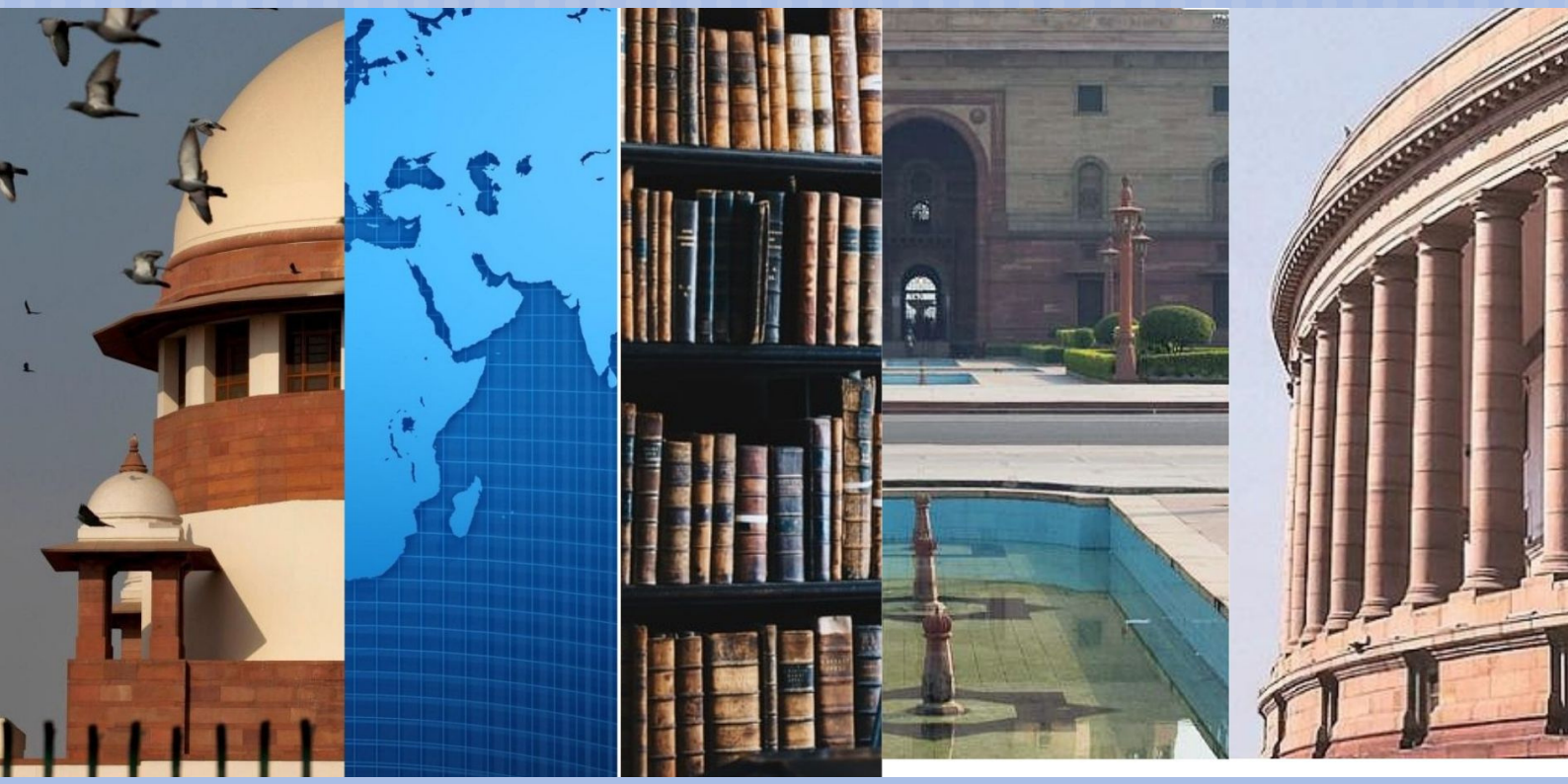
Journal of Global Research & Analysis

A Multi Disciplinary Referred Research Journal

RNI-HARENG/2012/59126 ISSN: 2278-6775



EDITED BY

Dr. Subhash Kumar

Volume 8 (2) December 2019

Journal of Global Research & Analysis

[A Bi-Annual (June & December)
Multi-Disciplinary Referred Research Journal]

editorjgra@geeta.edu.in **RNI-HARENG/2012/59126** **ISSN: 2278-6775**

Journal Website: https://www.geetalawcollege.in/academics/list-of-journals/

OWNED BY

K.R. Education Society, 547, Sector -11 (HUDA), Panipat, Haryana

Published by Nishant Bansal (On Behalf of) K.R. Education Society, Panipat**.**
Address of Publisher – H.No. 547, Sector -11 (HUDA), Panipat, Haryana, **Printed By –** Jitender Nandal**, Address of Printer** – Nandal Enterprises, Printing #39, 1st Floor, Kissan Bhawan, Assandh Road, Panipat, 132103 (Haryana). **Owned By** K.R. Education Society, 547, Sector 11 (HUDA), Panipat, Haryana, **Editor –** Dr. Subhash Kumar, **Place of Publication** - K.R. Education Society, 547, Sector -11 (HUDA), Panipat, Haryana, India.

Annual Subscription-Rs. 1000/- **Single Copy- Rs. 500/-**

Bank Draft drawn in favour of K.R. Society and Payable at Panipat may be sent to the following address: The Editor (Dr. Subhash Kumar) Journal of Global Research & Analysis, Geeta Institute of Law, Karhans, Samalkha, Panipat- 132103 (Haryana).

DISCLAIMER

JOURNAL OF GLOBAL RESEARCH AND ANALYSIS

Journal of Global Research & Analysis (JGRA) is a peer reviewed "A Bi-Annual Multi-Disciplinary Refereed Research Journal" (Print) in English for the enhancement of research published by Geeta Institute of Law (GIL) under the aegis of K. R. Education Society, Panipat.

The editors, publishers and printers do not own any responsibility for the views expressed by the contributors and for the errors, if any, in the information contained in the Journal and the author shall be solely responsible for the same.

TABLE OF CONTENTS

1. Rawls Theory of Justice and Reservation in India: An Analysis in Light of Justice Rendered

Samiksha Mathur……**1**

2. E-Commerce & Taxation: Challenges and Reforms

Sonakshi Kashyap……**14**

3. Right to Free and Compulsory Education for Children: Issues and Challenges in Indian Context

Neelam & Nitan Sharma……**28**

4. Social and Digital Exclusion of Individuals with respect to Assam NRC

Aastha Sharma……**41**

5. Explicating Bilateral Investment Treaties

Aakriti Srivastava……**51**

6. The Necessity of Mediation in India

Abhishek Chauhan & Arpit Parakh……**63**

7. The Doctrine of Legitimate Expectations: India should inspire from the WTO

Anmol Jain……**75**

8. One Nation One Election: Constitutional Conundrum and Reality

Gaurav Shukla……**85**

9. From Sabarimala to Barpeta Sattra: A Constitutional Perusal of Entrenched Discrimination In Light of Sabarimala Judgment

Raajdwip Vardhan & Susmit Isfaq……**96**

10. UN Guiding Principles regarding Violation of Right to Clean and Healthy Environment: A Major Step Forward or a Big Stride Backwards?

Raj Shekhar & Harsh Mishra……**107**

11. Making India an 'Arbitration Hub': Issues and Implications in Light of the Arbitration and Conciliation (Amendment) Act, 2019

Shubhangi Komal……**122**

12. Two Child Policy: A Pragmatic Goal in India

Sobha Sagnika Panda & Seemon Snigdha Jena……**134**

13. Human Rights of Prisoners: A Domestic & International Law Perspective

Sandeep Saini & Chinky Nanda……**146**

RAWLS THEORY OF JUSTICE AND RESERVATION IN INDIA: AN ANALYSIS IN LIGHT OF JUSTICE RENDERED

Samiksha Mathur

Teaching Associate, Jurisedge

ABSTRACT

To ensure justice in any system is difficult and controversial. It requires the agency to look from all angles and incorporate interests of all people. Rawls made important contribution to concept of justice by incorporating principles of liberty and equality. In the Indian scenario there have been major inequalities prevailing which led to enactment of reservation policy to ensure justice to minority sections. It is rather pertinent to see if Indian idea of reservation is based on Rawls theory of justice and whether its application has helped in achieving greater equalities. The theme of this paper is to see the nexus between John Rawls theory of justice and policy of reservation in India. It will also delve into criticism surrounding this issue and suggests appropriate recommendations to deal with them. The research shall in a holistic manner address and link the issue of caste, power and justice in contemporary India.

1. INTRODUCTION

"*We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty*".

-Dr. B.R. Ambedkar[1]

Philosophers all over the world have debated over the meaning of justice and means to ensure it. Justice is a goal which all societies from the time immemorial have tried to achieve. Jurists have

[1] B R Ambedkar, "*Speech at the Constituent Assembly of India*", Indian National Congress, (Nov 25.1949), https://www.inc.in/en/media/speech/speech-at-the-constituent-assembly-of-india.

discussed the idea of justice in different lights for instance Buddha, Confucious and Aristotle associated virtue significant in determining justice. For Kant, Michael Sandel it was morals which hold importance to determine the perils of justice. Rawls rather had a political inclination while talking of justice and Bentham limited justice to utility. Amartya Sen contributed by deviating from Rawls utopian concept to rather a real one, to remove inequality, was his motto rather than creating massive ideals.[2]

Justice is also often associated with ideals of liberty and equality. Liberty and equality play an instrumental role to implement justice in a society. They are the means to the end of justice. Coming to the concept of equality, it has its roots in the natural law theory if we look into Aristotle's distributive justice it requires equal treatment to be given to those who are equal before law. Inequalities in the twenty first century are a rampant area of concern which is addressed both at national and international levels. There have been growing inequalities in light of gender, economic status, race, religion, and caste. To minimize the plight of adversely affected a framework is needed to enhance their capabilities and ensure greater equalities. One of the measures taken by states to deal with problem of inequality is in form of affirmative actions or quotas. This is a measure by which special treatment is given to the minority sections so that they can develop themselves and come at an equal platform to engage with those who are in majority.[3]

India has a long much debated love and hate relationship with reservation policy. The idea was initially to accommodate the interest of those sections of society discriminated for a long time. To ensure inclusive growth and just treatment to those who are born in communities who have been socially outcasted due to caste inequalities. The current research will entail to look into the backing of reservation policy in India in theory of Justice as propounded by John Rawls. It will also analyze whether this theory has helped in minimizing inequalities in contemporary scenario.

2. JOHN RAWLS THEORY OF JUSTICE

[2] Surendra Bhandari, *The Ancient and Modern thinking about Justice: An appraisal of positive paradigm and influence of international law*, Annual Review of International Studies, 1-41 (2014).
[3]Sasheej Hegde, *The Many 'Truths' of Reservation Quotas in India: Extending the Engagement*, 43 Social Scientist. 64, 61-104 (2015).

Rawls theory of justice is chiefly based on fairness. He firmly stated justice to be equal to fairness. Rawls conception of justice has made significant contribution to meaning of justice which further helped in broadening the horizons thereby carving out principles to help in eradication of unjust system.[4] The theory is more political than legal. According to his idea a good society is one which runs on the basis of justice as it is the virtue for social institution. He with his theory attempted to propose a doctrine which can be established as basic structure of society.[5]

Rawls explains the significance of justice as it is important for assigning rights and duties in the society and also to allocate the gains and burdens for the same. His observation speaks about the disparities which are existing and visible in society, a perfectly just society is rare and does not really exist. In most of the societies what is just and unjust are disputed. He insists that for a society to be just, it is important for it to address problems associated with efficiency, coordination, and stability.[6] In his philosophical writings, John Rawls has placed importance on the concept of equality which can further help in ensuring justice. In his book, a theory of Justice, the first half establishes a hypothetical situation in which individuals are unaware of their social position in the society i.e. veil of ignorance which helps them to distribute the gains and burdens equally and efficiently. The second half the book tries to implement the same principle of veil of ignorance in contemporary institutions to ensure greater justice. The writing shows that he wanted to propound a theory which could deal with growing differences existing in the society and which was not addressed by other philosophers at that time.[7]

The two most important principles laid down by Rawls in his writings are first that each person should have equal liberty in comparison to all other persons and second that social and economic positions should be open i.e. equality of opportunity and must be beneficial to all especially to least advantageous members of society. Thereforethe first principle mandates that everyone has "an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all." The second dictates that inequalities in "social and economic" goods

[4] Vinit Haskar, *Rawls theory of Justice, Analysis,* 32 Oxford University Press on behalf of The Analysis Committee.150, 149-153 (1972).
[5] Dick Arneson, *John Rawls theory of Justice* (2008).
[6] Norman E. Bowie, *Some comments on Rawls' Theory of Justice*, 3 Social Theory and Practice, 65-74 (1974).
[7] M K Vyas, *Concept of Justice, Utilitarianism and Modern Approaches,* 35 &36 Banaras Law Journals, 104-113 (2006-07).

must arranged "to the greatest benefit of the least advantaged" members of society (the "difference principle"), while being "attached to offices and positions open to all under conditions of fair equality of opportunity."[8]If both of these principles are efficiently incorporated in a system it would serve justice to full capacity.

Rawls belonged to group of believers of social contract theory deviates from the view of his contemporary placing great importance on justice and equality. He formulated a hypothetical scenario in which people are unaware of their positions in society having zero idea about their class, social status or their fortune or intelligence and like. He argues in this very scenario justice will finds its place behind the veil of ignorance. It is this veil which will bind people together and promote justice without any biasness.[9] Ignorance of these basic attributes about oneself will lead towards ethos of fairness. In absence of knowledge of their existence and privileges a new system will bloom which is fair to all. In this scenario those who are from the least well off strata's of society will reap a lot thereby equality being established to full extent. By this hypothetical situation he wishes to establish the idea of fairness eradicating inequalities.

The two principles provide that each person is to have equal right to have elaborate scheme of equal basic liberties in consonance with similar scheme of liberties for others. These liberties basically comprise of political liberties like right to vote, freedom of speech, freedom to hold property, freedom from arbitrary arrest and so on. This principle forms the basis to ensure justice in a society, it is of supreme importance. Coming to the second principle it concentrates on ensuring social and economic equality.[10] According to Rawls, social and economic equalities are to be arranged in a fashion that the offices and are open to all, there is equality of opportunities and it favors the least advantageous members of the society, thereby establishing the difference principle. In that way the society can fully become equal and just. This principle basically highlights that there should be equality of opportunities in public sphere but there can be slight deviance from it for the purpose of incorporating interests of marginally weaker section which in

[8]David Schaefer, "*A Theory of Justice" by John Rawls*, Arc Digital, https://arcdigital.media/a-theory-of-justice-by-john-rawls-e71ea5df44f2.
[9] Thomas M. Scanlon, Jr., *Rawls' Theory of Justice*, 121 University of Pennsylvania Law Review 1022, 1020-1069 (1973).
[10] Joseph heath, *Rawls on global justice: a defense*, 31 Canadian Journal of philosophy, 193-226 (2005).

turn will lead to equality. According to Rawls if interest of least advantageous groups is taken care off it will lead to greater equalities.[11]

Therefore from the observation of the law of justice as propounded by Rawls it can be said that fairness is not just equal distribution of offices and positions merely on basis of merit but also require representation from those belonging to socio economic weaker sections. Equality is not just everyone to be treated equally but may also require some support to be given to those belonging to disadvantageous sections so that they can be brought to same level as of others. Rawlsian justice allows giving certain benefits to disadvantageous groups for the purpose of bringing them at position to those who are from the well off backgrounds.[12]

3. CASTE BASED RESERVATION IN INDIA

The long prevailing history of untouchability and social hierarchy led to creation of reservation policy for upliftment of those who were discriminated. In the post independenceera the law making body of the country realized of the great existing disparities in the society which required urgent attention to ensure peaceful existence of people. The framers of Constitution with a vision to ensure greater equality inserted the policy of reservation which is India's conception of affirmative action.[13] The reservation policy focused its attention to those belonging to socially and educationally weaker sections of society and allowing them to participate in mainstream positions. Initially this policy was restricted to promotion of interest of Scheduled Castes and Scheduled Tribes but later other backward classes were also incorporated under the umbrella.[14]

The preamble of Constitution clearly establishes chief principles of liberty, justice and equality which the constitution aims to achieve and promote. Article 14 forms the bedrock of equality and is the Magna Carta for protecting equality of all.[15] In the similar light Article 15 and Article 16 were enacted which enunciate reservation of seats for appointment and promotion for the

[11]JOHN RAWLS, A THEORY OF JUSTICE 150-161 (Oxford University Press 1973).
[12] Thomas W Pogge, *The incoherence between Rawl's theories of justice*, 72, Fordhum Law Review, 1739-1759 (2004).
[13]The History, Rationale and Critical Analysis of *Reservations* under the Constitution of India, India Law Journal, https://www.indialawjournal.org/archives/volume3/issue_2/article_by_rushminsunny.html.
[14] Satish K. Sharma, *Reservation Policy in India: Exclusion in Inclusion*, Social Exclusion in India: Perspectives and Issues, 75-92 (2014).
[15] Article 14 Constitution of India, Right to equality-The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

representation of backward classes of the society.[16] Special provisions can be created for reservation of seats for the purpose of advancement of those who are socially and educationally backward and scheduled castes and tribes.

The first committee to look into the matter of reservation was Kaka Kalekar Committee in the year 1955 which observed that there are in total 2,399 backward castes and communities in the country out of which 837 belong to most backward category. It further observed that women also belong to backward category. It suggested for reservation in government and local bodies for those belonging to backward classes. Another important committee employed to look into status of reservation was Mandal Commission under the chairmanship of B.P. Mandal in the year 1979. The commission looked into social, economical and educational indicators to determine backwardness. The commission in its report created the idea of other backward classes which compromise of 51 percent of the population. It recommended for reservation 27 per cent of seats for other backward classes. This category consists of both hindu and non hindu minorities.[17] Later in the case of *Indira Swahney v Union of India*[18], the judiciary realized the need to remove creamy layer in order to avoid misuse of this policy by those who are well off. The judgment also made an important inference that reservation can only be made at the time of entry and cannot be sought for promotion. However this was challenged in *M Nagraj & others v Union of India*[19] the court observed that the provisions under Article 16(4) are merely enabling and if there is proof of backwardness reservation can be made in promotions as well. There have been contradictions and controversies from the time of inception of this policy. [20]

4. RESERVATION FOR ECONOMICALLY WEAKER SECTION

A monumental development in Indian reservation policy took place with 103rd Amendment Act 2019, which empowered the state to permit 10 per cent reservation to economically weaker sections (EWS). With this he existing scheme of reservation has increased to 59.50%.[21]While

[16] Sunil Kumar Jangir, *Reservation Policy and Indian Constitution in India*, IASIR.
[17]K.C.Suri, *Caste Reservations in India : Policy and Politics*, 55, IJPS,37-54 (Jan- Mar 1994) 54.
[18]Indira Sawhney & Ors v. Union of India, AIR 1993 SC 477.
[19] M. Nagaraj v. Union of India, (2006) 8 SCC 212: AIR 2007 SC 71.
[20]Sameer Pandit, *M. Nagraj v Union of India: Legal & theoretical reflections*, 49 No. 2 Journal of the Indian Law Institute, 249-259 (2007).
[21] K Ashok Vardhan Reddy, *Can the Ten per cent Quota for Economically Weaker Sections Survive Judicial Scrutiny?*, The Hindu, Mar 06, 2019.

seen as a welcoming step by many the judiciary seemed to be at odds with the latest development. The jurisprudence behind it remains that it will impeach the basic structure and surpasses the pre determined "50 per cent ceiling". The amendment came into effect on January 14, 2019, amending Article 15 & Article 16 of Indian Constitution. Two new clauses have been inserted to provide a maximum of 10 per cent reservation to EWS.

Article 15(6) empower state to make any "special provision" for reservation in admission to educational institutions including with private institutes , whether aided or unaided. Article 16(6) permits reservation in appointment or posts under the state for economically weaker sections. The people falling under the category of economically weaker section will be notified by the state based on family income and other indicators of economic disadvantage.[22] As per the memorandum of Ministry of Social Justice and Empowerment, Government of India stipulated that persons whose families have a gross annual income less than Rs.8 lakhs, or agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in notified Municipalities, or residential plots less than 200 sq. yards in areas other than notified Municipalities, are to be identified as EWS for the benefit of reservation.[23]

The Supreme Court has often held that the sole criterion for reservation cannot be purely economic backwardness. Reservation policy in India is not an anti povertyprogramme rather it is policy to ensure representation of underrepresented classes. But in view of this criticism legislature has acted by amending the provisions of Constitution and allowing reservation to economically weaker sections, thereby nullifying the earlier provisions.

5. NEXUS BETWEEN RAWLS THEORY OF JUSTICE & RESERVATION POLICY IN INDIA

The most controversial area of Indian Constitution is affirmative action. There has been long debate over its efficacy and need in the society. Initially the policy was restricted to a particular

[22] Explanation to Article 15 Constitution of India.
[23] Reddy, *Supra* note 21.

time but with passage of time it became well incorporated and difficult to challenge even after years.[24]

The concept of affirmative action has not just stirred debate in constitutional aspects but also jurisprudential aspect. Each school of jurisprudence has their own set of arguments to support or reject affirmative action. Justice being an important element in all legal system, how it can be employed has been more difficult. Rawls has long advocated the need and importance of justice, his theory of justice is popular throughout the world. Justice can be served with fairness, equality and non discrimination. In this light it is important to study the nexus between India's caste based reservations and newly incorporated Economically Weaker Sections and John Rawls theory of Justice. For the purpose of studying the theme of current paper it is important to study whether policy of reservation has been inspired from theory of Justice as propounded by Rawls and whether the model produced by Rawls can actually be implemented in a legal system.

John Rawls in his theory of justice has well stated that the public offices and positions should not just be open to all but all should have an equal opportunity to avail them. In the sense equality of opportunity is not enough what is also required is that who are belonging to least advantageous section should be given fair chance to become a part of it. Thereby formal equality is not enough but rather a more inclusive approach has to be taken to ensure representation from all sections of the society. In circumstance of non inclusion of disadvantageous groups would depict injustice even when it was not apparent to be done. Even in absence of direct discrimination it can be seen that certain sections of society have been excluded due to their social, economical or educational disadvantaged positions. Due to belonging to disadvantaged groups it can also be seen that these sections do not aspire to hold important beaurocratic positions as they consider it unachievable.[25] They would not be motivated and work towards achieving prestigious positions due to their backwardness. This attitude will lead to injustice of distribution. From a social point of view inadequate representation of a particular group in prestigious positions is indicative of injustice.

The Indian legislative and judiciary has realized such a situation of injustice and in similar lines have come up with policy of reservation. To uphold the values enunciated in Preamble in form

[24] Ira Chadha-Sridhar & Sachi Shah, *Caste and Justice in the Rawlsian Theoretical Framework: Dilemmas on the creamy layer and reservations in promotions,* 10 NUJS Law Review 2, 171-207 (2017).
[25]Ajendra Srivastava, *Reverse discrimination in favour of other backward classes: some reflections*, Banaras Hindu University.

ideals of justice, liberty and equality, the framers have incorporated Article 14, 15 and 16 to ensure justice. Reserving seats in education and jobs is a way to reduce long embedded inequalities in the society. Moreover post Mandal Commission it was again realized there is large section of society which is under represented i.e. other backward classes. There was a wide disparity among sections of society which was apparent. Due to cultural differences there was also difference in preference in terms of career and education, members belonging to backward classes rarely dared to dream of being part of prestigious institutions and positions. This prevented people from disadvantaged sections of society to go up the ladder in terms of education. There seemed both inequalities in status and power which was a reflection of injustice prevailing in the system.[26] To combat inequalities the Indian legislature has often resorted to policy of quota, fixation of quota being dependent on social and educational backwardness. The main aim behind providing special protection is to bring the disadvantaged groups in forefront. The idea of justice followed by Indian judiciary and legislature to promote equality is to treat equals equally and improve the conditions of downtrodden sections.

In similar light to meet contemporary challenges and criticism from all corners the legislature with came up with 103 Amendment Act, 2019 introducing reservation based on economic criteria. It classified people belonging to EWS to avail benefits of reservation and upto 10 per cent quota to be allowed in education and jobs to this new category identified by state.

After analyzing Rawls concept of justice, caste based reservation and newly introduced reservation for economically weaker section in India it is quite evident the Indian legislature have resorted to second principle of justice as propounded by Rawls. This difference principle has motivated the legislatures to enact policies which benefit the least advantaged group and access to important offices and positions are not restricted only to well off people. Rawls theory of justice totally backs the policy of affirmative action in India.

6. RESERVATION IN LIGHT OF EQUALITY & JUSTICE IN CONTEMPORARY INDIA

[26] Rochana Bajpai, *Rhetoric as argument: Social Justice & Affirmative Action in India*, 44, no.4, Cambridge University Press, 675-708 (2010).

India being a welfare state has long argued in favour of reservation to create inclusive state by incorporating minority interests. The caste hierarchies have seen a long battle asking for diminishing inequalities which are prevailing. To accommodate socially and educationally backward people in mainstream professions and government positions by way of quota was considered as an obvious choice at the time of enacting the Constitution. Growing inequalities is always a threat to state which ultimately question their justice mechanism.[27] To imbibe interests of diverse sections reservations was put into force to ensure greater equality and justice to weaker sections of society. This policy of Indian state can be evidently traced and backed by the theory of justice given by Rawls. India has incorporated the difference principle by ensuring justice to least advantaged sections of society by way of reservation.[28]

Now when we analyze this policy of reservation and how far it is able to achieve the goal of greater equality the picture is rather tinted. The initially idea of creation of inclusive society and addressing problems of those who were discriminated long in history due their caste hierarchies was noble. But eventually as we move forward the initial vision to create an egalitarian society seem to be lost somewhere. It is not reservation which is bad per se but it is the idea of its execution which is questionable.[29] It is not just social, educational and economic inequalities which we need to take into consideration at this point of time, there has been other inequalities which also needs to be taken into account. Also apart from social, educational and economic disparities there are also other sections of people who are suffering great inequalities like transgender and LGBT community. Their concerns are often ignored suppressing their interests leading to another set of inequalities. Also the policy of reservation is now moving towards merely a political vote bank and not for creating greater equalities. This makes the current reservation policy flawed requiring a radical rethinking.[30] Also if look into the theory of justice propounded by Rawls it is important to see that it talks about rather an utopian concept of justice which is difficult to apply in reality. The idea is fair but its application rather difficult. As Amartya Sen has rightly pointed out that the justice in transcendental institutionalism as

[27] P S Krishnan, *Quotas are for justice and not to plug holes*, Indian Express, Jan 3, 2017.
[28] Manu Mishra and & Udita Malviya, *Distributive Justice & Its Relevance in Contemporary Times*, Manupatra Articles, http://docs.manupatra.in/newsline/articles/Upload/5F79FD56-36E8-490F-A9D6-7DC60A0AD828.Paper.pdf.
[29]Neera Chandhoke, *Social Justice and Reservation Scheme*, The Hindu, Aug 16, 2004.
[30] Satish Deshpande, *Reservations are not just about quotas*, The Hindu, May 23, 2016.

contested by Rawls is actually not possible looking at the diversities and therefore it is better to focus on removal of inequalities rather than creating high justice ideals.[31]

Moreover the concept of veil of ignorance to achieve justice is mere hypothetical it is difficult to apply so as we look into various aspects for better understanding of situations. The judiciary and legislature while deciding disadvantaged sections of society look into various aspects which cannot be done behind veil of ignorance. So certain concepts laid down by Rawls are flawed, which before applying in any system need to be evaluated in the light of current developments. Another area of concern which makes the picture of caste based reservation blurry is the questions how long will this policy continue. Even after seventy years of independence we have not achieved what we aimed to achieve in initial ten years of independence. In fact the number of people has increased who fall within the reserved categories. Does this indicate we are moving backwards? Also are we unable to fight with growing inequalities? This clearly shows that reservation instead of reducing inequalities has created a new set of inequalities. The benefit of reservation is often taken by those who are already well off thereby hampering the entire purpose of special privileges. This has created a gulf in administration of justice in the country. Also it has led to driving away the talents of the country to other nations as important positions and institutions have quota which make it inaccessible for deserving candidates. Thereby justice is not actually been done as those who have capabilities are not able to enter important positions leading to feeling of dissatisfaction amongst them.[32] The entire discussion reservation in India is a vicious cycle because it starts with inequalities and ends with it too.

7. CONCLUSION

The researcher in this research paper has analyzed the basis of reservation policy in India and its jurisprudential compatibility with Rawls model of justice. After analysis it is evident that Indian model of reservation is supported by Rawls difference principle. It focuses on equality of opportunities in offices and positions by taking special care of least advantaged members of

[31]Vinit Haskar, *supra* note 4 at 3.
[32]Quleen Kaur Bijral, *Affirmative Action: the System of Reservations and Quotas in India*, The logical Indian, https://thelogicalindian.com/story-feed/awareness/affirmative-action-the-system-of-reservations-and-quotas-in-india/.

society. It addresses problems associated with social and economic inequalities and methods to remove them. In similar lines legislature of India came up with policy of reservation to accommodate interests of socially and educationally backward classes and remove old age discrimination against certain sections of society mainly dalits. A new category of Economically Weaker Section has been introduced in reservation system to include economic criteria and safeguarding interest of poor and downtrodden. Therefore it can be concluded that India's policy of reservation is in complete consonance with Rawls theory of justice.

Another issue addressed by researcher is whether reservation has helped in reducing inequalities and enhancing justice. The recent inclusion of EWS category has received both applauds and censure form various corners of society. Though the step is not bad per se but increasing the reservation to over "50 per cent ceiling" is detrimental to the economy and would lead to a new set of inequalities, thereby brushing off the talented lot In the contemporary times if we see there are not just social, educational and economic minorities which exist in a state there are other sections which are facing grave inequalities like transgender and LGBT community. These minorities have not been recognized by state leading to gulf of inequalities. Also there is no data which shows that post reservation inequalities have reduced, on the contrary a new set of inequalities have arisen as those who are capable are unable to represent themselves in important positions and offices. There is brain drain from the country due to not getting what is due to them.

In the light of current discussion it can be seen that there is nexus between Rawlsian idea of justice and reservation policy in India. The argument put forth by Rawls to ensure justice to least advantaged group is based on same premise under which India grants reservation to minorities. Hence, it can be said India's reservation policy is based on Rawlsian concept of Justice. Moreover it can be concluded that despite reservation there has been no significant reduction in discrimination and inequalities in the current society.

Also the researcher would like to comment that reservation is not a bad policy per se but it is important to revisit the roots and enact a policy which not just takes social, educational and economic backwardness into account but also other aspects like position of transgender and other minority communities. Reservation should be granted on fairer terms with an aim to make an inclusive society with a vision of development of all its members. Therefore it is high time for

legislature to recognize its duty to ensure welfare of all members and granting reservation to those who are actually in need of it rather than those who are already uplifted.

E-COMMERCE & TAXATION: CHALLENGES AND REFORMS

Sonakshi Kashyap

Assistant Professor of Law, Trinity Institute of Professional Studies, New Delhi

ABSTRACT

We have witnessed a shift from traditional markets to online markets in the 21st century. E-commerce businesses have bloomed and show high potential for growth in the near future as internet reaches to more and more people. This expected business growth comes with expected increase in profits of online businesses. Hence, there is a need to tax e-commerce businesses. However, e-commerce businesses unlike traditional businesses, do not operate in a physical space but in a virtual space. Therefore, taxation of e-commerce poses various challenges for tax authorities, as to whether permanent establishment or sales should form nexus for taxation?; or whether a particular income can be characterized as business profits or royalty or technical fees?; or whether use of consumer data is significant in establishing nexus for taxation? etc. To resolve these challenges, the Organization for Economic Cooperation and Development (OECD), had released a Base Erosion and Profit Shifting (BEPS) report. Action Plan 1 of the report deals with the challenges posed in taxation of digital economy, and suggests the alternatives of significant economic presence, final withholding tax, or equilization levy which can be adopted by countries in order to tax e-commerce businesses. The Indian legislature has adopted the alternative of 'Equilization Levy' suggested by OECD to tax e-commerce activities in India. Recently, OECD released 'Unified Approach' proposal to tax digital businesses by shifting nexus from permanent establishment to sales. Since, e-commerce businesses operate on a global scale, international consensus is crucial so that inter-national equity and, effectiveness and fairness in taxation can be maintained.

1. INTRODUCTION

In today's world, traditional markets have been replaced by digital markets. The internet streamlines our daily lives, every major activity, whether its communication, travel, work or shopping etc. is done digitally. The internet has given birth to electronic commerce. We have evolved from a 'brick & motor economy' to a 'click & order economy'. E-commerce in simple

words is buying and selling of products and amenities over the internet. The Organization for Economic Cooperation and Development (OECD), defines e-commerce transactions as "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders." [1]Several examples of online transactions may include- shopping applications like- amazon or ebay, subscription based applications like- Netflix or Hotstar, food delivery applications like- swiggy or zomato, online cab services on Uber or Ola, and many more.

The major factor distinguishing e-commerce from traditional commerce is the entry of the digital element and elimination of the physical element. Unlike traditional businesses which had an actual tangible presence, the e-commerce businesses operate in a virtual space. Hence, income tax authorities often fail to claim jurisdiction to tax e-commerce transactions. This paper, discusses the need, challenges and reforms pertaining to the taxation of commercial transactions over the internet.

2. NEED FOR TAXATION

The necessity to tax e-commerce activities can be explained through the underlining reasons-

2.1. Accelerating Growth in E-commerce Transactions

According to a recent report[2], electronic commerce is expected to grow "from USD 24 billion in 2017 to USD 84 billion in 2021". The reasons behind such tremendous growth are the expected increases in- internet users, online shoppers, m-commerce sales etc. Governments, anywhere in the world, especially in developing countries depend largely on tax revenues to run their countries. In such a scenario, acknowledging the rate at which e-commerce transactions are expected to grow in near future, they cannot be allowed to go untaxed, thereby leading to major revenue loss for governments.

2.2. Fundamental Conditions of Taxation

[1]*Glossary of Statistical Terms*, OECD (Nov. 5, 2019, 10:30 AM), https://stats.oecd.org/glossary/detail.asp?ID=4721.
[2] *Unravelling the Indian Consumer*, DELOITTE (Nov. 5, 2019, 02:35 PM), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/consumer-business/Unravelling%20the%20Indian%20Consumer_web.pdf.

OECD has laid down certain core principles[3] of taxation to guide the taxation authorities. These are, the principles of neutrality, simplicity & certainty, effectiveness & fairness, efficiency, flexibility, and equity. These principles accentuate the need for e-commerce taxation, in particular they are essential to avoid-

2.2.1. Discrimination Between Digital And Traditional Forms Of Business

If e-commerce transactions remain untaxed, it would be unfair to tax traditional businesses as well. Taxation rules cannot be allowed to discriminate between different forms of business (neutrality principle) on the grounds of difficulty in tax collection. If such discrimination is allowed, traditional businesses would vanish.

2.2.2. Discrimination Between Foreign And Domestic E-commerce Firms

Also, foreign e-commerce platforms have an advantage over domestic e-commerce platforms, as they may escape taxation due to lack of physical presence. This may lead to domestic firms shifting base to low tax jurisdictions or being consumed by foreign firms. Hence, it poses great threat to growth of India's digital economy. The Committee on Taxation of E-commerce[4] (hereinafter referred to as 'the committee') had observed that this "can lead to fiscal constraints for Government which may need to be compensated by additional tax burden on local tax residents, which may further erode their competitiveness, thereby creating a vicious downward cycle." E-commerce has created most problems for developing nations, as most of the e-commerce firms are incorporated in developed nations, while they sell their services to people and businesses in developing countries. Therefore, non-taxation of e-commerce activities furthers the divide between developed and developing economies.

2.2.3. Discrimination between Rich & Poor

"People who make purchases through the internet are, on average, more affluent."[5] The reason behind the same is that they have access to modern technology, knowledge of the same as well as

[3] A Borderless World: Realizing the Potential of Electronic Commerce, Committee on Fiscal Affairs, OECD Ministerial Conference, 4 (1998).
[4] Proposal for Equalization Levy on Specified Services, Committee on Taxation of E-Commerce, CBDT, DOR, MOF, GOI (2016).
[5] Richard Jones & Subhajit Basu, *Taxation of Electronic Commerce: A Developing Problem*, 16 Int. Rev Law Comput Tech 35, 40-41 (2002).

financial capacity to pay for purchases online. Contrary to this people in the low income strata cannot afford the apparatus necessary for online transactions. Due to the rise in online sales and the inability of the governments to tax them, they tend to meet their resource needs by increasing consumption taxes and hence leaving the lower income households high and dry. These higher taxes in turn encourage rich people to again opt for online shopping, thereby creating a vicious circle entangling the poor.

3. CHALLENGES IN TAXATION OF E-COMMERCE TRANSACTIONS

Earlier, businesses operated within the national boundaries of respective countries, and hence were taxed by the sovereign authorities of those countries. However, with the rise of globalization, national boundaries were blurred, and businesses started operating internationally. Global businesses posed challenges of double taxation as the residence as well as source country both claimed to tax their transactions. To overcome double taxation, countries started entering into double taxation avoidance agreements. With further development, e-commerce sprouted. While earlier global businesses feared double taxation, e-commerce businesses pose the challenge of double non-taxation (due to lack of jurisdiction) for taxation authorities. The various challenges in application of existing taxation regimes to e-commerce transactions have been discussed hereunder-

3.1. Lack of Physical Presence

E-commerce operates in virtual space, and hence the question of jurisdiction remains the root problem in taxation of online transactions. Taxation authorities face difficulty in creating nexus between a specific location and the generation of income.

3.1.1. Permanent Establishment (PE) Issues

As per Article 5 of OECDs Model Convention on Taxation- "the term **permanent establishment** means a **fixed place of business** through which the business of an enterprise is wholly or partly carried on." The requirement of a fixed place was made at a time when the thought of conducting businesses online was not plausible to the policy makers. E-commerce businesses can operate without any physical presence; therefore it is not tenable to apply existing physical establishment rules to e-commerce. For example, nowadays contracts can be concluded

over the internet without physical requirements of agents or employees, intangible goods like software can be delivered digitally, customers can make digital payments etc.

