right in international law[50].

In the *Advisory Opinion on Namibia* (1971)[51], the International Court of Justices (ICJ), have to confine the positive approach of self-determination in international law. It noted that, the right to self determination had become applied to non-self-governing territories such as Namibia, and indeed it seemed to suggest that the very process of decolonization could be explained in terms of the application of the right to self-determination. In this case self-determination was not the central issue. The Court's words, then, were not terribly consequential, but they nonetheless displayed a conception of self-

49 Gentian Zyberi, *Self-Determination through the Lens of the International Court of Justices*, Netherlands International Law Review, Dec-2009

50 Jan Klabbers, *The Right to be Taken Seriously: Self-Determination in International Law*, Human Rights Quaeterly 28 (2006), p.186-206.

51 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.CJ. 16 (21 June), p 52.

determination as a substantive right that accrues to peoples, or at least to non-self-governing territories, and that those peoples or territories might wish to see enforced. Indeed, the Court still seemed to conceptualize, in Namibia, the right to self-determination as a substantive right, applicable mainly in the context of decolonization[52]. Right to self-determination, having been written "with the blood of the peoples," was thus conceived as an enforceable, tangible right. To whom the right belonged may have been unclear, but it was clear what it might entail: creation of an independent state or (often perceived as somehow lesser solutions) affiliation or integration. Indeed, Judge Ammoun drove the point home by recalling that between 1945 and 1970, no fewer than fifty-five states had become independent and benefitted from the right of self-determination[53]. In this case self-determination was substantive and enforceable right.

In the *Western Sahara Advisory Opinion*[54]: The Western Sahara was been a colony of Spain since 1884, and was known as Spanish Sahara. The General Assembly in1966 adopted Resolution 2229(XXI) which reaffirmed in paragraph 1 'the inalienable rights of the peoples of Ifni and Spanish Sahara to self-determination in accordance with General Assembly resolution 1514(XV)'. In paragraph 4 of the GA Resolution, directed the Spanish to have a referendum in the Western Sahara in order to excise the self-determination for indigenous people. Spain agreed to it in 1975. But before that Morocco and Mauritania objected it. These two states claimed for the territory of the Western Sahara on the basis of historic predating Spain's colonization. The GA and Advisory Opinion of ICJ as to questions: 1. Whether the Western Sahara was *terra nullius* prior to Spain's colonization, and 2. What legal ties existed at this time between the Western Sahara and Morocco, in one hand and Mauritania on the other[55]. The Court found with regard to the first question, the territory was not in *terra nullius* because when the territory, was first occupied by the inhabitants' of nomadic peoples who were socially and politically organized. With regard to the second question, the Court found that, although some Saharan tribes had ties of political authority with Morocco, there was no proper evidence to define the sovereign authority over them. The Court finely concluded that there was no legal ties which may affect the expression of self-determination under General Assembly Resolution 1514(XV), by the people of the Western Sahara[56].

The Court finely addressed the issue of self-determination. The Court reiterated the position has set in *Namibia* casein 1971, to the effect that self-determination was applicable to all non-self-governing territories. In this regard the Court linked the reference of self-determination contained in Article

52 *Supra note* 49
53 *Ibid*
54 ICJ Report 1975,
55 General Assembly Resolution 3292 (XXIX) of Dec 1974.
56 ICJ Report 1975, pp.12, 68.

1 and 55 of the Charter to Chapter XI, stating that those explicit references to self-determination had 'direct and particular relevance for non-self-governing territories'[57]. The Court also discussed the GA Resolution 1514(XV), had provided the basis for the process of decolonization which was resulted in 1960 many states were created and they now the Members of the UN. After referring the key provisions in Resolution 1514(XV), 1541(XV) and 2625(XXV), the Court concluded that it was necessary, in the process of self-determination, 'to pay regard to the freely expressed will of the peoples'[58].

In the *East Timor (Portugal v. Australia*)[59]: Portugal, the administering Power for the territory of East Timor, instituted proceedings against Australia on 22 February 1991 concerning 'certain activities of Australia with respect to East Timor'. The subject-matter of the dispute was an agreement entered into by Indonesia and Australia for the exploration of the continental shelf of the so-called 'Timor gap'. Portugal contended that Australia had, by its conduct, 'failed to observe…the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor]…and... *the right of the people of East Timor to self-determination and the related rights* [emphasis added]'[60]. Related rights in this case included the right to territorial integrity and unity and permanent sovereignty over natural wealth and resources, as corollaries of the right to self-determination of peoples. As a consequence, Australia had to cease infringing the relevant international norms and it owed reparation to the people of East Timor and to Portugal.

While acknowledging that 'Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable'[61], the Court did not go any further in setting out what exactly entailed that *erga omnes* character. Thus, the Court missed the opportunity to clarify the scope of *erga omnes* obligations with regard to the right to self-determination. Had the Court decided to pronounce even obiter on this issue, it would have helped to bridge to some extent the gap between what Bruno Simma has called the world of the 'ought' and the world of the 'is'. In any case, the publicity given to the issue of East Timor simply by bringing it before the ICJ, coupled with the renewed efforts of the international community, brought about the UN-supervised popular referendum of 30 August 1999, where the East Timorese people voted for their independence from Indonesia. Thus, although the Court concluded that it had no jurisdiction to entertain the case,41 it could be said that the legal proceedings before it seem to have had a positive impact on the solution of the problem of East Timor.

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57 *Ibid*, p.31.
58 *Ibid,* p.32-33.
59 ICJ, East Timor *(Portugal v. Australia),* ICJ Reports 1995,
60 *Ibid,* p 92, par. 2
61 *Ibid,* p 102, par. 29m

PRESENT VERSION OF SELF-DETERMINATION:

Until the Second World War the principle of self-determination remained essentially a political concept. In the post-war period the status of self-determination changed dramatically. The principle of self-determination was included in number of international instruments, including the Charter of the United Nations and two Human rights Covenants[62]. It has also been subject to many General Assembly resolutions and figured in numerous cases before the International Court of Justice. Self-determination has therefore developed since 1945 from an essentially political concept to legal right.

Basically, self-determination is given to the deprived people were their whole right have taken by other States. The Peremptory work of the international instruments raised the legal foundation of right to self-determination. The Articles 1 & 55 of the Charter says 'the principle of equal rights and the self-determination of people' and the Chapters XI (Non-Self-Governing Territories) and XII (International Trusteeship System) which clearly emerge as the legal foundation of the law of decolonization. As these was expressly affirmed by ICJ in *South West Africa* case and *Western Sahara* Case, *East Timor case* it became applicable to non-self-governing territories, trust territories and mandates, notwithstanding the differences and the qualifications of the respective constituent instruments. As such, it includes the right of the population of a territory freely to determine its future political status. An important finding in that regard is acknowledging the *erga omnes* character of the right to self-determination and its place as one of the essential principles of contemporary international law. Although the Court has yet to spell out in clear terms the obligations which such qualification entails for the entire community of States, it is submitted that the language employed by the Court suggests that such obligations would require the taking of active steps on the part of the violating State, but also on the part of every other State not only to put an end to a breach of this right, but also to actively promote its fulfillment

CONCLUSION:

Right to self-determination is promoted within a myriad of international instruments; principles of self-determination have become embedded within international law. Relying upon these principle since the end of the World War-I, the international community has fostered decolonization, protected human rights worldwide, and helped to promote the idea that all individuals are entitled to participate in the decision-making process that affects the political, economic, social, and cultural conditions under which they live.

Right to Self-determination is acknowledged and recognized by almost every Member States of the UN. However attaining Right to Self-determination for the people has become a painstaking struggle. It affects every quarters including the first world countries. The need for Right to Self-

62 ICCPR 1966 & ICESCR 1966.

determination would arise whenever the people undergo extreme struggle against the suppression based on class, caste, color, religion, etc, by their own leaders. Albeit recognized by increasing number of instruments, Right to Self-determination is still considered to be a vague chapter. The reason could be the lack of concrete definition in the international arena. In addition, unwillingness of the States to abide by the jurisprudence delivered by the ICJ would be reminded of the double-standard approach of the States. For instance, the ICJ, in its judgments, has defined Right to Self-determination, but still it requires recognition from the States concern. The scholars have also attempted in defining the Right to Self-determination to some extent. Again, it needs State's recognition to be accommodated effectively. The history of international law would remain of how the Right to Self-determination had been achieved having losing thousands of lives. Some have succeeded and many have failed. For instance, Cuba, Kosovo, Tamil Eelam, Scotland etc., would be ample examples. The need for Right to Self-determination would not have arrived if States would have had heard their people's legitimate demands. In view of the above, States are required to concentrate on the welfare of the people without any discrimination. In addition, it has become necessary for the States to abide by the system of international law, especially to the instruments that deal with the human values.

Voice of Refugees: Upholding their Human Rights

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1. INTRODUCTION

The word 'refugee' is something that triggers the intuition of an individual. The individual who has been forced to leave his/her country for potential or religious reasons or for the reasons of war, not enough food etc. is called as a 'refugee'.The concept of refugee is usualy confused with the concept of 'Asylum Seekers'. It is usualy used as synonym to each other. But it must be noted that all asylum seekers may not be called refugees whereas all refugees were asylum seekers at a certain point of time.

Asylum seekers become refugee once they get permitted by UNHCR (United Nations High Commisioner of Refugees). The rights of the refugees are deeply in connection with international human rights law. The problem of the refugee is complex. The knowledge of international human rights law can assist UNHCR staff in solving many protection problems faced by refugees, but it does not necessarily provide answers for every situation. Similarly, this body of law together in itself is complex and a full examination of its many provisions and institutions would require large amount of time.

2. REFUGEES RECOGNISED IN INDIA

2.1. REFUGEE OF PARTITION[1]

Though people who crossed over the newly formed boundaries between India and Pakistan-by choice or forcibly-didn't lose their nationalities, they were still forced to live the lives of a refugee. Refugee camps across north India served as homes for those who had borne the brunt of Partition.

Since these refugees were automatically the citizens of newly independent India, the question of a threat to national security due to their presence was out of the question. But at this juncture, when the fledgling state was just trying to stand on its feet and struggling to provide these refugees with basic amenities like food, clothing and shelter, the 1948 war with Pakistan broke out.

The national capital of Delhi in particular saw a huge influx of refugees. The numbers were such that an entire city-Faridabad-had to be built to rehabilitate refugees who were living in appalling conditions in various camps.

2.2. TIBETAN REFUGEES[2]

The next major movement of refugees towards India happened almost a decade after Partition, in 1959, when the Dalai Lama, along with more than

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1 As available at https://timesofindia.indiatimes.com/city/trichy/lankan-refugees-in-dilemma-over-return/articleshow/57565017.cms "Sri Lankan refugees in dilemma over return - Times of India". *The Times of India,* Last accessed on 04-08-2019

100,000 followers, fled Tibet and came to India seeking political asylum. Granting asylum to them on humanitarian grounds proved costly to India, earning the ire of the Chinese government.

As a result, Sino-Indian relations took a major hit. Border issues between the two countries, and Chinese encroachment on Indian Territory, began to crop up with greater frequency in the wake of New Delhi's decision to provide a haven to these fleeing Tibetans.

The 1962 war with China, in particular, proved very costly to India. There were many reasons that led to the war, but the granting of political asylum to Tibetans was certainly one of the triggers.

The Tibetan refugees settled across northern and north-eastern Indian states, and the seat of the Dalai Lama, the spiritual as well as the political leader of the Tibetan community, was established in Dharamshala, Himachal Pradesh.The Tibetan government in exile operates from there to this day.

The Tibetan refugees continue to live harmoniously, largely, with other local Indian groups and as a community they are perceived as 'peaceful'.

2.3. BANGLADESHI REFUGEE

The next major refugee crisis happened during Bangladesh's war of independence in 1971, when millions of refugees migrated from the country to India, fleeing the conflict between the Pakistani army and Bangladeshi forces. This led to a sudden spike in population in states bordering Bangladesh, and it became increasingly difficult for the government of India to ensure food security. According to some estimates, more than 10 million Bangladeshi refugees escaped in 1971 and took shelter in India.

Even today, the issue of illegal Bangladeshi immigrants is used by political parties to garner votes in every election cycle. Unlike the Tibetan refugees, they are seen as a security threat.

Furthermore, the constant tussle between the local communities and Bangladeshi refugees today often sparks violence, resulting all too often in deaths. The conflict is fiercest in a number of north-eastern states, such as Assam, Tripura and Manipur. The local communities and tribal groups have alleged that refugees from Bangladesh and the continuous flow of illegal immigrants have led to a change in the social demography of that area, thereby making the locals a minority in their own homeland. This was one of the primary reasons behind the Kokrajhar riots in Assam in 2012, which saw the deaths of more than 80 people.

2.4. SRI LANKAN TAMIL REFUGEES[3]

Another sizeable group of refugees in India comprises Sri Lankan Tamils

2 As available at https://www.thequint.com/news/india/tibetan-refugees-india-passports-not-property "Tibetan Refugees in India Get Passports, Not Property". The Quint. Last Accessed on 04-08-2019.

3 Goldenziel, Jill."*The Curse of the Nation-State: Refugees, Migration, and Security in International Law*", Arizona State Law Journal, Vol. 48, 2016

who abandoned the island nation in the wake of active discriminatory policies by successive Sri Lankan governments, events like the Black July Riots of 1983, and the bloody Sri Lankan civil war.

Mostly these refugees, whose numbers are over a million, settled in the state of Tamil Nadu as it is nearest to Sri Lanka and since it was easier for them, as Tamils, to adjust to life there. "More than 1.34 lakh Sri Lankan Tamils crossed the Palk Strait to India between 1983 and 1987 during the first in flow. In three more phases, many more refugees entered India. The war-torn Sri Lankans sought refuge in southern India with more than 60,000 refugees currently staying in 109 camps in Tamil Nadu alone," according to a report in India Today.

