Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 1-7

Offences Against Child and Protection of their Rights

Vaishali Sharma*

ABSTRACT

Child offences clearly has a negative impact on children and can result in behavioural, emotional, cognitive and development difficulties, this may lead greater difficulties in life that will extend in adulthood .The use of proper investigation techniques and appropriate handling of cases can result in less traumatization of children. Researcher has done analysis of laws relating to offences against child. But scenario of misconduct rate indicates there is need to rethink of present law quite often, which are appropriate to protect children from the victimization. There is certain law to protect children, constitutional rights, and crimes and its classifications consequences in criminal justice system are discussed. Regarding highlighted factors present paper attempts to focus on the law-related problems, provisions, protective factors analyses and rights of child victims are focused. For this study secondary sources were used.

INTRODUCTION

Since ages, children have been victimized by one exploitation or the other. It is not wrong to say that they are a neglected lot. Throughout the history of our society generally, the wrongdoings committed against children or the crimes in which children are the sufferers are considered as crime against children. Indian penal code and the various protective and preventive special and local laws specifically mention the offences wherein children are targets. The age of child varies as per the definition given in the concerned Acts and sections but age of child has been defined to be below 18 years as per The Juvenile Justice (Care and Protection of Children) Act, 2000. Therefore, an offence committed on a victim under the age of 18 years is construed as crime against children for the purpose of analysis in this chapter. Children are more vulnerable persons in the society, their protection under law must be greater, there are many crimes against children, children the person who require to get proper attention and care in their life. sometimes it is really difficult for the child to restrain from the negativities of the modern technology and social media. They easily gets attached with the newly things from an early age to be social and make new friends there are drug rackets, prostitution rackets, porn sites, hackers, etc. They even do not understand what is good and what is bad for them. Many times they blackmailed by someone or many times their loneliness became the reason.

* Indore Institute of Law, Rau Pithampur Road, Opp. IIM, Indore (M.P.).

WHO IS CHILD?

- An unborn or recently born person.
- A young human being below the age of puberty or below the legal age of majority.
- [1] A child is a human being who is not yet an adult.[2]

SIGNIFICANCE OF RESEARCH

Offences against child is increasing at an alarming rate all over the world. India among the top countries of the world facing highest rate of offences against children and the law in India aspects to deal with such a sensitive and serious issue. The significance of this paper is to contribute critically analysis the position of child in the society .

OBJECTIVE OF RESEARCH

The main objective of research are following:

(i) To know the nature and extent of viciousness against children.
(ii) Analyze the impact of offences against children in society.
(iii) To know the statistical distribution of crimes against children.
(iv) To creating awareness and the social responsibility among society members.

RESEARCH METHODOLOGY

This project work is descriptive and analytical in approach. This is doctrinal research points discuss in the particular project is include the study of different sources on the topics as well as the points guided by the concern faculty. Footnotes also provide for acknowledging the sources.

RESEARCH QUESTION

The primary research question is that whether the law of our country adequate to deal with the case of offences against child and was implemented of various acts.

Secondly, there are the various agencies like police, doctors and courts effective enough to impart justice to victims?

CHAPTERISATION

Offences Against Child

Children, who by definition require the protection and care of adults, are among the most vulnerable and cleared victims of crimes. Misconducts against children include physical and emotional abuse; neglect; and exploitation, such as through child pornography or sex trafficking of minors. Child-related crimes often are perpetrated by parents, relatives, caretakers, and others who are charged with their care and guidance. School officials, physicians, police officers, and other such authority figures are required to report any signs of abuse or exploitation against a child. The following articles cover child abuse, statutory rape, child pornography, sexting, and other crimes against children. Basically there are physical emotional, sexual neglect or negligent treatment also exploitation .

Physical Abuse

In physical abuse child has been physically harmed due to some interaction or lack of interaction by another person.

Emotional Abuse

Basically failure to provide a proper environment to the child in which he can developed properly threat and scaring are the some examples of emotional abuse.

Sexual Abuse

Engaging a child in any sexual activity child cannot understand what is going on he/she cannot give consent to anyone basically these are prostitution, unlawful sex practices, pornography etc.

Negligent Treatment

Caregiver cannot fulfil the needs of the child intentinally for the purpose of harming to the child. This includes the failure of protection of the child.

Exploitation–It can be commercial where child is used in some kind of labour or other activities which is beneficial for the others.

MAIN OFFENCES

(1) Crime against Children under Indian Penal Code

(i) Murder (Section 302 IPC)
(ii) Attempt to commit murder (Section 307 IPC)
(iii) Infanticide (Section 315 IPC)
(iv) Rape (Section 376 IPC)
(v) Unnatural offence (Section 377 IPC)
(vi) Assault on women (girl child) with intent to outrage her modesty (Section 354 IPC)
- Sexual harassment (under Section 354A IPC)
- Assault or use of criminal force to women (girl children) with intent to disrobes (under Section 354B IPC)
- Voyeurism (under Section 354C IPC)
- Stalking (under Section 354D IPC)

(vii) Insult to the modesty of women (girl children) under Section 509 IPC
(viii) Kidnapping & Abduction (Sections 363, 364, 364A, 366IPC) along with break of such cases committed with various purposes
(ix) Foeticide (Sections 315 and 316 IPC).
(x) Abetment of suicide of child (Section 305 IPC)
(xi) Exposure and abandonment (Section 317 IPC)
(xii) Procuration of minor girls (Section 366-A IPC)
(xiii) Importation of girls from foreign country (Section 366-B IPC) (under 18 years of age)
(xiv) Buying of minors for prostitution (Section 373 IPC)
(xv) Selling of minors for prostitution (Section 372 IPC)

(2) Crime against Children under Special and Local Laws

(i) Prohibition of Child Marriage Act, 2006
(ii) Transplantation of Human Organs Act, 1994 (for persons below 18 years of age)
(iii) Child Labour (Prohibition & Regulation) Act, 1986
(iv) Immoral Traffic (Prevention) Act, 1956
(v) Juvenile Justice (Care & Protection of Children) Act, 2000
(vi) Protection of Children from Sexual Offences Act, 2012 collected for the first time in 2014.[3]

Internet Crimes

Internet related crimes is increasing rapidly now-a-days the offenders came into direct contact with the child via chatrooms and social sites.

Sex Tourism

Someone travel for the purpose of involving in sexual activities, it is a part of global sex slavery and trafficking issue in which children are sexually abused. This is the fastest growing business in the world. This violates the human rights.

Child Abuse

When a parent or caregiver causes injury, death, emotional harm or risk of serious harm to a child. There are many forms of child abuse likewise maltreatment with child there many child abuses which is followed in the country like sexual abuse, etc.

Child Pornography

Sexually explicit or obscene images of minor under age of 18 years. Mostly it is done with the help of internet. It is the most heinous crime which give rise to many other crimes like sex tourism, sexual abuse of child.

LAWS TO CONTROL CHILD PORNOGRAPHY IN INDIA

Information Technology Act, 2000 and Indian Penal Code, 1860 provides protection from child pornography. In February 2009, the Parliament of India passed the Information Technology Bill which made creation and transmission of child pornography illegal. The newly passed bill, the punishment first offence of publishing creating, exchanging, downloading or browsing any electronic depiction of children in "obscene or indecent or sexually explicit manner" can attract 5 years in jail and a fine of Rs. 10 lakh.[4]

Statutory Rape

Rape and statutory rape is different. Rape is decided on the grounds of sexuality but statutory rape decided on the ground of age. In statutory rape sexual contact with the minor is done sexual assault rape of a child comes under. Statutory rape refers to sexual relations involving someone below the "age of consent". People below the age of consent cannot legally consent to having sex. This means that sex with them, by definition, violates the law.

Statutory rape laws vary by state, with states setting the age of consent differently, as well as using different names to refer to this crime. Many states punish statutory rape under laws addressing sexual assault, rape, unlawful sexual intercourse or carnal knowledge of a child. There are very few federal laws dealing with statutory rape.[5]

Child Neglect

Child neglect is the most frequently reported form of child abuse (60% of all cases) and the most lethal.[6]

Child neglect is the failure to provide for the shelter, safety, supervision and nutritional needs of the child. Child neglect may be physical, educational, or emotional neglect:

Physical neglect includes refusal of or delay in seeking health care, abandonment, expulsion from the home or refusal to allow a runaway to return home, and inadequate supervision.

Educational neglect includes the allowance of chronic truancy, failure to a child of mandatory school age in school, and failure to attend to a special educational need.

Emotional neglect includes such actions as marked in attention to the child's needs for affection, refusal of or failure to provide needed psychological care, spouse abuse in the child's presence, and permission of drug or alcohol use by the child.

Child Prostitution

Prostitution has the immemorial significance from the history in the Vedas, Mahabharata they tackled prostitution means sexual exploitation of a person for commercial purpose, child prostitution is one of its kind, it means use of child for financial purpose.

Indian Laws Related to Child Prostitution

Article 23 deals with the prohibition of trafficking in him, Indian Penal Code enacted many law related to prostitution with the child like Sections 372 and 373 selling of minor girls for the purpose of prostitution, 10 years imprisonment and fine will be imposed.[7]

Sale of Children

Sale of children is basically related to prostitution any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.

Law Related to Sale of Children

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.[8]

Inhuman Treatment

Degrading treatment with the children by their guardians or caretaker by which they get emotionally, mentally or physically disturbed.

Child Trafficking

Child trafficking is a serious problem that is prevalent especially in India. According to a report published by the U.S. Department of State, "India is a source, destination and transit country for men, women and children subjected to forced labour and sex trafficking…The majority of India's trafficking problem is internal, and those from the most disadvantaged social strata-lowest caste Dalits, members of tribal communities, religious minorities and women and girls from excluded groups.

RIGHT OF THE CHILD

Right to Survival

- Right to be born
- Right to minimum standards of food, shelter and clothing
- Right to live with dignity
- Right to health care, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy

Right to Protection

- Right to be protected from all sorts of violence
- Right to be protected from neglect
- Right to be protected from physical and sexual abuse
- Right to be protected from dangerous drugs

Right to Participation

- Right to freedom of opinion
- Right to freedom of expression
- Right to freedom of association
- Right to information
- Right to participate in any decision-making that involves him/her directly or indirectly

Right to Development

- Right to education
- Right to learn
- Right to relax and play
- Right to all forms of development—emotional, mental and physical[9]

CONSTITUTIONAL PROVISION OF THE RIGHTS OF CHILD IN INDIA

1. The Constitution in its Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) guarantees under the articles Factories Act, 1948 (Amended in 1949, 1950 and 1954)
2. Hindu Adoption and Maintenance Act, 1956
3. Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960
4. Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1987
5. Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989
6. Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992
7. National Nutrition Policy, 1993
8. Transplantation of Human Organ Act, 1994
9. Information Technology Act, 1996
10. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002
11. National Charter for Children, 2003
12. National Plan of Action, 2005
13. Prohibition of Child Marriage Act, 2006
14. Juvenile Justice (Care and Protection of Children) Act (Amendment, 2006), 2006
15. The Right of Children to Free and Compulsory Education Act, 2009
16. The Child Labour (Prohibition and Regulation) Amendment Bill, 2012
17. The National Policy for Children, 2013
18. Juvenile Justice Rules Gazette Notification, 2016
19. The Rights of Persons with Disabilities Bill, 2016[10]

IMPACT OF OFFENCES AGAINST CHILDREN ON SOCIETY

Children are so innocent in nature; this innocence can be misused by others. Especially, when offences take place it will be shameful, and society hates it. There is threat in the mind-set of society members, which impacts on parents psychologically as well as social conditions. Because in country like India, normative structure like socialization where parental conditions play vital role. People will suffer by the crimes, it will also destroy the social conditions in labelling perspective. Government as implemented various policies and laws in order to protect children by assuring them some rights, even United Nation

declaration on children rights becomes questionable if increasing rate of crime exceeds further. Major forms of offenses against children in India: Sexual offences: protection of children from Sexual Offences Act, 2012 deals with sexual crimes against children in India, earlier it was dealt with rape, Section 375 of Indian penal code.

CONCLUSION AND SUGGESTIONS

Rights of the children of India, owing to their developing mind are vulnerable to the environment they are in. It is of importance that such environment is made suitable for their growth and development, regardless of whether such child is in fight with law or not and be given sufficient care and safety of the law. No nation can embellishment if children of such nation suffer, therefore, India with the help of various international, national and state mechanisms tries to protected the rights of the children as has been discussed above .After through analysis of Indian law and position of child in the country. In India, child offences are the most heinous crime as todays era. Child needs proper safeguard of their right and give security for their better future they get better nourishment. Offences against child is increasing day-by-day but as per the citizen of the country it is our duty to protect the dignity of the country and somehow it is possible to maintain the dignity of the child. After proper analysis the scenario of law in the country I would concluded that the present system is not sufficient if law is clear at some points, the guidelines of law are not strictly followed police, courts, doctors which hamper justice for the child victim. The researcher appeal some new amendments in the system and procedure under law and their strict implementation is necessary.

As per researcher view these reforms may include—

- Setting up of new centres which will take the responsibility of overseeing the complete process of justice of child victim so the child is not further lack with judicial process.
- Making child pornography and voyeurism strictly punishable in every forum.
- Make the child welfare institutions more and more.
- Child victim with sexual harassment can be treated equally in the society so they do not feel inferior.

NOTES AND REFERENCES

1. Available at https://en.oxforddictionaries.com/definition/child access on 7/7/2018 at 5:00 pm
2. Available at https://www.collinsdictionary.com/dictionary/english/child access on 7/7/2018 at 5:00 pm
3. Available at http://ncrb.gov.in/StatPublications/CII/CII2014/chapters/Chapter%206 access on 8/7/2018 at 4:15 pm
4. Retrieved from http://wapspell.com/t19105p1-New_Cyber_Law_In_India.htm,last visited on 9/7/2018 at 5:30 pm
5. Available at https://criminal.findlaw.com/criminal-charges/statutory-rape.html access on 8/7/2018 at 6:30 pm
6. Available at https://www.medicinenet.com/script/main/art.asp?articlekey=8358 access on 9/7/2018 at 2:30 pm
7. Available at http://www.legalserviceindia.com/legal/article-44-a-legal-framework-about-child-prostitution.html access on 9/7/2018 at 4:00 pm
8. Available at https://www.ohchr.org/en/professionalinterest/pages/opsccrc.aspx access on 9/7/2018 at 7:30 pm
9. Available at https://www.smilefoundationindia.org/child_rights.html
10. Available at https://blog.ipleaders.in/child-rights-in-india/ access on 10/7/2018 at 8:00 pm

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 8-12

Article 51A (g): Duty of Citizens Towards Natural Environment

Arpita Jaiswal*

ABSTRACT

The researcher has done the research on the topic Article 51A(g) i.e. the duty if citizens of India, towards natural environment. Environment is the key to survival of every living being. It is the only home that humans have, and it provides air, food, and other needs. The environment and human beings are interdependent, human beings depends on environment for survival, whereas environment depends on human beings, because if the people don't take care of the environmental factor it will destroy. As all the things that people needs and wants comes from natural world directly or indirectly. We depends entirely on the healthy natural environment for our wealth and well being. But now-a-days the equilibrium is disturbed, not only due to natural cause, but also due to human mistakes. The people are not aware of the value of our natural environment. Due to which environment problems are increasing day by day and becoming more serious all over the world. It is our fundamental duty to take care of the environment. The Article 51A(g) of the constitution states that it is the fundamental duty of all the citizens of India "to protect and improve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for creatures". This includes our duty towards rivers, towards wildlife, etc. One must follow his fundamental duty towards natural environment, because by breaching the duty, they are making their existence of life and the future in danger. By their negligence directly or indirectly they will only suffer. So the fundamental duty towards natural environment must be followed by all.

The researcher in the research summarizes the meaning of Article 51A(g), with its amendment also with the importance of natural environment. Without natural environment no one can survive. So it is our prime duty to protect our natural environment. The researcher has covered the duties towards natural environment and also whether it is followed or not. The reasons behind the breach of duty. The meaning of environment protection is also covered with the Environment Protection Act, 1986. The laws and acts related to the environment is also covered by the researcher in the research. The meaning of Article 48A is also covered. The researcher for the better understanding has explained the case law M.C. Mehta v. *Union of India, which was related to Ganga river water pollution. And at last the researcher has concluded the research by the suggestions and recommendations.*

INTRODUCTION

The Article 51A(g) states the fundamental duty of citizens of India towards natural environment and to protect natural environment which includes protection of rivers, lakes, forests, animals, etc. The Article 51A (g) says that "it is the duty of every citizen of India to

* Indore Institute of Law, Indore (M.P.), India, jarpita966@gmail.com.

protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures".

Environment is the key of survival or existence of all human beings, but now-a-days there is drastic change in the environment, due to pollution, global warming, industrialization, etc. There can be no life without environment, no person can survive without environment. All the human beings depends upon natural environment like food, rivers, clean air, etc. Healthy environment helps in maintaining the natural balance and also helps in growing, developing, nourishing the natural living beings on the earth. Now-a-days the environment is very much polluted not only due to natural cause but also due to human mistakes. The Article 51A (g) of the constitution defines the duty of all the citizens of India towards natural environment, i.e the duty towards rivers, towards forests, towards air, towards animals etc., but although now-a-days citizens don't follow their duty towards environment which is affecting the environment badly.

AMENDMENT OF ARTICLE 51A (G)

[1]By 42nd Amendment to the Constitution, the Parliament, with Page 14 object of sensitizing the citizens of their duty, incorporated Article 51A in the Constitution, *inter alia*, requiring a citizen to protect and improve the natural environment including the forests, lakes, rivers and wild life.

DUTY OF THE CITIZENS OF INDIA TOWARDS NATURAL ENVIRONMENT

The Article 51A(g) states that, it is our fundamental duty to protect the natural environment which involves many duties like to safeguard the environment from pollution and to protect the natural environment from industrialization, etc. Some of the duties are as follows:

- By disposing the waste material in the dustbin rather than throwing it anywhere. Different dustbins are there for dry waste and the liquid waste, it should be used properly.
- By planting more and more trees so that it will help in maintaining the natural equilibrium and will also help in reducing the rate of carbon dioxide.
- Recycling ad reusing the products.
- Avoiding wastage of water, water is the important natural resource and even without water we can't survive so its wastage may result in harm.
- By keeping the surrounding clean, so that we can prevent the environment from pollution.
- Taking care of your pets and the street animals, because animals also plays a vital role in the contribution of environment, so it is our duty to protect the wildlife from danger.
- By stop cutting the trees, trees are the most important part of our life, as without trees it is difficult for all the living being to survive in this planet.
- Quitting the usage of poly bags which is made of plastic, because it is harmful for all the human beings and animals.
- By respecting the value of water and preventing it from the misusage by the people as they do beside the rivers, etc.

WHETHER THE DUTY TOWARDS NATURAL ENVIRONMENT ARE FOLLOWED BY THE CITIZENS OR NOT

According to the researcher, the citizens of India are not following their duty towards natural environment. The citizens of many states are least concerned about the cleanliness of the environment. The activities done by the people is making the environment dirty, which is resulting in environmental pollution which is harmful for all. Some of the activities are as follows:

- The people don‘t throw the waste in the dustbin, they throw the garbage here and there, which is one of the reason for air pollution, soil pollution, etc.
- The people usually wash their clothes beside the river which leaves the foam and also uses soap while taking bath in river which makes the water of the river dirty and results in water pollution.
- The chemical factories usually discharge their untreated effluents in the river which causes many diseases to the people and is the biggest reason for water pollution.
- Use of plastic in the firm of polybags and throwing it here and there.
- Cutting the trees for the personal use.

REASONS WHY THE PEOPLE DON’T FOLLOW THEIR DUTY TOWARDS NATURAL ENVIRONMENT

The people are not aware of their fundamental duty towards environment. They because their comfort don‘t value the natural environment. The people are least bothered about the condition of environment in which they are living. By getting influenced by the other also they are doing so. Lack of standard of living is also one of the reason, those people don’t care about the surrounding in which they are living. It is also due to illiteracy, because they are not aware of the fundamental duty which mentioned under Article 51A (g) of the Indian Constitution.

ENVIRONMENT PROTECTION

The practice of protecting the natural environment which includes the policies and procedures which aims at conserving the natural resources, preserving the natural environment. Environment protection usually includes protecting the natural resources from the danger like protecting wildlife, protecting trees from cutting down, preventing water from being polluted, etc. The environment protection includes the safety and security of the environment. This generally prevents the environment from being exploited. The steps for the improvement of environment or natural resources is also involved in environment.

ENVIRONMENT PRTECTION ACT, 1986

[2]The Environment (Protection) Act was enacted in 1986 with the objective of providing for the protection and improvement of the environment. It empowers the Central Government to establish authorities [under section 3(3)] charged with the mandate of preventing environmental pollution in all its forms and to tackle specific environmental problems that are peculiar to different parts of the country. The Act was last amended in 1991.

[3]The Constitution of India also provides for the protection of the environment. Article 48A of the Constitution specifies that the State shall endeavor to protect and improve the

environment and to safeguard the forests and wildlife of the country. Article 51A further provides that every citizen shall protect the environment.

Article 48A

The Article 48A of Indian Constitution is fully related to the environment protection and states, Protection and improvement of environment and safeguarding of forests and wildlife. " State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country." Article 48A was added by the Constitution (42nd Amendment) Act, 1976.

ENVIRONMENTAL LAWS

In the Constitution of India it is clearly stated that it is the duty of the state to 'protect and improve the environment and to safeguard the forests and wildlife of the country'. It imposes a duty on every citizen 'to protect and improve the natural environment including forests, lakes, rivers, and wildlife'. Reference to the environment has also been made in the Directive Principles of State Policy as well as the Fundamental Rights. The Department of Environment was established in India in 1980 to ensure a healthy environment for the country. This later became the Ministry of Environment and Forests in 1985.

The constitutional provisions are backed by a number of laws—acts, rules, and notifications. The EPA (Environment Protection Act), 1986 came into force soon after the Bhopal Gas Tragedy and is considered an umbrella legislation as it fills many gaps in the existing laws. Thereafter a large number of laws came into existence as the problems began arising, for example, Handling and Management of Hazardous Waste Rules in 1989.

Acts Related to Environment

The act passed in India regarding the natural environment are as follows:

(1) The Water (Prevention and Control of Pollution) Act, 1974.
(2) The Air (Prevention and Control of Pollution) Act, 1981
(3) Wildlife Protection Act, 1972.
(4) The Forest (Conservation) Act, 1980.
(5) The Environment (Protection) Act, 1986.
(6) The Motor Vehicles Act, 1988.

Case Law: M.C. Mehta *v.* Union of India, 1988 AIR 1115, 1988 SCR (2) 530

In this case it was held that, in the river Ganga waste material by tanneries in Kanpur. No one was aware about the pollution growing in the river. The municipalities responsible for the cleanliness of the river, and were not doing their duty well. There was no systematic process of sewage also due to which river Ganga was severely polluted. And the Ganga start becoming the dumping ground for the discharge of untreated waste materials from the Kanpur tanneries.

And the court decided to take all the measures to prevent water pollution from river Ganga, which was causing many diseases to the people. The court also held that it was the responsibility of industry to prevent the pollution, by treating the industrial waste before being discharged. And gave the statement that industrial licences should be issued only when the industry will guarantee that it has adequate or sufficient provisions for treatment of trade effluents. Further the court also held that the Mahapalika was responsible for not taking the steps of checking the pollution and also directed the Mahapalika to take immediate

action for preventing the water pollution. The court also asked the government to take steps to increase the awareness among the people of their fundamental duty towards the natural environment which is stated under the Article 51A(g) of the Indian Constitution.

RESEARCH ON THE QUALITY OF AIR BY NEERI

This was the research done by NEERI (National Environment Engineering Research Institute) for checking the quality of air and the condition of air pollution. It is the research in air quality management by inventory, monitoring, stimulation, data analysis, prediction and control within the domain. Monitoring of air pollutants was aimed towards the regulatory compliance. And it was found that the air nearby the industry contains many air pollutants and is very polluted which was harmful for all living beings whereas the air of forest was very pure with good quality which was healthy too.

CONCLUSION

It is the fundamental duty to care of the natural environment. The breach of duty towards natural environment by the people is keeping their life in danger and even the existence of life in future in this planet. In the recent years the carelessness towards the natural environment by the people has resulted in increase in the environmental pollution like air pollution, water pollution, noise pollution, soil pollution, etc. and also in industrialization which directly affects the equilibrium of the nature. It is utmost important for the people to know their duty towards natural environment and follow it. They must need to be aware by the problem causing to the nature by them or by the other forces and also should try to protect the natural environment. All should take care of the natural environment as it is the fundamental duty and should value the environment by staying in natural discipline.

Notes and References

1. https://www.indianbarassociation.org
2. http://envfor.nic.in
3. www.legalbites.in

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 13-18

BURQA : A Tradition or an Obligation

Shubham Patel*

ABSTRACT

The researcher has done the research on the topic "Burqa, a tradition or an obligation", which the most common and interesting topic to do debate on. The Burqa, a common dress wear by the muslim women with different perception some wear because it is a tradition, some because of fashion. But there are some muslim women who wear the burqa because they are forced to do so, it at times feels ashamed and odd for the muslim women in the public. They are not that much comfortable in burqa as it covers the whole body in summer it becomes difficult to wear burqa. So burqa has its own benefits and limitations. For some women it acts as an obligation but for some it'is a willing tradition. It is also said that it violates the right of equality of muslim women. Muslim women should have choice to wear burqa if they are willing so they can if they don`t want they should not be forced.

The researcher in the reseach has covered the meaning of burqa with the relevant verses stated in Quran. The importance of burqa is also explained in the research in reference to India. The researcher in the research has also covered the history of burqa which contains the origin of burqa. The burqa should be an obligation or not, which contains mainly the limitations of burqa is also covered in the research. The researcher has also covered the points which relates that a burqa is a tradition of muslims. In the research the researcher has also explained that what the Quran says about burqa. And whether it should be banned or not with the reasons is also covered. And lastly, it has concluded with the suggestions and recommendations.

INTRODUCTION

As per the Islamic traditions, burqa is a dress which is wear by the muslims womens. Burqa is actually a black cloth that cover their bodies. It is considered to be very sacred in muslims. And they really respect and wear it as per their tradition and culture. It is also known as chadri and paranj in central asia.

In the Islamic texts burqa has been defined in the following way—

Relevant verses of the Quran is translated as:

[1]"O Prophet! Tell the wives and thy daughters and the women of the believers to draw their clocks close round them (when they go abroad). That will be better, so that they may be recognized and not annoyed. Allah is ever Forgiving, Merciful."

Qur'an, Surah 33 (Al-Ahzad), verse 59

"And say to the faithful women to lower their gazes, and to guard their private parts, and not to display their beauty except what is apparent of it, and to extend their scarves (khimars) to cover their bosoms (jaybs), and not to display their beauty except to their

* Indore Institute of Law, Indore (M.P.), patelshubhaam1797@gmail.com

husbands, or their fathers, or their husband's fathers, or their sons, or their husband's sons, or their brothers, or their brother's sons, or their sisters' sons, or their womenfolk, or what their right hands rule (slaves), or the followers from the men who do not fell sexual desire, or the small children too whom the nakedness of women is not apparent, and not to strike their feet (on the ground) so as to make known what they hide their adornments. And turn in repentance to Allah together, O you the faithful, in order that you are successful" —Qur'an, Surah 24.

IMPORTANCE OF BURQA IN INDIA

India is a secular country and therefore here lives a million of people who are free to worship the god they want to. There are several people of different religions in India and they live here with utter peace and happiness. Same is with the muslim population in India. Muslims are free to worship their god that is Allah and a wider part of our country has now be resembled as the muslims state in India where they follow their tradition and culture. Among the muslim population in India, the burqa is common in many areas like Old Delhi. In the locate of Nizamuddin Basti, the obligation of a women to wear a burqa is dependent on her age: young, unmarried women or young, married woman in their first years of marriage are required to wear the burqa. However, after this the husband usually decides if his wife should continue to wear a burqa. In addition, the Indian burqa is a slim black cloak different from the style worn in Afghanistan.

BURQA AND ITS HISTORY

Islam began as a small faith community in the Arabian Peninsula. The community was established in Medina by the Prophet Mohammed (c. 570-632 CE). From there it spread through the Middle East to Saharan and sub-Saharan, to central Asia, and to many societies around the Arabian Sea. After Islam was established in the Middle East and North Africa, it made significant inroads into Europe, as well.

Scarves and veils of different colors and shapes were customary cultures long before Islam came into being in the seventh century in the Arabian Peninsula (which includes present-day Saudi Arabia). To this day, head coverings play a significant role in many religions, including Orthodox Judaism and Catholicism.

Since the seventh century, Islam has grown to be one of the major religions. As it spread through the Middle East to Saharan and sub-Saharan Africa, to Central Asia, and to many different societies around the Arabian Sea, it incorporates some local veiling customs and influenced others. But it is only recently that some Islamic states, such as Iran, have begun to require all women to wear the veil (in Iran it is called the chador, which covers the entire body).

Critics of the muslim veiling tradition argue that women do not wear the veil by choice, and they are often forced to cover their heads, and bodies. In contrast, many daughters of Muslim immigrants in the West argue that the veil symbolizes devotion and piety and that veiling is their own choice. To them it is a question of religious identity and self-expression.

BURQA SHOULD BE AN OBLIGATION OR NOT

The Islamic world is experiencing a rise in women wearing the burqa claiming it to be a part of the Islamic dress code. Whether it is worn by choice or force is open to debate as very few women are able to, or prefer not to voice an opinion on the matter. Those who

have, generally argue against the compulsory (by law in Afganistan) wearing of this garment with a minority claiming the right to wear it citing Quranic and prophetic instruction.

A Burqa is an outer garment worn by women in Islamic societies for the purpose of concealing their bodies and/or face. It is mostly when a woman leaves her home and is compelled to wear it until she returns.

The Burqa is worn throughout Middle Eastern nations and most Muslim nations around the world, with a few liberal or democratic governments being less strict about its use. One such famous example is Turkey, where secular ideas prevail and give people the freedom to choose. Meanwhile, in stricter nations, women are forced to wear the burqa; failure to do so can result in beatings, harassment or worse. Obviously a woman wears a burqa but more specifically, conservative practicing Muslims wear it. Girls are not mandated to wear a burqa until they reach puberty but this notion is not practiced, as girls as young as six are made to wear a burqa to physically and mentally prepare them for adult life.

Burqa falls under the category of Hijab. This is Arabic word which means to veil or cover and refers to a women's head and body covering. In Saudi Arabia, women wear a loose robe called abaya and a face veil called niqab, while in nations like Tunisia or Turkey; Muslim women tend to wear only a headscarf. In Iran, they take a step further and the "fashion police" mandate all women to wear loose clothing—preferably a black or white robe—when going out, women are supposed to wear either a full face veil or scarf. One of the extremes of burqa is the Afghan burqa, which was enforced by the Taliban. This burqa covers the entire body in loose clothing with the face (including eyes) being covered with only a grille for the women to look through.

WHAT DOES QURAN SAYS ABOUT BURQA?

First of all it depends upon who you ask. There is disagreement in Islamic circles as to what extent Quran advocates the wearing of the burqa. However, the Quran does not specifically mention burqa or tell women to wear such extremely confining clothes. Instead, it instructs men and women to dress and behave modestly in society (24:31), which the Ulama or "Scholars" do agree upon. Modern day Muslims base their authority regarding the burqa on the hadith or collected traditions of life in the days of prophet Muhammad. It is important to note here these "collected traditions" have no place in Islam. Most followers of these traditions know little of their origins or authenticity. For thousands attributed to the Prophet only one bears notable credibility:

> [2]"Do not write down anything I say except the Quran. Whoever has written something other than Quran let him destroy it." (Ahmed Ibn Hanbal, Vol.1, page 171 also Sahih Muslim, book 42, number 7147).

With contradiction and confusion thrown up by the Hadith and "scholars of islam" let us consider what the Quran says and which sheds light on the issue of the burqa:

> [3][33:52] No women are lawful for you beyond this, nor for you to replace them with other wives even if you are attracted by their beauty, with the exception of what your right hand possesses. You must be content with those already made lawful to you. God is watchful over all things.

The significance of the underlined words is that they confirm that God never commanded women to cover their faces. If the burqa was a command from God, as some claim, then

how can any man be attracted to a woman's beauty (as in 33:52)? Naturally the woman's beauty, which God is speaking about, is the beauty of her face. If the burqa was a command from God then the words in 33:52 would become meaningless and obsolete.

Now let us review what the Quran says about the topic of a dress code.

For women: cover your chest (24:31), Lengthen your garments (33:59) and for both sexes; the BEST garment is righteousness and modest conduct (7:26).

The word burqa is not to be found anywhere in the Quran, but as it falls under the heading of hijab which is used in Quran we should explore its use. The Arabic word hijab can ce translated into veil or yashmak. Other meanings for the word include screen, barrier, cover, mantle, curtain, drapes, partition, division, divider, etc.

The word hijab appears in the Qur'an seven times, five of them as "hijab" and twice as "hijaban". None of these "hijab" words are used in the Quran in reference to what the traditional Muslims call today "the dress code for Muslim woman". Hijab in the Qur'an has nothing to do with a woman's dress code.

> [4][7:46] A Hijab separates them, while the Purgatory is occupied by people who recognize each side by their looks. They will call the dwellers of Paradise: "Peace be upon you." They did not enter (Paradise) through wishful thinking.

[42:51] No human being can communicate with God except through inspiration, or from behind a hijaban, or by sending a messenger through whom he reveals what he wills. He is the most high, most wife.

Another word commonly used to justify the wearing the burqa or at best a veil is the word khimaar, which can be found, along with the dress code for women in 24:31. Some Muslims quote this verse as a commandment for hijab, or head cover by pointing to the khumurihinna in 24:31, which simply means cover, forgetting that God has already used the word hijab, several times in the Qur'an. Those blessed by God can see that the use of the word "Khimaar" in this verse is not for hijab, not for head cover. Those who quote this verse usually add (head cover or veil) after the word Khumurihinna, and usually between parentheses, because it is their addition to the verse of God. Here is the most accurate translation of 24:31.

[24:31] And tell the believing women to subdue their eyes, and maintain their chastiny. They shall not reveal any part of their bodies, except that which is apparent. They shall cover their chests with their 'khimaar'.

Most of the translators, obviously influenced by the hadith translate the word as VEIL and thus mislead people into believing that this verse is advocating the covering of the head and hair, some even go to the extent of claiming that 24:31 implies the covering of the face!

But the truth is that the word khimaar simply means a cover, any cover is called khimaar in Arabic. The derivative word khamrah, which means intoxicants, is so called because it covers the brain.

