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PREFACE

It is with immense pleasure that the 21st Edition of the NHRC English Journal is being released on the occasion of Human Rights Day on 10th December 2022, in the discharge of the obligation of the Commission to spread human rights literacy and awareness as enunciated in the Protection of Human Rights Act, 1993.

Human Rights are the epitome of peace, tranquillity and coherence in society, as they embody the pious principles of dignity, equality, fraternity, and diversity. The Constitution of India, which is the supreme governing document of the country, enshrines human rights in the Preamble, Fundamental Rights and Directive Principles of the State Policy and Fundamental Duties defined in Article 51A. Moreover, their scope and ambit are constantly amplified through International Conventions, judicial intervention and progressive legislative enactments. Every right is corelated to some corresponding duty to be performed. We have to live in harmony with all living creatures for achieving sustainable development goals. In view of the challenges posed today, it is necessary to have researched articles taking stock of the situation and finding solutions for further guidance.

Since the publication of its first Edition in 2002, the Journal has relentlessly endeavoured to be a unique platform to share knowledge, ideas and opinions on varied facets of human rights issues among distinguished scholars, domain experts, legal practitioners, academicians, researchers, jurists, social activists, and others. Over the years, the annual Journal has played a significant role in promoting high-quality scholarship on human rights and spreading awareness about the legal and policy framework with the safeguards available to protect human rights.

I sincerely hope that this edition of the NHRC Journal will stimulate thinking about the human rights issues covered in the edition, create awareness in society, and facilitate the promotion of human rights for having a bearing on good governance.

Lastly, I express my warm gratitude to the learned members of the Editorial Board for their valuable cooperation and all the authors for contributing the enriching articles, without which the publication of this Journal would not have been possible.

(Arun Mishra)

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FROM THE EDITOR'S DESK

The English Journal of the National Human Rights Commission has been published annually since 2002 as part of the statutory responsibility of the Commission under Section 12(h) of the Protection of Human Rights Act (PHRA), 1993, to spread human rights literacy.

The Journal has successfully maintained a legacy of providing a platform for scholarly work on human rights and bringing together the fraternity of Human Rights scholars on substantial topical issues, in addition to facilitating the advancement of human rights culture and foster good governance in the country.

In this 21st Edition of the English Journal, renowned academicians and domain experts from civil society have contributed the articles. An attempt has been made to inspire discussions on thematic human rights issues, including Gender Rights, Child Rights, Rights of Tribals, Rights of Nursing Personnel, Intellectual Property Rights, Sustainable Development Goals, Access to Justice towards creating social order, challenges in Adoption Law, the imbroglio of legal capacity in Indian Disability Law, and the interrelationship between Rights, Duties and Directive Principles.

We trust that this Edition of the annual Journal will undoubtedly be a valuable addition to the pre-existing literature on human rights jurisprudence, apart from being a prized possession for policymakers, legal fraternity, research scholars, members of civil society organisations, administrators and others.

I take this opportunity to complement the devoted endeavours of all the authors of this Journal for carrying out intensive research, all the members of the Editorial Board for their persistent guidance, and commitment of the NHRC officials who have arduously worked for the publication of this Journal.

(D.K. Singh)

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Access to Justice towards the Creation of Inclusive Social Order as Envisaged under the Constitution: A Juridical Critique of Human Rights Perspective

Virendra Kumar*

Abstract

'Access to Justice' is a concept and a contrivance as well. It's one of the singular objectives in the creation of an inclusive social order, which has emerged as a universal principle of peace and development, for inclusivity promotes unity in diversity and strengthens democratic participation without undermining the dignity of the individual. This indeed is our most cherished constitutional goal. In order to realise this singular objective, the two constitutional perspectives; namely, access to justice with the intervention of court vis-à-vis Fundamental Rights and access to justice without court intervention vis-à-vis Directive Principles of State Policy have been explored. We have attempted to show that for the fruition of directives, it is not necessary at all to make them justiciable; rather, doing so would be their misconstruction. Functionally, both the perspectives are not merely complementary; rather, it is the directives that prepare the base for the enforceable Fundamental Rights and, thereby, enriching the whole gamut of human rights jurisprudence!

1. Introduction: Access to Justice and Complexion of the Indian State in its Realisation

In the celebration of 75 years of India's Independence as Azadi ka Amrit Mahotsav, we are prompted to take into account, how, in what manner, and to which extent we have hitherto succeeded in fulfilling the promises that we, the people of India, made to ourselves in the Constitution of our own making. Speaking pragmatically, all the promised goals tend to converge into the realisation of an inclusive social order, which is constitutionally conceived and proclaimed as 'Fraternity' in the very Preamble of the Constitution.