The Sri Lankan Tamils, who came to India as refugee around 1960 as a result of a pact between Shastri and Bandaranaike, are the descendents of those Tamils who around 1840 went to Ceylon as cheap agricultural labour and those who migrated subsequently. In Sri Lanka the Tamils are mainly settled in Jaffna peninsula and the interior hill country. In the former, where they settled early, the Tamils are efficient paddy growers adept in the use of dry-farming techniques, albeit on small firms; in the latter they are recent migrants, employed mainly as plantation and estate labourers. This spatial segregation has contributed at least as much as ethnic differentiation to the creation of an areal-cultural, pluralistic, but fragmented and internally conflicting society. Their problem arose from the noon-acceptance of their demand for dual citizenship and retention of Tamil as one of the principle languages of the country.

The ensuing agreement stipulated over a period of 15 years some 525,000 Sri Lankan Tamil would return to Tamil Nadu in India. In fact the migration volume was much smaller as only about 55,000 of them returned on the permanent basis. In addition, many returnees stayed in India for a few years, and returned to Sri Lanka permanently. This periodic migration and return migration have since 1950 been continually fuelled by ethnically based communal antagonism and political rivalry between the Sinhalese and the Tamils (Silva 1977:177).

At the census of 1961 Sri Lankan Tamils settled in India numbered 28,600, of whom 23000 were concentrated in their ancestral Tamil Nadu with the rest in Mysore, Andhra Pradesh, and Maharashtra states. Their number almost doubled to 55,000 in 1971.

'N' number of factors has played a more important role in the process of Tamil resettlement than continued residence in rural areas possessing ecological settings, parameters and resources similar to those in the areas of immediate origin in Sri Lanka and in the areas of resettlement back in Tamil Nadu. This trend was further buttressed by their uninterrupted agricultural or primary mode of living. Many of them, on their own initiative, became absorbed in emerging capitalist agriculture. Many of them have remained

peasant farmers. On the whole government help has been only marginal. The colonies that the government selected for them which they then cleared and settled were covered before colonization with degraded but fairly dense scrub-jungle. Also, the government established tea and cocoa plantation in Nilgiris and Kanyakumari hills and a Plantation Deelopment Corporation intended to settle some refugees as estate labourer. Except for minor conflicts arising out of competition for the use of irrigated lands the Sri Lankan Tamils were successful in resettling in Tamil Nadu, the land of their choice, the land which they could identify with. They were also successful in integrating themselves with the indigenous Tamil population.

2.5. THE AFGHAN REFUGEES

While not one of the larger refugee groups in the country, a number of Afghans also took shelter in India after the Soviet invasion of Afghanistan in 1979. Small groups of Afghan refugees kept coming to India in subsequent years. These refugees are mostly concentrated in and around Delhi, and have largely established spaces for themselves.

Also, according to the website of the UN High Commissioner for Refugees (UNHCR), many of the Hindu and Sikh Afghans who came to India after fleeing fighting in their home country in the early 1990s have been granted citizenship over the past decade. Both the World Bank and UNHCR reports suggest that currently India has more than 200,000 Afghan refugees living in its territory.

2.6. THE ROHINGYA REFUGEES[4]

The debate over refugees gained national prominence yet again last year after 40,000 Rohingya Muslims escaped Myanmar to take shelter in India. The office of the UNHCR has issued identity cards to about 16,500 Rohingya in India, which it says helps "prevent harassment, arbitrary arrests, detention and deportation" of refugees.

However, India has categorized the Rohingya as illegal immigrants and a security threat, siding with the Burmese government. The Indian government has stated that the principle of non-refoulement, or of not forcing refugees to return to their country of origin, does not apply to India principally as it is not a signatory to the 1951 Refugees convention.

The Indian government has, in fact, appealed to Myanmar to take back the Rohingya refugees. However, a report in The Indian Express notes, "India's claim to send the Rohingyas back to Myanmar rests on the notion that the refugees are of Burmese stock. However, the issue at hand is that the Burmese do not consider the Rohingyas as their citizens and consider them to be

4 2001 Declaration by States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees

immigrants who were brought in from Bangladesh during the British colonial rule. Further, Bangladesh, which remains the favourite destination for the Rohingyas facing atrocities in Myanmar, is of the opinion that they are natives of the Burmese state and should be protected there."[5]

2.7. THE CHAKMA OR HE JONG REFUGEES

Many from the Chakma and Hajong communities[6]-who once lived in the Chittagong hill tracts, most of which are located in Bangladesh-have been living as refugees in India for more than five decades, mostly in the North-East and West Bengal. According to the 2011 census, 47,471 Chakmas live in Arunachal Pradesh alone.

In 2015, the Supreme Court of India had directed the central government to give citizenship to both Chakma and Hajong refugees. In September last year, the government of India decided to provide citizenship to these groups, despite opposition from many groups in Arunachal Pradesh, where these refugees are concentrated.

3. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

UNHCR India works in close cooperation with the Government of India, NGOs and civil society to support refugees and asylum-seekers. The Government of India respects UNHCR's processes and documentation allowing refugees and asylum-seekers to access public health, education and legal aid services.

India has been generous to refugees and asylum-seekers. The two largest groups of refugees in India, notably, Sri Lankan and Tibetans, are directly assisted by the Government of India. In addition, there are some refugees and asylum-seekers registered with UNHCR, mainly from Afghanistan and Myanmar and in smaller numbers from countries in the Middle East and Africa.

Refugees are eligible to apply for Long Term Visas (LTVs) / stay visas issued by the Government of India. The LTV / stay visa regularises their stay in India and reduces challenges in accessing public services and employment. UNHCR advocates that UNHCR documentation and LTVs are recognized by authorities and service providers to facilitate continued access to basic services and opportunities in asylum.

UNHCR's urban operation is primarily based in New Delhi with a smaller presence in Chennai to facilitate the voluntary repatriation of Sri Lankan refugees. UNHCR's partner organizations are operational in key locations to support refugees and asylum-seekers.

UNHCR and partners promotes inclusion of refugees and asylum-seekers into

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5 *Ibid*

6 As available at https://indianexpress.com/article/explained/how-chakmas-and-hajongs-settled-in-north-east-why-arunachal-worries-about-citizenship-4851866/ "Advertising How Chakmas and Hajongs settled in North East, why Arunachal worries about citizenship". *Indian express*. Last accessed on 27-09-2019

existing national services and supports livelihood activities to help refugees become self-reliant.

4. RIGHTS OF REFUGEES IN INDIA

4.1. Non – Refoulement – It is the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution.

4.2. Freedom of Movement

4.3. Right to Liberty and Security of the person

4.4. Right to Family Life – This right extends to the family of the Refugee as well.

5. REFUGEE STATUS UNDER 1951 CONVENTION[7]

The 1951 convention also protects other rights of refugees such as the rights to education, access to justice, employment and other fundamental freedoms and privileges similarly enshrined in international and regional human rights treaties. In their enjoyment of some rights, such as access to the courts, refugees are to be afforded the same treatment as nationals while with others such as wage – earning employment and property rights, refugees are to be afforded the same treatment as foreign nationals. Despite these rights being protected in the 1951 convention and under human rights treaties, refugees in various countries do not enjoy full or equal legal protection of fundamental privileges.

6. REFUGEE RIGHTS ENSHRINED UNDER INDIAN CONSTITUTION

Importance is given to refugees even under Indian Constitution. Articles 14, 20, 21, 22, 25, 32 highlights about the rights which are applicable to a Refugee.

6.1. Article 14 - Right to Equality[8]

6.2. Article 20 - Right to protect in respect of conviction of offences[9]

6.3. Article 21- Right to Life and Personal Liberty[10]

6.4. Article 22 - Right to protection under arbitrary arrest[11]

6.5. Article 25 - Freedom of Religion[12]

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7 As available at https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy "Overview of U.S. Refugee Law and Policy". American Immigration Council. Last accessed on 23-09-2019.

8 Bakshi P M , "*The Constitution of India* ", 13th edition , p.19

9 *Ibid* p.60

10 *Ibid* p.63

11 *Ibid* p.78

12 *Ibid* p.83

6.6. Article 32 - Right to approach Supreme Court for enforcement of Fundamental Rights[13]

7. NEED FOR HELP IN INDIA

When it comes to the question as to, if the refugees are in need of help in India, a lot of analysations are made with regardance to the problems faced by the refugees in India.

Firstly, with regardance to Medical Problems including all post traumatic stress disorders like Anxiety, over alertness, chronic fatigue syndrome, motor difficulties, amnesia, sleep paralysis etc. All these will make major impact on the mental health of a Refugee.

Secondly, focus is on Exploitation that can happen in the society by the enforcement officials, by the citizens of the country and also by the UN peacekeepers. These exploitations can be done with regardance to Human rights violations, Child Labour Regulation violations which might lead to mental and physical trauma, especialy to children and women.

The third main problem one can focus with regardance to the problem faced by refugee is Language Barrier. To come as an asylum seeker in a country, and to get status of a refugee there, might actualy follow with the problem of language barrier. A refugee might not be in a position to understand and converse in the language of the nation, they are refugee in.

By analysing all these problems, one might actualy can come across the fact that, these refugees are actualy in need of help at an adverse rate.

8. CONCLUSION

A refugee generaly gets very little financial aid because there isnt much available and therefore they must rely on other sources and good hearted people to help them through. Not many people undrestand or even care about them and so they are forgotten about. Some do get by better than others and can speak several languages and this is an advantage.

The reason we all should uphold the right to refugees because human have migrated for past 70 tousand years and as per Article 14 od UN Declaration of hUman Rights, all humans have a legal and moral right to seek safety and decent life. All the parents, expecially women have the right to seek protection for their children and right to seek shelter from abuse in a patrairchal society.

Immigrants, generaly, broaden our understanding and enrich our society in multiple ways. There is no good future for humanity in a world that allows moral barbarism to prevail. Logically speaking, a society that turns its back on people in dire need is not a society worth living in because we all have a moral responsibility to each other as human beings.

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13 *Ibid* p.97

India's economic resurgence and status as the only stable democracy in the region, makes it an attractive destination for refugees. India being the second most popular nation in the world and also beiung a developing country is doing the best it can do to protect the refugees.

in India since Independence. Oxford University Press, London 1974.

Efforts of United Nations in Protecting Rights of Child

Ms. Suman C. Patil*

I. Introduction

Children are the future of the nation. They are innocent, trustworthy and nearer to God. Despite being couched in national and international instruments, the rights of children have remained a distant dream. Around the world millions of children are deprived of their rights.

In the history of human rights, the rights of children are the most ratified. The United Nations Convention on the Rights of the Child (UNCRC) defines Child Rights as the minimum entitlements and freedoms that should be afforded to every citizen below the age of 18 regardless of race, national origin, colour, gender, language, religion, opinions, origin, wealth, birth status, disability, or other characteristics. These rights encompass freedom of children and their civil rights, family environment, necessary healthcare and welfare, education, leisure and cultural activities and special protection measures.

Regardless of their geographical or cultural origin, children are prey to exploitation. Children's victimization in its different expressions is a constant feature of practically all societies.[1] In this article, an effort is made to trace the international regime in place for protection of the rights of children. Part-I of the article deals with the introduction while Part-II and Part-III are respectively devoted to core conventions relating to rights of child and Institutions and Conventions having a Bearing on Rights of Child. The impact of the international instruments on domestic law is dealt with in Part-IV. Concluding remarks are to be found in Part-V.

II. Core Conventions relating to Rights of Child

At the beginning of the 20th century, children's protection starts to get its due place, including protection in the medical, social and judicial fields. This kind of protection started first in France and spread across Europe afterwards. Since 1919, the international community, following the creation of The League of Nations, later to become the United Nations (UN), started to give some kind of importance to that concept and elaborates a Committee for child protection. The League of Nations adopted the Declaration of the Rights of the Child on September 16, 1924, which is the first international treaty concerning children's rights. In five chapters it gives specific rights to the children and responsibilities to the adults.… World War II and its casualties left thousands of children in a dire situation. Consequently, the UN Fund for Urgency for the Children was created in 1947, which subsequently became UNICEF and was granted the status of a permanent international organization in 1953.[2] Initially,

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1 B. K. Raine, *"Child and Human Rights: An Insight",* in B. P. Singh Sehgal ed., *Human Rights in India*, (New Delhi: Deep & Deep Publications, 1996), p. 183.

2 *"Children's Rights History",* https://www.humanium.org/en/childrens-rights-history/accessed on 15-11-2019

UNICEF focused particularly on helping young victims of WW2, taking care mainly of European children. But in 1953 its mandate was enlarged to a truly international scope and its actions expanded to developing countries. UNICEF then adopted several programs for helping children in their education, health, and their access to water and food.

Following more than a decade of focus on child health issues, UNICEF expanded its interests to address the whole needs of the child. Thus began an abiding concern with education, starting with support for teacher training and classroom equipment in newly independent countries. In 1965 the organization was awarded the Nobel Peace Prize "for the promotion of brotherhood among nations." Today, UNICEF works in 190 countries and territories, focusing special effort on reaching the most vulnerable and excluded children, to the benefit of all children, everywhere.[3]

Millennium Development Goals (MDGs) are a guiding force on many issues affecting the lives of children, young people and their families.[4] Tremendous progress has been made in reducing preventable child deaths, getting more children into schools, reducing extreme poverty and in ensuring more people have access to safe water and nutritious food.[5]

1. Declaration of the Rights of the Child, 1959

In 1924, the League of Nations (LON) adopted the Geneva Declaration, a historic document that recognised and affirmed for the first time the existence of rights specific to children and the responsibility of adults towards children. The United Nations took over the Geneva Declaration in 1946. However, following the adoption of the Universal Declaration of Human Rights in 1948, the advancement of rights revealed the shortcomings of the Geneva Declaration, which therefore had to be expanded. They thus chose to draft a second Declaration of the Rights of the Child, which again addressed the notion that "mankind owes to the Child the best that it has to give."[6]

In 1959 the General Assembly of the UN adopted the Declaration of the Rights of the Child, which describes in 10 principles the children's rights. However, this text has not been signed by all the countries and its principles have only an indicative value; however, it paved the way to the Universal Declaration of

3 https://www.un.org/en/sections/issues-depth/children/accessed on 15-11-2019

4 Millennium Development Goals were eight international Development Goals for the year 2015 that were established following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. All 191 United Nations member states at that time, and at least 22 international organizations, committed to help achieve the following Millennium Development Goals by 2015. The goals are: 1. To eradicate extreme poverty and hunger, 2. To achieve universal primary education, 3. To promote gender equality and empower women, 4. To reduce child mortality, 5. To improve maternal health, 6. To combat HIV/AIDS, malaria, and other diseases, 7. To ensure environmental sustainability, 8. To develop a global partnership for development.