Hence, to clear doubts regarding Permanent Establishment Rules with regard to e-commerce activities, OECD released the following clarifications[6]-

(i) Website- According to OECD, "an Internet web site, which is a combination of software and electronic data, does not in itself constitute tangible property."[7] Therefore, website by itself does not give jurisdiction to tax.

According to the Indian Income Tax Act[8] (hereinafter referred to as the 'IT Act'), a company can be taxed if it is either incorporated[9] or has "effective place of management"[10] in India, and in case of a non-resident company if it has business connection in India[11]. In ***ITO v. Rights Florists Pvt. Ltd***.[12], Rights Florists an Indian firm sought to deduct from its total income, payments made to Google and Yahoo for online advertisements. The Income Tax Appellate Tribunal (ITAT) disallowed the deductions, holding that payment for online advertisement constituted business profits, and since neither Google nor Yahoo had physical establishments in India their incomes were not taxable in India. It was observed that-

> *"even though the conventional PE test does not find high relevance in the virtual world, the requirement of physical presence still stands as the basic test…..Websites cannot be said to have physical presence on the internet, and are supposed to have it where the place of effective management and their tangible servers lie."*

Also, due to lack of business connection of the firms in India, the tribunal held against deductions.

(ii) Internet Service Provider (ISP)- Business websites are hosted on servers operated by ISPs, in lieu of payment by the business enterprises. However, this does not confer any control over the server to the business enterprise. Hence, in such a case the location of server does not constitute permanent establishment of the enterprise. However, if the server is at the disposal

[6] Clarification on the Application of Permanent Establishment Definition in E-commerce, OECD Committee on Fiscal Affairs (2002).
[7] *id*. at 5
[8] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India).
[9] 43 IT Act § 6(3)(i) (1961).
[10] 43 IT Act § 6(3)(ii) (1961).
[11] 43 IT Act § 9(1)(i) (1961).
[12] ITO v. Rights Florists Pvt. Ltd., 143 ITD 445 Kol. 2013 (India).

of the enterprise (owner/lessee), the location of server will constitute permanent establishment of the enterprise. But, for this purpose, "a server will need to be located at a certain place for a sufficient period of time so as to become fixed."[13] Also, it would not constitute a PE if functions performed on server are preparatory & auxiliary in nature such as- communication links, collection of market data, advertising, information supply, mirror servers etc.

Recent case laws also suggest that PE rules have been diluted in the United States (US). Earlier the US Supreme Court[14] had held that payment to out of state mail-order company was not taxable by the state of sale because physical presence was essential to maintain balance in inter-state commerce. The Supreme Court in 2018 overruled the above ruling in ***South Dakota v. Wayfair Inc.***[15], wherein it was held that sale of goods or services in a state in itself created sufficient nexus to the state in which they are consummated, therefore conferring jurisdiction on the state to tax those sales.

3.1.2. Attribution Of Income

"Residence based taxation" requires tax to be imposed in the country of residence, whereas "Source Based taxation" requires that tax on income ought to be collected by the authorities of the country in which the income generates. However, both the basis of taxation poses problems in case of taxation of e-commerce activities. As far as source based taxation is concerned, there is no certainty as to the source of online businesses as they operate over the internet and do not require actual presence. On the other hand, if residence based taxation is used to tax internet sales, e-commerce enterprises strategically shift their bases to tax havens. Such challenges demand changes in existing rules of taxation.

3.1.3. Tax Avoidance And Tax Havens

E-commerce has posed another challenge for taxation authorities, wherein firms manipulate tax laws in order to avoid payment of taxes. Online firms often try to shift their profits to countries with lower rates of taxation, known as tax havens, thereby saving huge profits for themselves and creating huge revenue losses for the countries of their actual operations. Two major

[13] *ibid.*
[14] Quill Corp. v. North Dakota, 504 U.S. 288, 1992.
[15] South Dakota v. Wayfair Inc., 585 U.S. 2018.

examples, of tax manipulation by MNEs can be of Apple and Google.[16] Apple Inc., a USA based MNE, maneuvered multiple offshore agreements to shift its profits from USA to Ireland to save billion of dollars of tax as the corporate tax rate in Ireland was as low as 2%.

Similar is the case of Google, which transferred its Intellectual Property Rights for the region of Europe, Middle East and Africa (EMEA) to Ireland Holdings Limited (IHL). It further granted rights to manage royalties earned in EMEA countries to another subsidiary Google Ireland Limited (GIL). These payments were taxed @ 12.5% in the Ireland, whereas the effective rate in the US was 35%.

3.2. Characterization of Income

Characterization of income is very essential to establish the incidence of tax. For instance, in India according to the IT Act, only royalty income[17] and fees for technical services[18] is taxable for non-residents and business profits are not taxable unless a foreign firm has a "permanent establishment" in India. The categorization of payments is very difficult to analyze in case of online services as they differ in nature from offline services. Also, there is no uniformity between different countries as to how they characterize different incomes. While OECDs Technical Advisory Group in its report gives a restricted scope of incomes that can be classified as royalty or payments for technical services, India's High Power Committee (HPC) advocates a much broader interpretation of the same. India differs in categorization of 13 out of 28 categories of incomes analyzed by OECDs TAG group.

In ***Ebay International Ag v. DDIT, Mumbai***[19],listing fees charged by an online platform was held to be business profits and not fees for technical services. Similarly in another case[20], payment for e-banner advertisement was held not to be royalty but business profits. This is because uploading of such advertisement does not confer any rights in the equipments of the service provider to the assessee company.

[16]DR. GIRISH AHUJA & DR. RAVI GUPTA, DIRECT TAX LAWS AND INTERNATIONAL TAXATION 1651-1652 (36th ed. 2018).
[17] 43 IT Act § 9(1)(vi)(c) (1961).
[18] 43 IT Act § 9(1)(vii)(c) (1961).
[19]Ebay International Ag v. DDIT, Mumbai, TS T34 ITAT 2012 (Mum. Tribunal) (India).
[20] Yahoo India Pvt. Ltd. v. DCIT, (2011) 059 DTR 0001 (Mum. Tribunal) (India).

In ***Google India Pvt. Ltd. v. ACIT***[21], Google India was granted distribution rights of Google Adwords program by Google Ireland Limited (GIL), and Google India failed to minus the Tax Deductible at Source (TDS) from remissions made to GIL. The assesses argued that the payments were not taxable, as it was a mere reseller of advertising services in India and had no control over any softwares. However, the tribunal held that the payments constituted royalty, for the reason that the Adwords program did not merely provide advertising space to customers, rather it used various patented tools and softwares to collect consumer data such as age, income, gender, region etc. in order to target the advertisements to specific consumers.

However, the judgement was criticized as such differentiation between online and offline businesses put online businesses to a disadvantage. Therefore, this judgement further necessitated formulation of rules for taxation of e-commerce services.

3.3. Consumers Contribution to Business Profitability-

Consumer data collected through direct surveys or through information on social media, browsing activity etc. of consumers, help digital businesses to target their potential consumers more precisely and hence increase business profits. Therefore, consumer data adds value to e-commerce businesses. The question for income tax authorities is that whether such contribution by remote consumers to a digital platform create any nexus for taxation purposes. According to the Committee-

> *"the presence of users of a digital or telecommunication network in a multi-dimensional business model signifies value creation and economic participation in that tax jurisdiction, and should give rise to the threshold nexus for taxing that enterprise in that jurisdiction, particularly, when such user contribution is relied upon for earning income from that jurisdiction."*[22]

At the same time, the committee recognized the challenges in quantifying such value creation.

4. REFORMS IN TAXATION OF E-COMMERCE TRANSACTIONS

[21]Google India Pvt. Ltd. v. ACIT, ITA No. 949 & 950/ Bang/ 2017 (India).
[22]*Supra* note 5 at 54.

As discussed above, the rules of taxation applicable to traditional businesses fail when it comes to taxation of e-commerce activities. Therefore, several reforms in taxation laws took place both at the national and international levels.

4.1. International Scenario

OECD issued a 15 Action Plan under its Base Erosion and Profit Shifting (BEPS) initiative on 5th October, 2015 to deal with challenges posed to international taxation by companies which avoided tax payments by undertaking crafty tax inversions and shifting base to low tax jurisdictions.Action Plan 1 tackles the concerns associated with taxation of digital economy by suggesting the following alternatives that can be adopted by different countries to tax e-commerce transactions-

(i) Significant presence rule- If an e-commerce enterprise has sufficient digital presence in a country, it should be deemed to constitute a 'Permanent Establishment' in that country. However, the problem with such a rule is what amount of activity can be considered to establish significant presence of a digital firm. Secondly, how such presence would be established poses a problem as multiple factors such as users data, use of local platforms, modes of payment, local domain names etc. need to be considered. Thirdly, adoption of this rule would entail great deal of amendments in existing laws and tax treaties which will require consensus amongst governments regarding attribution of income, which is difficult to achieve.

(ii) Final withholding tax- Countries have the option to impose final withholding tax on payments to non-resident e-commerce enterprises for digital sales of goods and services. Such tax can be deducted by the payers in case of Business to Business (B2B) transactions, however, it is not feasible to collect such taxes in case of Business to Consumer (B2C) transactions even if intermediaries are required to deduct the tax because in cases where intermediaries and consumers are not in the same jurisdiction the intermediaries may fail to do so.[23] Another issue with this option is that it will also require amendments in tax treaties which have precedence over domestic laws.

[23] Address the challenges of the Digital Economy to existing international tax rule, BEPS Report on Action Plan 1, OECD, 296-297 (2015).

(iii) Equalization levy- Imposition of an independent levy i.e. equalization levy on gross payments made to non-resident e-commerce enterprises for digital transactions by in-country customers and users. Since, such levy is not a tax on income, it does not require amendments in existing tax treaties, giving it an edge over other alternatives suggested by the OECD.

Recently, the OECD had released a 'Unified Approach' proposal which seeks to shift the standard of taxation from physical presence to sales. It will involve determination of a revenue threshold to establish the jurisdiction to tax. The questions regarding rate of taxation, profit reallocation etc. requires political agreement through open consultation process, which the OECD expects to reach by 2020-21.

4.2. National Scenario

4.2.1. Finance Act, 2016

The High Power Committee, 1998 under the chairmanship of Shri. Kawaljeeth Singh had recommended a low withholding tax on e-commerce transactions, which did not formulate into any law. India introduced the concept of 'Equalization Levy' in the Finance Act, 2016[24] (hereinafter referred to as 'the Act') in order to tax digital transactions on the basis of suggestion made by the committee. The intention behind such levy was to eliminate the discrepancies that existed in our taxation systems. The objectives of such levy as stated by the committee were-

(i) To ensure tax neutrality between traditional and digital business forms as well as between resident and non-resident e-commerce players. "In particular, this levy seeks to bring the foreign enterprises that earn significant income from a jurisdiction that erodes its tax base."[25]

(ii) It aimed at "greater clarity, certainty and predictability in respect of characterization of payments for digital services and consequent tax liabilities, to all stakeholders, so as to minimize costs of compliance and administration and minimize tax disputes in these matters."[26]

The imposition of equalization levy according to the committee's report should be restricted to payments for intangible services[27] and only for B2B transactions and not B2C transactions[28].

[24] The Finance Act, 2016, No. 28, Acts of Parliament, 2016 (India).
[25] *Supra* note 5 at 75.
[26] *Supra* note 5 at 84.
[27] *Supra* note 5 at 87.

Consequent to the recommendations, Chapter VIII was added to the Finance Act, 2016-

(i) Services covered- **Section 165** of the Act is the charging section which provides that equalization levy shall be charged @ 6% on payments made "for any **specified service** received or receivable by a person, being a non-resident from— (i) a person resident in India and carrying on business or profession; or (ii) a non-resident having a permanent establishment in India."

'Specified Service' has been defined under the Act[29], to mean- "online advertisement, any provision for digital advertising space or any other facility or service for the purpose of online advertisement and includes any other service as may be notified by the Central Government in this behalf." Hence, Central government has been given great power to include any kind of activity within the ambit of specified services. According to **Section 164 (f)** "online means a facility or service or right or benefit or access that is obtained through the internet or any other form of digital or telecommunication network."

(ii) Exceptions- Certain exceptions[30] from imposition of equalization levy are applicable if a foreign service provider has a PE in India & there is connection between the PE and the service provided; in cases if the aggregate payments in a previous year fall below the threshold of rupees one lakh; or if the payments are not for carrying out commercial activities (i.e. business or profession) but for personal consumption.

(iii) Collection of levy- Contrary to the general rules which require the person receiving the payment to pay the tax, in case of equalization levy, the assessee who makes payment for specified services under section 164 has an obligation to deduct equalization levy on such payments[31] and deposit the same with Central government by the 7th of the month next to in which the levy is deducted.[32] The assessee remain liable to pay such amount with central government even if they fail to deduct the same from service provider.[33]

(iv) Penalties- Any delay beyond period specified in section 166 in deposit of the equalization levy or part of it with the central government invites an extra interest @1% p.m. for the period of delay.[34]

---

[28] *Supra* note 5 at 90.
[29] 28 Finance Act § 164(i) (2016).
[30] 28 Finance Act §165(2) (2016).
[31] 28 Finance Act §166(1) (2016).
[32] 28 Finance Act § 166(2) (2016).
[33] 28 Finance Act §166(3) (2016).
[34] 28 Finance Act § 170 (2016).

Further, penalties for failure to deduct equalization levy have been provided under **Section171** to be equal to the amount of levy that has to be paid in addition to the levy and any interests due under section 170. Further, if an assessee deducts the amount however fails to deposit the same according to sec 166(2), the assessee is liable to pay the equalization levy plus interest under sec 170 and also "a penalty of one thousand rupees for every day during which the failure continues, so, however, that the penalty under this clause shall not exceed the amount of equalization levy that he failed to pay."[35]

The committee had also recognized the need to avoid double taxation of transactions as independent levy and also under the income tax act, and therefore the following amendments were made in the IT Act, 1961-

Incomes that have been subject to equalization levy under chap VIII of the Finance Act,2016, have been exempted from inclusion in total income of the service provider for taxation purposes.[36] Further, **Section 40 (a)(ib)** of the IT Act, disallows deduction from total income of "any consideration paid or payable to a non-resident for a specified service on which equalization levy is deductible but has not been deducted or after deduction, has not been paid on or before the due date." The proviso states that in case the levy is paid or deducted & paid after due date, it can be reduced from the total income of the year of payment.

In cases where the equalization levy is applicable but not paid, it is mandatory to obtain a certificate under section 197 of IT Act.

There are some loopholes in the implementation of equalization levy[37], as there is no clarity as to whether foreign tax credit[38] would be available to firms for equalization levy that has been already paid in India. Also, there is uncertainty as to whether subsidiaries in India could deduct amounts spent on promotional activities by their foreign holding companies. Furthermore, the imposition of equalization levy may turn out to be harmful for small & medium enterprises who rely on services such as advertising of foreign e-commerce enterprises, because these enterprises may increase the price of their services in order to cover the costs of the levy. Hence, the exemption of specified services below aggregate amount of rupees 1 lakh from equalization levy is criticized on account of low threshold where it comes with expected increase in prices of

[35] 28 Finance Act § 171(ii) (2016).
[36] 43 IT Act § 10(50) (1961).
[37] Ayush Vijavargiya, *Equilization Levy: Taxing the overseas giants*, 3 IJTL 25, 40-41 (2016).
[38] *Supra* note 5 at 101.

services. The nature of equalization levy also remains under clouds of doubt as some argue it to be income tax, whereas others argue that it is an independent levy.

4.2.2. Finance Act, 2018[39]

The Finance Act, 2018 added Explanation 2A to Section 9, broadening the concept of "Business Connection". The explanation provides that "significant economic presence of a non-resident in India amounts to business connection." This means that if an non-resident carries on "transaction in respect of any goods, services or property including provision of download of data or software in India"[40] above prescribed amounts; or engages in "systematic and continuous soliciting of business activities or interaction with such number of users as may be prescribed, in India through digital means"[41], such activities amount to "significant economic presence" whether or not agreements are entered or services are rendered in India or non-resident has residence or place of business in India.

Such a broad definition would bring a lot of e-commerce transactions within the ambit of taxation in India. However, caution is required as the same transactions may also be taxable in other countries.

4.2.3. Goods & Services Tax (GST)

Goods and Services Tax (GST) was introduced in India in 2017 by 101st Constitution Amendment Ac. The GST Act has provisions for taxation of e-commerce transactions. **Section 2** of the Central Goods and Services Tax (CGST) Act[42], defines "electronic commerce" as "the supply of goods or services or both, including digital products over digital or electronic network"[43]; and "electronic commerce operator" as "any person who owns, operates or manages digital or electronic facility or platform for electronic commerce"[44].

[39] The Finance Act, 2018, No. 13, Acts of Parliament, 2018 (India).
[40] 13 Finance Act § 4(II)(a) (2018).
[41] 13 Finance Act § 4(II)(b) (2018).
[42] Central Goods and Services Tax Act, 2017, No. 12, Acts of Parliament, 2017 (India).
[43] 12 CGST Act § 2(44) (2017).
[44] 12 CGST Act § 2(45) (2017).

The Act requires compulsory registration of electronic commerce operators, and persons supplying online data to residents in India.[45] However, registration is not required if total sales fall below the threshold of rupees 20 lakh.[46]

In case of direct sales by seller through online mode, simple GST filing is required, whereas in case of sale through e-commerce operator on commission basis, Tax collectable at source (TCS) @ 1% of the sale amount is deductible.[47] This can be later claimed by the seller during its GST filing. GST covers within its ambit online e-commerce platforms, like- flipkart & amazon, which charge listing fees from the sellers or work on commission basis; it also is applicable on online aggregators like- Uber, and on Online Information and Database Retrieval services etc.

5. CONCLUSION

Taxation is an important source of revenue for governments, and therefore it is essential to tax e-commerce businesses which are expected to grow at an exponential rate in near future. Several reforms have been undertaken to streamline existing laws and introduce new concepts (like- equalization levy) in order to tax e-commerce transactions. However, multiple regimes like- GST and equalization levy as well as wide definitions (of royalty, business connection etc.) under IT act, may lead to over taxation of online businesses. Hence, the need of the hour is emergence of global consensus on taxation of digital transactions (which the OECD aims to achieve by 2020), and accordingly framing of the national legislations.

[45] 12 CGST Act § 24 (2017).
[46] Notification No. 65/2017- Central Tax , CBEC, DOR, MOF, GOI (Nov. 15, 2017).
[47] 12 CGST Act § 52 (2017).

RIGHT TO FREE AND COMULSORY EDUCATION FOR CHILDREN: ISSUES AND CHALLENGES IN INDIAN CONTEXT

Neelam

Research Scholar, UILS, Chandigarh University, Chandigarh

&

Nitan Sharma

Research Scholar, Department of Law, Jammu University, Jammu

ABSTRACT

Education in the Indian constitution is concurrent issue the act lays down specific responsibilities for the centre state and legislative the results showed that in male and female adults, whether they are residents of rural or urban area the awareness about Right to Education was low. Results of the present study pointed towards the fulfillment and unfulfilment of RTE of various objectives of Right to Education. Subsequently it might be proposed that the mindful individuals must work for making mindfulness about Right to instruction. Mindfulness programs like Lectures, Awareness camps, Seminars, etc**.**

1. INTRODUCTION

"Every child when born brings with the hope that god is not yet disappointed with man'' stated Rabindra Nath Tagore. The words itself acknowledge the fact that all children represent the most fundamental and sacrosanct resource of any society. But most regrettably being vulnerable in nature they are often subjected to various kinds of exploitation. It is important to mention here that our constitutional edifice is built on the values of equality and non –discrimination by providing opportunity to all irrespective of any differences on the basis of caste, creed, sex, religion, language and culture.

Although people from all walks of life enjoy full fundamental freedoms and rights still a significant part of the multitude is illiterate and lives below the poverty line. The single most powerful tool for the upliftment and progress of such diverse communities is education.

It ensures empowerment of an individual and achieves special importance when its beneficiary belongs to vulnerable section of the society i.e., Children. Access to education is every child's Human Right and every State's responsibility because it is through education that child learns to acquire the knowledge necessary to become a responsible citizen of his country.[1] Additionally, most of the human rights can only be accessed through education which operates as a multiplier enhancing the enjoyment of all individual rights and freedoms.[2]

If recent statistics and studies are to be believed then 32 million Indian Children of age up to 13 years have never been to any school.[3] It is sufficient to portray the implementation dimension of Right to Education Act, 2009 that obligates appropriate government to provide free elementary education and ensure compulsory admission, attendance and completion of elementary education to every child in the six to fourteen age group. When it comes to quality education, the Annual Status of Education Report (ASER) and several other studies reveal that more than 50 percent of class 5 students cannot even read basic text or solve a basic arithmetic problem.[4] Norms and standards relating to pupil teacher ratios (PTRs), buildings and infrastructure, school-working days, teacher-working hours, trained and educated teachers have seldom been realized till date. In 2018, Oxfam India analyzed the nine year progress of the Right to Education Act since its enactment in 2009. The observations highlighted significant lack of allocation of resources to education in general and elementary schools. This was far from satisfactory and needed immediate amends in order to improve overall learning outcomes of children.[5] Some reports even hinted towards this fact that with the current rate of progress to ensure effective implementation of the RTE Act, it will take India 87 years to make every school compliant with its very minimalistic quality norms as mandated under aforesaid legislation.[6] The basis of quality education entails inclusion and equity, and it's imperative to reach out to disadvantaged sections through inclusive policies and programmes. No doubt the government has also rolled down

[1] Right to free and compulsory education to children has also been recognised as a basic human right in Article 26 of Universal Declaration of Human Rights, 1948 and in Article 13(2)(a) of International Covenant on Economic, Social and Cultural Rights, 1966.

[2]KartarinaTomasevski, The Right to Education – A Discussion Source: International Development Cooperation Agency http://www.sida.org. (last visited on February 27, 2020).

[3]According to the report of the National Sample Survey Office (NSSO), 32 million Indian Children of age upto 13 years have never attended any school, the majority of them belonging to the socially disadvantaged Class (2014).

[4]ASER Education Report, 2018.

[5] Available at www.oxfanindia.org/blog/10-things-rte. (last visited on February 27, 2020).

[6] Status of Implementation of The Right of Children to Free and Compulsory Education, 2009: A Draft Report Card (2014-2019), *available at*: rteforumindia.org (last visited on February 27, 2020).

number of schemes[7] to make right to education a livable reality for all sections but it would not be wrong to say that there is still a gap between theory and practice.

It is important at this juncture to identify various barriers that are responsible for lack of access to free and compulsory education for children in contemporary milieu. With this object in mind, the researchers intend to analyze and evaluate the right of children to free and compulsory education in Indian context and thus help in identifying various issues and challenges that needs to be addressed on priority basis to strengthen the prospects of education among children across vast socio-economic landscape.

2. RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION IN INDIA- LEGISLATIVE JOURNEY

Our constitutional makers were aware of the fact that for the success of a democratic system of government, education is one of the essential prerequisite. Thus, a duty was enjoined upon the State under Article 45[8] to provide free and compulsory education to all children until they complete the age of 14 years within 10 years of the commencement of the Constitution. It implies that the said directive needs to be implemented by the end of January 1960. But the State could not keep the time limit for its implementation, as during the year 1960-61 only 62.40% of the children of 6-11 age group and 22.5% of the 11-14 age groups were going to a school. Such state of affairs made government of India to formulate its First National Policy on Education in 1968 that called for fulfilling compulsory education for all children up to the age of 14 and the better training and qualification of teachers. It also called for education spending to increase to six percent of the national income. Most notably, the adoption of National Policy for Children, 1974 was the first policy document concerning the needs and rights of children. The main provision of the policy comprises the obligation on the part of the State to provide the free and compulsory education to the children and the program of informal education in the pre-school education. With the constitutional amendment in 1976, the Education has been placed under the concurrent list due to which it becomes the responsibility of the state and Centre both to deal with education system. After that there was Second National Policy on Education which came in

[7]Samagra Shiksha, Mid Day Meal, Scheme to Provide Quality Education in Madrasas (SPQEM), Scheme for Infrastructure Development in Minority Institutes (IDMI).
[8] Before the enforcement of the Constitution (Eighty-Sixth Amendment), Act, 2002.

1986 that covers all aspects of education from elementary to university level and even adult education. It was renewed in the year 1992. The policy directly deals with children between the age group of 0-18. Recognizing the impact of early years to the development of a child the policy makes room for early childhood care and education through the integrated Child Development programme. With regard to elementary education the policy makes three very important commitments: universal access and enrolment, universal retention of children up to age 14, and improvement in the quality of education. The policy states *'it shall be ensured that free and compulsory education of satisfactory quality is provided to all children upto 14 years of age before we enter the twenty-first century.*'[9]

It is important to mention that the first official recommendation for the inclusion of a fundamental right to education was made in 1990 by the Acharya Ramamurti Committee. Thereafter, several political as well as policy level changes influenced the course of free and compulsory education. Our country particularly witnessed an increased international focus on its initiatives regarding free and compulsory education after its participation in the World Conference on Education for All in 1990. India also ratified the United Nations Convention on Rights of the Child in 1992. Further, 73rd and 74th Constitutional Amendment Acts which were enacted in the year 1992 created a paradigm shift in the governance models by invoking decentralization thereby giving the opportunity to the local communities and the institutions in the monitoring of government programs on education. But majority of the interventions by successive governments remained only on papers and hardly informed the realities of time.

In the meantime, it were the initiatives of the Hon'ble Supreme Court of India which, by reading that right to education is a fundamental right under Article 21[10], paved the way for passing of the Constitution (Eighty-Sixth Amendment) Act, 2002 whereby right of children to education was made a fundamental right under Article 21-A.[11] The Court in Mohini Jain v. State of Karnataka held that the 'right to education' is concomitant to fundamental rights enshrined under Part III of the Constitution and that 'every citizen has a right to education under the Constitution'. The court held that a 'right to education' flowed from the enforceable right to life and personal liberty

[9] Dr. Pallvi Pandit, *'Education in India: National policies and regulations'*, International Journal of Applied Research 393-396 (2016).
[10] Mohini Jain v. State of Karnataka, (1992) 3 SCC 666; Unni Krishnan v. State of A.P. and Ors.,(1993) 1 SCC 645.
[11] Article 21-A provides: The State shall provide free and compulsory education to all children of the age six to fourteen years in such a manner as the State may, by law, determine.

guaranteed by Article 21 of the Constitution, since there could be no 'dignified enjoyment of life', or the realization of other rights, without adequate education. Similarly judgment by the Supreme Court in Unnikrishnan case radically transformed the status of Article 45. The Court ruled that Article 45 in Part IV has to be read in harmonious construction with Article 21 in Part III of the Constitution, as Right to life loses its significance without education. However, while declaring the right to education as a fundamental right, it was held that it was not to be construed as an absolute right, and its content was defined by the parameters of Articles 41, 45 and 46 of the Directive Principles. The court further held that the right to education understood in the context of Articles 45and 41 means, in other words, that every child/citizen has a right to free education up to the age of 14 years and thereafter the right would be subject to the limits of the economic capacity of the State.

Following the judgments of the Supreme Court, Article 21-A was inserted by the 86th Amendment to the Constitution that made primary education free for all children in the age group of 6 to 14 years. Further, this amendment has inserted new clauses in Articles 45[12] and 51-A[13] of the Indian Constitution. Pursuant to the above, the Parliament passed the Right of Children to Free and Compulsory Education Act, 2009.

3. FEATURES OF THE RTE ACT, 2009

- It ensures free and compulsory education to all children within the age group of 6 to 14.
- No school fees, capitation fees, charges or expenses are to be paid by a child to get elementary education.
- The appropriate government which means central or state government and its affiliates (local authority) has to provide a school within 1 km walking distance for children in classes I to V and within 3 Kms for those in classes VI to VII. These schools are termed as 'neighbourhood schools'.

[12] Article 45: 'The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.'

[13]Part IV of the Constitution deals with Fundamental Duties from Article 51 A(a) to (j). By the 86th Amendment a new clause has been added in Article 51 A of the Constitution, after clause (j), the following clause shall be added, namely: "(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six to fourteen years."

- The Child or his parents are not to be subjected to any screening procedure for admission to school.
- Special training provision for a child of above six years not been admitted to any school or, unable to continue studies, to bring him par with his class and to be admitted in an age appropriate class. In such cases, the child can continue beyond 14 years to complete his/her elementary education.
- 25 percent of the seats in private schools are reserved for RTE Students which are funded by the government. The Centre and the State share the joint responsibility to provide funds for RTE execution.
- Central Government has the responsibility to prepare National Academic Curriculum, teacher training manuals, capacity building and technical support to the states for the promotion of the RTE.
- The State Government has to ensure the development of course of study, admission of children, teaching staff, infrastructure development of schools, completion of education of children up to the age of 14 and inclusion of children from marginalized and disadvantaged section of the society.
- It is the duty of every parent to admit their children or ward to school and to ensure that they receive elementary education.
- Teachers in the schools have to ensure their regular attendance, completion of curriculum within the specific time, assessing the ability of the child and prescribe special attention if need be, conduct the parent-teacher meeting to appraise overall development of the child.
- There should be one teacher for every 30 students for the class I to V and one teacher for every thirty-five students for class VI to VIII.
- It also provides for prohibition of deployment of teachers for non-educational work, other than decennial census, elections to local authority, state legislatures and parliament, and disaster relief.
- It focuses on making the child free of fear, trauma and anxiety through a system of child friendly and child centred learning.

It is important to mention here that RTE Act has successfully managed to increase enrolment rate in the upper primary level (Class 6-8). More than 3.3 million students secured admission

under 25 % quota norm under RTE. Stricter infrastructure norms have also resulted in improved school infrastructure, especially in rural areas. Moreover, removal of 'no detention policy' by way of amendment in the Act in 2019 has brought accountability in the elementary education system.

Despite such salutary provisions, one can find a number of issues and challenges when it comes to implement the right to free and compulsory education for children in letter and spirit.

4. ISSUES AND CHALLENGES

4.1 Key Anomalies within the RTE Act:

- A closer look at the provisions of the Right to Education Act highlights the major anomalies in the landmark law. It is worrying that the authors of the Act have not visualized the long term consequences of the revolutionary provision of providing 25% reservation to children from the weaker sections. The first big unanswered question relates to the fate of children from the weaker sections after they complete their free elementary education in the elite schools. Predictably, these children will have to leave these schools and slips back to schools of questionable standards, which is bound to be psychologically traumatic. Even while receiving education they are exposed to different living standard. Will they be treated with dignity and equality by their peers and teachers? Will it not be traumatic for the poor kids to cope with that?
- Secondly, on age criteria, the act allows only children in the age group of 6-14 to claim the benefits. It leaves out 0-6 years and 14-18 years despite India has signed the U.N. Charter which states clearly that free education should be made compulsory to children of 0-18 years old.
- The teachers are the kingpin of entire education system and it is this factor on which lies the onerous responsibility of ensuring the effective implementation of RTE Act and given today's complex environment, the diversity and complexity of backgrounds from which students enter in the schools today, this responsibility increases in magnitude. Research shows that teacher qualification, preparation of teaching and learning, content

knowledge, and experience, are important factors contributing towards teacher effectiveness.[14]

- Despite the enactment of the Right to Free and Compulsory Education, 2009 which guarantees free and compulsory education, several schools are charging capitation fees for education in pre-primary. They are also interviewing parents and/or children. There have been complaints from parents saying that several schools took their interview and asked questions about their family income, vehicles they owned, income certificates etc. Several schools have even demanded donations at the time of admission for the pre-primary admission.
- it's a strange irony that while on the one hand the government wants to provide quality education to all children, across all barriers, on the other hand it recognizes four kinds of schools under the Right to Education Act, viz., Government Schools, Government-aided Schools, Special Schools recognized by the government such as kendriya vidyalayas, navodaya vidyalaya and sainik schools. There are others at the state level too. With such a variety of schools, it is only natural that quality of education varies. Once again it boils down to the rich being able to afford better quality education and the poor having to compromise with something inferior.
- The fees of the children will be borne by state government. The fee will be reimbursed at government rate. There will be a wide gap between the cost of education per child and the reimbursement by the government. There comes the question of who will bear this deficit burden? Further, there are certain overhead expenses such as uniform, books, stationary, etc. required for attending a private school. The Chances are high that the parents themselves would feel intimidated at the thought of sending their kids to private schools.
- To encourage parent and broader community participation in school monitoring and decision-making the Act makes provision for schools to form a School Management Committee with at least 75% of parents of children in the school of which fifty percent are to be mothers. SMCs are empowered to monitor the performance of schools and the use of government grants, to prepare school development plans and to fulfill other

[14] Darling-Hammond, L. Powerful Teacher Education: Lessons from Exemplary Programs. San Francisco: John Wiley and Sons (2006).

functions prescribed by State governments. It has often been observed that parents are not interested in coming to school because for them coming to school simply means losing a day's salary. So provision of SMC does not have any meaning for these schools where children are first generation learners and where parents are daily wage manual labourers. On the other hand, studies show[15]that communities can have a positive impact on school effectiveness. Whatever research is available on community engagement show that communities active role in school improvement often leads to many positive outcomes including improved student achievement. When school involve families in positive ways, rather than labeling them as problems, such schools can easily be transformed from places where only some students flourish to one where all children do well.

- The right to Education act 2009 is totallyagainst the Corporal punishment but still Indian schools uses corporal punishment and it is against the human right based approach to Education. Along with this it is not only restricted to schools alone, it can be pain caused by parents at home or any other violent action intended to discipline children or to punish them.

4.2. Correlation with other Child related Crimes:

Poor access to education cannot be attributed to any sole reason like poverty as commonly understood rather they are associated with number of other social realities prevalent in Indian societies. Child Labour, Child Marriage, Child Trafficking, Child victims of domestic violence and Child Sexual abuse are the potential barrier that either leads to the denial of education or reduced learning outcomes among children.

Childhood is considered to be the age of learning, playing and enjoying. It is the crucial age to make the base of the future education. The latest Census report (2011) reveals that child marriage is still rampant in our country. Around 33.8 million child marriages were reported for girls aged less than 18 and boys below 21 years. According to a UNICEF report (2014), one in three of all child marriages globally take place in India and rates are highest among the poorest and most socially disadvantaged. Association between education and early marriage is likely

[15] Family, School and Community Connections: Improving Student Learning, IOWA School Boards Foundation, 1(6) 1-6 (2007).

bidirectional.[16] A big determinant of the age of marriage is education. Around 45% of women with no education and 40% with primary education married before the age of 18, according to NFHS-4. This decreases with higher education attainment. A study revealed that one year increase in a girl's education can delay her marriage by 0.4 years.[17] Access to safe, affordable and good quality education, empowerment of women and girls, influencing public opinion to promote behavior change and consistent laws and strict enforcement are the key drivers that can bring about change in child marriage and in the attitudes and beliefs that underlie the practice.

Our country has a very high incidence of child trafficking despite existence of stringent laws and rules to contain it. As many as one child disappears every eight minutes, and the number of children who went missing and remain untraced has increased by almost 84% between 2013 and 2015.[18] Trafficking destroys children's lives and ends their education. Most disquieting aspect of this problem is that vast majority of trafficked children are girls and they are deprived of an education and trapped in a life of poverty and slavery.[19]

Domestic violence in homes also has direct bearing on learning outcomes of children. Pattern of abusive and coercive behaviour of intimate partners by using, physical, sexual and psychological attacks reduced academic progress and increased disruptive or unfocused classroom behaviour for children, adolescents, and teenagers. Children from dysfunctional families are less likely to function successfully at school.[20]

In India, every other day some or the other child in any of the schools across the country becomes a victim of sexual abuse. It can affect the normal development of a child impairing their mental, physical, and social being. The statistics are simply shocking. A study by Noble Laureate

---

[16] Lee-Rife S, Malhotra A, Warner A, Glinski AM. What works to prevent child marriage: A review of the evidence. Stud Fam Plan. 2012: 287-303.

[17] The persistence of child marriages in India – Livemint, available at: https://www.lvemint.com (last visited on March 9, 2020).

[18] International Missing Children's Day: A child goes missing every 8 minutes in India, available at: https://www.indiatoday.in./amp/fyi/story/international-missing-childrens-day-a-child-goes-missing-every-8-minutes-in-india (last visited on March 9, 2020).

[19]Trafficking destroys children's lives and ends their education, available at: https://theirworld.org/news//child-trafficking-destroys-lives-and-ends-education (last visited on March 9, 2020).

[20]Valerie McGaha-Garnett 2013. The Effects of Violence on Academic Progress and Classroom Behavior: From a Parent's Perspective. *Ideas and Research You Can Use: VISTAS* retrieved from https://www.counseling.org/docs/default-source/vistas/the-effects-of-violence-on-academic-progress-and-classroom-behavior.pdf?sfvrsn=12

Kailash Satyarthi's Children's foundation depicted the reporting of sexual crimes against children to have increased by 34 percent in the past three years, but the number of investigating agencies or courts have remained the same. Even a study by the National Commission for Protection of Child Rights in 2017 revealed that about 53% of kids surveyed reported to have faced one or the other form of sexual abuse.[21] Given that surveys of sexual crimes often carry the risk of underreporting due to associated stigma, it is possible that actual incidence of the crime is even higher than reported. So the creation of a caring and child-friendly environment in schools is the need of the hour.

Child labour is yet another potent barrier towards the realization of 'Education for All' a liveable reality. While child labour can be an obstacle to education, at the same time education is instrumental in the prevention of child labour. The age which is the initial stage for getting formal education is spent working as shoe- shine boys, working on shops, rag-pickers and are even found begging. And it is evident to say that most of the children are bonded into labour being forced either by their parents or due to lose of parents. In this regard Children are known to drop out of school and accompany their parents by earning money in one and another way. At this juncture, the role of law enforcement authorities becomes critical to contain this practice. However, the statistics shows otherwise. Between 2015 and 2018, authorities were able to attain conviction in only 25 percent of the cases where a violation of the Child labour act was recorded. In February 2019, a study revealed that 10,826 cases of violation of the child labour act were reported across the country in the past four years. Of these, only 56 % cases (6,032) went to the stage of prosecution. [22]

4.3. Coordination between various implementing agencies:

Every other day we see children working at roadside restaurants, in people's home and in hazardous establishments. To pick these children up and put them in schools is a herculean task. To begin with, rescue of child labourers and punishing the employer is the work of the Labour Ministry and the police. The responsibility of bringing children to schools is the work of the Human Resource Development Ministry. Then again, monitoring implementation of the RTE

[21] Are children safe in schools across the country?, available at: www.indiatoday.in/amp/education/-today/featurephilia/story/are-children-safe-in-schools-across-the-country (last visited on March 9, 2020).
[22] All About Child labour: An Indian Perspective, available at: www.jatinverma.org/child-labour-an-indian-perspective (last visted on March 12, 2020).