In 24:31, God is telling the women to use their cover (khimaar, being a dress, a coat, a shawl, a shirt, a blouse, a tie, a scarf…etc.) to cover their bosoms, not their heads, face or hair. Of god willed to order the women to cover their heads, face or hair, he would have simply said, "Cover your head, face and hair." God is neither vague nor forgetful! God does not run out of words. He does not wait for, nor need a scholar to apply the correct words for him! God confirms that the Quran is complete and fully detailed (6:114/5).

The Arabic word for chest or more accurately the cleavage is jayb and this is the word used in this verse, but the Arabic words for head which is Ra's, or hair which is sha'r are NOT. The commandment in the verse is clear – cover your chest.

The last part of the verse 24:31 translates as, "They shall not strike their feet when they walk in order to shake and reveal certain details of their bodies." Details of the body can or cannot be revealed by the dress you wear and not by your head cover.

It is a crime that so many men who have coaxed, or pressured, or demanded that their women wear the burqa, or that their daughters wear a hijab prematurely, are most probably unable or willing to read the Quran and uphold its tenants, being totally dependent on the interpretations incorrectly preached to them by immoderate clerics and cultural exhortations not based on pure religion. The problem with so many clerics in powerful positions within many Islamic communities around the globe, is that these religious leaders do not allow for intellectual freedom, or personal interpretation when it comes to matters of self-assessed modesty and female dressing because of the narrowness in which they view women's supposedly intemperate sexuality and the lack of self-control in men.

Surely in this day and age, human beings can be trusted to walk down the street, safe in the knowledge that a glimpse of hair not cause a riot. A veil worn in any form should be a personal and independent choice, free of social pressure. A shroud should not be used to effectively excise a woman from the society in which they live and the possibilities of the freedoms we should all enjoy.

There should be no compulsion in religion: the right way is now distinct from the wrong way. Anyone who denounces the devil and believes in God has grasped the strongest bond; one that never breaks. God is Hearer, Omniscient.

SHOULD THE BURQA BE BANNED IN INDIA?

Ban on burqa—the burqa is neither a cultural or religious symbol nor a simple piece of clothing. It doesn't form a part of somebody's identity because you cannot identify a person whose face cannot be seen. It reduces women to cargo—muslim cargo if you will. It only identifies human bodies as muslim women.

Let's call the burqa what it really is—a horribly regressive practice meant to oppress women. It is a symbol of violence. We banned Sati. We should ban the burqa. Both the forms of violence, albeit in varying degrees. Sure, the burqa cannot kill someone, but is that an argument? Should we condone violence that doesn't kill?

Some people assume that Muslim women love the burqa and will be devastated if they are not allowed to wear it at all times. Others assume all Muslim women hate it and are happy to be liberated from it. Which assumption is true, nobody can tell. So shouldn't we go with the one that is likely to bring some positive change rather than the one which is likely to maintain the status quo? The argument, however, seems to be "let's give some of them the "choice" to continue with a regressive practice, but let's not give any of them the option to get rid of it."

CONCLUSION

The burqa is just a costume, it can't be related with the tradition and all. The choice should be given to the muslim women that whether they are willing to wear or not, they should not be forced by anyone for doing so. As it violates their right of equality which is stated in the Article 14 of Indian Constitution. Every person has right of freedom to wear

any thing they want they should be forced. As the coin has two faces, similarly, burqa has its own benefits and limitations. It is up to the person the person is taking it. Every person should keep in mind that no tradition says to violate the right of person if it is doing so it is not the tradition.

Notes and References

1. http://www.quran-islam.org
2. https://people.howstuffworks.com
3. https://people.howstuffworks.com
4. http://www.irfi.org

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 19-23

Case Comment : Smt. Indira Nehru Gandhi *v.* Raj Narain and Anr.

Archi Jain*

INTRODUCTION

Indira Nehru Gandhi……..…….……Appellant

v.

Shri Raj Narain & Anr…….……Respondent

Case Citation: *AIR 1975 SC 2299*[1]
Appeal No. (Civil): *887 of 1975*
Judgment Date: *November 07, 1975*

Bench: *5-Judges Bench of*

- Hon'ble Justice Ajit Nath Ray (Chief Justice of India)
- Hon'ble Justice Hans Raj Khanna
- Hon'ble Justice Kuttyil Kurein Mathews
- Hon'ble Justice Mirza Hameedullah Beg
- Hon'ble Justice Yashwant Vishnu Chandrachud

The very famous case of Indira Gandhi v. Raj Narain which became one of the landmark cases in the history of India involved a lot of power tussle and political force in action. The issue dates back to 1971 when 5th Lok Sabha elections were held from March 1 to March 10 in which Indira Gandhi campaigned and won elections with a huge border of securing 352 seats out of 518. In her opposition, Ram Manohar Lohia's SSP candidate Raj Narain was contesting in the constituency of Rae Bareili in the state of Uttar Pradesh.

After losing the election, he filed the case against Indira Gandhi, accusing her of election rigging and other corrupt practices in the general elections. On 24th April, 1971, he challenged the validity of elections in the Hon'ble High Court, Allahabad. The petition mentioned that Smt. Indira Gandhi has violated the basic code of conduct and violated the election code enshrined in Representation of People's Act, 1951. The petition also alleged several Gazetted government officials including Yashpal Kapoor, armed and police forces were wrongfully used by Smt. Indira Gandhi in her campaigning.

The charges went to liquor and blanket distribution among prospective voters and exceeding the campaign expense prescribed by R.P.A., 1951. This case was decided on November 7, 1975 by the Hon'ble High Court of Allahabad and the learned judge, acting under Section 8-A declared that the candidate—Indira Gandhi is disqualified from the election for next six years from the day of judgment which was November 7, 1975.

* Indore Institute of Law, Indore (M.P.).

Hon'ble High Court of Allahabad admitted few facts of this case, which were :

1. Smt. Indira Gandhi contested for a seat in Lok Sabha elections in 1971.
2. That she availed assistance from a range of government agencies and officials and also indulged in luring voters by distributing blankets and liquor to the voters.
3. That she filed the nomination papers to be a candidate for election in the Rae Bareli community on 1st February, 1971.

BACKGROUND

After getting defeated in election against Smt. Indira Gandhi, Raj Narain filed an election petition against her on 24th April, 1971, challenging Prime Minister's election. The court admitted the case and hearing began on 15th July, 1971 before the Justice B.N. Lokur. In August 1971, Raj Narain asked to make amendments in his original pleading so as to put more charges on Smt. Indira Gandhi. Also, he applied under Order XI Rule 1 and Order XI Rule 12 of the Civil Procedure Code for leave to deliver interrogatories in writing the examination of Indira Gandhi and for a direction to her to make innovation on oath of the documents which are have been in her possession or power relating to the question arising in the petition. The single bench judgement which was passed by Justice W. Broome on 14th September, 1971 regarding the above matter, allowed the leave to deliver interrogatories in writing for the examination of Indira Gandhi but subject to a few questions only but he disallowed the amendments to the original pleading as it would amount to amendments to the material facts.

In 1972, Raj Narain went to the Hon'ble Supreme Court against the above judgement of Hon'ble High Court. In 24th June, 1972 a bench of 5 judges of Hon'ble Supreme Court allowed some of the interrogatory questions put forward by Raj Narain and disallowed the rest. Also, the bench allowed him to make amendments and produce new evidence regarding Yashpal Kapoor who acted as a private citizen or as a Gazetted officer during the campaigning of Indira Gandhi in Rae Barely.

The case went on through 1973 and 1974 and on 5th April 1974, the Hon'ble Supreme Court granted leave for the third appeal during the hearings. This time it was Indira Gandhi's claim of privilege of not to produce the blue book in the court which is rules and instructions for the protection of PM when on tour or travel. After this on 24th January 1975 the Hon'ble Supreme Court quashed High Court's verdict to produce the blue book before the court. However, the third judge, Justice Jagmohan Lal Sinha was directed to secure affidavit about disclosures of the blue book so that he can decide whether or not to admit parts of it as evidence.

Meanwhile, in other related case, the verdict impacted the Indira Gandhi's case. On 3rd October 1974, a Supreme Court bench ruled that election expense incurred by anyone with the consent of the candidate is an authorized expense and had to be included in the candidate's report on election expenses. Thereafter, Raj Narain moved a writ petition challenging the 1974 Act amending Representation of People's Act and Justice Sinha declared that it was in connection with this case. On 18th March 1975, Indira Gandhi appeared in the court.

The next big and landmark decision was given by High Court whereby it declared the election of Smt. Indira Gandhi as Void on 12th June 1975. It observed that Smt. Indira Gandhi took help of Shri Yashpal Kapoor, Gazetted officer of Government of India, the District Magistrate and Superintendent of Police, Rae Bareli, the Executive Engineer, PWD

and the Engineer Hydel Department for her election campaigning and thus committing corrupt practices under Section 123 (7) of Representation of People's Act, 1951 but it also rejected Raj Narain's plea on the constitutionality of 1974 Act. After this verdict, Indira Gandhi's counsel moved for a stay and Justice Sinha gave an unconditional stay of 20 days. She also challenged the "unseating" verdict against her by the High Court and seeked "absolute stay" on the same.

The vacation judge, Justice V.R. Krishna Iyer on 24th June 1975 granted a conditional stay which gave a blanket cover on electoral disqualification but Indira Gandhi was debarred from participating and voting in the LokSabha and could not draw salary as a member.

ISSUES

There were three main issues to be decided by the Supreme Court in the present case, and they are:

Issue 1: Whether or not Clause 4 of Article 329A of the Constitution of India, was constitutionally valid.

Contested on the grounds that:

Clause 4 of Article 329A destroys basic structure.

The constitution of the House which passed the Constitution(Thirty-ninth Amendment) Act is illegal.

Issue 2: Whether or not, Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975, was constitutionally valid.

Contested on the grounds that:

These Acts destroy or damage basic structure or basic features.

Issue 3: Whether or not, the election of Indira Gandhi was void.

Contested on the grounds that:

She obtained the assistance of Gazetted Officers of the Uttar Pradesh government, namely, the District Magistrate, the Superintendent of Police, the Executive Engineer, Public Works, and Engineer, Hydel, for the construction of rostrums and arrangement of supply of power for loudspeakers in the meetings addressed by her during her election campaign.

She spent more than the prescribed amount of money, during her election campaigns.

RULES

The following rules were applied while passing the judgment:

(1) Article 329(b) in the Constitution of India, 1949.
(2) Section 123(7) in the Representation of the People Act, 1951.
(3) Representation of the People (Amendment) Act, 1974.
(4) Election Laws (Amendment) Act, 1975.
(5) Article 368 in the Constitution of India, 1949.

PRINCIPLES INVOLVED

- Rule of Law.
- Right to Free and Fair Elections.
- Right to Equality.
- Jurisdiction of Court.
- Laws of Election.

CONCLUSION

The Supreme Court passed its order in its judgement on 7th November, 1975. The five judge bench of the Supreme Court gave its orders regarding the above mentioned issues, in accordance with the reasons mentioned above in the Application Section.

It was held that clauses '4' and '5' of Article 329 A was unconstitutional as being violative of the basic structure of the Indian Constitution.

Representation of People's (Amendment) Act,1974 & Election Laws (Amendment) Act,1975 were considered to be legal, perfectly constitutional and free from all infirmities.

Election of Indira Gandhi, from her constituency Rae Bareli, was considered to be valid.

The Supreme Court set aside the judgement given by the Allahabad High Court, it removed all corrupt charges levied against Indira Gandhi and acquitted her, thereby making her election valid.

CRITICAL ANALYSIS

After thorough examination of the rationale given by the Judges in this particular case, and after going through the background history of this case, I personally feel that the Judgement although was academically and theoretically correct, but in practicality and on the grounds of Justice, Equity and Good Conscience it was a failed judgement.

Indira Gandhi had taken assistance by Government Officers in her election campaign, she also availed services from the army and the airforce, during her election campaigns. The Allahabad High Court, very righteously found her guilty of corrupt practices as mentioned in Section 123(7) of The People's Representative Act, 1951, and hence made her election void, it also barred her from contesting any elections for the next 6 years. Indira Gandhi took an unconditional stay order from Justice Jagmohan Lal Sinha, and then appealed to the Supreme Court, meanwhile she very artfully imposed emergency on the nation and then got many of her opposition members arrested under preventive detention, by doing this she was able to pass the Thirty-ninth Amendment Act of the Constitution with little difficulty. She also passed the People's Representative (Amendment) Act, 1974 and the Election Laws (Amendment) Act 1975 (will now be referred to as Amendment Acts, 1974, 1975).

These three major amendments were clearly made to remove all grounds on which she was found guilty in the Allahabad High Court. The Supreme Court in its judgement held that Amendment Acts, 1974, 1975, were constitutionally valid as they were legislative rules and the parliament had powers to amend them, but the Judges should have noticed that these amendments were made for the sole purpose of removal of all kinds of charges from Indira Gandhi's head.

Also at the time of passing of these amendments most of the opposition members were under preventive detention, without any cause, this prevented them from giving their opinions and votes for or against that legislation. The Supreme Court very ignorantly said that, that was a matter of the Parliament and the Supreme Court could not do anything about it. The duty of the Supreme Court is to uphold the constitution, it is considered as the guardian, the watchdog of the constitution, and here the constitution was being tampered within an illegal manner, and all that we heard from the Supreme Court Judges was that it was out of their jurisdiction and hence they would not go into that matter.

It was by reason of these Amendment Acts, that Indira Gandhi was allowed to go scot free. Had she been any ordinary person, she would have never been able to make these amendments, she misused the power given to her as the Prime Minister, for her own benefits. Every charge that was made on her by the Allahabad High Court was well taken care of in these Amendment Acts. She changed the definition of "candidate". The definition of "candidate" in Section 79(b) of the 1951 Act until the amendment thereof by the Election Laws (Amendment) Act, 1975 was as follows:

> 'Candidate' means a person who has been or claims to have been duly nominated as a candidate at any election and any such person shall be deemed to have been a candidate as from the time when, with the election in prospect, he began to hold himself out as a prospective candidate.

This definition was substituted by Section 7 of the Amendment Act, 1975, as follows: 'Candidate' means a person who has been or claims to have been duly nominated as a candidate at any election.

She also made sure that Yashpal Kapoor's resignation was held valid from an earlier date, by Section 8(b) of the Amendment Act, 1975, by introducing Explaination 3 at the end of Section 123(7) of People's Representative Act.

These two changes helped her to show that she did not take any help from Yashpal Kapoor while he was a Gazetted officer. Thus, she removed all grounds of guilty charge on herself.

I therefore feel that the Supreme Court acted in a very ignorant manner. Its duty was to do justice. Here Indira Gandhi had committed an offence but she used her power to amend the very laws that charged of being guilty and the Supreme Court all this while was sleeping, and when Raj Narain pleaded for Justice, all that Supreme Court could him were long unnecessary and unwanted reasons or rationale of how the issue was out of their jurisdiction.

The only time in this judgement where the Supreme Court did uphold the constitution was when it struck down clause '4' & '5' of Article 329A as being violative of Basic Structure. Overall I personally feel that the Supreme court acted in a bird-brained manner, the reason why it only struck down clause '4' & '5' of Article 329A was because it saw these clauses as a threat to itself. It knew that the other issues did not hurt the Supreme court in any manner and therefore it acted dormant in matters of those issues.

Note and Reference

1. Manupatra Online.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 24-31

Case Review on Jeeja Ghosh *v.* Union of India

Anshita Arun*

INTRODUCTION

Article 14

According to Article 14, **"the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India".**

While the concept of "equality before the law" was borrowed from the Common Law upon which English Legal System was founded, the phrase "equal protection of laws" has its link with the American Constitution.

Both the phrases advocate **"equality to status and of opportunity"**. In fact, **"equal protection of laws"** also emphasizes on equal treatment under equal circumstances. Thus, Article 14 stands next to any arbitrary or discriminatory laws passed by legislatures. Whenever there's arbitrariness in the State action, an individual can fall back on Article 14.

Article 14 also takes into deliberation the fact that not all laws must be generic in nature and not same laws are pertinent to all persons. Hence, it has the provision of treating different individuals differently if circumstances demand so. Although it allows **"reasonable classification"** of individuals, objects, and transactions to achieve specific ends, it prohibits **"class legislation"** which adopts a discriminatory approach by **"conferring particular privileges upon a class of persons".**[1]

RULE OF LAW

The Constitution of India declares that were a Democratic, Secular and a Socialist Republic. The Rule of law governs our country. 'Equality before law' and 'Equal protection of law' are the most fundamental right conferred on its citizens 'Rule of Law'. **Rules of law contains three principles given by Prof. Dicey** or it has three meanings as stated below:

- Absence of Arbitrary Power or Supremacy of Law.
- Equality before Law.
- The Constitution is the result of the ordinary law of the land.
- **The absence of Arbitrary Power or Supremacy of Law** – In other words, a man may be punished for a breach of law but he can be punished for nothing else. It means the absolute supremacy of Law as opposed to the arbitrary power of the Government.
- **Equality before the Law** – It means subjection of all classes to the ordinary law of the land administered by ordinary law courts. This means that no one is above law with the sole exception of the monarch who can do no wrong.
- **The Constitution is the result of the ordinary law of the land** – It means that

* BA.LL.B., 2nd Semester, Indore Institute of Law, Indore (M.P.).

the source of the right of individuals is not the written Constitution but the rules as defined and enforced by the Courts.

The doctrine of Rule of Law has been adopted in Indian Constitution.

EXCEPTION TO THE RULE OF EQUALITY

Under Article 359, when the decree of crisis is in activity, the implementation of Art. 14 might be suspended amid that period. Craftsmanship 361 gives that president and governors will not be responsible to any Court for the activity and execution of the forces and obligations of the workplace. They additionally appreciate insusceptibility from criminal and common procedures until the point when certain conditions are satisfied.

Individuals from Parliament and of State Legislature are not obligated in regard of anything done or said inside the House (Article, 105 and 194). Outside Diplomats are safe from the ward of Courts. Article 31C shapes an exemption by barring a few laws [for executing any of the order standards determined in Art. 39(b) or (c)] from the domain of Article 14.

EQUAL PROTECTION OF LAWS

It is an assurance of equivalent treatment. An equivalent law ought to be connected with an equivalent hand to all people who are the equivalents. The decide is that the like ought to be dealt with alike and not that dissimilar to ought to be dealt with alike. The same or uniform treatment of unequal's is as terrible as unequal treatment of equivalents. It has been said that the equivalent security of the law is a promise of insurance or certification of equivalent laws.

The control of law forces an obligation upon the state to take unique measure to forestall and rebuff severity by police approach. The Rule of Law epitomized in Article 14 is the 'essential element' of the Indian Constitution and henceforth it can't be pulverized even by an alteration of the Constitution under Article 368 of the Constitution.

ARTICLE 14 PERMITS REASONABLE CLASSIFICATION BUT PROHIBITS CLASS LEGISLATION

Article 14 does not imply that all laws must be general in character or that similar laws should apply to all people or that each law must have all inclusive application, for, all people are not, by nature, achievement or conditions, in similar positions. The State can treat diverse people distinctively if conditions legitimize such treatment. Truth be told, indistinguishable treatment in unequal conditions would add up to disparity. The governing body must have the ability to bunch people, items and exchanges with a view to achieving particular points. Along these lines, a sensible arrangement isn't allowed yet fundamental if society is to advance.

By the procedure of characterization, the State had the intensity of figuring out who ought to be viewed as a class for reasons for enactment and in connection to a law ordered on a specific subject. Characterization implied isolation in classes which had a deliberate connection, generally found in like manner properties and attributes. It hypothesized a level-headed premise and did not mean crowding together of specific people and classes discretionarily.

The class enactment is what makes an uncalled for separation by giving specific benefits upon a class of people self-assertively chose. Also, no sensible refinement can be discovered advocating the incorporation of one and rejection of other from such benefit.

While Article 14 restricts class enactment, it grants sensible orders of people, items, and exchanges by the assembly to achieve particular finishes. As such, Article 14 forbids is class enactment and not a grouping with the end goal of the legislation.

TEST OF REASONABLE CLASSIFICATION

Article 14 forbids class legislation; it does not forbid reasonable classification of persons, objects, and transactions by the Legislature for the purpose of achieving specific ends. Classification to be reasonable should fulfill the following two tests:

1. It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from another left out of it.
2. The differentia adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved by the statute in question.[2]

Article 21

According to Article 21, it states : **"No person shall be deprived of his life or personal liberty except according to procedure established by law"**.

According to **Justice Bhagwati, Article 21 "embodies a constitutional value of supreme importance in a democratic society." Justice Iyer has characterized Article 21 as "the procedural magna carta protective of life and liberty.**

This right has been held to be the heart of the Constitution, the most organic and progressive provision in our living constitution, the foundation of our laws. Article 21 can only be claimed when a person is deprived of his **"life" or "personal liberty by the State"** as defined in Article 12. Violation of the right by private individuals is not within the preview of Article 21.

Article 21 secure three rights :

- Right to Life
- Right to Personal Liberty
- Right to live with Human Dignity

Basically the case concern with the "**RIGHT TO EQUALITY AND RIGHT TO LIVE WITH HUMAN DIGNITY"**.

In the Maneka Gandhi case the court gave a new dimension to Article 21. It held that the right to live is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. Elaborating the same view, the court view in Francis Coralie *v.* Union Territory of Delhi.

"The privilege to live incorporates the privilege to live with human nobility and all that accompanies it, that is the minimum essentials of life, for example, satisfactory sustenance, apparel and haven over the head and offices for perusing composing and conveying everything that needs to be conveyed in various structures, openly moving about and blending and blending with kindred people and should incorporate the privilege to fundamental necessities, the fundamental necessities of life and furthermore the privilege to bear on capacities and exercises as constitute the absolute minimum articulation of human self."

Another broad formulation of the theme of life to dignity is to be found in **Bandhua Mukti Morcha *v.* Union of India** Characterizing Article 21 as the heart of fundamental rights, the Court gave it an expanded interpretation Justice Bhagwati observed:

> "It is the fundamental right of everyone in this country… to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government has the right to take any action which will deprive a person of the enjoyment of these basic essentials."[3]

BACKGROUND

Facts of the Cases

Bench: A.K. Sikri, R.K. Agrawal

- Ms Jeeja Ghosh is an Indian citizen with cerebral palsy. She is an eminent activist involved in disability rights. She is, *inter alia*, a Board Member of the National Trust, an organisation of the Government of India, set up under the National Trust for Welfare of Persons with Autism, Cerebral Palsy, **Mental Retardation and Multiple Disabilities Act (Act 44 of 1999).**
- Ms Ghosh has been felicitated by the West Bengal Commission for Women on the occasion of International Women's Day in the year 2004, and is the recipient of Shri N.D. Diwan Memorial Award for Outstanding Professional Services in Rehabilitation of Persons with Disabilities by the National Society for Equal Opportunities of the Handicapped (Naseoh) in the year 2007.
- Ms. Jeeja Ghosh is also the recipient of the "Role Model Award" from the office of the Disability Commissioner, Government of West Bengal, for the year 2009, and was also an elected Board Member of the National Trust for Persons with Autism, Cerebral Palsy, Multiple Disabilities and Mental Retardation from 14-8-2008 to 19-7-2011.
- It so happened that Ms Ghosh was invited to an International Conference, North-South Dialogue IV, in Goa, from 19-2-2012 to 23-2-2012, hosted by Adapt. The Conference was intended to put a special focus on people with disabilities and their families, countries in the global South facing huge systemic and institutional barriers, and the tools for change that would make a difference in their lives in these countries.
- Adapt purchased return plane tickets for Ms Jeeja Ghosh, including a seat on flight SG 803, operated by **Spice Jet Ltd**. scheduled to fly from Kolkata to Goa on the morning of 19-2-2012. The Conference was to begin in the afternoon of 19-2-2012.
- After being seated on the flight, Ms Jeeja Ghosh was approached by members of the flight crew who requested to see her boarding pass, which she gave them.

Then they proceeded to order her off the plane. Despite her tearful protestations and informing them that she needed to reach Goa for the Conference, they insisted that she deboard. After returning to the airport and arguing with airlines officials, she later discovered that the Captain had insisted that she be removed due to her disability.

- It is averred in the petition that as a result of the shock and trauma of this event, she had trouble in sleeping and eating, so she was taken to a doctor the following day where she was prescribed medication. Because of this, she was unable to fly to Goa on 20-2-2012, and, thus, missed the Conference altogether. Not only did this humiliate and traumatize her, but it also deprived the Conference organiser, Adapt and all of the attendees of the opportunity to hear her thoughts and experiences, and prevented her from providing her analysis of the Indo-German project under review.
- Ms. Ghosh grudges that even after four years of the said incident whenever she has a flashback, she feels haunted with that scene when she was pulled out of the plane, like a criminal. She continues to have nightmares. The petitioners, in these circumstances, have preferred the instant petition under **Article 32 of the Constitution of India** for putting the system in place so that other such differently-abled persons do not suffer this kind of agony, humiliation and emotional trauma which amount to doing violence to their human dignity and infringes, to the hilt, their fundamental rights under Articles 14 and 21 of the Constitution.
- We may mention, at this stage, that Spice Jet had sent a letter to Petitioner 1 apologizing for the incident. However, according to the petitioners, Spice Jet tried to trivialize the incident by just mentioning that **"inconvenience caused"** was **"inadvertent".** It is also mentioned in the petition that before approaching this Court she had submitted a complaint to the Ministry of Social Justice and Empowerment about the incident as well as to the Commissioner for Persons with Disabilities, West Bengal and the Chief Commissioner for Persons with Disabilities, Government of India.
- It is claimed that such behaviour by the airlines crew is as outrageous as it is illegal. Spice Jet's staff clearly violated **"Civil Aviation Requirements"** dated 1-5-2008 (for short "the CAR, 2008") with regard to "**Carriage by Air of Persons with Disability and/or Persons with Reduced Mobility"** issued by Respondent 2, Directorate General of Civil Aviation (for short "DGCA") as authorized by **Rule 133-A of the Aircraft Rules, 1937**.[4]

QUESTION OF LAW

Issues

- Whether the obligations of the airline companies under CAR-2008?
- Whether obligation of Government under PWD Act (1995) and UNCRPD?
- Whether the Constitution guarantees of Right to Live with Dignity?

HIGHLIGHTS OF THE MAJOR ARGUMENTS

Petitioner's Arguments

- Such acts are in violation of the Petitioner's Fundamental Right to life, to move freely across the country, and to practice trade and profession.

- The Petitioners refuted the contentions of the respondent no. 3 and denied any kind of procedural negligence on the part of Ms Ghosh.
- Airlines' denial of carrying her was in violation of CAR-2008, and other relevant provisions of the PWD Act (1995) and UNCRPD.
- It is the Government's obligation to see that rights of persons with disabilities are being taken care of.

Respondent's Arguments

- **Respondent 2, DGCA** : It was rather unusual, that a Governmental body itself came out in support of the present petition, so far it helps in implementation of the Guidelines prescribed.
- **Respondent 3, the Airlines** : It was Ms. Jeeja Ghosh who failed to disclose her disability at the time of booking of her flight tickets, and hence her disability was the cause, of her jeopardizing the safety of other passengers onboard. (her health condition was injurious to other passengers)[5]

Judgement

- The irresistible conclusion is that Ms. Jeeja Ghosh was handled with a lack of **insensitivity and that the airlines' action of de-boarding her was illegal and insensitive.**
- Rights provided by the Act of 1995 are for upholding the human dignity and are in furtherance of the equal rights that persons with disabilities enjoy.
- The **Constitution of India under Part-III provides for rights based on human dignity. Violation of Article 21 of the Constitution would indeed violate the right to live with dignity.**
- Rights of persons with disabilities need to be viewed from a **human rights perspective, rather than charity, medical or social models.**
- **All the non-disabled persons should understand one fact that persons with disabilities have a right to live with dignity.**

Further it was held that Notwithstanding remuneration for the misfortune and experiencing that came about this specific episode the applicant is additionally looking for course to guarantee that the respondents make a move to guarantee execution of the Civil Aviation Requirements and other statutory and established necessities, with obviously spelt out commendable punishments for rebelliousness with the controls to guarantee that such conduct does not happen later on.

Hearing the appeal, on May 12, 2016 the Supreme Court watched "we land at the compelling conclusion that Jeeja Ghosh was not given fitting, reasonable and minding treatment which she required with due affectability, and the choice to de-board her, in the given conditions, was uncalled for. More than that, the way in which she was dealt with while de-boarding from the air ship, delineates add up to absence of affectability with respect to the authorities of the carriers. The way in which she was managed demonstrates the attestation of Shapiro as right and defended that 'non-crippled don't comprehend incapacitated ones".

The Supreme Court additionally included "On our finding that respondent No. 3 acted in a hard way, and in the process disregarded Rules, 1937 and CAR 2008 rules bringing about mental and physical enduring experienced by Jeeja Ghosh and furthermore outlandish

oppression her, we grant an aggregate of 10,00,000 as harms to be payable to her by respondent No. 3 inside a time of two months from today".

The Honorable Supreme Court likewise expressed "after perspectives might be re-evaluated by the DGCA/Government to see whether they can be fused in CAR 2014 by legitimate revisions, institutionalization of types of gear, encourage work area, wheelchair utilization, security checks, on board offices, grumblings component, trainings, off-loading. We coordinate that the official respondents, in meeting with different divisions as said above, will think about the previously mentioned perspectives, and even different angles which merit such consideration however might not have been indicated by us, inside a time of three months and on that premise whatever further arrangements are to be joined ought to be embedded.[6]

Relevant Acts/Statues

- Constitution-Articles 14, 19, 21, 32
- The Persons with Disabilities Act, 1995
- Civil Aviation Requirements' 1st May, 2008 (CAR-2008)
- Rule 133A of the Aircraft Rules, 1937
- United Nations Convention on Rights of Persons with Disabilities—Articles 5,9, 9(2)
- Vienna Convention on Law of Treaties (1963)

Cases Related to Article 14

- Northern India Caterers *v.* State of Punjab
- Maganlal Chhaganlal *v*. Greater Municipality
- State of West Bengal *v*. Anwar Ali Sarkar
- Bachan Singh *v*. State of Punjab
- Air India *v*. Nargesh Meerza

Cases Related to Article 21

- A.K. Gopalan *v.* State of Madras
- Maneka Gandhi *v*. Union of India
- Olga Tellis and others *v*. Bombay Municipal Corporation and Others
- Bandhua Mukti Morcha *v*. Union of India and Others
- S.S. Ahluwalia *v*. Union of India

CONCLUSION AND SUGGESTIONS

The people who are disabled should be treated equally without any discrimination. Even they have the right to live with dignity without any inequality. According to me there should be some special precautions and aid provided to them so that they do not face any problem. The very fact that such requirements were issued by the Directorate General of Civil Aviation reflects that the authorities are not oblivious of the problems that persons with disabilities suffer while undertaking air travel. At the same time, it was found that these instructions did not adequately take care of all the hassles which such people have to undergo. This should not happen.

The equipment and other facilities should be standardized in consultation with the Department of Disabilities Affairs. Internal audits should be introduced to ensure that assistive devices are available in good condition and handling persons are properly trained in their use. This aspect should also be overseen by DGCA. Responsibilities also need to

be clearly defined for each stakeholder, namely, responsibility of the airlines, their agents and ticketing website for ticketing, airport operator for providing a help desk and assisting the passenger on arrival at the airport, responsibility of airline for check-in, responsibility of CISF for security check, etc.

Further the people with reduced mobility should be include such persons who require assistance in air travel, for example, persons with hearing and vision impairment, persons with autism, etc. who have no visible impairment but still require facilitation at the airport and in the aircraft. The Committee also suggested standardization of training, standard operating procedures, need for sufficient oversight by authorities, need for clarity on requirement of medical clearance by passengers, consistency of equipment at airports and on aircraft, proper training of security checking personnel and need for more clarity on seating arrangement to PRMs. Safety briefings in aircraft should also be made in sign language for persons who are hard of hearing/deaf. It should also cover emergency evacuation of blind passengers. At last I conclude that people should be treated equally and should not be discriminated on any grounds and everyone has a right to live with dignity.

Notes and References

1. http://www.elections.in/political-corner/significance-of-article-14-of-indian-constitution/
2. http://www.elections.in/political-corner/significance-of-article-14-of-indian-constitution
3. https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/
4. http://www.advocatekhoj.com/library/judgments/announcement.php?WID=7440
5. http://www.livelaw.in/people-disabilities-also-right-live-dignity-sc/
6. http://www.hrln.org/hrln/disability-rights/pils-a-cases/1863-jeeja-ghosh-vs-union-of-india-airport-services-changed-to-accommodate-passengers-with-disabilities.html

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 32-42

Adoption under Juvenile Justice System

Pratiksha Sharma*

INTRODUCTION

"Children need love, especially when they do not deserve it".

—Harold S. Hulbert, Child Psychiatrist

The nation's future citizens deserves solicitude and best care. A child is absolutely born innocent but certain social and environmental factors in a negative aspect diverge their minds towards criminal tendencies, whose removal might mould them into a person of stature and excellence. We all know that children are the assets and wealth of any nation. A healthy environment should be provided to all the children so that they become civilized citizens who are physically fit, socially active and mentally conscious. Recently, juvenile delinquency has become an important facet of criminology. Juveniles have got serious forms of delinquent behaviour which may hamper the stability, social command and social destruction of the nation. That's why the juvenile justice system made to improve all these things. The juvenile justice system is the primary system used to handle children who are convicted of criminal offenses. The juvenile justice system intervenes in delinquent behaviour through police, court, and correctional involvement, with the goal of rehabilitation. Juvenile courts were established because prior to that time, children and youth were seen as miniature adults and were tried and punished as adults, as above I mentioned that children are the assets of the nation and they need much love and care so for their development a special and different courts are established so they make them better. The main goal of the juvenile justice system is rehabilitation rather than punishment. Many children are there in the nation who are orphan and they commits crime and go to juvenile jails for rehabilitation and after that there are provisions in our law if any couple, or any person who want to adopt any child they can adopt them also because these juveniles also need love and care. For their better lives courts allow their adoption. This white paper only aims to tell the society that we should adopt these children also, they are not criminals, their situations make them to do so. We have duty to save their lives and to adopt them and give them love and care.

According to section 2 (12) of the Juvenile (Care and Protection) Act, 2015, a "Child" means a person who has not completed eighteen years of age. The Act classifies the term "Child" into two categories : "Child in conflict with law" and "Child in need of care and protection".

According to United Nations Convention on the Right of Child, 1989 defines that "child" means a human being below the age of eighteen years unless the law declaration applicable to child, majority is attained earlier.

According to Juvenile Justice (Care and Protection) Act, 2015 "Adoption" means the process through which the adopted child is permanently separated from his biological parents

* Law Student, Indore Institute of Law, Indore (M.P.).

and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.