5 https://www.unicef.org/sowc2016/accessed on 15-11-2019

6 Declaration of the Rights of the Child, 1959 – Humanium, https://www. humanium.org /en/declaration-rights-child-2/ accessed on 13-10-2019

Children Rights.[7] The ten principles are:

The rights to:

1. Equality, without distinction on account of race, religion or national origin.
2. The right to special protection for the child's physical, mental and social development.
3. The right to a name and a nationality.
4. Adequate nutrition, housing and medical services.
5. Special education and treatment when a child is physically or mentally handicapped.
6. Understanding and love by parents and society.
7. Recreational activities and free education.
8. Be among the first to receive relief in all circumstances.
9. Protection against all forms of neglect, cruelty and exploitation.
10. Be brought up in a spirit of understanding, tolerance, friendship among peoples, and universal brotherhood.

In order to promote awareness and to encourage states to act towards the protection and the assurance of children's rights the year 1979 was declared International Year of the Child by the UN.

2. United Nations Convention on the Rights of the Child, 1989

The Convention on the Rights of the Child (CRC) was adopted unanimously by the UN General Assembly on November 20, 1989. Its 54 articles describe the economic, social and cultural rights of the children. The Convention on the Rights of the Child is the text in relation to human rights which has been the most rapidly adopted.[8] This Convention is a lens through which all can look at the state of world's children.[9]

The CRC is also significant because it enshrined, "for the first time in binding international law, the principles upon which adoption is based, viewed from the child's perspective." The CRC is primarily concerned with four aspects of children's rights: participation by children in decisions affecting them; protection of children against discrimination and all forms of neglect and exploitation; prevention of harm to them; and provision of assistance to children for their basic needs.[10] For the purposes of the CRC, a child is defined as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".[11]

The UN Committee on the Rights of the Child met for its first formal session in September/October 1991, it discussed the very meaning of Children's Rights

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7 https://www.humanium.org/en/childrens-rights-history/accessed on 15-12-2019
8 https://www.humanium.org/en/childrens-rights-history/accessed on 13-10-2019
9 Judith Masson, *Children's Rights as Human Rights*, Indo-British Seminar on Human Rights, (New Delhi: British High Commission, 1998), p. 73.
10 Children's Rights: International Laws | Law Library of Congress, https://www.loc.gov/law/help/child-rights/international-law.php 15-11-2019
11 Article 1, United Nations Convention on Rights of Child.

and concluded that the Convention on the Rights of the Child was about human rights for children. It highlighted the general principles that were to help in the interpretation of the convention as a whole and thereby guide its implementation. The formulation of the principles draws much from Articles 2, 3, 6 and 12 of the convention itself.[12]

i. Non-Discrimination: One general principle as identified by the committee is that all children should enjoy their rights and should never be subjected to any discrimination. The obligation to provide equality of opportunities among children is expressed in Article 2, which reads: "States parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's parents or legal guardians, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, poverty, disability, birth or other status."

ii. Best interests of the child: Children, especially when they are very young, are vulnerable and need special support to be able to enjoy their rights fully. Principle of the best interest of the child is formulated in Article 3:1. "In all actions concerning children whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

iii. The right to survival and development: The principle most directly related to children's economic and social rights is formulated in the right to life Article. The Article goes further than just granting children the right not to be killed; it includes the right to survival and development which is formulated in Article 6:2 and states thus: "State parties shall ensure to the maximum extent possible the survival and development of the child."

iv. The views of the child: A crucial dimension of the convention is principle respecting the views of the child. The principle is formulated in Article 12:1 which states that "States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.

These four principles contribute to a general attitude towards children and their rights. They are based on the notion that children too are equal as human beings. The affirmation of the rights to play underlines that childhood has a value in itself; these years are merely a training period for life as an adult.

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12 *"Four principles of child rights",* INTERNATIONAL CHILD AND YOUTH CARE NETWORK, available at https://www.cyc net.org/ today2001/today011120.htmlaccessed on 13-10-2019

The UNCRC outlines the fundamental human rights that should be afforded to children in four broad classifications that suitably cover all civil, political, social, economic and cultural rights of every child[13]:

i. Right to Survival: This right includes right to be born, right to minimum standards of food, shelter and clothing, right to live with dignity, right to health care, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy

ii. Right to Protection: Right to be protected from all sorts of violence, right to be protected from neglect, Right to be protected from physical and sexual abuse, and right to be protected from dangerous drugs are included in this right.

iii. Right to Participation: This right consists of right to freedom of opinion, right to freedom of expression, right to freedom of association, right to information, and right to participate in any decision making that involves him/her directly or indirectly.

iv. Right to Development: Right to education, right to learn, right to relax and play, right to all forms of development – emotional, mental and physical are covered under this right.

The right of children to protection from violence is enshrined in the Convention on the Rights of the Child and yet still one billion children experience some form of emotional, physical or sexual violence every year; and one child dies from violence every five minutes.[14]

Though the Convention is a great landmark, the implementation machinery under the Convention is very weak. The Committee on the Rights of the Child has no teeth. It can only make suggestions and recommendations. Therefore, the international cooperation and sincere national efforts are required to improve the lot of millions of children.[15]

The UN adopted the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, popularly known as Sex Trafficking Protocol, on May 25, 2000. This Protocol addresses the problem of sex trafficking, one among many purposes for which children are bought and sold including, in addition, forced labour, adoption, participation in armed conflicts, marriage and organ trade.[16]

3. World Summit for Children, 1990

The September 1990 World Summit on Children provided UNICEF with an unprecedented high- level meeting to endorse the CRC in international affairs, with heads of state from around the world heralding the CRC as a basis to create

13 Child Rights in India | Right To Education And Health - Smile Foundation, available at https://www.smilefoundationindia.org/child_rights.html, accessed on 22-04-2019.

14 https://www.un.org/en/sections/issues-depth/children/accessed on 13-10-2019

15 Dr. S. K. Kapoor, *Human Rights under International Law and Indian Law*, 2nd ed., (Allahabad: Central Law Agency, 2001), p. 147.

16 P. K. Pandey, *Children's Rights: Laws, Policies and Practice*, (New Delhi: Regal Publications, 2013), p. 68.

a better world for children (UNICEF 1990).[17] This was a follow-up action to the convention which enabled the national leaders to focus exclusively on issues affecting the future of children.

Along with UNCRC, Beijing Rules or the Standard Minimum Rules for the Administration of Juvenile Justice, 1985, and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, 1990, set the minimum standard of conferring on children certain special rights.[18]

The Worst Forms of Child Labour Convention was adopted on June 17, 1999. It focuses on ending slavery, debt bondage, forced recruitment of children in armed conflict, prostitution, drug trafficking and any work harmful to the health, safety and morals of children.[19]

III. Institutions and Conventions having a Bearing on Rights of Child

Since December 10, 1948, the Universal Declaration of Human Rights, recognizes that "motherhood and childhood are entitled to special care and assistance."[20] In addition to these core principles, additional provisions are to be found in the following conventions which contain provisions for the benefit of children.

1. International Labour Organisation

The ILO has been instrumental in protecting the rights of children and laying down conditions and standards regarding wages and welfare of working children. It also identifies hazardous occupations and bans the employment of children in such occupations. It suggests labour welfare and social welfare measures to protect working children from exploitation, suitable machinery, etc.

2. U.N. Conference on Environment and Development, 1992

Agenda 21, formulated under the UNCED reinforces the commitments made at the World Summit for Children, 1990. Specific Goals for child survival, development and protection were agreed upon at the World Summit and remain valid also for Agenda 21. Chapter 25 of this Agenda 21 is devoted to children and youth.[21]

3. World Conference on Human Rights, 1993

The World Conference reiterates the principle of "first call for children." In this respect it underlines the importance of the role of the UNICEF in the protection and promotion of the rights of the child. "Human Rights begin with Children's Rights" is the new perception given by the UNICEF for the

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17 Inter-Governmental Organization, available at: https://ssrn.com /abstract=3214766 accessed on 13-10-2019

18 Pankaj Sinha ed., *Indian Laws Protecting Children*, (New Delhi: Human Rights Law Network, 2011), p. 29

19 P. K. Pandey, *loc.cit.*

20 https://www.humanium.org/en/childrens-rights-history/accessed on 13-10-2019

21 Mamta Rao, *Law Relating to Women and Children,* 4th ed., (Lucknow: Eastern Book Co., 2018), p. 564.

promotion of the rights of the child.[22]

Part-IV: Impact on domestic law

India being one of the responsible members of the United Nations and being a country wedded to the concept of welfare society has provided specific provisions in the Constitution for children. Art.15(3) enables state to make special provisions for the benefit of children. Art.21A makes free and compulsory education up to the age of fourteen years a fundamental right. Art.23 prohibits all forms of trafficking and forced labour. Several Directive Principles of State Policy mandate the State to direct its policy to protect the interest of the children. State has to see that the tender age of children are not abused, that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment (Art.39); state has to provide for early childhood care and education to children below the age of six years (Art.45)

Further, there are specific statutes enacted for the benefit of children. Viz: the *Child and Adolescent Labour (Prohibition and Regulation) Act, 1986; Commissions for Protection of Child Rights Act, 2005; the Right to Education Act, 2009; the Protection of Children from Sexual Offences Act, 2012,* etc. The executive, legislature and judiciary are all striving to ameliorate the conditions of children. The status of children in India is very alarming. A look at some of the figures make it evident. India has the highest rate of neo-natal deaths (around 35%) and 40% of child mal-nutrition in the developing world. There is a constant reduction in the number of girls as in the 0-6 age group; there are 927 girls forevery 1000 boys.[23] There is high rate of child marriage, a large number of children are labourers and at the same time there are a large number of sexually-abused children. That means much need to be done.

Part-V: Conclusion

Though a noteworthy progress at the international level by the UN through adoption of declarations and conventions and bringing the state parties under obligation to respect the rights of the children is made, much needs to be done on the ground. The final affirmation of children's rights which would ensure the world a prosperous future can be achieved only through international cooperation, that is to say the sound implementation of the rights to development.[24] In developing countries, particularly in India, there is still a long way to go in realizing the rights of children. Though all the relevant rules and policies are in place, there is a lack in enforcement initiatives. There is a need to intensify efforts for children welfare at all levels to implement the rules and provisions of the Conventions and contribute to create a world suitable for children.[25]

22 Mamta Rao, *op.cit.*

23 Pankaj Sinha ed., *supra* n.18 p. 29

24 B. K. Raine, *supra* n.1, p. 185.

25 Child Rights in India | *Right To Education And Health* - Smile Foundation, available at https://www.smilefoundationindia.org/child_rights.html, accessed on 22-04-2019.

An Assessment of the Relevance of Fugitive Economic Offenders Act, 2018 to Rejuvenate the Indian Economic Sector

Jayamol P.S*

Introduction

Crime is an evil which has the effect of putting the victim as well as society in peril. While committing the crime the offender violates the social norms. Among the various types of crimes which are prevailing, economic offences are a new category of offences which has gained momentum recently with the increasing number of cases in this area. It causes financial losses to the victims and at the same time blocks the economic growth of the country. In the last few years, a string of businessmen have left the country after defrauding the public sector banks. Fugitive is the term used to address a person who is running away or hiding from the police or a dangerous situation. According to the External Affairs Ministry, India has the record of 31 fugitives who have caused loss of 40,000 crores of rupees to the public exchequer. The reported cases through print, social and other media regarding people who defraud public sector banks and escape to foreign countries reveal the alarming situation in our country. The increasing number of bank fraud cases reported also records the increased level of Non Performing Assets (NPA) which has left an adverse impact on the banking sector. The *Fugitive Economic Offenders Act*, 2018 is a new law to confiscate the assets of the absconders till they make a submission to the jurisdiction of Indian courts. Many stringent provisions are prescribed under the Act to catch hold of these offenders. But at the same time there are serious criticisms against the Act saying that it has nothing to do with the economic offenders. In this backdrop this paper tries to analyse the impact of the Act in the Indian economic sector. It is divided in to three parts. The first part analyses the existing system of economic offences and the legislations to deal with that. Second part focuses on the *Fugitive Offenders Act* and tries to explore the possibilities in the Act to prevent the economic offences. Last part puts forward the findings to rejuvenate and revamp the economic sector with these legislations.

Meaning and definition of fugitive offender

The *modus operandi* of the bank frauds are almost the same. The Banking Regulations, Enforcement agencies, Reserve Bank guidelines and all laws in general became a mockery in front of these extra brilliance. They arrive very late in to the frames, but by that time they would have reached the safer destinations of foreign countries. The ordinary meaning of the term Fugitive is "a person who is running away or hiding from the police or a dangerous

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situation"[1]. A fugitive Economic Offender (FEO) is defined under the Act as any individual against whom a warrant for arrest in relation to a scheduled[2] offence has been issued by any court in India who- has left India so as to avoid criminal prosecution, or being abroad, refuses to return to India to face criminal prosecution[3].