Act is the responsibility of the Child Rights Commissions in each State, which are under the Women and Child Development Department. It is crucial therefore that the efforts of all these agencies are coordinated for the larger goal of providing education to all children to become a reality.

4.4. The Textbook Culture:

The formal school system repudiates space to children and teachers to engage with subjective experiences and life as it plays out for the students. The regime of standardization dominates the schooling system and leads to the fragmentation of learner's lives. There is a gap between the world of books and the world a child inhabits. School textbooks are out of sync with the reality a child lives in. The clash between these two worlds produces dissonance. The culture of rote learning and the examination oriented attitude to textbooks dismiss the student's own life world as insignificant. This dominance of textbooks undermines the role of both the teacher and the learner and denies them creative engagement with the learning endeavor. The teacher-child relationship remains confined in hierarchical terms. All children who come to a learning site should have the opportunity to contribute to the attractions of the space by their conversations and their questions. It is therefore advocated to create learning environments that invite children to share and to create curricula and content that the participating children find enough to connect with, where they feel comfortable enough to express themselves.

4.5. Focus on 'Quantitative' rather than 'Qualitative':

Under the pressure to meet the national and international commitment, the progress towards universalization of elementary education is being viewed unduly in terms of meeting quantitative targets. There seems to be an inadequate focus on schooling processes and outcomes. Central as well as State governments are heavily preoccupied with reporting the progress in terms of expansion of the schooling facilities and coverage of children in the relevant age group and hence neglecting the qualitative aspects.

5. CONCLUSION

It becomes clear from the above discussion that the issues and challenges confronting realization of the right to free and compulsory education are numerous and requires multi stakeholder's

involvement. No doubt government has taken numerous steps to provide institutional and financial support for universalizing elementary education. However it should not just be restricted to opening schools and increasing numbers in the schools but also to reach the unreached and improving their learning competencies. Efforts should likewise be made to overcome gender and other disparities in education as well as all forms of discrimination, based on the '3-D obstacles': disability, difficulty and disadvantage. [23] Teaching quality is yet another area of concern that invites intervention at three levels: teacher recruitment, teacher training and management. Our Constitution fathers did not intend that we just set up hovels, put students there, give untrained teachers, give them bad textbooks , no playgrounds and say, we have complied with Article 45 and primary education is expanding...They meant that real education should be given to our children between the ages of 6 and 14.[24] Today the implementation of the act is now en route to its decennial journey, but the ground reality still reveals a sad story. The accomplishments on the part of the administration, in ensuring the implementation of the said norms are still far from its realisation. The negligence and inactions of the administration has given a space for more fallout, thus allowing the perpetuation of impasse within our government schools at the elementary level. Education comes under the concurrent list, and therefore the centre and the state have both shared responsibilities. The educational policy of India must seek support from the rich spiritual heritage available in important religious scriptures of various religious communities living in India. As preached in Bhagwad Geeta, *gyan* (Knowledge), *karma* (action) and *bhakti* (devotion) are necessary for development of integrated personality of every person and any educational system should be a combination of them. [25] To sum up it can be concluded that to expect laws to change people attitudes and behaviour overnight is not realistic. Like many attempted social changes in India, this too has to start at the community level, requires a widespread change of an age-old mindset and must make people at the helm of affairs accountable.

[23] Commission on Human Rights, Preliminary Report of the Special Report on the Right to Education, Ms. Katarina Tomasevski, UN Doc. E/CN.4/1999/49 (13 Jan. 1999)
[24] Shri M.C. Chagla, Education Minister, 1964.
[25] Dr. Sunder Singh Yadav and Dr. S.K. Saini, "Right to Free and Compulsory Education in India: A Limbo Step", XLII *Journal of the Legal Studies* 78 (2011).

Journal of Global Research &Analysis **Volume 8 (2)**
(A Multi-Disciplinary Refereed Research Journal) **RNI-HARENG/2012/59126, ISSN: 2278-6775**

SOCIAL AND DIGITAL EXCLUSION OF INDIVIDUALS WITHRESPECT TO ASSAM NRC

Aastha Sharma

Student, West Bengal National University of Juridical Sciences, Kolkata

ABSTRACT

"*Every individual is entitled to right to nationality as under UDHR and the UN Conventions, however the situation in Assam leads to a situation of a statelessness of multiple individuals from various ethnic, cultural, religious backgrounds and thus disenfranchising them and other basic rights like right to get benefits out of Aadhar, right to move freely, right to own property, right to healthcare, etc. are also put into question. The freedom to exercise certain rights which are so basic in nature are also taken away from individuals excluded from CAA-NRC and the state has been failing to protect them or provide them with aid which is their primary duty. What we need to do is to combine capabilities approach with the rights-based approach, point out the state failures with the process and come up with an alternative framework to not marginalize and exclude those declared foreigners and impinge on their fundamental basic rights but rather let them stay and work in the country and be sensitive to them. "*

1. INTRODUCTION

Statelessness has been defined by UNHCR in Article 1 of the 1954 Convention relating to the status of stateless persons[1] as someone who is not considered as a national by any state under the "operation of law." [2] Every individual acquires citizenship rights by *jus soli* or *jus sanguinis,* by birth or by parent's nationality. [3]An individual is also entitled to citizenship rights by applying for citizenship of the country or by the process of naturalisation. However, an individual might not be considered to be a citizen of any state in certain circumstances due to the loopholes in the domestic law or emerging of new state or changes in borders and hence becomes the victim of ineffective governance.

[1] Convention Relating to the Status of Stateless Persons, 1954, Art. 1. [hereinafter referred to as "the 1954 Convention"].
[2] Article 1, UNGA, Convention Relating to the Status of Stateless Persons, 28 September 1954, UNTS, vol. 360.
[3] United Nation High Commissioner for Refugees, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Article 1-4 of the 1961 Convention on the Reduction of Statelessness* (2012), available at http://refworld.org/docid/50d460c72.html (last accessed on November 10, 2019).

In the present day context of Assam NRC, we see that they go through *de jure* and *de facto* statelessness wherein the former is about people who do not receive nationality automatically under the operation of any State's law and are declared stateless persons, while the latter deals with the group of people who cannot establish their nationality and are hence treated as stateless individuals. [4] Citizenship Act, 1955 is a determinant of Indian citizenship and establishes ways in which citizenship can be acquired and repealed. Reading Sec. 6A of Citizenship Act, 1955 along with Assam Accord, 1985, we see that all those individuals born before January 1971 will be considered Indians, while those born after March 25, 1971 will be considered as foreigners and will be deported out of India.[5] However, in the case of Assam, there have been no talks of deportation with any of the countries and hence these individuals will be put in detention camps for indefinite period and will be classified as stateless citizens.

The author in the following paper aims to discuss- how the process of identification of citizenship in Assam NRC is flawed and exclusionary in nature and is leading to statelessness among citizens. Further, I aim to discuss as to what the repercussions of statelessness are and how is it leading to social and digital exclusion of these individuals and further leading them into deprivation, marginalization and poverty.

2. INTERNATIONAL INSTRUMENTS WITH RESPECT TO STATELESSNESS

We see that UDHR under Art. 15 gives the right to nationality to every individual and India has ratified UDHR and is hence bound by its principles.[6] The 1954 Convention in their provisions like Article 16, 17, 22 provide for free access to courts, wage earning employment and public relief facilities to the stateless individuals just like the nationals. The 1961 Convention on the Reduction of Statelessness[7]aims to reduce statelessness and hence in its Article 6, 7 and 8 of the Convention provides that if an individual is losing his/her nationality of one state due to marriage, renunciation, deprivation, it would only be conditional upon the individual gaining the nationality in some other state and that individual should not be rendered stateless. With respect

[4] Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, International Journal of Refugee Law, Vol 10, No 1/2 (1998).
[5] The Citizenship Act, 1955, §6A.
[6] Universal Declaration of Human Rights, Article 15.
[7] Convention on the Reduction of Statelessness, 1961. [hereinafter referred to as "the 1961 Convention"].

to UNHCR principles, India is not a party to both the Conventions on Statelessness (1954 & 1961), however India is bound by so many other international obligations which require it to work against statelessness and follow these conventions. Further, Article 51 (c) of the Indian Constitution[8] provides that "*India shall endeavour to foster respect for international law and treaty obligations"* and reading this with the 1954 Convention, leads to the Conventions acting as customary international law status and these principles hold legal recognition. Therefore, we see that they have become jus cogens and customary in law and hence are to be identified under Article 21 of the Indian Constitution. Moreover, UNHCR office has been functioning in Delhi and Chennai for some time and they respect the asylum-seekers and refugees to access public health, education and legal services.[9] Ergo, India has to respect obligations as established under the UNHCR Conventions against Statelessness.

Additionally, Guideline 4 of the UNHCR detention guidelines, 2012[10] establish that detention should be used as a last resort and for a legitimate purpose. The detention should last only for the duration when reasonable efforts are being made to establish identity or to carry out security checks but not for unlimited period of time without any purpose or necessity. Further, Guideline 6 of the 2012 Guidelines[11] establish that indefinite detention is arbitrary in nature as per the proportionality test, there should be a maximum limit put on the detention in law and when the justification for detaining an individual is no longer valid, then that individual should be released immediately. The OHCHR Guidelines on Arbitrary Detentions also provide for provisions which said that no individual should be detained arbitrarily without any justification and his right to personal liberty should not be violated and that alternatives to detention should be considered.[12] These are some of the international instruments and legislations which bind India to prevent statelessness in the state of Assam.

3. EXCLUSIONARY PROCESS OF IDENTIFICATION OF CITIZENSHIP

[8] The Constitution of India, 1950, Art. 51 (c).
[9] United Nations High Commissioner for Refugees, *UNHCR in India,* available at https://www.unhcr.org.in/index.php?option=com_content&view=article&id=18&Itemid=103 (last accessed on November 10, 2019).
[10] UNHCR Detention Guidelines (2012), Guideline 4. [hereinafter referred to as "UNHCR Guidelines, 2012"]
[11] UNHCR Detention Guidelines (2012), Guideline 6.
[12] OHCHR, Advanced Edited Version, Working Group on Arbitrary Detentions, 2018.

The author in this section aims to discuss the process of identification of citizenship in Assam and how it is flawed and exclusionary and leading to social and digital exclusion of the individuals in the state.

Social exclusion is the process of exclusion of individuals and groups from accessing public goods, attainment of equal social opportunities and benefits due to social neglect, discrimination, oppression or violence.[13] Social exclusion, in today's times also includes digital exclusion as an engagement with the technology is essential to fully participate in the society and not be deprived of the economic, social and cultural capabilities.[14]

The individuals in Assam are granted citizenship on the basis of various documents like that of voter ID, Aadhar, birth certificates, marriage certificates, etc. and on the basis of those documents, they have to establish that their parents/grandparents came to India before eve of Indo-Bangladesh war in 1971.[15] These individuals are declared to be foreigners or doubtful voters if they have migrated to India after 1971 and one of their parent is a doubtful voter or a foreigner. There have been instances wherein individuals have been declared as foreigners because of difference in spelling of the name from the family or wherein there is error in the age and hence some anamoly in difference of father-son's age.[16] The process is arbitrary in nature with inexperienced and inefficient officials sitting to decide the fate of several individuals without any regard for their conditions. On being declared a foreigner, they have to apply for appeal in the Foreigners Tribunal within 120 days of the earlier order, post which a decision is made determining your citizenship in the country by the tribunal.[17] In this process of identification of citizenship, these individuals are not provided any legal aid or resources by the

[13] Harsh Mander& Gitanjali Prasad, *Introduction to Indian Exclusion Report 2013-2014* (2014).
[14] Chris Martin, Steven Hope, Sanah Zubairi & Ipsos Mori Soctland, *The role of digital exclusion in social exclusion*, September 2016, available at https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2016/09/LOW-2697-CUKT-Digital-Participation-Report-REVISE.pdf (last accessed on November 10, 2019).
[15]Firstpost, *Assam NRC: Proof of citizenship demands in the state, definition of "illegal migrant" reveal legal minefield,* August 3, 2018, available at https://www.firstpost.com/india/assam-nrc-proof-of-citizenship-demands-in-the-state-definition-of-illegal-migrant-reveal-legal-minefield-4886931.html (last accessed on November 10, 2019); The Economic Times, *If NRC is deployed across India, how will you prove your citizenship?*, August 3, 2019, available at https://economictimes.indiatimes.com/news/politics-and-nation/if-nrc-is-deployed-across-india-how-will-you-prove-your-citizenship/are-you-an-indian/slideshow/70509705.cms (last accessed on November 10, 2019).
[16] Economic Times, *In India's citizenship test, a spelling error can ruin a family,* August 17, 2018, available at https://m.economictimes.com/news/politics-and-nation/in-indias-citizenship-test-a-spelling-error-can-ruin-a-family/articleshow/65434885.cms (last accessed on November 10, 2019).
[17] Foreigners (Tribunals) Amendment Order, 2019, § 3A.

state and are rather forced to appear for proceedings in the Foreigners tribunal, miles away from their village to prove their citizenship. They have to take loan to pay huge fees to the lawyers, travel to the tribunal from village and sell their assets for sustenance. Further, the onus of proof to prove their citizenship falls on the miserable individuals with no resources at their disposal, while it should be on the state[18], hence trapping them in a bureaucratic loop. The entire process is aimed at targeting the poor and marginalized communities with minimum resources, at targeting woman who got married off early and migrated to Assam with no proof of marriage certificate, birth certificate or board certificate. These individuals are further more prone to harassment by police and authorities and feel marginalized in the entire process. This arbitrary exercise leads to a state of deprivation, discrimination and violence against a disadvantaged group and this culture of poverty as talked by Upendra Baxi in his reading has to be done away with.[19]

There have been further attempts to shift the focus of the movement from ethnic and nationality issue to a religious issue by introduction of Sec 2 of the Citizenship Amendment bill, 2016[20] by the government which talked about inclusion of people belonging from the communities of Hindu, Sikhs, Parsis, Jains, Buddhists and Christians from Bangladesh, Afghanistan and Pakistan and provide them with citizenship by the process of naturalization under Sec. 6 of Citizenship Act, 1955 if they have resided in the country for 6 years or more.[21] This provision specifically targets the Muslim community going against the value of secularism which India upholds so dearly and shifts the focus of the entire process from ethnic and linguistic basis to religion. This invokes the faces of exclusion as given by Iris Young where she talked about oppression, marginalization, violence as faced by certain communities on the basis of where they come from and their capability to approach an opportunity in the society.[22]

In terms of the digital exclusion as faced by individuals ue to the arbitrary process of citizenship identification, we see that digital media plays a huge role in keeping an individual away from poverty and deprivation. Digital inclusion helps in providing access to information, communication and exchange of ideas between people, while digital exclusion and digital divide leads to lack of information access and inability to access relevant content online and the

[18] K. Arjuna Rao v. Katuru Yeukondalu, Civil Revision Petition No. 3262 of 2013.
[19]UPENDRA BAXI, LAW AND POVERTY: CRITICAL ESSAYS (1998).
[20] The Citizenship (Amendment) Bill, 2016, § 2.
[21] The Citizenship Act, 1955, § 6.
[22] Iris Marion Young, *Justice and the Politics of Difference* 39-42, 48-63 (1990).

services.[23] It usually gets difficult to maximise the benefits of the opportunities provided to them due to the lack of internet. Digital inclusion is considered to be an essential element for social inclusion of individuals and communities and for ensuring that every individual has the means and skills to access Information and Communication Technologies (ICT's) and benefit from them by participating in the society and economy.[24]

There are several factors leading an individual to digital exclusion and lack of access to the internet like poverty, lack of infrastructure, illiteracy, gender and age bias. Digital exclusion and social exclusion are well-knit into each other and by increasing digital inclusivity, we can improve the social inclusivity in the society too like providing opportunities via internet to old age groups or otherwise marginalized communities so that they can participate in societal activities.[25] In the case of Assam NRC, when these individuals have no resources or legal aid to help in the process of identification of citizenship, internet access and dissemination of information between individuals via digital medium helps in the process. Further, people who are already marginalized or oppressed, can be involved digitally and it will make them not as excluded, lonely and depressed and they will be able to contribute to the society.[26] Digital exclusion and non-involvement in societal activities can lead to poverty, deprivation of education, health, livelihood and standards of living in the society.[27]

Furthermore, the aim of UNHCR to create digital identities for every individual which are portable and can be given access to the Internet, mobile phones and related services. This digital identity will help individuals in accessing jobs, earning money, online learning and web-based economic activities and it will be easier for individuals to access these services and seek governmental help if there is digital inclusion.

Digital exclusion can lead to lack of benefits with respect to Aadhaar scheme as well. Even when these individuals are provided Aadhaar cards as being resident of the country, but are considered as doubtful voters and excluded from NRC and hence sometimes, they do not end up getting the

[23]Eshita Mukherjee, Osama Mazar, Raina Aggarwal & Rajat Kumar, *Exclusion from Digital Infrastructure and Access* , Indian Exclusion Report, 2016, 6-32 (2016).
[24] KIRKMANN-BOESEN & MARTIN, APPLYING RIGHTS-BASED APPROACH: AN INSPIRATIONAL GUIDE FOR CIVIL SOCIETY (2007).
[25]*Supra* note 14.
[26]*Supra* note 14.
[27]*Supra* note 24.

benefits for the welfare schemes which are linked to Aadhar as their names have been removed from the list. Alternatively, sometimes there is low internet connectivity in the area and hence the individuals do not get authenticated by Aadhaar and thus leading to not getting any benefits out of it since all the schemes are linked with Aadhaar now. Hence, there is a need of better connectivity and digital inclusion for everybody so that there is no denial of basic human rights and benefits due to low internet connectivity. [28] The internet use and digital connectivity might not help in overcoming social exclusion in its entirety as there will be inequalities in how the internet is mediated and who is using it, but it will bring in some inclusion and better development of the individuals sitting idle in the detention camps. The government needs to adopt a rights-based approach[29] wherein they accept that it is every individual's right to get basic benefits in the society and state should ensure access to all as their right and something that they are entitled to and not something as a favour by government on the individuals.

4. IMPLICATIONS OF STATELESSNESS IN ASSAM WITH REGARD TO APPROACHES OF POVERTY

With respect to the effects of statelessness on these individuals and the implications of it leading them into further deprivation and misery, and looking at it from different approaches of poverty.

The stateless individuals are detained into detention camps for an indefinite period of time and have to comply with conditions on restrictions of movement, travel, residing in a place, association with certain people or engagement in certain activities as under Sec 2 and Sec. 3(2) (e) of the Foreigners Act, 1946[30] and Para 11(2) of Foreigners Order, 1948.[31] However, these provisions do not discuss the duration for which the individual will be detained in the camps and they can be incarcerated for their entire life without any provision for the same is a violation of their basic constitutional fundamental right. Article 21 of the Indian Constitution talks about an individual's right to live with dignity and not mere animal existence and that the state is supposed to facilitate the rights, liberties and freedoms of the individual by taking positive steps

[28] The Sentinel, *Digital Exclusion,* October 24, 2017, available at https://www.sentinelassam.com/news/digital-exclusion/ (last accessed on November 10, 2019).
[29] *Supra* note 24.
[30] The Foreigners Act, 1946, § 2, 3(2) (e).
[31] The Foreigners Order, 1948, Para 11(2).

in that direction.[32] Moreover, the UNHCR Guidelines, 2012 establish that the detention should not be indefinite and unjustified as established in the previous section.

Further, when these individuals and children are detained in camps, they are also denied the other basic human rights like right to education, right to health, right to avail legal services, right to privacy, etc. However, Article 22 of the 1954 Convention provides for education to all stateless individuals as is provided to the nationals of the state. Moreover, the case of *Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P.*[33]provides for education to children of refugees, migrants, minorities, indigenous people as under UNCRC and Article 21 A of the Constitution of India. These provisions regarding education are not fulfilled in the camps, hence depriving those children of their basic constitutional right and leading to lack of job opportunities on growing up and hence not making a decent standard of leaving. Further without the proper documentation and in the detention camps, they cannot afford to get non-public health services. The detention camps are built inside the prisons and hence lack basic health facilities to be provided to individuals. They live in abysmal conditions with over-crowding of "foreigners", thus leading to unhygienic and unsanitary conditions, lack of pre and post-natal core, malnutrition amongst new born children and prevalence of respiratory and skin diseases. The situations they are living in affect their ability to obtain food, clean water, vaccination, hospitalization or medicines, thus affecting the basic standard of living.[34]

Living in detention camps also affect the fundamental right to movement under Article 19 of the Indian Constitution, as they cannot move beyond the town or certain boundaries, they have CCTV's inside the camps to monitor their movement and the camps have gates with metal railing which are 10 ft tall along with having barbed wires. This says a lot about their freedom to movement and life lived with dignity. Art. 27 of the 1954 Convention establishes that these stateless individuals should be provided identity papers and should be given a travel visa so as to travel, but that is not done for these individuals in the detention camps. They are furthermore not provided any legal recognition, hence not being able to own property, access public benefits and resources, etc. They are also denied the right to bail and parole in the camps, they are separated

[32]Francis Coralie Mullin v. Union Territory of Delhi, (1981) 1 SCC 608 ; M Nagraj v. Union of India, (2006) 8 SCC 212.
[33] Maharishi Mahesh Yogi Vedic Vishwavidyalaya v. State of M.P., (2013) 15 SCC 677.
[34] Harsh Mander v. Union of India & Principle Secretary, Home and Political Department, Writ Petition (Civil) of 2018.

from their family and not allowed to meet them, it also affects the mental health of the individuals and the feeling of worthlessness and hostility towards the country that denied them the citizenship sometimes pushes them towards militant and violent activities.[35] This exercise is to be looked as a process of marginalization and deprivation of individuals already lacking resources. This entire exercises signifies that poverty is much more than economic poverty and is about a culture of poverty which includes social, political and cultural deprivation and poverty where an individual becomes a victim of marginalization and oppression and violence and has to fight social status to get the opportunities that he is entitled to.[36] This problem has to be viewed from the aspect of rights-based approach, we need to look at non providing of individual's rights of citizenship and other basic fundamental facilities as state failure and not as a favour owed by the state to the individuals. Those individuals in the camps are entitled to get the legal resources, education, healthcare benefits, right to life with dignity and liberty by the state.

Furthermore, we see that the process of exclusion is pushing people into poverty by looking at it from the capabilities approach given by Sen and Nussabaum.[37]Capabilities approach is basically a freedom which every individual has to lead the life he or she values, it talks about what you are able to achieve and the freedom given to you to exercise your choice, now we see that putting these stateless individuals in detention camps with no access to basic facilities restrict their freedom to exercise choice regarding their own life and hence reduces their capability and thus they are not able to convert it into income, leading to a life of poverty. The entire purpose of the capabilities approach is for each individual to achieve full human functioning and that each individual deserves dignity and respect and hence these stateless individuals also deserve to have a qualitative and decent living.

Hence, we analysed all the approaches of poverty concerning poverty line, capabilities, social exclusion so as to determine how the exercise of identification of citizenship is leading to

[35]*Supra* note 26.
[36]*Supra* note 18.
[37] Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice in Capabilities, Freedom and Equality: Amartya Sen's Work from a Gender Perspective* 47-58 (2007).

exclusion of individuals and leading them into a state of deprivation, oppression and further poverty. [38]

5. CONCLUSION

The paper above was an attempt by the author to analyse the process of identification of citizenship in Assam and critically evaluate the flawed and exclusionary aspects of it. The author further discussed how the process is leading to statelessness for a large number of individuals, even those who have lived in the state for more than 50 years but are denied citizenship on the basis of lack of one document or some minor error in the documents. The effects of statelessness are rather disastrous leading individuals into furthered state of poverty and deprivation. We also looked at various approaches of poverty to determine the effect on stateless individuals and arrived at the conclusion that poverty is not only with respect to economic or income aspect but includes social, cultural, political aspects as well. There have to be efforts taken by the State and Central Government to ease the process of NRC and not deny them legal aid as promised under Article 21 of the Indian Constitution. Further, they should also not be denied the basic fundamental and human rights inside the detention camps and provided opportunities to continue their lives instead of pushing them into a state of poverty.

[38] Caterina Ruggeri Laderchi, Ruhi Saith & Frances Stewart, *Does it Matter that we don't agree on the definition of poverty? A comparison of four approaches,* QEH Working Paper Series (2003).

EXPLICATING BILATERAL INVESTMENT TREATIES

Aakriti Srivastava

Student, Hidayatullah National Law University, Raipur

ABSTRACT

With the changing times, the countries have invented new tools to expand their interests and gain profits. Countries are no longer isolated and depend on each other for a variety of exchanges. Whether it's a developing country or developed country, it doesn't matter every country makes some kinds of investments in other countries. But these investments are under threat of unfair treatments, unfair terms and expropriation by the host country. The countries in every age needed some tool for the protection of the investments.

Bilateral Investment Treaties are an invention of the present age to protect and promote investments. It is a unique tool as it is entered by the governments for the protection of the property of private parties. The concept of BIT has not been invented in a day and neither appeared out of thin air. It has evolved through a period of time, developed itself and now it manifests itself in many forms.

Through this paper I have tried to explain the meaning of BITs and why are they beneficial to the parties? In this paper, I tried to shed light on the origin of the bilateral investment treaties. What was the need for it? Nothing remains the same over a period of time. For a thing to remain effective, it must adapt to the changing needs of time and remain beneficial in the interests of the parties. In this paper, I have tried to explain how the BIT has changed yet remained the same over the period of time. Further, I have tried to explain the well-crafted clauses of the BIT that has made it beneficial.

1. MEANING

In different ages, different instruments were used by countries to protect their commercial interest in other countries. The current time is definitely the age of BIT (Bilateral Investment Treaty) or BIPA (Bilateral Investment Protection Agreement). Bilateral Investment Treaties are basically a treaty-based on an agreement to protect and promote the investors of a country in another country's territory.

It is a unique agreement between two governments of two countries to protect the private

interest of their investors.[1]

2. ORIGIN

The roots of BITs can be found in FCNs (Friendship, Commerce & Navigation Treaties). BIT and FCN cannot be substituted for each other, treating them as alike concepts would be to do injustice to both. BIT is a specialized and focused agreement to protect foreign investments. FCN covered a wider spectrum of topics like trade, human rights, intellectual property, investment protection, immigration, shipping, taxation, inheritance, investor's rights etc.

FCN treaties are a rich source of information to understand, study and research on the source of rights in international relations.[2]FCN treaties were originally entered to ease trade relations and foster partnership between countries to establish a friendship. They were used as a legal instrument to protect the interest of citizens of friendly nations.

The first FCN was entered between the US and France in 1778, called the Treaty of Amity and Commerce. At that time the US was newly freed from the colonial rule of Great Britain and France was an enemy of Great Britain. A major purpose of the treaty was to protect the commercial interest of both parties.[3]

The primary assumption behind these early treaties was that in absence of such treaty the country's citizens may not necessarily be able to carry out trade. The FCN treaty emerged in an age where the people were better accustomed to colonial rules and trading restrictions than an amicable treaty which would protect the rights of both parties without harming rights of another party.

The bilateral treaty of friendship, commerce and navigation or the FCN were a once inescapable fact of the international diplomacy focusing ondifferent aspects of it at different times[4]. But with time the focus of FCNs shifted. After World War I, the focus of FCN treaties shifted on the foreign national investments. After World War II, bilateral FCN treaties to

[1]*Bilateral Investment Treaties: What They Are and Why They Matter,* THE US-CHINA BUSINESS COUNCIL, https://www.uschina.org/reports/bilateral-investment-treaties-what-they-are-and-why-they-matter.
[2] John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in Modern Era,* COLUM. J. TRANSNAT'L L., 302, 302-307, (2013).
[3]*French Alliance, French Assistance, and European Diplomacy during the American Revolution, 1778–1782,* OFFICE OF THE HISTORIAN, FOREIGN SERVICE INSTITUTE, UNITED STATES DEPARTMENT OF STATES,https://history.state.gov/milestones/1776-1783/french-alliance.The single most important diplomatic tie that the colonies of America were able to establish was with France. The chief architect of this treaty were Benjamin Franklin and Comte de Vergennes, French foreign minister.
[4] Herman Walker Jr., *Modern Treaties of Friendship Commerce and Navigation*, 42 MINN. L. REV., 805,805, (1958).

protect investment became popular. From 1946 to 1966 US signed twenty-two(appx.) of such treaties.[5]

The importance of foreign investment increased, this can be seen through the increase in percent share of foreign investments in world trade which was earlier occupied by extractive industries which involves extraction and refining of raw material from the earth. These changes also made way for the emergence of multinational companies.

3. DEVELOPMENT OF BIT

As the world became divided into developed and developing countries, which were newly freed from colonial rule, and there was apprehension on both sides as to the FCNs in place. The conditions that were laid down in the popular US FCN treaties did not reflect the joint standards of both parties. United States' FCN treaties which constituted the majority of such treaties were not popular among the developing countries.

The developing countries had a different outlook on the rights of the host countries in times of expropriation and reimbursement. The popular US view was to make fair and equitable payment in case of expropriation which was justified only on grounds of the public good. The developing countries did not give its assent to this view. Both the parties, the capital investor and the host countries, were apprehensive of the judicial system of each other's country[6].

In the lights of these facts, individual European countries started entering into what we now refer to as modern-day BIT, a bilateral treaty dealing exclusively with foreign direct investments. The Europeans were reasonable and considerate in their demands as compared to the US. [7]

The first BIT in its recognizable form was signed as late as on Nov 25, 1959, between Germany and Pakistan. A war-torn Germany which had lost all its foreign investments became the pioneer of these treaties.[8]It was formally called as the Treaty for the Promotion

[5]*Developing a Model Bilateral Investment Treaty*, 14 LAW & POL'Y INT'L BUS, 273, 276, (1983) As of 1981, FCN treaties were in force in between the United States and approximately fifty foreign countries. For a listing of FCN treaties in force, prepared by United States Department of States, see 20 I.L.M., 565, (1981).
[6]Salacuse, *Towards a New Treaty Framework for Direct Foreign Investment*, 50 J. AIR L. & COM., 969, 985-90, (1985).
[7] WILLIAM E. COUGHLIN, THE U.S. BILATERAL INVESTMENT TREATY, REGULATINGTHE MULTINATIONAL ENTERPISE: NATIONALANDINTERNATIONAL CHALLENGES, 129, 136-37, (Fisher & Turner eds. 1983).
[8] UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES, 90-91, (1988).

and Protection of Investments entered by the Federal Republic of Germany and Pakistan in Bonn, Germany. Even today Germany leads the scoreboard with one hundred and sixty BITs.[9]

The mass content of the first treaty was concluded in seven pages and fourteen articles, yet in its spirit, it was the first form of BIT entered.[10] The first BIT had protection for investment, clause for equitable national treatment, protection against discrimination and expropriation, and provided for settlement of disputes through International Court of Justice or any other arbitration tribunal.

The US soon followed with its own BITs in 1981[11]. Presently there are more than 2800 Bilateral Investment Treaties entered, out of which 2337 are in force.[12]The BIT can be customized as per the need of the countries. This feature of the BIT has been used and the BIT has been used as an effective instrument to accord legal rights and responsibilities in a variety of areas.

For example, Morocco- Nigeria BIT concluded in the year 2016 has given importance to sustainable development.[13]The treaty is one of many which is aimed at increasing the trade within the continent. Morocco has been a noteworthy player in this initiative; it has entered into BITs with Mali, Guinea-Bissau, Rwanda and Ethiopia.[14]

Several countries like Canada, Japan, New Zealand, United States and Finland. Canada leads the scoreboard with 83% of its BIT having reference to environmental concerns.[15] The BITs of Namibiaand Netherlands (2002), Republic of Korea and Trinidad and Tobago (2002), and Finland and Kyrgyzstan (2003) mention in one form or another in their preambles the protection for health and safety of the public. The BITs of Finland and Nicaragua (2003) and

[9] For the complete list of BITs *See.Database of Bilateral Investment Treaties*, ICSID, WORLD BANK GROUP, https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx#a5.
[10] For detailed treaty see. *Treaty for the Promotion and Protection of Investments with Protocol and exchange of notes)*, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef.
[11]COUGHLIN, *supra* Note 7.
[12]Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Oxford,2, (2008) Also see XVII *World Investment Report*, UNCTAD, 26, (2006).
[13] Tarcisio Gazzini, *The 2016 Morocco-Nigerian BIT: An Important Contribution to the Reform of Investment Treaties*, INVESTMENT TREATY NEWS, (Sept. 26, 2017), https://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/.
[14] Thomas Kendra, IIham Kabbouri et. al., *The Morocco-Nigeria BIT: a new breed of investment treaty?*, RBITRATION BLOG, (November 16, 2017), http://arbitrationblog.practicallaw.com/the-morocco-nigeria-bit-a-new-breed-of-investment-treaty/.
[15] Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements*, OECD Working Papers on International Investment, (2011).

Austria and Bosnia Herzegovina (2000) give importance to stand by the established norms of labour.[16]

4. BENEFITS

Despite the much-praised additions, the prime motive of these treaties remained the same. The developing nation aims to increase investments, raise capital and import skilled labour which the developing nation itself cannot provide and the investing country sought protection for its investors and aims to increase returns on its investments.[17] The BIT has a double effect: 1) with respect to investors and 2) with respect to investment.[18]

The existence of BIT encourages the investor to invest in a country. It provides a friendlier environment in the host country and removes any apprehension or fear in the minds of investors. It serves a guarantee for justice as both the parties usually choose arbitration as the method of dispute resolution in case of a dispute.

But even so, the non-existence of a BIT does not mean there will be no investment. For example, even after many efforts of the US and India, a BIT could not be amicably negotiated[19]but since 2000, the US FDI is on the rise in India. In 2000, US FDI was 2.38 billion US Dollar, in 2016 it was 38.63 billion US dollar and then it recorded its highest point in 2018 at 45.95 billion US Dollar.[20]

It cannot be positively said that if there was a US-India BIT, it would have led to an increase in investment or that the present investment is less due to the absence of BIT. But it is a valid point that at least in some nations, the presence of BIT might not persuade an investor but the absence of BIT might dissuade an investor.

An investor will feel more secure in investing in a country which a BIT with his/her country. As in the absence of one, there is no guarantee of fair treatment except a belief in good faith

[16] UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES 90-91 (1988) [hereinafter BILATERAL INVESTMENT TREATIES].
[17] Peter Egger & Michael Pfaffermayr, The impact of bilateral investment treaties on foreign direct investment, 32 Journal of Comparative Economics, 788, 789, (2004).
[18]Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, INT'L LAW., 655, 673-675 (FALL 1990).
[19] Richard M. Rossow, *U.S.-India Insight: Do Not Give Up on the Bilateral Investment Treaty*, CENTREFOR STRATEGIC INTERNATIONAL STUDIES, (November 28, 2017), https://www.csis.org/analysis/us-india-insight-do-not-give-bilateral-investment-treaty.
[20] M. Szmigiera, *Direct Investment Position of U.S. in India 2000-2018*, STATISTA, (Sep 2, 2019), https://www.statista.com/statistics/188633/united-states-direct-investments-in-india-since-2000/.

of the host country. Thus, it can be easily deduced that there is an advantage to countries having BITs as it would directly indicate the investor of a friendlier environment.

Secondly, the BIT serves as a concrete tool to provide protection to countries in times of dispute. As countries have already had a selected mode of mechanism which can settle disputes. Having set definitions give the aggrieved party a stronger base to claim their rights. Most of the BITs choose arbitration or international organisations for settlement of disputes. This practice was followed by the first BIT also.

Many BITs choose the ICSID (International Centre for Settlement of Investment Disputes) or the UNCITRAL (United Nations Commissions on International Trade Law) as the head organisation for settlement of disputes. The various clauses of BIT which over the period of time has become its identity cover a wide variety of possible circumstances which can arise for the investors and the countries. The BIT has emerged as an instrument to increase foreign investment majorly due to the popularity and effectiveness of such clauses.

The modern BIT calls for the definite presence of some clauses. Some of these clauses have been present since the inception of BIT, some can be traced before to the FCN treaties and some have evolved over the period of time. These clauses create a sense of security and provide a friendlier environment.

5. MAJOR CLAUSES

Though every BIT has its own content and the content has evolved over the period of times but there are some similarities which are the clauses or provisions which can be found in every BIT and form the major working part of the BITs. Most of the BITs nowadays have a preamble which is kept consistent with the contents, purposes and aims of the BIT.

A Preamble is an important tool for interpretation of the BIT.[21]A traditional preamble can be found in the China and Djibouti BIT (2003), and the second type of preamble, non-traditional which gives importance to other aspects other than protection and promotion of investment can be found in USA and Uruguay BIT (2005) [22].The major clauses can be listed as

- Definition

[21] Vienna Convention on the Law of Treaties between States and International Organizations or between International Org, 1986, E.94 V.5 United Nations Publication,21 March, 1986.In Part III, Section 3, Article 31(2), *General Rules of Interpretation* states *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.*
[22]BILATERAL INVESTMENT TREATIES, *supra* note 16 at 3-5.

- Scope and Coverage
- National Treatment & MFN
- Minimum Standard of Treatment
- Expropriation & Compensation
- Umbrella Clauses

1. DEFINITION

The first article is most commonly a definition provision which set the definitions of government, territory, investor and parties. This clause is also commonly used to recognise ICSID (International Centre for Settlement of Investment Disputes). This is fundamental to the process of distribution of rights as this clause decides the parties who can claim relief under the BIT.

2. SCOPE AND COVERAGE

Most of the BITs have an asset-based definition of the investment and nationality-based definition of an investor. These definitions gave a wide berth to interpretation at the time of disputes and arbitral award presentation.

To counter this, BITs now have a clause to delimit the scope of definitions. It might introduce some requirements to be fulfilled to qualify as an investor or investment, it might prese3nt a closed list, include or exclude certain items from the scope[23].