My research work has been carried on with the following objectives :

- Deep study about Juvenile Justice System in India and in other countries.
- To know about Laws and Punishment for Juveniles.
- Adoption under Juvenile Justice System.
- To collect better options for the adoption of the Juveniles.
- To tell the society to adopt these children also.

The following Research Question has been developed in this research paper :

- It is easy to adopt a Juvenile in our society?
- Procedure and laws are favourable for adopting a Juvenile?

In accordance with the following objectives I have opted for the Doctrinal method of research. I have been through several official websites, online journals, articles, blogs, and above all I have referred to the books for the articles, case laws, definitions, views of authors, etc.

EVOLUTION AND DEVELOPMENT OF JUVENILE JUSTICE SYSTEM

The legal concept of juvenile status, like the concept of childhood itself, is relatively new. The juvenile court system was established in the United States a little more than a century ago, with the first court appearing in Illinois in 1899. Prior to that time, children and youth were seen as miniature adults and were tried and punished as adults.[1]

Amid the dynamic period, which happened in the vicinity of 1880 and 1920, social conditions in the United States were described by vast floods of movement and an emotional increment in urbanization. As an immediate outcome, several poverty stricken youngsters meandered the avenues, and numerous wound up engaged with criminal movement. At first, kids who were sentenced violations were housed with grown-up culprits. Social activists, legislators, and different authorities before long understood that kids regulated with grown-ups were learning grown-up criminal practices and were leaving those foundations prepared forever vocations in culpability. As a result of this negative impact, isolate adolescent court frameworks and going with restorative organizations were created.[2]

The state guarantees special treatment to them through statutory law. However, in practice, they often get victimized by legal and procedural entanglements.

The emergence of the concept of juvenile justice in India owes much to the developments that have taken place in western countries, especially in the perception of children and human rights jurisprudence in Europe and America. The Apprentices Act, 1850 was the first legislation that laid the foundation of juvenile justice system in the country. The concept consequently gained momentum with the enactment of the Indian Penal Code (1860), Reformatory Schools Act (1897), Code of Criminal Procedure (1898) and recommendations made by the Indian Jail Committee (1919-20), which categorically mentioned that the child offender should be treated differently from an adult offender. It also held that imprisonment of child offenders should be prohibited and recommended for provision of reformatory schools and constitution of children's courts with procedures 'as informal and elastic as possible'. The Committee also drew attention to the desirability of making provisions and special enactment for children who had not committed crime so far, but could do so in the

near future on account of living in criminal or inhuman surroundings or those without proper guardians or homes.[3]

The Madras Children Act, 1920 was the first Children Act to be enacted, closely followed by Bengal and Bombay in 1922 and 1924, respectively. Later, many more states enacted their own Children Acts.

The Juvenile Justice Act places Juveniles in two categories :

1. Juveniles in " conflict with the law" handled by the state government.
2. Juveniles in the need of "care and protection" to be looked after by state governments and child welfare committees.

According to the child and care protection act, the maximum tenure of punishment give to the juveniles is maximum 3 years and this type of punishment are : 1. Rehabilitation centres, 2. Juveniles School, 3. Fines, 4. They will be made to work in various programmes by the government, etc. In the present day scenario, there is no need for juveniles to be given such minor punishments because of the nature of offence was serious and the character of the offender so depraved as to justify imprisonment (Ved Kumari: 2004). During this period, by and large, the "welfare" approach was adopted for children – whether delinquent, destitute or neglected.[4]

NORMATIVE STRUCTURE OF JUVENILE JUSTICE SYSTEM

Juvenile Justice Act, 1986

Truth be told the indigenous reasoning on Juvenile Justice has been staying up-to-date with the worldwide patterns in this field. With the selection of the United Nations Standard Minimum Rules for the organization of the Juvenile Justice, India was the primary nation to advance its framework in the light of the standards articulated in that. The Statement of Objects and Reasons of the Juvenile Justice Bill of 1986 said that one of the goals of the proposed law was to bring the task of the Adolescent Justice System in the nation in congruity with these Rules. Obviously, the other targets were to Jay down a uniform legitimate structure for Juvenile Justice, to give towards a particular approach towards the avoidance and control of adolescent wrongdoing, to spell out the hardware and foundation for Juvenile Justice activities, to set-up standards and principles for the organization of Juvenile Justice, to create fitting linkages and coordination between the formal framework and intentional organizations and to constitute unique offenses in connection to adolescents furthermore, to endorse discipline thereof.[5]

With its authorization on 2nd October, 1987, the Juvenile Justice Act of 1986 has supplanted before system of the Children Act sanctioned by the Central and State Governments for managing youngsters coming in struggle with law. The Juvenile Justice Act not just goes for rebuilding the framework tuned into the universally announced arrangement of standards yet additionally expects to develop another idea of adolescent equity inside the genuine importance of social equity as cherished in the Constitution of India. It most likely speaks to an edified reaction to the socio-social and monetary progress that influences juvenile more than some other portion of society. The Act visualizes an ideal utilize of the characteristic possibilities of the family and the network in handling the issue of blundering adolescents, beyond what many would consider possible. It endeavors to bring them back inside the standard of social life. It calls for an expanded approach towards the recuperation, re-instruction and recovery of different classifications of socially maladjusted adolescents, through a functioning cooperation of people in general. All together

to understand this objective, the Act soaks up the fundamental components of all the due procedures, parens patriae what's more, participatory models (Singh, H., 2001). The new law without a doubt puts a cumbersome obligation on the state to fittingly tackle the assets from different divisions of financial improvement in guaranteeing the prosperity and welfare of adolescents and an opportunity to recuperate on the off-chance that they happen to flounder.[6]

JUVENILE JUSTICE SYSTEM (CARE AND PROTECTION OF CHILDREN) ACT, 2000

In view of the current developments, the juvenile justice administration in India, was found to have several gaps in legal provisions and shortcomings by way of linkages between the governmental and non-governmental efforts in the care, treatment and rehabilitation of such children. The JJ Act, 1986 required that the pre-existing system built around the implementation of the then available Children's Acts be restructured. However, due to the absence of a national consensus on the time frame for such a restructuring, the steps taken by most of the State Governments were still heavily short of the proclaimed goals. The inadequacy of the juvenile justice personnel, in terms of both quantity and quality continues to be the weakest part of the operational strategy. In order to rationalise and standardise the approach towards juvenile justice in keeping with the relevant provisions of the Constitution of India and International obligations in this regard, the Government of India (re)enacted the Juvenile Justice (Care and Protection of the Children) Act, 2000.[7]

Juvenile Justice Act, 1986 and Juvenile Justice (Care & Protection) of Children Act, 2000–Comparative Perspectives.

Age

The law provides that any juvenile or child who has not completed the age of eighteen would fall within the jurisdiction of the Act. 1n the previous enactment the definition of juvenile included boys who had not completed the age of 16 and girls who had not completed the age of 18. With the present change, the CRC standard, which defines a child as anyone under the age of 18, has been complied with.

SEPARATION OF CHILD IN CONFLICT WITH LAW FROM CHILD IN NEED OF CARE AND PROTECTION

The law accommodates isolate treatment for youngsters needing consideration and assurance and adolescents in strife with the law. Under the old Act the classification of delinquent juveniles furthermore, disregarded juveniles was intended to isolate the two classes of kids with the Juveniles Welfare Board and the Juvenile Home implied for the dismissed juvenile and the Juveniles Court and Special Home implied for the delinquent juveniles. Anyway the detachment was just an incomplete division as pending request the two classes of kids were kept in a Perception Home together. In this way the contention went that regularly youngsters who had conferred genuine offenses were kept in an indistinguishable establishment from youngsters whose lone wrongdoing was that they were disregarded kids according to the Act. Remembering this contention, the state has now guaranteed a total partition between the two classifications as now adolescents in struggle with the law are kept in the perception home and kids needing consideration and security are sent specifically to the juveniles home. Anyway this move itself appears a superficial endeavor at truly changing the profoundly custodial nature of the whole juvenile equity

framework. However, this shift itself seems a cursory attempt at really changing the deeply custodial nature of the entire juvenile justice system.[8]

Juvenile Justice Act, 2015

The JJ Act, 2015 also deals with both categories of children.

Children in Conflict with Law

1. It treats all the children below 18 years equally, except that those in the age group of 16-18 can be tried as adults if they commit a heinous crime.
2. A child of 16-18 years age, who commits a lesser offence (a serious offence), may be tried as an adult if he is apprehended after the age of 21 years.
3. A heinous offence attracts a minimum seven years of imprisonment. A serious offence attracts three to seven years of imprisonment and a petty offence is treated with a three year imprisonment.
4. No child can be awarded the death penalty or life imprisonment.
5. It mandates setting up of Juvenile Justice Boards (JJBs) in each district with a metropolitan magistrate and two social workers, including a woman. The JJBs will conduct a preliminary inquiry of a crime committed by a child within a specified time period and decides whether he should be sent to rehabilitation centre or sent to a children's court to be tried as an adult. The board can take the help of psychologists and psycho-social workers and other experts to take the decision.
6. A Children's court is a special court set-up under the Commissions for Protection of Child Rights Act, 2005, or a special court under the Protection of Children from Sexual Offences Act, 2012. In absence of such courts, a juvenile can be tried in a sessions court that has jurisdiction to try offences under the Act.[9]

Children in Need for Care and Protection

Child Welfare Committees (CWCs) should be set-up in each district with a chairperson and four other members who have experience in dealing with children. One of the four members must be a woman. The committee decides whether an abandoned child should be sent to care home or put up for adoption or foster care.[10]

Adoption under Juvenile Justice System

Adoption can be a most delightful arrangement for childless couples and single individuals as well as for destitute youngsters. It empowers a parent-tyke relationship to be set up between people not naturally related. It is characterized as a procedure by which individuals take a youngster not destined to them and raise it as an individual from their family. Reception as a lawful idea was accessible just among the individuals from the Hindu people group with the exception of where custom allows such selection for any area of the nation. Just Hindus were permitted to lawfully embrace the kids and alternate networks could just go about as lawful gatekeepers of the kids. The religion—particular nature of selection laws was an extremely retrograde advance. It strengthened practices that were out of line to kids and upset the development of a Uniform Civil Code.

Article 44 of the Constitution

The state shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India. Over the years several attempts were made to formulate general secular law on adoption. The attempts of Parliament in this direction did not bear fruit, all these

went in vain on account of a number of reasons. The history of all such efforts does not bring credit to the secular credentials of the Indian polity.[11]

The Adoption of Children Bill, 1972 was not approved as the Muslims opposed it. The Adoption of Children Bill, 1980, aiming to provide for an enabling law of adoption applicable to all communities other than the Muslim community, was opposed by the Bombay Zoroastrian Jashan Committee, which formed a special committee to exempt Parsis from the bill. The National Adoption Bill, tabled twice in Parliament in the seventies, has yet to enter the statute books. The history of attempt to bring in the concept of secular adoption into our system of laws narrates a sad tale of inaction and action without conviction on the part of the legislature.[12]

Adoption Legislations in India and Enactment of J.J. Act

The existing legislations for adoption or taking a child in custody in India are following:

The Hindu Adoptions and Maintenance Act

The Hindu Adoptions and Maintenance Act (HAMA), 1956, accommodates selection of Hindu youngsters by the new parents having a place with Hinduism. This isn't pertinent to different networks like Muslims, Christians and Parsis. They need to plan of action to Guardians and Wards Act, 1890, wherein they move toward becoming watchmen of youngsters. Be that as it may, the tyke does not have the status as it would have had, had it been destined to its new parents. One of highlights of this Act is that no Hindu individual can embrace a child or girl, in the event that they as of now have an offspring of that sex. Frequently the goals behind the law are great, however, the techniques received miss the mark. The HAMA gives that there ought to be an age distinction of 21 years between the new parents and the embraced kid at whatever point they are of inverse sex. This is expected to avert sexual manhandle.[13]

The Guardians and Wards Act

Individual laws of Muslims, Christians, Parsis and Jews don't perceive finish appropriation. As non-Hindus don't have an empowering law to receive a youngster legitimately, the general population having a place with these religions who are covetous of embracing a tyke can just take the kid in 'guardianship' under the arrangements of The Guardians and Wards Act, 1890. The statute does not manage appropriation all things considered but rather fundamentally with guardianship. The process makes the child a ward, not an adopted child. Under this law, when children turn 21 years of age, they no longer remain wards and assume individual identities. They don't have a programmed right of legacy. New parents need to leave whatever they wish to pass on to their kids through a will, which can be challenged by any 'blood' relative. The previously mentioned establishments stay quiet about the vagrant, relinquished and surrendered youngsters. There was no arranged enactment managing the reception of the offspring of these classes. Subsequently, a few misguided judgments or abnormalities showed up in regard of the authority, guardianship or appropriation of these kinds of youngsters, which were biased to the enthusiasm of the kids.[14]

Considering every one of the viewpoints said above commendable endeavor were attempted by the law-making body by the stipulations, which have been made in Chapter IV of the Juvenile Justice (Care and Protection of Children) Act, 2000. This establishment demonstrates that the assembly might be found to have acknowledged the idea of mainstream selection whereby with no reference to the network or religious influences of the guardians

or the kid concerned, a privilege seems to have been allowed to all nationals to embrace and all youngsters to be received. It is applicable to say here that there emerges disarray with regards to the elucidation and idea of appropriation as in light of the fact that the articulation "Selection" has not been characterized at all in the institutions like HAMA or GAWA. In addition, the lawful status of the received youngster has not proclaimed to be equivalent to that of an organic honest to goodness kid. In spite of the fact that at the underlying stage the Juvenile Justice (Care and Protection of Children) Act, 2000 did not contain these variables, these are presented in Juvenile Justice (Care and Protection of Children) Amendment Act, 2006. The idea of reception has been very much characterized in Sec. 2 (aa) of the said Act, which is as per the following:

Reception implies the procedure through which the received youngster is for all time isolated from his organic guardians and turns into the honest to goodness offspring of his new parents with all rights, benefits and obligations that are appended to the relationship. The Act presented an articulation "kid needing consideration and security" and it has been characterized in Sec. 2 (d) of the Act. This definition covers what is implied by vagrant, deserted and surrendered youngsters.[15]

Rehabilitation and Social Reintegration for Orphan, Abandoned or Surrendered Children

The Part IV of the Act manages restoration and social re-combination of youngsters. The essential point of restoration and social reintegration is to help youngsters in reestablishing their nobility and self-esteem and standard them through recovery inside the family where conceivable, or something else, through elective care programs and long haul institutional care will be of final resort.

Sec. 40 of the J.J. Act gives that the restoration and social reintegration of a tyke will start amid the stay of the youngster in kids' home or extraordinary home, yet as the family is the best choice to give care and security to kids, selection is the main option for recovery and social reintegration of vagrant, relinquished or surrendered kids.[16]

Legislation/Guidelines/Directives for Adoption of Orphan, Abandoned or Surrendered Children

The accompanying enactment, rules or mandates are to be agreed to in regard of reception of vagrant, relinquished or surrendered kids.

1. Rules issued by Central Adoption Resource Authority time to time in light of the judgment of the Supreme Court on between nation selection in Laxmi Kant Pandey *v*. Association of India and others [W.P. (Crl.) No. 1171/1982] and consequent judgments.
2. Hague Convention on Inter-nation selection endorsed by India in 2003.
3. Adolescent Justice (Care and Protection of Children) Act, 2000 and Central Model Rules declared under this Act.[17]

Relevant provisions for Adoption under J.J. Act, 2000 and Rules

Sec. 41 of J.J. Act, 2000 read with Rule 33(1) of Central Rules expresses the following aspects of adoption:

> The essential point of appropriation is to give a youngster who can't be watched over by his organic guardians with a lasting substitute family. The group of a youngster has the essential duty to give it a second thought and assurance. Vagrant, deserted or

surrendered youngsters can be received for their restoration through such system as might be recommended. Such kids might be given in selection by a Court with regards to the arrangements of a few rules in regards to reception issued by the State Govt./ Central Adoption Resource Authority and told by the Central Govt. In any case, the Court ought to be happy with the examination having done which are required for giving such youngsters in appropriation. For situation of the vagrant, deserted or surrendered kids for reception as per the said rules, the State Govt. will perceive in each locale at least one establishments or intentional associations as particular appropriation organizations.

The Children's Homes and establishments keep running by the State Govt. or on the other hand intentional associations for kids needing consideration and insurance who are vagrant, deserted or surrendered, ought to guarantee that these kids are pronounced free for appropriation by the Committee (Child Welfare Committee) and such cases will be alluded to the reception office of that region for their arrangement in selection. The rules issued by the CARA and told by the Central Govt. U/s 41(3) of the Act, will apply for all issues identifying with appropriation.

Now, it is necessary to understand what is Child Welfare Committee. As per Sec. 2 (f) of the Juvenile Justice Act, 2000 the expression "Committee" means a Child Welfare Committee constituted U/s 29 of the Act. Now it is necessary to ascertain the meaning of Child Welfare Committee.[18]

Child Welfare Committee

Sec. 29 of the Juvenile Justice Act, 2000 accommodates the Child Welfare Committee. The Committee has the sole expert to pronounce the kid needing consideration and assurance who are vagrant, deserted or surrendered free for selection. CWC will decide lawful status of all vagrant, deserted and surrendered youngsters. Capacities and forces of the Committee, strategy in connection to the Committee, creation of tyke before board of trustees, methodology for request, system identified with vagrant and deserted kids and technique identified with surrendered youngsters will be administered as set down in the Juvenile Justice Amendment Act, 2006 and its Rules. On leeway from CWC that a specific kid is free for reception, there will be end of parental right.[19]

Criteria for the Child to be Adopted

Sec. 41(5) of Juvenile Justice (Care & Protection of Children) Act, 2000 provides that a child shall be offered for adoption on fulfilment of the following requirements:

1. In case of abandoned child, if two members of the Committee declare the child legally free for placement.
2. In case of surrendered child, if the period two months for reconsideration by the parents is lapsed.
3. In case of a child who can understand and express his consent, if his/her consent is obtained in this regard.[20]

To Whom Child May be given in Adoption?

Sec. 41 (6) Juvenile Justice (Care and Protection of Children) Act, 2000 that the court is engaged by Sec. 41 of the Act to enable a kid to be given in selection to the accompanying people:

I. A man regardless of his/her conjugal status.
II. The guardians to embrace an offspring of a similar sex independent of the quantity of existing natural children or little girls.
III. The childless couples.[21]

Procedure for Adoption

Procedure in Case of Orphaned and Abandoned Children

The Specialized Adoption Agencies will deliver all stranded and relinquished youngsters who are to be announced lawfully free for reception before the Committee inside 24 long stretches of accepting such kids, barring the time taken for travel. A duplicate of the report ought to be recorded with the police headquarters in whose locale the kid was discovered relinquished. A child ends up qualified for appropriation when the Committee announces the tyke lawfully free for selection after consummation of its request. Such request ought to be led by the Probation Officer or Child Welfare Officer, who will create answer to the Committee containing the discoveries inside multi month. The Specialized appropriation organization will proclaim expressing that there has been no petitioner for the kid even in the wake of making notice in no less than one driving national daily paper and one territorial dialect daily paper for youngsters underneath two years old and for kids over two years, an extra TV or radio declaration and notice to the missing people squad or department will be made.

Time Stipulation: If there should arise an occurrence of surrendered tyke underneath two years, such a presentation will be finished by CWC inside a time of sixty days from the time the tyke is found. For a surrendered tyke over two years old, such a revelation will be done inside the time of four months. A tyke must be delivered before the Committee at the season of proclaiming him/her lawfully free for reception. Thus, the youngster will be set in a specific reception office or perceived and ensured kids' home or in a pediatric unit of a Govt. clinic took after by creation of the kid before the Committee inside 24 hours. No tyke over seven years old who can comprehend and express his conclusion will be pronounced free for reception without his/her assent.[22]

Procedure in case of Surrendered Children

A surrendered kid is one who has been announced all things considered after due procedure of request by the Committee and keeping in mind the end goal to be proclaimed lawfully free for selection, a surrendered kid will be any of the accompanying:

1. Conceived as a result of non-consensual relationship,
2. Conceived of an unwed mother or without any father present,
3. Whose one of the organic guardians is dead and the living guardian is debilitated to fare thee well, and
4. A youngster whose guardians or watchmen are constrained to give up him/her because of physical, enthusiastic and social factors outside their ability to control.

The Committee will give exertion for guiding of the guardians, clarifying the results of reception and investigating the potential outcomes of guardians holding the youngster and if the guardians are unwilling to hold, at that point such kids will be kept at first in child care or organized their sponsorship. In the event that the surrender is unavoidable, a deed of surrender will be executed on a non-legal stamp in nearness of the Committee. Time Stipulation: in the event of surrendered youngster, two months reevaluation time will be

given to the natural parent or guardians after surrender before pronouncing the kid legitimately free for reception.[23]

CONCLUSION

The order of the Juvenile Justice (Care and Protection of Children) Act, 2000 and its consequent change in 2006 is certainly a noteworthy exertion of the assembly towards acknowledgment of appropriation of vagrant, relinquished and surrendered kids by individuals independent of their religious status. It can't be denied that it is a common enactment just under which any individual can embrace an offspring of vagrant, deserted and surrendered kid independent of his/her religion. It is more kids situated not at all like different enactments.

In any case, it might be said while some more factors should be thought about particularly by the assembly. As, this Act stipulates reception by any individual independent of his/her conjugal status, however, it doesn't indicate whether the assent of the other companion is required to be acquired by the embracing mate in the event that selection by a wedded couple. This may make misguided judgments among the Hindus as in Hindu Laws (HAMA) taking assent of the spouse by her better half is a fundamental criteria for reception. Furthermore, the articulation "Court" has not been particularly characterized with the end goal of reception under this Act because of outlandish slip-ups/misinterpretation emerges much of the time in recording the application for selection by the new parents. Thirdly, the Act is quiet about the criteria for age contrast between the adoptee and new parents on the off-chance that they are of inverse sex.

This is a fundamental factor for reception, which ought to be considered truly to prevent tyke manhandle and trafficking. Every one of these realities are clearly relevant to all religions and consequently, it is important to determine them for the enthusiasm of the kids. We ought to always remember the push of the National Policy for the Welfare of Children (1974) that "The Nation's youngsters are a remarkably vital resource. Their support and anxiety are our obligation".

Notes and References

1. https://criminal.findlaw.com/juvenile-justice/development-of-the-juvenile-justice-system (Accessed on 19 July 2018).
2. https://criminal.findlaw.com/juvenile-justice/development-of-the-juvenile-justice-system (Accessed on 19 July 2018).
3. www.development4you.org/2011/12/juvenile-justice-system-in-india.html (Accessed on 19 July 2018).
4. www.lawyersclubindia.com/articles/Juvenile-justice-system-in-India (Accessed on 20th July 2018).
5. The Juvenile Justice System in India : From Welfare to Rights, ed. 2004, p. 129, Ved Kumari.
6. *Ibid*.
7. www.lex-warrier.in/2017/09/juvenile-delinquency-india-critical-analysis (Accessed on 20th July).
8. www.lex-warrier.in/2017/09/juvenile-delinquency-india-critical-analysis (Accessed on 20th July).
9. https://www.gktoday.in/.../juvenile-justice-care-and-protection-of-children-act-2015 (Accessed on 20th July).
10. *Ibid*.
11. Indian Constitution, Art. 44.
12. www.legalserviceindia.com/article/l327-Adoption-under-Juvenile-Justice-Act.html (Accessed on 21 July 2018).
13. Hindu Adoption and Maintenance Act, 1956.
14. Guardians and Wards Act, 1890.

15. *Ibid*.
16. *Supra*, 12.
17. www.legalserviceindia.com/article/l327-Adoption-under-Juvenile-Justice-Act.html (Accessed on 21 July).
18. *Ibid.*
19. Juvenile Justice (Care and Protection of Children) Act, 2000, sec. 29.
20. Juvenile Justice (Care and Protection of Children) Act, 2000, sec. 41.
21. Juvenile Justice System (Care and Protection of Children) Act, 2000, sec. 41.
22. *Supra* 12.
23. *Ibid*.

REFERENCES

Guardians and Wards Act, 1890.
Hindu Adoption and Maintenance Act, 1956.
Indian Constitution.
Juvenile Justice (Care and Protection of Children) Act, 2000.
The Juvenile Justice System in India : From Welfare to Rights, ed. 2004, pg. 129,Ved Kumari.
https://criminal.findlaw.com/juvenile-justice/development-of-the-juvenile-justice-system.
https://www.gktoday.in/.../juvenile-justice-care-and-protection-of-children-act-2015.
www.development4you.org/2011/12/juvenile-justice-system-in-india.html.
www.lawyersclubindia.com/articles/Juvenile-justice-system-in-India.
www.lex-warrier.in/2017/09/juvenile-delinquency-india-critical-analysis.
www.legalserviceindia.com/article/l327-Adoption-under-Juvenile-Justice-Act.html.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 43-50

Problem of Criminality in Prisons— Its Reforms

Swapnil Patidar*

INTRODUCTION

Prisoners in India, and their organization, is a state subject secured by thing 4 under the State List in the Seventh Schedule of the Constitution of India. The administration and organization of detainment facilities falls solely in the space of the State governments, and is administered by the Prisons Act, 1894 and the Prison manuals of the separate state governments. Hence, the states have the essential part, obligation and expert to change the present jail laws, rules and regulations. The Central Government gives help to the states to enhance security in detainment facilities, for the repair and redesign of old prisons, medical offices, advancement of borstal schools, offices to ladies guilty parties, professional preparing, modernization of jail businesses, preparing to jail faculty, and for the formation of high security fenced in areas.

The Supreme Court of India, in its judgments on different parts of jail organization, has set down 3 expansive standards with respect to detainment and care. Right-off the bat, a man in jail does not turn into a non-individual. Furthermore, a man in jail is qualified for every single human ideal inside the impediments of detainment. In conclusion, there is no support for disturbing the torment effectively innate during the time spent detainment.

However, another issue identifying with jail discipline concerns criminality among detainees inside the jail. The consistent long non-appearance from typical society and separation from individuals from the family denies the detainees of their sex delight which is one of the fundamental organic desires of human life. Not having the capacity to control this sex want, the detainees frequently depend on unnatural offenses, for example, homosexuality, homosexuality and so on.

Along these lines, such offenses and individual attacks are regular inside jail dividers. To stifle this hazard, a portion of the propelled nations have allowed periodical marital visits for detainees in order to offer them an authentic chance to conciliate their sex desire and in this way dispose of violations of this nature in jails. A few penologists have, nonetheless, contradicted the possibility of 'matrimonial visits' on the ground that sexual hardship must proceed as one of the unavoidable enduring of detained life.

That separated, matrimonial visits appear to be pointless for three evident reasons, to be specific, most detainees are detained for a half year or less, a significant substantial number of them are unmarried or isolated from their spouses; and the arrangement of "home leave" and parole offers a greatly improved and more regular arrangement than marital visits in the new and humiliating climate of a jail.

* Indore Institute of Law, Indore (M.P.).

PROBLEMS IN PRISONS

(1) The Problem of Overcrowding in Prisons

It is known fact that prison in most parts of India are overcrowded. For instance, there were 8500 prisoners in Tihar Jail of Delhi in 1995, as against the capacity of 2500 persons. The effect of overcrowding is that it does not permit to segregation among convicts those punished for serious offences and for minor offences. As a result of this, the hard criminals may spread their influence over other criminals.[1]

The juvenile offender, who are kept in jails because of inadequacy of alternative places where they can be confined, come into contact with hard criminals and are likely to become professional offenders. And after release from the jail they might cause the harm in the society.

The law commission in its 78th report made some recommendations for easing congestion to the prisons. These suggestions include liberalization of conditions of release on bail, particularly release of certain categories of under trial on bail.[2]

Other methods of reducing overcrowding in prisons may include extensive use of fine as an alternative punishment for imprisonment, civil commitment and release on probation. Overcrowding may also be reduced by release on parole, a prison after he has served part of the sentence imposed upon him. It is a conditional release of an individual from prison. The system of remission, leave and premature release may also be useful in talking the problem of overcrowding in prison institutions.[3]

(2) The Problem of Criminality in Prison

Another problem related to prison disciplines concern criminality among inmates inside the prison. The continuous absent from the normal society and detachment from members of the family deprives the inmates of their sex gratification which is one of the vital biological urges of human life.

The Indian prison management does not accept the idea of conjugal visits, as the system of parole serve more useful purpose so far marital relationship concern. And such conjugal visits cannot be appreciated for the reason of morality and ethical consideration keeping in view the Indian values and cultural norms. Another case of criminality among prison inmates is their frequent quarrelling inside the institution. Every inmate tries to establish his superiority over his fellow inmates. Therefore, prisoners often narrate with exaggeration the tales of their adventure and the dangers overcome by them while committing crime. There are occasion when inmates quarrel on trifling matters like those of distribution of bread, toilets, etc. or the differences of their opinion about a particular warden, guard or jailor. The offences of petty thefts are also common in prisons because the inmates are supplied only the articles of bare necessities. Obviously, the articles stolen are usually soap, oil, utensils or a few loaves of bread which are supplied to inmates in prisons.[4]

Crimes in Prisons

Prisons Violence

Prison violence is a daily occurrence due to the diverse inmates with varied criminal backgrounds that penitentiaries house. The three different types of attacks are inmate on inmate, inmate on guard, and self-inflicted.

These attacks can either be impulsive and spontaneous or well-planned out and premeditated. Factors such as gang rivalries, overcrowding, minor disputes, and prison design contribute to the violent attacks that transpire. Prisons are trying to avoid, or at least

better deal with these situations by being proactive. They are taking steps like placing violent convicts and gang leaders into solitary confinement, balancing the cells by critically examining each inmate to see where they are likely to reside peacefully, reducing blind spots, and training as well as educating the officers.

Prisons Abuse

Prisoner abuse is the mistreatment of persons while they are under arrest or incarcerated, therefore deprived of the right of self-defense against acting authorities and generally defenseless in actual fact.

Abuse falling into this category includes:

- *Physical abuse*: Illicit beating and hitting, unlawful corporal punishment, stress positions, excessive or prolonged physical restraining, etc.
- *Torture*: Any act, whether physical or psychological, which is deliberately done to inflict excruciating and agonizing pain upon a person under the actor's custody or physical control for any reason such as extracting information or punishment.
- *Sexual abuse*: Excessive vaginal or rectal contraband searches or other internal checks, forced sexual intercourse, forced insertion of objects into vagina or rectum, arbitrary strip searches, denuding actions, etc. (Sexual abuse is thematically widely overlapping with psychological abuse).
- *Psychological abuse*: Verbal abuse, sleep deprivation, white noise, pointless/absurd or humiliating instructions, recurrent exhaustive inspections and shakedowns, arbitrary strip searches, denuding actions, exposure, etc.
- *Enhanced interrogation*: Methods implemented in the War on Terror purportedly needed to extract information from detainees.

(3) Inadequate Prison Programmes

Despite the problems of overcrowding, manpower shortage and other administrative difficulties, innovative initiatives have been undertaken in some prisons. For e.g. the Art of Living has been carrying out a SMART programme in Tihar Jail. This includes two courses per month and follow up sessions every weekend. Two courses are annually conducted for prison staff. But these are more by way of exceptions and experiments. A Srijan project there is aimed at providing social rehabilitation. However, such programmes are few and far between. Many prisons have vocational training activities, but these are often outdated. Hardly any of the prisons have well planned prison.

(4) Sexual Harassment of Women Prisoners

Women prisoners are tortured most, they are not only beaten up by the jail authorities, but are also sexually harassed not only by the authorities but sometimes also by the fellow prisoners, and rarely any step is taken towards their protection. An incident happened in Khetri Jail, Rajasthan, where two jailers bailed out a woman and kept her for a week to rape her every day. The All Bengal Women's Association's report on women prisoners in Presidency Jail, Calcutta, in 1974 highlights similar incidents.

In Elisaar jail, Meena had arrived in the fearful state, she was unable to walk, her rectum and the vaginal area was torn and was bleeding, she became lunatic, as she had been kept in police custody for twenty-two days after her arrest and was brutally being raped by five or six policemen. She was from a village in Nepal, and the irony was she was sentenced a 'simple imprisonment' for seven days, and this was what she had faced. There have been many more incidents in which sexual harassment of women prisoners were reported.

(5) Class-wise Treatment

A person whether a free man, or a prisoner, have the right to healthy food, but the condition of food in these prisons is pathetic. The food quality of the jail has always been a matter of disappointment; there is a huge improvement required in this regard. The improvement in this area is being handled by government, but instead, the government is providing discriminatory services that the people could enjoy benefit only if they have the capacity to pay for the extra benefit.

The Class-A prisoners are provided with the special benefits like, they could pay for their own expenditure by depositing a certain amount fixed by the government for enjoying special services like- morning tea, newspaper, pillow, 3 times non-vegetarian food in a week and if they are vegetarian they will be served ghee, dal, and buttermilk.

INDIAN PRISON ADMINISTRATION

The Indian jail administration does not acknowledge the possibility of conjugal visits as the arrangement of leave and parole fills a more helpful need so far conjugal connection between life partners are concerned. That separated, such conjugal visits can't be acknowledged for the reason of profound quality and moral contemplations keeping in see the Indian qualities and social standards. The Prison Act, 1894 accommodates arrival of prisoners on leave and parole in order to keep up solidarity of their family life.

Another reason for criminality among jail detainees is their regular quarreling inside the jail. Each detainee endeavors to build up his prevalence over his kindred detainees. In this way, detainees frequently describe with misrepresentation the stories of their experience and the risks defeat by them while carrying out wrongdoing. The discussion regarding the matter regularly prompts a warmed discourse and in the long-run outcomes into utilization of power and terrorizing.

Now and again, the circumstance takes the state of a gathering competition coming about into conflicts between the detainees. There are events when detainees fight on piddling issues like conveyance of bread, toilets, and so forth or the distinctions of their feeling about a specific superintendent, monitor or jailor.

The offenses of negligible burglaries are likewise normal in penitentiaries in light of the fact that the prisoners are provided just the articles of minimum essentials. Clearly, the articles normally stolen are typically cleanser, oil, utensils or a couple of portions of bread which are provided to detainees in penitentiaries.

Last yet not the minimum, the doubt and absence of confidence among detainees for the jail specialists is yet another reason for strain in penitentiaries. The inclination of non-compliance to jail authorities and disobedience of jail directions is regular with detainees. The authorities of the jail, to be specific, the jailors, directors, superintendents and monitors on their part, are by and large harsh and intense with the detainees.

Some of them even fall back on degenerate practices and stretch out undue favors to specific detainees in return for insignificant increases. This clearly causes disdain among different detainees and consequently a sort of cool war results between the prisoners on one hand and the jail experts on the other.