Legal framework against fugitive offences

The organised forms of crimes are always a focal point of discussion among the world community. The United Nations Organisation adopted the ***Convention against Transnational Organized Crimes***[4] (UNTOC) which is intended to obtain world cooperation against organised crimes. In line with this convention, the United Nations has adopted the ***Convention against Corruption***[5](UNCC), after taking in to consideration the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law[6]. According to the Convention, corruption undermines democracy and the rule of law, and also leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security. The UNCC mentions about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering. It is a well recognized and the only legally binding universal anti-corruption instrument. Being the signatory of this International Convention majority of the United Nations member states are parties to this Convention[7].The Convention points out different forms of corruption and also states about the ways of eradicating this evil. That includes preventive measures[8], transfer of criminalization and law enforcement[9], International

1. *See*, https://dictionary.cambridge.org/dictionary/english/fugitive (last visited on 22.11.2019).
2. *See*, The Schedule under the Act. It includes,1. Offences under the *Indian Penal Code*, 1860, 2. Offences under the *Negotiable Instruments Act*,1881, 3. Offences under the *Reserve Bank of India Act*,1881,4. Offences under the *Central Excise Act*,1944,5. Offences under the *Customs Act*, 1962, 6. Offences under the *Prohibition of Benami Property transactions Act*,1988,7. Offences under the *Prevention of Corruption Act*,1988, 8. Offences under the *Securities and Exchange Board of India Act*, 1992,9. Offences under the *Prevention of Money Laundering Act*,2002,10. Offences under *the Limited Liability Partnership Act*,2008, 11.Offences under the *Foreign contribution (Regulation) Act,*2010,12. Offences under the *Companies Act*,2013,13. Offences under the *Black money(Undisclosed Foreign Income and assets)and Imposition of Tax Act*,2015, 14. Offences under the *General Goods and services Tax Act* ,2017.
3 Section 2(1)(f) of the *FEO Act*, 2018.
4 adopted by General Assembly resolution 55/25 of 15 November 2000.
5 General Assembly Resolution 58/4 of 31st October 2003.
6 Preamble of the United Nations convention Against corruption
7 *Seegenerally*, https://www.unodc.org/unodc/en/corruption/uncac.html (last visited on 9.11.2019).
8 Chapter II of UNCC. Article 5(1)Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
9 . Chapter III of the UNCC.

cooperation for confiscation[10], asset recovery[11], technical assistance[12] and information exchange[13]. It also directs ways and means for recovering crime proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analyzing and disseminating to the competent authorities reports of suspicious financial transactions[14].

The FEOs are enemies of the growth and stability of any country. The economic offenders after committing financial fraud of crores of rupees easily flee to other countries and enjoy their remaining life there only. At the same time they challenge the economic growth and the very existence of their mother country. As pointed out by Shashi Tharoor M.P, in the Parliament while discussing the *Fugitive Economic Offenders Ordinance*[15] is apt to the situation.

"The magnitude of the crisis is seen by a response of the Ministry of External Affairs in the Lok Sabha which has itself admitted that in March this year India has the awful record of having 31 fugitive economic offenders who had collectively robbed the honest tax payer of over Rs. 40,000 crore. That is the figure given by the Ministry of External Affairs to this House. Now, to give that figure of Rs. 40,000 crore some perspective, that is also nearly the same amount that this Government allocated on paper to the Mahatma Gandhi National Rural Employment Guarantee Programme and they took credit saying this is the record highest ever allocation in 2017-18 for this scheme. While the men and women of our country dependent on their daily wages are struggling with delayed payments because the Government, apparently, does not have enough money to give the States to pay our MNREGA workers, our white collar economic offenders have got away from this country with impunity".

It shows that, the ultimate sufferers are the laymen in the country. The Constitution of India emphatically declares that the democratic republic of India shall be a welfare state committed to the pursuit of the idea of socio economic justice. It ensures to the people of India economic, social and political justice[16]. Social justice takes within its sweep the objective of removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities. Apart from that Article 14[17],

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10 Article 54 enables signatory countries to confiscate property without criminal conviction.
11 Chapter V of the UNCC deals with asset recovery.
12 *Ibid*., Article 60 –Training and Technical assistance of UNCC.
13 *Ibid*., Article 61.
14 *Ibi*d., Article 58 says about Financial Intelligence Unit.
15 Debate of *Fugitive Economic Offenders Ordinance*, 2018 in Parliament .(Sixteenth Lok Sabha).
16 The concept of social-economic justice is a living concept and gives substance to the rule of law and meaning and significance to the idea of a welfare State. *See*, V.N. Shukla's, *Constitution of India*,11th Ed, (Eastern Book Company, Lucknow, 2004) p.4.
17 The State shall not deny to any person equality before law and equal protection of the laws within the territory of India.

21[18],38(2)[19], and 39(b)[20] of the Constitution of India which emphasise on the people's right to live with dignity, also to sustain and demand social welfare measures and to remind the State about the kind of society the Constitution expects to create.

As pointed out by the Law Commission of India[21], all State instrumentalities involved in the investigation, prosecution, and trial of economic offences must be oriented to the philosophy of these offences as a source of grave challenge to the material wealth of the nation. Like wise Justice. Malimath Committee[22] on Criminal reforms suggested that sentences in economic offences not run concurrently, it should run consecutively. As per the committee, law has to be enacted to protect informers of economic crimes. It was also stated in the Committee report that organised crime, economic crime, terrorism and similar developments are threatening the very foundation of democracy and rule of law.There are many legislations in our country covering economic offences. The *Indian Penal Code,* 1860 deals with the basic offences such as cheating[23], counterfeiting[24], breach of trust[25], etc. The *Prevention of Money Laundering Act*[26], 2002 the *Negotiable Instruments Act*[27], 1881, the *Securitisation and Reconstruction of Financial Assests and Enforcement of Security Interest Act*[28], 2002, etc. are some laws which tries to prevent the frauds and enforcement of securities in India.

The bad loan problem of Indian banks

India's banking system is facing a crisis of NPAs. The lending norms for the banking sector prescribes a physical asset cover ratio of 150 percent. It means

18 Right to life and personal liberty.

19 The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all the institutions of the national life. 38(2)-the State shall , in particular , strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

20 it states that the ownership and control of the material resources of the community are so distributed as best to sub serve the common good.

21 47th Report of the Law Commission of India on the trial and punishment of social and economic offences, p.156

22 Committee on reforms of Criminal Justice system, Vol.1, March 2003.

23 Section 420 of IPC states that whoever cheats and there by dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed , and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine.

24 Section 28 &489B of IPC.

25 *Ibid*., Section405.

26 *See*, Section 3. Offence of money-Laundering.-Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering

27 The Preamble of the Act says- to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques.

28 This is an Act to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.

that for every 100 rupees to be lend, the value of the pledged asset needs to be rupees 150[29]. This is to ensure security of the loans given by the banks. Apart from that the Reserve Bank of India (RBI) issues timely notifications to the various scheduled banks, with a view to provide a framework enabling them to detect and report frauds early and taking timely consequent actions like reporting to the Investigative agencies so that fraudsters are brought to book early. These directions also aim to enable faster dissemination of information by the RBI to banks on the details of frauds, unscrupulous borrowers and related parties, based on banks' reporting so that necessary safeguards or preventive measures by way of appropriate procedures and internal checks may be introduced and caution exercised while dealing with such parties by banks.[30] There are many precautions adopted from the part of RBI to evade the NPAs. However, the reports reveals the dangerous cracks in the Indian financial system for which the Finance Ministry, RBI, other scheduled banks and bank managements cannot escape from responsibility.

An overview of the *FEO Act*, 2018

The objective of the Act as provided is, to take measurestodeterfugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian Courts, to preserve the sanctity of the rule of law in India and for matters connected thereto or incidental thereto. The *FEO Act*, 2018 can claim some novel features which are absent in any other legislations.

1. Declaration of a person as fugitive economic offender[31]

The Director[32] or any other officer not below the rank of a Deputy Director authorised by the Director has reason to believe that any individual is a fugitive economic offender, he may file an application[33] before the Special Court to declare him as a FEO[34] .The Special Court by a declaration order that the proceeds of crime in India or abroad whether owned by the offender or not and any property or benami property in India or abroad by the FEO stand confiscated to the Central Government[35]. The confiscation order of the Special Court shall identify the properties in India or abroad that constitute the proceeds of crime which are to be confiscated .The order shall also specify any other property of the offender in India to be confiscated. If the property to be confiscated is in a contracting state the Special Court may issue a letter of

29 C. Shiv Kumar, Breaking the Banks, *Frontline,* March 16,2018, p.24.
30 https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=10477(last visited on 21.11.2019).
31 Section 4(1) of the *FEO Act*, 2018.
32 A Director appointed under the *Prevention of Money Laundering Act*,2002.
33 the application shall contain certain particulars like his reason for believing that person as a fugitive economic offender, information available about that person, a list of properties of that person including the properties outside India, list of Benami property owned by that person in India or abroad, a list of persons who may have an interest in the properties.
34 *Ibid*., Section 12.
35 *Ibid*., Section 12 (1).

request to that state. If the property which is a proceeds of crime is *bona fide* acquired by another person with the offender, without knowing that it was proceeds of crime, that property can be exempted. All rights in the confiscated property vested with the Central Government. If on conclusion of the proceedings the court finds that he is not an offender, the Special Court shall order release of property. After getting an order of release from the Special Court the Director or any other person may withhold the release of such a property.

2. Scheduled Offences[36]

These are offences specified in the Schedule of the Act. If the total value involved in such specified offence or offences is one hundred crore rupees or more, *FEO Act* will be applicable. It includes:

- Offences under the *Indian Penal Code,* 1860
- Offences under the *Negotiable Instruments Act*,1881
- Offences under the *Reserve Bank of India Act*,1881
- Offences under the *Central Excise Act*,1944
- Offences under the *Customs Act*,1962
- Offences under the *Prohibition of Benami Property transactions Act*,1988
- Offences under the *Prevention of Corruption Act*,1988,
- Offences under the *Securities and Exchange Board of India Act*, 1992
- Offences under the *Prevention of Money Laundering Act*,2002
- Offences under the *Limited Liability Partnership Act*,2008,
- Offences under the *Foreign contribution (Regulation) Act*,2010
- Offences under the *Companies Act*,2013
- Offences under the *Black money(Undisclosed Foreign Income and Assets)and Imposition of Tax Act*,2015,
- Offences under the *General Goods and services Tax Act*,2017

3. Attachment of property[37].

The Director or any other person authorised by him, may, attach the property mentioned under section 4 with the permission of Special Court. The Authority can do so even before filing such as an application for which there is a reason to believe that the property is proceeds of a crime , or is a property owned by a FEO and there are likelihood that the property will not be available for confiscation[38]. The attachment shall continue for a period of 180 days from the date of such attachment or to an extended period permitted by the Special Court.

4. Search and seizure[39]

36 *Ibid*., Section 2(1)(m) .
37 Section 5(1) of the *FEO Act*, 2018.
38 The director or any person who provisionally attaches that property shall within a period of 30 days of attachment file an application before the Special Court.
39 *Ibid*., Section 8.

If the Director or any other person has reason to believe that any person who may be declared as FEO is in possession of any proceeds of crime or records which relate to proceeds of crime or possession of any property related to proceeds of crime, the Director may authorise any officer subordinate to him to enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept. While doing so if the keys are not available he can break open lock of door, box, locker etc.

5. Search of persons[40]

If an authority has reason to believe that any person has secreted any record or proceeds of crime which may be useful for any proceedings under the Act, he may search that person and seize such record of property. The authority shall prepare a list of record or property seized and obtains the signature of the witnesses.

6. Notice[41]

The notice shall be issued by the Special Court to FEO and any other person who has any other interest in the property. A notice requires that the individual shall appear before the specified place within six weeks and his failure to present will declare him as a FEO. A notice can be issued by electronic means to the offenders mail address submitted for his PAN and Aadhaar.

7. Power to disallow civil claims[42]

On the declaration of an individual as FEO, he is disallowed by any Court or Tribunal in India from putting forward or defending any civil claim. This is one of the most important provisions provided under the *FEO Act*, 2018. This is a bar from putting forward or defending any civil claim once an individual has been declared a fugitive economic offender by the virtue of Section 12 of the Act by the Special Court. This bar finds application upon any and all civil claims, including civil proceedings which have no nexus with the offences in question including divorce proceedings, succession petitions, suits relating to family disputes, consumer complaints etc.

8. Management of properties confiscated under the Act[43]

The Central Government may appoint many of its officer's as to perform the functions of an Administrator. The Administrator appointed shall receive and manage the property and also to take measures to dispose of the property.

Assessment of the *FEO Act*, 2018

Irrespective of whether a country is developed, developing or under developed, banking sector forms the backbone of every country. Increasing NPA is a major threat faced by the banking sector. When the bank frauds are

40 *Ibid*., Section 9.
41 *Ibid*., Section10.
42 *Ibid*., Section 14.
43 *Ibid*., Section 15.

more the NPA also increases and the general public will see the public sector banks with suspicion.

India is a well recognised country with its democratic principles. The *FEO Act*, 2018 has come up with some novel features to regulate and to save the economy from the clutches of looters. But this Act also is not devoid of criticisms. The first one is that it allows confiscation of assets of fugitive economic offenders before the adjudication. It disentitles a FEO from any recourse under civil law. These provisions were vehemently criticised as against the provisions of Constitution of India. Article 21 of the Constitution is blatantly violated by these provisions. Section 14 of the Act bars the FEO from filing or defending any claim or proceedings of civil matters in any Civil court or Tribunal in the country. It is also pointed out that section 5(2) is arbitrary. It enables the authorities to search, seize and confiscate the property before the commencement of the proceedings. An Act which is arbitrary will not survive the touch stone of judicial review[44].