3. NATIONAL TREATMENT & MFN

The national treatment clause that the host government has to treat foreign companies the same as their own companies. The most favoured nation clause ensures that the host country will treat investors of the country no less-favourably than the investors of any other country (non-party to the agreement).[24]These clauses stand to protect the investors from any restrictions, like ownership caps.[25]

[23] SCOPE AND DEFINATION: A SEQUEL, UNCTAD Series on Issues in International Investment Agreements II, UNCTAD 2011.
[24] Article 3 &4, 2012 U.S. Model Bilateral Investment Treaty.
[25] *Bilateral Investment Treaties: What are they and Why they matter*, US-CHINA BUSINESS COUNCIL, https://www.uschina.org/reports/bilateral-investment-treaties-what-they-are-and-why-they-matter.

The importing country will be stopped from fixing different tariff for different countries. Moreover, the exporting country would be unable to use tariffs as an unfair tool in competing for importing countries market.[26]

4. MINIMUM STANDARD FOR TREATMENT

The international community never agreed on a fixed standard of treatment. The world consists of different cultures and opinion. The most remarkable difference can be seen in western cultures and the eastern ones. And these countries mostly happen to be on the two sides of the table as developing countries or the host countries in need of investment and developed country or capital countries.

So, the countries set minimum standards of treatment between themselves with which both the parties have to abide by. All BITs, therefore, have some basic standards on which the treatment given to investments are checked.

Fair and equitable treatment- The doctrine of fair and equitable roots can be found in Havana Charter,1948, where it was argued that the investment should be given 'just and equitable treatment'. [27] There are two popular interpretations of the principle of fair and equitable treatment.

Firstly, its meaning can be interpreted through the plain or literal rule of interpretation, according to which it means being un-biased in dealing with the investment of any country. The second approach, states that the treatment should be in accordance with minimum international standard established through cases.[28]The first approach can be explained through the example of BIT between France and Uganda (2002). The BIT between USA and Uruguay (2005) is an example of the second one, it states that the treatment of investments will be in accordance with customary international law.[29]

[26]Konstantine Gatsios, *Preferential Tariffs and the 'Most Favoured Nation' Principle: A Note*, 28 Journal of International Economics, 365, 365-373, (1990).
[27] For text, see United Nations Conference on Trade and Employment, Final Act and Related Documents (1948), Sales No. 1948. I1.0.4. I. Sections of the text concerning investment issues are conveniently reprinted in UNCTAD, International Investment Instruments: A Compendium, vol. 1 Doc. UNCTAD/DTCI/30, 3-13, (1996).
[28] Stephen Vasciannie, *The Fairand Equitable Treatment Standardin International Investment Lawand Practice*, 70 (1) British Yearbook of International Law, 99, 99-106, (2000).
[29]BILATERAL INVESTMENT TREATIES, *supra* note 16 at 31-32.

The government of the host country also, in most cases, undertakes to provide *full security and protection* to the investors. This means to provide security in accordance with international standards and not in excess.

5. EXPROPRIATION AND COMPENSATION

Expropriation in simple terms is a government takeover of private properties. It can be lawful as well as unlawful. It was in the leading case of Texaco Overseas Petroleum Company v. Libya[30], that it was seen that a lawful expropriation can be called one which is done for the public good, is not discriminatory in nature and is followed by reasonable compensation.

The fear of expropriation has been one of the driving forces for the birth of BITs. Unlawful Expropriation can be done in two ways directly and indirectly. By directly it means sending the army to capture the factories or by signing the rights to the company in its name. No set definition can be laid down for indirect expropriation.

But it can be said that indirect expropriation is those actions of the state which leads to depreciation of the value of an investment. It can be through a regulatory act, government policies or other state actions. [31]In a later age, BITs have shown attention to indirect expropriation.

The BIT between China and Jordan (2001) states directly lays down on both form of expropriation whether direct or indirect. Another example is BIT between Kuwait and Lithuania (2001) states provisions for protecting investments of both the country and investments from both direct and indirect expropriations. The provisions of the BIT equalise nationalization and expropriation.[32]

6. UMBRELLA CLAUSES

Under this clause, the host country assumes responsibility for any other obligation arising in future. It is for better protection for the investment. The interpretation of the umbrella clause varies from case to case and from tribunal to tribunal.

6. MODEL BIT

[30] 17 I.L.M. 1; (1978).
[31] Mark W. Friedman et al., *Expropriation and Nationalisation Global Arbitration Review*,https://globalarbitrationreview.com/chapter/1142558/expropriation-and-nationalisation.
[32]BILATERAL INVESTMENT TREATIES, *supra* note 16 at 44-45.

The nations, due to the need of BIT, have entered into a practice of preparing a Model BIT. These can be understood as a standard form of contracts or a pre-drafted agreement which the countries prepare in advance. This document serves as a basis of negotiation. The preparation process gives time to nations to study and understand the need for the entire procedure.

It gives the nation to co-ordinate various organs of the state and build a consensus. And to put out a concrete offer in front of the other nations. Additionally, it also gives the upper hand in negotiations as it set the terms.[33]

A total of 80 model BITs have been adopted until now.[34] Some of them replacing its predecessor. The first was model BIT was France Model BIT made in the French language made under the title of PROJECT D'ACCORD ENTRE.[35] The investment exporting countries like USA[36], France[37], India[38]etc have Model BITs.

The evolution of BITs has seen three overlapping eras[39]. First 1950-1980, where the purpose of initial BITs was only to protect investment as there was considerable apprehension as to the judicial system of developing countries. These were initial model BITs. The nations who made such prototype BITs are France, the United State, Iran, Egypt, Austria, Sudan etc[40].

During the second era that is after 1980 the countries became less sceptical of each other, and developing countries started entering into BITs not only with developed nations but also among themselves. A new type of claim emerged in the form of environmental regulations violations. The year 2000 marked the beginning of the third era which still continues. The backlash that globalisation received and the increase in the number of cases filed under BITs.

Environmental regulations violations claim also occupied a place in these cases.[41] The benefits of BITs became doubtful in light of harms done to the environment.[42]The new era

[33]Salacuse, *supra* note 18 at 662-663.
[34] For complete list *see. Model Agreements*, INVESTMENT POLICY HUB, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements.
[35]*France Model BIT, International Investment Instruments: A Compendium / Volume 3/ Prototype Instruments*, INVESTMENT POLICY, UNCTAD,https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2862/download.
[36] For text *see* United States Model BIT 2012.
[37] For text *see* France Model BIT 2006.
[38] For text *see* India Model BIT 2015.
[39] Kenneth J. Vandevelde, *Model Bilateral Investment Treaties: The Way Forward*, 18 Sw. Int'l L., 307, 307-309, (2011).
[40]Model Agreements, *supra* note 34.
[41] For example, In *Chemtura Corporation v. Canada* ICJG 464 (PCA 2010), shows that environmental regulations though in tune with domestic laws can be challenged by investors. In *Metalclad Corporation v Mexico* ARB (AF)/97/1 (NAFTA), the corporation alleged the local government interference in development

model BITs deals with a variety of areas such as setting the norms of environmental regulations, labour laws, corporate social responsibilities etc.

7. CONCLUSION

Bilateral investment treaties are present age tool to protect and promote investment. The BITs can find its origin in the FCN treaties. Though substantially different as the FCN treaties deal with a variety of issues whereas the traditional BIT dealt only with protection and promotion of the investments.

The BITs have passed through many phases of change before achieving its present identity. The scope of areas dealt by BITs today has been expanded, now it includes environmental protection, health and safety regulations, human rights etc but still, the major focus is on investments. BIT gives a friendlier environment to investors and a series of assurances which are vital for the smooth running of business operations for them. It also the protector of investors' interest if there occurs an expropriation.

There are certain clauses in BIT which enable the BIT to accord these benefits on the nations party to the BIT. The National Treatment clause ensures that the investor is not subjected to any additional taxes, penalties etc and is treated at the same level as the companies of the host country. The investors' interest is also guaranteed by the minimum standard of treatment clause. It guarantees fair and equitable treatment to the investors and security and protection to the investors. The host country also guarantees the nation of no partial treatment towards other nations. This means that the country's investors will have equal opportunity as any other investor.

There are protection clauses for expropriation. Generally, expropriation is allowed only when it is done for the public good and reasonable compensation is paid for them. The major capitalist country recognises the importance of BIT and often prepare one in advance called a Model BIT.

---

and operation of hazardous land fill. In *S.D. Myers v Canada* 40 I.L.M. 1408 (2000) (NAFTA Arb. Trib.)the ban laid by Canada government on PCB export was claimed by the investor to be violative of some provisions of Chapter 11 of NAFTA. In *Methanex Corp v. United States of America* 44 I.L.M. 1345 (2005) (NAFTA Ch. 11 Arb. Trib.) an investor alleged that a ban on sale of methanol was virtually same as expropriation.

[42] Dr. Dominic Dagbanja, *The Conflicting Relationship between Bilateral investment treaties and Environmental Law in Ghana*, INTERNAT LAW UNDER CONSTRUCTION,https://grojil.org/2019/01/08/the-conflicting-relationship-between-bilateral-investment-treaties-and-environmental-law-in-ghana/.

Model BITs are useful as it allows a nation to study and understand the importance of the BIT itself and allows a nation to build up a national front or concrete offer which they are able to put in front of the other party. Additionally, it also gives a base for negotiations to the party as it drafts the conditions. BIT is seen as a positive tool to increase the investment and presently entered by developed country-developing country, developed country-developed country and developing country-developing country.

THE NECESSITY OF MEDIATION IN INDIA

Abhishek Chauhan

Student, Hidayatullah National Law University, Raipur

&

Arpit Parakh

Student, Hidayatullah National Law University, Raipur

ABSTRACT

The customary procedure of adversarial litigation in vogue in India, described by procedural complexities, draconian standpoint and wastefulness has seen a huge overabundance of pending cases with not a single solution for be found. The powerlessness of the legal framework to manage this emergency has offered ascend to the need of an elective debate goals system which can guarantee quick transfer of cases in an opportune way. Mediation has been quick rising as the most suitable strategy for settling debates of any nature. In perspective on the looming requirement for speedy allotment of equity to the majority, there is requirement for a solid administrative system, with statutory acknowledgment and legitimate assent, to go to the guide of the overburdened legal executive. This paper plans to talk about the need of joining intervention as one of the chief strategies for question redressal so as to give interchange discussions to conveyance of equity to the standard natives. It likewise talks about the development and improvement of intervention in the Indian judiciary landscape and the need of giving further stimulus to a mediation system.

1. INTRODUCTION

The ill-disposed arrangement of equity conveyance in India has demonstrated to be inadequate with superfluous deferrals and over the top costs making access to equity by the normal prosecutor bulky and troublesome[1]. Traditional litigation with its adherence to complex techniques has not encouraged rapid agreement of equity and has made a gigantic build-up of pending cases .according to the National Judicial Data Grid, there are in excess of 88 lakh common cases pending over the High Courts and subordinate courts, with right around 5 % being 10 years or increasingly old[2]. The ordinary defendant spends a normal of

[1]Sukanya Holdings Pvt. Ltd v Jayesh H. Pandya, (2003) 5 S.C.C. 531(India).
[2]National Judicial Data Grid (August 04, 2019), https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard.

10 years in court and it takes just about 1,228 days for an issue to be settled in the High Courts[3]. The pervasive framework essentially doesn't have the devices fundamental for a brief and conclusive equity conveyance framework as in practically all cases, the gatherings' allure against the choice of the lower courts, prompting further heap up of cases in the High Courts and Supreme Court[4]. It is difficult to clear such a colossal excess of cases in this present structure .To demonstrate this issue, it is evaluated that it will right around 466 years to clear the overabundance of pending cases in the Delhi High Court[5]. This has provoked the courts to take plan of action to different elective contest goals systems [hereinafter alluded to as 'ADR'] for quick transfer of debates and to decrease the weight on the overburdened legal executive.

With the development of the Indian economy, commercial disputes are inescapable and liable to increment. While the legal framework needs to advance itself, there is additionally the need to build up a legitimate administrative structure for ADR instruments through fitting enactment[6]. In such manner the Arbitration and Conciliation Act, 1996 has been established to empower arbitration' for agreeably settling their debates by falling back on discretion and has been effective as it were[7]. The most significant component of the mediation procedure is the accentuation on classification and lack of bias Mediation is likewise considered as the most prudent and time bound goals process. As indicated by information got from the Bangalore Mediation Centre the normal time taken for pre-suit mediation is 150 minutes[8].

2. MEDIATION – SCOPE & APPLICATION

Mediation is a comparable instrument where gatherings to a question are encouraged by a nonpartisan outsider who utilizes different exchange and correspondence procedures to empower them to go to a commonly pleasant settlement[9]. In contrast to an arbitral honor, the mediation settlement isn't official and either gathering claims all authority to pull back from

[3] Harish Narasappa, "*The long, expansive road to justice*", India Today (April 27, 2016), https://www.indiatoday.in/magazine/cover-story/story/20160509-judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice-828810-2016-04-27.

[4] Justice M.M. Kumar, "*Relevance of Mediation to Justice Delivery in India*" (July 10, 2010), https://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/NCMediationNewDelhi.pdf.

[5] *It would take Delhi HC 466 years to clear backlog: CJ,* The Indian Express (February 13, 2009, http://indianexpress.com/article/india/india-others/it-would-take-delhi-hc466-yrs-to-clear-backlog-cj/.

[6] Mayur Suresh & Siddharth Narrain, *"The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India"*, 17-20 (2014).

[7] Law Reform Commission Report, *Alternative Dispute Resolution: Mediation and Conciliation (November 2010*)(Last visited on March 3, 2018), http://www.lawreform.ie/_fileupload/reports/r98adr.pdf.

[8] Bangalore Mediation Centre, General Statistical Report (2007-2017), (August 04, 2019), https://nyayadegula.kar.nic.in/statistics.html.

[9] Black's Law Dictionary, 996 & 1377 (7th ed.).

the procedures at whatever point they want. It is a non-adjudicative and consensual procedure, where the gatherings willfully choose to determine their questions without fitting in with procedural complexities and absence of conviction[10]. Mediation includes a move in the concentration from the courts as conventional establishments of equity to a casual, organized and intuitive procedure guided by an unbiased outsider where the accentuation will be on the proper goals of debates' and real acknowledgment of regular interests[11]. international commercial disputes, mediation has been distinguished as assuming a significant job in lessening occasions of end of business exchanges and in any event, encouraging the organization of equity among parties[12]. The go between is an unprejudiced and impartial outsider who attempts to make a favourable air for the gatherings' to interface and convey their disparities yet does not have the power to settle on a coupling choice[13]. In spite of the fact that the middle person is an impartial and not in the situation of an adjudicator, he urges the gatherings' to distinguish and value their positions' and advantages' while effectively encouraging them to arrange and land at a settlement. The mediator's job in the process is fundamental as he intercedes in the contention or question with the assent of the gatherings' so as to help them in landing at a commonly adequate arrangement in a non-ill-disposed and deliberative way[14].

3. MEDIATION IN INDIA

In India, the idea of mediation follows its source back to the conventional Panchayati system, where regarded town older elder or the Sarpanch would assume the job of a go-between in keeping up harmony and congruity, which is common till date. The old arrangement of Lok Adalat, or "peoples' Court", which was the favoured method of network question goals preceding the appearance of the British, has by and by been resuscitated and organized with the establishment of the Legal Services Authority Act, 1987[15]. Anyway, mediation was given authoritative acknowledgment without precedent for the Industrial Disputes Act, 1947[16]. The Act accommodated a Conciliation Officer and a Board of Conciliators being named by the

[10]Sahil Kanuga, Raj Panchamtia, *"Mediated Settlements: The Way Ahead fir India"*, Bar & Bench (May 27, 2019), https://barandbench.com/mediated-settlements-way-ahead-for-india/.
[11]Dr. Justice D.Y. Chandrachud, *Mediation – Realizing the Potential and Designing Implementation Strategies,* http://lawcommissionofindia.nic.in/adr_conf/chandrachud3.pdf.
[12] Supra note 4.

[13]United Nations Convention on International Settlement Agreements Resulting from Mediation, Preamble (2019).
[14] Anil Xavier, "*Mediation Is Here to stay"*, Indian Yearbook of Law and Policy (2009), https://www.arbitrationindia.com/pdf/mediation_tostay.pdf.
[15]Legal Services Authority Act, 1987, No. 39 (India).
[16]Section 4, Industrial Disputes Act, 1947, No. 14 (India).

Government with the obligation of setting up a mollification structure for settling questions of the laborers and workers[17]. It was not until 1988 that the 129th Law Commission Report on Urban Litigation and Mediation as Alternative to Adjudication (1988), saw that in perspective on the huge overabundance of pending cases, there was a critical need to build up a reasonable structure for quick and expedient goals of questions, which won't be damaged by exorbitant postponements and procedural unbending nature however with the sole point of giving access to equity to prosecutors 'in financially savvy and time-bound way[18].

A milestone occasion in the field of intervention in India came in 1999 with the alteration to the Code of Civil Procedure, 1908 [hereinafter alluded to as the 'CPC']. Section 89 Order X Rule 1 of the CPC sets out that where it appears to the court that there is a plausibility of a judicial settlement between the gatherings, 'it can allude the gatherings' to land at such a settlement through various ADR instruments, which incorporate 'mediation'[19] . This will alleviate the weight from the overburdened judiciary by empowering the gatherings 'to arrange and examine such terms of settlement that will be advantageous to their inclinations', without coming to court. By allowing statutory acknowledgment to ADR instruments, the judiciary can concentrate on significant established and criminal cases which require increasingly dire consideration.

4. JUDICIAL INTERVENTION IN THE MEDIATION PROCESS

In 2003, the Supreme Court while looking at the sacred legitimacy of Section 89 in Salem Advocate Bar Association v Union of India (Salem I)[20] saw that there were deficient foundation and absence of vital system for execution of ADR components for settling questions outside the courts. It comprised a Committee (Salem I), with Justice Jagannadha as the director, to make proposals and set out a recipe to be embraced by the court before alluding cases to mediation[21]. It likewise set out the Mediation Rules , 2003 , which contains an arrangement for obligatory mediation, even against the assent of the gatherings[22]' In Salem Advocate Bar Association v Union of India (Salem II)[23], the Salem II Committee was comprised to return to and look at the usage of the rules' of the past Committee .and

[17]Section 7, 12 Industrial Disputes Act, 1947, No. 14 (India).
[18]Law Commission, of India, *Report on Urban Legislation Mediation as Alternative to Adjudication "Report No 129*, Law Commission of India (August 1988), https://indiankanoon.org/doc/99360072/.
[19]Report *on Amendment of Section 89 of the Code of Civil Procedure, (1908& Allied Provisions* Report No. 238), Law Commission of India (December 2011), http://lawcommissionofindia.nic.in/reports/report238.pdf.
[20]*Salem Advocate Bar Association v. Union of India,* (2005) 6S.C.C. 344 (India).
[21] Id.
[22] Rule 5(f)(ii), Alternative Dispute Resolution and Mediation Rules, 2002, No. (India).
[23] (2005) 6 S.C.C. 344 (India).

furthermore prescribed setting up of mediation centers by the High Courts' of Allahabad , Bangalore , Delhi among others where an extraordinary dominant part of cases are as yet pending[24].

Regardless of such creative measures, mediation still neglects to pull in litigants' and doesn't bring out a lot of excitement among the lawful crew. As a rule, prosecutors ' support discretion to mediation or some other type of ADR system. The primary explanation is that the Arbitration and Conciliation Act, 1996 sets out that an arbitral award passed by an Arbitral Tribunal will be conclusive and authoritative on different gatherings and every such individual guaranteeing under them[25]. It additionally accommodates the implementation of an arbitral award in the way as a pronouncement of a common court as per the provision of the Code of Civil Procedure, 1908[26]. This gives a force to parties to elude their questions to discretion as they can get the advantages of a court requested interchange goals process that is wilful and dependent on the assent of the gatherings for an award having a similar legitimate acknowledgment as a proper court order. Then again mediation is an increasingly casual and party-driven procedure, coming up short on a judge or referee who has the power to settle on a coupling choice and depends more on the eagerness of the gatherings to go to a trade off than the pretended by the mediator. In addition , the gatherings' don't have the choice to request against an mediated settlement as it is an intentional procedure and the mediator comes up short on the power to settle on a coupling choice[27]. The main statutory arrangement that offers enforceability to an intervened settlements is Section 74 of the Arbitration and Conciliation Act which expresses that any settlement understanding landed at by method for appeasement will have a similar impact of an arbitral award , given under Section 30 of the said Act[28].

In 2010, the Supreme Court, in the milestone judgment of Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd [29] ., tended to the need to give lawful acknowledgment to mediated settlements at standard with a court order or an arbitral award. It was seen that:

[24] Id.
[25]Section 36, Arbitration and Conciliation Act, 1996, No. 26 (India).
[26] Id.
[27] Mediation and Conciliation Project Committee, *Mediation Training Manual for Referral Judges*, https://vidhilegalpolicy.in/wp-content/uploads/2019/05/26122016_Strengthening MediationinIndia_FinalReport.pdf.
[28]Section 74, Arbitration and Conciliation Act, 1996, No. 26 (India).
[29]Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd, (2010) 8 S.C.C. 24 (India).

Where the reference is to a neutral third party (`mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal.[30]

The Afcons case is significant not just in light of the fact that it endeavours to clear the ambiguities encompassing Section 89 of the CPC, yet in addition since it reaffirmed the prior choices of Salem I and Salem II in re-underscoring the requirement for a proper discussion for alluding cases to mediation and the requirement for the judges to assume a functioning job in managing the mediation procedure[31]. It additionally sets out the kind of cases that are appropriate for mediation[32]. It is important to build up an indigenous model dependent on social and monetary contemplations, particular from the western idea of mediation[33].

Post Afcons, the extent of mediation has been fundamentally extended past common and business debates to incorporate criminal cases .In 2013, the Supreme Court on account of K. Srinivas v D.A. Deepa[34], while talking about the idea of pre-litigation mediation in marital questions laid planted that non-compoundable offenses as depicted in S. 320 of the Code of Criminal Procedure, 1973[hereinafter alluded to as the ' CrPC] can be alluded to mediation by the courts , with the consent of the parties' . In this way, it tends to be seen that the Courts in India have not been unwilling to using ADR systems for settling even criminal cases.

In 2016, the Delhi High Court went above and beyond when it set out that mediation can likewise be relevant to cases under Section 138 of the Negotiable Instruments Act , 1881[Dishonour of Checks because of inadequate parity][35]. Submitting general direction to the previous Supreme Court choices, the court set out that there is no express arrangement that suspends the gatherings' from settling debates which are criminal in nature through any of the ADR systems under S. 89[36].The Court saw that where the gatherings ' had consented to go to an intervened settlement, there is no express arrangement under the CrPC which forbids them from doing so[37]. For this situation, as check bouncing[38] is a criminal compoundable offense

[30] Ibid.
[31]Tara Ollapally, Annapurna Sreehari, & Shruthi Ramakrishnan , The Mediation Gap : Where India Stands and How Far It Must Go " DAKSHINDIA, https://dakshindia.org/Daksh_Justice_in_India/14_chapter_04.xhtml.
[32] Supra note 27.
[33] Supra note 3.
[34]*K. Srinivas* Rao *v. D.A. Deepa,* (2013) 5 S.C.C. 226(India).
[35]Dayawati v Yogesh Kumar Gosain (C.R.L.REF. No. 1 / 2016)
[36] Id.
[37] S.S. Rana & Co. Advocates, *" Delhi High Court : Go To Mediation For Cheque Bouncing "*Mondaq (November 14 , 2017), http://www.mondaq.com/article.asp?article_id=646106&type=mondaqai.

under S 320 of the CrPC, the Courts have the power under Part X of the CPC to define rules for mediation in such cases.

5. STATUTORY MEDIATION IN INDIA

It is relevant to make reference to that different endeavours have been made towards presenting mediation by means of statutory acknowledgment. The latest of them was in 2018 when the Parliament corrected the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015[otherwise called the ' Commercial Courts Act, 2015] . The Amendment of 2018 presented Section 12 A which makes it necessary for the gatherings' to allude their case to mediation under the Legal Services Authority Act, 1987 preceding starting prosecution for a commercial dispute[39]. In this manner, it makes pre-litigation mediation obligatory for commercial dispute under the Act. The main exemption to this standard is the place the issue is of a critical nature and requires between time alleviation[40]. Sub-proviso (5) of Section 12A likewise sets out that a settlement landed under the area will have a similar impact as an arbitral award under Section 30(4) of the Arbitration and Conciliation Act, 1996[41]. This implies mediated settlements are currently at standard with court orders/grants, as was mulled over in the Afcons case[42].The stipulation additionally excludes the time of pre-institution mediation from the domain of the Limitation Act, 1963[43]. This arrangement is critical as it focuses on the need to finish the whole mediation a procedure inside a predefined time limit to guarantee that the gatherings' may land at a decision inside a sensible time span.

Another striking model is the Companies Act, 2013 and the relating Companies (Mediation and Conciliation) Rules, 2016. Section 442 of the Companies Act accommodates the setting up of a Mediation board ' comprising of such number of specialists hosting endorsed for mediation between the parties "[44]. Anyway, the arrangement is unambiguous in nature. An uncovered scrutiny will show that however it is alluded to as the Mediation and Conciliation board, clause (1) unmistakably expresses that the issue will be settled distinctly by mediation

[38]Section 138, Negotiable Instruments Act, 1881, No. 26 (India).
[39]Section 12 A (1) The Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts (Amendment) Bill , 2019, No. 28(India).
[40] Id.
[41] The Commercial Courts, Commercial Division And Commercial Appellate Division Of High Courts (Amendment) Bill, 2019, No. 28 (India).

[42] Supra note 20.
[43] Id
[44]Section 442, Companies Act, 2013, No. 18 (India).

and makes no notice of conciliation[45]. In this manner, it very well may be construed that the Act has neglected to recognize mediation and conciliation[46].The Mediation and Conciliation Rules give that the job of the arbiter and the conciliator are comparable in nature[47]. This negates the report made by the Salem I Committee, which had made an obvious qualification among mediation and conciliation and opined that both of the two capacities ought to be kept independent and ought not to be befuddled[48].

The arrangements of mediation and conciliation ought to be kept particular and separate so as to maintain a strategic distance from perplexity with respect to whether Act expects to incorporate just mediation as the sole instrument for goals of commercial disputes or whether it needs to make a different conciliation system too separated from the one in the Arbitration and Conciliation Act, 1996[49].

The Consumer Protection Bill, passed on July 30, 2019 has a different part [Chapter V] which sets out the referral of shopper debates to mediation. The Act offers forces to the District Commissioner to guide the concerned parties to allude their case to intervention if there is a plausibility of legal settlement, as per the arrangements of Chapter V[50].

6. SHORTCOMINGS OF THE MEDIATION REGIME IN INDIA

Notwithstanding different endeavours being made to set up mediation as a practical option in contrast to customary case , either through court-attached mediation or statutory acknowledgment , the reality remains that examples of gatherings' falling back on mediation is dreary[51].

One of the chief reasons why the antagonistic procedure is progressively common is the absence of open mindfulness about ADR systems when all is said in done[52]. So as to cause the individuals to understand the utility of mediation, there must be a positive system to

[45] Id.
[46]Rashika Nath & Abhinav Sankaranarayanan, "*Formulating A Model Legislative Framework For Mediation In India" XI* NUJS LAW REVIEW, (2018).
[47]Rule 17, Companies (Mediation and Conciliation) Rules, 2016, No. 18.
[48] Supra note 18
[49] Arjun Natarajan, *Companies (Mediation And Conciliation) Rules, 2016 – "Giant Leap" Or "Achilles Heel" For Mediation In India*?, LIVE LAW (September 20, 2016), http://docs.manupatra.in/newsline/articles/Upload/CD7C2CD4-01A5-4A20-84DF-EEF979A15235.pdf.
[50]Section 37, Consumer Protection Bill , 2019, No. 35 (India)
[51]Alok Prasanna Kumar, Ameen Jauhar, Kritika Vohra, and IshanaTripathi. 2016. *Strengthening Mediation in India: Interim Report on Court Annexed Mediations*. VIDHI CENTRE FOR LEGAL POLICY (2016), https://doj.gov.in/sites/default/files/Final%20Report%20of%20Vidhi%20Centre%20for%20%20Legal%20Policy.pdf.
[52]Supra note 27.

impart certainty and urge individuals to take response to mediation[53]. In such manner, the lawful crew, particularly the attorneys' must play a main job in controlling the litigants ' to arrive at a settlement in a participative and successful way[54]. In spite of the fact that it is justifiable that there may be obstruction by individuals from the legitimate calling around there because of a paranoid fear of decrease of their job, it is basic to verify their co-activity[55]. It is essential for legal counsellors to comprehend that a long way from decreasing their significance, it would prompt further increment in their jobs and capacities. As per Justice A .K. Sikri, the explanation for mediation isn't just to take the weight off the courts , however to convey equity to the individuals Mediation would require a move from the job of being dynamic members' to a facilitator who will help the parties'[56] in the acknowledgment of their inclinations'[57] .

Legal intercession is additionally a significant factor for advancing mediation [58] . In compatibility of the Salem I Committee Report[59], the Mediation and Conciliation Project Committee (MCPC) was set up with the point of guaranteeing that the mediation preparing programs completed by the different High Courts were being actualized effectively[60]. Both the Bench and the Bar Councils of different High Courts' must make light of a proactive job in laying a reasonable system for the guideline of the mediation procedure ,, for example, the moral contemplations , the charges of middle people's , terms of settlements' and so on[61]. There is a critical requirement for mediation preparing programs on the lines of Judicial Arbitration and Mediation Services (JAMS) in India for preparing and accreditation of middle people'. This is important to guarantee that the middle people are profoundly talented experts' who have the imperative aptitude and limit with regards to giving particular administrations of debate goals to their customers'[62]. In India, the non-attendance of an administrative structure on mediation forces parties ' to move toward private intervention establishments like Center for Advanced Litigation Practice (CAMP) and Indian Institute of Arbitration and Mediation (IIAM) which give pre-litigation mediation administrations and

[53]Supra note 9.
[54] Id.
[55] Id.
[56] "*Justice A.K. Sikri; The Professor Judge of India"*, BAR & BENCH (March 22,2019), https://www.barandbench.com/columns/justice-ak-sikri-the-professor-judge-of-india.
[57] Douglas A. Henderson, '*Mediation Success: An Empirical Analysis',* 11 Ohio State Journal On Dispute Resolution 105 (1996), 113
[58] Id.
[59] Supra Salem I.
[60] Id.
[61] Nadia Alexander, '*Mediation and the Art of Regulation'*, 8 Queensland U. Tech. L. & Just. J. 1 2008.
[62] Art Hinshaw, *Regulating Mediators,* 21 Harvard Negotiation L. Rev. 163 (2016).

furthermore intercession preparing programs, inside its own institutional guidelines[63]. There is a dire need of a uniform guideline on mediation practice in the nation, to be clung to by every licensed go between's who have experienced preparing programs and have been ensured by government associated mediation establishments[64]. This is important to not exclusively to guarantee purchaser assurance from untalented and beginner people's nevertheless it additionally to keep up trust in privacy and authorization of the entire procedure[65].

7. THE NEED FOR A REGULATORY FRAMEWORK FOR MEDIATION

So as to teach intervention as an inherent component in the predominant legitimate culture, there is requirement for an administrative structure, not really subject to the judiciary[66]. Everywhere throughout the world, various nations' have comprehended the significance of court-added mediation process as the favoured method of contest goals and have built up their very own systems For a nation like India[67], which has an assorted societies and works on winning in various locales, there is requirement for a solid authoritative structure on the lines of the Uniform Mediation Act in the USA[68]. This would guarantee consistency and consistency in the mediation procedure, which would and would get rid of the requirement for confining diverse Mediation Rules by various High Courts[69]. The sanctioning of a well-characterized authoritative structure would likewise have the benefit of drawing in outside venture as universal organizations support ADR systems for settling commercial disputes[70].

In M.R. Krishna Murthi v. The New India Assurance Co Ltd[71], the Supreme Court, while watching the colossal flood in engine mishap related cases all through the nation , stressed the need of setting up a Motor Accidents Mediation Authority (MAMA) in each region[72]. These establishments would utilize mediation for choosing significant issues, for example, award of

[63] Supra note 29.
[64] Supra note 64.
[65] Ibid.
[66] Supra note 9.
[67] Mark Kleiman, "*A Perspective on the Growth and Evolution of the Field of Mediation",* http://www.mediate.com/articles/kleimanM1.cfm.
[68] Supra note 61.
[69] Id.
[70] Supra note 46.
[71] *MR Krishna Murthi v. New India Assurance Co. Ltd.*, 2019 S.C.C. OnLine S.C. 315.
[72] Ibid.

between time help, and pay among others in an adequate way[73]. Concerning this, the Supreme Court focused on the need of receiving pre-litigation mediation rather than ill-disposed arbitration for brisk transfer of debates[74]. The Court saw that while the facts used to demonstrate that intervention has been consolidated in the lawful framework vide statutory institutions, there is an expanding need to acquaint a uniform enactment with control the procedure of mediation in the nation[75]. Towards this end, it has prescribed the Government to think about presenting an Indian Mediation Act[76].

In locales over the world, mediation has helped in improving conveyance of equity and has become a necessary piece of the question goals structure though India has been battling in such manner[77]. One of the pioneers of advancing mediation in India , Justice (Retired) Raveendran has pointed the requirement for spreading familiarity with the utility of mediation as a comprehensive, participatory procedure whereby there is a success win circumstance for both the gatherings' and the plausibility of proceeded with relationship regardless of whether no interceded settlement is come to[78].

8. CONCLUSION

As a procedure, mediation is yet to establish a critical connection on the legal scene in India. In correlation, arbitration as a procedure has been in vogue in India since the institution of the Indian Arbitration Act, 1940, later supplanted by the Arbitration and Conciliation Act, 1996. As a process, arbitration is more adjudicatory in nature when compared to mediation or any other ADR mechanism because of the binding nature of the arbitral award[79]. The change from the ill-disposed, arbitration based set up to an elective debate redressal instrument is bit by bit to follow. The New York Convention on the Enforcement of Foreign Arbitral Award (1958), built up the arbitration system in India and it took a long time for India to embrace the global practices identified with cross-fringe enforceability. Presently , with India turning into a signatory to the United Nations Convention on International Settlement Agreements

[73]Mridul Godha, *" A Renewed Interest In Mediation In India "*KLUWER MEDIATION BLOG, (March 30 , 2019), http://mediationblog.kluwerarbitration.com/2019/03/30/a-renewed-interest-in-mediation-in-india/.
[74] Ibid.
[75] Supra note 71.
[76] Ibid.
[77] Law Commission of India, *" Report on Need for Justice-dispensation through ADR',* Report No 222 (April 2009), http://lawcommissionofindia.nic.in/reports/report222.pdf.
[78] Justice R.V. Raveendran, '*Mediation-Its Importance and Relevance',* (2010) PL October 10.
[79] Supra note 53.

Resulting from Mediation, 2019 [Singapore Convention][80], one can just wish that India will manufacture its own mediation system in similarity with global models.

[80]Promod Nair and Shivani Singhal , " *Singapore Convention on Mediation : A New International Framework For Recognition and Enforcement of Mediated Settlement Agreement "(*August 07, 2019*)* BAR & BENCH (August 07, 2019), https://barandbench.com/singapore-convention-on-mediation-a-new-international-framework-mediated-settlement-agreements/).

THE DOCTRINE OF LEGITIMATE EXPECTATIONS: INDIA SHOULD INSPIRE FROM THE WTO

Anmol Jain

Student, National Law University, Jodhpur

ABSTRACT

The doctrine of legitimate expectation, in the context of a state-citizen relationship, creates a positive obligation on the state to perform certain activities if it has promised to do so. The courts have to walk to tight-rope in determining when the circumstances permit the invocation of the doctrine. Recently, in January 2019, the Supreme Court decided a case pertaining to the grant of pension to state government employees, and affirmed that view that 'the legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular or natural sequence.' In this short-piece, I argue that this test for determining the existence of a legitimate expectation is quite narrow and thus, calls for certain changes. I also indulge in a comparative exercise and discuss how the understanding of legitimate expectation under the WTO law is broad and multi-faceted, where the doctrine is applied in a manner to secure public interest and the principles of development of an economy.

1. INTRODUCTION

Universalization of the law is an upcoming phenomenon due to the expanding understanding of globalization. Courts regularly refer to decided cases of multiple jurisdictions to draw inspirations. Legislators often consider a successfully prevailing foreign statute as a model framework while drafting a new corresponding domestic statute. This dynamic blend enables a nation to develop an assimilated culture by adopting the best practices of the world. Is this assimilation worthy enough to sustain? The effective functioning of the Indian Constitution compels me to answer in affirmation. The Indian Constitution, often marked as a borrowed document, is an Indianized synthesis of constitutional law principles and practices prevailing in multiple jurisdiction such as the US, the UK, Russia, Ireland, Canada etc. The Indian courts have time and again visited the foreign decisions to realize the aim of transformation of the Indian society as dreamt by the constitution framers. However, a recent decision of the Supreme Court of India fails to uphold this promise. In *State of Bihar & Anr. v. Dr.Sachindra Narayan & Ors.*, decided in January 2019, the Supreme Court adopted a narrow

understanding of the doctrine of legitimate expectations and held that an expectation could legitimately bind the State *only* if it emanates from a pre-existing legal obligation on the State. In effect, the Supreme Court allowed the State to discontinue the credit of pension to the respondents after approximately 30 years of continuous 'mistake' – a mistake that resulted is no positive obligations on the State.

This paper is an endeavour to highlight the issues and challenges imbibed in the Indian understanding of doctrine of legitimate expectation and argue that the courts should adopt the World Trade Organization's understanding on the subject matter.

2. THE JUDGMENT

The facts in this case were as following. Anugraha Narayan Sinha Institute of Social Studies, Patna [hereinafter referred as "**the Institute**"] was established through a statute in 1964. In 1985, the Institute passed a Board Resolution granting pensions in favour of the retired employees on the month-to-month basis. The cause of the dispute arose in January 2014 when the Institute stopped the payment of pensions. Being aggrieved and financially hurt, the respondents (the pensioner in the SC decision) approached the Division Bench of the High Court of Judicature at Patna and received a favourable order. The appellants were directed to pay the arrears as well as the current pension to the respondents. When challenged in the Supreme Court, the appellants were successful in reversing this order and the financial assistance was termed as unfounded in law.