REHABILITATIONS OF PRISONERS

1. Education and Training of Prisoners

There is an arrangement made by the jail expert that further training of all detainees fit for benefitting along these lines incorporating religious guideline in the nations where there

is conceivable. The instruction of ignorant people and youthful detainees ought to be mandatory and extraordinary consideration ought to be paid to it by the organization. Each jail ought to have a library for the utilization of all classes of detainees and they ought to be urged to make full utilization of it. To the extent practicable each detainee ought to be permitted to fulfill the necessities of his religious life by going to the administrations gave in the foundation and possessing the books of religious recognition and guideline of his denomination.[5]

2. Re-Socialization

As the concept socialization implies group membership, so the derivative concept re-socialization implies changes in group memberships. Many findings in the social origins of individuals behavior suggests that the problem of re-shaping the anti-social attitudes and values of offenders is related to the possibility of altering the patterns of group membership which they bring with them into the prison. The question therefore arise to what extend does the prison community provide opportunities for altering the group membership and reversing the socialization process which contributed to the criminal behavior of those incarcerated in it?[6]

3. Parole

One of the most important but controversial devices for reducing pressure on prison institutions is the selective release of prisoners on parole. Parole has a dual purpose, namely, protecting society and at the same time bringing about the rehabilitation of the offenders. The parole system is an excellent way to allow prisoners to rehabilitate and get in touch with the outside world.

Parole is a legal sanction that lets a prisoner leave the prison for a short duration, on the condition that she/he behaves appropriately after release and reports back to the prison on termination of the parole period. The conditional release from prison under parole may begin anytime after the inmate has completed at least one-third of the total term of his sentence but before his final discharge. Release on parole is a part of the reformative process and is expected to provide opportunity for the prisoner to transform himself into useful citizen.

Parole is thus a grant of partial liberty or lessening of restrictions to a convict prisoner, but release on parole does not, in any way, change the status of the prisoner.

Parole is a penal device which seeks to humanise prison justice. It enables the prisoners to return to the outside world on certain conditions. The main object of the parole as stated in the Model Prison Manual is:

(a) To enable the inmate to maintain continuity with his family life and deal with family matters
(b) To save the inmate from the evil effects of continuous prison life.
(c) To enable the inmate to retain self-confidence and active interest in life.[7]

It must be noted that a parole is different from a “furlough”. While parole is granted to a prisoner detained for any offence irrespective of the duration of imprisonment, a furlough is only granted to prisoners facing long sentences, five years or more. Furlough is matter of right, but parole is not. However, an abuse of the system is a drag on the country. The urgent need of the hour is for police officials to acknowledge that the parole system is being misused and find ways to ensure that parole laws are properly enforced in prisons across the country.

4. Probation

The term "Probation" is derived from the latin word 'probare' which means 'to test' or 'to prove'. Probation offers an opportunity for the probationer to adjust himself to normal society thus avoiding an isolation and dull life in prison. Probation is a conditional release of an offender under supervision. The system of probation involves conditional suspension of punishment.

The Central Correctional Bureau observed the year 1971 as "Probation Year" all over the country. Probation seeks to socialize the criminal, by training him to take up an earning activity and thus enables him to pick up those life-habits, which are necessary for a law-abiding member of the community. This inculcates a sense of self-sufficiency, self-control and self-confidence in him, which are undoubtedly the essential attributes of a free-life. The Probation Officer would guide the offender to rehabilitate himself and also try and keep him away from such criminal tendencies.

The Probation of Offenders Act, 1958 contains elaborate provisions relating to probation of offenders which are made applicable throughout the country. The Act provides four different modes of dealing with youthful and other offenders in lieu of sentence subject to certain conditions. These includes:

1. Release after admonition[8] .
2. Release on entering a bond on probation of good conduct with or without supervision, and on payment by the offender the compensation and costs to the victim if so ordered, the courts being empowered to vary the conditions of the bond and to sentence and impose a fine if he failed to observe the conditions of the bond.[9]
3. Persons under 21 years of age are not to be sentenced imprisonment unless the court calls for a report from the probation officer or records reasons to the contrary in writing.[10]
4. The person released on probation does not suffer a disqualification attached to a conviction under any other law[11] .

PRESENT CONDITION IN PRISONS

The management of prisons falls exclusively under the domain of the state government, as per the seventh schedule of the constitution. In every state, the prison administrative machinery works under the chief of prisons who is a senior ranking IPS officer. Indian prisons face three long-standing structural constraints: overcrowding, thanks to a high percentage of undertrials in the prison population, understaffing and underfunding. The inevitable outcome is sub-human living conditions, poor hygiene, and violent clashes between the inmates and jail authorities.

According to the Prison Statistics India 2015 report by the National Crime Records Bureau (NCRB), India's prisons are overcrowded with an occupancy ratio of 14% more than the capacity. More than two-thirds of the inmates are undertrials. Chhattisgarh and Delhi are among the top three in the list with an occupancy ratio of more than double the capacity. The prisons are overcrowded by 77.9% in Meghalaya, by 68.8% in Uttar Pradesh and by 39.8% in Madhya Pradesh. In absolute numbers, UP had the highest number of undertrials (62,669), followed by Bihar (23,424) and Maharashtra (21,667). In Bihar, 82% of prisoners were undertrials, the highest among states.

While 33% of the total requirement of prison officials still lies vacant, almost 36% of vacancy for supervising officers is still unfulfilled. Delhi's Tihar jail ranks third in terms of

a severe staff crunch. The manpower recruited inside this prison is almost 50% short of its actual requirement. As the nation's capital, Delhi has the most over-crowded jails and suffers from acute shortage of prison guards and senior supervisory staff. States like Uttar Pradesh, Bihar and Jharkhand have the most scantily guarded jails, seeing over 65% staff vacancies among jailers, prison guards and supervisory levels.

In the absence of adequate prison staff, overcrowding of prisons leads to rampant violence and other criminal activities inside the jails. In separate incidents, 32 prisoners escaped in Punjab in 2015, while in Rajasthan, the number of such cases has risen to 18. Maharashtra witnessed the escape of 18 prisoners. In 2015, on an average, four prisoners died every day. A total of 1584 prisoners died in jails, 1469 of which were natural deaths and the remaining 115 were attributed to unnatural causes. Two-thirds of all unnatural deaths (77) were reported to be suicides, while fellow inmates murdered 11, nine of which were in jails in Delhi. About 12,727 people are reported to have died in prisons between 2001 and 2010.

If a professional gangster or a white-collar criminal is willing to grease the palms of the prison official, he can have mobile phones, liquor and weapons inside the jail premises. On the other hand, the socio-economically disadvantaged undertrials can be deprived of their basic human dignity at the hands of the state machinery.

In many places, training for carpentry and fabric painting is also provided. Also in many jails women empowerment by training them in weaving, making toys, stitching and making embroidery items. Wage earning and gratuity schemes and incentives are also used to reduce the psychological burden on the convicts. Recently, the Government of Himachal Pradesh had lifted ban on wearing Gandhi cap in jails. Various seminars are organized by jail authorities to enlighten the prisoners on their legal rights, health and sanitation problems, HIV/AIDS and issues of mental health, juveniles, minorities and steps to reduce the violence in prisons.

In Kewal Pati *v*. State of U.P.,[12] the Supreme Court recognize the right of the legal heirs of the victim prisoner who happened to be killed in the prison, to be compensated by the state as it failed to afford him security in the prison. In a very interesting judgment, among other thing a session court ordered that state government to pay up the cost of education of the children accused till his imprisonment was over.

CONCLUSION

To ensure good discipline and administration, an initial classification must be made to separate male from females, the young from the adults, convicted from the unconvinced prisoners, civil from criminal prisoners and from casual from habitual prisoners. The main object of prison labour is prevention of crime and reformation of the offenders. And the other main object was to engage them so as to prevent mental damage and to enable them to contribute to the cost of their maintenance.

The undertrial prisoners constitute a majority of population in prison than convicted prisoners. The undertrial prisoners are presumed to be innocent and most of them are discharged or acquitted after immeasurable physical and mental loss caused to them by detention due to delay in investigation and trial. The prison is not a place which is to be compared to hell; it has some recreational activities also like the rehabs, which employs the inmates so that the life in jail does not stops.

Once the prisoners leave the jail, they are used to working, and they also have some amount of money with them which help them to restart their lives. This is beneficial for the

people who are giving imprisonment terms for long terms. These people often face desertion from their family; they have to restart their lives from ground zero level so especially for these people IGNOU courses are offered to them. The prisons in India needs to be well established with new and improved laws which give the prisoners a better life during their jail time.

Also, there must be a central committee which should make sure that the inmates are treated well by the policemen, and every intended accused should be made to see the magistrate in the stipulated 24 hours. In my opinion the laws exists but the implementation needs to be taken care off. They should be given the basic rights necessary for human existence.

Notes and References

1. Paranjape, N.V., "*Criminology Penology*", 12th edition, Central Law Publication, 2005, p. 364.
2. *Ibid*.
3. Nina Kinsella in *Proceedings of the National Conference of Social Work*, 1937, p. 586.
4. Paranjape, N.V., "*Criminology Penology*", 12th edition, Central Law Publication, 2005, p. 366.
5. Roy, Joytilak Guha, Prison and Society, Gian Publishing House, 1989, p. 112.
6. Norman Johnston, Leonard Savitz, Marnin E. Wafgang. The sociology of punishment and correction, Published by John Wiley and Sons, New York, 1962, p. 99.
7. Bhikhabhai Devshi *v*. State of Gujarat, AIR 1987 Guj. 136.
8. Section 3 of Probation of Offender Act, 1958.
9. Section 4 of Probation of Offender Act, 1958.
10. Section 6 of Probation of Offender Act, 1958.
11. Section 12 of Probation of Offender Act, 1958.
12. 1995 (3) SCC 600.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 51-62

Judicial Approach Towards Protection of Street Vendors

Varun Sharma*

"Unlike a drop of water which loses its identity when it joins the ocean, man does not lose his being in the society in which he lives. Man's life is independent. He is born not for the development of the society alone but for the development of himself".

—B.R. Ambedkar

I. INTRODUCTION

In a democratic polity like India the judiciary is an indispensable and important organ of governance. It is a sharpened device to protect the personality of human beings in the collective efforts of forging social progress. Judicial decisions contributed tremendously to bring out essence of fundamental rights enshrined in the Constitution of India. Effective access to justice is itself a basic human right. It is a requirement of a system which purports to guarantee human rights, and Indian Judiciary has secured this right to the people. Since individualism prevailed over the collective existence of human beings, the judiciary too applied innovative technique to recognize the individual as a subject of right by expanding the meaning and scope of right whereby a liaison got established between the public governance and the rule of law.[1]

Part III of the Constitution incorporated many of civil and political rights recognized under international human rights instrument. Protection of right to life and liberty is the most important right guaranteed under Article 21. Initially, the right to life under Article 21 of the Constitution of India was restricted to the protection against any arbitrary arrest or to protection of life and limb. But now due to the new dimensions given by judicial activism, the right to life has come to include variety of rights which are very essential to enjoy life with human dignity.[2] The new expanding horizons are, right to livelihood, right to environment, right to speedy trial, right to legal aid, right to health care, right to food, right to shelter, right to compensation, right against custodial violence, etc.

The expression "Justice" briefly speaking is the harmonious reconcilement of individual conduct with the general welfare of the society. The attainment of the common good as distinguished from the good of individuals is the essence of justice. The Constitution of India profess to secure to the citizens social economic and political justice. Social justice means the abolition of all sorts of inequities. To achieve this ideal of social justice, the Constitution lays down directives for the state in Part IV of the Constitution of India. The Supreme Court of justice as guarantor and protector of fundamental rights has constitutional duty to secure socio-economic justice to all the citizens of the country. [3]

* Research Scholar, Department of Law, Punjabi University, Patiala (Punjab).

Law is an effective tool to translate the aspirations of common man into reality. The Indian Constitution itself is a great social document. It underlines the supremacy of law, social, economic and political justice. The judiciary in India have also taken up the task of social justice administration through judicial activism in the exercise of writ jurisdiction. This trend is discernible from the decisions of Supreme Court and High Court onwards 20th century. The higher judiciary realised that India being a welfare state, is committed to the cause of social justice and the courts must respond to this cause keeping in view the felt needs of Indian society. To begin with the Indian Constitution envisages that the Republic of India shall secure to all its citizens justice, liberty, equality. It recites that constitutional law shall endeavour to ensure social justice to all citizens within the framework of constitutional mandate. [4]

II. SOCIAL JUSTICE AND STREET VENDORS

The expression of social justice recognises the Benthamite principle of greatest happiness of the greatest number without deprivation of legal rights. Social justice may be in the form of distributive justice. When it operates at the level of distributive justice its seek to ensure a fair distribution of social benefits and burdens among the members of community. Distributive justice intended to secure minimum standard of living to needy and poor persons. Thus, the essence of distributive justice is to secure a balance or equilibrium among the members of the society. [5]

The right to 'live' is not confined to the protection of any faculty or limb through which life is enjoyed or the soul communicate with the outside world but it also include "The right to live with human dignity". Social interest litigation is innovative strategy which has been evolved by the Supreme Court and High Court for the purpose of providing easy access to justice to the weaker sections of India humanity. It is a powerful tool in the hands of public spirited individuals and social-action groups for combating exploitation and injustice securing for the underprivileged segments of society their social and economic entitlements.[6]

In *Francis Coralie* v. *Union Territory of Delhi*[7], **Justice Bhagwati** observed that it is the fundamental right of everyone in this country, to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at least, therefore, it must include protection of health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.

In *Lingappa Pochanna* v. *State of Maharashtra*[8], Justice A.P. Sen observed that the concept of distributive justice as one of the form of social justice. The concept of distributive justice in the sphere of law-making connotes, *inter-alia* the removal of economic-inequalities and rectifying the in-justice. It seeks to remove in-justice and ensure social justice to all those who had been deprived of the access to justice.

In *Panchayat Varga Sharamjivi Samudaik Co-operative Society* v. *Haribhai Mevabhai*[9], The Apex Court observed that socio-economic justice is a constitutional right enshrined for the protection of the society. The right to socio-economic justice in the trinity, the preamble, fundamental rights, directive principles is to make the quality of life of the disadvantage people meaningful.

The Supreme Court in *Murlidhar Dayandeo Kesekar* v. *Vishawanath Pandu Barcle*[10], economic empowerment was held to be a basic human right as a part of right to live with equality of status and dignity. The preamble ensure dignity of each and every individual. The dignity is assured by securing to each individual equal fundamental rights and at the same time, by laying down a number of directives for the state to direct its policies towards *inter-alia*, securing to all citizens men and women equally, the right to an adequate means of livelihood, just and humane conditions of work, a decent standard of life. Economic justice means equal pay for equal work irrespective of his caste, sex or social status.

The three Judge Bench of the Supreme Court has explained the concept of social justice in *Air India Statutory Corporation* v. *United Labour Union*[11], the concept of 'Social justice' consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social Justice" is then an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and so elevate them to the level of equality to live a life with dignity of person. "Social justice" is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc., from handicaps, penury, to ward-off distress and to make their life livable, for greater good of the society at large. The aim of "Social Justice" is to attain substantial degree of social, economic and political equality which is the legitimate expectation and constitutional goal. In a developing society like ours, where there is vast gap of inequality in status and of opportunity, law is a catalyst, Rubicon to the poor, etc. to reach the ladder of social justice. The Constitution, therefore, mandates the state to accord justice to all members of the society in all facets of human activity. The concept of social justice enables equality to the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality.

The time has now come when the courts must become the courts for the poor and struggling masses of this country. They must be sensitised to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. It is through public interest litigation that the problems of the poor are now coming to the fore-front. Today a vast revolution taking place in the judicial process. The theatre of law is fast changing.[12] The judiciary has to innovate justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. India is a first country in the world, provides legal status to street vendors/hawkers. The Apex Court has recognised street vending in various golden judgments.

III. RIGHT OF LIVELIHOOD OF STREET VENDORS

The right to livelihood is crucial to women and men around the world. It is a right that is fought for and defended by farmers, un-organized workers, informal workers and the urban poor. Conceptually, it is much more than the right to work. It is the right to pursue a dignified life. In its essence the right to livelihood offers people the opportunity to realize other rights with dignity. Particularly, it is a right that is embraced by street vendors around the world, who frequently encounter obstacles to livelihood and seek equal opportunities to realize their rights. The right to livelihood to make a living and survive with dignity is at the core of the right to food, which is the right to produce one's own food or earn sufficiently to purchase it. Right to life including right to livelihood as guaranteed by Article 21 is not reduced to mere paper platitude but is kept alive, vibrant and pulsating so that the country

can effectively march towards the avowed goal of establishment of a society as envisaged by the founding fathers while enacting the constitution of India along with its preamble.[13]

Struggle for survival for earning the livelihood is primarily a person's individual responsibility. International recognition of socio-economic rights and inclusion of directive principles in the constitution have led to recognition of right to livelihood as a component of "Right to Life". This is evident from the observation of Supreme Court that if the right to livelihood is not treated as part of the constitutional right to life the easiest way of depriving a person of his right to life would be to deprive him of his livelihood to the point of abrogation.[14]

In *Bombay Hawkers' Union and Ors.* v. *Bombay Municipal Corporation and Ors*.[15], the petitioners had challenged the validity of Sections 313, 313-A, 314 and 497 of the Bombay Municipal Corporation Act, 1888 which empowered the municipal authorities to remove their huts from pavement and public places on the ground that their removal amounted to depriving them of their right to livelihood and hence it was violation of Article 21. While agreeing that the right to livelihood is included in Article 21 the court held that it can be curbed or curtailed by following just and fair procedure. It was held that the above sections of the Bombay Municipal Corporation Act were Constitutional since they imposed reasonable restrictions on the general public. Public streets are not meant for carrying on trade or business. However, the Supreme Court took a humanistic view and in order to minimise their hardships involved in the eviction it directed the Municipal Authorities to remove them only after the end of the current monsoon season. The court also directed the corporation to frame a scheme for demarcating hawking and non-hawking zones and give them licenses for selling their goods in hawking zones. License in hawking zones cannot be refused except for good reasons.

In *Olga Tellis* v. *Bombay Municipal Corporation*[16], which is popularly known as the slum-dwellers case, the question related to the eviction of the pavement-dwellers who were censured in 1976 and were given identity cards, from footpaths, pavements or any other place reserved for public purpose. The Supreme Court though upheld the validity of the impugned provisions of the Bombay Municipal Corporation Act, 1888 and the eviction of the petitioners from the pavements directed the state to provide them alternative sites for their resettlement and to earn livelihood. The court explaining the scope of the "Right to Life", laid down.

The right to life includes the right to livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation deprive a person of his right to livelihood and you shall have deprived him of his life. The court made a reference to the directive principles contained in Articles 39 (a) and 41 and said that state might not by affirmative action be compellable to provide adequate means of livelihood or work to the citizens but any person, who was deprived of his right to livelihood except, according to just and fair procedure established by law, could challenge the deprivation as offending the "Right to Life" conferred by Art. 21.

IV. RIGHT OF HAWKERS TO TRADE ON PAVEMENTS

The Supreme Court in *Municipal Corporation Delhi* v. *Gurnam Kaur*[17], upheld the constitutionality of sections 320 and 322 of the Delhi Municipal Corporation Act, 1957 which empowered the corporation to direct removal of encroachment from any public place like pavements or public space. The court took a humanistic view and in order to minimise

the hardship involved in the removal of hawkers from illegal encroachment directed the municipal corporation authorities to frame scheme to rehabilitate the petitioners by erecting hawking and non-hawking zones, as was suggested in the Bombay Hawker's Union case.

In *Sodan Singh* v. *N.D.M.C.*[18] case which was adjudicated upon by a Constitutional Bench of the Supreme Court has significantly contributed to jurisprudence of street vendor's rights. A five judge bench of the Supreme Court has held that hawkers have a fundamental right to carry on trade on pavement of roads, but subject to reasonable restrictions under Article 19(6) of the Constitution. The petitioners who were poor hawkers were carrying on business on the pavements of roads of Delhi and New Delhi. They alleged that they were permitted by occupying a particular area on the pavements on payment of certain charges described as Tehbazari, but they refused theme to continue with their trade and thereby they were violating their fundamental right guaranteed under Articles 19(1)(g) and 21 of the Constitution. The Supreme Court held – The right to carry on trade or business mentioned in Article 19(1)(g) on pavement of roads, if properly regulated, cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and for no other use. The right if properly regulated would help both the small traders and the general public by making available ordinary articles of everyday use for a comparatively lesser price. If the circumstances are appropriate and a small trader can do some business for personal gian on the pavement to the advantage of the general public and without any discomfort or annoyance to the others, there cannot be any objection to his carrying on the business. Proper regulation is, however, a necessary condition as otherwise the very purpose of laying down roads to facilitate traffic may be defeated. This right is subject to reasonable restrictions under clause (6) of Article 19.

Though the hawkers have a fundamental right to carry on the business or their choice yet they have no right to do so on a particular place. They cannot claim that they may be permitted to trade on every road in the city. If a road is not wide enough to conveniently manage the traffic on it, no hawkering may be permitted at all, or may be sanctioned only once a week. Hawkering may also be prohibited near hospitals or where necessity of security reasons so demands. Public streets are primarily to be used by the public generally as pathways for passing and re-passing but there are other ancillary purposes for which the public streets can be used as of right. 'Street trading' is an age-old vocation adopted by human beings to earn living. 'Street trading' is accepted as one of the legitimate modes of earning livelihood in the most affluent countries of the world. This is prevalent in countries where there is a complete social security and no compulsion on the citizens to be driven to street trading out of poverty or unemployment. Extreme poverty in India warrants outright rejection of the argument that nobody has a right to engage himself in 'Street trading'. However, the state is empowered to regulate by making necessary enactments under Article 19(6) of the Constitution. The court suggested for framing proper schemes for regulating the hawkering business by creating hawkering and non-hawkering zones.

In *Saudan Singh* v. *N.D.M.C. and Ors.*[19] case, questions were raised regarding the functioning of the MCD scheme which was to look into the issue of identifying hawking zones, identify vendors entitled to relocation and space in vending zones, etc. It was alleged that the manner in which the scheme was being implemented was fraught with arbitrariness. However, the court did not entertain such apprehensions and held that the MCD scheme should be popularized in order that more and more people can be benefitted by it and can submit their objections, if any. The court also took note of the Thareja Committee as well as salient features of NDMC scheme. The Supreme Court further recognized the scheme

formulated by MCD to determine which squatters/hawkers should be given permission to carry on their trade in public areas and laid out four categories of hawkers, as follows:

(1) Persons who have been found squatting between 1970 and 1982 and whose names are contained in the survey report prepared after the survey conducted in 1982 will receive first priority for grant of tehbazari permission subject to the scrutiny of their claims;
(2) In so far as casual tehbazari on weekly holidays, festivals/melas, etc. is concerned, as well as at the 67 weekly bazars held, persons availing of the said benefit will continue to be granted the casual or weekly tehbazari;
(3) Squatters who have started squatting/hawking in 1983 onwards and who are found on the date of survey would also be considered for grant of open tehbazari of 6' x 4' subject to the production of proof of continuous squatting and proof of residence and nationality. Such squatters/hawkers would be granted open tehbazari subject to availability of space provided they have cleared the dues of the MCD; and
(4) Persons who do not fall within the aforesaid three categories would be permitted to apply for hawking licenses under Section 420 of the Delhi Municipal Corporation Act, 1957 and their applications would be considered on merit for permission to hawk not squat—by moving in specified areas with their goods on their heads or on cycles. They will be entitled to hawk with their goods anywhere in the zone in respect of which they have been granted a license. However, such permission will be subject to any restrictions that may be imposed by the residential associations of different colonies.

V. RIGHT TO REHABILITATION OF DISPLACED STREET VENDORS

The Calcutta High Court in *South Calcutta Hawkers' Association* v. *Government of West Bengal and Others*[20], held that hawking is a fundamental right, subject to reasonable restrictions. It advises the municipal authorities to come up with hawking and non-hawking zones, so as to prevent issues of congestion and eviction in the future. It also specifies that prior notice before eviction needs to be provided. It also asks the government to address the problem of growing rural to urban migration, so as to reduce the number of people occupying the streets. It also asks the government to attempt as far as possible to rehabilitate the hawkers that are displaced and to make sure that no favouritism is shown, as well as people who have not been displaced should not benefit from the rehabilitation schemes.

Ratio Decidendi of the Case

(i) Unauthorized stalls and structures which have been constructed should be removed but after giving at least 24 hours notice to the stall-holders for removing their structures or goods therein by issue of a notice to the stall-holders of particular footpaths or area.
(ii) The hawkers have fundamental right to carry on trade or business of their choice but not to do so on a particular spot or place and this fundamental right is subject to reasonable restriction imposable under Art. 19(6) of the Constitution of India.
(iii) It is within the domain of the State to make any law imposing reasonable restrictions in the interest of general public on such right (right to hawk).
(iv) It is for the Government to take reasonable steps to prevent movement of people from rural areas to urban areas. This is a matter of executive policy than for judicial flat.

(v) The State and the Municipality must designate the streets and earmark the places from where street trading can be done.

(vi) It is expected and desirable that the state being a welfare State should immediately formulate schemes and policies for the purpose of rehabilitation of the hawkers in such manner as the State may think fit and proper.

In *Shri Rajdev Singh and Anr.* v. *New Delhi Municipal Council and Ors.*[21], the Delhi High Court made it very clear that street vendors are not encroachers on land. In this case M/s. Hotel Imperial had filed the writ petition aggrieved by the action and inaction of the respondent authorities of allotting taxi booths, shops including Tibetan shops in front of the hotel and abutting on the wall. The petitioners seek the relief of demolition and removal of such structures and for a restraint order against the respondent authorities from permitting the use of the road in front of the hotel for any such purpose. The petitioners claim that the respondent NDMC is required to maintain the streets under the provisions of the New Delhi Municipal Council Act, 1994 (hereinafter to be referred to as, the NDMC Act) especially in view of the provisions of Section 11(p) of the NDMC Act. Section 11 prescribes the obligatory functions of the Council and the removal of obstruction and projections on streets and other public places is one such function under sub-section (p). A reference has also been made to the provisions of Sections 202 and 203 of the NDMC Act providing for vesting of the public streets in the Council and for the functions to be performed in respect thereof.

The Delhi High Court held that the petitioners never objected to location of these persons on pavements for decades and it is only now that they seek removal of such private respondents, who have been given stalls. Respondent/NDMC has defend their existence on license basis—in view of stand of respondent/NDMC, private stall-holders holding valid license cannot be said to be encroachers on land. There can be no doubt that these licensees must adhere to terms and conditions of licenses. NDMC is directed to carry out an inspect one of these stalls within a maximum period of four weeks from today to verify that such stall-holders are adhering to norms. In case of violation, immediate action in accordance with law must be taken. Further, if there are any stalls existing for which no license has been granted, they are naturally required to be removed forthwith.

The Orissa High Court held that allocation of space in vending zone on seniority basis in *Janpath Khurda Byabasai Sangha & Ors.* v. *State of Orissa & Ors.*[22], the brief facts leading to the present writ petition are that petitioner is a registered society formed by the street vendors/hawkers who have been doing their business for years together beside the road in temporary shops of Janpath at Bapuji Nagar and earning their livelihood. According to the petitioners, they have been paying license fees regularly for the purpose to the Bhubaneswar Municipal Corporation (for short, 'the Corporation'). ln spite of the same, the members of the Society have been evicted from the said-place by the Corporation with the assurance to settle them by providing vending zones. Now the Corporation has backed out of its assurance. The Orissa High Court has issued the direction to the Bhubaneswar Municipal Corporation to take necessary steps for providing vending zone to 66 members of the petitioner's Society in order of their seniority. However, this Court has made it clear that the allotment of space in the vending zones will not confer any legal right to do their business perpetually.

The Kolkata High Court declared that no eviction without notice in *Bhika Ram Chand Mal Sweets and Snacks Pvt. Ltd.* v. *Mayor, Kolkata Municipal Corporation*[23], while safeguarding the interest of the shopkeeper directed the authorities to ensure smooth passage

to the shop but at the same time refused to pass any order to evict the street vendor surrounding the shop. It also observed that evictions under section 372 of the Kolkata Municipal Act, 1918 cannot be carried due to the overwriting, protection granted by the Central Act.

The Karnataka High Court held that right to approach license from authorities in *Asif Pasha* v. *The Commissioner*[24], petitioners were street vendors and carried out their business in small temporary constructions or sheds raised by them at public places. Mysore city corporation evicted them from their respective places, where they were carrying out their business on a day-to-day basis. Petitioners requested being poor self-employed people, they are entitled to the protection under the recently enacted Act. The Karnataka High Court held that petitioner ever at liberty to approach the respondent's municipal corporation for seeking appropriate license and permission to carry on their vending business at a designated place complying with the condition of such license as may be imposed by the municipal corporation regarding the Act of 2014.

VI. HAWKERS NEED TO BE REGULATED NOT ELIMINATED

In *Maharashtra Ekta Hawkers Union* v. *Municipal Corporation, Greater Mumbai*[25], the Supreme Court after considering the various decisions went to formulate a committee to look into the issue of allotting sites to hawkers and resolving other ancillary issues, for Bombay. It further gave a set of consolidated guidelines, which are as under:

(1) An area of 1 mtr × 1 mtr on one side of the footpath wherever they exist or on an extreme side of the carriage way, in such a manner that the vehicular and pedestrian traffic is not obstructed and access to shops and residences is not blocked. Where hawking is permitted, it can only be on one side of the footpath or road and under no circumstances on both sides of the footpaths or roads. Aarey/Sarita stalls and sugarcane vendors would require and may be permitted an area of more than 1 Mt. by 1 Mt. but not more than 2 Mt. by 1 Mt.;

(2) Hawkers must not put up stalls or place any tables, stand or such other thing or erect any type of structure;

(3) There should be no hawking within 100 meters from any place of worship, holy shrine, educational institutions and hospitals or within 150 meters from any municipal or other markets or from any railway station. There should be no hawking on foot-bridges and over-bridges. Further certain areas may be required to be kept free of hawkers for security reasons. However, outside places of worship hawkers can be permitted to sell items required by the devotees for offering to the deity or for placing in the place of worship e.g., flowers, sandalwood, candies, agarbattis, coconuts, etc.;

(4) The hawkers must not create any noise or play any instrument or music for attracting the public or the customers;

(5) All municipal licensing regulations and the provisions of the Prevention of Food Adulteration Act must be complied with;

(6) Hawking must be only between 7.00 am and 10.00 pm;

(7) Hawking will be on the basis of payment of a prescribed fee to be fixed by BMC. However, the payment of prescribed fee shall not be deemed to authorize the hawker to do his business beyond prescribed hours and would not confer on the hawker the right to do business at any particular place;

(8) The hawkers must extend full cooperation to the municipal conservancy staff for cleaning the streets and footpaths and also to the other municipal staff for carrying on any municipal work. They must also cooperate with the other government and public agencies such as BEST undertaking, Bombay Telephones, BSES Ltd., etc. if they require to lay any cable or any development work;

(9) No hawking would be permitted on any street which is less than 8 meters in width. Further the hawkers also have to comply with Development Control Rules thus there can be no hawking in areas which are exclusively residential and where trading and commercial activity is prohibited. Thus, hawking cannot be permitted on roads and pavements which do not have a shopping line;

(10) BMC shall grant licenses which will have photos of the hawkers on them. The license must be displayed, at all times, by the hawkers on their person by clipping it on to their shirt or coat;

(11) Not more than one member of a family must be given a license to hawk. For this purpose BMC will have to computerize its records;

(12) Vending of costly items, e.g. electrical appliances, video and audio tapes and cassettes, cameras, phones, etc. are to be prohibited. In the event of any hawker found to be selling such items his license must be cancelled forthwith;

(13) In areas other than the Non-Hawking Zones, licenses must be granted to the hawkers to do their business on payment of the prescribed fee. The licenses must be for a period of year. That will be without prejudice to the right of the Committee to extend the limits of the Non-Hawking Zones in the interests of public health, sanitation, safety, public convenience and the like. Hawking licenses should not be refused in the Hawking Zones except for good reasons. The discretion not to grant a hawking license in the Hawking Zone should be exercised reasonably and in public interest;

(14) In future, before making any alteration in the scheme, the Commissioner should place the matter before the Committee who shall take a decision after considering views of all concerned including the hawkers, the Commissioner of Police and members of the public or an association representing the public; and

(15) It is expected that citizens and shopkeepers shall participate in keeping non-hawking zones/areas free from hawkers. They shall do so by bringing to the notice of the concerned ward officer the presence of a hawker in a non-hawking zone/area. The concerned ward officer shall take immediate steps to remove such a hawker. In case the ward officer takes no action a written complaint may be filed by the citizen/shopkeeper to the Committee. The Committee shall look into the complaint and if found correct the Committee will with the help of police remove the hawker. The officer in-charge of the concerned police station is directed to give prompt and immediate assistance to the Committee. In the event of the Committee finding the complaint to be correct it shall so record. On the Committee so recording an adverse remark failure to perform his duty will be entered in the confidential record of the concerned ward officer. If more than three such entries are found in the record of an officer it would be a ground for withholding promotion. If more than 6 such entries are found in the records of an officer it shall be a ground for termination of service. For the work of attending to such complaints BMC shall pay to the Chairman a fixed honorarium of Rs. 10,000 p.m.

VII. RULE OF BENEFICIAL INTERPRETATION TO BE APPLIED IN CASE OF AMBIGUITY

The Delhi High Court in *Dharam Singh and Ors.* v. *Municipal Corporation of Delhi and Ors.*[26], held that the right to carry on trade or business mentioned in Article 19(l)(g) of the Constitution, on street pavements, if properly regulated cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and for no other use. Proper regulation is, however, a necessary condition as otherwise the very object of laying out roads "to facilitate traffic" may be defeated. lf the matter is examined in its light it will appear that the principle stated in Saghir Ahmad case in connection with transport business applies to the hawkers' case also. The proposition that all public streets and roads in India vest in the State but that the State holds them as trustee on behalf of the public, and the members of the public are entitled as beneficiaries to use them as a matter of right, and that this right is limited only by the similar rights possessed by every other citizen to use the pathways, and further that the State as trustee is entitled to impose all necessary limitations on the character and extent of the user, should be treated as of universal application. The court further held that the provisions of the Municipal Acts should be construed in the right of the above proposition. ln case of ambiguity, they should receive a beneficial interpretation, which may enable the municipalities to liberally exercise their authority both, in granting permission to individuals for making other uses of the pavements, and, for removal of any encroachment which may, in their opinion, be constituting undesirable obstruction to the traveling public. The provisions of the Delhi Municipal Corporation Act, 1957, are clear and nobody disputes before us that the Municipal Corporation of Delhi has full authority to permit hawkers and squatters on the sidewalks where they consider it practical and convenient. The provisions of both Sections 173 and 188 should receive liberal construction, so that the New Delhi Municipal Committee may be in a position to exercise full authority.