It is also taken to be note that some of the provisions are already there in existing legislations. Under Section 82 of Criminal Procedure Code, if any court has reason to believe that a person is evading a warrant issued by it, then it can require him to appear before the court within 30 days and if he fails to do so any property of the concerned person can be attached[45]. Under Section 10 of the *FEO Act*, once an application has been filed to declare a person as a FEO, he gets six weeks to appear, and an additional period of one week may be given if his counsel appears on his behalf[46]. So, in fact, it gives fugitive economic absconder and offenders more time than the existing *Criminal Procedure Code*. Moreover, if the value of the offence involved is rupees 100 crore or more the Act is applicable to the listed offences in the schedule of the Act. The effect is that the properties can be confiscated, in case of people who are evading court proceedings under these Scheduled Acts.

Findings and Conclusion

Economic offences are not an isolated phenomenon. It is the favourite mode of blood less crime for the criminals all over the globe. It has been pointed out by many, including our Parliamentarians, that the 100 crore limit should be removed. Of course, money matters in a developing country like India, but the nature of offence, that is to be suppressed and all types of white collar absconders have to brought under the arms of law. It is to be ensured that there

44 In *Shayara Bano & Ors. v. Union of India & Ors. (2017)9 SCC 1.* the Hon'ble Supreme Court dealt with the scope of challenging validity of an enactment on grounds of arbitrariness and observed that, "Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well Under Article 14"

45 Section 83 of *Criminal Procedure Code.*

46 Section 11(2) of the FEO Act,2018.

47 Article 52. Prevention and detection of transfer of proceeds of crime of *UNCC*

is better intelligence on those engaging in fraudulent activities so that they can be nabbed before they leave the country. As well stated in Chapter V of the UNCC;

"each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer[47]".

The banks should be vigilant while providing massive loans to borrowers without there being collateral of equal value. Apart from the banks and the debtor, the presence and support of unscrupulous politicians are also a reason for creating more fugitives. Without the support of politicians fugitives cannot easily escape from the arms of law. The Act has come in to effect only recently and soon after that a Mumbai Special Court has declared liquor baron Vijay Mallya as the first FEO in India. The pitfalls and short comings of the Act cannot be assessed within this limited period of time. But coming years will tell whether the *FEO Act* 2018 is a boon or bane to the Indian economic sector.

A Critical analysis of judicial response towards in – country and inter- country adoption in India.

*DEEPU.P[1]
** Dr.RAMESH[2]

"Adoption is not about finding children for families ,its about finding families for children"

- Joyce Maguire Pavao

I. Introduction:

The law of adoption in India has received a fair treatment from judicial hands right since the times of the Privy Council to till date. The Adoption law and regulations have been passed through different stages. The law of adoption deals with its various facets which includes the capacity of the person to take in adoption as well as be given in adoption. It also deals with the requirements of valid adoption and its consequential effects. In this chapter the researcher made an attempt to examine critically some of the decisions of Privy Council, High Courts and Apex Court dealing with adoption. Various issues have come up before the court in different circumstances raising question of vital importance.

Before coming into force of the Constitution of India on January 26, 1950 the highest judicial institutions in the country were High Courts and subsequently by the Government of India Act, 1935 established the Federal Courts in India. From these courts appeals lay to the Privy Council in England. Thus, the rulings of the Privy Council dominated the Indian judicial scenario up to establishment of the Supreme Court of India.

Courts are considered to be impartial and independent organ of the state. The Constitution has conferred the judiciary with authority as a highest interpreter and guardian of the Constitution. Supreme Court is also guardian of the Fundamental Rights of the people and final interpreter of the Constitution. Article 32 of the Constitution empowers the Supreme Court to issue directions or orders in the nature of the writs of Habeas corpus, Mandamus, Prohibition, Certiorari and Quo warranto for the enforcement of fundamental rights. Article 32 provides a quick remedy for the enforcement of the fundamental rights. High Courts of states have also been granted similar power under Article 226 of the Constitution. This Article confers a wide power on the High courts to remedy injustice wherever it is found.

Traditional rule of *locus standi*that a petitioner under Article 32 can only be filed by a person whose fundamental right is infringed has been relaxed[3]. Its philosophy has been that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of their fundamental rights or legal rights and such person or class is not able to

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3 Oxford Dictionary Locus Standi- the right or capacity to bring action or to appear in a court.

approach the court for relief due to poverty or socially and economically disadvantaged position, any public spirited citizens can file public interest litigation or social interest litigation for enforcement of Constitutional and legal rights of any person or group of persons may file petition or application for writ , order or direction in the High court under Article 226 and in case of violation of the fundamental rights in the Supreme Court under Article 32 of Constitution of India.

II.MEANING & DEFINITION OF ADOPTION

Adoption has always been considered as a wonderful opportunity to provide the child with home and the parents a child. It offers an excellent alternative to institutional care for an abandoned, destitute or neglected child in an atmosphere of happiness, love & understanding which only a family can provide.

Punjab and Haryana High court in *Inder Singh V Kartar Singh,*[4] has expressed the meaning and purpose of adoption in the following words.

"Broadly put,adoptionundere Hindu law is the admission of the stranger by birth to the privileges of a child by a legally recognized form of affiliation and contemplation of Hindu law and adopted child is deemed to be begotten by the father who adopts him or for and on behalf of whom he is adopted. Thus , 'Taking of a son' is a substitute for the failure of male issue and its object is two folds:

1) To secure the performance of funeral rites of the person to whom the adoption is made; and
2) To preserve the continuance of his lineage. In other words the main object of adoption under strict Hindu law seems to be to secure spiritual benefit for the adopter, though its secondary object is to secure an heir to perpetuate an adopter's name"

Section 2(aa) of Juvenile Justice Act 2000: Adoption means the process through which the adopted child is permanently separated from his biological parents & becomes the legitimate child of his adoptive parents with all rights, privilege & responsibilities that are attached to the relationship.[5]

Section 2(3) of Central Adoption of Resource agency: Adoption means the process through which the adopted child becomes the lawful child of his adoptive parents with all the rights, privileges & responsibilities that are attached to a biological child.[6]

III. Judicial Response to the Issues of Child Adoption:

a) EARLY JUDICIAL TREND:

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4 AIR 1966 Punj.258

5 C. P. Veena, *Law relating to Juvenile Justice (Care & Protection of Children Act 2000,* C. Jammandas & Co, Educational&law publishers, Mumbai Pg 14.

6 153rd Law Commission Report on Intercountry country adoption.

The Privy Council look into the issue relating to validity of an adoption made by a minor in the case of *Jammana V/S Bamasoondri*[7] The council observed that under the Indian Majority Act, 1875 , a person or widow in taking adoption , she must attain the age of discretion. Further, the Privy Council said that under the Hindu law one of the pre requisite conditions of the adoption is that the person must attain the age of discretion irrespective of the status.

The widow by re – marriage lost her right to give in adoption her son by the first marriage unless she was authorized by the first husband to do so. The Bombay High court made it clear in *Punchappa V/S Sauganbaswa*[8], that the parents could not delegate this of heirs to another though the physical act of giving the son.

The issue before the Bombay High court in the case *Fakirappa V/S Vacitrava*[9], a widow having sons by her first husband remarried, but again become a widow. With a view to continue the line of her second husband, she took in adoption a son by her former husband, whom she herself gave in adoption as the natural mother. The adoption was held to be invalid, because the lady lost her right to give away her son in adoption as soon as she remarried, as also on the ground that the same person can't be both giver and taker.[10]

The Privy Council has continued to maintain the view that under the Hindu Law the main objective of adoption are securing the performance of the funeral rites of the person to whom the adoption is made and preserve the continuance of his linage.[11]In *Amarendu Man Singh* V/S*Senatan Singh*,[12]The Privy Council recognized the religious motive as dominant and secular motive as secondary. This view has latter confirmed by the Supreme Court of India.[13]

The ceremonial prospective of adoption has continued to be dominated by religious consideration, this was reflected in the case of *Bal Gangadhar Tilak V/S Shriniwas Pandit*[14] , the Privy Council observed that among the Hindus the ceremony of adoption is held to be necessary not only for the continuation of the childless father, but as part of the religious means where by a son can be provided who will make those obligation and religion sacrifices which would permit of the soul of the deceased passing into paradise.

Whatever the customary practice followed by the parties in the matter of adoption cannot be interpreted as derogatory to the written provisions of the law which is mandatory. Thus, in contrary to the express provisions of the law, customary provisions cannot be enforced was held in *Hem Singh V/S Harman Singh*[15]. This is the new developing concept of law.

7 (1876) 3 IA 72
8 (1900) 24 ILR Bom , 89
9 (1923) Bom.LR 482 (F.B)
10 Sharad Chandra V/S Shaniabai , (1944) ILR, Nag.544
11 Ramasubbayya V/S Cenchuramayya , AIR 1957 PC 124
12 (1933) 60 IA 242
13 V.J.S.Chandrasekar V/S Kulandaivel, (1963) SC 185.
14 (1915) 42 FA 135
15 AIR 1954 SC 581

The formalities of giving and taking of an adoption as an essential ceremony on the part of the parties and no other form is prescribed for the ceremony, this was held by the Hon'bleSupreme Court in the case of *LokShman Singh V/S Rup Kanwar*[16] subsequently it was held in number of cases.

b)JUDICIAL TRENDS IN SEVENTIES: The earlier judicial trends demonstrate that adoption continued to exist in Hindu social structures right from the ancient times. Quite a large number of cases came before the High Court and Privy Council during the pre-independence era. Subsequently some of the cases came before the Supreme Court of India. The important aspect came before the court was that objectives of the adoption, impact of ceremonies, personal law as well as the authority of the widows to adopt vis a vis the limitation thereon. During fifties and sixties the question relating to the adoption of orphan child was silent.

The legal effect of the adoption among the "Acharyas of Vallabha Sampradaya", which was discussed in *Deviraiji Vijayalaji V/S M.Chandraprap*[17] in the present case the parties to the litigation were all decedents of Sri. Vallabhacharya. They were working as Acharyas in various temples and shrine in Gujarat, Rajasthan and other places. One of the "Gaddis", as they were called, was situated at Junagarh. After the death of the last holder, Sri Purushottamlaji, his widow adopted the appellant defendant as a son to her deceased husband. It was assumed that in the concerned family there was a custom known as " GodaDatta", but the mother said that she had cancelled the adoption and that she was entitled to do so under the customary law applicable them. While delivering the judgment the High Court made the following observation on 'Goda-Datta' adoption:

1) No ceremony of giving and taking of the boy is required in the case of Goda-Datta adoption.
2) No ceremony of Datta- hamam is also required for such adoption.
3) This type of custom could be made use of making adoption of even an orphan.
4) The essential ceremonies as per the family tradition include:
    a) Margan , i.e., pouring of sacred water on the person of the adoptee
    b) Punya- vachn, i.e reading of holy literature at the time of adoption.
    c) Tilak on the forehead of the adoptee in front of the idol
    d) Smelling of the head of the adoptee and putting on an "upara" (Scarf) on the person of the adoptee.

It was also argued in the present case that in the " Vallabhkul", the decedents of Sri Vallabacharya, here are two types of adoption, one "Samanya" and the other " Goda- data". The court held that only the second type of adoption, i.e., "Goda- data" had been proved. This adoption is perhaps the only

16 AIR 1961 SC 1378
17 AIR 1971 Guj.188

instance in Hindu law where an adoption once made can not be cancelled.

Whether the adult orphan can be adopted and the step mother can be capable of giving adoption, these issues were decided by the court in *Dhan Raj V/S SurajBai*[18]. The Supreme court of India observed that the child would not necessary mean in that context a minor child. If the child is a minor, in such a situation in the absence of the father or mother, a guardian appointed by the will of the child's father or mother[19] and a guardian appointed or declared by a court would be competent to give the child in adoption. Nowhere under the law have permits the step mother also capable of being giving adoption. In the mean while law is also silent regarding the adoption of adult orphan. Unless custom prevails.

c) JUDICIAL TRENDS IN EIGHTIES

During the eighties the courts made several interpretations to the existing laws governing adoption. The important aspects which received judicial attention during the eighties have been inter country adoption. This is for the first time the Supreme Court of India analyzed the various problems of inter country adoption and laid down the guidelines for the Inter country adoption.

The statement made by the testator in the will about the adoption is certainly a piece of admissible evidence but , there is no rule of law or prudence laying down the principle that such a statement must be regarded as conclusive proof of adoption, it was observed in the case of *Banwari Lal V/S Trilok Chand*[20].

The custody of minor based on the interest of child as paramount and do nothing which would be adverse to its interest or affect it physically or mentally in any manner which was held by Apex court in *Poonam Datta V /S Krishnala Datta*[21].

The constitutionality of Inter country adoption was first time debated in the famous case In*Re Rasiklal Chagan Lal Mehta*[22] . The facts were that a German couple attempt to take a girl child in adoption from an orphanage at Rajkot and take her to Germany with them. Since there was no legal provision the applicant took recourse to Section 9(4)[23]. The difficulty faced by the couple was that only a Hindu could take a child in adoption under the above provision of law. The couple also filed an affidavit stating that they have embraced Hinduism without any further inquiry into this aspect of the matter the court permitted to adoption of the child. The High Court noticed that even before the

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18 AIR 1975 SC 1103

19 Section 9 (4) of the Hindu Adoption and Maintenance Act Mother means natural mother not the step mother.

20 AIR 1980 SC 419: 1980 1 SCC 349 : 1980 UJ (SC) 110: 1980 3 Mah LR 91: 1980 1 SCR 998.

21 AIR 1989 SC 401

22 AIR 1982 Guj.193

23 Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

court order an adoption deed had been executed stating that the authorities of the orphanage had given away the girl child in adoption in the presence of many social workers and the child would be taken to Germany by the adoptive parents. The couple applied for a passport for the child which was returned with the remarks that without an express order from the court it could not be issued. At this stage the German couple moved the High court for seeking view of the whole matter and it issued a notice Suomoto to the applicant as to why the order of the district court is not quashed. The applicant thereafter, sought the permission of the court for withdrawing the application with a view to pursuing the matter under the **Guardians and Wards Act, 1890**. The court refused the request and referred the matter to Division bench, which allowed withdrawal but at the same time framed some guidelines in this context.