Among other arguments, the appellants pointed out that under Section 8 of the Act establishing the Institute, the State Government is obliged to contribute a sum of rupees two lakhs in each financial year for research work, publication, buildings and for proper maintenance and development of the Institute, but not *pension.*In addition, it was highlighted that the State Government did not approve the said resolution and thus, extra financial liability cannot be imposed on the Government. In reply, the respondents presented an argument built on the doctrine of legitimate expectations. The respondents focussed on the fact that the State Government was releasing Grant-in-aid inclusive of the pension fund in accordance to the resolution since 1985. Also, the Government had earmarked grants under the pension head during 2004-05 to 2011-11. This created a legitimate expectation towards the continuous receipt of pensions. It was countered by the State by the claim that disbursement of grant was a 'mistake', which has been rectified now.

The Supreme Court did not accept the arguments raised by the respondent and decided in favour of the appellant, the Institute. The Court referred to *Union of India &Ors. v. Hindustan Development Corporation &Ors.,*[1][hereinafter referred as "**the HDC judgment**"] wherein it was held that:

> "*[Legitimate Expectation] is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. ... Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.*"

This excerpt of the HDC judgment was followed by the Supreme Court to decide against the respondents, the pension-seekers.

3. PROBLEMS WITH THE JUDGMENT

I present certain reservations against this ruling. *First*, in *Ram Pravesh Singh and Ors. v. State of Bihar and Ors.,*[2]which was decided after the decision in the HDC case, the Supreme Court had redefined the warranted circumstances for holding an expectation as legitimate and enforceable:

"*[When] there [is] any regularity and predictability or certainty in action which can lead to a legitimate expectation.*"

In the instant matter, the pensioners had been receiving pension money since 1985 until 2014, when the Institute realized that they have been extending an unfounded pension, a mistake arising from their own wrong. However, prior to their realization, there was a continuous and regular disposal of pension for around 30 years, giving rise to a reasonable expectation of continued payment with certainty.

[1]Union of India & Ors. v. Hindustan Development Corporation & Ors., (1993) 3 S.C.C. 499, ¶28.
[2]Ram Pravesh Singh and Ors. v. State of Bihar and Ors., (2006) 8 S.C.C. 381.

Second, the law of property extinguishes one's legal right over the property and invests it in favour of the adverse possessor without any judicial recourse left with the true owner after the expiry of twelve years from the date when the possession of the defendant becomes adverse to the plaintiff.[3] The Supreme Court has recently reiterated this position.[4] The dichotomy in law emanates from the fact that on the one hand, law extinguishes the right over one's own property for negligence in taking care from adverse possession; whilst on the other, the law forbears the negligence of the State while crediting pension in favour of the respondents for 30 long years.

Third, one might argue that directing the state to extend the pension puts unwarranted financial burden and thus, is detrimental. However, there is simple economic argument against this proposition. The Government has recently announced the Direct Benefit Transfer scheme for the poor agricultural farmers, in place of the existing subsidies, through the General Budget 2019. I could trace two fundamental principles underlying the soundness of this policy. *First*, it presents the State as having an attitude of respect towards its citizens and belief that the citizens are capable enough to decide for themselves. There is no fallacy in this argument. The entire capitalistic market philosophy is based on the presumption that market decides for itself, and the term market denotes the 'players' or the individuals working in the market. Similarly, though the agriculturalist cannot sustain himself without any state help, however, it is beyond doubt that he understands his farm better than the State. Therefore, when the State extends subsidies towards a particular goods or services, it induces the farmer to opt for that particular goods or service. Not only is the farmer induced, s/he is forced to opt for that particular commodity for lack of resources to choose other commodities. Direct Benefit Transfer ensures competition in the market and an effective choice with the farmers to decide for himself without any paternalistic intervention on part of the State. One might feel that such money is prone to misuse and there is no surety that farmer is utilizing the money for his development. Well, implementation has always been a tough task and a successful implementation warrants rigorous checks and constant supervision.[5] Success of similar schemes in Mexico and Brazil based on effective supervision cannot be denied. At the same time, State needs to move from paternalistic attitude to a fraternal persona, to ensure

[3] Indian Limitation Act, 1963, s. 27 r/w art 65, Schedule.
[4]Dagadabai (Dead) by L.Rs. v. Abbas @ Gulab Rustum Pinjari, Civil Appeal No. 83 of 2008 (decided on April 18, 2017).
[5]*See* Arvind Subramanian et al., *The Case for Direct Cash Transfer to the Poor*, 43(15) ECONOMIC AND POLITICAL WEEKLY 37 (2008).

that it works hand in hand with the farmers in the research and development, and sharing the fruits of such research at reasonable costs.

Second, extending direct credit to the farmers shall make them financially sound and enhance their purchasing power. With increased purchasing power and cash holding, the farmers shall ensure that the aggregate demand does not fall down during recession. In addition, with increased savings in the bank accounts of the farmers, the country shall receive more of domestic indirect investment, though the banking channel, which shall contribute in the economic growth, given a sound banking system with sufficient regulations and responsible people holding the offices to issue credit based on sound research.

Drawing an analogy to the grant of pension, I argue that pension shall allow the respondents to lead an independent life without possible invocation of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 or Section 125 of the Code of Criminal Procedure, 1973. It shall allow the respondents to live a dignified life and feel more inclusive in the society, as pension shall allow them to take decision for themselves. Moreover, financial soundness shall enhance their purchasing power and thus, more demand in the market.

It is nowhere denied that a decision of this kind is a policy decision, something that falls within the exclusive domain of the Parliament and the Executive. However, it can also not be denied that the Indian Supreme Court has been famous for its judicial activism in order to do complete justice and has not abstained from framing policies wherever required. The instant matter is much simpler. The Supreme Court was not tasked to formulate a policy to fill the legislative void, but to see whether the practice of the Institute to credit pension can be discontinued. It was a matter of mere interpretation. As argued by Gautam Bhatia is his recent work, Constitution was drafted with a transformative purpose, with an aim to transform the political, legal and societal structure.[6] A contextual reading of the Constitution shall mandate the Court to opt that interpretation which favours the principles of social justice and egalitarian economic development. It is an accepted fact that inequalities in the country are increasing.[7] It has been noted that high levels of wealth disparity subverts democracy[8] and in light of such circumstances prevailing in the country, the Supreme Court should think

[6]GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION (2019).
[7] *Public Good or Private Wealth - The India Story*, OXFAM INEQUALITY REPORT (January 21, 2019), https://www.oxfamindia.org/sites/default/files/Davos-India_Supplement.pdf: The report presented various disturbing facts prevailing in the country. 'India's top 10% of the population hold 77.4% of the total national wealth. The contrast is even sharper for the top 1% that holds 51.53% of the national wealth. … Wealth of top 9 billionaires is equivalent to the wealth of the bottom 50% of the population.'
[8]Id.

beyond the black letters of the law and understand that it is legitimate for the respondents to expect continuance of their pensions.

Finally, even if the requirement to build a case for legitimate expectation is a pre-existing legal obligation on the State, I argue that by crediting pension for such a long period, the state itself has created a new obligation, not by words but by actions and supported by the Board Resolution. Such obligations cannot be marked as express obligation; however, they are more than implied obligations. Any retraction at this stage shall be dishonouring the faith of the respondents. At the same time, I do not wish to contend that *any* action of the State should bind itself and warrant continuance. Actions against the values of the Constitution and objects of the Statute, expressly or impliedly, should not be considered as binding.

4. LOOKING INTERNATIONALLY: SEEKING INSPIRATION FROM THE WTO

One must wonder the reason for resorting to the World Trade Organization's jurisprudence. Generally, a comparative analysis involves the study of two legal system working in two polities. WTO, though not a political nation, but it has been able to develop certain overarching constitutional law principles through the trade routes, which makes the Organization unique. The Marrakesh Agreement establishing WTO, working through the covered agreement, obliges the member states to grant Most Favoured Nation (MFN) status to all the other members, implying a non-discrimination trade behaviour among nations, ensuring the principle of *equality*. The WTO Agreement primarily aims at reducing tariff and non-tariff barriers to achieve the aims of globalization and free flow of goods and services, ensuing the principles of *liberty*. The WTO grants equal voting powers to its member states, irrespective of their contribution. Every country enjoys one vote in all deliberations of the WTO and the decisions are taken based on negative consensus, i.e. if any member wishes to block any decision, it has persuade all other nations to submit similar intentions. This regime is diametrically opposite to working system of other international organizations. For instance, in the United Nations, the P5 countries enjoy veto powers to block any decision and in the International Monetary Fund, the voting power is determined based on the monetary contribution of the States to the Fund. Such novel practices of the WTO ensues the principles of *fraternity*.

It has been noted since the framing of the Indian Constitution that the trinity of liberty, equality and fraternity lies at its foundations. Noteworthy are the words of Dr, B.R.

Ambedkar during his closing speech to the Constituent Assembly on the 25th November 1949:

> "*Political Democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity … liberty cannot be divorced from equality; equality cannot be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative… Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them.*"[9]

These principles – liberty, equality and fraternity – went on to become the foundations of the world's largest Constitution, the *Constitution of India*.[10] This concurrence between the foundations of the WTO law and the Indian Constitution makes a comparative study between the WTO law and the Indian law apropos.

5. LEGITIMATE EXPECTATIONS UNDER THE WTO

The Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter referred as "**DSU**"] has played one of the crucial roles in achieving the purposes of the WTO. The primary task of the Dispute Settlement Body is to preserve the rights and obligations of the members under the covered agreements and the interpretation of the WTO Agreement. Article 3.2 of the DSU provides that interpretative exercises have be conducted in accordance of the customary rules of interpretation of the public international law,[11] indicating a reference to the Vienna Convention on Law of the Treaties.[12] The doctrine of legitimate expectation is accepted and recognized internationally since long and this has

[9] Speech by Dr. B.R. Ambedkar, *Constituent Assembly of India Debates (Proceedings) – Volume XI*, LOK SABHA, http://164.100.47.194/Loksabha/Debates/cadebatefiles/C25111949.html.
[10] *See* INDIA CONST. pmbl.
[11] Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, ¶16, WT/DS2/AB/R (1996).
[12] Articles 31 and 32, Vienna Convention on the Law of Treaties art. 31 & 32, May 23, 1969, 1155 U.N.T.S. 331; Appellate Body Report, *US – Continued Existence and Application of Zeroing Methodology*, ¶268, WT/DS350/AB/R (2009); Panel Report, *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, ¶46, WT/DS50/R (1997).

allowed the Panel and the Appellate Body of the WTO to apply the same.[13] Instances of the same shall be studied in the further part of this paper though three disputes.

Japan – Measures Affecting Consumer Photographic Film and Paper[14]was one of the initial disputes involving the arguments on legitimate expectation. The dispute emanated from the Japanese laws and regulations concerning the distribution and sale of the imported consumer photographic film and paper. Japan was alleged of negatively discriminating the imported film and paper in violation of Articles III and X of the General Agreement on Tariffs and Trade. In addition, the US argued that the Japanese measures impair the benefits due to the US under Article XXIII:1(b):

> "*If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of … the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, the contracting party may, … make written representations or proposals to the other contracting party…*"

It was in reply to this provision that Japan invoked the doctrine of legitimate expectations. Japan contended that these 'benefits' consists of legitimate expectations of opportunities that shall arise from the concessions made by the member State and only those expectations could be legitimate, which have been made considering the measures that could be reasonably anticipated at the time of concession.

This attempt of Japan to restrict the scope of legitimate expectation was rejected by the Panel and it was held that any reasonably anticipated measure should not frustrate the legitimate expectations if they impair the benefits accruing under the Agreement. Therefore, interpreting the expectations in its broadest sense, it was decided by the panel that any expectation arising from the Agreement is legitimate. I locate the underlined reason for this decision in the concept of *certainty* in the expectations from the promised benefits.

---

[13] Appellate Body Report, *Japan – Alcoholic Beverages II*, ¶13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996); Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, ¶1050, WT/DS44/R (1998); Thaddeus Manu, *Interpreting Doctrine of Legitimate Expectation in WTO Jurisprudence in its Application to Compulsory Licensing*, 8(1) TRADE L. & DEV. 63 (2016).

[14]Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, ¶1050, WT/DS44/R (1998).

The next dispute under study is the *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products.*[15] It was concerning the 'mailbox application system' wherein instead of considering product patenting, India started offering exclusive marketing rights for five years to the applicants for pharmaceuticals and agricultural chemical product. This measure was challenged under Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which deals with patentability of all inventions but certain exceptions. Among other reasons, the Panel concluded that India did not uphold the legitimate expectations of other WTO members by failing to implement Article 27 in its purest essence and manner. The Panel referred to its predecessors' reports and noted that legitimate expectations in the matters of intellectual property rights should be considered in light of the rights granted to the patentees and thus, be construed to signify presence of competitive market conditions in the countries.[16] Such an understanding of the principles of legitimate expectations is dangerous for its individual-centric approach, especially if we take the case of pharmaceutical products. The Appellate Body understood this apprehension and it overruled the findings of the Panel with respect to legitimate expectation and gave an indication that the correct manner to use the doctrine of legitimate expectation is to *secure public interests* and protection of society at large.

The final for the comparative study is *EC – Customs Classification of Certain Computer Equipment.*[17]Here, a measure enacted by the European Communities concerning the import of Local Area Network adapter equipment was challenged by the US for violating Article II of GATT 1994 and inconsistency with the schedule of concessions. The US had argued that the impugned measure impairs its legitimate expectation, which is a core part of the WTO Agreement. Though the Panel accepted these arguments, but only to be overruled later by the Appellate Body. The Appellate Body noted that the doctrine of legitimate expectations flows from the principle of 'good faith'; however, such expectations should be based on the common intentions of the parties derived from their acts and conducts. Any unilateral subjective expectation shall not be considered as legitimate. Therefore, it was decided that *mutual understanding based on the conduct* shall give rise to legitimate expectation.

---

[15] Panel Report, *India – Patent Protection for Pharmaceuticals and Agricultural Chemical Products*, ¶46, WT/DS50/R (1997).

[16] *See* Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, ¶12-13, BISD 7S/60 (1958); Panel Report, *US – Taxes on Petroleum and Certain Imported Substances*, ¶5.22, BISD 34S/136 (1987); Panel Report – *US – Section 337 of the Tariff Act of 1930*, ¶5.13, BISD 36S/345 (1989).

[17] Appellate Body Report, *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (1998).

6. CONCLUDING REMARKS

The understanding of legitimate expectations in the WTO is broad based and multi-facet. It has interpreted and applied the doctrine in a manner to secure public interests and principles of development of an economy, such as ensuring competitive practices. The aforementioned cases derives three characteristics of legitimate expectation under the WTO: (1) legitimate expectation should complement the notion of 'certainty' in law; (2) only those expectations are legitimate which holds good in larger public interest; (3) the expectation cannot be unilateral and subjectively derived. Legitimacy is accorded through the conduct of the other party.

Applying these principles in the *State of Bihar & Anr. v. Dr. Sachindra Narayan & Ors.*, it shall be beyond any iota of doubt to conclude that the respondents were correct in their expectations of continued pension benefits, which they were receiving since 1985 until 2014. The decision to discontinue the pensions injects uncertainty and is concerned merely with the interests of the Government and not the public at large. Moreover, the expectations were not unilateral but derived based on the resolution passed by the Institute and regular payment of pension for a period of around 30 years, a conduct marked as a '*mistake*' by the State! It is high time that we uphold the aspirations of transformative Constitution envisaged by the Constituent Assembly and adopts a broad understanding of legitimate expectations in the legal system.

ONE NATION ONE ELECTION: CONSTITUTIONAL CONUNDRUM AND REALITY

Gaurav Shukla

Former LL.M. Student, Gujarat National Law University, Gandhinagar

ABSTRACT

Elections must be continuous as well as free and fair as they represent the vibrancy of democracy. The discourse on one nation one election or simultaneous elections is of much relevance in today's politics. The present government is pushing very hard for one nation one election, however; on the other hand, opposition parties are vehemently criticizing this very idea as violative of the federal structure and democratic spirit of the Country. The idea of simultaneous elections is not a new phenomenon in our Country as the simultaneous elections of Lok Sabha and Vidhan Sabhas have happened earlier also, however time has changed so the political and ground realities too, in the present times it is challenging to implement idea of one nation one election in our electoral system. However, it would be extreme to say that this idea cannot be implemented at all, but the time is not yet feasible to implement this idea at one go. To bring one nation one poll into reality consensus amongst political parties and various stakeholders is the primary imperative, which is a long shot in today's hullabaloo of politics. The paper attempts to analyze the issues surrounding one nation election on this backdrop.

1. INTRODUCTION

India is a vibrant and largest democracy in the world. The essence of any democratic system is its ability to conduct free and fair elections. Holding free and fair elections requires not only sound legal system and transparent electoral process but also an institutional structure regulating the whole process of elections. Elections in India are a very big exercise with over 900 million eligible voters across the Country and over one million polling booths in the Country[1]. One nation one election or concurrent/simultaneous elections is a much-debated and disputed topic in recent times. The idea of 'one nation one election' or simultaneous elections in the present context implies synchronization of parliamentary and State legislative

[1]Mukesh Rawat, *Lok Sabha Polls: Facts and Figures of India's Massive General Election*, INDIA TODAY (Apr. 8, 2019, 19:21 IST), https://www.indiatoday.in/elections/lok-sabha-2019/story/lok-sabha-polls-facts-figures-india-massive-general-election-1496461-2019-04-08.

assembly elections. The elections of third-tier institutions (i.e., Panchayat and Municipal Bodies) are not taken in the realm of simultaneous elections because State Election Commissions of different State conducts these elections after the introduction of 73rd and 74th Constitutional Amendments[2] in our Constitution. And, considering the large numbers of third tier institutions across the Country, these elections may not be adequately or properly synchronized with Parliamentary and Assembly elections.[3]

If we see history of Elections in India, it is not the first time when quests for simultaneous elections have been made; our Country has already witnessed simultaneous election of Lok Sabha and Vidhan sabha in year 1951-1952. This trend has continued in three subsequent general elections, viz. Elections in 1957, 1962 and 1967. But in 1968, 1969 and 1970 elections, the simultaneous elections of Lok Sabha and Vidhan Sabha could not take place due to premature dissolution of some of the State Assemblies

2. QUEST FOR SIMULTANEOUS ELECTIONS

The idea of simultaneous elections is primarily advocated because due to regular elections State has to incur exorbitant expenditure of capital/tax payer's money in managing election machineries and also the administrative machinery of the State suffers. The task of holding free and fair elections at regular intervals is assigned to the Election Commission of India and respective State Election Commissions of the States.[4] As we all agree that elections are the means towards the end of serving the people. When the Country runs in a constant election mode working and functioning of the government hinders. Due to frequent elections, government's deviates from governance hence elections which is a means to serve people becomes an end in itself.[5] If we see the efforts of various institutions towards bringing simultaneous elections into reality, the Election Commission of India has already endeavoured to bring such electoral policy in our electoral system. In 1983 the Commission

[2] The Constitution (Seventy- third Amendment and Seventy-fourth Amendment) Act, 1992, Acts of Parliament, 1992.
[3] Bibek Debroy and Kishore Desai, *Analysis of Simultaneous Elections: The "What," "Why," And "How",* NITI AYOG (July8,2019), https://niti.gov.in/writereaddata/files/document_publication/Note%20on%20Simultaneous%20Elections.pdf.
[4] INDIA CONST. art. 324 & art. 243K.
[5] Bhupendra Yadav, *Discussion on "Simultaneous elections- Possibilities and Challenges",* ADRINDIA (Nov. 23,2019), https://www.adrindia.org/content/discussion-%E2%80%9Csimultaneous-elections-%E2%80%93-possibilities-and-challenges%E2%80%9D-26th-oct-Wednesday.

had suggested that 'a system should be evolved so that elections to Lok Sabha and State legislative Assemblies could be held together.[6]'

The Law Commission has also shown interest in this regard[7], the Commission advocated the idea of simultaneous elections of Lok Sabha and State Assembly elections. The Commission, however, in its concluding remarks observed that *the desired goal of simultaneous elections could not be achieved overnight in the prevailing circumstances. It has to be achieved in stages.*

Former Chief Election Commissioner of India, S.Y. Qureshi, has, argued that the drawbacks of frequent elections are there but holding simultaneous elections in the present scenario is not feasible. He further said that when we are in a constant election mode, we are also in a permanent corruption mode, thousands of crores are spent during these elections and the money which is spent is not earned by any legal means but acquired through corruption and other illegal means. Besides, frequent elections create divide and rift between different communities in the society. Communal riots and caste disturbances are deliberately created during elections to ensure the polarisation of votes.[8]

The report of the Standing Committee[9] of Rajya Sabha in this regard is of much relevance. The report suggests that simultaneous elections in the Country will help to reduce massive expenditure, policy paralysis, impact on the delivery of essential services and the burden of crucial workforce that is employed during the election time.

NITI AYOG has also released a detailed paper[10] advocating implementation of simultaneous elections in our electoral system. The paper mainly lists four arguments in favour of simultaneous elections:

A. It has been said that because of frequent elections there are disruptions in the governance as the Model Code of Conduct is imposed when the notification of elections is issued by the Election Commission.
B. It has been further stated that State has to bear massive expenditure in conducting separate Lok Sabha and State Legislative Assembly elections.

[6]ELECTION COMMISSION OF INDIA, FIRST ANNUAL REPORT, (1983).
[7]170TH REPORT, LAW COMMISSION OF INDIA, 'REFORM OF THE ELECTORAL LAWS', (May 1999).
[8]S.Y Qureshi, *An idea whose time may not have come*, THE HINDU. June 19, 2019.
[9]SEVENTY NINTH REPORT, RAJYA SABHA, 'FEASIBILITY OF HOLDING SIMULTANEOUS ELECTIONS TO THE HOUSE OF PEOPLE & STATE LEGISLATIVE ASSEMBLIES', (December 17, 2015).
[10]INDIA CONST., *supra note 2.*

C. The third contention was the drain of resources of security forces due to their deployment in polling booths at different parts of the Country.

D. And, finally, it mentions the most common issues which occur in normal life when the elections are announced; there are disruptions in public life, upsurge in casteand communal divide created around the elections to ensure polarisation of votes andmost importantlystoppage of development works due to frequent elections.

3. THE ISSUE OF VIOLATION OF DEMOCRATIC SPIRIT AND FEDERAL STRUCTURE

Democracy is the form of government elected by people. It is a continuous participative exercise, not a calamitous, periodic exercise[11]. As discussed earlier, free and fair elections at regular intervals are the hallmarks of vibrant and real democracy. Elections provide an opportunity to the people of the Country to express their faith or dissatisfaction in the government from time to time. India is a multi-plural, multilingual state; every corner of the Country has its different setups and divergent needs as well as aspirations, therefore instead of Presidential form of government our Constitutional forefathers brought Parliamentary form of government.[12]

The Parliamentary form of government is accountable to the people, and the biggest problem in this form of government is that it can fall before the completion of its full term due to various reasons such as shortfall in majority, defection by MLA's or MP's. The idea of simultaneous elections is criticised by various academicians and political parties; it has been said that the elections of Lok Sabha are contested on national issues whereas State elections are generally focussed and fought on regional/local issues, if the elections to be held simultaneously, it will likely to confuse voters, and it would be complicated enough to distinguish between national and regional issues during these elections.[13]

Further, it has also been argued that if the elections are to be held simultaneously, there is likelihood that only one party will rule at Centre as well as in States which means that the

[11]Mrinalini Padhi, *The Ballot Box Wisdom versus Free and Fair Election,* SCC ONLINE BLOG (May 8, 2019), https://www.scconline.com/blog/post/2019/05/08/the-ballot-box-wisdom-versus-free-and-fair-election/.
[12]VOL IV, CONSITUTION ASSEMBLY DEBATES, 646-647.
[13]Anolam and Farheen Ahmad, *Modi's 'One Nation One Election': Death Knell for Cooperative federalism?* BUSINESS STANDARD (Sep. 25, 2019), https://www.business-standard.com/article/current-affairs/modi-s-one-nation-one-election-death-knell-for-cooperative-federalism-118021600416_1.html.

regional parties and regional issues will be at stake.[14] Prof. Sanjay Kumar, while speaking on '*The challenges in holding simultaneous elections in India[15]'*, mentioned a study conducted by *The Centre for the Study of Developing Societies* which shows that from 1989 to 2014 out of thirty-one Legislative Assembly and Lok Sabha elections conducted simultaneously in them twenty-four elections are such where major political parties were voted in similar proportions of votes both for Assembly and Lok Sabha elections, while only in seven elections voters voted differently. He concluded by saying that simultaneous elections will reverse the process of deepening democracy. Dr. Madhvan while speaking on the same subject[16] said that simultaneous elections could drastically affect the role of regional parties representing the marginalised communities of the Country. He also quoted Praveen Chakravarty's Paper which analysed the possible effect of simultaneous elections on voter's behaviour, the paper analysed around 2600 assembly constituencies in sixteen elections, and the findings showed that the majority of the time the same party was voted and chosen in the Assembly as well as in the Lok Sabha during simultaneous elections.[17]

Now, we have to examine whether the introduction of simultaneous elections in any way violates the federal structure of the Country. It has perspicuously held that India is an indestructible union of destructible units.[18] This means that India is a federal Country with a strong Union government at the Centre. The idea of federalism has been recognized in Basic Structure Doctrine.[19] Hence, violation of federal structure will violate the Basic Structure of the Constitution. It has been said that to synchronize elections of Lok Sabha and Vidhan Sabhas, tenure of some of the state assemblies either have to be extended beyond five years or have to be curtailed; for this President rule have to be imposed in various States which has been said to be a blow to the federal structure of the Country. [20]

4. MODEL CODE OF CONDUCT: ISSUES AND CHALLENGES

[14] *Id.* at 13.
[15] *Discussion on "Simultaneous elections- Possibilities and Challenges",* ADRINDIA (Nov. 25, 2019), https://www.adrindia.org/content/discussion-%E2%80%9Csimultaneous-elections-%E2%80%93-possibilities-and-challenges%E2%80%9D-26th-oct-Wednesday.
[16] *Id.*at 15.
[17] Praveen Chakravorty, *Different Vote for State and Centre*? IDFC INSTITUTE (Aug. 26, 2019), http://www.idfcinstitute.org/knowledge/publications/op-eds/different-vote-for-state-and-centre/.
[18] Raja Ram Pal v Hon'ble Speaker Lok Sabha, (2007) 3 SCC 144 (India).
[19] Kesavananda Bharati v State of Kerala, AIR 1973 SC 1461 (India).
[20] Santosh Paul, *Simultaneous Elections: Distorting accountable democracy and federalism*, THE ET TIMES, July 2, 2019.

Model Code of Conduct MCC, hereinafter MCC, is the guidelines issued to regulate political parties and candidates prior to elections. Model Code of Conduct is issued by Election Commission of India, the purpose of imposition of MCC is to maintain sanctity of elections i.e., to ensure free and fair elections. [21] Article 324[22] of the Constitution of India, 1950, provides power to the Election Commission of India to supervise, control, direct elections, under this wide power Election Commission issues Model Code of Conduct to the political parties and candidates. The Model Code of Conduct is operational from the date of announcement of elections till the date of results of elections. However, MCC has no statutory backing; it is enforceable by other laws and statues such as Representation of Peoples Act, 1951, Code of Criminal Procedure, 1973 and Indian Penal Code, 1860. When imposition of Model Code of Conduct is announce, the party in power cannot announce any new scheme or development which may potentially affects or influence the voters, MCC also prohibits issuance of advertisements at the cost of public exchequer. Apart from all these things the MCC contains certain provisions regulating general conduct of political parties, meetings, procession of any kind, guidelines during polling day, general instructions for polling booths, guidelines to party in power and election manifestos, and instructions to the election observers.[23]

If we have to analyze controversy surrounding MCC, we have to see arguments of both the sides, those who are in support of simultaneous elections argued that MCC hinders the growth of the nation as well as the development works, because when elections are announced all the actions of government comes under the scanner of MCC, to contrast this, it has been said on the other side that the Model Code of Conduct applies in instances where the government wants to introduce a policy or programme which may have bearing on election outcomes or could entice or influence the voters. And, if the government still wants to implement that policy or programme then firstly it has to seek clearance from the Election Commission, the Commission may allow or may not allow. Further, it has been pointed out that there are quite number of instances where the Election Commission has given such clearance when there is a matter of urgent public importance. It is unfair to say that the Model Code of Conduct stoops all the existing schemes of the government. Thus, to say that policy

[21] S.K. MENDIRATTA, ALL YOU WANT TO KNOW ABOUT INDIAN ELECTIONS, 330 (Lexis Nexis Butterworth's Wadhwa, 2009)
[22] Superintendence, directions and control of elections has been vested in Election Commission of India.
[23] "*Model Code of Conduct for the guidance of political parties,"* ELECTION COMMISSION OF INDIA (Dec. 15, 2019),https://eci.gov.in/mcc/.

paralysis happens because of Model Code of Conduct is strange.[24] The other solution to this problem can be that the Model Code of Conduct can be enforced from the date of notification of elections instead from the date of announcement of elections, thus limiting/reducing the duration of MCC during elections, this may be one of the immediate solutions to face this situation.[25]

Further, it has also been contested that frequent elections make political representatives more accountable and responsive to the Public, as they have to come to public whenever elections are announced.[26]

5. POLITICAL CONSENSUS: IS IT HAPPENING?

Political consensus is very necessary to implement this idea however political parties are at a crossroads over this issue. Some are favouring it and some are vehemently opposing it.[27] YSRCP Chief Jagan Mohan Reddy while supporting the idea said that 'one nation one election proposal is a bold initiative. He said that there are every likelihood that the ruling government may misuse state machinery for their benefit if the elections are continued to be conducted separately thus disrupting free and fair election process.'[28] The other supports include BJD chief Naveen Patnaik, Telangana Rashtra Samiti Chief K Chandra Sekhar Rao.

The Indian National Congress (INC) on the other hand opposed the idea of simultaneous elections by saying that the idea is impractical, unworkable and can lead to a scenario where the balance in Indian democracy may be lost because of its diverseness.[29]

All India Trinamool Congress (AITC) has supported the idea of holding simultaneous elections to Panchayat and Municipal Bodies but has rejected the idea of simultaneous

[24] Anuradha Raman, *Will the idea of 'one nation, one poll' work in India?* THE HINDU, June 28, 2019.
[25] B. Muthu Kumar, *One election, Two votes: The feasibility of reviving past trends*, 5 GNLU L. Rev. 139, 141-142 (2018).
[26]BHUPENDRA YADAV, s*upra note 5.*
[27] Poornima Joshi, *Who wants 'one nation, one poll'?* THE HINDU BUSINESS LINE (July 15, 2019), https://www.thehindubusinessline.com/specials/india-file/who-wants-one-nation-one-poll/article28253835.ece
[28]*Andhra Pradesh CM Jagan Supports 'One nation One election' proposal, raises SCS issue,* THE NEW INDIAN EXPRESS (June 20, 2019), https://www.newindianexpress.com/states/andhra-pradesh/2019/jun/20/andhra-pradesh-cm-jagan-supports-one-nation---one-election-proposal-raises-scs-issue--1992722.html.
[29]*Congress, Mayawati, Mamta to skip Modi meet on 'one nation one election',* BUSINESS STANDARD(July 19, 2019), https://www.business-standard.com/article/politics/congress-mayawati-mamata-to-skip-modi-meet-on-one-nation-one-election-119061900472_1.html.

elections for Vidhan Sabha and Lok Sabha, it has been said that postponement of elections for the purpose of simultaneous elections is anti-democratic and unconstitutional.[30]

The Communist Party of India (CPI) is of the opinion that the idea of simultaneous elections is unscientific and impractical which in the present situation is not feasible to be implemented.[31]

Thus, it can been seen that political parties are divided over this issue, some are supporting the idea by saying that it can be implemented with necessary amendments, however some are opposing on the view that implementation of simultaneous elections is antithesis to the democracy and democratic values. Here, if we see the current discourse on simultaneous elections, it is very difficult to say that there is a minimum consensus among members of civil society and politicians to adopt such electoral policy in our elections. At the same timeit should also not to be denied that simultaneous elections if bring into reality will be one of the biggest electoral reforms in the Country.

6. CASE OF SWEDEN AND SOUTH AFRICA

Case Of Sweden- If we see the Swedish electoral system it represents rule of proportionality. The rule of proportionality implies that number of seats any one party receives in national elections is proportional to the number of votes that party receives in the election.[32]
In Sweden elections of Sweden county/regional and municipal councils are held simultaneous with general elections i.e., elections of Riksdag, in every four years on a fixed date i.e., *the second sunday in september after every four years (last election was held on 9th September, 2018).* Yellow Ballot Papers are provided in Riksdag elections, whereas white for municipal elections and blue ballot papers are provided in county council elections[33].

South African Context: - Elections in South Africa takes place in every five years. In South Africa both national and provincial elections are held simultaneously. The South African Electoral system also follows proportional representation system of voting. In this type of system, voters vote for political parties and not for individual candidates. A political party

[30]*One Nation, One election is impractical unconstitutional: Trinmool*, BUSINESS STANDARD (July 8, 2019), https://www.business-standard.com/article/news-ians/one-nation-one-election-is-impractical-unconstitutional-trinamool-118070700306_1.html.
[31]*Left Parties oppose 'one nation one poll'*, THE HINDU, June 17, 2019.
[32]*Elections to the Riksdag*, SVERIGESRIKSDAG (July 10, 2019), https://www.riksdagen.se/en/how-the-riksdag-works/democracy/elections-to-the-riksdag/.
[33]*Id at 32.*

then gets share of seats in Parliament in proportion to the number of votes it got in an election. Each party than have power to decide on the members to fill seats it has won.[34]

Thus, we have seen the practice of simultaneous elections in these two countries, if we look into Indian context though the practice of simultaneous elections is not feasible in the present scenario, nevertheless it is not impractical or impossible to be implemented, further discussions and deliberations in this regard may open a new path.

7. CHALLENGES IN SIMULTANEOUS ELECTIONS

- It is very challenging to achieve the idea of simultaneous elections in practice in the existing constitutional framework as the practical realities are somehow different then the expectations. If we begin to see obstacles in simultaneous elections apart from constitutional conundrums it has been seen in number of times that tenure of Lok Sabha or Vidhan Sabha gets dissolved untimely before the completion of five year term because Indian politics is highly unpredictable. In that scenario, President Rule may have to be imposed for the remaining period and in that event to maintain the cycle of simultaneous elections, fresh elections may not be possible.
- The Union government and the governments at the State level needs to enjoy the confidence of the house to remain in power which may not be possible because of the practice of coalition government and defection by elected members or due to some politics or other reasons.
- Article 83 of the Constitution of India, 1950, provides for duration of both the houses of Parliament, article 83(1) provides that Rajya Sabha cannot be dissolve but 1/3rd members shall retire in every two years. Article 83(2) provides for five years for the house of people unless dissolved earlier. Similar, provision under article 172(1) provides for five year term for state legislative assemblies. Now, if we see the proviso to article 83(2) it provides that when the proclamation of emergency is in operation, the term of the house cannot be extended for a period exceeding one year at a time by Parliament through a law and not should not exceed period of six months in any case after the proclamation of emergency has ceased to operationalise. The same procedure has been prescribed in proviso to article 172(1) of the Constitution for the State Legislative Assemblies. Thus, tenure of House cannot be extended at any cost except

[34] *Election Types National and Provincial*, ELECTORAL COMMISSION OF SOUTH AFRICA, (Aug. 20, 2019), https://www.elections.org.za/content/Elections/Election-types/.

in emergency situation but it can be prematurely dissolved before expiration of its terms.

- The other concerns revolving around the idea of One Nation One Election is that it cannot be possible without introducing constitutional amendments[35]. Another issue is that the simultaneous elections will involve a lot of administrative arrangements, including the increase in numbers of Paramilitary Forces for the deployment during elections, more EVM's and VVPAT's and other institutional setups.
- Arguments against the simultaneous elections are also forwarded on the ground that it would be antithetical to the federal polity of our Country. In order to conduct simultaneous elections, the tenure of Lok Sabha or some of the State Assemblies need to be curtailed or to be extended. As, the Constitution of India states that term of Lok Sabha and State Legislative Assemblies cannot be extended beyond five years except in case of Emergency.[36] Thus the idea of simultaneous elections is not be possible without bringing a constitutional amendment which is a very tedious task in present political scenario of the Country.

8. THE WAY FORWARD AND CONCLUSION

Dr. Rajendra Prasad[37], has said that *"the man of strong character, vision and the man who will not sacrifice national interest for self interest or for the interest of some smaller groups or areas. We can only hope that Country will nurture and through up such men in abundance."* This can be hoped from our political leaders at the helm and different key stakeholders of the Country that they will act in best manner to serve the best interest of the Country. At least, it can be said that these decisions should not be taken in haste, the desirability and feasibility of simultaneous elections should be properly assessed before its implementation. The report of the Standing Committee of Parliament [38] and Law Commission[39], suggests that simultaneous elections in the present set of circumstances may not be achieved at one go but can be implemented in stages. The following reports recommended holding of elections in phase wise manner. According to these reports elections of some legislative assemblies whose term ends within six months to one year before or after election date could be held during the mid-term of the Lok Sabha and

[35] INDIA CONSTI. art. 83, 85, 172, 174 & 356.
[36]INDIA CONSTI. art. 83(2) & 172(1).
[37]VOL. XI, CONSTITUTION ASSEMBLY OF INDIA, (Nov 26th, 1949).
[38] BHUPENDRA YADAV, *supra note 5.*
[39]255TH REPORT, LAW COMMISSION OF INDIA, 'ELECTORAL REFORMS', (March 2015).

remaining with the Lok Sabha elections. The United Kingdom's experience in passing the Fixed-term Parliaments Act, 2011, has been referred, where mid-term poll could be held only if two-third majority of the House of Commons vote for fresh election or an alternative government is not formed within fourteen days.[40] It was further suggested that in case of premature dissolution of Lok Sabha or State legislative assembly, if mid-term election became essential, then the tenure of the freshly elected House should be only for remaining period of previous House.