VIII. MANAGEMENT OF STREET VENDORS IN THE METRO CITIES

In *Patri Vyapar Mandal, Delhi (Regd.)* v. *MCD Town Hall and Ors.*[27], the Supreme Court was called upon to once again look into the aspect of management of street vendors in the metro cities. This particular matter pertained to the city of Delhi and the Court observed that pursuant to the National Policy on Urban Street Vendors, ward vending committees had been constituted in all the 134 wards of the MCD, in addition to Zonal Vending Committees had also been constituted in all the l2 zones. The Court also observed that in several cases street vendors could not be allocated spaces as the said sites were in occupation of unauthorized persons. To resolve this issue the Court accepted the suggestion that a photo census should be conducted of all squatters. The Court further made photo census compulsory for all future allotment also.

The Delhi High Court held that street vendors is a part of urban plans and schemes in *Manushi Sangathan* v. *Delhi Development Authority and Ors.*[28], right to hawk is protected and guaranteed under Article 19(1)(g) of the Constitution but is subject to Clause 6 and the State can impose reasonable restrictions in the interest of general public. No one, therefore, by hawking can cause nuisance, annoyance and inconvenience to other members of the public and the authorities could regulate and control hawking. In this case, the Supreme Court laid down modalities for declaring hawking and non-hawking zones in order to protect hawkers and regulate hawking. It was directed that in future before making any alteration in the scheme, the commissioner shall take into consideration all public interest including hawkers, commissioner of police and representative associations of the public.

It was recognized that hawking if properly regulated considerably adds to the convenience and comfort of the general public by making available ordinary articles of daily use at comparatively less price. It is a source of self-employment. Direction given to DDA to continue with the pilot project. The street vendors permitted to hawk in the area which was demarcated by DDA prior to their removal and the question whether Nehru Place should be declared a no hawking zone and the question of demarcating non-vending areas will be decided by the DDA after making reference to the Ward Vending Committee and on the basis of the directions issued by the Supreme Court and in terms of the Scheme of the MCD.

IX. SUPREME COURT DIRECTIONS TO GOVERNMENT TO ENACT LAW TO REGULATE HAWKERS

In *Gainda Ram* v. *MCD*[29], a division bench of Supreme Court has issued directions to the Delhi Government to enact a law to regulate hawkers' fundamental rights, secured under Article 19(1)(g), keeping in mind also the rights of the commuters to move freely and use the roads without any impediment also a fundamental right under Article 19(1)(d). The fundamental right of the hawkers, just because they are poor and unorganized, cannot be left in a state of limbo nor can it left to be decided by the varying standards of a scheme which changes from time to time under the orders of the Court.

CONCLUSION

The Constitution of India guarantees right to livelihood to all its citizens. Street vendors have received scant attention in urban world. The municipal laws consider street vending in public place as crime. Due to this fact, they are often driven away from streets and harassed by civil authorities. The need of hour is rather than eliminating street vendors completely from urban landscape, their vending must be regulated so that their livelihood is not snatched away from them. For over three decades the Supreme Court of India has consistently argued that a right-based approach needs to be adopted towards street vendors. The role and concern of judiciary of India has been a profound concern in making better the lives of poor, who were object of exploitation. The expansive and creative judicial interpretation of the word "life" in Article 21 of the Constitution of India has led to the salutary development of right to livelihood in India. The judiciary has widened the ambit of constitutional provisions to enforce the human rights of citizens and has sought to bring the Indian law conformity with the global trend in human right jurisprudence. In 1989, the Supreme Court recognized the right of hawkers and squatters to run their business on public streets. The Supreme Court directed appropriate government to enact a central law for the street vendors over the years. The Apex Court has passed several judgments upholding the rights of street vendors. The Hon'ble Supreme Court of India have given directions to all state governments for the implementation of the Street Vendors' Protection of Livelihood and Regulation of Street Vending Act, 2014. Now, it has been universally accepted that street vending has provided vibrancy, colour and a market outlet in Indian cities. Street vending plays a vital role in economy as a source of livelihood.

Notes and References

1. M.P. Jain, *Indian Constitutional Law*, 760 (Lexis Nexis, Butterworth Wadhwa, Nagpur, 7th edn., 2017).

2. Aishwarya Kamya Singh, *A Study of Expanding Horizons of Fundamental Rights*, 210 (Central Law Agency, Allahabad, 1st edn., 2017).
3. Narendra Kumar, *Constitution Law of India*, 39 (Allahabad Law Agency, Faridabad, 15th edn., 2018).
4. N. V. Paranjape, *Studies in Jurisprudence and Legal Theory*, 270 (Central Law Agency, Allahabad, 14th edn., 2014).
5. *Ibid.*
6. B.N. Mani Tripathi, *Jurisprudence and Legal Theory*, 310 (Allahabad Law Agency, Faridabad, 10th edn., 2018).
7. AIR 1981 SC 746.
8. AIR 1986 SC 389.
9. AIR 1986 SC 230.
10. AIR 1995 SC 224.
11. AIR 1997 SC 645.
12. *Supra* note 4 at 290.
13. Ajay Gulati, *Public Interest Lawyering, Legal Aid and Para Legal Services*, 275 (Central Law Publications, Allahabad, 5th edn., 2016).
14. Sangeeta Roy, "Street Vending in India—A Review of Existing Laws, Rights and Regulations", Vol. 5, *IJLJ* 125 (2014).
15. AIR 1985 SC 1206.
16. AIR 1986 SC 180.
17. (1989) 1 SCC 101.
18. (1989) 4 SCC 155.
19. (1992) 2 SCC 458.
20. AIR 1997 Cal. 234.
21. WP (C) 7050/1999, *available at:* www.indiankanoon.org (last visited on Nov. 10, 2018).
22. (2010) 1 ILR 4.
23. WP No. 297 of 2016, *available at:* www.legalcrystal.com (last visited on Nov. 10, 2018).
24. WP No. 28461 of 2016, *available at:* www.casemine.com (last visited on Nov. 10, 2018).
25. (2004) 1 SCC 625.
26. (2005) DLT 466.
27. (2009) 12 SCC 475.
28. (2009) DLT 82.
29. 2010(10) SCC 715.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 63-73

Welfare Schemes and Reservation Policy in State of Punjab

An Analysis

Dalliandeep Kaur Tiwana*

INTRODUCTION

The State of Punjab is among one of the most progressive states in India, caste system in Punjab is not as rigid as in rest of India. The geographical location of the state of Punjab was such that all the foreign invaders used it as an entry gate to India. The Punjab state is known as land of Gurus and Saints and it has witnessed various reform movements. Caste inequalities and discrimination has been condemned by Sikh Gurus and various other Sufi and Bhakti Saints. The dominance of Brahmins on other castes in social hierarchy of Punjab has long been depleted thus various changes were seen in social and religious setting of the region. The objectives with which most of the social reform movements were initiated focused at providing the depressed and destitute people equal status and to save them from tyranny in society. The people belonging to depressed classes got attracted by the ideological framework of these movements and large number of these people converted to new religion. When the Punjab was dominated by the Muslim community, there was large number of conversions to Muslim religion. When Sikhism was at its peak, large number of people gets converted to Sikh religion. With the coming of British people in India many become Christians. People converted according to the religion of ruling class but these conversions did not reduce the inequality, discrimination and oppression over the people belonging to lower castes. As conversions from Hindu religion to Christianity or Islam did not brought any change in the social conditions of these depressed classes, so it could be concluded that the caste system was practically prevalent in all the religious, although it was prohibited by the Sikh Gurus. The dominance of Brahmins was not so strong and had less effect in Punjab than in other parts of the India. The teachings of Sikh Gurus focused on casteless society. The Christian missionaries also played an important role to eradicate equality they started their activities in the state of Punjab in the first half of the 19th century[1]. In the year 1991 Scheduled Castes accounted for 28.3 per cent of total population of Punjab. In some districts it would be about 38 per cent of the total population, due to the fact that Scheduled Caste population in Punjab was growing at a faster rate than the rest of the country[2]. According to the census of 2011 the highest per cent of Scheduled Caste population amongst all the states of the country is in the state of Punjab. The total Scheduled Caste population in Punjab is 88.60 lack which is 31.94 per cent of the total population, i.e. 277.43 lack of the state. In the total population of India share of Punjab is 2.3 per cent and whereas the per

*Assistant Professor, Sri Guru Granth Sahib World University, Fatehgarh Sahib.

centage of Scheduled Caste population in India is concerned, it is quite high in Punjab as compared to the other state, in Punjab it is 26.06 per cent as compared to 13.89 per cent for the other states as a whole. According to the census of 2011 the majority of Scheduled Castes people live in a rural area (73.33%) whereas 26.67 per cent Scheduled Caste people resides in the urban areas[3].

CASTE SYSTEM IN PUNJAB

The caste hierarchy and the practice of untouchability towards the backward classes were widely believed to be the core defining feature of the social structure of traditional Indian society. As per the majority view of different scholars, caste system and discrimination on the basis of caste existed everywhere in the Indian subcontinent and everyone practiced it[4]. In the state of Punjab Sikh religion is in majority. The teaching of the Guru Nanak Dev Ji, who was the first Guru of Sikhs, was against the brahmanical orthodoxy and the caste system. Guru Nanak advocated equality for all irrespective of religion and caste. The religious book of Sikhs i.e. Shri Guru Granth Sahib contains the work of many saints and Sufis of Bhakti period, who belonged to lower castes like Kabir ji and Ravidas ji. This holy Granth also contains the writings of Muslim Sufis like Sheikh Farid and Bhikam. The 'Five Beloved', i.e. Panj Pyare who were the first to be baptized as Khalsa on the day of baisakhi in the year 1699 by the Guru Gobind Singh Ji (Tenth Guru) also belonged to the shudra caste. According to the various researches conducted by the scholars they have reported the less hold of caste on the social relationships among Sikhs in particular and the Punjabis in general. While reporting the problems of lower castes in the Punjab province the British administrators viewed it more in the terms of politico-economic disabilities rather than in terms of being problem of untouchability and caste system as in rest of the country. The report of the British Government observed in the year 1920, "that it would be false to give too great importance to the existence of the caste problem and untouchability in the province of the Punjab. Even some scholars from west went on the extent of predicting that the province of Punjab was a notable exception to the caste system in India[5]. So it could be concluded that Punjab does not witnessed the conceptualization of the caste system. There is no availability of any detailed availability of any detailed documentation as a proof of untouchability in the state of Punjab[6]. However, all the scholars who have studied the Punjab did not agree with such a proposition.

MEASURES FOR THE PROTECTION OF SCHEDULED CASTES AND OTHER BACKWARD CLASSES IN PUNJAB

The population of the state of Punjab from the view of caste system and preferential treatment has been broadly divided into three categories: (a) Open Category people, (b) Scheduled Castes, (c) Other Backward Classes. In the state we don't have the population of Scheduled Tribes. As discussed above, discrimination towards backward classes exit in Punjab but the magnitude of this practice was not as severe as in other parts of the country. In order to provide proper opportunities and to minimize the discrimination towards Scheduled Castes and Other Backward Classes, Government of Punjab had constituted various commissions and launched various schemes for their welfare.

(A) Punjab State Backward Classes Commission—Punjab State Backward Classes Commission was constituted by the Government of Punjab in the year 1993. This was constituted after the decision in the case of ***Indra Sawhney and Others v. Union of India***[7], the Apex Court of India has directed the Union Government, Governments of all States and

the Administrators of the Union Territories to formulate a permanent body in order to entertain the complaints over inclusion and under inclusion in the list of Other Backward Classes of the state. In order to give effect to the directions of the Supreme Court, the Governor of State of Punjab established a Commission known as the Punjab State Backward Classes Commission. Following are the main functions of the Commission:

(1) The main duty assigned to this commission is to entertain, examine and decide upon the complaints of inclusion and under inclusion in the list of category of backward classes of citizens.
(2) To review the list of the backward classes of citizens when directed by the state government.

It is the responsibility of the state government to provide as much staff as is required for the performance of duties of the commission. This body is established by the government with the objective that no person belonging to Other Backward Classes should remain deprived of the benefits which are provided by the state government through various schemes to the backward classes[8].

SCHEMES FOR THE WELFARE OF OTHER BACKWARD CLASSES

Government of Punjab has time to time launched various schemes for the welfare and upliftment of Other Backward Classes students in order to provide them assistance in better education.

(1) Pre-Matric Scholarship for Other Backward Classes–Inspite of several measures taken by both Central and State Governments after the independence of the country to improve the education level among the Other Backward Classes the results were not as anticipated. To improve the literacy rate among them the Government of India has introduced a pre-matric scholarship scheme for those students of Other Backward Classes, whose parent's income from all the sources does not exceeds 44,500 per year. The amount of scholarship programme will be different from class to class. Scholarship scheme for day scholar students is as follows:

(a) Class I to V — 25 Rupees per month for ten months
(b) Class VI to VIII — 40 Rupees per month for ten months
(c) Class IX to X — 50 Rupees per month for ten months

This amount of scholarship will be payable to the student from the date of joining to the date of leaving the school. Funding pattern under this scheme is fifty-fifty[9].

(2) Post-Matric Scholarship for Other Backward Classes—The post-matric scholarship for Other Backward Classes students is a centrally sponsored scheme. The main objective of this is to provide help to the Other Backward Classes students in monetary terms, those who are studying at post-matriculation or post-secondary stage. This scholarship would be provided by the State Government, Union Territory Administration to which the applicant student belongs or permanently settled. Under this scheme 100 per cent assistance is to be provided by Indian Government over and above the committed liability of state, this committed liability of the state is 201.44 lacs in the eleventh five year plane[10]. A web portal, namely, punjabscholarships.gov.in has been launched during the year 2013-14 for the receipt of online applications from the students. Under this centrally sponsored scheme government of Punjab has framed the policy for the allotment of scholarship to the deserving students. The candidate must have secured 60 per cent marks in his/her previous annual examination in order to avail the benefit of this scheme[11].

(3) Attendance Scholarship for Primary Girl Students of Backward Classes and Economically Weaker Families—It was observed that the girl students of the backward classes and economically weaker families are much less as compared to their population in the educational institutions. Keeping in view these circumstances the government of Punjab decided to adopt some measures so that the dropout tendency is checked at primary stage of education[12]. The Punjab Government introduced the scheme of Attendance Scholarship for Backward Classes particularly for girls during the year 2011-12. Aim of this scheme was to encourage the attendance of girl students at primary level. Under this scheme the attendance scholarship is given to per student for ten months in a year at the rate of 50 rupees per-month.

(4) Construction of Hostel for OBC Boys and Girls in Schools and Colleges— The main objective behind this scheme is to provide hostel facility to the boys and girl students belonging to other backward classes. This scheme was started by the Government of India in its 9th five year plan, i.e. from 1997-2002. The funding pattern for the construction of hostels under the scheme provided for the cost sharing between the union and state governments, the ratio of sharing is 50:50, with the 100 per cent funding to the U.Ts and central government institutions. The total accommodation facility in the hostel should not exceed hundred and five per cent seats be reserved for the persons with the disability[13].

(5) Punjab State Scheduled Caste Commission—Punjab State Commission for Scheduled Castes has been formulated on 16th February under the Punjab State Commission for Scheduled Castes Act, 2004. The main aim behind the constitution of this commission is to protect and safeguard the interests of the people belonging to scheduled castes in the Punjab State. The Punjab State Commission for the Scheduled Caste Act, 2004 has been enacted by the state legislature of Punjab and it provides for the constitution of the commission for scheduled castes in the state.

According to this Act, "Scheduled Caste means such Caste, race or tribes or part of group within such castes, race or tribes as are deemed under Article 341 of the Constitution of India to be Scheduled Castes"[14]. The State Government by notification in official gazette formulated a body to be known as "The Punjab State Commission for Scheduled Castes". Major function of this Commission is to look into the issues concerning with the benefits and safeguards provided to Scheduled Castes under the Indian Constitution, by the laws made by Parliament or State Legislatures or under any order of the Government. The responsibility of the commission is to check the effective implementation of such safeguards.

SCHEMES FOR THE WELFARE OF SCHEDULED CASTES

According to the census of 2011, the Punjab state has the highest percentage of Scheduled Castes population. Keeping in view the welfare of Scheduled Castes living in the state of Punjab various welfare schemes have been launched.

(1) Shagun to Scheduled Castes Christian Girls Backward Classes and Other Economically Weaker Families—The main aim of this scheme is to provide a positive change in the life of girls belonging to the lower strata of society by providing them financial assistance at the time of their marriage. Apart from giving monetary help at the time of marriage this scheme also discourages the evil of child marriage prevalent in society[15]. This scheme was started on 1st April 1997 at that time Shagun of Rs. 5100 was given to the parents or guardians of the girls belonging to Scheduled Castes, whose annual family income does not exceeds 16,000 Rupees. This scheme was further extended for the benefit of Christian girls also. In the year 2004 this scheme was renamed as Ashirwad scheme and the

amount of shagun was increased from 5100 Rupees to 6100 Rupees for the girls belonging to Scheduled Castes, Christian religion and of daughters of widows of any caste at the time of their marriage[16]. In the year 2006 the amount of financial help was increased from Rs. 6100 to Rs 15000[17], but this benefit could only be availed by those families whose income does not exceeds Rs. 30,000.

(2) Post-Matric Scholarship for Scheduled Caste Students—This scheme is sponsored by the Central Government and it is the single largest intervention by the Indian Government for empowerment in the field of education of Scheduled castes students. This scheme was introduced by the Government in as early as in 1944 but it gathered its momentum only in post-independent era and in the year 1948-49 it was extended to cover Scheduled Tribes students also. This scheme has received importance in five year plans and number of beneficiaries increased with the passage of time[18]. The benefit of this scholarship is only available for the studies within India and to those students whose family income from all sources does not exceed 2 lakh and fifty thousand in a year. This scheme is implemented through DPI Colleges, Director, Technical Education and Industrial Training; Director Research and Medical Education and DPI (SE). In order to fill a scholarship forms a web portal, namely, punjabscholarships.gov.in has launched during the year 2013-14[19].

(3) Scheme for Pre-Matric Scholarship for Scheduled Caste Students Studying in Classes IX and X—This scheme is especially designed to provide assistance to the parents or guardians of Scheduled Caste children for their education studying in Class IX and X in order to check out the drop-out rate at the secondary level[20]. And secondly, to improve the involvement of Scheduled Castes Students in IX and X class so that they can perform better at post-matric stage of education. The award under this scheme is only available for the studies within the country and the scholarship is given by the concerned State Government and Union Territory Administration to which the candidate belongs.

(4) Pre-Matric Scholarship to Children of those Parents engaged in unclean occupations—A scheme of scholarship to the wards of those who are involved in unclean occupations like scavenging of dry latrines, flaying, tanning irrespective of their religion is a centrally sponsored scheme. This scheme was introduced with an object to provide good education at the school level for them. Under the preview of this scheme 1000 awards were given to those students studying in classes VI to X in the schools having the facility of hostels. These benefits can only be availed by those children, whose parents income does not exceeds Rs. 500 per month and only one child in the family was entitled for the grant of this scholarship. At the rate of 100 rupees in a month monetary help was given to the candidate to meet the expenses of coast of boarding and loading, cost of books, tuition fee and other incidental charges and additional sum of Rs. 45 was given to cover the expenditure on towels, toilets, uniform, etc. every month. This scholarship scheme is jointly being finance by center and states from the year 1979-80, sharing between center and state is on 50:50 bases.

(5) Attendance Scholarship to Scheduled Castes Primary Girl Students—It has been witnessed that girl students belonging to Scheduled Castes in educational institutions is much less than their population. This is due to the poor economic status of their parents that they do not pay much attention to the education of their daughters. Girl students who are already studying in the schools their dropout rate is much higher due to the factors like early marriage or taking up the jobs for assisting their poor families[21]. Keeping these things in the consideration the Government of Punjab state decided to adopt some measures so

that dropout rate could be checked at the primary level of education. This scheme was introduced from the academic year of 1992-93. Under this scheme the attendance scholarship of Rs. 50 is given for the period of ten months to the girl students of Scheduled Castes, if they fulfill the following conditions[22]:

(i) The parents of such girl child should not have more than five acres of land.
(ii) The parents or guardians of such girl child are not liable to the payment of income tax.
(iii) In order to claim the benefit of this scheme minimum 75 per cent of attendance is required in a class.

(6) Scheme for Sanctioning Special Grant to Scheduled Caste Girl Students Studying in Post-Matric and Post-Graduate Classes—This scheme is designed with the purpose to provide monetary help to the girl students studying in post-matric and post-graduate classes of Scheduled Caste community[23]. This scheme was started in the academic year of 1980-81; this scholarship scheme is being implemented by Education Department, Director, Research and Medical Education and Director, Tech. Education. Following are the conditions to avail the scholarship under this scheme[24]:

- Only those girl students who are domiciled in the state of Punjab can claim the benefit under this scheme.
- The income of the parents/guardians of such a girl students should not exceed more than Rs. 609,65 per annum from all the sources.

Financial assistance of Rs. 50 per month is given to the girl students studying in post-matric classes and amount of Rs. 60 per month is given to girl students studying in post-graduate courses.

(7) Encouragement Award for Scheduled Caste Girl Students for Pursuing 10+2 Education—In the state of Punjab literacy rate of open category is 69.70 per cent and that of Scheduled Castes is 56.22 per cent. Female literacy rate among the Scheduled Caste is quite low i.e. 48.25 per cent against 63.40 per cent of the general female literacy rate, the reason for this is that dropout rate of scheduled caste girl students is very high as compared to general category. It is 30.13 per cent at primary level, 46.96 per cent at middle level and 63.62 per cent at secondary level of education[25]. So the Government of Punjab has implemented this scheme through the welfare department in the year 2007-08. Under this scheme every girl belonging to scheduled caste and studying in class 11^{th} and 12^{th} will be given Rs. 300 every year. Only those SC girl students can claim the benefit of this scheme, whose parent's income is below the taxable income slab.

(8) Grant for the Purchase of Medical, Engineering, Veterinary, Agriculture and Engineering Books (Non-plan)—"The text books pertaining to Medical and Engineering courses are generally costly and beyond the purchasing capacity of the students belonging to Scheduled Castes. Thus, they suffer in studies *viz-a-viz* students of other communities, who are economically better. To overcome this handicap a scheme, for giving grant to various institutions for the purchase of Medical and Engineering books was introduced in 1974-75. Funds under this scheme are being shared on 50:50 bases between the Centre and State Government books so purchased are kept in libraries for the exclusive use of students belonging to Scheduled Castes[26].

(9) Grant to Scheduled Caste Students Studying in Medical and Engineering Colleges—Indian society is based on hierarchy of caste system. Caste in India is generally related to the occupation of the people. Scheduled Caste people are mostly engaged in

menial type of jobs and that is the major reason that they are financially weak and cannot afford to send their children to professional colleges like medical and engineering colleges. The Government of Punjab introduced this scheme from the year 1982-83 on the same lines as the Indian Government provides under its centrally sponsored 'Post-Matric Scholarship Scheme' for SC students. According to the provisions of present scheme, special grant is being given to the scheduled caste students who are taking medical and engineering education of Rs. 125 per month today scholars and of Rs. 250 per month to hostellers but subject to the condition that income of their parents does not exceed Rs. 60,965 in a year[27].

Apart from above mentioned schemes there are plethora of other schemes like, Bapu Jigjivan Ram Chhatrawas Jojna, Scheme for setting up of Legal Aid Clinics in all Disticts of Punjab, Free Books to Scheduled Caste Students Imparting Training in Driver-*cum*-Mechanic, Coaching for Stenography for Scheduled Caste Candidates, New Courses/ Vocational Training in the ITI's for Scheduled Caste Students, Financial Assistance to the Scheduled Caste for Flying Training of Commercial Pilot, Award to Brilliant Scheduled Caste Students License, which are launched by the government of Punjab which works towards the upliftment of Scheduled Caste.

THE PUNJAB SCHEDULED CASTE AND BACKWARD CLASSES (RESERVATION IN SERVICES) ACT, 2006

The philosophy of the preference treatment in public service is based on a general principal that only with the help of economic upliftment improvement can be made in the lives of Scheduled Caste people. The founding fathers of Indian Constitution believed that it is a fundamental duty of state to make provisions for the reservation of the jobs in favour of backward classes which are not adequately represented in the services under the state. In the state of Punjab reservation is provided to scheduled castes and backward classes under The Punjab Scheduled Caste and Backward Classes (Reservation in Services) Act, 2006. This bill for reservation in jobs for Scheduled Castes and Backward Classes received the assent of the governor of Punjab on 4th October 2006 and it was first published in official gazette on 5th October 2006. Section 2 of this Act defines some of important terms like 'appointment'[28], 'backward classes[29]', 'state government[30]', Scheduled Caste[31]'. Reservation policy provided under this Act is not applicable on employment under the Union Government, recruitments under private sector and jobs in domestic services[32]. This Act provides that while making recruitments according to the service rules seats should be reserved for the scheduled castes and backward classes in the jobs under all the establishments. The term establishment is defined under this Act as, "any office of the state government, a local authority or a statutory authority constituted under any state law for a time being in force, or a board, or corporation in which not less than fifty-one per cent of the paid up share of capital is held by the government of state of Punjab and includes a university nor college affiliated to the university, primary and secondary schools and other educational institutions, which are owned by the state government and also includes an establishment in public sector"[33]. Now establishment in public sector means any trade, business, industry which is owned, controlled and managed by the government of Punjab or by any government company as defined in section 617 of the Companies Act, 1956[34]. In such a government company fifty-one per cent is of Punjab government[35]. In the state of Punjab while making the appointments by the way of direct recruitment or by transfer in Group 'A', Group 'B', Group 'C' and Group 'D' services twenty-five per cent of seats for scheduled caste members and twelve per cent for backward classes should be reserved. In the case of promotions

among Group 'A' and Group 'B' services fourteen per cent reservation is provided to scheduled caste people and whereas Group 'C' and Group 'D' services are concerned twenty per cent reservation is provided to them. Among the scheduled castes also there are different categories in the state of Punjab. This Act provides that 50 per cent vacancies of reserved quota in the case of scheduled castes should be given to Balmikis and Mazhabi Sikhs as of first preference[36].

Under this Act running roster would be prepared according to the quantum of reservation provided to different categories under section 4 clauses (2), (3), and (4) and state government is authorized to make different rules for this purpose[37] and to implement the policy of reservation in Punjab state. Preferential treatment for these categories is not limited to permanent posts but it also extends to appointments on *adhoc* basis, daily wage staff, and short-term vacancies, etc. Any person who wants to avail the benefit of this reservation policy in the direct appointments or by the way of promotions as the member of scheduled castes has to support his claim by the certificate of the caste identification which is given under the Constitution (Scheduled Caste) Order, 1950, notified by the Indian President for the State of Punjab[38]. And people belonging to backward classes are also required to submit the certificate of class identification issued by the state government before claiming any benefit under this Act. Giving effect to the various Judgments of Supreme Court of India, the Government of Punjab had made a legislative provisions that the backlog or carry forward vacancies for scheduled castes shall be treated as a separate category in itself and the rule of 50 per cent of total reservation pronounced in Mandal case would not be applicable on backlog vacancies[39]. Section 7 of the Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006 makes the provisions against the de-reservation of the vacancies reserved for the scheduled castes and backward classes. It provides that in the absence of suitable candidates from the above category, the vacancies shall remain unfilled but sub-section (2) of section 7 is an exception to this rule. It provides that in public interest and after the satisfaction of Department of Welfare of Scheduled Castes and Backward Classes such a de-reservation may be done. Any person who contravenes any of the provision of this Act shall be liable to be punished under Punjab Civil Service (Punishment and Appeal) Rules, 1970[40]. This Act itself gives power to the State Government to make rules to remove any of the difficulty which arises while giving effect to the provisions of this Act[41]. Section 11 of this Act castes duty on every establishment to maintain annual report, maintenance of other records such as roster register. Any officer authorized by the government may inspect any documents which are maintained in relation to the recruitments and promotions. So this Act provides the detailed provisions regarding the reservation in appointments for Scheduled Castes and Backward Classes. But recently High Court has held that reservation in promotions cannot be allowed in the absence of quantifiable data showing the backwardness of classes and those they are not adequately represented in the services under the state. In this ruling High Court of Punjab and Haryana has stuck down the provisions of The Punjab Scheduled Castes and Backward Classes (Reservation of Services) Act up to the extent to which it provides quota in promotions[42]. In order to safeguard the interests of Scheduled Castes, the Cabinet has okayed the introduction of a Bill in the Vidhan Sabha for ensuring restoration of 14 per cent reservation in Group A and B and 20 per cent reservation in Group C and D to the members of Scheduled Castes in promotions. The enactment of the legislation would pave the way for implementation of the benefit of reservation in promotion as provided in Article 16(4) (A) of the Constitution of India with effect from February 20, 2018.

Pertinently, the Punjab and Haryana High Court in its judgment on February 20, 2018 had struck down sections 4(3), 4(4) and 4(8) of "The Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006" following which the Punjab Government had decided to restore 14 per cent reservation in Group A and B and 20 per cent reservation in Group C and D to SC employees[43]. The recent verdict of Supreme Court on reservation in promotions in the case of ***Jarnail Singh v Lachhmi Narain Gupta***[44], held that reservation in promotions does not require the state to collect quantifiable data on the backwardness of the Scheduled Castes and the Scheduled Tribes, yet makes the "creamy layer" in either group ineligible for the benefit and this verdict allowed the reservation in promotions for Scheduled Castes and Scheduled Tribes.

CONCLUSION

The above analysis has attempted to understand the nature of various welfare schemes launched by the Punjab government for the upliftment of scheduled castes and other backward classes. The government of Punjab from time to time has started the schemes for the upliftment of backward classes. Punjab is known as the region without caste but the occupational and social structure of the state of Punjab continues to be compartmentalized along caste lines. However, the structure of caste hierarchy is quite different in the state of Punjab as compared to rest of India. Social reform movements and the political mobilization of the scheduled castes in the form of Ad-Dharma movement had the impact making people aware of the importance of their numbers. Apart from the various schemes which provide financial assistance almost from the primary to higher level of education, the Punjab government is also providing the benefit of reservation to these classes. Due to the impact of these welfare schemes which provides for distribution of free books, financial assistance for studies, free hostel facilities and scholarship schemes for scholarship students, the more enrollments of scheduled caste students at under-graduate, post-graduate and higher studies has been witnessed. It has been observed that policy of preferential treatment given under the Constitution of India is helping the people of scheduled castes to enhance their social, economic, educational and political status. Reservation in the services under the government is empowering them to come at par with upper class of society. The proportion of scheduled castes and other backward classes has increased in the government services and hence providing them the chance to raise their standards. Not only in educational institutions and services reservation is also provide to scheduled caste people in legislative assemblies and local body elections with a view to give them the chance of decision making and put forward their views and ideas on different issues of society.

NOTES AND REFERENCES

1. R.B. Singh, *Scheduled Castes Welfare: Myth or Reality*, 13 (2003).
2. Manhmohan Singh Gill, *Punjab Society: Perspectives and Challenges*, 26 (2003).
3. Scheduled Caste Population in Punjab *available at* http://welfarepunjab.gov.in/Static/SCPopulation.html Visited on 10-September-2018.
4. Dipankar Gupta, *Interrogating Caste*: *Understanding Hierarchy and Difference in Indian Society*, 63 (2000).
5. Surinder S. Jodhka, "Changing Manifestation of Caste In the Sikh Panth", *The Oxford Handbook of Sikh Studies*, 588 (2014).
6. Surinder, S. Jodhka, *Caste in Contemporary India*, 26(2015).
7. AIR 1993 SC 477.
8. Government of Punjab, Department of Welfare of Scheduled Castes and Backward Classes *available*

at http://welfarepunjab.gov.in/Static/PDF/BoardsCommissions/BCCmmsn.pdf Visited on 12-september-2018.