The High Court directed that in all cases regarding inter country adoption notice has to be issued to Indian Council or Child Welfare (ICCW) and Indian Council for Social Welfare (ICSW) or other social welfare agencies in the district.[24] Where by the court further held that inter country adoptions under Section 9(4) of the Hindu Adoptions and Maintenance Act, 1956 should be legally valid under the laws of both the countries. The adoptive parents must fulfill the requirement of law of adoptions in their country and must have the requisite permission to adopt from the appropriate authority thereby ensuring that the child would not suffer in immigration and obtaining nationality in the adoptive parents' country.. The court also laid down that a provision for a periodical report pertaining to the maintenance and wellbeing of the child in the hands of the adoptive parents can be envisaged as a condition of the order. In this regard the court pointed out the lot of difficulties in respect of inters-country adoption.

Some of social organization and voluntary agencies indulged the malpractice in inter county adoption this issue was discussed in the case *of Lakshmi Kant Pandey V/S Union of India*[25]: the facts were that a letter addressed by the petitioner, an advocate containing of malpractice indulged by social organizations and voluntary agencies engaged in inter country adoption. The letter based on "Empirical investigation carried out by the staff of a reputed foreign magazine" called THE MAIL which revealed that hundreds of unwanted babies were being transported from the slums of Calcutta to the USA. The paper also reported the death of Nathan, a two months old baby who died on dehydration on arriving in New York. They also alleged that foreign couples after taking child in the name of adoption pushed to beggary and prostitution. Based on this the petitioner sought relief against this.

This letter was treated as a writ petition by the Hon'ble Supreme Court and notice was issued to the Union of India, the Indian Council for Child welfare and the Indian Council for Social Welfare to appear and assist the court in

24 Supra 34
25 AIR 1984 SC 468

laying down principles and norms which should be followed in cases of Inter-country adoptions.

The question for consideration before the Hon'ble Supreme Court was that whether child should be allowed to be adopted by foreign parents and if so, procedure always based on the best interest of the child.

Hon'ble Supreme Court of India while disposing the case held that since there is no statutory enactment in India regarding the Inter country adoption. Further held that adoption always based on the best interest of the child, for this reason at the time of adoption adoptive parents should follow the procedure laid down under the GUARDIANS AND WARDS ACT,1890. Every effort must be made to find out adoptive parents for it within the country. Taking note of this, the Apex Court laid down various guidelines in the matter of foreign in inter country adoptions.

Amongst the guidelines laid down by the court, the following may be stated:

1) Only government recognized agencies should be entrusted with the task of scrutinizing applications by foreign parents wishing to adopt Indian children.

2) The antecedents of the applicants should be verified[26]

3) Preferably, the child should be given for adoption before he or she competes the age of three, though there can be no hard and fast rule on this.

4) A progress report of the child along with a recent photograph, quarterly during the first two years, and half – yearly during the next three years, should be provided.

5) The parents should either deposit or enter into a bond for a certain amount, to enable the child to be repatriated, if needed.

6) The entire proceedings on the application should be confidential and as soon as the order is made on the application, the papers and documents should be sealed.

In view of difficulties faced by some agencies in implementing these measures, the Supreme Court,[27] again made certain classifications and modifications, such as:

1) The scrutinizing agency appointed by the court is to be an expert body having experience in the area of child welfare. It should not in any manner be involved with placement of children for adoption.

2) The agency engaged in placement of children for adoption should not readily assume that children, including cradle babies who are found abandoned, are legally free for adoption. Such children must be

26 Their family background, financial status, health etc.

produced before the Juvenile Court so that further enquires can be made. In states where there are no Children Acts in force, children should be referred to the Social Welfare Department for making further inquiries and tracing their parents and guardians. The procedure should be completed at the latest within three months. Until the report of the Juvenile Court or the Social Welfare Department declaring such children as destitute or abandoned, these children cannot be given in adoption.

3) No court in a state shall entertain an application for the appointment of a foreigner as guardian of a child who has been brought from another state, if there is a Social or Child Welfare agency in that other state which has been recognized for inter – country adoption by the Government of India.

4) Representatives of Foreign Social or Child Welfare agencies should be :

   a) Indian citizens with a degree or diploma in social work, coupled with experience in child welfare.

   b) Acting only for one Social or Child Welfare agency and desirably, the geographical area of operation should be limited so that he is able to attend to his functions diligently.

   c) Having a general power of attorney to act in India on behalf of the Social or Child Welfare agency and should also have the authority to operate bank accounts in the name of the foreign agency with the permission of Reserve Bank of India.

   d) Not permitted to receive children directly from the parents.

   e) A person recognized as such by the Central Government. Such recognition should be given by the Government only on the condition that the various requirements laid down are complied with.

5) Where the child is a handicapped one, the court dealing with an application for appointment of foreign parents as guardians , should not insist on the foreign parents or even one of the them coming down to India for approving the child.

6) Every effort must be made to give a child in adoption to Indian parents before considering the possibility of placing it in adoption with foreign parents.

The practical implementation of these amended guidelines also posed difficulties. Hence, the Supreme Court [28]again issued some new directions in

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27 AIR 1986 SC 272
28 AIR 1987 SC 232

the matter of the procedure to be followed for adoption of children by Foreign and Indian parents. These directives to some extent modified the earlier ones. These are, inter alia:

1) Payment of some amount to the scrutinizing agencies for their services;
2) Formulation of some procedure for prevention of illegal trade of babies;
3) Maintenance of a consolidated list of prospective Indian Parents wishing to adopt;
4) No notice to be published in regard to any adoption application whether it is for foreign adoption or adoption under the Hindu Adoption and Maintenance Act,1956;
5) The time required for procession of the adoption application to be reduced;
6) The limit of reimbursement of expenses incurred by recognized placement agencies to be raised to Rs 6,000 and so on.

Even while elaborate guidelines have been evolved by the Government in 1995, for regulating adoption of children by parents out of the country, yet the procedural wrangles, including delays and technicalities, could dissuade and discourage even genuine couples form adopting abandoned, destitute children. It is unfortunate that the Adoption of Children Bills, which had provisions enabling foreigners to adopt a child in India and take it to their country, had to be abandoned because of opposition from certain quarters. There are innumerable couples who wish to adopt and an unlimited number of children who need a home and family but the absence of uniform adoption laws and simple, swift procedures only encourages short cuts, commercialization and risk of exploitation.

d) JUDICIAL TRENDS IN NINETIES

During this period the principles of the law of adoption have been reiterated by the High courts, though no major principles laid down by the Supreme Court of India in this period but inter country adoption continued to dominate and Apex court issued some more directions in this regard.

The child to be adopted should fulfill the statutory requirement regarding the age below fifteen years which is mandatory unless the custom permits, which was discussed in *Mahalingam V/S Kannayyam*[29].

The inter – country adoption agency in Netherland approached directly to the Social Welfare Department of Jaipur and Superintendent of Shanti Devi SheeshuGrah Jaipur to give minor destitute girl name as Babita in guardianship

29 AIR 1990 Mad.333

and later for adoption to the couples in Johannes *Philipus V/S State of Rajasthan*[30]. The court pointed out that where no Indian couple has come forward to adopt the child and biological parent of the said child was not traceable, in such a situation in the best interest of minor child should be given in the foster care of the foreign national couple.

The above ruling of the High court shows that after the Supreme Court laid down the guidelines for inter country adoption it is becoming easier for the foreign national couple to take Indian children in adoption. It helps both child and the parents.

In Society of Sisters of Charity St. Gerosee Convent V/S Karnataka State Council for ChildWelfare,[31] the court held that the rationale behind finding Indian parents or parents of Indian origin is to ensure the well being of the children and that they grow in Indian surroundings so that they can retain their culture and heritage. The best interest of the children is the main and prime consideration..

L.K.Pandey's Case[32] again matter came before the Supreme Court for seeking further clarifications. The basic points for the consideration related to the role of Central Adoption Resource Agency (CARA) in matters of inter–country adoptions. The court appreciated the role of the CARA and found it plays a very vital role in inter country adoptions. The existence of Central Adoption Resource Agency does not affect the scope of verdict of the said case. Further observed that most of the case the birth registration of the abandoned children are not available hence Court directed responsible person belong to the agencies should file an application along with the relevant documents accompanied with an affidavit to the local magistrate. Then the local magistrate should have the authority to make an order approving the particulars to be entered in the birth certificate and on the basis of the magisterial order the requisite certificate should granted only after the adoption is finalized and the particulars of adopting parents are available to be included.

The judgment also laid down a scale of expense to be recovered by the agency offering placement for maintaining the child form the adoptive parents.[33] There was some modification in 1986[34] the court keeping in view the rise 30% of cost of living once in three years.[35]

While no formal ceremonies are required to prove adoption yet there has to be sufficient evidence of the adoptee being given and taken in adoption by the

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30 AIR 1990 Raj 124
31 AIR 1992 Kart.208
32 *L.K.Pandey V/S Union of India*, AIR 1992 SC 118
33 *Ibid*
34 AIR 1986 SC 272
35 The Supreme Court has retreated the guidelines laid down in L.K.Pandwy's case in SumanlalChtalalKamdar and othere V/S Miss AshaTrilikhbai AIR 1995 SC 165 and held that the guidelines must be strictly adhered to.

biological parents and adoptive parents respectively and also other circumstances which establish the fact of adoption. Simply because a person out of compassion or generosity or some other consideration, allows somebody to live in his house does not indicate or prove relationship through adoption.

e) JUDICIAL INTERPRETATION DURING 2000 TO 2010:

Can school authorities refuse to substitute name of parents of adopted child in the school register merely because of minor discrepancies in adoption papers even though the adoption is duly registered? This issue was discussed in *Ranjit Singh Dhilion V/S Punjab School Education Board* ,[36] A child was adopted by her maternal uncle all formalities were completed and the adoption – deed was duly registered as well. The parents applied to the school for change of name of the parents of the child in the school register. The District Education Board, however, refused to change the parents name in the school records on the ground that the name of the biological mother of the child in the admission register was different from the name mentioned in the adoption deed. The parents appealed against this. Court held that once adoption- deed is registered, the respondent Education Board has no jurisdiction doubt the authority of the same. Further the court observed that " we are of the considered opinion that a bona fide mistake cannot be permitted to stand in the way of substantial justice". Where an adoption is registered, there is a strong presumption under section 16 the HAMA that the adoption has been made in compliance with the provisions of the Act, unless and until it is disproved.

Is the presumption regarding authenticity or validity of registered adoption under section 16 of Hindu Adoption and Maintenance Act irrebuttable? This issue raised in *Jai Singh V/S Shakuntala*[37]. In this case, the court negated the presumption which is attached to a registered adoption deed and held that there was enough evidence to prove that there was no valid adoption..

Can holding of joint bank accounts by a person with the deceased lead to an inference that the person was adopted by the deceased? In *Nilima Mukherjee V/S Kanta Bhusan Ghosh*:[38]It held that the mere fact of having a joint account was no proof of adoption and so she could not be considered to be the adopted child of the deceased tenant. Here the mere fact that a relative was staying with the deceased or had joint bank accounts, without any other documentary or factual evidence of adoption, cannot be proof of adoption.

Adoption is made when the actual giving and taking had taken place and not when the religious ceremony is performed like Dattaka Homma. For a valid adoption , it would be necessary to bring on records that there has been an actual giving and taking ceremony, this was held in *Guradas V/S Rasaranjan*[39].

In re Adoption of *Payal @ SharineeVinayPathak V/S SonikaSomikaSahay @*

36 AIR 2004 P& H 382
37 AIR 2002 SC 1428
38 AIR 2001 SC 2725

Pathak[40] : was brought into the judicial sphere the question of adoption as a fundamental right. In this case, the petitioners already had a daughter and they assumed the guardianship of another surrendered baby of five months. The girl remained with them for four years after which the couple formally applied to adopt the child. The High Court of Bombay observed that adoption is a basic facet of right to life under Article 21 of the Indian Constitution. The Court held that the right to life is asserted parents and individuals, men and women seek to adopt to give meaning and fulfillment to their lives. Also, the right to life also protected the interests of children who are in need of special care and protection. Therefore, the court held that the embargo on adoption of same sex children by the Hindu Adoption and Maintenance Act would have to give way to statutory provisions in the Juvenile Justice Act that allowed the parents to adopt a child irrespective of the number and sex of their biological children.

As we see that the court took the role of judicial activism and safeguarded the right of adoption as an inherent right implied in the right to life under the Article 21 of the Indian Constitution.

In Philips Alfred *Malsvin V/S V.J.Gonsalves*[41], court remarked that" the right of a couple to adopt a son is a Constitutional right guaranteed under Article 21. The right to life includes these things, which make life meaningful. If the right to adopt was a flow from Article 21 of the Constitution then it implies that everybody irrespective of religion or community can adopt.

f) RECENT JUDICIAL TRENDS:

The cases have continued to flow in the High court as well as Supreme Court raising continuous issues in adoption matters. Hence, an attempt it made to analyses some of the ruling of both the High Courts and Supreme Court of India.

Whether the father consent is necessary at the time of adoption despite is not living with his wife and child. This issue was discussed in *M.S. TeestaChattoraj V/S Union of India*[42], It was held by court that the consent of the father had to be taken since he was alive and without his consent the adoption was illegal. It was further held that giving up visitation and maintenance rights does not mean that the father had renounce the world and his consent would still have to be obtained.