Section 14 and 15 of Representation of the People Act, 1951, states that the Election Commission of India can notify the elections to Lok Sabha and State Legislative Assemblies six month prior to the end of their natural terms. These provisions may be used to achieve the required purpose without extension of terms of some of the State Assemblies.

Further, to address the problem of premature dissolution of Lok Sabha or Legislative Assemblies, the Election Commission of India and Law Commission of India both have suggested in making no-confidence motions more *constructive*. The Law Commission of India has recommended amendment to the rule[41] of no-confidence motion on the lines of *German Constitution*. In German system the opposition party moves both the no-confidence motion against the elected government and a confidence motion in favour of an agreed leader by the House to form an alternative government so to avoid premature dissolution of the house, but this is only possible when necessary exceptions will be carved out in X schedule[42] of the Constitution.

The idea of one nation and one election is a noble idea to end continuous cycle of elections in our Country but its implementation equally requires huge political will and set of constitutional amendments which is not practically feasible in the current political scenario; however this policy can be implemented in phased wise manner as discussed above, to give necessary time to the nation to adopt and realise such a big electoral reform.

[40]RAJYA SABHA *supra note* 9.
[41]Rules of Procedure and Conduct of Business in Lok Sabha, 2014, Rule 198, 2014(India).
[42] The Constitution (Fifty-second Amendment) Act, 1985, Acts of Parliament, 1985(India).

FROM SABARIMALA TO BARPETA SATTRA: A CONSTITUTIONAL PERUSAL OF ENTRENCHED DISCRIMINATION IN LIGHT OF SABARIMALA JUDGMENT

Raajdwip Vardhan

Student, National Law University and Judicial Academy, Assam

&

Susmit Isfaq

Student, National Law University and Judicial Academy, Assam

ABSTRACT

Throughout the ancient history of this great nation of India, women have always found themselves placed on a nigh mighty pedestal as far as their mythological role is concerned, however, in reality, their plight has been far from what has been depicted in the ancient literatures of the subcontinent. Their status quo has been marred under the weight of patriarchy, and their position in society has always been overshadowed by the mindset of the society, and time and again, the women of our country have had to bear the brunt of the patriarchal society that they are a part of, as evident by the numerous limitations placed on their daily lives.

One such misogynistic scenario, still prevalent in the state of Assam, is the treatment meted out towards women in the famed 'Barpeta Sattra', one of the foremost institutions of Assamese culture and heritage. Therein, written in bold words at the entrance, lies a board proclaiming "No Entrance for Females", a statement as ironical as any other due to the fact that the Sattra was established by Madhab dev, the disciple of Srimanta Sankardev. Being a prolific socio-religious reformer, Sankar dev was responsible for laying down the principles of heterodoxy as well as promoting acceptability towards people from every social strata, and infusing them into Assamese culture. When this incident is looked at in light of the recent Sabarimala judgment which afforded entry to the sanctum sanctorum of the Sabarimala temple after centuries of discrimination, the issue of the Barpeta Sattra must not be neglected anymore.

As such, the aim of this paper shall be to look at the position of women in Northeastern India, and scrutinize the treatment of women in Barpeta Sattrafrom the lens of the Sabarimala judgment as well as the Constitutional provisions on the matter, thus inculcating the

jurisprudence evolved in the Sabarimala judgment into the current condition of gender based restriction with regard to the Barpeta Sattra of Assam.

1. INTRODUCTION

Throughout history, women have more or less been attributed a position in society which is based on entrenched inequalities, and these have been grounded in both religious and cultural practices, where they are barred from taking part in certain activities which their male counterparts can partake in. One of the chief among these are the restrictions placed on the entry of women into religious institutions, with the reasons cited for such restrictions stem from a variety of reasoning, the most common being the prohibition of women during their menstrual cycle, as had happened in the case of *Sabrimala.*

Of such institutions, the famous *Barpeta Sattra* which is one of the most premier *Vaishnavite* sites worship, too falls on the category of institutions which bars women; a board present in front of the shrine states written 'women are not allowed entry in the *Kirtan Ghar* and *Manikur Griha.* The *Vaishnavite* movement of Assam was started by the saint *Sakardeva*, and many of its principles and ideas have been inculcated into the cultural ethos of the Assamese people, as well as among some other ones from the adjacent states of Assam. The *Barpeta Sattra* was established by *Madhav deva*, who was the *Sankar deva's* successor.

When taking into account the position of women within the *Vaishnavite* sect, Moheswor Neog, the famous academician whose studies were based around the cultural history of Assam and the Northeastern states, had famously noted that during *Madahdeva's* time, he had explicitly designated certain religious duties to women, and had stated that these women be the ones to carry on the morning *prasangas* (prayer) in the *kirtanghar* of the *Sattra.*[1] Thereby, it can be inferred that women were given their due honor with regard to the religious duties during the time of *Madhavdeva,* and it is only later on that these discriminatory practices began under influence of the patriarchal nature of society. The contributions of Padma Priya, who renounced her worldly duties and spent her life as an unmarried ascetic and worked tirelessly for the furtherance of the sect too cannot be undermined in any way.[2]

[1]Moheswor Neog, *Economic and Social Conditions of Medieval Assam,* ASSAM TRIBUNE, December 16, 1990.
[2]Id.

It must also be noted that this entrenched discrimination has not been kept hidden from the eyes of politicians and law makers of Assam, for the Governor of Assam J.B Pattnaik took a number of women with him into the Barpeta Sattra way back in the year 2010, and even tried to persuade the head priest of the institution to amending these prejudicial rules.[3]

One thing to be noted at this point is the fact that such discriminatory behavior is not only evident among temples of Hinduism, but also among the religious institutions of Islam as well, the most famous being the Haji Ali Dargarh, where the trustees of the esteemed institution stated that it would be a "grievous sin" to allow women into the sanctum sanctorum of the mosque.[4]

The Constitution of India contains the principle of equality as well as the liberty to pursue a religion of one's desire in its preamble itself, as well as cites it among the fundamental rights, and the freedom of religion has been enshrined clearly under Article 25. When read in synergy with each other, it is clear that practices such as barring the entry of women from entering certain religious bodies is a practice which is prohibited by the constitution itself. Furthermore, the recent Sabrimala judgment has also allowed entry to women into the sanctum sanctorum of the temple by scrapping a previously enforced traditional rule that barred the entry of women for a reason similar to *Barpeta Sattra.*The proclamation passed by the Apex Court in the Sabarimala judgment now begins to beg the question – *'If Sabarimala then why not Barpeta Sattra?'*

2. RELIGIOUS FREEDOM: A CONSTITUTIONAL ANALYSIS

The Constitution of India begins with the Preamble, and it itselfconfers the liberty of worship to all the people of the country, and furthermore, ensures equality of status and opportunity among all without any discrimination whatsoever irrespective of any differences. The words of the Preamble are further strengthened by the fact that the Constitution derives its ultimate sanction from the people of the country themselves, and thus, the people of the nation are themselves the source of the authority vested in the Constitution.

[3]Sukendu Bhattacharya, *Patnaik helps women break centuries-old barrier,* HINDUSTAN TIMES, April 14, 2010. (Accessed on 19 October 2019, https://www.hindustantimes.com/india/patnaik-helps-women-break-centuries-old-barrier/story-UPeLf2kqTuaQmfahDx8s9O.html).

[4]'*A grievous sin': Why women were banned in Haji Ali Dargah in the first place*, INDIA TODAY, August 26, 2016. (Accessed on 19 October 2019), https://www.indiatoday.in/fyi/story/haji-ali-dargah-why-women-were-banned-from-entering-inner-sanctum-337379-2016-08-26).

The question that now arises is what authority does the preamble have as far as determining the rights and positions of the people in the country goes? The major point to remember here is that although the Preamble of a Constitution does not hold any statutory significance of its own, in India, the position is different. Here, the preamble is also considered a basic feature of the Constitution, and thus a similar stand has also been emphasized by the Apex Court of the country when it unequivocally stated that the Preamble of the Indian Constitution is of extreme significance and importance, and thus, the Constitution must be read and any interpretation of it must be made in light of the grand and noble vision that has been expressed in the Preamble of the Constitution.[5]

Thus, if we look at the prohibition of women from entering certain institutions of religious significance, such as the *Barpeta Sattra*, we can clearly ascertain that such prohibitions are in contravention of the principles enshrined in our Preamble, for it clearly states that people shall have the liberty to worship any religion of their choosing, and the freedom to partake in religious activities or visit religious institutions is a liberty that comes associated with the same. Moreover, the same can also be said to be against the principles of equality as enshrined in the Preamble, since the limitations which are in place for females are not in place for their male counterparts, and thus, the notion of equality as written in the Preamble is again violated.

Moving forward with the discussion on equality, Article 14 of the Indian Constitution grants 'equality before law' and 'equal protection of laws'. The latter signifies that all the people, be it a citizen or a non-citizen due to the words "any person" used in the article, must be given equal treatment under equal circumstances, and any arbitrary practice which is discriminatory in nature, such as prohibition of entry for women into religious places is advocated against by this provision.

Article 15 of the Constitution states that no citizen shall be subjected to any liability or restriction with regards to entry into shops, places of public entertainment and restaurants, or restricted from using any public wells, tanks, bathing ghats or roads maintained either wholly or partly by State funds or solely dedicated to use by the general public, merely on the ground of the sex/gender of the concerned person. While an argument can be made that the provision only deals with gender based discrimination with regard to certain public places, when read in synergy with the proclamations of the judiciary in the cases of Anuj Garg and Others v.

[5] Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.

Hotel Association of India and Others[6] it is evident that gender bias of any form violates the constitutional norms.

Moving on to the freedom of religion as prescribed by the Constitution, Article 25 (1) states that subject to the public order and morality, all persons are equally entitled to freedom of conscience and the right freely to profess and practice any religion of their choosing. The right to have access to particular place that has significance and importance for the religion in question has also been constitutionally protected by the Apex court of the country by its judgement in the landmark case of Commissioner, Hindu Religious Endowments. [7] Considering the fact that the only restriction placed on the Article is if it violates public order and morality, considering the fact that the permission to women to partake in religious practices can never be justified under the garb of this provision, it can be easily concluded that the same is a violation of the freedom enshrined under Article 25 (1).

Article 26(b),which grants every religious denomination the power to manage its own affairs in the matters of religion has been and is still used as a veil by a number of institutions for justifying discriminatory and prejudicial practices, however, in the case of Sri Venkataramana Devaru and Others v/s The state of Mysore and Others,[8] it was held by the Hon. Supreme Court that although the denomination in the present instance has a right under Article 26 to wholly exclude members of the public from worshipping in the temple, the same must however yield to the '*overriding right'* declared under Article 25 (2) (b) in favour of the public to enter into a temple and offer worship.

3. SABARIMALA JUDGEMENT – A STUDY FROM THE PERSPECTIVE OF FREEDOM OF RELIGION

Located in the state of Kerala, Sabarimala is one of the largest institutions of worship for the people belonging to the Hindu religion. The temple belongs to the deity Lord *Ayyappa*, and it has traditionally banned the entry of women between the ages of 10-50 into the sanctum sanctorum of the temple. The history of the temple states that it is Lord *Ayyappa's* refusal to marry the *Devi Malikappurathamma* till the day that no first time devotees come for

[6]Anuj Garg v. Hotel Association of India &Ors. (2008) 3 S.C.C.1.
[7]Commissioner, Hindu Religious Endowments, Madras v. Sri LakshmindraThirtha Swamiar of Sri Shirur Mutt, A.I.R. 1954 252.
[8]Sri Venkataramana Devaru and Others v. The State of Mysore and Others, A.I.R 1958 S.C 255.

pilgrimage to Sabrarimala; and this reason forms the basis of the prohibition on women from entering into the temple.

Based on this history, Travancore Devasom Board (Board dealing with the temple management) has contended that in light of the fact that the deity in the temple is in the form of a *Naisthik Brahmachari,* it is believed that young women should not be allowed to offer any worship in the temple so as to ensure that even the slightest deviation from celibacy and austerity of the deity is not caused by the mere presence of women.[9]It is because of this reason that women between the ages of 10 to 50, the age between which the menstrual cycle occurs, are denied entry into the temple.

The major questions of law in this case were:

i) Whether the exclusionary practice of prohibiting women is based on biological factors, and thus amounts to discrimination, being violative of Articles 14, 15 and 17, or if it is protected by 'morality' as envisaged under Article 25 and 26?

ii) Whether exclusion of women falls under the bracket of "essential religious practice" under Article 25?

With regard to the first question of whether such exclusionary practices violate the principles of equality and promote gender based discrimination which has been deemed illegal by Articles 14 and 15, one can look at the judgement of the court in the case of Charu Khurana & Others, v. Union of India & Others,[10] discrimination of any sort related to gender will violate the constitutional norms.

On the question of untouchability under Article 17, it can be ascertained that the provision not only bans the literal meaning of untouchability within the people, but also strives to remove and eradicate all notions of purity and impurity with regard to one's social identity, and as such, an argument can be made that practices such as Sabarimala are detrimental to the principle that Article 17 wishes to uphold. On the question of untouchability being practiced for religious reasons in temples, the Supreme Court has already proclaimed that –the provisions under Article 25 (2) (b) sanctions and authorizes the State to take certain steps for

[9]Sandipan Sharma, *Do gods discriminate? Sabarimala Board says Lord Ayyappa does not like women in temple,* FIRSTPOST. (Accessed on 20 December 2019). http://www.firstpost.com/india/do-gods-discriminatesabarimala-board-says-lord-ayyappa-does-not-like-women-in-temple-2601986.html).

[10]Charu Khurana & Others, v. Union of India & Others, (2015) 1 S.C.C. 192.

removing the 'scourge of untouchability' amongst the Hindu people, and the word 'public' under the aforementioned provision includes within its ambit any section of the public. Public institutions would therefore not merely be restricted to those temples which have been dedicated to the public as a whole, but also those which have been founded for the benefit of certain sections, and hence, denominational temples would also fall under the scope of the abovementioned Article.[11]

Furthering the issue of untouchability, it can also be argued that the practice of excluding women from entry into a particular religious institution only on the ground that these women are menstruating at that particular point of time furthers the notions of purity and pollution, and takes into consideration the age of custom of untouchability, thus regarding these women as polluted' in a sense.

On the question of morality, the Hon. Apex Court of the nation stated in the Sabarimala judgment itself that the term 'morality' under Article 25 (1) of the Indian Constitution should not be viewed with a *narrow lens* since that would lead to confinement of the definition of morality to what an individual or a section of society or any particular religious sect may perceive it to be. One must remember that when a violation of fundamental rights occur, the term 'morality' naturally implies Constitutional morality, and thus, any view or stand that is ultimately taken by Constitutional Courts must always be in conformity with the basic tenets as well as principles of the concept of Constitutional morality that traces its support from the Constitution itself. [12]

With regard to the question of whether prescribed prohibition was an essential one as far as the religious practices are concerned, the argument forwarded by the temple authorities was that considering the fact that Lord Ayyappa has taken a vow of celibacy, having women enter the temple would be detrimental to the vow that Lord Ayyapa has taken, and thus it forms a part of the essential religious practice argument to bar women from entering the temple.

However, in his judgement, Justice Chandrachud scrutinised this argument as forwarded by the authorities, and stated – *"The Respondents submitted that the deity at Sabarimala is in the form of a Naishtika Brahmacharya: Lord Ayyappa is celibate. It was submitted that since celibacy is the foremost requirement for all the followers, women between the ages of ten and fifty must not be allowed in Sabarimala. There is an assumption here, which cannot stand*

[11] *Supra Note* 10.
[12] Indian Young Lawyers Association & Ors. v. The State of Kerala &Ors, (2018) 8 S.C.J 609.

constitutional scrutiny. The assumption in such a claim is that a deviation from the celibacy and austerity observed by the followers would be caused by the presence of women. Such a claim cannot be sustained as a constitutionally sustainable argument. Its effect is to impose the burden of a man's celibacy on a woman and construct her as a cause for deviation from celibacy. This is then employed to deny access to spaces to which women are equally entitled. To suggest that women cannot keep the Vratham is to stigmatize them and stereotype them as being weak and lesser human beings. A constitutional court such as this one, must refuse to recognize such claim."[13]

Hence, it can construed from this that the ground as prescribed by the temple authorities does not stand the ground of essentiality, and thus, the practice of barring women entry into the temple is not essential in nature.

4. ANALYSIS AND CONCLUSION

If we reopen the history of *Vaishnavite* movement in Assam, We could see the role that women played in spreading the movement. Be it Padma Priya, the daughter of Gopal Ata of Bhawanipur, Assam who devoted all her life in spreading *Vaishnava* movement in Assam by writing poems and going to places or be it Aai Sumati, who in her capacity saved the historical artefacts and texts by entering the Sattra while it was burning in the devastating fire that broke out in the Sattra- Women have undoubtedly played no lesser role than men in the Vaishnavite movement of Assam.

Still, just like many other religious places in India, including Lord Kartikeya Temple in Pushkar, Ranakpur Temple in Rajasthan, and Haji Ali Dargah in Mumbai etc. which bars entry of women; *Barpeta Sattra* is no different. The rationale behind this in most of the cases is related to the menstruation process that women go through in their lifespan. India, being a country which has been mainly patriarchal in nature, connotes the concept of purity with menstruation. It regards the menstruating women as 'impure' which the believers believe that makes the premise unholy. In case of *Barpeta Sattra*, it is often argued that due to the fact that the inhabitants of the campus are mostly celibate, hence entrance of women might divert their minds and which will lead to transgression of the religious code of conduct. The reason the supporters of the tradition gives has no reasonable nexus with each other.

[13]*Supra Note 12.*

The case of entrance discrimination in *Barpeta Sattra* can be looked through the purview of Article 25 and 26 of the Indian Constitution. Article 25 empowers all persons equally the right to profess, practice and propagate religion. Article 26, however, gives right to the religious denominations to manage affairs, establish and maintain institutions and to administer such property. The constitution does not define 'religious denomination'.

In the landmark judgment of the *Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[14] the apex court has explained what a religious denomination is. It says that it is "a collection of individuals, classed together under the same name; now almost always specifically, especially a religious sect or body having a common faith and organisation and designated by a distinctive name." by this, it can be said that *Barpeta Sattra* is a religious denomination. Yet, it does not give them the absolute right to discriminate entrance based on gender. Article 25(2) (b) upholds the individual's protection from discrimination and Article 26(b) on the contrary upholds the institutional right to an organised religious practice. These two provisions which are prima facie contradictory to each other has to be harmoniously constructed. In the *Devaru's case*[15], the Supreme Court has explained the ambit of 'matters of religion' which is present in Article 26. It says that matters of religion in Article 26 include practices of religion that are basic to the religion itself. In the light of Barpeta Sattra, the discrimination cannot be regarded as the 'basis'of the religion and the belief that they possess.

Except for this *Sattra*, no other *Sattra* bars women from entering its premises. That is sufficient to say that discrimination is not an essential part of the religion that they believe. In the same case, the court has said that the rights guaranteed under Article 26 are not absolute and subject to the restrictions of Article 25. It has to be harmoniously constructed with the rationale behind Article 25 and has to be liberally interpreted for the benefit of the public.

Article 51A of the Indian Constitution, which is a fundamental duty, places a responsibility among the citizens to promote harmony and brotherhood amongst the citizens, and to renounce practices which are derogatory towards the dignity of women. To go with the spirit of Article 51A of India, one has to realise the need for withering away discriminatory traditions and practices. We all shape morality by our practices at home and by seeing practices prevalent in society. There cannot be a defining standard of morality. Religions too

[14]*Supra Note 7.*
[15]*Supra Note 8.*

play an important part in shaping the morality of a person. The Supreme Court of India in the Sabarimala Judgement has clearly stated that -

"Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders of the Constitution adopted has to survive, constitutional morality must have a content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity. These are the means to secure justice in all its dimensions to the individual citizen. Once these postulates are accepted, the necessary consequence is that the freedom of religion and, likewise, the freedom to manage the affairs of a religious denomination is subject to and must yield to these fundamental notions of constitutional morality."[16]

It can be seen the kind of emphasis the Apex court has given on Constitutional morality. The court has looked at the matter of entrance discrimination from the perspective of women who are the victims of social constructions.

One has to understand the fact that questioning an age-old tradition does not amount to disrespecting it. With the changing times, one has to understand that discriminating practices are reminiscent of age-old patriarchy and feudalism that Indian society still has. Discrimination hiding under the veil of tradition cannot be and should not be negotiated. These are barriers to progress and one has to understand it. To change a society like that of India there have to be bold moves taken. To start with, the process of menstruation is biological and natural. Connecting that with 'purity' and 'impurity' is a socially constructed notion. Secondly, the law of the land which is a staunch promoter of gender equality calls it unlawful to discriminate human in the name of gender without reasonable nexus. One has to understand that superiority is not related with any gender, and one gender deciding the fate of another is not acceptable.

Finally, to conclude, the *Sabarimala* judgment which was awarded a year ago, despite being put for review before a larger bench, does not stand undermined in its importance in any manner, for it has proved to be a crucial step towards ensuring that the gender based discrimination with regard to right to religion which is prevalent is tackled before the judiciary so as to ensure that the constitutional rights available to all are in fact exercised by all irrespective of any differences based on their gender. However, it is important to

[16]*Supra Note 12.*

understand that apart from the judicial processes, the society too must take into consideration, as well as understand the implications of such a judgment, for it is not possible to put before the judiciary every similar matter for consideration. Incidents such as the prohibition of entry for menstruating women into the *Barpeta Sattra* of Assam too should be dealt away with in light of the judgment proclaimed for *Sabarimala,* and the archaic and discriminatory rules must be done away with in light of legal luminescence bestowed upon all by the judiciary, for only then will the rights enshrined in the Constitution transcend from mere lines into something greater for every citizen of India.

UN GUIDING PRINCIPLES REGARDING VIOLATION OF RIGHT TO CLEAN AND HEALTHY ENVIRONMENT: A MAJOR STEP FORWARD OR A BIG STRIDE BACKWARDS?

Raj Shekhar

Student, National University of Study and Research in Law, Ranchi

&

Harsh Mishra

Student, National University of Study and Research in Law, Ranchi

ABSTRACT

UN has been engaged in the task of developing regulatory framework for accountability of TNCs for human rights violations in the last six decades. Attempts to develop UN Draft Code of Conduct could not succeed. Similarly, UN Norms also could not give tangible outcomes. UN Guiding Principles represent contemporary approach of UN towards accountability of TNCs for violation of human rights. UN Guiding Principles are very comprehensive which invariably include within its ambit the issues of violations of right to clean and healthy environment by the TNCs. While UN continues to be involved, the approach adopted by it in Guiding Principles is significantly distinct from its approach under UN Norms. Such shift in approach has enabled UN Guiding Principles to generate wider consensus amongst various stakeholders of the international community particularly TNCs. The paper argues that potential efficacy of Guiding Principles will be tested as and when a hard case comes up for resolution. Till then, consensus should be used to develop this framework under which TNCs act responsibly avoiding any direct or indirect involvement in environmental damage.

1. INTRODUCTION

The Transnational Corporation (acronym TNCs) have long been alleged to be involved in worst kinds of environmental damage in the course of their activities that they undertake round the globe.[1]While United Nations (UN) must be given credit for bringing the right to a healthy and clean environment to the forefront at the international level,[2][3] it also provided the

[1] Peter Robbins, *TNCs and Global Environmental Change: A review of the UN Benchmark Corporate Environmental Survey*, 6 GEC 235, 235-244 (1996).
[2]UNITED NATION, *Report of the United Nations Conference on the Human Development* (Aug. 1, 2019 11:45 AM), http://www.un-documents.net/aconf48-14r1.pdf.

platform to undertake efforts to develop binding legal framework for accountability of TNCs for the violation of human rights. Draft Code of conduct for TNCs given by the United Nations failed to become a reality due to various kinds of factors including lack of consensus.[4] Few years later, another attempt to develop UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms)[5] could not succeed again as no consensus could be reached.[6] Accordingly, the effort was given up and a new approach was adopted in the form of UN Guiding Principles on Business and Human Rights (UN Guiding Principles).

1.1. **The Developmental Phase of UN:**

UN Norms imposed on companies same kind of duties under international law as were undertaken by States upon themselves.[7] Therefore, they triggered a debate not only about their content but also about their impact. The debate led the Commission of Human Rights (CHR) to initiate a new process in 2005 by requesting the UN Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises initially for two years.[8]Accordingly, Professor John Ruggie of Kennedy School of Government at Harvard University was appointed as Special Representative of the Secretary General (SRSG). Its work may be classified into three distinct phases –

1.1.1. ***Phase – I (2005-2007):*** It was marked by little shared knowledge on the part of stakeholders.[9]

1.1.2. ***Phase – II (2007-2008):*** This phase led SRSG to conclude that existing public as well as private initiatives concerning business and human rights do not constitute a coherent or complementary system and have failed to move markets.[10] According to SRSG, it

---

[3] UNITED NATIONS *Rio Declaration on Environment and Development* (1992) (Aug. 16, 2019 02:35 PM), http://www.unesco.org/education/pdf/RIO_E.PDF.

[4] Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 J. World Inv. & Trade, 11-87 (2015).

[5] UN News, *UN human rights body approves guidelines for multinational corporations,* UNITED NATIONS (Aug 13,2019), https://news.un.org/en/story/2003/08/76902-un-human-rights-body-approves-guidelines-multinational-corporations.

[6] Pini P. Miretski & Sascha-Dominik Bachmann, *The UN 'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights': A Requiem*, 17 (1), Deakin Law Rev. 5, 9 (2012).

[7] John Ruggie, *Guiding Principles On Business And Human Rights: Implementing The United Nations "Protect, Respect And Remedy" Framework,* OHCHR (Aug. 21, 2019), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf .

[8] UNHRC, *Human Rights And Transnational Corporations and Other Business Enterprises*(Aug. 25, 2019 12:22 PM), ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc.

[9] Ruggie, *supra* note 6, at 3.

[10] *ibid.*

was 'due to lack of authoritative focal point' that SRSG later developed as Protect, Respect and Remedy Framework.[11] The framework hinged on three pillars[12] – Firstly, State duty to protect against human rights abuses by third parties including business enterprises. Secondly, corporate responsibility to respect human rights. Thirdly, greater access to judicial and non-judicial remedies. These three pillars constitute 'an inter-related and dynamic system of preventive and remedial measures'.[13]

1.1.3. ***Phase – III(2009-2011)***: This marked the beginning of operationalisation of the framework.[14] Under this phase, SRSG was required to come out with 'practical recommendations for its implementation'. These recommendations took the form of UN Guiding Principles.

2. DISCUSSING THE SIGNIFICANT GUIDING PRINCIPLES

UN Human Rights Council endorsed UN Guiding Principles drafted by SRSG on 16 June 2011 after extensive consultation with various stakeholders. UN Guiding Principles are classified into following three parts, namely:

i. *State Duty to Protect Human Rights*
ii. *Corporate Responsibility to Respect Human Rights, and*
iii. *Access to Remedy*

Each part of the UN Guiding Principles is further classified into two sets of principles – Foundational and Operational. Each principle is followed by Commentary which further explains its meaning. UN Guiding Principles clarified at the outset that these Principles are not creating new international law obligations.[15] They merely explained the 'effects of existing standards and practices for States and businesses'.[16] They 'integrated them into a single, logically coherent and comprehensive template'.[17] They identified shortfalls in existing regime and suggested improvement therein. Therefore, UN Guiding Principles can make sense only when taken together, not in isolation. States and TNCs were required to collaborate in this endeavour.

2.1 State's Duty to Protect Human Rights:

[11] *ibid.*
[12] *id.* at 4.
[13] *ibid.*
[14] *ibid.*
[15] *ibid.*
[16] *ibid.*
[17] *id.* at 5.

This duty consists of two Foundational Principles and six Operational Principles. The duty includes States to be under an obligation to protect abuse of human rights under their territory/jurisdiction by TNCs through 'effective policies, legislation, regulations and adjudication'.[18] Further, States are required to clearly lay down their expectations from business enterprises regarding respecting human rights throughout their operations.[19]Duty also requires States' to – enforce laws; ensure that corporate law enable business respect for human rights instead of constraining it; effectively guide business enterprises regarding respecting human rights; and encourage them to address their human rights impact.[20]

Business enterprises that are controlled or substantially supported by States are required to undertake human rights due diligence.[21]Besides, States should maintain adequate oversight in their contracts with business enterprises as well as during the course of legislating for such business enterprises regarding respecting human rights.[22]Also, mere privatization does not absolve States' from their international human rights obligations.[23]They are required to use contractual clauses of their commercial transactions with business enterprises in promoting respect for human rights.[24]They should maintain adequate policy making space in their pursuit of business related policy objectives either with their counterparts or with business enterprises.[25]They, as members of multilateral institutions, are required to ensure that such institutions do not hamper their capacity to fulfill their duty to protect in respecting human rights.[26]

2.2 Corporate Responsibility to Respect Human Rights:

This responsibility consists of five Foundational Principles and nine Operational Principles. It is interesting to note that although the part is titled as corporate responsibility but the term used in the principles is 'business enterprises'. Latter term is undoubtedly wider in scope and includes business entities other than corporations as well. Foundational principles require business enterprises to respect human rights.[27] Respect includes avoiding infringement of

[18] OHCHR, *Guiding Principles On Business And Human Rights (*Aug. 25, 2019 03:26 PM) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[19]*id.* at 3.
[20]*id.* at 4.
[21]*id.* at 6.
[22]*id.* at 8.
[23]*ibid.*
[24]*ibid.*.
[25]*id.* at 11.
[26]*ibid.*
[27]*id*at 13.

human rights and addressing their adverse impacts on human rights.[28] This responsibility has twin characteristics. Firstly, it exists beyond complying national laws and regulations meant for protecting human rights. [29] Secondly, responsibility is irrespective of their abilities/willingness in meeting their obligations pertaining to human rights.[30] So, both States and business enterprises are given a distinct role in furthering human rights agenda. However, there is a significant difference between the two. Business enterprises are created to earn profits, structured accordingly and justify their existence so long as they continue to earn profits. On the other hand, States are created for welfare of people, structured accordingly and justify their existence so long as they continue to do welfare. This distinction has a direct bearing on the obligations that should be imposed on them and the practical consequences thereof.

For the purpose of UN Guiding Principles, the term 'human rights' mean 'internationally recognized human rights'. [31] Internationally recognized human rights are authoritatively contained in International Bill of Human Rights (comprising Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, eight International Labour Organization's core Conventions set out in Declaration on Fundamental Principles and Right at work).[32] Business enterprises may have regard to 'additional standards' like the ones relating to 'indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities, migrant workers'.[33] Although right to clean and healthy environment is not explicitly mentioned but has been interpreted to be included in their ambit and scope.

Business enterprises are required to avoid causing/contributing to adverse impacts on human rights through their activities.[34]In situations where they are themselves not causing such impacts on their own, they should prevent or mitigate such impacts 'directly linked to their operations, products or services by their business relationships'.[35] Activities for this purpose

[28] *ibid.*
[29] *ibid.*
[30] *ibid.*
[31] *ibid.*
[32] *id.*at 14.
[33] *ibid.*
[34] *ibid.*
[35] *ibid.*

include actions as well as omissions whereas business relationships include 'business partners, entities in value chain and any other non-State entity directly linked' therewith.[36]

Although the responsibility is applicable to 'all business enterprises irrespective of their size, sector, operational context, ownership and structure' but the means adopted for this purpose are to be proportional to their capacity.[37] Therefore, TNCs will have to own up greatest of responsibility and the means also need to be the most formal of all.

Business enterprises are required to prepare policy commitment; due diligence process and remediation processes regarding human rights.[38] Every TNC therefore need to develop a specific policy elaborating details of their responsibility towards human rights. Further, this policy needs to translate itself in the form of due diligence processes and remediation processes regarding human rights. The operational principles require such policy to be 'approved at the most senior level'; containing its 'expectation of personnel, business partners and other parties directly linked' thereto.[39] It should not only be communicated to all relevant parties internally as well as externally but also be made publicly available.[40] It should be reflected in operational procedures.[41] It is important to note that the term 'statement' is used in generic sense giving considerable freedom to a TNC regarding the form to be adopted for this purpose.[42] Experts are required to be involved in drafting such policy and the extent of their inputs depends on the complexity of business enterprise.[43] Since TNCs adopt the most complex forms of business organization in our contemporary world, their policies are required to be the highly enriched by inputs of experts (both internal and external).

Human rights due diligence needs to – include within its ambit adverse human rights impacts caused/contributed by a business enterprise by its activities or the ones directly linked to its operations, products or services, complexity whereof will vary according to its size, risks, nature and context of operations; be ongoing as risks may vary with time due to expansion or contraction of its operations.[44] It may be included in 'enterprise risk management systems' in

[36] *id.*at 15.
[37] *ibid*.
[38] *id.* at 16.
[39] *ibid*.
[40] *ibid.*
[41] *ibid.*
[42] *id.*at 17.
[43] *ibid.*
[44] *id.* at 18.

case it exceeds identification and management of material risks.[45] It should be initiated, as early as possible, as part of the process of developing new activity or relationship since it is possible to increase or mitigate human rights risks during the course of structuring contracts or it may be inherited through M&A.[46] Such human rights due diligence will enable the business enterprises in defending itself in the court of law by taking every possible step to avoid its complicity.[47]

Assessment of human rights risks is required to be done through 'meaningful consultation with potentially affected groups and other relevant stakeholders'[48] at regular intervals[49]. Such assessment may be clubbed with other assessments like environment and social impact assessment but not at the expense of any internationally recognized human rights.[50] Business enterprises need to assimilate findings of such impact assessments in their functions and processes in such a manner that responsibility for addressing such impacts is fixed and effective responses are enabled through internal decision making, budget allocations and oversight processes.[51] Appropriateness of action in this regard will be determined by the fact whether such adverse impacts are caused or contributed by the concerned business enterprise or directly linked to its activities by a business relationship or extent of its leverage.[52] A business enterprise has leverage if it has the 'ability to effect change in wrongful practices of an entity'.[53] If the business enterprise has leverage, the same must be exercised and if it lacks such leverage, it must explore ways to increase the same through capacity building, incentives etc.[54]If it is not possible to increase leverage at all, business enterprise should discontinue its relationship, having regard to the potential adverse human rights impact of doing so.[55] If such relationship cannot be discontinued, being essential for the business of the business enterprise, it should demonstrate its efforts towards mitigating such impact and should further be prepared to accept any consequences of continuing such relationship. TNCs usually have a dominant position in its relationships with other partners as well as even States

[45] *ibid*.
[46] *ibid.*
[47] *ibid.*
[48] *id.* at 19.
[49] *id.* at 20.
[50] *ibid.*
[51] *id.* at 21.
[52] *ibid*
[53] *id.* at 20.
[54] *ibid*.
[55] *ibid.*

in regard to environmental damage. Therefore, they will usually have maximum leverage in most of such situations.

Business enterprises should track effectiveness of their response through the means of both 'qualitative and quantitative indictors' as well as 'feedback from both internal and external sources including affected stakeholders'.[56] It has peculiar significance from environmental perspective since the affected parties may be situated in the surrounding areas of the activities of TNCs and may otherwise be marginalized in their own society, enhancing their vulnerability.

Business enterprises should communicate their efforts aimed at redressal of adverse human rights impacts externally, particularly to the affected stakeholders in such form and frequency as is accessible as well as sufficient to evaluate its adequacy having regard to legitimate needs of commercial confidentiality.[57] Such communication may be in the form of 'in-person meetings, online dialogues, consultations with affected stakeholders and formal public reports'.[58]

In case business enterprises learn about causing or contributing to adverse human rights impacts, they should cooperate with the aim of at remediation through legitimate processes.[59] This may happen despite using best policies and practices. Operational-level grievance mechanisms can be particularly effective in this regard.[60]Such causation or contribution amounting to crime will require cooperation with judicial authorities.[61]

Business enterprises should 'comply with all applicable laws and respect international recognised human rights'.[62] This is an important principle since such laws will be laid down by the concerned State for territories within its jurisdiction. In environmental context, a business enterprise must comply in letter and spirit with all environmental laws. In case domestic laws are deficient, a business enterprise should respect internationally recognized human rights.[63]Possibility of such a deficiency is real in a world where different nations have varying degree of commitment towards realisation of human rights. Business enterprises should 'treat any risk of causing or contributing to gross human rights abuses as a legal

[56]*id.* at 22.
[57]*id.* at 23.
[58]*id.* at 24.
[59] *ibid*.
[60]*id.* at 24.
[61] *ibid.*
[62]*id.* at 25.
[63]*ibid.*

compliance issue'.[64] Guiding Principles acquire significance in the light of extraterritorial civil claims of environmental nature. Rome Statute of ICC may be relevant in States providing for corporate criminal liability.[65] Individual liability may also be imposed on directors, officers and employees for their acts amounting to gross human rights abuses.[66] Such corporate criminal liability and individual liability may arise in the case of environmental damage. Business enterprises should prioritise redressal of actual and potential adverse human rights impacts having regard to their severity and remediability in case of delay.[67]

2.3 Access to Remedy.

Access to remedy consists of one Foundational Principle and six Operational Principles. States must 'ensure access to effective remedy through judicial, administrative, legislative or other means' in case of human rights abuses occurring within their territory/jurisdiction.[68] Various options may be explored for this purpose, namely – constitutional, statutory, criminal, civil, judicial, non-judicial, National Contact Points (NCPs), ombudsperson, government-run complaints offices.[69] States should ensure effectiveness of domestic judicial mechanism in cases of human rights abuses by business enterprises.[70]They should remove legal barriers (e.g. apportioning legal responsibility among members of corporate group; denial of justice in the host states and inability to access courts in home states irrespective of merits of claim; exclusion of certain groups like indigenous peoples and migrants from legal protection of their human rights which is available to wider population) and procedural barriers (e.g. high litigation costs; non-access to legal representation owing to resource constraints or disincentives for lawyers in advising victims; non-availability of aggregation of claims like class actions or representative proceedings like Public Interest Litigation; inability of State Prosecutors to investigate involvement of business or individuals in human rights related crimes owing to lack of adequate resources or expertise or support) in accessing justice.[71] Bhopal gas leak tragedy unfortunately emerged as a classical example in India where victims suffered from such legal and procedural barriers.