9. Pre-Matric Scholarship for OBC Students (C.S.S. 50:50 Basis) *available at h*ttp://welfarepunjab.gov.in/Static/PDF/BCSchemes/PreMatricScholarshipForOBCStudents.pdf Visited on 16-september-2018.
10. Post-Matric Scholarship for OBC Centrally Sponsored Scheme" *available at* http://welfarepunjab.gov.in/Static/PDF/BCSchemes/PostMatric per cent20ScholarshipForOBC.pdf Visited on 16-september-2018.
11. Government of Punjab Department of Welfare, Notification Dated 28-June 2016 *available at* http://punjabscholarships.gov.in/Public/pdf/Policy_PMS_OBC.pdf Visited on 16-september-2018.
12. ATTENDANCE SCHOLARSHIP FOR PRIMARY GIRL STUDENTS OF BACKWARD CLASSES AND ECONOMICALLY WEAKER FAMILIES (State Plan Scheme) *available at* http://welfarepunjab.gov.in/Static/PDF/BCSchemes/AttendenceScholarShipForPrimaryGirlStudentOFBCEconomicallyWeakerFamilies.pdf Visited on 17-September-2018.
13. CONSTRUCTION OF HOSTELS FOR OBC BOYS AND GIRLS IN SCHOOLS AND COLLEGES (STATE PLAN) (C.S.S. 50:50 BASIS) *available at* http://welfarepunjab.gov.in/Static/PDF/BCSchemes/ContstuctionofHostelsforOBCBoys&GirlsSchool&Collages.pdf visited on 17-september-2018.
14. The Punjab State Commission for Scheduled Castes Act, 2004, s 2(f).
15. Punjab Shagun Scheme for Girls *available at* https://www.mygovernmentschemes.com/punjab-shagun-scheme-for-girls/ Visited on 22-september- 2018.
16. Usha Nayar & Dr Vijay Kulkarni, *Intervention to Save the Girl Child in Punjab*, 25 (2006).
17. SHAGUN TO SCHEDULED CASTES, CHRISTIAN GIRLS, BACKWARD CLASSES AND OTHERECONOMICALLY WEAKER FAMILIES. (STATE PLAN) *available at* http://welfarepunjab.gov.in/Static/PDF/ScSchemes/SHAGUN_TO_SCHEDULED_CASTES__CHRISTIAN_GIRLS__BACKWARD_CLASSES_AND_OTHER_ECONOMICALLY_WEAKER_FAMILIES.pdf Visited on 22-september- 2018.
18. Nirwal Malhotra & Najma Rizvi, *Source Material of Scheduled Castes and Scheduled Tribes*, 31(1997).
19. POST MATRIC SCHOLARSHIP TO SCHEDULED CASTE STUDENTS (Centrally Sponsored Scheme) *available at* http://welfarepunjab.gov.in/Static/PDF/ScSchemes/POST_MATRIC_SCHOLARSHIP_TO_SCHEDULED_CASTE_STUDENTS.pdf Visited on 22-september-2018.
20. SCHEME OF PRE-MATRIC SCHOLARSHIP FOR SCHEDULED CASTE STUDENTS STUDYING IN CLASSES IX & X (w.e.f. 1-7-2012) *available at*http://welfarepunjab.gov.in/Static/PDF/ScSchemes SCHEME_OF_PREMATRIC_SCHOLARSHIP_FOR_SCHEDULED_CASTE_STUDENTS_STUDYING_IN_CLASSES_IX__X_(wef_1-7-2012).pdf Visited on 24-september-2018.
21. Indira Priyadarshini N. Badiger, *Scheduled Caste Women and Higher Education*, 86(2015).
22. ATTENDANCE SCHOLARSHIP TO SCHEDULED CASTE PRIMARY GIRL STUDENTS (State Plan Scheme) *available at* http://welfarepunjab.gov.in/Static/PDF/ScSchemes/ATTENDANCE_SCHOLARSHIP_TO_SCHEDULED_CASTE_PRIMARY_GIRL_STUDENTS.pdf visited on 25-september-2018.
23. S.P. Agrawal, *Information India, 1992-93: Global View,* 598(1994).
24. "Scheme for Sanctioning Special Grant to Scheduled Caste Girl Students Studying In Post-Matric and Post-Graduate Classes *available at* http://welfarepunjab.gov.in/Static/PDF/ScSchemes/SCHEME_FOR_SANCTIONING_SPECIAL_GRANT_TO_SCHEDULED_CASTE_GIRL_STUDENTS_STUDYING_IN_POSTMATRIC_AND_POST_GRADUATE_CLASSES per cent 20(1).pdf visited on 25-september-2018.
25. ENCOURAGEMENT AWARDS TO SC GIRL STUDENTS FOR PURSUING 10+2 EDUCATION (STATE PLAN SCHEME) *available at* http://welfarepunjab.gov.in/Static/PDF/ScSchemes/ENCOURAGEMENT_AWARDS_TO_SC_GIRL_STUDENTS_FOR_PURSUING_10_2_EDUCATION.pdf visited on 25-september-2018.
26. Welfare Measures for Scheduled Castes and Scheduled Tribes *available at* http://shodhganga.inflibnet.ac.in/bitstream/10603/26529/15/15_chapter per cent 206.pdf Visited on 25-september-2018.

27. Grant to Scheduled Caste Students Studying in Medical & Engg. Colleges (Non-plan Scheme) *available at* http://welfarepunjab.gov.in/Static/PDF/ScSchemes/grant_to_scheduled_caste_students_studying_in_medical_engg_colleges.pdf visited on 26-september-2018.
28. "Appointment" means an appointment made by direct recruitment, by promotion or by transfer of a person already in service of the Government of India or a State Government.
29. "Backward Class" means a Backward Class, declared as such by the State Government by notification in the Official Gazette from time to time.
30. "State Government" means Government of the State of Punjab in the Department of Welfare of Scheduled Castes and Backward Classes.
31. "Scheduled Castes" means Scheduled Castes, notified by the President of India under Article 341 of the Constitution of India by the Constitution (Scheduled Castes) Order, 1950 as amended from time to time.
32. The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006, s 3.
33. *Id.*at s 2(c).
34. Companies Act of 1956 has been now replaced by Companies Act of 2013.
35. The Punjab Scheduled Castes and Backward Classes (Reservation in Services) Act, 2006, s 2(d).
36. *Id.* at *s* 4.
37. The Punjab Scheduled Caste and Backward Classes (Reservation in Services) Act, s 12.
38. *Id.*at s 5.
39. *Id.*at s 6.
40. *Id.* at s 8.
41. *Id.*at s10.
42. "Quota in promotion sans data not justified, says HC" *available at* http://www.tribuneindia.com/news/punjab/quota-in-promotion-sans-data-not-justified-says-hc/567982.html Visited on 4-October-2018.
43. Government of Punjab, India *available at* http://punjab.gov.in/key-initiative?view=show&pp_id=30825 visited on 5-October-2018.
44. Special Leave Petition (civil) No. 30621 of 2011.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 74-79

Plea Bargaining

Legal Framework in India

Navneet Kaur*

INTRODUCTION

The plea bargain (also plea agreement, plea deal, copping a plea, or plea in mitigation) is any agreement in a criminal cases between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. This may mean that the defendant will plead guilty to a less serious charge, or to one of several charges, in return for the dismissal of other charges; or it may mean that the defendant will plead guilty to the original criminal charge in return for a more lenient sentence.[1] Plea bargaining can present a dilemma to defense attorneys, in that they must choose between vigorously seeking a good deal for their present client, or maintaining a good relationship with the prosecutor for the sake of helping future clients.[2]

Plea bargaining is basically an American concept in which a prosecutor and an accused settle a criminal case among themselves through bargain. The accused pleads 'guilty' 'no contest' in exchange of some concession from the prosecutor. The concession can include reducing the original charge or charges, dismissing some of the charges or limiting the punishment imposed by the court on the accused.[3] A plea bargain allows both parties to avoid a lengthy criminal trial and may allow criminal defendants to avoid the risk of conviction at trial on a more serious charge. For example, in the U.S. legal system, a criminal defendant charged with a felony theft charge, the conviction of which would require imprisonment in state prison, may be offered the opportunity to plead guilty to a misdemeanor theft charge, which may not carry a custodial sentence.

The U.S. Supreme Court, however, has repeatedly rejected arguments that plea bargaining is unconstitutional.[4] But it has held that defendant's guilty pleas must be voluntary and that defendant may only plead guilty if he knows the consequences of what he is doing. The guilty plea would be invalidly taken where the trial judge failed to inquire defendant as to whether he understood charge against him and was aware of consequences of plea.[5]

TYPES OF PLEA BARGAINING

There are generally three types of plea bargains recognized:

Charge Bargaining

The most common form of plea bargaining, the defendant agrees to plead guilty to a lesser charge provided that greater charges will be dismissed. A typical example would be to plead to manslaughter rather than murder.

*Assistant Professor, SGGSWU, Fatehgarh Sahib.

Sentence Bargaining

It is far less common and more tightly controlled that charge bargaining, sentence bargaining is when a defendant agrees to plead guilty to the stated charge in return for a lighter sentence. Typically this must be reviewed by a judge, and many jurisdictions simply don't allow it.

Fact Bargaining

This is the least common form of plea bargaining, and it occurs when a defendant agrees to stipulate to certain facts in order to prevent other facts from being introduced into evidence. Many Courts don't allow it, and in general, most attorneys do not favor using fact bargains."[6]

PLEA BARGAINING IN INDIA

Plea bargaining has been introduced in India by an amendment[7] of the Code of Criminal Procedure, 1973.[8] A new chapter XXIA (containing sections 265A to 265L) has been inserted in the Code of Criminal Procedure, 1973. The Law Commission[9] has recommended to introduce plea-bargaining in India to dispose of the huge number of criminal trials pending in the Indian courts in an effective way. Later on the Malimath Committee[10] on Reforms of Criminal Justice System also endorsed the recommendations of the Law Commission and observed that Plea-bargaining would be effective to secure the convictions, to reduce the trial-period and pending cases.[11]

POSITION PRIOR TO THE CRIMINAL LAW AMENDMENT ACT, 2005

The Apex Court in many of the cases has examined the constitutionality of the sentence bargaining. In *Madanlal Ramchandra Daga* v. *State of Maharashtra*[12] Justice M. Hidayatullah disapproved the practice of the plea bargaining. Justice P.N. Bhagwati in *Kasambai Abdul Rahmanbhai Sheikh* v. *State of Gujarat*[13] has declared Plea bargaining as unconstitutional and illegal. In *Thippaswamy* v. *State of Karnataka*[14] the Supreme Court held that enhancement or imposition of sentence in appeal or revision after the accused had plea-bargained for a lighter sentence or mere fine in the trial court as unconstitutional being violative of Article 21. The Supreme Court decided that the disposal of the cases on the basis of plea bargaining is not permissible. Mere acceptance of guilt or admission should not be the ground for reduction of sentence.[15] In *State of U.P.* v. *Nasruddin*[16] the Supreme Court held that reduction of sentence to period already undergone as a result of plea bargaining would open a gate leading to serious miscarriage of justice. From the above decisions by the Apex Court it is clear that prior to the Criminal Law Amendment Act, 2005 the Indian Criminal Justice System never appreciated the plea-bargaining. To some extent, sentence bargaining was applied in cases where the nature of the punishment and power to reduce the quantum of the sentence was within the discretionary power of the trial courts.

POSITION AFTER THE CRIMINAL LAW AMENDMENT ACT, 2005

It is a welcome step in the Criminal Justice System and it has unique features.

Plea bargaining is applicable in respect of an accused alleged to have committed offences punishable upto seven years. Plea-bargaining does not apply where—

- the punishment for the offence is—death, imprisonment for life or imprisonment for a term exceeding seven years,

- where such offence affects the socio-economic condition of the country like offences under The Immoral Traffic (Prevention) Act,1956; The Protection of Civil Rights Act,1955; the Explosives Act,1884; etc.
- where such offence has been committed against a woman, or a child below the age of fourteen years.[17]

An accused of an offence may file an application in the court where the offence is pending for trial along with the brief description of the case. The affidavit by the accused shall also be submitted stating that he clearly understood the nature and extent of the punishment, there is no previous conviction and he voluntarily preferred plea-bargaining.[18] The complainant and the accused are given time to work out a mutually satisfactory disposal of the case, which may include compensation and other expenses incurred during the case to victim by accused.[19] Where the case has been satisfactorily disposed, the court may sentence the accused one-fourth of the punishment provided or extendable as the case may be.[20] The decision of the court in case of plea-bargaining is final and no appeal (except by the special leave petition under Article 136 and writ petition under Articles 226 and 227 of the Constitution) shall lie in any court against such judgement.[21] Also, the statement and the facts stated by the accused in an application for the plea-bargaining shall not be used for any other purpose other than for plea-bargaining.[22] Unlike America, plea-bargaining cannot be allowed to settle all types of the criminal cases in India. In India only sentence bargaining is allowed according to the provisions of the chapter XXIA of the Code of Criminal Procedure, 1973.

While commenting on the concept of plea bargaining, the Gujarat High Court observed in the *State of Gujarat* v. *Natwar Harchanji Thakor*[23] that the very object of the law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the pendency and delay in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static and it is really a measure of redressal and it shall add a new dimension in the realm of judicial reforms. In *Pardeep Gupta* v. *State*[24], Shiv Narayan Dingra J., observed that the trial court's rejection of the plea bargain shows that the learned trial court had not bothered to took into the provisions of chapter XXI A of Code of Criminal Procedure meant for the purpose of plea bargaining and rejected the application on the ground that since the applicant is involved in an offence under Section 120-B Indian Penal Code and the role of applicant was not lesser than the other co-accused. But none of the offences in which the petitioner had been booked attracted more than seven years punishment. The request of plea bargaining ought to be considered taking into account the role of the accused, and the nature of the offence, etc. The trial court could not have rejected the application for plea bargaining on the ground that he was involved in Section 120-B Indian Penal Code and therefore, the request for plea bargaining was not available to him. The attitude of the trial court revealed that it did not even read the provisions of chapter XXI A before considering the application. The High Court directed the trial court to reconsider the application of plea bargaining made by the accused in the light of provisions made in the Code of Criminal Procedure and not in a casual manner.

In *Guerrero Lugo Elvia Grissel & Ors.* v. *State of Maharashtra*,[25] the compensation of 55 Lac to the victim along with imprisonment of twenty-one months to the accused is awarded. Even this decision was of no benefit to the petitioners. In this case already eighteen years elapsed since the offence was committed.

It is clear from the review of pre as well as post-amendment judgments that plea bargaining is in a poor state in Indian criminal justice system as the number of cases reported under plea bargaining are very few.

BENEFITS OF PLEA BARGAINING

Plea bargaining seems to be beneficial to both the parties in the criminal justice system. Some of its advantages are as follow:

1. **Speedy Trial**: The Supreme Court has declared that right to speedy justice is a part of fundamental right under Article 21 of the Constitution. It is included in the concept of right to life and emphasizes the urgency to dispose of the cases without delay.[26] Plea-bargaining provides an opportunity to both the parties to avail its benefits.
2. **Saves Time**: On accused's acceptance of guilt, there is no need to go through the whole trial and therefore it saves the precious time of the courts. It will be helpful to reduce the work load of the courts.
3. **Leniency**: When a person pleads guilty, he pleads for lesser charge than the normal one and ultimately he will be awarded lesser sentence or punishment.
4. **Saves Money**: The parties need not to follow the lengthy trial and it saves accused from paying the large fee to Attorney.
5. **Sure Conviction of accused**: Sometimes due to inadequacy of the evidences, witnesses, etc. the prosecutor is unable to prove the guilt of the accused. In those very cases the guilty person gets acquitted. But in case of plea-bargaining, the accused is definitely convicted.
6. **Compensation to victim**: When both the parties together mutually dispose of the case, the victim can claim compensation from the accused too and such amount is great help to victim as amount of fine alone would not be sufficient.

CONCLUSION AND SUGGESTIONS

No doubt plea bargaining helps to dispose of the cases quickly, provides financial help to victim and it is time-saving. The introduction of new chapter of plea-bargaining in the Indian Penal Code, 1860 is a positive step towards it but apart from it, this plea-bargaining has some drawbacks or weaknesses and these should be corrected by making amendments.

1. Plea bargaining not applicable in offences against women and children below the age of 14 years. They cannot avail the benefit of compensation in plea-bargaining which can be more amount than the amount of fine.
2. Plea bargaining is not applicable if the crime is committed against child below fourteen years of age. If the crime is committed against the child of 15 years, the provision of plea-bargaining is applicable. What's the difference between the child of fourteen and fifteen years, one year hardly makes any difference. The classification is wrongly done.
3. In cases of joint-victims, if women being one of them, how plea-bargaining be made out. There is no clarity on this point.
4. No doubt, plea bargaining should not be allowed in all socio-economic offences but many of them are of petty nature and are committed for small benefits. Here, no difference made out between them. Excluding the socio-economic offences of serious or heinous nature, others should have been included in plea bargaining.

5. Plea bargaining has been connected with the quantum of sentence or offence not by the nature or morality of the offence.
6. The 1/4th specification of sentence to be awarded in plea-bargaining cases is again not proper. It should be extended whether upto 1/4th or 1/4th exactly, not specifically prescribed. It should be expressly mentioned as to avoid confusion.
7. The appeal lies only by way of Writ Jurisdiction or by special leave to appeal.
8. Plea bargaining impairs the human rights of the accused. He is brought into a situation to accept his guilt and no need to prove his guilt.
9. Plea bargaining is most favorable to the progressive countries. India is not that much progressive as the literacy rate is low here. Many of the people are illiterate and they are unable to avail the benefits of Plea-bargaining. It can be misused also.
10. Plea bargaining seems to be adversely affecting the poor and favorable to rich. The rich people can buy their freedom or release.
11. Plea bargaining can sometimes lead to forced acceptance of guilt, when one has not committed any crime.
12. Sometimes, innocent people will often take a guilty plea bargain. This is done out of fear of being found guilty by a jury in a trial or to avoid the lengthy trial.

Every law has some benefits and loopholes. The deficiencies existing in law should be removed as to make it suitable to meet demands of people or society. Thus, from the above study we can conclude that plea bargaining is no doubt a welcome measure in the Criminal System. It should be cautiously applied by the Courts to impart justice. The Court should satisfy itself that the accused pleading guilty is doing it with his free consent i.e. voluntarily and with full knowledge of its consequences. Also, the hearing should take place in the Court. The Indian Criminal Courts are too burdened by already pending cases, so it's not possible to allow every case to go for a trial. With the passage of time it can be concluded whether it seems to be justified/fair or not.

Notes and References

1. Bryan A. Garner, (ed.) *Black's Law Dictionary,* 1173 (St. Paul, Minn: West Group, 7th edn., 2000).
2. Joseph W. Vanover, "Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice", II, *JDR,* 183 (1998).
3. Dr. Deepa Singh and Dr. K.P. Singh , *Criminology, Penology and Victimology,* 308 (The Bright Law House, New Delhi, 1st edn., 2013).
4. *Brady* v. *United States*, 397 U.S. 742 (1970).
5. *McCarthy* v. *United States*, 394 U.S. 459 (1969).
6. Plea Bargains: In Depth, *available at*: http://criminal.findlaw.com/criminal-procedure/plea-bargains-in-depth.html (visited on December 17, 2016).
7. Criminal Law Amendment Act, 2005.
8. Act No. 2 of 1974.
9. Law Commission of India, 142nd Report on Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining (August, 1991) and 154th Report on The Code of Criminal Procedure, 1973 (August 1996).
10. Malimath Committee was appointed by Ministry of Home Affairs, Govt. of India on 24 Nov. 2000 to consider measures for restoring of the Criminal Justice System.
11. Government of India, Report: *Malimath Committee on Reforms of Criminal Justice System* (Ministry of Home Affairs, 2003).
12. AIR 1968 SC 1267.
13. AIR 1980 SC 854.

14. AIR 1983 SC 747.
15. *State of U.P.* v. *Chandrika*, AIR 2000 SC 164.
16. (2000) 10 SCC 336.
17. The Code of Criminal Procedure, 1973, Section 265A.
18. *Id*. Section 265B.
19. *Id*. Sections 265C and 265 D.
20. *Id*. Section 265E.
21. *Id*. Section 265G.
22. *Id*. Section 265K.
23. *2005* Cri. LJ 2957.
24. 1993 Cri. LJ 1671.
25. 2012 Cri. LJ 1136 (Bom.).
26. *Hussainara Khatoon & Ors.* v. *Home Secretary, State of Bihar*, 1979 AIR 1369.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 80-84

Sex Selection and Abortion

Comprehensive Approach in Indian Context

Suman Rinwa*

To become a mother is a complete transformation of a woman; it is messy, joyful, complicated and exhausting experience of life. Child is a treasure which pleasure to mother. To become a mother, brings a joy in any family to become a mother of male child is a matter of great pride for a family. Preference for a male child is deeply rooted in culture and tradition of India. Most parents give first priority to their son while daughter is usually considered as a burden. **Son mania** is in our culture, not only in India but almost in every country of Asia.

The desire of having a Son results in female foeticide or termination of pregnancy based on predicted sex of the baby, which is known as **Sex Selective Abortion**. This is not about abortion only but much larger problem than that: the worth of a woman's life. The number of abortions due to reason of sex selection of a unborn child has been increasing in last few decades which is alarming for human race. According to a new United Nations Organisation's study mortality rate of girls is 75 per cent higher than that of boys, this show that people are partial and in careless in nurturing a girl child. Already by nature, 105 boys are born per 100 girls but now in present sphere of time 112 boys are born per 100 girls.

Sex ratio was satisfying in India till independence, thereafter it is declining as per census reports. Although due to awareness, education and strict laws it has improved a little bit but still condition is not satisfying. In the population census of 2011, it was revealed that the sex ratio in India is 940 females per 1000 males which is upward than census of 2001 (933 females per 1000 males). The Times of India conducted a survey which is reported in 29th January, 2019 news paper; as per the survey, sex ratio in Southern states is declining to a state of worry. States like Haryana, Punjab, and Maharashtra are improving their sex ratios and southern states like Andhra Pradesh, Karnataka are declining with a disastrous speed. Worst sex ratios in 2016 were in Andhra Pradesh and Rajasthan, that is, 806 females per 1000 males.

REASONS BEHIND NEED OF SEX-SELECTION

1. Historical view about patriarchal family where males carry hierarchy and name family.
2. Men were bread earner of family.
3. As per cultural norms women after marriage leave her native place and family where she was born and brought up.
4. In male dominating society, family with more sons became stronger.
5. Now days in nuclear families, male child completes the family.

*M.A., LL.M., Advocate, Jodhpur High Court, Rajasthan.

6. Females are more vulnerable to sexual abuse and molestation.
7. Dowry is also one of the main causes.
8. Rearing and caring of a girl child is different from that of a male child. They need more facilities and security.
9. Misuse of medical technological advancement.
10. Parents and Grand-Parents feel honoured and blessed with a boy baby, on the other hand, they feel ashamed when a girl comes to their family.
11. Illiteracy, insecurity and poverty are some reasons which make people feel girl as a burden.
12. Son is considered as a family asset while girl is considered as a liability.
13. As per almost all religions, son is liable to fulfil after death ceremonies.

RELIGION AND ABORTION

No religion gives consent to terminate the pregnancy (especially when the baby is girl) by any means. It is considered as non-practicable and way to hell.

Hinduism

Hinduism is based on dualistic model consisting of ATAM (soul) and PRAKRITI (matter). There are different views about time of ensoulment and consciousness of foetus in the womb but the practice of abortion is negatively described in Hindu Scriptures. Female is considered as a Goddess in Hindu religion and aborting foetus because of its sex is considered as a biggest SIN, as if killing a Brahmin (Brahmhatya).

Christian and Jewish

Both the above religions oppose sex-selective abortions very strongly. A profile movement by Christian community was pushed, leading to vote on the bill to ban the sex-selective abortions.

Buddhism

It is very clear from various sources that sex-selective abortions have been disapproved by Buddhist religion also. Buddhism follows non-violence and killing a life in womb because she is female is completely violence.

MORAL AND ETHICAL VIEWS ON SEX-SELECTIVE ABORTIONS

1. A decision to abort a child because it is a girl cannot be morally and ethically considered as a 'Right Action'.
2. In India it is not limited to female foeticide but extends to GIRL INFANTICIDE, which is a murder and murder is wrong from all view points.
3. There is a great need of growth in women population but how it can be possible while we are not allowing them to take birth. Who are we to stop them to have a happy and life on Earth?
4. Abortion is considered as a eternal controversy :
   (a) Pro-life—Human life is very sacred. Abortion is considered morally wrong and should be criminalized as murder.
   (b) Pro-choice—Women has right to terminate the pregnancy regardless of any reason.
5. Generally women are not in favour of abortion which is selective. Many feminist believe that the entire control on their reproductive life should be free from male and family dominance.

IMPACT OF FEMALE SELECTIVE ABORTIONS IN INDIA

1. Excessive decline in number of girls. Amartya Sen has suggested it as MISSING WOMEN.
2. Decrease in proportion of women to men, leads to increase in female trafficking and sex works (both forced and self-elected).
3. Increase in pornography, violent sexual crimes (rape, acid attack molestation, etc.) or we can say there is increase in sex industry.
4. Unmatched or mismatched marriages (increased age difference between male and female).
5. Families having sons as first or second child are small and families, in need of son are bigger / larger.
6. Partial attitude towards girls in education, health and other necessary facilities.
7. Concept of exchange marriage is very common that is, the family which gives girl can take the girl.
8. Increased use of bride purchase in remote areas.
9. Having a son is a matter of pride and women having daughters receive only social disrespect.
10. Ill-effect on health of women facing abortions.
11. There is no dispute that over the next 20 years, in India, there will be 10 per cent to 20 per cent surplus men.
12. Increased psychological problems in men as they are unable to fulfil traditional expectations of marrying and having children.
13. Cases like Baby FALAK (a small girl admitted in AIIMS, Delhi with multiple fractures and injuries; she got this much of pain by family members because she was a unwanted girl).
14. Sex determination and abortion is emerging as a business due to industrialization of health sector.

LAWS RELATED TO ABORTION IN INDIA

Abortion in Indian law is defined as an untimely termination of the foetus any time before the natural time of birth of child from mother's womb. As per medical language, abortion is untimely delivery of a child before it is viable, and it is viable from 28th week of pregnancy.

Medical termination of pregnancy (MTP) Act, 1971, refers to the deliberate medical termination of pregnancy in two ways:

1. **Medical-Abortion**—This process involves termination of pregnancy by pills and medicine with a non-surgical process before seven weeks of pregnancy.
2. **Surgical-Abortion**—After seven weeks of pregnancy surgical abortion is performed with the consent of women till twelve weeks. For abortion between twelve to twenty weeks approval of two gynaecologists is required.

This Act was amended in years 2003 and 2004.

Indian Penal Code, 1860 also deals with termination of pregnancy but it is not directly related to abortion. What it deals with is miscarriage under sections 312-316 of the Code.

Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994 was enacted in India to check female foeticides. This Act—

1. Banned pre-natal sex-determination.
2. Prohibition of sex-selection before or after conception.
3. Regulates the use of pre-natal diagnostic techniques (not to be used for sex-determination).
4. No person, indulged in ultrasound process will communicate sex of foetus to pregnant woman or her relatives by words, signs or any other means.
5. Any person or organisation that is advertising for sex-determination can be imprisoned for 3 years and Rs 10,000 fine.
6. All the centres and Labs must be registered.

This Act was amended in 2003 to make this Act stricter.

GOVERNMENT MEASURES TO CONTROL SEX-SELECTIVE ABORTIONS

1. Indian Government has opposed practice of female foeticide and female infanticide but implication of laws is slow, ineffective and less strict.
2. The Dowry Prohibition Act was passed in 1961 and revised in the years 1983 and 1985.
3. Various investment schemes for girls with a good rate of interest.
4. Free and reasonable charges for education of girls.
5. Strict provisions in Domestic Violence Act, 2005.
6. Equal rights and duties are provided and imposed to girls.
7. Reservation to women in education and Government jobs.
8. Various schemes in which a lump-sum amount is given to girls from birth till marriage for education and marriage.
9. Free legal aid and special police stations for women where they can complaint about their forced abortions.
10. Women commissions to solve matters relating to women: their life and dignity.
11. Various scholarships and easy loans for educational encouragement of girls in higher education.
12. Various nutritional and vaccination programs for pregnant women at government hospitals and Aangan Bari centres.
13. Motivational and educational sessions along with advertisement to save the Girl Child.
14. Special provisions for punishment for those who are indulged in molestation of girl and heinous crimes against her body and soul.

SUGGESTIONS FOR PREVENTION OF SEX-SELECTIVE ABORTIONS IN INDIA

1. Permanent termination of Doctor's licence of practice, who is indulged in such a shameful act against humanity.
2. Heavy penalty should be imposed on the companies producing specialized medical instruments for this purpose.
3. Heavy fine and punishment provisions for parents involved in this act.
4. Widespread campaigns and seminars to educate and make would-be parents aware that girl is not a burden but a pride for any family.
5. More rights and facilities should be provided to girls. Although there are many laws in support of girls but maximum of them are not aware about these laws.

6. Abolishing dowry system. There are laws for prohibition of dowry; still it is increasing day-by-day due to lack of awareness in layman.
7. More programs are required for gender equality by government and NGOs.
8. Gaps of educations, health, nutrition, laws and human rights should be removed among men and women.
9. Data of all ultrasound machines should be controlled by government authorities.
10. Sex-selective abortions should be treated as murder.
11. Families involved in this act should be boycotted by the society and they should not get any government facility or opportunity.
12. Religious preachers should be involved in educating people to not to commit this SIN.
13. Schools and colleges must educate senior students about feminine respect.

CONCLUSION

Sex-selective abortions are better called female-selective abortions. This is an alarming problem for human race and women dignity and can be controlled by public awareness only. There are many laws and provisions for girls and women to empower them. Governments are also taking various measures to strengthen women power so that girls are not treated as a burden or liability. A son and a daughter should be treated equally because in 21st century, women has entered in almost all domain areas of men and working with perfection more than men.

Personally I believe that sex determination of foetus should be banned completely but alone government cannot check and control this problem without public awareness, especially co-operation of expecting parents. As per all religions it is a sin and morally no one should attempt to commit this sin. The parents who are expecting must think for a while, what if their mother had aborted them in womb? We are no one to kill a life in womb because of her gender. The girl in womb should be treated as if she is a blessing of God. At last, I would like to conclude as—

SAVE GIRL, SAVE HUMANITY.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 85-95

Concept of Agricultural Insurance

Historical Perspective

Prabhjot Kaur Ghuman*

INTRODUCTION

The universe as a whole is created, as a thing created it is but natural that, it will be destroyed. Creation is inevitably followed by destruction. Destruction is an optimum change to the worse in that sense change is a natural course and its occurrence involves risk. Risk is therefore inevitable in life. Business is a course of life so in life and business there lie a variety of risks. Risk is closely connected with ownership. The owners want to save themselves from risk and out of this desire are the businesses of insurance born.[1]

The aim of all insurance is to protect the owner from a variety of risks which he anticipates. He who seeks this protection is called the assured or insured and the other person who takes the risk by undertaking to protect that other from loss is called their underwriter or insurer and he does this for a small consideration called the premium. So a contract of insurance may be defined as a contract whereby one person undertakes in return for the agreed consideration to pay to another person a sum of money or its equivalent on the happening of a specified event. The happening of a specified event must involve some loss to the assured or at least should expose him to adversity which is in the law of insurance commonly called the risk.[2]

The main role of insurance in society is to spread risk and if the risk materializes, to spread the resulting loss. Thus, the few who need it can be compensated from the contribution paid by the many who do not need it but who, as people who are risk—averse, need the reassurance that, if they were the ones in need, they too would be compensated.[3]

The fundamental function of insurance is to shift the loss suffered by a sole individual to a willing and capable professional risk bearer in consideration of a comparatively small contribution called the premium. Insurance is a process whereby the risk of financial loss arising from death or disability of a person of damage, deterioration, destruction a loss of property awing to perils to which they are exposed, is assumed to another.[4]

MEANING, CONCEPT AND NATURE OF INSURANCE LAW

The dictionary meaning of insurance is “undertaking a company, society or the State, to provide safeguard against loss provision against sickness, death of a return for regular payment.[5]

A contract in which one party agrees for payment of a consideration to make monetary provision for the other upon the occurrence of some event or against some risk.[6]

*Research Scholar, Punjabi University, Patiala (Punjab).

Insurance is defined as a co-operative device to spread the loss caused by a particular risk over a number of persons who are exposed to it and who agree to ensure themselves against that risk. Risk is un-certainty of a financial loss. [7]

CONTRACT OF INSURANCE

The contract of insurance may be defined as "a contract either to indemnify a person against the loss, which may arise on the happening of an event or to pay a certain sum of money on the happening of a specified event for an agreed consideration."[8] The person to be paid or indemnified is called 'policy-holder'. The other party who undertakes to indemnify or pay money is called 'insurance company'. The consideration for the risk undertaken is called 'premium' and the document containing the terms and conditions of the insurance contract is called 'insurance policy'.

Since insurance is a contract, certain sections of contract Act, 1872 are applicable. As per Sec. 10, "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and which are not hereby expressly declared to be void."[9]

As we know that the insurance contract involves the elements of general contract. So as per Sec. 10[10], "the valid insurance contract must have the following essentials:

(1) Offer and Acceptance

An offer may be defined as the offeror's willingness or promise to do or to refrain from doing something in the future. Acceptance consists of either doing the act asked by the offeror or making a promissory expression of assent to the terms of the offeror.[11]

As per Sec. 2 (a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal."[12]

Sec. 2(b)[13] provides, "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise."

Thus an offer or a proposal consists of 2 things:

(i) A promise by the offeror.
(ii) A request to the offeror for something in return. In insurance, the publication of prospectus, the canvassing of the agents are invitations to offer.[14]

(2) Competence of Parties

"All agreements are contract if they made by the free consent of the parties competent to contract."[15]

Thus, this section requires parties to be competent to contract. Every person is competent to contract who is of the age of majority being 18 years, according to the law to which he is subject, and who is of a sound mind and is not disqualified from contracting by any law to which he is subject.[16]

A minor is not competent to contract. A minor is a person who is under the age of eighteen years. A contract by a minor is void except contract for necessaries. And a person of unsound mind cannot enter into any contract. But incompetent person can still be beneficiary under a Contract of Insurance. In *Great American Insurance Co.* v. *Madan Lal Sonulal*[17], it has been held that a minor's property must be insured by persons competent to act for him. He would be entitled to recover the insurance money. The court rejected the

defence of the insurance company that the person on whose behalf the goods were insured was a minor and allowed the minor to recover the insurance money.

(3) Free Consent

Contract Act, 1872 defines[18] 'consent is said to be free when it is not caused by Coercion (defined in S.15), undue influence (S.16), Fraud (S.17), misrepresentation (S.18) and mistake (Ss. 20, 21, 22). In the absence of free consent' there can be no valid contract.

In *P. Sarojan v LIC*[19], it has been observed that where false answers as to the state of health were given in a proposal for life insurance, the policy was to be voidable and it was not material that the medical officer of the corporation had certified the life assured as good.

So we says that in Insurance Contracts, where the consent of one party or the other has been induced by Coercion, undue influence, misrepresentation or fraud or where both parties were consenting under a mistake then the contract would be voidable at the opinion of insurer.[20]

Utmost Good Faith : The duty of utmost good faith can be defined as 'a positive duty to voluntarily disclose, accurately and fully, all facts materials to the risk being proposed, whether asked for them or not.'

The law imposes a duty of uberrima fides or 'utmost good' faith on the parties to an insurance contract. The contract is deemed to be one of faith or trust, and most contracts of a fiduciary nature are subject to the same doctrine.[21]

The assured is under a duty to disclose all material facts relating to the insurance which he proposes to effect. He must make no misrepresentation regarding such facts. Usually, however, these duties are modified by the terms of the contract.[22]

(4) Legal Consideration

Consideration is the price of a promise a return for a promise made.[23] It is essential for formation of a contract. It may take the form of a money payment, a delivery of goods, a promise of money payment.[24]

NATURE OF INSURANCE

The main role of insurance in society is to spread risk and if the risk materializes, to spread the resulting loss. Thus, the few who need it can be compensated from the contributions paid by the many who do not need it.[25] The insurance has the following characteristics which are, generally observed in case of life, marine, fire and general insurance.