Shabnam Hashmi V/S Union of India and Ors[43]; In this case the petitioner was a Muslim who had adopted a young girl when she was small. She filed the petition for recognition of the right that a person belonging to any religion could adopt a child since the Muslim law did not allow for adoption. A three

39 AIR 2006 SC 3275
40 AIR 2010 Bom CR 434
41 AIR 2001 Ker 187
42 AIR 20
12 SC 188
43 AIR 2014 SC 36

judged bench of the Supreme Court comprising of P.Sathasivam . CJI, RanjanGogai and Shivakirtisingh JJ decided this case which dealt with the right to adopt by virtue of Juvenile Justice Act 2000, the rules of 2007 and CARA guidelines.

It was argued by the All India Muslim personal law board that adoption was only one of the contemplated methods under the Juvenile Justice Act 2000 and Islamic law did not recognize the concept of adoption. They objected that Islam did not recognize adoption but rather it recognized the concept of Kafala which was similar to adoption.

The Supreme Court held that the Juvenile Justice Act was an enabling legislation and it aims at achieving the purpose of a uniform civil code. Thus it was held that any person belong to any religion could adopt a child subject to the rules farmed on the point of giving adoption the status of a fundamental right it hesitated but recognized the statutory right to adopt.

Darshana Gupta V/S None and Ors[44]; Court held that, when the child to be adopted is orphaned, abandoned or surrendered child or a child in need of care and protection as defined in Juvenile Act, the bar imposed by Section 11(1) and (2) of Hindu Adoption and Maintenance Act does not bar the Hindu having biological child from adoption the child of same gender. In changed social scenario, Acts were liable to be construed harmoniously to ensure rehabilitation and social reintegration of orphaned, abandoned and surrendered children. Therefore, adoption of girl child was valid.

Varsha Sanjay Shinde and another V/S Society of Friends of the Sassoon Hospital and others[45]: the Bombay High court held that once a child is approved by an Oversees couple after the due procedure is followed, the same child cannot be shown to other Indian parents and that such Indian parents then cannot claim any right or priority to get the child merely because they are Indian parents and preference should be given to them over Overseas Indians and Foreign Couples. Although the main issues was decided the Court kept the petition pending in order to see the compliance of directions given by the court for giving the child to the Overseas Indian couple and to ensure that the Indian Parents(petitioners) also get a child expeditiously. Court further laid down following guidelines for in country and inter country adoptions to be read and applied in consonance with Guidelines of 2011:

1) All the concerned Agencies ie, RIPA, Specialized Adoption Agencies, State Adoption Resource Agency, Authorized Foreign Adoption Agency, APC to scrupulously follow the Guidelines which have been laid down in 2011.
2) Though there is no specific number mentioned in the Guidelines as to the number of Indian parents to whom the child should be shown, within a period of three or four weeks, the child should be shown to as

44 AIR 2015 Raj 105
45 AIR 2013Bom 297

many Indian parents as possible and, secondly at a time , the child should be shown only to one parent and not multiple number of parents has been done in the present case.

3) Only if the child is not accepted by Indian parents and the Adoption Agencies on account of their experience come to conclusion that the child is not likely to be taken in adoption by Indian parents then, in that case, it should be shown to foreign parents.

4) When the child is shown to the foreign parents, it should be shown in the list of priorities which are mentioned in the said Guidelines.

5) ARC and State Adoption Resource Agency should work not in conflict but in coordination with Central Adoption Resource Agency.

Pharez Jojn Abraham By Lrs V/S Arula Jothi Sivasubramainam .K & others[46]

By virtue of adoption, a child gets transplanted into a new family thereafter he or she is deemed to be a member of that family as if he or she were born son or daughter of the adoptive parents having same rights which the child had to succeed to the property by virtue of being son of his natural father, in the family of his birth, is thus, clearly to be replaced by similar rights in the adoptive family and consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son.

For the first time the court bring a drastic change in *Stephanie Joan Becker V/S State andOrs*[47], the Delhi High court refused the adoption on the sole ground that the prospective mother was aged fifty three years which violated the requirement of maximum age of forty five years as under the CARA guidance. In spite of NOC form CARA regarding the relaxing the age requirement as under the guidance the court refused to bow down. In appeal the Apex court displayed a drastic change towards the adoption. Held that adoption is completely depending upon the facts and circumstance of the each case. Base on the no objection certificate from the CARA court allow the adoption to prospective adoptive mother and bypass the strict adherence with the guidance to allow adoption.

Despite of the CARA guidelines, the High courts and the lower courts have adopted a restrictive view towards inter – country adoption. In *Craig Allen Coates V/S State,*[48] the Delhi High court refused adoption on the ground that the couple already has three children and fourth child might be neglected or exploited as a helper as one of the parents is disabled.

IV.Epilogue: The courts play a vital role in interpreting the provisions of adoption laws in India. Therefore the approach of the court in interpretation of these provisions of laws must be benevolent and justice oriented. The order must be passed keeping in view of principles of justice , equity and good

46 Criminal appeal7207 of 2008 decided on July 2 ,2019
47 AIR 2013 SC 3495
48 2010 (11) SCR 102

conscience. While passing any adoption order the court need not make a negative approach rather than positive and affirmative action. The court always pass an adoption order only on the basis of the child interest and it should take into consideration on the merits of the each cases. For all the cases shows that the court has always give much importance to the welfare of the child rather than the technicalities and procedural aspects.

UN Guiding Principles on Development Displacement

Prof. (Dr.) Prakash Kanive*[1]

Introduction

The review of international frameworks, standards and practices for mitigation of impact of development project on the displaced community, has led to an understanding that there are no exclusive conventions in international sphere to protect the interest of displaced persons. However, inferences regarding protection of project displaced person can be made from the existing human rights related conventions. Based on those inferences it can be concluded that it is the obligation of the state to enact vibrant legislations to protect the interest of project displaced persons at the municipal level. Government of India has ratified such conventions; in effect it is binding on her part to enact legislations to implement those obligations. Most of the legislations relating to development project are based on such ratified conventions. Besides, United Nation has issued some guidelines as to procedure to be followed in land acquision and execution of development project. These guidelines have further strengthened human rights conventions. The UN Guidelines on development based eviction address the human rights implications of displaced persons. Obviously these guiding principles represent a further development of the comprehensive human rights guidelines on development displacement. These guidelines are in consonance with human rights conventions which recognise the rights of every one to an adequate standard of living for himself and his family including adequate food, clothing, and housing and to the continuous improvement of living conditions. The UN Guidelines also deal with the practice of 'forced eviction' by keeping in mind the international standards on human rights. The guidelines are applied to every act or omissions involving the coerced displacement of persons from their home, land and common property resources that depend upon for generations, without legal justification. In this paper an attempt is made to understand how these guidelines enable the government to enact comprehensive legislations and relevant rules to protect the interest of project displaced community.

UN Guiding Principles on Internal Displacement

Arbitrary or forced eviction results in gross violation of human rights which are recognized in international law which includes the basic human rights like right to earn livelihood, live in wholesome environment, adequate housing, food, water, health, education, work, security of person and property, freedom from cruel and inhuman treatment and restriction on movement. Thus eviction is permitted only in exceptional circumstances and strictly in compliance with law and procedure prescribed in international human rights and humanitarian law. Forced eviction affects the poorest, most socially and economically vulnerable and marginalized sectors of society, especially women, children,

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minorities and indigenous peoples, as it increases social conflicts[2].

As per the present UN guidelines, evictions for development activities includes any evictions conducted for serving 'public purpose' such as large dams, large scale industrial or energy projects or mining; and land acquisition for urban renewals, slum up gradation, housing, city beautification or other land use programs, major international business or sporting events and ostensibly environmental purposes. Eviction may take place without regard for existing human rights and humanitarian standards, like right to livelihood, right to wholesome environment, right to housing etc., The present guidelines on development based eviction recognize various context of development and provides guidelines to states to adopt such measures in order to prevent eviction in violation of international human rights law and standards which do not permit 'forced evictions'. The main object of those guidelines are to help out the states and its agencies to frame and develop their own laws, procedure and policies to prevent forced eviction and to provide effective remedies to those whose human rights are violated at the domestic level.

General obligations

(A) Obligations of states and other concerned

Eviction for development is a big process, which involves many actors to carryout eviction, some propose to do it, some oppose, few may bear the forced eviction, but state has the principal obligation for applying human rights and humanitarian norms, to comply with the binding treaties and general principles of international public law, as provided in the present guidelines. However, it does not absolve the responsibility of other concerned persons including project managers and their executives, international organizations and financial institutions, transnational and other corporations and individual parties like private land owners. States duty under international law includes respect, protect and fulfillment of all human rights and fundamental procedures. States shall perform the duty by refraining from violation of human rights domestically and extraterritorially, ensure within states jurisdiction human rights of others are not violated, and to take preventive and remedial measures upholding human rights and provide assistance to those whose rights have been violated. These obligations are continuous and simultaneous and are not suggestive of a hierarchy of measures.[3]

Even courts are bound to recognize the status of downtrodden. Judges of the court have a duty to redeem their constitutional and international obligations to justice no less to the pavement dweller than to the guest of the five star hotels[4]

(B) Basic Principles of human rights

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2 UN Guiding Principles on Internal Displacement E/CN.4 /1998/53/Add.2.dated 11 Feb. 1998' Available at <http://www.brookings.edu/fp/projects/idp/resources/GPsEng.pdf.> Last visited on 5 dec.. 2019.

3 *Ibid*. Principles 1-4

4 *Randhir Singh v. Union of India* SCC 618, 1982.

As provided in international human rights law every individual has a right to livelihood and adequate housing as component of adequate standard of life. The right to adequate housing and livelihood includes inter-alia, right to protection against arbitrary or unlawful interference with privacy, family, home and legal security of tenure. International law requires the states to ensure the protection against forced evictions and human right to adequate housing and secure tenure without discrimination of any kind on the basis of race, colour, sex, language, religion or basis of political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth or other status.[5]

Right to rehabilitation and resettlement is a recognized right of every individual, group and community which inter alia includes right to alternative livelihood, alternate land of better or equal quality and housing that must satisfy the following criteria for adequacy, viz., accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location and access to essential service such as health and education[6].

In *Olga Tellis and Others v. Bombay Municipal Corporation,*[7] the Hon'ble Supreme Court recognized the rights of slum dwellers. The state government pleaded before the Supreme Court that the pavement dwellers who were censused in 1976 would be given, though not as a condition precedent to their removal, alternate sites within the reasonable distance so that the slum dwellers could attend on their callings. Slum dwellers who were given identity cards and whose dwellings were numbered in 1976 census would be given alternate sites for their settlement. Slums which were in existence for long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for public purposes, in which case alternate sites or accommodation will be provided to them. The 'low income scheme shelter programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and the Slum Up gradation Programme (SUP) under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimize the hardship involved in any eviction, the supreme court directed that the slums, wherever situated will not be removed until one month after the end of the current monsoon season. i.e. until Oct 31, 1985. Thereafter only in accordance with the judgment they are permitted to be removed. Pavement dwellers who are censused or uncensused, will not be removed until the same date viz. Oct 31, 1985-99.

States shall provide effective legal and other appropriate remedy available in the system to such persons whose rights are violated or under the threat of

5 Principle 6, UN Guiding Principles on Internal Displacement E/CN.4 /1998/53/Add.2.dated 11 Feb. 1998'

6 General Comment No. 4 on the right to adequate housing adopted by committee on Economic, Social and Cultural Rights 1991.

7 AIR 180, 1985 SCR Supl. (2) 51.

violation due to forced eviction.States shall refrain from taking any measure which results in better to worse with reference to protection of rights and interests of displaced persons due to forced evictions. States must recognize its international obligation to prohibit forced evictions including arbitrary displacement that results in altering the ethnic, religious or racial composition of the affected population[8].States should develop internal policies and organize activities in accordance with international human rights obligations in pursuit of provisions for internal development assistance.

(C) International state obligations and its implementation

States can permit eviction only under exceptional circumstance, where it has to justify the adverse effect of eviction on internationally recognized human rights. Such inevitable eviction shall fulfil the following requirement (i) authorized by law (ii) an eviction done in accordance with international human rights law (iii) undertake exclusively for public purpose & general welfare[9] (iv) acquired land and eviction shall be reasonable and proportional (v) eviction authorities shall ensure fair and reasonable amount of compensation (vi) and carried out in accordance with the present guidelines. These procedural protections are available to all vulnerable persons, affected individuals and groups irrespective of the fact that they hold title to home, livelihood, and other properties under municipal law.

States shall enact the legislations and policy framework to prohibit evictions contrary to international human right[8] obligations. States shall avoid, to the maximum extent possible, from acquiring the properties like housing, land, livelihood particularly when they do not contribute anything to the enjoyment of human rights. States have to prescribe appropriate civil and criminal remedies against any public or private persons or entity within the jurisdiction that carried out evictions in a manner not fully consistent with applicable law and international human rights standards. States shall ensure that those effective and adequate legal remedies are available all to those who lose their properties, remain vulnerable or unable to defend the forced eviction.[10]

(D) Policies & Strategies against forced eviction

States should adopt appropriate strategies, policies and programmes to the maximum within its means ensuring the effective protection of individuals, groups and communities against the forced eviction and its consequences. The policies strategies and programmes adopted by the states should be subjected to periodical comprehensive review in order to achieve the compatibility with the international human rights norms. By this review states shall strive to remove such provisions which are allowing to sustain existing inequalities that

8 Principles 8-9 UN Guiding Principle on Internal Displacement.

9 UN Guideline on eviction provides that promotion of general welfare means measures taken by governments in consonance with their International Human Rights obligations, particularly guaranteeing the human rights of most vulnerable.