[64] *ibid*.
[65] *id.* at 26.
[66] *ibid.*
[67] *ibid*.
[68] *id.* at 27.
[69] *id.* at 28.
[70] *id.* at 28.
[71] *ibid.*

In addition to providing effective judicial mechanism for redressal of grievances, States are required to provide effective State based non-judicial and non-State based non-judicial grievance mechanisms respectively which should be adjudicative and have rights compatibility.[72]The role of National Human Rights institutions is envisaged as crucial in such a situation.[73] In order to ensure early and direct remediation for individuals and communities adversely affected by the human rights abuse, business enterprises are required to 'provide or participate in effective operational level grievance mechanisms'.[74]

Industry should ensure availability of effective grievance mechanism. [75] Criteria of effectiveness are - legitimate; accessible (language, literacy, costs, physical location, reprisal fears); predictable; equitable (victims lack access to information and expert resources owing to financial resources); transparent (communicating progress of individual grievances and performance of mechanism to wider stakeholders through statistics, case studies etc. while at the same time maintaining confidentiality of dialogue as well as identity of parties involved); rights compatible (if outcomes have human rights implications they should be in tune with internationally recognized human rights, even if grievances are not presented in terms of human rights as is usually the case); generate continuous learning through discussion.[76]

Every corporation and State has to mould the principles to suit its requirements since with more than 80,000 corporations and 193 UN Member states, one size cannot fit all.[77]

3. ANALYSING THE STRENGTHS AND WEAKNESSES

The legislative history and subsequent development of UN Guiding Principles is contentious. Therefore, it will always be a relevant factor in assessing the merits and demerits thereof.

3.1. Merits of UN Guiding Principles

The UN Guiding Principles are significant for – elaboration of 'implications of existing standards and practices' for States and TNCs; integration into 'single, logically coherent and comprehensive template'; and identification of pitfalls in current regime and manner of its improvement.[78]

[72]*id.* at 31.
[73]*id.* at 30.
[74]*id.* at 33.
[75]*ibid.*
[76]*ibid.*
[77]Ruggie, *supra* note 6, at 5.
[78]*ibid.*

3.1.1. UN Guiding principles are squarely applicable to TNCs since they will easily fall within the scope of the term 'business enterprises'. A glance at the principles and the commentary thereon, clearly indicates that TNCs constitute a very important focus of the UN Guiding Principles and are drafted in such a manner so as to cover complex business strategies adopted by them.

3.1.2. UN Guiding principles constitute the most comprehensive framework developed till date to address the problems posed by human rights abuses committed by TNCs across the world.

3.1.3. SRSG succeeded in building a broad consensus. Dilution of rigour of UN Norms which preceded the UN Guiding Principles brought in more receptivity from TNCs for the latter.[79]It has been 'endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors'.[80]It may also be used by judiciary across the world particularly developing countries, in their interpretations so as to drive TNCs as well as States towards their respective domestic constitutional goals.[81]In this sense, UN Guiding Principles furthered the agenda of human rights vis-à-vis TNCs.[82]

3.1.4. Developing countries are in competition with each other in their desire to increase foreign investment. States have withdrawn itself from many areas of economy hitherto reserved for it, leaving them open for private entities. TNCs have fulfilled the vacuum so created by such withdrawal. It may cause adverse environmental impact. India is no exception to this trend. Despite such withdrawal, such States continue to be duty bound to protect human rights under UN Guiding Principles. A Categorical statement in this regard was much needed in the form of UN Guiding Principles in order to avoid confusion regarding the accountability of the State.

3.1.5. Although the UN Guiding Principles deliberately avoid the language of rights, they focus on access to effective remedy.[83] Emphasis on State and non-State based judicial and non-judicial mechanisms along with their effectiveness criteria particularly of rights compatibility, creates opportunities which may be tapped in the future for redressal of grievances against TNCs for violation of right to clean and healthy environment.

---

[79]Ruggie, *supra* note 6, at 4.
[80]*ibid.*
[81]Harri Kalimo & Tim Staal,*"Softness" in International Instruments the Case of Transnational Corporations*, 41 Syracuse J. Int'l L. & Com. 257, 310 (2014).
[82]SURYA DEVA, REGULATING CORPORATE HUMAN RIGHTS VIOLATIONS: HUMANISING BUSINESS 109(2012).
[83]*ibid.*

3.1.6. UN Guiding Principles dropped the term 'sphere of influence' adopted in the UN Norms and instead used the term 'due diligence'.[84] TNCs are more conversant with the latter since it is already an integral part of their business strategy. Commentary is indicative of the fact that such due diligence will be applicable in the sphere of influence of company.[85]

3.2. **Demerits of UN Guiding Principles**

3.2.1. UN Guiding Principles made a marked shift in the approach adopted by UN Norms. Firstly, UN Guiding Principles substituted the term 'duty' with 'responsibility' indicating that their violations may not invite legal consequences. It reflects an erroneous understanding that all human rights responsibilities of corporations are without any legal consequences or are distinct from them.[86]Preference for the term 'responsibility' over 'obligations' has its own set of implications over their appeal and impact on businesses more so when the former is defined in terms of 'expectation' from business'.[87]Secondly, 'obligations of corporations mirrored duties of states'[88] under the UN Norms whereas UN Guiding Principles adopted only the duty to protect human rights with reference to states and duty to respect human rights with reference to corporations resulting in adverse consequences.[89] By following this division, it "ignored the crucial link between States' duty to 'protect' human rights and corporate responsibility to 'respect' human rights".[90] It is not possible for States to enforce human rights obligations against corporations when they merely have a responsibility (not duty) to respect human rights. [91] Thirdly, it has resulted in a marked shift of focus from human rights obligations of corporations to that of States.[92]

3.2.2. States' duty to protect may be of only limited help in their dealings with TNCs because of the dependence of former on the latter for foreign capital and transfer of technology. Due to this dependence, the State concerned may be lacking capacity or even unwilling to discharge this duty.

---

[84]*id.* at 108.
[85]*ibid.*
[86]Deva, *supra* note 82, at 111.
[87]Kalimo and Staal, *supra* n 81, at 311.
[88]Deva, *supra* note 82at 110.
[89]*id.* at 106.
[90]*id.* at 110.
[91] *ibid.*
[92] *ibid.*

3.2.3. UN Guiding Principles have listed human rights in reference to International Bill of Rights. However, one should not lose sight of the fact that international bill of rights was not drafted keeping corporations in mind. Further, in a way they 'at most reiterate existing legal requirements'.[93]

3.2.4. UN Guiding Principles failed to explicitly mention any independent responsibility on the part of TNCs regarding right to clean and healthy environment although their complicity in causing environmental damage is seen in many cases across the world.[94] This is a huge setback since UN Norms had already expressly included right to clean and healthy environment and that too in a regulatory framework dedicated to human rights.

3.2.5. UN Guiding Principles preferred the term 'impact' over 'violation' (latter is used twice and that too in relation to obligations of the States).[95] Such preference is inappropriate to represent the gravity of corporate human rights violation as the term lacks clarity as a legal term.[96]

3.2.6. UN Guiding Principles is silent on the ways to overcome barriers of *forum non conveniens* which is so ingenuously deployed by TNCs to their advantage and that too at huge cost to victims of environmental damage.[97]

3.2.7. Monitoring mechanism in practice is non-existent or deficient to deal with specific instances.[98] Failure to approach designated body for grievance redressal makes UN Guiding Principles far weaker a framework than OECD Guidelines for Multinational Enterprises which permitted establishing National Contact Points (NCPs).[99]

3.2.8. UN Guiding Principles are vague from the viewpoint of fixing accountability of business enterprises.[100] They are a 'step backward' in terms of accuracy as they suffer from 'incoherence'.[101]

A UN report last year highlighted the unawareness or unwillingness on the part of most of the companies (barring few exceptions) to implement their duties regarding human rights under

[93]Kalimo and Staal, *supra* n 81, at 312.
[94]Deva, *supra* note 82 at 112.
[95]*id.* at 113.
[96] *ibid.*
[97] *ibid.*
[98]*id.* at 114.
[99]*id.* at 113.
[100] David Weissbrodt, *Human Rights Standards Concerning Transnational Corporations and Other Business Entities*, 23 Minn. J. Int'l L. 135, 154 (2014).
[101]Kalimo and Staal, *supra* note 81, at 311.

UN Guiding Principles.[102]It indicates that States lag far behind the desired objectives in their duties under UN Guiding Principles. In this sense, success of UN Guiding Principles depends on the readiness of States as well as businesses to scale up their efforts in implementing the principles.

4. CONCLUSION AND THE WAY FORWARD

International community envisaged pivotal role for UN upon its creation after Second World War. Its role has varied from preventing world wars to combating poverty. In order to ably discharge its responsibility, it was imperative for the UN to engage with various state and non-state actors. TNCs being one of the most prominent non-state actors (owing to massive accumulation of capital and development of new technology), UN was required to explore possibilities of strengthening their accountability as part of its mandate. Its peculiar institutional structure attracted various stakeholders towards itself in the course of their struggle for improving accountability of TNCs for violation of human rights.

Although UN Draft Code of conduct for TNCs and UN Norms failed to give the desired outcome, one thing is unmistakably clear. UN continues to be engaged in the task of addressing the vexed issue of accountability of TNCs for violations of human rights. In this sense, UN Guiding Principles are definitely a step forward in that direction. Further, UN has found it difficult to build consensus in favour of binding regulatory framework for accountability of TNCs for their violation of right to clean and healthy environment. It is evident from the fate of Draft Code of conduct for TNCs as well as UN Norms. The transition from UN Norms to UN Guiding Principles marks a shift in approach towards the whole issue of accountability of TNCs. Rigour of UN Norms for TNCs stands severely diluted by UN Guiding Principles leading to predictable change in responses. UN Norms invited strong protest from the business associations whereas UN Guiding Principles have succeeded in avoiding such ire. Although the compromise made to achieve this success has created a confidence deficit amongst the various stakeholders involved, UN Guiding Principles cannot be regarded as a step backward by any stretch of imagination. They are definitely a step forward in the direction of strengthening the accountability of TNCs for violation of right to clean and healthy environment. However, potential efficacy of any regulatory framework is tested both when it confronts hard situations and the extent to which it avoids the emergence

[102]UN experts report, *Business 'dragging its feet' on human rights worldwide*, UNITED NATIONS (Aug. 26, 2020), https://news.un.org/en/story/2018/10/1023312.

of hard situations. It seems that the high degree of acceptability enjoyed by UN Guiding Principles will enable this framework to minimize probability of TNC's causing environmental damage. However, if such situations in fact arise in future, fingers continue to remain crossed regarding adequate redressal of grievance of victims of such environmental damage.

MAKING INDIA AN 'ARBITRATION HUB': ISSUES AND IMPLICATIONS IN LIGHT OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019

Shubhangi Komal

Student, National University of Study and Research in Law, Ranchi

ABSTRACT

India is a large, diverse and wonderful cosmopolitan country. In the early 1990s, owing to the significance of an open economy, India opened up its markets and embraced the good and the bad of the globalisation process. Our large population exerts colossal pressure on the resources and institutions of India including the legal and judicial system. Law has to continuously evolve to keep pace with the changing times, human needs and technology. Being a growing market, India has become an attractive destination for investment in infrastructure and manufacturing. To provide a conducive environment for business, we need to realize the dream of making India an international hub of arbitration. Thus, it is only when India becomes an arbitration-friendly jurisdiction then it can improve its position in enforcing contract indicator of the ease of doing business index. However, like all institutions, arbitration is plagued with occupational diseases such as excessive judicial interference. Thus, setting up a world class arbitration institution with expert arbitrators on their panel is the need of the hour. The Arbitration and Conciliation (Amendment) Act, 2019, recently passed by the Government of India, aims to encourage institutional arbitration, which is essential for growth of arbitration in the country. However, instead of reducing scope of interference of judiciary, it has increased judicial and executive interference to a great extent. The present paper critically examines the 2019 Amendment Act which seeks to establish an Arbitration Council of India and forecasts the anomalies in the Act which would rather make India an unfriendly jurisdiction for arbitration instead of a hub of international arbitration.

1. INTRODUCTION

"When will mankind be convinced and agree to settle their difficulties by arbitration?"

-Benjamin Franklin

Even though the adjudication of disputes through arbitration has been recognised in India since a long time,[1] however, the progress of such an adjudicatory system remains obstructed by several factors such as the approach of litigants and the Bar as well as the intrusion by judiciary in arbitral matters. As a result, the Government of India faces the same dilemma, which was encountered by one of the founding fathers of United States, Benjamin Franklin about three centuries back.

In 1985, the United Nation Commission on International Trade Law (UNCITRAL) designed the Model Law on International Commercial Arbitration and handed it to the Governments willing to enact, Indian government being one of them. During post-liberalization of its economy, the Government of India, inspired by the initiative taken by the UN General Assembly, enacted the Arbitration and Conciliation Act, 1996 in order to renovate the arbitration law of the country. The rationale behind the enactment of the 1996 Act was to provide an efficacious and expeditious dispute resolution mechanism in India and to build confidence of international investors in the reliability of the Indian legal system in order to encourage foreign companies to enter into business contracts with Indian companies which, in turn, would allure foreign investment. However, despite several efforts, India failed to realise these objectives by virtue of which it stands at 163rd position in "ease of enforcing contracts", as per the World Bank's Report on Ease of Doing Business, 2019.[2] The enforcing contracts indicator measures the effectiveness and standard of commercial dispute resolution mechanism by perusing the quality of judicial processes index, in order to evaluate whether an economy has adopted adequate practices in its court system across four areas: (i) court structure and proceedings, (ii) case management, (iii) court automation and (iv) alternate dispute resolution.[3] Thus, the current position of India with respect to enforcing contracts indicator suggests that the country is lagging behind in effective resolution of disputes which certainly will have a significant impact on the global perception of "doing business" in India.

Thus, in order to attract foreign investment and encourage business in India, the need of the hour is to improve the commercial alternate dispute resolution mechanism, especially arbitration mechanism of the country. Hence, the government, in order to realise its dream of making India an international hub of arbitration and an investor-friendly jurisdiction,

[1]The Indian Arbitration Act, (1899).
[2]Asit Ranjan Misra, *India's rank jumps 14 places in World Bank's ease of doing business ranking,* LIVEMINT (Oct. 24, 2019), https://www.livemint.com/news/india/india-jumps-14-notches-in-world-bank-s-ease-of-doing-business-rankings-11571882591868.html.
[3] *Enforcing Contracts,* The World Bank: Doing Business: Measuring Business Regulations, https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/faq

appointed a High Level Committee under the chairmanship of Justice B.N. Srikrishna (retd.). The Committee was endowed with the responsibility to suggest reforms with respect to institutionalization of arbitration mechanism in India. The recommendations of the Committee were finally accepted by the Government of India and moulded in the form of Arbitration and Conciliation (Amendment) Act, 2019, in an endeavour to advance arbitration in the country.[4] Further, the enactment of the New Delhi International Arbitration Centre Act, 2019 is also a positive step towards promoting India as an arbitration-friendly destination.

Though the 2019 Amendment Act and NDIAC Act are positive measures towards realisation of the aim of India becoming an international arbitration hub, however, the Act suffers from certain anomalies which the author has critically analysed in greater detail. The author has also compared the Indian arbitration regime with the arbitration legal system of other jurisdictions in order to throw light on the deviations made in the 2019 Amendment.

2. THE APPOINTMENT OF ARBITRATORS

The Arbitration and Conciliation Act, 1996 confers power on the parties to choose an arbitrator of any nationality in order to ensure autonomy of the parties.[5] However in case of default by the parties, arbitrators shall be appointed by graded arbitral tribunals authorized by the Supreme Court (in case of international commercial arbitration) or by the High Court (in case of domestic arbitration) by virtue of the 2019 Amendment.[6] Further, in case of a graded institution being unavailable, a panel of arbitrators may be appointed by the Chief Justice of the concerned High Court so as to perform the functions and obligations of the arbitral institutions.[7]

The underlying idea is to reduce the intervention of judiciary in appointment of arbitrators which is in stark contrast to what was held in the judgment of SBP & Co. v. Patel Engineering Ltd.[8]. The Apex Court, herein, held that, "the appointment of arbitrators under section 11 is a judicial function." However, the 2019 Amendment has diluted this principle by recognising appointment of arbitrators as a non-judicial function by virtue of the 2015

[4] Saurbah Bindal, *Paradigm Shift: What Arbitration and Conciliation Amendment Bill, 2019 means for arbitration in India*, THE FINANCIAL EXPRESS (Aug. 14, 2019), https://www.financialexpress.com/india-news/paradigm-shift-what-arbitration-and-conciliation-amendment-bill-2019-means-for-arbitration-in-india/1675286/.
[5] The Arbitration and Conciliation Act, §11(1) (1996).
[6] *Id.* §11(3A) to (6).
[7] *Id.* proviso to §11(3A).
[8] (2005) 8 SCC 618.

Amendment, which provided that "delegation of the powers of appointment of an arbitrator by the Court concerned to an arbitral institution shall not amount to delegation of judicial power."[9] Thus, the provision seeks to diminish judicial interference in appointment of arbitrators.

On the other hand, in Singapore, the Singapore International Arbitration Centre (SIAC) has been statutorily recognized as the "appointing authority" in case the parties fail to appoint an arbitrator.[10] Article 9A of the International Arbitration Act (IAA) confers the power of appointment of arbitrators on the "appointing authority" which has been defined in article 8(2) of the Act as follows: "The President of the Court of Arbitration of the Singapore International Arbitration Centre shall be taken to have been specified as the authority competent to perform the functions under article 11(3) and 11(4) of the Model law."[11] Therefore, in Singapore, the whole appointment process is carried out only by a single arbitration institution i.e. the SIAC without any intervention of the judiciary.

Though the 2019 Amendment, inspired from Singapore's IAA, has taken the required steps to speed up the expansion of institutional arbitration in India by truncating the intrusion of judiciary in arbitration matters, however, it misses out on a significant aspect of the aforementioned legislation. On the one hand, IAA has designated only one arbitral institution (i.e. Singapore International Arbitration Centre) as the "appointing authority", on the other hand, the 2019 Amendment has neither conferred the power of appointment on one or two arbitral institutions nor does it limit the number of arbitral institutions to be designated by the courts. Instead infinite number of institutions can be appointed by the courts (1 Supreme Court plus 24 High Courts) for the required purpose.[12] Therefore, this designation aspect is within the discretion of the courts which, in turn, is full of danger as there are instances where the Indian courts have failed to recognize the intention of the legislature behind the arbitration law. Moreover, the whole appointment process in India is not possible without judicial intervention and is still dependent on the judiciary for same. Further, an important facet of limiting such power to a single institution is to maintain the quality of appointment

[9] Arbitration and Conciliation Act, §11(6B) (1996).
[10] Art. 9A. Default appointment of Arbitrators – (2) Where the parties fail to agree on the appointment of the third arbitrator within 30 days of the receipt of the first request by either party to do so, the appointment shall be made, upon the request of a party, by the appointing authority.
[11] The International Arbitration Act, art. 8(2) (1994).
[12] Pranav Rai, *Proposed 2018 Amendments to Indian Arbitration Law: A Historic Moment or a Legislative Blunder?*, KLUWER ARBITRATION BLOG (Nov. 24, 2018), http://arbitrationblog.kluwerarbitration.com/2018/11/24/proposed-2018-amendments-to-indian-arbitration-law-a-historic-moment-or-legislative-blunder-2/

made. However, the 2019 Act overrides this important facet by divesting the power of appointment on (infinite) graded arbitral institutions.

3. ARBITRATION COUNCIL OF INDIA

The 2019 Amendment has introduced a new chapter (Part IA) which deals with Arbitration Council of India (ACI). The ACI is an autonomous body authorized to frame rules on grading arbitral institutions and specifying norms on accreditation of arbitrators, quality and performance monitoring, issuing recommendations and guidelines for arbitral institutions. It is also endowed with the responsibility to build India as a "centre for domestic and international arbitration".[13]

The 2019 Amendment Act provides for creation of the Arbitration Council of India by the Union Government through an official gazette notification.[14] The Central Government is empowered to appoint or nominate the members of the Arbitration Council of India. Further, it has the power to regulate terms and conditions of work of the Chairperson and Members along with their salaries and allowances.[15] Even the power to remove a member of the Council is vested with the Central Government.[16] Also, for establishment of offices at places other than Delhi, the Council needs to take prior approval of the Central Government.[17] Hence, it is evident that there is great interference by the Government in the functioning of the Arbitration Council of India.

Thus, one can infer that the major drawback of this legislative step is that since ACI is a government body rather than an autonomous and self-regulatory body, it restricts the autonomy of the parties in global arbitration regime by virtue of governmental and judicial interference. The ACI is headed by former judges and is composed of members appointed or nominated by the Central Government. Some of its members are also ex officio members by virtue of their position in ministries. This is in stark contrast to the recommendations of the Committee which envisaged that the role of government should be limited so as to provide infrastructural support, financial assistance and promotion of arbitral institutions. This also raises a very pertinent question: the participation of the government in a number of arbitrations could make the independence and impartiality of arbitrators questionable as they

[13] The Arbitration and Conciliation Act, § 43D (1996).
[14] *Id.* § 43B(1).
[15] *Id.* §43C(3).
[16] *Id.* §43G.
[17] *Id.* §43B(4) (1996).

will be subjected to accreditation by the Council. Therefore, the idea of party autonomy seems to be lost in the said Amendment.

"Party autonomy," one of the essential elements of the entire arbitration jurisprudence[18], is restricted to a large extent by the above enactment. This can be inferred from the fact that the courts would be presented with finite options of arbitral institutions which would have been approved by the Arbitration Council of India, thus, limiting the choice of the parties to those arbitrators who would have formed the panel of arbitrators in those institutions. The courts would be inept to nominate an ungraded institution – which would have gained notoriety for its facilities and quality of services and which would simply want to set up a local office in India without undergoing the executive impediments of being evaluated by the ACI. Furthermore, the 2019 amendment fails to observe the recommendations of the High Level Committee Report as it does not provide for the designation of an overseas arbitration practitioner with extensive expertise and experience in international arbitration and appointed by the Attorney General for India as the member of the Council.[19]

A foreign party usually prefers an independent regime with neutral set of laws for resolution of its commercial disputes rather than an arbitration regime which has significant executive or judicial interference.[20] Since the amendment places a greater reliance on judiciary and executive for institutionalization of arbitration in India rather than an independent organization as in the case of Singapore, thus, India would certainly fail to realise its dream of becoming an arbitration hub.

The predominant reason for Singapore emerging as a world leader in arbitration is its neutral laws on arbitration.[21] The Singapore International Arbitration Centre (SIAC) was established in 1991 as a non-profit non-governmental organisation. It is entirely self reliant, although at the very outset, it was financed by the Singapore government. Similarly, the Hong Kong International Arbitration Centre (HKIAC) was established in 1985 by a group of leading business people and professionals with the support of the Hong Kong Government. Presently, it operates as a limited guarantee company and a non-profit organisation. In 1919, the International Chamber of Commerce (ICC) was inaugurated in Paris and it is functions as a

[18]INDU MALHOTRA, O.P. MALHOTRA ON THE LAW & PRACTICE OF ARBITRATION AND CONCILIATION (3rd ed. 2014).
[19]*Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India*, (July 30, 2017), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.
[20]MALHOTRA, *supra*.
[21] Jane Croft, *Singapore is becoming a world leader in arbitration*, FINANCIAL TIMES (June 3, 2016), https://www.ft.com/content/704c5458-e79a-11e5-a09b-1f8b0d268c39.

non-profit Chamber. The London Court of International Arbitration (LCIA) was established in 1883. Like every other institutions, it is also a private, non-profit organisation neither connected to nor affiliated with the government of any jurisdiction.[22] In contrast, ACI is a government body rather than an independent body which poses a potential threat to its independence and autonomy as government interference would promote partiality, red-tapism, subjectivity and lack of transparency and accountability in its functions.

4. QUALIFICATIONS OF ARBITRATORS

The Arbitration Council of India is also endowed with the function of reviewing the grading of arbitrators.[23] The Eight Schedule, as advanced by the 2019 Amendment specifies the qualifications, experience and general norms to be fulfilled by a person to qualify for accreditation as an arbitrator.[24] The first part, which deals with "qualifications and experience of arbitrators", mentions an exhaustive list of professionals who can be appointed as an arbitrator. For example, "a chartered accountant within the meaning of Chartered Accountants Act, 1949 having ten years of practice experience" is qualified to be appointed as an arbitrator but there is no reference to an architect who is equally competent to be appointed as an arbitrator in his/her respective spheres. One can observe an unreasonable classification within the list as well. There is no provision for experience in cases like an officer of the Indian Legal Service, although a specific prerequisite of ten years of experience can be observed in cases like advocate or chartered accountant, etc. Moreover, these qualification envisaged in Eight Schedule primarily rely on seniority, a basic professional degree or number of years of employment rather than on the knowledge or expertise of an individual in arbitration. Further, terms like "officer of the Indian Legal Service", "senior managerial position" and "senior legal experience" makes the regulation ambiguous.

After examining the Eight Schedule, one can infer that only Indian nationals qualify for appointment as an arbitrator and the Schedule out rightly disqualifies a foreign scholar or foreign-registered lawyer or a retired foreign officer from seeking appointment as an arbitrator. This, in effect, would certainly discourage foreign parties from choosing for Indian institutional arbitration as it limits the preferences of the parties by restricting nationality of the arbitrators by virtue of which the parties are compelled to refer their disputes to an

[22] Bibek Debroy & Suparna Jain, *Strengthening Arbitration and its Enforcement in India-Resolve in India,* NITI AAYOG, https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.
[23] The Arbitration and Conciliation Act, §§ 43D, 43I (1996).
[24] *Id.* §43J r/w Eighth Schedule.

arbitrator with deficit experience and specialization – both academic and professional – in handling international arbitration.

Further, this restriction on nationality of arbitrators to be compulsorily Indians is a direct breach of section 11(9) of the 1996 Act, which provides that in case the parties, involved in international commercial arbitration, belongs to different nationalities, the arbitrator appointed shall be of a nationality other than that of the parties.

Also, this restriction on foreign arbitrators is contrary to the recent judgment by the Apex Court in Bar Council of India v. AK Balaji &Ors.[25] wherein it was held that "foreign practitioner or an arbitrator will be eligible to arbitrate in any International Commercial Arbitration conducted in India." The court observed, "There is no absolute right of the foreign lawyer to conduct arbitration proceedings in respect of...international commercial arbitration. If the Rules of Institutional Arbitration apply or the matter is covered by the provisions of the Arbitration Act, foreign lawyers may not be debarred from conducting arbitration proceedings arising out of international commercial arbitration in view of Sections 32 and 33 of the Advocates Act. However, they will be governed by a code of conduct applicable to the legal profession in India." Justice Indu Malhotra relied on the abovementioned decision in order to refute any erroneous notions about 2019 Amendment regarding foreign arbitrators and their role in the coming future.[26] Moreover, this decision, read in unison with values of party autonomy enshrined under section 11(1) and neutral nationality under section 11(9) of the 1996 Act explicitly forecasts that "there is no bar with respect to appointing an arbitrator of any nationality". Thus, the position of foreign arbitrators in arbitrations seated in India remains ambiguous.

Further, the second part of the Eight Schedule which deals with "general norms applicable to arbitrator" is unreasonably loose and evades objectivity due to presence of ambiguous words such as "conversant with labour laws", "robust understanding of international legal system on arbitration," etc.

5. CONFIDENTIALITY OF ARBITRAL PROCEEDINGS

[25] (2018) 5 SCC 379.
[26] Shashank Garg, *NPAC's Arbitration Review: Future of foreign arbitrators in India- Perception v. Reality*, BAR AND BENCH (Oct. 7, 2019), https://www.barandbench.com/columns/npac-arbitration-review-future-of-foreign-arbitrators-in-india-perception-vs-reality.

The precocious words of the American TV commentator, Gretchen Carlson, "The minute that you go for arbitration, it's 100% confidential, so nobody ever hears about it" has resonated in the ears of the Govt. of India by virtue of which they inserted Section 42A in the 1996 Act. The provision explicitly provides that "the arbitrator, the arbitral institution and the parties to arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award."[27]

The above provision is in direct conflict with the recommendations of the High Level Committee which proposed that the confidentiality of arbitration proceedings should be left at the discretion of arbitral institutions rather than mandating them, through legislation, to maintain it. If this approach would have been adopted, it would have been in consonance with the rules of internationally recognised arbitration institutions.[28]

Though the above provision is inspired from the Hong Kong's Arbitration Ordinance (HKO), it misses out on various aspects of confidentiality dealt by HKO such as: (i) confidentiality in court proceedings related to arbitral proceedings, (ii) confidentiality obligations of the parties subject to party autonomy, and (iii) several other nuances, for example, the various exceptions to confidentiality obligations, etc.

The ICC recently updated its "Note to Parties and Arbitral Tribunals on the Conduct of Arbitration" under the ICC Rules of Arbitration[29], effective from 1 January 2019, which stated that "all awards made from 1 January 2019 may be published, no less than two years after their notification based on an opt-out procedure." According to the opt-out procedure, the publication of an award can be objected to or requested to be sanitized or redacted by any party at any point of time. In such an event, the award will either not be published or be sanitized or redacted in accordance with the arrangement of parties.

While India's tradition of publishing awards is compatible with the internationally recognized standards, however, by not adopting opt-out scheme in section 42A, the destiny of an award with respect to its publication remains ambiguous and certain questions remain unanswered: Who will determine that whether the publication of award is incidental to its execution or

[27] The Arbitration and Conciliation Act, § 42A (1996).
[28] SIAC Rules, Rule 39 (2016) and LCIA Rules, Rule 30 (2014).
[29] ¶ *40-46, Note to Parties and Arbitral Tribunals on the conduct of Arbitration under the ICC Rules of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE, https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf.

not? Does publication involves full disclosure or will the parties concede to a redacted award?

6. TIMELY CONDUCT OF PROCEEDINGS

Section 29A of the 2015 Amendment Act provided "a twelve month period for conclusion of arbitration proceeding starting from the date the tribunal entered reference", was subject to a lot of criticisms from the arbitrators and practitioners alike owing to its austerity because the provision eventually prompted the parties to request an extension. The 2019 Amendment by extending the time frame for completion of arbitral proceedings made the provision flexible. It provided that the mandate of section 29A would be applicable from "the date of completion of proceedings."

Proviso to sub-section (1) of section 29A requires that "in the case of international commercial arbitration, the award may be made as expeditiously as possible and an endeavour may be made to dispose off the matter within a period of twelve months from the date of completion of pleadings" which is referred to in section 23(4). While this provision does not contain mandatory language, it may act as guidance to parties and arbitrators to ensure that the arbitral award is rendered within the stipulated time frame.

While it is a welcome step, it may result in conflict with the rules of arbitral institutions as it fails to observe the procedural aspects inherent to a complex international arbitration. In international arbitration, a hearing on case management is held on a regular basis by arbitration and after receiving the connivance of the parties, an order is issued on the procedural timetable for completion of pleadings.[30] However, if section 23(4) prevents a tribunal from gaining oversight of its proceedings, then it becomes difficult to effectively conduct complex multi-party arbitrations involving massive documents, where it is practically impossible to conclude pleadings in six months.[31] Similarly, the autonomy of the parties is drastically restricted on the question of decision on a more flexible procedural schedule. Most importantly, if the time requirement under section 23(4) is not complied with, then the parties will always be cautious of the fate of an award.

It is pertinent to note that the time limit stipulated under the Amendment Act has worked well in practice. An exemption may be justified only for institutional international commercial

[30] ICC Arbitration Rules, Rule 24 (2017).
[31] Nigel Blackaby, et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (6th ed. 2015).

arbitration where there is an inherent safeguard in form of the soft influence that institutions have over the arbitrator and arbitration proceedings. [32] Institutions, usually, have the autonomy to extend timelines under their respective rules and can effectively monitor time limits without any interference by the court. Therefore, the most appropriate exemption from the time-limit could have been one which is based on whether the arbitration is institutional or ad-hoc in nature, rather than whether it is an international commercial arbitration or a domestic arbitration.

7. CONCLUSION

Arbitration is a vital complement to enhance "ease of doing business" as it will significantly relive the burden on the judiciary, thus reducing pendency and instilling the confidence of investor, if the dispute resolution processes are efficient and reliable. The 2019 Amendment Act encourages the growth of institutional arbitration in India which is a sine qua non for making arbitration a successful means of setting commercial disputes. It aims to project India as an international arbitration hub, however, there is a need to have concerted efforts not only from the Government but also from the legal fraternity and corporate India. One of the key reasons behind the failure of arbitration in India is judge dominated arbitration and the 2019 Amendment, instead of reducing the interference of judiciary has increased it to a great extent. This can be inferred from the fact that members of the ACI consists of judges and members, appointed and nominated by the Central Government. Thus, it restricts the autonomy of the parties in international arbitration through governmental and judicial intervention. However, a comprehensive set of rules regulating the operation of the council, which would be designed in complement of Part IA, could overcome the complexities associated with the provisions of Part IA.

The proposed changes in the 2019 amendment instead of being a step forward, may force India to take two steps backward as an arbitration-friendly jurisdiction. Consequently, the amendment needs to be seriously reconsidered because in its present form, it gives rise to several serious issues, for instance, composition of the ACI, confidentiality, etc. Though some of these issues can be resolved over time through judicial pronouncements, it would be wise to resolve these ambiguities through legislation. Further, due to these uncertainties, foreign parties may not be inclined to seat their arbitrations in India until these issues are

[32] REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA at 64 (2017).

resolved. Moreover, the Government, the business community and the corporate houses need to promote awareness regarding arbitration and also engage in conducting workshops to demonstrate the proper conduct of the arbitral proceedings. This would certainly inculcate the creation of "arbitration culture" which our country is lacking at present.

TWO CHILD POLICY: A PRAGMATIC GOAL IN INDIA

Sobha Sagnika Panda

Student, KIIT School of Law, KIIT Deemed to be University, Bhubaneswar

&

Seemon Snigdha Jena

Student, KIIT School of Law, KIIT Deemed to be University, Bhubaneswar

ABSTRACT

Earth's population had slow paced beginnings but always had staggering potential. Resource paucity is one of the most dreaded unavoidable consequences of population explosion. It is not a surprise that the world is ushering into a dystopian future where mankind would no longer be in a position to decide on the issue of global population by weighing the moral pros and cons of controlling the population dynamics and would be compelled to adopt drastic measures. The 'Two-Child Policy' is a more humane approach towards tackling this crisis as compared to the more desperate methods we are destined to apply when our species would be on the edge of collapse and extinction. The much welcome significance of this policy would be respecting the personal reproductive choices of a woman, curb the overburdened national environment due to immigration crisis, realizing the right of every man to a healthy and sustainable ecosystem and creation of an enabling environment where every child is allowed to realize his or her potential to the fullest. To not be in a dilemma to choose public good by compromising the moral considerations and human rights, the Government and other interested stakeholders need to adopt a civilized approach to execute this policy by giving every opportunity to people to make informed choices so as to allow people to be accepting of this process. We are facing an unfortunate end and population growth is racing us towards it faster and our neutrality in midst of this moral catastrophe which risks our very survival would definitely lead to more mind-numbing circumstances which be ten times manifold as compared to the problems we are experiencing now.

1. INTRODUCTION

Amid the hoopla over various social and contemporary issues prevailing, India has come up with strong debates for process for implementation of a system known as two-child policy in order to keep in check, the burgeoning population. The concept of one child or two child

policy aims at putting a cap on the growing population by imposing stringent rules and regulations upon individuals to limit the size of the family and evade multiple reproductions.

1.1 Origin of the concept

Way back in the 1970s, the Singapore Government had introduced a two-child policy which was a population control measure encouraging couples to have no more than two children.[1] This tactics was an integral part of the second 'Five-Year National Family Planning Programme' for the year 1972–75, which was revealed to the public at the launch of the 1972 'National Family Planning Campaign'.[2] In the early 1980s China had come up with the one-child policy to address the ageing population which had put it in the top most position for being the most populous country, the population being 1,433,783,686[3] and India being the second in the list. After various criticisms and impediments to the policy, China finally came up with the two-child policy in the late 2015.

India was one of the first countries to initiate a population control plan way back in 1952[4] but till now no specific laws have been passed regarding this. There has been few policies implemented by various government agencies, such as, "Indira Gandhi Matritva Sahyog Yojana" which was launched in 2010, further accomplished by the Ministry of Women and Child Development (WCD), Government of India[5] which provided Rupees 4,000 for maternity care benefit to any pregnant or lactating woman above the age of 19 only till she bears her second child. Similarly, the 'Kanya Jagriti Jyoti Scheme' which was introduced 2008 and was valid up to 2013 was sponsored by the state government of Punjab, granted Rupees 5000 if a girl child was born to a Below Poverty Line family, provided they had followed the two-child norm.

The primary reason for formulation of such a policy owes to its overflowing population of a country which makes it handicap to deal with all the basic necessities of individuals.

---

[1] Lim Tin Seng, *Two-child Policy*, SINGAPORE INFOPEDIA, https://eresources.nlb.gov.sg/infopedia/articles/SIP_2016-11-09_103740.html.
[2] Daniel M. Goodkind, *Vietnam's One-or-Two-Child Policy in Action*, 21 POP. & DEV. REV. 85, 92 (1995).

[3] *Countries in the world by population (2019)*, WORLDOMETERS, https://www.worldometers.info/world-population/population-by-country/.

[4] Debu C., *Should India support two child policy* , MY INDIA (Apr. 22, 2016), https://www.mapsofindia.com/my-india/government/should-india-support-a-two-child-policy.
[5] *Quick Evaluation Study on Indira Gandhi Matritva Sahyog Yojana*, NITI AAYOG (Apr., 2017), https://niti.gov.in/writereaddata/files/document_publication/IGMSY_FinalReport.pdf.

Population growth is directly proportional to resource scarcity i.e. when a country's population grows, there is draining of resources leading to its scarcity. If such a situation prevails in a country for a long period of time, no one can prevent the country from seeing the darkest phase in terms of poverty, malnutrition, unemployment etc. Hence, population growth is an impediment vis-a-vis social growth for which the countries must formulate policies to curb such a situation.