1. **Sharing of Risk:** Insurance is a device to share the financial losses which might be fall on an individual or his family on the happening of a specified event. The event may be death of an individual, theft, accident of vehicle, etc. The loss arising from these events if insured are shared by all the insured in the form of premium.[26]
2. **Co-operative Device:** The most important feature of insurance plan is the co-operation of large number of persons who agree to share the financial loss arising due to a particular risk which is insured. An Insurer would be able to compensate all the losses from his own capital. So by insuring a large number of persons, he is able to pay the amount of loss.[27]
3. **Value of Risk:** The risk is evaluated before insuring to charge the amount of share

of an insured, herein called consideration or premium. There are several methods of evaluation of risks. If there is expectation of more loss, higher premium may be charged. So, the probability of loss is calculated at the time of insurance.[28]

4. **Payment at contingency:** The payment is made at a certain contingency insured. If the contingency occurs, payment is made otherwise no amount is given to the policyholder.[29]
5. **Amount of Payment:** The amount of payment depends upon the value of loss occurred due to the particular insured risk. The insurer promises to pay a fixed sum on the happening of an event. It is immaterial in life insurance what was the amount of loss at the time of contingency. But in property and general insurances, the amount of loss are required to be proved.[30]
6. **Large number of Insured Persons:** To make the insurance cheaper, it is essential to ensure large number of persons or property because the lesser would be cost of insurance and so the lower would be premium.[31]

DEFINITION OF INSURANCE

According to Maclean, "Insurance is a method of spreading over a large number of persons a possible financial loss too serious to be conveniently borne by an individual. Insurance thus serves the social purpose because it is a social device whereby uncertain risks of individual may be combined in a group and this made more certain small periodic contribution of the individuals providing a fund out of which those who suffer losses may be reimbursed.[32]

Magee D. H says that "Insurance is a plan by which large number of people associated themselves, to the shoulders of all, risks attach to individuals".[33]

MEANING OF AGRICULTURAL INSURANCE

The Latin root of agriculture is agri or 'field' plus cultura, 'cultivation'. Cultivating a piece of land, or planting and growing food plants on it, is largely what agriculture means. Raising animals for meat or milk also falls under the category of agriculture.[34]

As per Oxford Dictionary 'Agriculture' means the science or practice of farming including cultivation of soils for growing of crops and rearing animals to provide food, wool and other products.[35]

Agriculture plays an important role in Indian Economy. It contributes nearly one-fourth of the national income. About 16.7 per cent of world population lives in India and Indian Agriculture is able to satisfy country's requirement of food grains. Moreover, agriculture supplies raw material to industrial sector such as cotton, jute, sugarcane, tobacco, etc. It provides large business to railways and railway provides employment to several people.[36]

Agricultural insurance is an important component of risk management in agriculture. It is an area of insurance that is technically demanding.[37]

Agricultural related insurance covered under the miscellaneous insurance business. Insurance Act defined the 'Miscellaneous Insurance Business' as the business of affecting contracts of insurance which is not principally or wholly of any kind or kinds included in life, Fire and Marine Insurance.[38]

Agriculture production in India is frequently affected by natural disasters such as droughts, floods. Cyclones, storms, landslides and earthquakes. Susceptibility of agriculture to these disasters is compounded by the outbreak of epidemics and man-made disasters

such as fire, sale of spurious seeds, fertilizers and pesticides, price crashes, etc. All these events severely affect farmers through loss in production and farm income. But agricultural insurance is a means of protecting the agriculturist against financial losses due to uncertain natural and manmade events.[39]

Indian agriculture is heavily dependent on rainfall which largely occurs during monsoon season of about two and half months. The abnormal behaviour of monsoon may cause natural disasters such as scarcity conditions or drought, floods, cyclones, etc. On an average 12 million hectares of crops area is affected annually by these calamities severely impacting the yields and total agricultural production.[40] Crop insurance provides cover against unavoidable loss of production due to or arising as a result of one more of the following causes:

(a) Climatic reasons such as drought flood and cyclone
(b) Pest infection
(c) Plant diseases
(d) Riots and strikes[41]

Horticulture crops, includes Grapes, Citrus (orange, lime, sweet lime), Chikoo (Sapota), Pomegranate, Banana, Mushroom, Papaya, Coconut. Plantation covered Rubber, Eucalyptus, Poplar, Teakwood, Oil Palm, Betelvine.

This scheme of insurance also covered Sugarcane, Tea, Floriculture, Polyhouse/ Glass house, Nurserys, Tissue Culture, etc. [42]

The silk worm's insurance policy is applicable to mulberry silkworms only of univoltine, bivoltine or multivoltine breed. Indemnity is in respect of total loss or destruction of the cocoons, following the death of silkworm due to accident or disease during the period of insurance.[43]

The Honey Bee insurance policy indemnifies the insured against all accidental losses or damages to the hire and/or Bee colony subject to the exclusion of loss of production, malicious or willful act or neglect or improper management, theft, clandestine sale or missing of worms, war invasion, act of foreign enemy, civil war, accident loss, theft risk can be covered on payment of additional premium.[44]

Agricultural Pumpsets insurance policy indemnifies the insured against unforeseen and sudden physical damage to the pumpsets caused by solely due to mechanical/electrical breakdown, fire and lighting, theft and burglary. The insurance is granted on Centrifugal Pump sets (electrical and diesel) up to 25 M. (capacity of approved makes used for agricultural purposes only).[45]

The 'failed well insurance' applies to dug wells, bore wells or dug-*cum*-bore wells used for developing ground water and financed by cooperative/commercial banks and sponsored by National Bank for Agriculture and Rural Development (NABARD). On the other hand, the new well insurance is applicable to drug wells or borewells which are being newly installed. The sum insured shall be limited to a maximum of Rs. 12000 per well.[46]

Left Irrigation Insurance covers intake well, delivery chambers, jack well, pump house, water storage task, pipeline cables, switch gears, starters and electrical motors of capacity from 3 HP to 200 HP.[47]

Agricultural production is mainstay for millions of low income families across the world. Agricultural micro-insurance aimed at low-income farmers involves the transfer of agricultural risks through conventional and index based parametric solutions. It provides a safety net to small scale farmers by insuring them against loss of income.[48]

NEED FOR AGRICULTURAL INSURANCE

Agricultural forms an indispensable part of the Indian economy. Despite its importance, it is still dependent on vagaries of nature. Natural calamities and untimely nature process can have cataclysmic effects on the health of agricultural output and thus on farmers too. In India wherein 60% population is dependent on agriculture, of which more than 70% are small and marginal farmers. Crop failure due to natural calamities not only impacts the economic condition of the farmers but also slows down the whole economic growth.[49] There are number of problems faced by the farmers, namely:

1. **Weather and Climate Change:** The weather in India these days has become erratic at best and rainfall does not happen at right time. Moderate rainfall, which is needed so much for proper agriculture, is now becoming a thing of the past.[50]
2. **Scales of Operation:** Real Estate prices have gone up to such a level that people are finding it hard to buy a home as it is. Majority of people who have their own land have got it from their ancestors. After the death of farmer his land is divided among his sons, it leaves precious little for farmer. This is the reason that the scale of operations here is so small.[51]
3. **Good Quality of Seeds:** Seed is critical and basic input for attaining higher crop yields and sustained growth in agricultural production. Good quality seeds are out of reach of the majority of farmers, especially, small and marginal farmers mainly because of exorbitant prices of better seeds.[52]
4. **Infertile Land and Lack of Infrastructure in Agricultural Sector:** Another major problem for agricultural productivity is that the soil is contaminated by the increasing level of river and canal pollution which is caused by high industrial effluents and toxic metals day-by-day.[53]
5. **Illiteracy and Inequality and Lack of Finances:** Illiteracy, lack of awareness about the recent development in the field of agriculture and poor socio-economic background of the farmers are some fundamental reasons for continuously decreasing agricultural productivity. High level of income gap between rich and poor farmers, agricultural and non-agricultural employees are responsible for non-fulfilment of even the basic necessities of Indian farmers. So we can says that agricultural insurance plays a significant role to protect the farmers against losses suffered by them due to crop failure on account of natural calamities.

HISTORICAL BACKGROUND OF AGRICULTURAL INSURANCE

The origin of insurance is lost in antiquity. The earliest traces of insurance in the ancient world are found in the form of marine trade loans or carriers contracts which included an element of insurance. Evidence on record that arrangements embodying the idea of insurance were made in Babylonia and India at quite an early period.[54]

In Rigveda, the most sacred book of India, references were made to the concept 'Yogakshema' more or less akin to the well-being and security of the people. The codes of Hammurabi and of many had recognized the advisability of provision for sharing the future losses.[55]

INTERNATIONAL PERSPECTIVE

Many developing countries have seen major shifts in their agricultural policies towards the modernization of the agricultural sector over the past two decates. The change in policy

contributed to more sustainable growth of the sector, although growth was slower than in non-agricultural sectors. Farmers and herders face a range of risks, including idiosyncratic risks (such as fire, hail, and health) which affect them independently and systemic risks (such as drought, epidemic diseases and price), which affect a large number of producers at the same time.[56] Between the 1950s and the 1980s, there was major growth in public sector Multiple Peril Crop Insurance (MPCI) programs in Latin America (e.g., Brazil, Costa Rica and Mexico) and Asia. (e.g.: India, the Philippines), often linked to seasonal production credit progress for small farmers. Agricultural (crop and livestock) insurance is currently available in more than 100 countries either as well developed programs or pilots.[57] In the following countries agriculture insurance is used as important risk mitigation tool and is largely based on the World Bank's Review:

- Public sector crop insurance in Brazil dates back to 1954 when the Federal government of Brazil formed PROAGRO (Guarantee program for Agriculture and Livestock Activities, Programme Garantia da ActividadeAgropequaria), a national, individual grower multi-peril crop insurance (MPCI) program linked to crop credit.[58]
- Single-risk insurance for hail is the most developed insurance with a long history and exists in all countries. For several countries in particular for Belgium, Germany, Netherlands, UK and Ireland, hail insurance or single product insurance are the main insurance.[59]
- In the United States, a subsidized multi-peril federal insurance program, administered by the Risk Management Agency is available to most farmers. The program is authorized by the Federal Crop Insurance Act. The Federal Crop Insurance Reform Act of 1994 dramatically restructured the program. And in 1996, the Risk Management Agency (RMA) was created in the U.S. Department of Agriculture to administer the Federal Crop Insurance Program[60].
- In Canada, the federal government passed the Crop Insurance Act. The Act would assist the provinces in making affordable crop insurance available to producers. Federally, the crop Insurance Program evolved into the Production Insurance Program and is now known as Agri Insurance. The Federal Agri Insurance Program falls under Farm Income Protection Act and is guided by the Canada Production Insurance Regulations and Growing Forward.[61]
- In Japan in 1929 the livestock Insurance Act was enacted as a modern disaster relief measure. The Crop Insurance Act was established in 1938. Further, the Agricultural Cooperative Association Law was enacted in 1947. This law became the main pillar of the reorganization of agricultural organizations as a part of the democratization and modernization of farm villages in Japan. Under this law, the Agricultural Disaster Compensation Program aims at providing stability to farm businesses by compensating losses that farmers may incur as a result of unexpected accidents.[62]

NATIONAL PERSPECTIVE

An Agriculture Insurance scheme was examined soon after the Independence in 1947. Following an assurance given in this regard by the then Ministry of Food and Agriculture (MOFA) in the Central Legislature to introduce crop and cattle insurance, a special study was commissioned during 1947-48 to consider whether insurance should follow an 'individual approach' or a 'homogenous area approach'. The study favoured 'homogenous

area approach'. In 1965, the government introduced a Crop Insurance Bill and circulated a model scheme of crop insurance on a compulsory basis to State governments for their views. The bill provided for the Central government to frame a reinsurance scheme to cover indemnity obligations of the States.[63]

However, none of the States favoured the scheme because of the financial obligations involved in it. On receiving the reactions of the State governments, the subject was referred to an Expert Committee headed by the then Chairman, Agricultural Price Commission, in July 1970 for full examination of the economic, administrative, financial and actuarial implications of the subject.[64]

INSURANCE SCHEMES AND REPORTS OF COMMISSIONS AND COMMITTEES

(1) First Individual Approach Scheme (1972-78)

The General Insurance Department of Life Insurance Corporation of India introduced a crop insurance scheme on H-4 cotton. The General Insurance Corporation of India took over the experimental scheme in respect of H-4 cotton grown by small and marginal farmers. This scheme was based on 'individual approach' and later included Groundnut, Wheat and Potato and was implemented in the States of Gujarat, Maharashtra, Tamil Nadu, Andhra Pradesh, Karnataka and West Bengal.[65]

(2) Pilot Crop Insurance Scheme (1979-84)

Upon the recommendations of Prof. V.M. Dandekar, a Pilot Crop Insurance Scheme was launched by the General Insurance Corporation in 1979, which was based on 'Area Approach' for providing cover against a decline in crop yield below the threshold level.[66]

(3) Comprehensive Crop Insurance Scheme (1985-99)

The Comprehensive Crop Insurance Scheme was introduced with effect from 1st April 1985 by the Government of India with the active participation of State Governments. The scheme was optional for the States.[67]

(4) Modified National Agricultural Insurance Scheme

The main purpose of this scheme was to provide insurance coverage and financial support to the farmers in the event of prevented sowing and failure of any of the notified crop as a result of natural calamities, pests and diseases. This scheme also encourage the farmers to adopt progressive farming practices, high value inputs and better technology in agriculture.[68]

(5) Weather-based Crop Insurance Scheme

The aim of this scheme is to mitigate a hardships of insured farmers against likelihood of financial loss on account of anticipated crop loss resulting from incidence of adverse conditions of weather parameters like deficit and excess rainfall, frost, heat (temperature), relative humidity, etc.[69]

(6) Pradhan Mantri Fasal Bima Yojana

The government's new Pradhan Mantri Fasal Bima Yojana promises a departure from the existing crop insurance schemes. These currently cap the premises at 8-9 per cent of the sum insured for Rabi food grains and oilseeds and at 12-13 per cent for annual commercial and horticulture crops.[70] Under the Bima Yojana all risks are covered. Post-harvest losses due to cyclone, rain or thunder are covered for farmers across India. It also covers loss due

to adverse weather conditions preventing sowing of crops after expenditure has been incurred.[71]

(7) Report of the Working Group on Risk Management in Agriculture (for the Eleventh Five Year Plan: 2007-12)

The agricultural sector is exposed to a variety of risks which occur high frequency. These includes climate and weather risks, natural catastrophes pest and diseases, which cause highly variable production outcomes.[72]

(8) From time to time there are various committee reports related to the insurance sector are given by the insurance regulatory and development authority of India, namely:

(i) Report of Expert Committee on Remuneration system for Insurance Brakes (22.12.2003)
(ii) Report of Justice Rangarajan Committee (17.06.2004)
(iii) Report of the KPN Committee on provisions of the Insurance Act, 1938 (30.08.2005)
(iv) Report of the Committee on Health Insurance for Senior Citizens (07.12.2007)
(v) Claim Development Analysis of Motor Third Party Claims (09.11.2010)
(vi) Survey Regarding Insurance Awareness level (14.02.2012)
(vii) Report of the Expert Committee on Health Insurance (22.05.2015).[73]

(9) 190th Report of Law Commission on the Revision of the Insurance Act, 1938 and the Insurance Regulatory and development Authority Act, 1999 (June 2004)

In this report, the commission is of the view that the Insurance Act, 1938 requires review and revision. But the revision of the act has to be carried out in such a manner that it should not only promote insurance business but also protect the interest of policyholders and strengthen the IRDA to insure financial stability in this sector.[74]

CONCLUSION

The above discussion clearly focuses upon the historical aspect of agriculture insurance. As we know that farmers face floods, drought, pests, disease and a plethora of other natural disasters. Insurance is a risk management tool that farmers can use in today's agricultural world. By paying insurance premium, farmers get their risks covered. Farmers in India have been subjected to publically administered insurance schemes since 1972. Every scheme has been flawed, yet the Government of India is still attempting to strengthen agriculture by protecting its farmers from the various risks. The market for agriculture insurance in developing countries, is no doubt, as vast acreage under cultivation. However, at the present stage of development of agriculture insurance, coverage of crops, areas and farmers will vary from country to country, depending upon national priorities and also the objectives set and the limitations imposed under various insurance schemes.

NOTES AND REFRENCES

1. K.S.N. Murthy and Dr. K.V.S. Sharma, *Modern Law of Insurance,* 3 (2009).
2. *Ibid*.
3. Surender Manola, Insurance Management, 12 (2004).
4. *Supra* note 1 at 4.
5. www.oxforddichonaries.com>definition*visited* on 18/07/2016.
6. Oxford Dictionary of Law, 288 (2009).
7. M.N. Mishra and S.B. Mishra, *Insurance Principles and Practice,* 3 (2016).

8. Dr. S.R. Myneni, Law of Insurance, 39 (2015)
9. *Indian Contract Act*, 1872.
10. *Ibid*.
11. Robert E. Schultz and Edward C. Bardwell, *Property Insurance*, 8 (1960).
12. *Supra* note 9.
13. *Ibid*.
14. Robert I. Mehr and Emerson Cammack, *Principles of Insurance* 10 (1957).
15. *Supra* note 9, s.10.
16. *Ibid*.
17. ILR (1935) 59 Bom 656.
18. *Supra* note 9 at S.14.
19. AIR 1986 Ker. 201.
20. S. 45, *The Insurance Act*, 1938.
21. Julia Holyoake and William Weipers, *Insurance*, 134-35 (2002).
22. E.R. Hardy Ivamy, *General Principles of Insurance Law*, 132 (1978).
23. *Supra* note 9 at S. 2(d).
24. *Supra* note 8 at 42.
25. *Supra* note 3 at 12.
26. *Supra* note 8 at 5.
27. Nalini Prava Tripathy and Prabir Pal, *Insurance Theory and Pratice*, 10 (2007).
28. *Ibid*.
29. Harold E. Raynes, *Insurance*, 48 (1960).
30. S.S. Huebher, Kenneth Black, J.R. and Robert S. Cline, *Property and Liability Insurance*, 170 (1976).
31. P. S. Palande, R.S. Shah and M.L. Lunawat, *Insurance in India—Changing Policies and Emerging Opportunities*, 9(2003).
32. *Supra* note 1 at 4.
33. *Supra* note 8 at 25.
34. *Available at* www.vocabulary.com/dictionary/agriculture*visitedon* 29/06/2017.
35. *Available at* https:en.oxforddictionaries.com/definition/agriculture *visited on* 29/06/17.
36. A.A. Rane, A.C. Deorukhar, *Economics of Agriculture*, 357 (2007).
37. Ramira Iturrioz, "Agricultural Insurance", https://www.casact.org>rainsura*visitedon* 18.07.16.
38. Section 2, *The Insurance Act*, 1988.
39. S.S. Raju and Ramesh Chand, *Agricultural Risk and Insurance in India*, 15 (2009).
40. Gurdev Singh, "Crop Insurance", www.11mahd.ernet.in/publications/data/2010.06.1 Singh pdf, *visited on* 19-07-16.
41. *Supra* note 8 at 523-24.
42. *Supra* note 8 at 524.
43. Practice of General Insurance *available at* www.nios.ac.in/media/document/VoclnsServices/m4-6f.pdf *visited* on 02/08/17.
44. *Ibid.*
45. *Available* at http://accountlearning.com/agricultural-pump-sets-insurance-in-india-features-benefits/ *visited* on 02/08/17.
46. *Supra* note 8 at 527.
47. Supra note 40.
48. *Supra* note 6 at 807.
49. *Available at* phdcci.in/image/data/upcoming%20events%202015/june%202015/Agriculture-Insurance.pdf*visitedon* 12/08/17.
50. Samudranil, 'Why are Indian farmers killing themselves', *availableat :* www.mapsofindia.com/my-india/india*visitedon* 30/06/2017.
51. *Supra* note 40.
52. *Available at* https://www.bighaat.com/blogs/news/421104-biggest-problems-faced-by-farmers-in-india *visited on* 30/06/2017.

53. Pamkhuila Shaiza, Agricultural problems faced by the farmers of India, *available at* https:// www.projectguru.in>publications/top-5-agricultural-problems-in-india*visitedon* 30/06/2017.
54. *Id.*, p. 8.
55. *Supra* note 40.
56. Olivier Mahul and Charles J. Stutley, "Government Support to Agricultural Insurance: Challenges and options for developing countries", ipcc-wg2.gov>njlite_download2 *visitedon* 19.07.16.
57. *Ibid.*
58. Insurance Institute of India, *Agricultural Insurance*, 167 (2014).
59. 'Agricultural Insurance Schemes', available at europa.eu>insurance>chapter 6 *visited on* 19.07.16.
60. 'Crop Insurance', *available at* https://en.m.wikipedia.org>wike/crop*visited on* 19.07.16.
61. 'Agri insurance Program-Agricultural and Agri-Food, Canada (AAFC)', available at www.agr.gc.ca>agriinsurance*visitedon* 19.07.16.
62. *Supra* note 58 at 183-84.
63. *Supra* note 38 at 43.
64. *Ibid*.
65. *Supra* note 58 at 45.
66. Lopamudra Mohapatra and R. K. Dhaliwal, "Review of Agricultural Insurance in Punjab State of India", *International Journal of Advanced Research*, 461(2014).
67. *Ibid*.
68. Various Crop Insurance Schemes, www.agricoop.nic.in>ncipletles*visited on* 16.07.16.
69. *Ibid*.
70. *The Indian Express*, Jan. 21, 2016.
71. *Available* at https://m.thehindubusinessline.com/farmers/article 842952.ece *visited on* 16.07.16.
72. *Available* at www.planningcommission.nic.in/aboutus/committee/wa11risk. *visited on* 16.07.16.
73. *Available* at https://www.ildai.gov.in>cms>frmgen. *visited on* 16.07.16.
74. Available at http://lawcommisionofindia.nic.in/reports/report190. pdf, *visited on* 16.07.16.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 96-106

Re-looking the Issue of Environmentally Displaced Person from an Environmental Justice Perspective

Rupak Kumar Joshi* and Ashutosh Kumar**

ABSTRACT

There is no dearth of evidence to say that there exists an overwhelming number of people who are migrating from their nation of origin to neighboring states and also internally, due to disasters which are unprecedented both in terms of destruction and frequency. However, the problem lies in quantifying and ascertaining the dominating cause of the disaster as well as the displacement. In fact, there has been growing consensus on the reliability of the data published by IPCC and other organizations which clearly points out that anthropogenic climate change is real. Nevertheless, there is a struggle for data to prove that in substantial number of cases, the dominating cause of migration is anthropogenic climate change. This paper is an effort to bring a paradigm shift in the way we look at the issue of 'environmentally displaced persons'. This shift shall be from looking at the issue from a 'refugee law crisis' approach to an 'environmental justice crisis' approach. This shift is needed because refugee law regime has failed to provide protection to this ever-growing group of displaced people. More so, because the 'environmental law' regime is scientifically better equipped to solve the problem of ascertaining the cause of displacement. The issue of environmentally induced displacement thus deserves special attention in Paris Conference of Parties to be held in December 2015, where a binding climate agreement is expected to be signed. This paper also builds a case for formulating a workable legal solution to the issue of environmentally induced displacement through a specialized UN organization which specializes in dealing with environmental issues.

INTRODUCTION

The Inter-Governmental Panel on Climate Change (IPCC) fifth assessment report released in 2014 is a reflection of the gravity of the issue of 'environmentally displaced people'. This report on climate change impact, adaptation and vulnerability featured a specific chapter on security implication of climate change. It concluded that slow and rapid onset environmental changes have 'significant' impact on forms of migration that compromise human security.[1] In stark contrast to the IPCC report which raised serious security concerns due to displacement caused by climate change, is the statement made by UNHCR which clearly disowns the issue of 'environmentally displaced persons'.

*The author is a Research Scholar at Department of Law, Kazi Nazrul University, Asansol (West Bengal). Email : rupakkumar@nls.ac.in.
** Co-Author is Assistant Professor, JEMTEC School of Law, Greater Noida, Affiliated to GGIP University.

The UNHCR has clarified[2] that terminologies like 'environmental refugees' and 'climate refugees' have no basis in international law as these terms do not fulfill the criteria under 1951 Convention or 1969 Protocol. Two reasons for giving a narrow interpretation to defining refugees are prominent from the UNHCR perspective document:

> "Using such terminologies which are not recognized by the international legal community, will undermine the efforts of the international legal regime to uphold the rights and obligations of refugees which are clearly defined for the protection of the refugees.
>
> Environmental factors do not fall under the five 'Convention' grounds and also does not satisfy the condition of persecution, thus creating confusion by using terms like 'environmental refugees'".

IPCC in 1990 predicted that "the gravest effects of climate change may be those on human migration as millions are displaced by shoreline erosion, coastal flooding and severe drought". A lot has changed since 1990. Although, we still have not found a legal recognition of the issue of 'environmentally displaced person' in any international instrument including The 1951 Convention relating to the Status of Refugees, climate change negotiations is seeing a shift from limiting the discourse from euro-centric 'mitigation' action to an increasing focus on 'vulnerability', 'adaptation', 'capacity building'[3] and 'loss and damage'[4]. Capacity building has been discussed in almost all of the recent Conference of Parties including the ones held in Doha, Warsaw and Lima. It also holds great importance in the Ad Hoc Working Group on the Durban Platform for Enhanced Action Negotiations and negotiations under Subsidiary Body for Implementation (SBI) held as a preparation for the Paris Conference to be held in December 2015, where a binding agreement on Climate Change is expected to be signed by parties to UNFCCC. In Cancun (2010)[5], the Conference of Parties developed an understanding on long-term cooperative action to address climate change loss and damage including the climate induced migration. This was the first explicit reference to the issue of climate induced population movement by the international community.

These developments among others have brought the much deserved international attention from north centric climate action to issues of south, environmentally induced displacement being one of the most important among them.

Further, the various issues faced in providing protection to 'environmentally displaced people' has been discussed in the paper. Special attention has been given to the problems related to ascertaining the scale, incidence and nature of environmentally induced displacement. It has also been presumed that a special section on whether anthropogenic climate change is real is not required as these facts are well settled. As to the question 'Do environmentally displaced people exist?', although there is active debate over the issue, this researcher has presumed *de facto* existence of those displaced due to anthropogenic climate change (as in the case of a Kiribati national where the New Zealand Court of Appeal conceded that Climate Change is a growing concern for international community, but the phenomenon and its effects on countries like Kiribati is not appropriately addressed under the Refugee Convention),[6] however, *de jure* recognition of the issue is lacking, which calls for an effort to bring together the challenges in addressing the issue and its solution.

1. THE ISSUE OF DEFINING 'ENVIRONMENTALLY DISPLACED PEOPLE'

A plethora of issues are associated with defining people who are displaced due to

environmental factors. Among them are the issues like whether to include people who have decided to migrate to another country, not out of compulsion but voluntarily, whether permanence of the destruction caused in the country of origin is a pre-requisite to granting of refugee status by the receiving state, whether suddenness of a disaster is a criteria for refugee determination and determination of the anthropogenic element of a disaster before refugee status is granted. All these factors among others need to be taken into consideration before coming to a convenient definition of 'environmentally displaced person'.

But before delving deeper into the technicalities involved in the above issues, it is important to highlight some of the definitions adopted by scholars which have earned wide acceptance.

1. Drop the Term 'Refugee'

The term refugee is too problematic to be used to address people who have been displaced. The term 'refugee' is conceptually inadequate to meet the complex structural causes and consequence of flight.[7] Moreover, in contrast to the elements involved in the conventional definition of refugee as defined in the 1951 convention, which revolves around 'persecution' as the central criteria for refugee status determination, environmentally displaced person demands a broader outlook as it is based on multi-causality.[8] Multi-causality includes a complex mixture of social, economic and institutional factors. This has been confirmed in cases of El Salvador, Haiti, the Sahel and Bangladesh, among many other nations.[9] Although the term persecution is too narrow to be used to address the issue of 'environmentally displaced persons', it can safely be deduced from Amartya Sen's epochal work on famines[10] which points out hidden issues of rights in relation to inequality, poverty, market and policy failures as deeper causes of so-called natural disasters.

2. Open-ended Approach

El- Hinnawi[11] (a researcher in UNEP) is credited by many to have made the first attempt to define Environmental Refugees in 1985 as:

> "Those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life [sic]. By 'environmental disruption' in this definition is meant any physical, chemical, and/or biological changes in the ecosystem (or resource base) that render it, temporarily or permanently, unsuitable to support human life".

Although the definition coined by Hinnawi is vague and open-ended, many authors have picked up elements from it to define 'Environmental' as well as 'Climate Change' Refugees.

3. Close-ended Approach

Bierman and Boas[12] who are advocates of the proposition that the issue of 'Climate Change Refugees' shall be dealt by adding a protocol to the UNFCCC defines them as "people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity".

Biermann and Boas make no distinctions based on the character of the migration. First, while the text of their definition refers to "people who have to leave", Biermann and

Boas explicitly reject voluntariness as a criterion for determining whether a migrant is covered. Second, they argue that whether relocation is permanent or temporary should not matter. Finally, Biermann and Boas write that they intentionally did not distinguish in their definition between internal and trans-boundary migrants. They object to these distinctions primarily because they do not want different categories of people who flee climate change events to receive different levels of protection.

Instead, Biermann and Boas base the parameters of their definition on the cause of relocation, i.e., climate change. They encompass sudden and gradual environmental change because climate change can cause both. To ensure they cover only climate-induced migration, they limit the types of environmental disruptions that can qualify refugees for assistance to three "direct, largely undisputed climate change impacts": "sea-level rise, extreme weather events, and drought and water scarcity". They do not cover events that they say are only peripherally related to climate change. For example, they exclude from their definition impacts only loosely linked to migration (e.g., heat waves), migration caused by mitigation measures (e.g., construction of dams to alleviate water shortages), migration from other types of environmental disasters (e.g., industrial accidents and volcanoes), and impacts only indirectly linked to climate change (e.g., conflicts over natural resources).

Biermann and Boas's definition seeks to encompass all those who flee the most direct impacts of climate change, but it has legal and scientific shortcomings. It makes a large number of people eligible for assistance by adopting broad elements related to the character of the migration, but in doing so, it runs counter to legal precedent associated with traditional notions of refugees. For example, the definition takes an approach opposite to the Refugee Convention by including both refugees and IDPs and by not requiring the displacement to be forced. At the same time, Biermann and Boas's focus on enumerated climate change impacts seems too restrictive. It relates to the idea that the international community should bear responsibility for harm to which it has contributed, but it does not take into account the possibility that advances in science could enable more accurate determination of which events are caused by climate change.[13]

4. A Blended Approach[14]

Bonnie & Giannini who are advocates of a new binding instrument specifically for 'Climate Change Refugee' elaborates on the nature of definition by highlighting its key elements, without actually defining them.

The proposed new definition of climate change refugee requires the following six elements to be met for a refugee to be considered a victim of climate change:

(a) Forced migration;
(b) Temporary or permanent relocation;
(c) Movement across national borders;
(d) Disruption consistent with climate change;
(e) Sudden or gradual environmental disruption; and
(f) A "more likely than not" standard for human contribution to the disruption.

The definition is designed for a binding instrument rather than for a general policy. Therefore, it circumscribes the class of people it covers according to existing legal principles and precedent associated with the term refugee. It balances such restrictions with an eye to meeting humanitarian needs and to addressing the particular character of climate change-induced migration.

A holistic approach where inputs from disciplines like law, science, economics, technological innovation, development, and poverty alleviation are taken is desired. Conditions beyond environmental disruption, such as poverty, can contribute to displacement that is primarily caused by climate change. Climate-induced problems may lead to circumstances, such as armed conflict, that increase population flows. Various stresses, including population growth and poor governance, influence the determination of environmentally displaced persons. Climate change migration also involves a wide range of actors, including individuals, communities, home and host states, and the international community more broadly, which complicates efforts to deal with climate change migration fairly and effectively.

A holistic approach where inputs from disciplines like law, science, economics, technological innovation, development, and poverty alleviation are taken is desired.

2. TECHNICAL CHALLENGES IN DETERMINING REFUGEE STATUS

A hurricane can be a natural phenomenon or a result of anthropogenic climate change. Therefore, according to the IPCC, identifying causation can be scientifically challenging. Some writers explicitly include both natural and human-caused harm in their definitions of environmental refugee, some exclude natural disasters. Whichever side is been taken in an instrument which may be drafted in the future to deal with the issue of environmentally displaced persons, there are too many technical aspects related to environment involved to be addressed by a Refugee agency or any other humanitarian aid agency for that matter.

1. Technicalities in Estimating Environmentally Displaced Persons

Undoubtedly, the human induced factor in climate change are widely accepted. Anthropogenic emission of Carbon Dioxide and other greenhouse gases, deforestation are some of the contributing factors of climate change. Arguments in favor of anthropogenic climate change is that there are scientific evidence that the human induced Green House Gases (GHG) emission have potential for climate change and there is dramatic increase in concentration in GHG in last 150 years.

But, in applying the principle of Common but Differentiated Responsibility in relation to Climate Change, there is an ongoing debate on the contribution and quantification of the anthropogenic climate change in the environmentally displaced phenomenon.

The countries which lie in the receiving end of the issue of environmentally displaced person generally take certain typical defenses in order to get away with their historical responsibility towards anthropogenic climate change. Science is unable to qualify which environmental disaster is caused due to anthropogenic interference and which are caused naturally. There is enough evidence of environmental disaster and climate change without human intervention. Secondly, subjection of the earth to anthropogenic influences is not a formal experiment and there cannot be an absolute quantification of the intensity and potential of the anthropogenic factors. Thirdly, our primary information sources are observation and physical modelling, both well supplied with uncertainties. In order to observe the data of the past the scientists have to depend on some proxy indicators of climate variables, for instance, amount of growth estimated from tree ring data are used to infer seasonal and annual temperatures.

Estimating the number of environmentally displaced person is complex. Take the case of identifying and mapping potential environmental 'hotspot' along with monitoring changing conditions, which is quintessential to solving the problem of protecting environmentally

displaced persons according to Dr. Camillo Boano of Refugee Studies Center of University of Oxford[15] . This involves examining 'tipping' points that trigger displacement rather than adaption in local regions, tracking migration trend in relation to environmental depletion and tailor development policies of resilience and sustainable development to evolving local needs. A refugee agency is not expected to have comprehensive understanding of these technicalities, and therefore, a specialized environmental agency is appropriate to address these essential requirements before an international instrument to deal with environmentally displaced persons introduced in the international arena.

2. Need for a Specialized Member from IPCC for Refugee Determination Mechanism

Determining individual state's contributions to climate change is difficult and should be left to the body of scientific experts. A global fund should consider the scientific findings along with data on states' capacities to pay to determine each state's ultimate responsibility. It should also reevaluate its allocations of responsibility periodically to make sure they remain up-to-date.

The UNFCCC formed a similar organ with its Subsidiary Body for Scientific and Technological Advice ("SBSTA"). The UNFCCC requires SBSTA, from a scientific and technological perspective, to assess existing knowledge on climate change, to evaluate measures to implement the UNFCCC, to identify valuable new technologies, to offer advice on research and development, and to respond to states parties' questions. The SBSTA consists of "government representatives competent in the relevant field of expertise. The 'independent' body of experts for 'environmentally displaced persons' could be on the lines of SBSTA.