10 Principles 5-6 UN Guidelines on Internal Displacements.

adversely affect women, marginalized and vulnerable groups. If such discriminatory provisions are allowed to continue, they would further contribute to urban or rural marginalized living in poverty.[11]

Speculation in land and real estate are the underlying causes for the forced eviction, hence the states have to take necessary measure to eliminate these causes. The states have to review the regulations relating to land and tenancy market if it is required. It has to intervene to ensure market forces do not increase the vulnerability of low income and marginalized groups to force eviction. In the event of increased prices of land and housing the state should ensure sufficient protection against the physical and economic pressure on residents to leave from housing or lands. Under the rehabilitation and resettlement scheme the priority in allocation of housing and land should be given to the elderly, children and persons with disabilities.

States should initiate to explore strategies that minimize displacement. Further state should make comprehensive and holistic impact assessment prior to commencement of project execution and development based eviction and displacement with the view to protection of human rights of potentially vulnerable persons groups and communities, including protection against forced evictions. Eviction impact assessment includes exploration of alternatives and strategies for minimizing harm. **Procedure prior to evictions**

The planning and development process should involve all those likely to be affected and subjected to following general procedures:[12]

- Appropriate notices should be served upon all potentially affected persons for the consideration of their eviction and public hearings should be arranged on proposed plans and alternatives.
- The authorities should disseminate all relevant information in advance including the land records and comprehensive rehabilitation and resettlement plan specifically to address the interest of vulnerable groups.
- Reasonable time should be given to the general public particularly potentially affected persons to review and comment on the proposed plans and opportunity to file objections against the proposed plans.
- Facilitate legal and technical advise to the affected persons about their rights and options.
- Holding of public hearings that provides opportunities to the affected

11 Special Rapporteur on Housing (2008) 'Re flexionessobrealgunasimplicacionesenmateria de derechoshumanos del Proyecto Hidroeléctrico de La Parota, Estado de Guerrero, México', in HRC, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Addendum, UN doc. A/HRC/7/16/Add.1, 4 March, paras 74-84.

12 Miloon Kothari and Patricia Asquez, Policy dabate; The UN Guidelines on Forced Evictions. Available at <http://devpol.hypotheses.org/965> Last visited on 5 Jan. 2019.

persons and their advocates to challenge the eviction decision and to put forward the alternative demands and proposals and development priorities.

State should find out the possible alternative to eviction. All potentially affected persons, groups and communities including women, children, indigenous people, persons with disabilities and persons who are working for affected people are entitled to get relevant information, full consultation and participation throughout the process of acquisition and entitled to propose and suggest the alternatives to eviction. If at all with reference to proposed alternatives suggested parties are not able to arrive at consensus or amicable settlement an independent body having constitutional authority like court of law, tribunal can intervene to mediate, arbitrate or adjudicate as it deem appropriate. In the process of land acquisition and eviction all affected persons should be given an opportunity to have dialogue and consultation with the acquisition authority by adopting special procedure.[13]

Prior to carryout eviction process the acquisition authorities have to demonstrate and convince the affected persons that it is inevitable and process in consonance with the international human rights law for holding general welfare activities.

Procedure to be followed during eviction

In the process of eviction in order to ensure the compliance with international human rights standards presence of government executives or their representatives on the eviction site is mandatory. These executives or their representatives have to present the formal authorization letter and they have to introduce themselves to the persons going to be evicted.

Neutral observers from regional or international agencies should be allowed to have access on request to the eviction site and observe the process of eviction in order to ensure the transparency and compliance with the international human rights principles.[14] While carrying out the eviction the basic human rights such as right to life, dignity and security shall not be violated, states shall ensure that women and children are not subjected to gender violence and discrimination in the course of eviction. Any lawful use of force by law enforcement authorities must respect the principles of necessity, proportionality and local code of conduct and international human rights standards. Eviction must not take place during religious festivals, school examination, just prior or during elections, inclement weather, at night etc. States and their agencies should ensure protection against direct and indiscriminate attack on the affected persons particularly women and children or arbitrary deprival of property as a result of demolition, arson or other forms

13 Human Rights Centre (2011) Guide to Legal Observing of Forced Evictions (Colchester: University of Essex), available at <http://direitoamoradia.org/wp-> Last visited on 12 March, 2019

14 Para 47, UN Basic Principles and Guidelines on development based evictions and displacement. Available at <www.ohchr.org> Last visited on 2 Feb. 2019.

of deliberate destruction, negligence or any form of collective punishment. Property possession left behind involuntarily should be protected against illegal appropriation, use and possession of property. The government executives should not force the affected persons to demolish their own dwellings & possessions. It should be left to their options though it facilitates the collection of salvages of their houses and other things.[15]

Relief and relocation after eviction

The government or any other person responsible to provide reasonable compensation and sufficient alternative accommodation and restitution when feasible, must do so immediately after eviction except in cases of force majeure (catastrophe). The competent authorities should ensure regardless of the circumstances and without discrimination evicted persons, especially who are unable to provide for themselves, have safe and secure access to;[16]

(a) food, potable water, and sanitation (b) basic shelter and housing (c) appropriate clothing (d) essential medical services (e) livelihood sources (f) fodder for livestock and access to common property resources on which they were depending upon earlier (g) education for children and child care facilities and state should see that other member of the extended family are not separated as a result of eviction.

In *Narmada BachaoAndolan v. Union of India and Others*[17], the Supreme Court held that "it is a matter of great concern that even after half a century of freedom water is not available to all citizens even for their basic drinking necessity violating the human right resolution of UNO and Article 21 of the Indian Constitution".

In *Francis Coralie Mullin v. The Administrator Union Territory of Delhi and Other*[18], the right to shelter was accepted as part of right to life. The court held that "the fundamental right to life which is the most precious human right and which forms the arc of all other right must therefore be interpreted in a broad and expensive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of human person"

States should comply with following criteria in resettlement facility to have compatibility with present UN Guidelines (1998).

(1) The introduced resettlement policy should be consistent with present UN guidelines and internationally recognized human rights principles in place.

(2) Resettlement should be provided in such way human rights of women, children indigenous people and other vulnerable groups are protected including right to property, access to resources and right to livelihood etc.

15 *Ibid.* para 32
16 Principle 18, UN Guidelines on Internal Displacements
17 2000 AIR 3751.
18 AIR 1981 SC 746.

(3) The authority providing resettlement facility is responsible to bear all incidental costs including all resettlement cost,
(4) No affected person, group or community shall suffer detriment to their right to continuous improvement of living conditions at the resettlement centers.
(5) The state shall provide all the necessary amenities, services and economic opportunities as guaranteed while the consent of displaced persons obtained for resettlement scheme.
(6) The traveling expenses between the resettlement center and work place and to have access to essential service should not place burden on budget of low income households;
(7) Resettlement center should not be situated in the polluted land or at the proximity of source of pollution that threaten the right to highest attainable standards of physical and mental health of inhabitants.
(8) The affected persons, groups and community should be given sufficient information regarding states plan, projects and implementation process relating to offered resettlement scheme including information on the purported use of evicted site and its future beneficiaries. While giving such information attention must be paid to indigenous people, minorities, landless labourers, women and children.
(9) The resettlement process should be carried out by involving the affected persons, groups and communities. States should consider and respect the alternatives suggested by the affected persons.
(10) Even after full public hearing if it is found that there is requirement of breathing time to move to resettlement center the affected community should be given at least 90 days' notice prior to the date of resettlement.
(11) Neutral observers both from regional and international level should be allowed to be present ensuring that there is no force, violence or intimidation involve.

Rehabilitation policy must include an emphasized programme for women, children marginalized and vulnerable groups to ensure their equal enjoyment of human rights such as housing, food, water, health, education, work, security of the person and properties, freedom from cruelty, inhuman or degrading treatment and freedom of movement, right to progressive realization of other rights. This should be the responsibility of host communities at the relocation site as well.

Forced evictions – Prescribed remedies

Persons who are subjected, or threatened to forced eviction have the right of appropriate remedy such as opportunity of being heard, access to legal counsel and legal aid, return, restitution, resettlement, rehabilitation and compensation and should comply with all Basic Principles and Guidelines on the Right to Remedy and Reparation for victims of gross violations of international human rights law and humanitarian law.

A. Compensation

When eviction is inevitable and necessary for the promotion of general welfare of the people, the state must provide fair and just compensation for the losses of personal or real property or goods including rights and interests in property. Compensation should be provided for any economically assessable damage as appropriate and proportional to the gravity of the violation and the circumstances of each case, including loss of life or limb. Physical or mental harm, lost opportunities including employment, education and social benefits, material damage and loss of earnings, including loss of earning potential, moral damage and costs required for legal assistance, medicine and medical services and psychological and social services. Costs, compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken the evictee should be compensated with land commensurate in quality, size and value.

Irrespective of the fact that the evicted person holds title over the property or not, entitled to compensation for the loss, salvage and transport of their affected properties such as informal property loss like, slum dwelling, also enables the evicted to claim compensation. Every women and men must be co-beneficiaries of all compensation packages. Single woman and widows should be entitle to their own compensation[19]

B. Restoration and return

Though eviction takes place in pursuance of development and infrastructure projects states seldom allow for restitution and return. When the circumstances allow for restitution and return the states should prioritize these rights of all persons, groups and communities subjected to forced evictions. However, such eviction victims shall not be forced against their will to return to their house, lands or place of origin[20].

When return is possible the concerned state has to provide for adequate resettlement in conformity with the UN guidelines such as financial assistance, provide for voluntary return in safety, security and dignity to homes or habitual places of residence. The responsible state authorities should co-ordinate the reintegration of returned persons and to ensure the full participation of affected persons in the process of return and resettlement special emphasis should be given to women for equal and effective participation in the process of return and resettlement, empowering them to overcome existing household, community, institutional, administrative legal or other gender biases that contribute to exclusion of women[21].

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19 Sections 77-80, RFCTLARR Act 2013 incorporated incompliance of UN Guidelines on Internal Displacement

20 Principle

28 UN Guidelines on Internal Displacements

21 *Ibid, Principle 29*

C. Resettlement and rehabilitation

While giving priority to right to return, certain circumstances such as promotion of general welfare or health, safety and enjoyment of human rights may reconstitute the resettlement of particular persons who are development based victims. Hence such resettlement must be provided in just and equitable manner and in accordance with international human rights principles and standards[22].

Judicial Interpretation

Whatever guidelines provided by the United Nations relating to development based evictions and displacements shall not be interpreted contrary to the recognized international human rights law and standards and even national law and prescribed remedies should not be inconsistent with international human rights norms[23].

It is evident that in recent years increasingly the Civil Society Organisations, NGOs and even independent institutions started using UN Guidelines with the legal mandate to build up their arguments in their affidavits as petitioners or amicus curie. These petitions on the basis of UN Guidelines influenced court judgments and convinced the judges regarding efficacy and value of international hard and soft laws[24].

In *Sudhama Singh and Others v. Government of Delhi and Another*[25]. a writ petition was filed before Delhi High Court seeking its intervention on behalf of Delhi slum dwellers. The petitioners sought for the relief of alternative land in consideration of demolition of their hutments (Juggies). This claim of relief was made on the basis of their human right to adequate housing. S Muralidhar J. in this case used both the provisions of Indian constitutional law and UN Guidelines to uphold the right to adequate housing of slum dwellers particularly, the court by referring to one of the key provisions[26] of UN Guidelines that provides for basic human rights standards for eviction and resettlement.

Similar precedence we see in *Muthurwa case*[27] where Judges could not find national law on eviction procedures and adequate remedies, UN Guidelines were used to design relief.Further, the court in this case called up on Kenya government to model national law for protection of human rights on the basis of UN guideline

Another significant judgment from Kenya High Court sets the precedent regarding resettlement of Kibera slum in Nirobi by keeping the UN Guidelines

22 *Ibid,* Principle 30.
23 *Ibid, para*. 74.
24 Housing and Land Rights Network in India 2013, available at <www.hlrm.org.in.> Last visited on 20 June 2019.
25 HC of Delhi (2010) W.P No. 8904/2009, 7735/2007, 7317/2009.
26 UNHRC Special rapporteur on Right to adequate housing, 2005 report, para, 35.
27 *The Muthurwa Right to Housing Case*: Progressive realization of Economic and Social Rights? Available at < https:// kituochasheris.wordpress.com> visited on 15 May 2019.

as the basis for resolving adequate housing issue of slum dwellers. Judge GV Odunga states in his judgments that UN Guidelines on evictions should be seen as a part of Kenyan Law[28].

As a significant milestone in developing legal framework the Mexican Supreme Court issued a 'Protocol' in 2014 intended to use it as reference material by the judges while adjudicating cases on large infrastructure, mining and other large development projects result in violation of basic human rights. The protocol uses the UN Guidelines to justify its provisions. This wide attention means that the protocol could have significant impact on the cases which are disposed and pending before the Mexican Courts on rural or urban construction projects.[29]

Conclusion

The United Nations being a prominent international organization has evolved many soft law instruments to check the phenomenon of land grabbing at the national and international level. The member nations of United Nations, community based Civil Society Organisations and independent institutions are increasingly using some strategies to apply these instruments. No doubt these UN norms have made a significant difference in the quantity of land expropriated and in reducing the number of persons displaced from their homes and lands. Nevertheless we need to identify and analyse many obstacles that are hindering the implementation of these norms.

On the other hand we see increased dependence of non-governmental organizations and Civil Society groups on UN soft law instruments or guidelines to frame their demands around the globe, the recognition of international human rights law and states obligation to implement them has become inevitable. Thus the actual requirement is to devise a means in association with local and national civil society groups,' independent institutions, UN bodies and governments at all levels to enable more rigorous application of internationally recognized human rights norms through laws, policies and administrative actions.

28 Some facts and Stats about Kibera, Kenya, available at <www.kibera.org.uk/facts-info>Last visited, 18 May 2019.

29 New Mexico court Rulings shows potential to transform judicial response to displacement, available at <www.mitdisplacement.org/ new page-36/> Last visited 20 June. 2017

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I Prakash Kanive, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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Sd
Prakash Kanive

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