1.2 Current scenario of the policy in India

Inflation being at the peak in India, families can barely finance one day meal for themselves. Amidst all these lies the population growth which requires stern measures to be taken in order to keep a check on it. Keeping this in mind, about 125 members of Parliament have reportedly signed a writ petition addressed to President Ram Nath Kovind, seeking the implementation of a two-child policy.[6] Since, we all Indians are very well aware of the phrase "Hum do humare do" which means that father and mother being two in number must have two childs. This concept has been publicised many a times in the social media as well as via various campaigns on population control but to utter dismay results are nil till date. Thus, the current scenario is heated up with debates by various politicians on this issue and the government is aiming to implement two-child policy keeping religion and politics at bay for the overall welfare of the nation.

2. POPULATION GROWTH AND REPRODUCTIVE RIGHTS OF WOMEN

Indian culture has always tried to socialize women into a gender role- acquiring certain traits, attitudes or behavioural patterns which is in consonance with the general ideology of feminity- one of them being is making babies which is further conditioned as male preference is still prevalent based on the religious foundation that it is only a son who can liberate his father's soul from damnation and would carry forward the family's name.[7]

Gender roles assigned to males and females gets transmitted across generations in the family like- it is the job of the man to earn but it is the duty of the woman to stay at home and take

[6] Vandana, *Why India should not delay implementation of two-child policy*, DAILY O (Aug. 14, 2018), https://www.dailyo.in/variety/two-child-policy-population-explosion-ram-nath-kovind-job-growth-hum-do-humare-do-chinese-population-east-asia-forum/story/1/26066.html.

[7] Bal GangadharTilak v. Shrinivas Pandit, (1915) 17 BOMLR 527.

care of the children. The 1994 Population Report of UN[8], upholds that right to reproductive choice includes the right to education, awareness in order to make an informed decision about the number and spacing of children.[9] Women since time immemorial been have been treated as sub-humans who are meant for pleasure. Their reproductive autonomy is limited as they have the least say in matters of reproductive decisions which is founded upon the notion that women must be given complete freedom to exercise control over their own bodies and reproductive processes (whether or not to get pregnant and stay pregnant) considering that the pregnancy takes place inside the body of a woman and has overwhelming impact on her physical and mental health and life.[10] A woman's right to make reproductive choices is well within the ambit of 'personal liberty' guaranteed by Article 21.[11] Rural women folk is the most affected section as they are viewed as baby-making devices and because of lack of sexual health education[12] (which includes the knowledge about contraceptives which is considered to be a taboo in many sections of Indian society).

Two child policy would curb the burden placed on women in many Indian households to produce children as more often than not women are compelled to satisfy the husband and his family's demands for a male child. In another case it was held that the right of a woman to give birth should be her personal choice and no one can interfere in her decision to carry on with or abort the pregnancy as an unwanted pregnancy has the risk of having an impact on the mental well-being of a woman.[13]

A drastic change can be expected in the assigned gender role within the society as women who are expected to devote a substantial part of their time towards child bearing and caring can now commit themselves towards building their careers and becoming a working parent significantly contribute towards the family's earnings which is traditionally considered to be man's obligation and right which would in turn grant women the chance to voice their opinions about the utilization of the earnings. Amongst young women early marriage and early motherhood can severely curtail educational and employment opportunities and is likely to have a long-term, disadvantageous impact on the quality of their lives and the lives of their

[8] Report of the International Conference on Population and Development, Rule 11.9, (Sep. 13, 1994), https://www.un.org/en/development/desa/population/events/pdf/expert/27/SupportingDocuments/A_CONF.171_13_Rev.1.pdf.
[9] Convention on the Elimination of all Forms of Discrimination Against Women art. 16(e), Dec. 4, 1979, 1249 U.N.T.S. 13.
[10] High Court in it's own Motion v. The State of Maharashtra, W.P. (Crl) No. 1/2016.
[11] Suchita Srivastava & Anr. v. Chandigarh Administration, (2009) 11 SCC 409.
[12] *Supra* note 8, at ¶7.2.
[13] Dr. Mangla Dogra & Ors. v. Anil Kumar Malhotra & Ors., C.R. 6337/2011.

children. [14] Education plays a catalyst in providing the women the much needed self-confidence and willingness and the ability to make the reproductive decisions on their own rather than being influenced by or coerced by the opinions of their husbands and family members encouraging them to work outside their homes as well which would give them a greater sense of independence and control over the resources and have an opinionated say in the way the resources should be used. A study published by United Nations in 1987 revealed that women who have had seven years of education have on an average three fewer children than women with no education.[15]

One of the inadvertent effects of two-child policy would be greater parental investment (time, money and affection) and consequently equality for daughters who are treated as second-fiddle in families obsessed with male child. The persisting illogical stereotypes that sons are more beneficial for the family as they are able to substantially contribute towards the agricultural labor in rural families and girls are still viewed as a burden who are no longer of any use as soon as they reach the marriageable age and are considered a substantial burden in such societies which believe in the age old tradition of giving a sizeable dowry at the time of marriage.

With lessening of the stiff competition girls usually face from their brothers in terms of craving for parental recognition and support with respect to education prospects and career opportunities, families with single daughter child are contemplated to play a proactive role in promoting gender equality though on the flipside there would also be the concern that in a male dominated society where even without any family planning constraints people do excessively resort to practices which are a menace in our country like- female infanticide, sex selection abortions and abandonment of girl child when child policy would be implemented the frequency of these practices would certainly increase as people would resort to illegal practices to cope with family planning and at the same time fulfill their desire to have a male child.

3. THE NEXUS BETWEEN IMMIGRATION AND POPULATION GROWTH

[14] *The Beijing Platform for Action Turns 20*, UN WOMEN, https://beijing20.unwomen.orh/en/about.
[15] Department of Economic and Social Affairs, *Fertility Levels And Trends In Countries With Intermediate Levels Of Fertility*, UNITED NATIONS SECRETARIAT, https://www.un.org/en/development/desa/population/events/pdf/expert/4/population-fertilitylevels.pdf.

Outburst of population can be understood to be a vital factor in terms of environmental degradation and unhealthy lifestyle of people at large. However, immigration also is an indispensable element of population growth for which the need of the hour is to enact certain laws and policies which would keep the population growth in check. Migration includes the permanent progress or movement of certain individuals or groups, through symbolic or political boundaries into new residential areas and communities.[16] Various researches have claimed that uncontrolled immigration can cause severe population problems if certain steps are not taken in time. It has been reported that the United States with minimal immigration might stabilize or bring its population to equilibrium at about 350 million shortly after the middle of the 21th century.[17] It is an unavoidable fact that immigration would lead to multiplicity of population which would ultimately amount to drastic downfall in health and economic services and most importantly environmental problems. Can you imagine a situation where there would be scarcity in all the basic necessities for survival and what would it lead to? Such a situation would arise when humans would turn into animals and do anything and everything to survive in this world which would put the ecosystem at stake. There would be no concept of existence of sustainability rather our further generations would be in an unsustainable condition which we suggest is a public malpractice.

Apprehend a situation where you have magical powers and you do everything to revive the environmental conditions and make a world better to live in but you do nothing about the current immigration problem. In such a situation, there would be everything to survive in a an environmentally sound nation but yet it would be unlivable due to the unchecked surge of population. The President's Council on Sustainable Development concluded in 1996: "We believe that reducing current immigration levels is a necessary part of working toward sustainability in the United States."[18] Talking about immigration problem in India, the situation is no different from that of the U.S or for that matter all the superpowers in the world. Every country aspires to control illegal immigration to conform to their domestic laws but to our utter dismay, none of the countries excel in such an attempt without existence of any strict laws pertaining to this matter. However the struggle for controlling illegal

[16] M Amarjeet Singh, *A Study on Illegal Immigration into North-East India: The Case of Nagaland*, IDSA OCC. PAPER (Nov., 2009), https://idsa.in/system/files/OccasionalPaper8_NagalandIllegalImmigrationl.pdf.

[17] Lindsey Grant, *Forecasting the Unknowable: The U.N. "World Population Prospects: The 2002 Revision"*, NEGATIVE POPULATION GROWTH FORUM (Jun., 2003), http://www.populationmedia.org/issues/NPG%20Forum%2OPaperO603.pdf.

[18] *President's Council On Sustainable Development*, POPULATION AND CONSUMPTION TASK FORCE REPORT (1996), http://clinton2.nara.gov/PCSD/PublicationsITFReports/pop-toc.html.

immigration has become a growing concern for most of the countries. The situation is much more convoluted in a democracy like India due to absence of adequate measures to control illegal immigration in India. Thus having infinite population growth in a finite world is absolutely a myth.

The famous economist, Kenneth Boulding once said, "The modern human dilemma is that all our experience deals with the past, yet all our problems are challenges of the future."[19] Thus, in a democracy like India where there are scarcity of laws pertaining to controlling illegal immigration and it is a matter of fact that immigrants cannot be devoid of their basic human rights. And in such a situation, there would be dearth of everything, so in order to combat with such an unavoidable matter, India should come up with two-child policy so that at least our population graph is kept in control because banning of immigrants to enter India is absolutely an unavoidable condition. The Indian legal system must incorporate a forum which must be specifically designed to process and adjudicate immigration issues especially for the emerging youth. If there is a conflict between huge population in India and also incoming of innumerable immigrants into India, the environmental condition is at stake and the time would definitely arise where there would be conflict in everything for the matter of survival.

The reunification of children with their respective families who are living without legal status in the United States, at some point of time may create a potential incentive for illegal migration both by parents and later by children.[20] To combat with such issues, the United States have rightly come up with an immigration forum, where, immigration adjudication is one of the single largest areas of administrative adjudication, with millions of individualized decisions made daily.[21] Along with enactment of a two-child policy, India is in immense need of a forum which would adjudicate over immigration matters, since population growth is merely ancillary to immigration. Having no such forum till date has become a major drawback that ultimately leads to innumerable illegal migrants entering India and draining of resources at large.

4. POPULATION GROWTH AND ENVIRONMENT CATASTROPHES

[19] Richard D. Lamm, *Immigration: The Ultimate Environmental Issue*, 84 DENV. U. L. REV. 1003,1015 (2007).

[20]Lenni B. Benson, *Finding the Forum That Fits: Child Immigrants and Fair Process*, 23 ROGER WILLIAMS U. L. REV. 419, 441 (2018).

[21]*Id* at 419.

Deforestation, soil degradation, desertification, reduced biodiversity, ozone layer depletion, acidification, freshwater exhaustion, coral reef destruction, and unprecedented waste generation are some of the environmental issues to name a few plaguing our planet now. The existing human population level makes a mockery out of the concept of 'sustainable development' which calls for an ideal world where the present generations are able to cater to their needs while at the same time not compromising the ability of the future generations to be able to fulfill their basic needs.[22] We as a community are now striving to attain the 'Sustainable Development Goals'[23] by the year 2030. No matter how fancier and more goals get added to the list every time, until we come to terms and accept the hard-hitting truth that population control is inevitable the dooms day for human species is not that far off.

The expansive interpretation afforded to Article 21 has led to the development of environmental jurisprudence in India. The two important principles which govern the environment are-(1) principle of sustainable development and (2) precautionary principle. Although we do have the concept of 'Precautionary Principle' which requires the State Governments and other concerned authorities to anticipate and prevent environmental degradation the state's duty towards providing a conducive and healthy environment to its subjects for leading quality lives is reduced to a directive principle [24] which being unenforceable in a court of law thus makes the state escape all liabilities and considering right to live with human regality is illusory without civilized and a healthy environment[25], the lack of responsibility and callous attitude of State is a huge setback for the society.

Right to life is a Fundamental right[26] envisages within its ambit not only physical existence but also the quality of life- right to enjoy water and air devoid of any pollutants for full enjoyment of life. [27] Making pollution a tort (civil liability) requiring the person or organization responsible to make good the damage caused to the environment and also pay damages to the victims who have suffered because of the ecological disturbance[28] under the 'Polluter-Pays Principle' though a much welcome feat but makes us question that whether in the face of impending destruction of the earth is monetary sanctions strong enough to have a

[22] TN Godavarman Thirumalpad v. UOI, AIR 2014 SC 1220.
[23] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, (Oct. 21, 2015),
hhttps://www.refworld.org/docid/57b6e3e44.html.
[24] INDIA CONST. art. 48A.
[25] State of MP v. Kedia Leather & Liquor Limited, (2003) 7 SCC 389.
[26] Francis Coralie v. Delhi AIR 1981 SC 746.
[27] Subhash Kumar v. Bihar, AIR 1991 SC 402.
[28] MC Mehta v. Kamal Nath, AIR 2000 SC 1997.

deterrent effect and make everyone realize the high stakes involved in the deadly gamble man is involved in by toying with the nature. Laws and regulations tailored to suit the specific conditions of a country is the most important instrument for taking concrete actions and although the volume of legal texts in this field is steadily increasing, much of the law-making in many countries seems to be impromptu and lacks the necessary institutional machinery and authority for effective enforcement.[29]

Considering that nature has tolerated years and years of torment and irreparable scars we have inflicted we might think that nature would always find a way of renewal but what we underestimate the time required for nature to do so considering we need no interference at all on our part to let it happen which seems blatantly impossible observing how greed is slowly but certainly taking precedence over morality and sheer common sense which has deprived us of our ability to weigh our actions and made us arrogant enough be in complete denial of the truth of our dark future.

5. TWO CHILD POLICY: A STEP TOWARDS CHILD WELL-BEING

With a uniform and stricter policy in India, the major drawbacks regarding the failure of child well-being can be managed. The primary impediments to child's well-being are poverty, lack of appropriate health care and financial instability. Increasingly, whether internal or in the form of external assistance,[30] reduction of poverty in a country has become the utmost priority of the government and also of the international development agencies with an overwhelming dependence on public funds. India is a democracy where almost everything has an extreme limit and hardly anything is in a stabilized phase which amounts to unequal distribution and there are few at a higher footing and many struggling for the mere opportunities available. The newspapers often highlight the issues pertaining to child poverty, except debates and discussions there are doubtlessly no measures taken and even if there are some, those have no implementation.

There is a dichotomy which is established between child poverty and adults poverty where the former requires more attention and caution than the latter because children needs and

[29] *United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992 AGENDA 21,* UNITED NATIONS SUSTAINABLE DEVELOPMENT, ¶ 8.1., https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

[30] Ashwani Saith & Rekha Wazir,*Towards Conceptualizing Child Wellbeing in India: The Need for a Paradigm Shift*, SPRINGER (Apr. 13, 2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2882047/#CR22.

capabilities are far more different than the adults. The state of poverty is more vulnerable for children as it affects their childhood, preliminary education and growth. The United Nations (UN) General Assembly adopted a definition of child poverty in its 2007 that highlights the effects of poverty in life of a child. The definition also focuses on its impacts which are both severe and potentially long-lasting than those of poverty experienced in adulthood: "Children living in poverty are deprived of nutrition, water and sanitation facilities, access to basic health-care services, shelter, education, participation and protection, and that while a severe lack of goods and services hurts every human being, it is most threatening and harmful to children, leaving them unable to enjoy their rights, to reach their full potential and to participate as full members of the society."[31]

When there are more than two children in each family in India, the number of child count grows exponentially day by day which is impossible to stop without a policy like "two-child policy". Lack of resources is not a matter concerning children's mental health rather it is the exclusion from activities that other children appear to take for granted, embarrassment and also the shame at not being able to participate on equal terms with other children.[32] When such situation happens with a child, it starts impacting his mental health and the process of his shattered future starts. Not every family has financial stability to rear as much child as they reproduce rather pondering at the poverty graph in India, the suggestion is to limit the reproduction at only two for better nourishment and maintenance. Further, in such case, no policy can be better than "two-child policy".

6. POPULATION POLICIES AND THEIR LEGAL RAMIFICATIONS

The gamut of incentives and disincentives lies at the heart of the antinatalist population control regimes. India is not oblivious to such policies as in the garb of legislations pertaining to subject matters which do not even remotely have any co-relation with population control, Indian Government has tried to promote population schemes the best example of which is the case of *Javed & Ors v. State of Haryana &Ors.*[33] in which the impugned provision (Section 175(1)(q) of The Haryana Panchayati Raj Act, 1994) expressly providing for the disqualification that a person having more than two children would stand disqualified from being a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila

[31] *UN General Assembly adopts powerful definition of child poverty*, UNICEF (Jan. 10, 2007), http://www.unicef.org/media/media_38003.html.

[32] NICOLA JONES & ANDY SUMNER, CHILD POVERTY EVIDENCE AND POLICY 16 (2011).

[33] W.P. (CIVIL) 302 of 2001.

Parishad was challenged as being violative of Article 14, Article 21 and Article 25 of the Constitution. The Apex Court took into its consideration the prevailing population trend in India at that time and also referred to the success rate of the 'carrot and stick rule' implemented by China to regulate it's population while delivering the judgement stating that fundamental rights needs to be read in consonance with the Directive principles of State Policy and the Fundamental duties, thus, upholding the constitutionality of Section 175(1)(q) in keeping with the objective of popularizing socio-economic welfare and promoting health care of the masses.

The question about the legality and effectiveness of using the age-old tactics of cajoling people to go for family planning by offering monetary incentives or on the flipside imposing monetary fines or creating other socio-economic disadvantages is gaining momentum considering the proposed private bill of 'Population Regulation Bill, 2019' seeks to provide an array of incentives to the Central government employees and employees of Public sector enterprises. The public perception of such incentives and disincentives not only depends on the nature of the policy but also the ways the Government adopts to implement such policy. In developing countries where over-consumption of resources is one of the most pressing problems makes the public view financial incentives as having more to do with coercion rather than choice[34], and the impoverished who are more often than not the intended target group and are at the receiving end of such policies have their will circumvented by threat of monetary sanctions or provision of additional perks who apprehend that their children too would be subjected to such crossroads. Whether coercion is a factor in the policy formulated depends on how effectively the concerned State is able to outline and justify its objectives.

The fundamental issue concerning the population control mechanisms is whether the State, in the first place, has right to implement such controls on reproductive choices which brings to the forefront the disturbing conflict between individual liberty and common good as it provides for curbing of individual rights for the greater good of the community and for meeting the required standards of public order, morality and general welfare of the public.

International Covenant on Economic, Social and Cultural Rights recognizes the need to continuously upgrade the standards of living and provide an adequate standard of living to

[34] R. Human, *Respecting Human Rights In Population Policies: An International Customary Right to Reproductive Choice*, 6 IND. INT'L& COMP. L. REV. 197, 235, https://mckinneylaw.iu.edu/iiclr/pdf/vol6p197.pdf.

every individual[35] but such rights are subjected to the limitations placed by law solely for promoting public good.[36] The rationalization for state encroachment upon the most intimate personal right of an individual-reproductive choice is meeting the needs and ensuring the well-being of the society at large, as the nature of public policies is not *pro privato commando* rather it is *pro bono publico.*

Population policies needs to be must be able to address socio-economic hurdles, offer comprehensive reproductive health care and provide such a platform where the public has the opportunity to make informed reproductive choices because even pronatalist policies have their negative underlying in the fact that access to reproductive control is limited. Rather than being outright coercive in nature violating human rights to a significant degree the population polices needs to be accomodating. The importance of improving the education and status of women to this process is vital. While there is no ironclad guarantee that adopting this liberal approach will bring about the desired results but it definitely would enable the public be a willing participant of the process.

7. CONCLUSION

On a concluding note, it can be suggested that the law has to interfere with some "milder" compulsory measures such as implementation of two-child policy to avert more serious consequences that families as well as the whole population has to face. With such anticipation, the government must take stern measures such as limiting the income tax exemption to two children which would eventually stimulate population growth. In a wider picture, this policy would also slacken the burden of monetary expense and the personal sacrifices usually required to raise a child. Additionally, it would cater to both the future prospects of children by securing the essential needs required for survival and also not letting the country be over-burdened with superfluous population. Considering the current scenario of population growth in India, it is possible that at some time in the future compulsory birth control in this country will be of paramount importance. Hence, there exists a long-term and gross discrepancy between the number of children desired and the number society can support, considering the same, we have to derive whether by exercise of human liberty we choose not to look into the future dilemmas or by reasonableness we prevent social deterioration or extinction.

[35]International Covenant on Economic, Social and Cultural Rights, art. 11,Dec. 16, 1996, 993 U.N.T.S. 3.
[36]*Id* at Art. 4.

HUMAN RIGHTS OF PRISONERS: A DOMESTIC & INTERNATIONAL LAW PERSPECTIVE

Sandeep Saini

Research Scholar, Maharaja Agrasen University, Himachal Pradesh

&

Chinky Nanda

Research Scholar, Chandigarh University, Chandigarh

ABSTRACT

Human Rights are rights provide to all Human Beings irrelevant to their nationality, place of birth, residence, sex, caste, origin, religion, language or any other status. All are equally entitled for their human rights. These rights are the fundamental rights interrelated, interdependent and indivisible. Universal declaration are often expressed & guaranteed by law, in the forms of statutes, general principles and the other sources of international law. Non discrimination is a principal in international law provide human rights to all. This are present in all major human rights treaties and provide the central theme of the human rights which eliminate all type of discrimination among all human beings. The principle applies to everyone in relation to all human beings regarding their rights and freedom. This principle is complemented by principle of equality. All human beings are born free. All have dignity and rights to live freely. The principle of universality of human rights is the basics of international human rights law. The principle was first emphasized in universal declaration of human rights in 1948, has been discussed in various international conferences & declarations. It is the duty of state to provide & protect the human rights to all of its citizens. These rights are equally provided to prisoners also. According to various provisions the people who are behind the bars also have same rights. Even though he or she has done an act which is punishable but according to human rights, he or she should be treated as human beings. In this article, we intend to discuss the various provisions which are provided to pre trial & post trial prisoners. Custodial death is vital problem in these days. The living standard in various prisons is not up to such standard. Despite the person has committed an act which is inhuman in nature but he should be treated as human being during the proceedings as well as punishment periods. The person should get proper & hygienic food. If he wants to study their government should provide that facility to him so that when he will complete his punishment, he can start his livelihood. The medical facility should be appropriated. The awareness of

welfare scheme to their family members for survival in their absence should be there. It is often said that the prisoners also are entitled to all or any his fundamental rights while they're behind the prisons. Indian Constitution doesn't expressly provide for the prisoners' rights but Articles 14, 19 and 21 implicitly guaranteed the prisoners' rights and thus the provisions of the Prisons Act, 1894 contains the provisions for the welfare and protection of prisoners. The Court has ruled that it can intervene with prison administration when constitutional rights or statutory prescriptions are transgressed to the injury of the prisoner. Supreme Court in many cases held that prisoner may be a person, a natural person and also a legal person. Being a prisoner he doesn't cease to be a person's being, natural person or legal person. Conviction for a criminal offense doesn't reduce the person into a non person, whose rights are subject to the whim of the prison administration and thus, the imposition of any major punishment within the prison system is conditional upon the absence of procedural safeguards.

1. INTRODUCTION: WHO ARE PRISONERS?

In this world, prisons are still laboratories of inhuman treatment in which human commodities are brutally kept and where spectrum of inmates ranges from driftwood to heroic dissenters. Convicts are not by mere reason of the conviction denied of all the fundamental rights which they otherwise possess. Prisoner means any person who is kept under custody in jail or prison because he/she committed an act which is prohibited by law. A prisoner also inmate is anyone who against their will is deprived of freedom. This freedom can be deprived by forceful restrain or confinement. The Indian society law is based on non violence. Respect of each other and human dignity of the human beings. By committed a crime the person does not change from human being to inhuman being. He/she is entitled to all the rights which is required for human beings. In society every person should be entitled to enjoy a life with dignity. Even if the person is kept in prison or custody, the person deserves the same rights which he /she had before committed the crime. If a person under trial or convict, right cannot be vanished. The prisoners have some basic legal rights in India that cannot taken away from them such as the right to get food & water, protection from torture, violence & any other harassment, should get an advocate of his own choice and being in touch with him to defend himself, should get information regarding his case.

2. HUMAN RIGHTS IN INDIA

Human rights are those rights which are said to be the fundamental or basic rights required by human beings in society. These rights being fundamental and universal in character assumed

international dimension. These rights ensure to make man free. These rights recognize the basic human needs and demands. Every country should ensure human rights to its citizens. The human rights should find its place in the constitution of every Country. Human rights in India are an issue complicated by the country's large size, its tremendous diversity, its status as a developing country and a sovereign, secular democratic republic[1]. The constitution of India includes fundamental rights, as well as separation of executive and judiciary. The country also has an Independent judiciary and well as bodies to look into issues of human rights. Articles also provide freedom of speech includes freedom of religion. It is the duty of every nation to create to such laws and conditions that protect the basic human rights of its citizens. India being a democratic country provides such rights to its citizens and allows them certain rights including freedom of speech of expression. These rights which are Fundamental Rights form an important part of the Constitution of India[2].

3. RIGHTS OF PRISONERS IN INDIA: CURRENT LAYOUT & CONTRAVENTION

The practice of torture in prison has been widespread and predominant in India since long time. It is a normal and legitimate practice all over. In the name of investigation the investigation officer tortures the individuals. This is not only against the male but also against the female in the form of custodial rape, molestation and other forms of sexual torture. The Hon'ble Supreme court in a case[3] said that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of criminal law. The horizon of human rights is expanding. At the same the time, the crime rate is increasing. The court observed that many complaints about violation of human rights because of illegal arrests. A realistic approach should be made in the direction. The law of arrest is one of balancing individual rights, liberties. The executives before giving the order of arrest should think that whether they are law violator or law abider.

Article 21 of the constitution guarantees the right of personal liberty & thereby prohibits any inhuman, cruel or degrading treatment to any person whether he is a national or foreigner. The article also protects people for being retrospectively punished for activities which were given a status of crime after they committed the act. In one of the leading cases, the Hon'ble Supreme Court of India while dealing with rights of prisoners given answer to the question whether prisoners are persons and whether they are entitled to fundamental rights while in

[1] Preamble, The Indian Constitution of India , 1950.
[2] Jain M.P., "Indian Constitutional Law", 5th Edition, Vol. 1, Wadhwa and Company, Nagpur, 2003, p.1295.
[3] Sunil batra v Delhi Administration, AIR 1980 SC 1579.

custody, although there may be a shrinkage in the fundamental rights. The handcuff is to hoop harshly and to punish humiliatingly. The minimum freedom of movement, under which a detainee is entitled to under article 19, cannot be cut down by the application of handcuffs. Handcuffs must be the last resort as there are other ways for ensuring security. Article 14 gives the right to equality and equal protection also to the prisoners. If any excesses committed on a prisoner, by the investigation officer or police is considered as volition of rights right to free legal aid is also provided by article 22. Some of the rights which have been provided by Indian constitution are-:

- Right of Inmates of protective homes[4]
- Right of free legal aid[5]
- Right to speedy trial[6]
- Right against brutal & unusual punishment[7]
- Right of fair trial
- Right against custodial violence of police & unnatural death in custody[8]
- Right to live life with human dignity

Apart from these rights of prisoners, the Constitution of India also provides following rights to the prisoners:-

- Right to meet Family members, friends, Relatives etc. and consult lawyer
- Rights against solitary confinement, handcuffing & bar fetters and protection from torture[9]
- Right to get wages in prison[10]

3.1 Prisoner's Rights under the Prisons Act, 1894

Prisons Act, of 1894 is the first law regarding prison regulation in India. This Act mainly focus on reformation of prisoners in connection with the rights of prisoners. The following Sections of the Prisons Act, 1894 are related with the reformation of prisoners:-

- Accommodation and sanitary conditions for prisoners

[4] Upendra Baxi v. State of U.P., (1983) 2 SCC 308.
[5] M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544.
[6] Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81.
[7] Jagmohan Singh v. State of U.P., AIR 1973 SC 947.
[8] D.K. Basu v. State of W.B., (1997) 1 SCC 416.
[9] Prem Shankar Shukla v. Delhi Administration, AIR 1980 SC 1535.
[10] People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.

- Provision for the shelter and safe custody of the excess number of prisoners who cannot be safely kept in any prison
- Provisions relating to the examination of prisoners by qualified Medical Officer
- Provisions relating to separation of prisoners, containing female and male prisoners, civil and criminal prisoners and convicted and under trial prisoners
- Provisions relating to treatment of under trials, civil prisoners, parole and temporary release of prisoners

In the year of 2016 the Parliament has been passed the Prisons (Amendment) Bill, 2016 to amend the Prisons Act, 1894 with a view to provide protection and welfare of the prisoners which are following:

- Section 39A: The Jail authorities shall be responsible to ensure basic hygiene in the jail premises and precincts of a prison by putting the prisoners on the job of maintaining hygiene and in the absence or unavailability of prisoners, by appointing temporary workers in such manner as may be prescribed[11].
- Section 58A. The State Governments shall establish separate prisons to keep habitual and hardcore offenders separately from the first time offenders and the offenders convicted for lesser crimes[12].
- Section 58B: The Superintendent or other officer of prison shall inspect and review periodically on a regular basis the condition of prison and submit a report in this regard to State Government in such form and manner as may be prescribed[13].
- Section 58C: The Superintendent shall take all necessary steps to ensure that prisoners don't indulge in mental or physical conflict either individually or in groups[14].
- Section 58D:
    (i) The officer of a prison shall ensure that prisoners of cybercrimes, treason or Anti national activities do not have access to any electronic equipment or digital means of Communication[15].
    (ii) (*ii*) The prisoners referred to in sub-section (*i*) shall not be entitled to the facilities referred to sections 58E and 58F.

[11] The prisons (Amendment) Bill, 2016, presented by Sh. Mullapally Ramchandran, M.P. Bill No. 15 of 2016.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*

- Section 58E: The State Government shall provide skill training including computer classes, Tailoring, carpentry, cooking, gardening, and language classes, in such manner as may be prescribed, to the prisoners.
- Section 58F:
  (i) The officers of a prison shall conduct workshops and seminars on such subjects as would be helpful for rehabilitation of and for educating the prisoners.
  (ii) The officers of a prison shall ensure active participation of prisoners in attending such workshops and seminars.
- Section 58G: For the purposes of sections 58E and 58F, the State Government shall appoint adequate number of professionals, educators and counselors in such manner as may be prescribed.

The provisions of the Prisons Act, 1894, are almost a century old, which are not only Outdated but also not in tune with the principles of the Constitution or the policies of the Government. There is a need to provide rules and regulations for the management of the prison in the present context. It is also essential to reform the environment of the prisons and to ensure humanitarian consideration of prisoners so as to ensure that prisons do not create hardened criminals. It is also essential to create an atmosphere to rehabilitate and socialize prisoners to enable them to re-enter the society.

The Bill seeks to achieve the above objectives by amending the Prisons Act, 1894 with a view to:

- Prohibit making available means of communication to prisoners
- Make special provisions with respect to pregnant prisoners
- Ensure maintenance of hygiene in prison and surrounding areas
- Establish separate prisons for different types of offenders
- Ensure review and inspection of prisons at regular intervals
- Prescribe measures to prevent mental and physical injuries among the Prisoners
- Provide skill training to inmates of prisons
- Conduct workshops and seminars for prisoners
- Appoint professionals, educators and counselors for the rehabilitation and Welfare of prisoners

4. THE ROLE PLAYED BY INDIAN JUDICIARY

The apex Court in India has been active in responding to human right violations in Indian Jails. During the proceedings they recognized a number of rights of prisoners by interpreting articles 21, 19,22,32,37 & 39-A of the constitution in a positive and Human way. According to many Judgments, the courts directed that, If a person has commits any crime, it does not mean that he /she ceases to be a human being and that he/she can be deprived of those aspects of life which constitute human dignity. The problems which the prisoners facing are mainly custodial deaths, physical torture, police harassments, poor quality of food, poor health system support, forced labor & other problems observed by the apex court have lead to judicial activism[16]. Even inhuman behavior by prison staff has repeatedly attracted the attention of critics over the years. Unfortunately, little has changed. There have been no reforms affecting the basic issues of relevance to prison administration in India.

5. THE STEPS TAKEN BY INDIA & WORLDWIDE FOR THE SOLUTION OF PROBLEMS

A decision of punishment constitutes only a deprivation of the rights to liberty. It does not curtail the basic human rights except of those which are naturally restricted by fact of being in prison. Prison reforms are necessary to ensure that the rights of prisoners should be protected and their social reintegration increased, in compliance with relevant international standards and rules. In order for prison system to be arranged in a fair and humane manner, the national rules & regulations and their policies should be guided by International norms. The torture given in prison is banned by 1948 Universal Declaration of human Rights[17], American convention on Human rights, the International covenant on Civil and political Rights. Prison authorities have a responsibility to ensure that the supervision and treatment of prisoners is in line with the rule of law, with respect to human Rights.

5.1 United Nation Minimum Rules & Regulations for Treatment of Prisoners

It came into force in 1955. The standards set out by the UN are no legally binding but offer guidelines in International and Municipal law with respect to any person held in any form of custody. They are generally regarded as being good principle and practice for the management of custodial facilities. The rules frame out standards for those custody which covers registration, personal hygiene, clothing and bedding, food & medical services, contact with the outside world, books, religion, retentions of prisoners property ,notification of death

[16] National Human Rights Commission, 1993.
[17] The United Nations General Assembly at its 183rd session on 10 December 1948 as Resolution 217 at the Palais de Chaillot in Paris, France.

,illness ,transfer, removal of prisoners and inspection of facilities. It also sets out guidelines for prisoners under sentence which further includes treatment, classification and individualization, work, educations and social relations. There are also special provisions for insane and mentally abnormal prisoners, prisoners under arrest or under trial, civil prisoners and persons arrested or detained without charge.

5.2 The European Convention for Prevention of Torture and Inhuman Treatment

The European convention for the prevention of torture and Inhuman treatment enters into force on 1st March 2002[18]. The convention establishes the European Committee for the prevention of torture and inhuman or degrading treatment or punishment for the prisoners & under trial prisoners. The committee is permitted to visit all places of detention, defined by the convention as "any place within its jurisdiction where persons are deprived of their liberty by a public authority." Once a state government is notified of the intention of the committee to carry out a visit it is required to allow access to the territory with the right to free travel without restriction, full information of the facility in question, unlimited access to the facility and free movement within it. All information gathered is confidential. In exceptional circumstances a state may make representations based on grounds of national defense, public safety, and serious disorder in custodial facilities against visit to certain place or at certain time. The state makes assure that whatever steps taken by authorities should not violates the human rights of the individual.

5.3 Breaches of Prisoners Rights at International level

In Afganistan, US soldiers are accused of abusing prisoners in a secret prison in Bargam Air Base. The prisoners held there were exposed to extreme temperatures, not given adequate food, bedding, or natural light and religious duties were interfered with. There are also claims of abuse in Shebarghan prison in northern Afghanistan for which America is jointly responsible with the Afghan government. Shebarghan Prison is claimed to be overcrowded with inadequate bathing and ablution facilities, as well as lack of food and medical care. In 2003[19], accusations start to emerge of prisoner abuse in Abu Ghraib Prison. US soldiers at Abu Gharib prison serving there were accused of beating prisoners, forcing prisoners to strip, forcing prisoners to masturbate, and threatening prisoners with dogs, smearing prisoners with faces, making prisoners simulate sex and form naked piles. There are also accusations that prisoners were raped, sodomised and beaten to death.

[18] The member states of the Council of Europe, meeting at Strasbourg on 26 November 1987. It was subsequently amended by two Protocols that entered into force on 1 March 2002.
[19] New York Times, 1st May 2012.

5.4 Steps for Implementation of Human Rights of Prisoners

Prison welfare Schemes should be introduced in prisons all around the world so that some productive work is done by prisoners so that they do not indulge in other atrocious activates while they are in jail and utilize their time in doing some beneficial activity. The jail authorities help the prisoners or inmates by conducting the activities which help themselves in a better way which helps them lead a better life after their release. The rules framed by the jail authorities make it mandatory to the prisoners to work which diverts their mind from other mischievous activities. The prisoners can also participated in games for this the jail authorities should organizes sports festivals. Which is not only boost them but also beneficial for their health. Drug addiction centers can be opened up in every prison so that the drug abuse and drug addiction of the inmates can be controlled so that they can live a better life after their punishment. There must be workshop in prisons so that prisoners can be made to work in this workshop & understand the importance of work. Recreational facilities can be given to the inmates just like vocational training, computer courses, short term courses & other type of basic education. Its help them to change their behavior and become good citizens. The authorities should make the framework for providing the job to the prisoners so that they can earn their dignity back in the society which they lost when they were arrested. Such types of programs should be optional and this should be strictly enforced by the jail authorities. Every inmate has to involve in it. This motivates to live better life after the end of their term and also these programs help in bringing out their talent apart from the act which has been done by him or her. This type of programs should be implemented in strictly way. Every individual has to be involved in it. This will motivate the inmates to live better life after the end of their punishment.

The right to health should be implemented in proper way. It applies on all type of prisoners. Same quality of medical care has to be given to the prisoners as the government provides the community. There are so many cases where this type of mistake has been found where no medical facility has been given to the prisoners. It's a fundamental principle of jail authorities to make rules regarding the health care of the prisoners. It includes safe drinking water, safe health, adequate sanitation, adequate nutrition & housing, healthy working and environmental conditions.

The NGO, advocates & social activists working all over India should come forward for getting prisoners released , especially the pauper ones, who are or have been under trials and behind bars for so long time. For this, they can be helped out in economic and social ways by filling bail applications, filing surety bonds and other by monetary assistance. The prisoners

who are in long periods of time need constant care and support they do not lose their humanity by committing crime .The prison is for a reformatory purpose .However ,the entire purpose fails when the prisoners are denied the very rights that are fundamental to their being human being. Thus the steps have to be taken regarding the prisoners as they are human being too.

6. Conclusion

It can be said that the prisoners are also entitled to all his fundamental rights while they are behind the prisons. Indian Constitution does not expressly provides for the prisoners' rights but Articles 14, 19 and 21 implicitly guaranteed the prisoners' rights and the provisions of the Prisons Act, 1894 contains the provisions for the welfare and protection of prisoners. The Court has ruled that it can intervene with prison administration when constitutional rights or statutory prescriptions are transgressed to the injury of the prisoner. Supreme Court in many cases held that prisoner is a human being, a natural person and also a legal person. Being a prisoner he does not cease to be a human being, natural person or legal person. Conviction for a crime does not reduce the person into a non person, whose rights are subject to the whim of the prison administration and therefore, the imposition of any major punishment within the prison system is conditional upon the absence of procedural safeguards.

Geeta Group of Institutions
Panipat, Haryana, India

Volume 8 (2) December 2019