First, the environmentally induced displacement instrument should assign the body of scientific expert's responsibility for determining the types of environmental disruptions encompassed by the definition of climate change refugee. It would ascertain which disruptions are consistent with climate change and to which disruptions human acts more likely than not have contributed. At this point in time, it is difficult for scientists to determine if climate change caused a specific event. The IPCC, however, has identified many potential effects, including increased temperatures, rising sea levels, desertification, and more intense storms, and has identified the likelihood that humans contributed to them. A member from IPCC in the body of expert is preferable. Even if existing science cannot eliminate all uncertainty, the precautionary principle states that some uncertainty is not an excuse to avoid action.[16]

Second, the body of scientific experts should provide information on state's contributions to climate change to help the global fund allocate the common but differentiated responsibilities for assisting climate change refugees.

Finally, the body of scientific experts should conduct general studies about the problem of climate change as it relates to refugee flows. It should both compile existing knowledge, including that generated by the IPCC, and drive future research agendas.

3. Allowing Voluntary Migrants to be given Refugee Protection

Some authors identify environmental refugees by the character of their movement. First, they consider whether a person was compelled to relocate or did so voluntarily. An extreme environmental disaster or the submersion of an island state would force inhabitants to abandon their homes, while the general degradation of a region's natural environment might lead people to decide to seek better fortunes elsewhere. El-Hinnawi limits his definition

to those "forced to leave".[17] Myers, who offers a more recent but also commonly cited definition from 2005, adopts a similar approach.[18] He describes environmental refugees as those "who can no longer gain a secure livelihood in their homelands" and "who feel they have no alternative but to seek sanctuary elsewhere".

Others divide people who flee environmental harm into sub-categories based on the degree of compulsion. In a 2007 United Nations University report, Fabrice Renaud and his coauthors articulate three categories: "environmentally motivated migrants", who "may leave' a steadily deteriorating environment"; "environmentally forced migrants", who " 'have to leave' in order to avoid the worst"; and "environmental refugees", who "flee the worst", including natural disasters. These approaches suggest a recognition that the classification of environmental refugee should be reserved for those who are forced to relocate.

The decision to migrate is better conceptualized as a continuum. People who have absolutely no control over their relocation represent the right-hand end of the continuum, designated as "involuntary". Moving to the left across the continuum are people with more control over the decision to migrate. At the far left of the continuum, voluntary migrants include only those who maintain control over every decision in the migration process. Such a continuum overcomes the debate over legalistic definitions of refugees and allows for a broad range of constraints on the decision-making process.[19]

The author subscribes to the concept of continuum as suggested by Diana C. Bates, as it takes a more practical approach to providing humanitarian assistance to people displaced to either sudden disasters (which compel the migrate) or slow onset disasters (which may equally lead to migration, although there is greater chances of other factors influencing the decision). Hurricanes and tsunamis are sudden catastrophes, while desertification is gradual degradation. Neither El-Hinnawi nor Myers make this distinction. Dun and her co-authors[20] explicitly include both "slow onset and rapid onset" environmental changes in their definition of environmental displacees, which they consider to be similar to the more commonly used term environmental refugee.

Slow onset displacement is very difficult to predict because of the types of migration (seasonal, return, repeat, permanent and temporary), the multi-causality of intervening variables (socio-economic status and migrant selectivity) and the complexity of environmental outcomes (deforestation and fisheries depletion).[21]

4. A Temporary Answer to a Permanent Question

A person might move only for a short time if his or her home and community can be repaired after an environmental disaster, or he or she might never be able to return because the destruction makes the area uninhabitable. On this point, El-Hinnawi and Myers have different views, with the former allowing for both kinds of relocation in his definition and the latter only for permanent or semi-permanent relocation. Olivia Dun and her co-authors[22] divide environmental refugees into three categories based on the degree of their compulsion to leave; for each, however, they specify that temporary and permanent displacement are covered. They describe temporary displacement as lasting up to three years, and permanent as anything longer, "even though eventual return may still be possible.

The author believes that humanitarian assistance shall be given to both temporary and permanently displaced people because both are in equal need of humanitarian protection.

5. Natural Disaster *v.* Anthropogenic Climate Change Disasters

To make a distinction between whether a disaster is natural or anthropogenic is not an

easy task. It demand the expert knowledge of scientific experts and therefore the author has suggested the establishment of a scientific body for the determination of refugees and for responsibility sharing among international parties.

Although the term persecution is too narrow to be used to address the issue of 'environmentally displaced persons', it can safely be deduced from Amartya Sen's epochal work on famines[23] which points out hidden issues of rights in relation to inequality, poverty, market and policy failures as deeper causes of so-called natural disasters.

3. LESSONS TO LEARN FROM PROGRESSIVE NATIONS WHO HAVE PROVIDED TEMPORARY PROTECTION TO ENVIRONMENTALLY DISPLACED PERSONS

Although majority of nations do not have any law or policy regarding environmentally displaced persons, there are a few exceptions, which can provide some clues for the prospective instrument for environmentally displaced persons.

1. European Union

No specific instrument regulates environmentally displaced individuals' protection at the EU level. However, some scholars have argued that to an extent or another, available instruments providing complementary forms of protection could be applicable to environmentally displaced individuals,[24] as enshrined in the Council Directive 2001/55/EC of 20th July, 2001.[25]

The purpose of the directive is to establish minimum standard for giving temporary protection in the event of a mass influx of displaced persons from third world countries who are unable to return to their country of origin. However, the directives suffers from certain limitation. Firstly, it is applicable only in cases of mass influx. Secondly, it does not provide for a clear mechanism of determination of candidates for protection. Thirdly, only temporary protection is granted.

2. Finland

Only few of EU member states have introduced express provisions addressing the protection of environmentally displaced individuals. Section 109 clause 1 of the Aliens Act provides that *"Temporary protection may be given to aliens who need international protection and who cannot return safely to their home country or country of permanent residence because there has been a massive displacement of people in the country or its neighboring areas as a result of an armed conflict, some other violent situation or an environmental disaster".*

The Finnish laws not only recognizes the environmentally displaced persons, it also provides specific humanitarian aid to these displaced people. It is also interesting to note that the principle of *non-refoulement,* around which the traditional refugee regime revolves, also features in the Finnish law protecting environmentally displaced people. Section 88A (1) of the Aliens Act provides that *"An alien residing in Finland is issued with residence permit on the basis of humanitarian protection, if there are no grounds under Section 87 or 88 for granting asylum or providing subsidiary protection, but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe…".* It is important to note here that this humanitarian aid is provided to aliens who were already residing in Finland when the disaster hit the country of origin. Therefore, it does not cover refugees in true sense, nevertheless comes close to the concept of 'refugee sur-place' in refugee laws.

3. Sweden

The Aliens Act under Section 2(3) provides that *"a person otherwise in need of protection is an alien who in cases other than those referred to in Section 1(refugee grounds) is outside the country of the aliens nationality, as he or she is unable to return to the country of origin because of an environmental disaster"*.

Italy and Cyprus have similar provision which provide protection to environmentally displaced persons. However, in Cyprus humanitarian aid is provided to environmentally displaced person, only to those who already have been given refugee status under the refugee law.

4. Canada and Australia

Among the four political parties in Canada, only the green party makes reference to environmental refugees. It stated that it will *"advocate for the inclusion of environmental refugees as refugee category in Canada and accept an appropriate share of the world's environmental refugees into Canada"*.[26] Canada made temporary arrangements for people who were already resident in Canada at the time of the Indian Ocean tsunami and following the Haitian earthquake in 2010.

Australia has an *ad-hoc* policy towards environmentally displaced persons. This means that temporary protection may be provided to aliens who have reached the shore of Australia. In 2009, Australia announced a policy to support Pacific islanders who continue to abandon their villages to rising waters.

4. CONCLUSION

It is clear that the UNHCR has out rightly rejected the use or incorporation of the term 'climate change refugees' or 'environment refugees' and UNFCCC is a specialized instrument which hardly deals with functions essential to the issue of 'environmentally displaced person' like humanitarian assistance. Additionally, the author doubts the level of acceptance an independent international instrument specifically for the current issue will receive. It is therefore suggested by the author that the middle path lies in the framing a new instrument under the aegis of United Nations International Strategy for Disaster Reduction (UNISDR).

UNISDR is part of the United Nations Secretariat. The UN General Assembly adopted the International Strategy for Disaster Reduction in December 1999 and established UNISDR and its secretariat to ensure its implementation. Its mandate was expanded in 2001 to serve as the focal point in the United Nations system to ensure coordination and synergies among disaster risk reduction activities of the United Nations system and regional organizations and activities in socio-economic and humanitarian fields (GA resolution 56/195). UNISDR's core functions span the development and humanitarian fields. Its core areas of work includes ensuring disaster risk reduction (DRR) is applied to climate change adaptation, increasing investments for DRR, building disaster-resilient cities, schools and hospitals, and strengthening the international system for DRR.

The author also recommends that till the time consensus is built to frame a new instrument under UNISDR, it is wise to formulate a well-framed guideline in the lines of the guidelines for internally displaced people which has been readily accepted by the international community. It is worth-mentioning that inputs can be taken from the report published by UNHCR 'Planned Relocation, Disaster and Climate Change: Consolidating Good Practices and Preparing for the Future' and the suggestions made in the Nansen Conference held in 2014.

1. Proposed Solution

Keeping the above developments in mind, the authors suggests that instead of taking the drastic step of amending the 1951 convention and changing the very essence and nature of the instrument by adding a terminology (climate change refugee) which does not directly fit into the meaning of persecution (although it is a highly debatable term) and the five convention grounds or adding a protocol to the UNFCCC as has been suggested by many scholars and has been criticized by some[27], a definition which harmonizes with the various stakeholders involved would make more sense. Therefore, in the opinion of the author, instead of choosing a controversial term like 'climate refugees' or 'environmental refugees' a more mellowed down term like 'environmentally displaced persons' would serve the purpose.

NOTES AND REFERENCES

1. *Available at:* http://www.ipcc.ch/pdf/assessment-report/ar5/wg2/WGIIAR5-Chap12_FINAL.pdf (accessed on 20 Oct. 2015).
2. U.N. High Comm'r for Refugees (UNHCR), *Climate Change, Natural Disasters and Human Displacement: A UNHCR perspective,* (August 17, 2015) (hereinafter UNHCR Perspective) *available at:* http://www.unhcr.org/5448c8269.html (accessed on August. 17, 2015)
3. *Available at:* http://unfccc.int/cooperation_and_support/capacity_building/items/7060.php (accessed on September 23, 2015).
4. *See generally* Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013. *Available at:* http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf (accessed on September 24, 2015).
5. *Available at:* http://unfccc.int/meetings/cancun_nov_2010/items/6005.php (accessed on September. 21, 2015).
6. *Should international refugee law accommodate climate change?,* UN NEWS CENTER, 3 July 2014, available at http://www.un.org/apps/news/story.asp?NewsID=48201#.Vebgnfmqqkp (accessed on September. 19, 2015).
7. Zetter, R.W. (2007), "More labels, fewer refugees: remaking the refugee label in an era of globalization", *Journal of Refugee Studies*, Vol. 20(2), pp. 172-92.
8. Lonergan, S. (1998), "The role of environmental degradation in population displacement", Environmental change and security program report, Issue No. 4. Washington: Woodrow Wilson International Centre for Scholars, pp: 5-15.
9. *Ibid.*
10. Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation*, Oxford: Clarendon Press, 1981, pp. 23.
11. ESSAM EL-HINNAWI, ENVIRONMENTAL REFUGEES, 4 (1985).
12. Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, (Global Governance Project, Global Governance Working Paper No. 33, 2007).
13. Docherty Bonnie & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugee*, 33-2, Harv. Envtl. l.Rev. 349, 372 (2009) at 368.
14. *Ibid.*, at 372.
15. Boano, Camillo, Zetter, Roger and Morris, Tim, *Environmentally displaced people: Understanding the linkages between environmental change, livelihood and forced migration*,CliMig, *available at:* https://climig.omeka.net/items/show/613 (accessed on November 15, 2015).
16. This version of the precautionary principle borrows from Principle 15 of the Rio Declaration on Environment and Development. U.N. Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, princ. 15, U.N. Doc. A/CONF.151/26 (Vol. 1) (Aug. 12, 1992) [hereinafter Rio Declaration].
17. *Supra* note 7.
18. Norman Myers, *"Environmental Refugees: An Emergent Security Issue",* 13th Economic Forum, Prague, 2005, *available at* http://www.osce.org/eea/14851 (accessed on August 3, 2015).

19. Diane C. Bates,Environmental Refugees? Classifying Human Migration Caused by Environmental Change, 23 POPULATION & ENV'T 465, 468 (2002).
20. Olivia Dun, Francois Gemenne & Robert Stojanov, Environmentally Displaced Persons: Working Definitions for the EACH-FOR Project (Oct. 11, 2007), *available at*: http://www.each-for.eu/documents/Environmentally_Displaced_Persons_-_Working_Definitions.pdf (discussing environmentally displaced persons; dividing them into environmental migrants, environmental displacees, and development displacees; and explicitly avoiding the term environmental refugee)
21. Curran. S., "Migration, Social Capital, and the Environment: Considering Migrant Selectivity and Networks in Relation to Coastal Ecosystems", *Population and Development Review*, Vol. 28, 2002, pp. 89-125.
22. *Supra* note 19.
23. Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation*, Oxford: Clarendon Press, 1981, p. 23.
24. Ammer, M. *Climate Change and Human Rights : The status of Climate Refugee in Europe* , Oxford University Press, 2009, p. 56.
25. *Available at:* www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF
26. Green Party of Canada, *Immigration and New Canadians*, 2011.
27. According to Bonnie & Giannini "The UNFCCC applies directly to climate change, but it too has legal limitations for dealing with climate change refugees. As an international environmental law treaty, the UNFCCC primarily concerns state-to-state relations; it does not discuss duties that states have to individuals or communities, such as those laid out in human rights or refugee law. It is also preventive in nature and less focused on the remedial actions that are needed in a refugee context. Finally, although the UNFCCC has an initiative to help states with adaptation to climate change, that program does not specifically deal with the situation of climate change refugees. Like the refugee regime, the UNFCCC was not designed for, and to date has not adequately dealt with, the problem of climate change refugees. Bonnie & Giannini, *supra* note 10, at 358.

Plebs Journal of Law (Vol. IV, No. I, July 2018)
p-ISSN : 2454-4124, e-ISSN : 2455-5096
pp. 107-114

Domains of Public Law and its Relevance in Indian Context

Ajay Kumar Bhatt and Prem Singh Bisht

INTRODUCTION

Ever since the evolution of the human race known as the Homo-sapiens, from nomadic to a civilized way of life the quest for public order, safety, security, freedom, orderly society and basic rules governing the society has been the challenge to be met. With the evolution of the human race in our society has also evolved over a period and so have our systems, of governance and process of law-making, to suit the needs and aspirations of a fast evolving and changing society. No doubt today we are in the Mideast of a situation of dynamic socio-legal matrix, which needs to be addressed by our scholars in the larger interest of society, for maintaining ever needed social equilibrium. During ancient and medieval period these changes were not so fast, however, in modern time owing to the advancement of science and technology in our society has undergone a rapid socio-politico-economic transformation, leading to a fast change in the outlook of our society and thereby generating a need for ever evolving public law and order, suitable to growing societal expectation. This brings us to the core of the problem in terms of how to appreciate the contemporary public law, constitutional and administrative law in the present-day scenario. All over the world Nations and societies are governed by a basic document called the constitution, beside public law and Administrative law. The purpose of this study is to understand and conceptualize the importance of the public law, constitutional law and the Administrative law in the day to day governance, of a modern democratic society.

In the Indian context the study of public law, constitutional law and administrative law is far more complex because it involves the study of our historical past and changes brought about by the invasion since ancient time, up to the time of being a colony of the British empire. We also can't overlook the bitter experience of partition at the time of independence in 1947 and the changes witnessed in the post-independence period till now.

HISTORICAL PERSPECTIVE

The knowledge of the historical background is very useful in understanding the evolution of the law in Indian subcontinent and also to get a deeper insight into the process of making of law and making of our constitution. Historically, during colonial period of AD 1600 to 1947, many rules, regulations and acts were passed by the Britishers in India for ease of Administration are summarised as under:

* Professor, ALS, Amity University (Haryana).
** (Retd. IPS), Research Associate.

Important Development during (1600 to 1858)[1]

This period started with Crown Charter of 1600 which led to the establishment of East India Company with exclusive trading right and the members of company were to resume the power of General Court, with power to make by— laws, ordinance, etc. This was followed by Royal Grants of 1615/1623 and Charter of 1726 /1753, which authorized company to inflict punishment to maintain discipline among the servants of the Company and made provisions for the establishment of a corporation in each presidency with a Mayer and 9 Elder Men respectively. The defeat of than erstwhile rulers in the Battle of Plassey in 1757, and Battle of the Buxar in 1764, established the Company's might in India. This paved the way for getting a treaty to be signed between Lord Clive and Mughal Emperor Shah Allam in 1765 on behalf of the Company. Under this treaty the Dewani of Bengal, Orissa and Bihar was vested in the East India Company. Consequently, the company became responsible for collection of revenue, decide civil and revenue case, maintain army, including administration of criminal justice and maintenance of law and order. This established the territorial Sovereignty of East India Company in erstwhile India. The Regulating Act of 1773, Charter Act of 1774 and Pitts India Act of 1784 were passed with an objective of bringing the management and control of the company under the control of British Parliament and British Crown and the establishment of a dual Government. Charter Act of 1833 made provision for the establishment of an all India Legislature and a strong central government to remove the confusion and uncertainties prevailing in the Indian law.

Important Constitutional Development during (1858-1935)

During this period Government of India Act of 1858[2] was passed to remove the defect of dual or double government introduced by Pitt's India act. This Act made India to be governed by and in the name of her majesty, paving the way for direct rule of the British Crown in India thus Company's rule in India came to an end. The Indian Council Act of 1861 and 1892, empowered the Governors—in the Councils of Bombay and Madras to make laws for their respective territory and introduced many changes in the constitutional set up respectively. The Government of India Act of 1919[3] , made a promise that a responsible government will be ultimately established in India, but British India would remain an integral part of the British Empire. The Act also made provision for a bicameral legislature, i.e. Council of states and the legislative assembly. The Dyarchy was introduced in the provinces, i.e. rule of double government with central subjects and provincial subjects. Not to mention the boycott of Simon Commission of 1927 who made important recommendations regarding abolishing dyarchy system, legislative assembly to be called a federal assembly and the establishment of the provincial public service commission. Another important historical development was the Poona Pact of 1932, whereby Mahatma Gandhi aggrieved by the communal award of Ramsay MacDonald started fast unto death. Indian leaders proposed a formula to break this fast-called Poona Pact, which made provision for 18 per cent seats be reserved for Depressed class in central legislature,148 seats in the provincial legislature and adequate representation in local bodies and public service.

Important constitutional development during (1935 to 1947)

The Government of India act of 1935[4] provided for federal government, proposed Dyarchy at center and abolished it in the provinces. Federal subjects were in two parts reserved subjects and transferred subjects. The Governor General was a very powerful authority under the act and provision were made for the establishment of a federal court, provincial executive consisting of the Governor and Council of Ministers. However, federal

court was not the final court as its appeal could lie in Privy Council. The proposal of Cripps Mission,1942 offered that Indian Union would be created which would be the dominion in the British Commonwealth and an elected body for framing of the new Constitution of India would be set up in which Indian states would also participate. This proposal was rejected by all parties on different ground and stood withdrawn on 11-4-1947. Even C Rajagopalachari formula of 1944, urging to Muslim league to cooperate with Indian National Congress in the formation of an interim government for the transitional period and later by plebiscite and the Adult franchise in Muslim majority area would decide the issue of separation from Hindustan, failed to bring consensus and was dropped. In this chain of the deliberation Wavell Plan and Shimla Conference of 1945[5], with the proposal that executive council would be reconstituted and members except Viceroy and the Commander -in - Chief were to be Indian (equal no of Hindu and Muslim) also failed. It was the Cabinet Mission of 1946 who came up with a concrete proposal of framing of the Indian Constitution by a Constitution making body called Constituent Assembly. Later, Lord Mountbatten Plan of 1947, became decisive in drafting the Indian Independence Act of 1947 and subsequently of our Constitution. In the background of this historical development an effort has been made to understand Public law, Constitutional law and Administrative law in contemporary India.

PUBLIC LAW

Public law is the law which affects and has relevance for society at large, as it governs and deals with the intricate relationship between individuals as well as individual and government. Thus, Public law stands for that law which affects society as a whole and comprises of administrative law, Constitutional law, Criminal law, Municipal law and International law, etc. in its ambit. However, the relationships that public law governs at times can be discriminatory due to the power vested in governmental bodies to implement and frame rules and procedures. In such a situation the recourse to judicial review is open and the court has to protect the individual's right by evoking the doctrine of the rule of law. For example, offences of theft, dacoity, murder, etc. falls under the category of Public law while a civil suit between neighbors for infringement of peaceful living enjoyment of one's property falls under private law. The scope of public law is:

- Administrative law deals with the law governing governmental agencies and various departments of government.
- Constitutional law deals with the laws protecting persons Fundamental Rights.
- All criminal laws.
- Municipal laws governing the town.
- International public law.

In order to appreciate how public law, relate to Administrative agency it is worthwhile to look at the famous case of Brown *v.* Board of Education, US (1954)[6]. In the instant case, Plaintiff pleaded that their daughter was denied admission in a nearby school close to their home because the school was for whites only consequently Linda has to walk a long distance to catch her school van. It was a case of racial discrimination and segregation as Linda was denied admission being black. In this historical case Hon'ble Supreme Court of US decided in favour of the plaintiff and held that Linda Browns Constitutional rights were violated by racial discrimination. The case fell under public law, though it was affecting only one child's

right, but had far reaching ramifications for the society at large. Thus, the Constitutional law as well as Administrative falls within the ambit of Public law.

In the recent time, the Hon'ble Supreme Court has pronounced two landmark judgements pertaining to society at large. In the first place on 22nd August 2017[7], the case of triple *talaq* or talaq-*e-biddat* that is instantaneous talaq. The Hon'ble Apex Court held that this practice is arbitrary as marriage can be broken whimsically without any attempt at reconciliation. Thereby, declaring it unlawful and unconstitutional. (Shayara Bano and Others *v.* Union of India) However, the theory of one Nation and one code has several challenges to coming across. It creates a situation where the constitution and religious laws collide. Though believers of a particular religion are free to keep their custom, but a dispute before the Court of law in India should be settled on the basis of a Civil Code. The Code of a nation must prescribe to all people equal rights and obligations and allow no discrimination or even special rights on the basis of religion, caste, gender, or sex. This will pave the way for not only real freedom of religion to an individual, but also fulfil the constitutional aim of a long awaited uniform civil code. It is ironic that as long as religion-based laws will remain in operation, the conflict will remain unresolved and clergy will always accuse the court of interfering whenever the court delivers a verdict not acceptable to them.

Another land mark judgement came regarding protection of to privacy of an individual[8] subject to reasonable restriction like any other Fundamental Right. This judgement will have a long term affect and repercussions on safeguarding the privacy of an individual from the arbitrary action of governmental agency as well as private sector. This historic landmark judgement propelled India into the ranks of progressive societies ensuring right of privacy to its citizens, a nine judge Supreme Court bench was unanimous in delivering verdict on 24, Aug 2017, that privacy is a Fundamental Right. It also overturned, an old ruling of an eight-judge bench, which refused to recognise privacy as a fundamental right. This 547-page ruling has setup many landmarks to outline basic constituents of a dignified life and responsibility and obligation of state to help the citizens to lead one. The Bench also asserted that like the right to life and liberty, privacy is not absolute. (Justice K.S. Puttaswamy (Retd.) and Others v. Union of India and Others) This ruling in time to come will have a far-reaching consequence on the following issues:

- Can we be forced to get an ADHAR card? Do we need to link it with a bank account, pan card, voter card, mobile no etc.?
- what about Beef ban, prohibition and other such restrictions by a group of orthodox activists in modern day India?
- Does the right to privacy exist in the age of the Internet and data mining?
- Does this judgement decriminalize consensual sexual relation among members of the LGBT community?
- As privacy constitutes the foundation of all liberty so how can anybody would like to be told by the state that what they should eat or how they should dress?
- RTI act may now face privacy hurdle as definition of public good will be questioned, and order of disclosure may be challenged.

Thus, in any civilized society, it is very important to uphold the public law relating to safety, security and fundamental rights enshrined in our Constitution. This makes our constitution a living document as it remains responsive to the ever-changing society and to cater for the needs and aspiration of its people by way of Amendments and Judicial Review.

CONSTITUTIONAL LAW

Constitution of a democratic nation is a living document which consistently guides the basic governance in that nation. It comprises of certain basic principles or established precedents which governs a state or an organisation. The understanding of the codified bare text known as constitution of state, the basic knowledge of the Constitutional law is imperative. Constitutional law simply stands for the Constitution as interpreted and construed by the courts and it has a philosophical element, rather dimension[9].

The Constitutional law also relates to the body of judicial precedent over a period of time where the court interpreted, various provisions during the proceeding. Three organs of government must confirm to the constitutional provision and no organ can exert supremacy over other organ in the scheme of democratic setup under the supremacy of the Constitution. The Constitution of any nation has a well-founded philosophy behind it in which people of the country strongly believe being the intentions of the first founding fathers of the Constitution. This philosophy of the Constitution is also known as constitutionalism and its exercise limitation on the arbitrary power of the government as per the mandate of the constitution. However, constitutionalism can have normative interpretation as well as non-normative interpretation. Normative interpretation refers to a government limited by the Constitution as in USA and India, while non- normative interpretation is an attempt to analyze and study in depth in order to ascertain common elements of the various democratic constitution and societies[10]. This is a search for locating the fundamental pillars on which Constitution rests. Unwritten part of written Constitution is commonly referred to as Meta constitution. In other words, it refers to the outer boundaries of a Constitution and a clear understanding of meta Constitution is imperative for a student of legal studies. In the interpretation of the Constitution, a set of widely accepted axioms or principles such as constitutional gaps and abstract provisions, contradictions, silences etc., are interpreted from the viewpoint of abstraction of the higher or natural law. To appreciate the concept of Meta Constitution, it would be worthwhile to quote Justice Beg in historic AK Gopalan's case, "every Constitution is an embodiment of highest positive law and also a reflection of higher law which may include principles of natural justice ethical principles or common law principles, which can be recognised by the courts". Thus, meta theory is an essential part of any field of study and its understanding is necessary requirements to be an expert in that field of study. Some of the examples of meta constitutional provisions abstracted by the courts in the Indian context are concept of due process of law, rule of law, separation of powers, judicial review and principle of natural justice.

The US text of the Constitution comprises of four features:

- A delegation of power by express constitutional provision,
- A separation of power,
- A reservation of power, and
- A limitation on the power of three organs of government.

It is well known in legal parlance that the decision of higher courts in constitutional matters under the doctrine of stare decisis become a precedent to follow for all courts below. The law of a state must be in conformity with the provision of the Constitution and judicial interpretation to be called constitutional law. In the US the "due process"[11] has been the greatest source of constitutional litigation.

In the famous case of Barron v. Baltimore 32 US[12], it was held that without a just, fair, and reasonable opportunity to be heard, no one should be deprived of his life, liberty and

property. This cardinal principle of justice known as due process is equally applicable in both criminal as well as civil cases. Therefore, constitutional law is the basis for the determination of a vibrant relationship between citizens and state which also controls the function of the various organs of state in a harmonious manner.

In UK there is no single document where we can locate the Constitution. The law is in customs, conventions, Acts of Parliament and judicial interpretation[13]. Membership of European community has considerably influenced the constitutional law in England, over a period. The Constitution of US was ratified on 21st June 1788 and comprises of just 7 Articles and 27 Amendments since its inception, making it one of the shortest Constitution in the world after Monaco. The first 10 Amendments in the US Constitution are known are popularly known as the Bill of Rights. The above comparison clearly reveals that Constitution of a country not only depicts the kind of society it has but also indicates the respect for human values and respect for the Fundamental Rights guaranteed by the state Thus, the Constitution is a truly living document, guiding good governance in order to bring quality in the life of the people, making all democracies to strive for it.

ADMINISTRATIVE LAW

All democratic states have socio-economic function and obligation as a prime source of governance and it has drastically increased over a period of time due growing public expectation[14] as well as awareness of citizens' right. This has become more complex and challenging in the developing economies for meeting the challenge of the intricate relationship between the public and administration. This situation demands some kind of law to regulate the activities of administration and its relationship with the common public so that the administration becomes more transparent, trustworthy, and fair in dealings without any kind of discrimination. The Administration existed even in the ancient past, but had only limited function to perform, however, in the present time the governments are burdened with a variety of functions and responsibility towards the public and society at large. This creates the need for the formulation of proper public policy by the concerned government department, so that prompt and appropriate implementation of these policies fulfils the needs and aspirations of the society. Though, Administrative law is broader concept, but literally speaking it deals with the decisions taken by various administrative organs of government, based on a set of rules, regulation, procedure and precedents[15]. No two departments of the government will have the same set of rules, regulations, and procedures because they differ from each other in terms of their set up and function. The same is the case with two democratic states of different countries, here again the priority of the countries and their need may differ from each other. However, in Administrative law[16] there are a few things which are common among all democratic countries and various departments of any country, i.e. administrative law must be based on the principle of Rule of law and the principal of due process of law is that the decisions of administrative bodies and various departments must be fair, just and reasonable.

The administrative law in India derives its force from the Constitution of India, which includes the Directive Principles of State Policy and to promote social welfare is one of the main objectives of good governance. It makes a change from being governed to being administered. There is enough constitutional mechanism to control the administrative authorities from abusing or misusing their authority and power entrusted to them for the public good, by evoking Article 32, 226, 136, 300 and 311 of Indian Constitution. Among the principal sources of administrative law in India are judicial rulings, constitutional

provisions, ordinances, departmental circulars, gazette notifications, various acts, administrative direction, statutes, etc. The administrative law affects the life of the people in their day to day activities based on their needs such as obtaining a driving licensee, licensee to run a restaurant or business, process of obtaining a passports and many more such things. Beside all this administrative bodies and departments have to take certain policy decisions regarding various issues such as increase of tax, maintenance of roads, construction of bridges, roads, acquisition of land, and other developmental activities, which may create a situation of conflicts between the concerned administrative department and individual or individuals. In such a situation the aggrieved party has the right to approach the competent court for judicial review of such order. Empirical research[17] in this area of administrative law has shown that certain policies and projects of government departments are delayed because of the apprehension of judicial review, while the fact remains that the work of public importance must not be delayed bringing about the socio-economic development of a nation. Therefore, streamlining the administrative procedures and process for good governance is the need of the hour in the field of administrative law, so that all works related to general public is done not only promptly but also with transparency. Last but not the least our constitution is the best document to guide good policy making as well as good governance.

CONCLUSION

In the time to come, the future of Public Law, Constitutional Law and Administrative Law will depend on expanding the knowledge base on how our law, legal institution, society and government can work together to advance our core socio-political and moral values? The implementation of administrative policies with ease requires decisions of administrative bodies to be based on consensus rather than taking unilateral decision affecting the lives of people at large. In this connection an innovative method known as " negotiated rule making", has come in US, in which representative of government, NGO, Corporate and stake-holder work together for a consensus on proposed administrative policy or project. This not only helps in preventing future litigation but also brings about public participation in decision making. The recent incident dated, 25-August-2107, of alleged failure of law and order machinery in the state of Haryana at the time of conviction in a case leading to arrest of Baba Ram Rahim is a glaring example, to understand why Administrative agencies entrusted with the duty and responsibility for the maintenance of law and public-order, failed to deal with the situation? The paramount questions are:

Was it a failure of political will to strictly deal with the problem in accordance the law laid down? Was it a case of top political-administration not giving free hand to civil-administration which by statute was entrusted to deal with the situation as per the mandate of public law for maintenance of peace and security? Or, if not so then, how a single man, may be having support of millions of followers can try to rise above the law of the land, as it poses a very serious question regarding rule of law before the Nation?

Whatsoever may be the answer to above questions and result of unending nationwide debate, two things have distinctly and clearly emerged out of it, they are:

In the first place the Indian judicial system not only stood the test of time but also, reaffirmed our belief that howsoever high a person may be law of the land is supreme and no one can be above the law of the land.

And in the second place, we have to seriously ponder upon our national priorities and come out of the colonial mind-set to be a truly progressive, democratic nation not only in

letter but more so in spirit.

Finally, Administration of Justice is one of the most important functions of the state because the citizens are made to realise the importance of the state by maintaining the law and order within the state through the Administration of Justice. Ongoing efforts of Deregulations and Privatisation and Division between the Public and Private Sector world-over, undoubtedly will have a long-term implication for the future Public Law and Administrative Law. In an increasingly globalised world future governance will require more and more stress on the evolution of democracy based administrative processes with an increased role for innovative public participation. Therefore, Public Law is that branch of law which deals with the relationship between individuals and the government and also deals with the relationship between individuals in society which are of a direct societal concern. Constitutional Law, Administrative Law, Taxation Law, as well as Procedural Law is all within the ambit of Public Law. It would not be out of place to mention that after seventy years of independence much is needed to be done in terms of our policies, affecting the public law and administrative law, it appears that some kind of colonial hangover is still there in the mind of our political executive and Bureaucracy who are mainly responsible for the governance of the country. The time is ripe for a change in the attitude of our policy or decision makers and executive dealing with day to day administration, to usher in a new era of good governance and good administration.

Notes and References

1. Dr. Kailash Rai, The Constitutional Law of India, 11th Ed., Central Law Publication, 107 Darbhanga Castle, Allahabad.
2. *Supra* note 1.
3. D.D. Basu, Comparative Constitutional Law, 2 Ed., 2008, reprint 2010, Lexix Nexis Butterworth, Wadhwa, Nagpur.
4. *Supra* note 1.
5. *Supra* note 3.
6. Brown *v.* Board of Education, US (1954).
7. *The Times of India* (daily), dated 22nd to 29th August 2017 Bennett, Coleman and Co. Ltd.
8. *Ibid*.
9. H.M. Seervai, Constitutional Law of India, 14th Ed., Universal Law Publication Co., New Delhi, 2005.
10. *Ibid*.
11. V.S. Deshpande, Judicial Review of Legislation, Eastern Book Co., Lucknow, 1975.
12. Barron *v.* Baltimore 32, US.
13. *Supra* foot note 11.
14. Edley, C.F. Jr., 1950 Administrative Law: Rethinking Judicial Control of Bureaucracy, Yale University Press, New Haven CT.
15. *Supra* foot note 14.
16. Training package on Administrative Law by Dr. Sunita Zalpuri Anchor DOPT- UNDP.
17. *Supra* footnote 16.