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Fulfilment of such a social order is comprehensive in character: it is founded upon the fundamental values of Justice, Liberty and Equality on the one hand,[1] and intended to be secured on the other hand in a humanistic manner that ensures the 'dignity of the individual' and 'unity and integrity of the Nation'.[2] It leads us eventually towards the *Human Rights Jurisprudence* with singular emphasis that in such a social order, each individual has the inherent right to lead a personally fulfilling and dignified life, while at the same time positively promoting the greater good of all.[3] In a way, the inclusive social order, premised on preserving human values of dignity, becomes the harbinger of, and precursor to peaceful, participatory, progressive, and sustainable development of the society at large.[4]

Establishing an inclusive society is indeed a gigantic and a challenging task, especially more in the backdrop of colonial rule from which we inherited a dismally fractured order, which was inherently divisive in character on all counts – socially, economically and politically. How to reconstruct the new social order as envisaged by us under the Constitution of Independent India continues to be perhaps the most critical question?

The founding fathers of our Constitution seemed to be mindful and consciously clear both of the constitutional objective and the means to attain that objective. Accordingly, they visualised the complexion of new India, called Bharat, which shall be "a Union of States."[5] Such an entity, having a distinct existence, objective and a conceptual reality, they visualised, shall be the Sovereign in her own right in the comity of Nations, having her own independent existence, and Republic in character in as much as she shall be headed by the persona chosen or elected by her own people and not by any hereditary monarch, the King or the Queen from

1 The three values of Justice, Liberty and Equality are used in the comprehensive sense. Justice means which is just socially, economically and politically; Liberty implies liberty of thought, expression, belief, faith and worship; and Equality connotes equality of status and opportunity.

2 Substituted by the Constitution (Forty-second Amendment) Act, 1976, s. 2, for "unity of the Nation" (w.e.f. 3-1-1977). The objective of expansion was not to add something new, but to expound what was already writ large in the provisions of the Constitution. *See* generally, infra, Part III. *See* also, The Tribune, September 11, 2022: "CPI MP moves SC against Swamy's plea over Preamble" – raising the controversy about the addition made through constitutional amendment in 1976 during the emergency imposed by the Indira Gandhi government.

3 'Inclusive social order', in the context of modern civil society, is not just a haphazard conglomeration of people, but a just and organised society, which is constituted of people of different persuasions, belonging to different religions, races, castes, sexes, ethnic groups or cultural traditions. The constitutional notion of such a society may be broadly located in the Fundamental Right to 'equality and non-discrimination' under Article 15 read with Article 14 of the Constitution, which stipulates that in our Indian polity, all citizens are free to organise themselves in any manner they like, and the "State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

4 For the exposition of 'peaceful, participatory, progressive, and sustainable development of the society at large,' *see* author's article, "Legality, Legitimacy, and Sustainability: Realising their inherent integrity in the backdrop of Covid-19 pandemic lessons – A Juridical Critique," Sambhashan, Volume 3: Issue 1 (2022) [published by Mumbai University, Mumbai, in their accredited journal].

5 Article 1(1) of the Constitution.

outside. In this wise, although we became independent on August 15, 1947, yet we became a full Republic on January 26, 1950.

In the matters of means to realise the objective of inclusive society, we have solemnly resolved to constitute India, into a "Socialist, Secular, Democratic" State.[6] This implies that for the fructification of constitutionally envisioned 'inclusive society', the Indian State shall always remain informed by the values of socialism, secularism and democratic tradition. That is, the Indian State in the matters of governance shall remain anchored to the philosophy of social welfare – welfare of all – irrespective of any consideration as of religion, race, caste, sex, et cetera.

For protecting constitutionalism, implying thereby a system of governance in which sovereignty lies in the Constitution, the Indian State in its governance is required to function through three distinct organs, namely the Legislature, Executive, and Judiciary. Each one of these has a distinct domain to function, and yet all of them are required to work in unison to fulfil the common constitutional objectives. In fact, the three-fold division or separation of powers is designed to maintain a system of checks and balances, in which Judiciary has been assigned the role of balancing, ensuring that all the organs of the State (including the judiciary), in the pursuit of realising the common constitutional objectives, function as per the limits laid down in the Constitution.

One of the most critical and crucial questions of constitutional import is: how the central objective of inclusive society, premised on justice, liberty and equality, is accomplished? It is to attain this objective, the notion of 'access to justice' as an integral part of Rule of Law, to be read as Rule of the Constitution, comes into play. In this respect, there are at least two broad perspectives, which may be deciphered from the Constitution. One, wherein we endeavour to establish inclusive society by having 'access to justice' with the instrumentality of courts. Two, wherein we tend to create inclusive social order without the intervention of courts. These two perspectives of access to justice may be delineated in the following next two sections, respectively.

6 *See supra,* note 2.

2. Creation of inclusive society by having 'access to justice' *with* the instrumentality of Courts

The system of hierarchy of courts has been created as envisaged under the Constitution.[7] In this respect, speaking functionally, the whole notion of 'Access to Justice' boils down to, what is termed as, procuring justice through 'judicial remedies' as provided in the law enacted by the State[8] in pursuance of the principles spelled out in the Constitution. Realisation of inclusive society through the contrivance of access to justice (judicial remedy) has many facets. In particular, the following nuances of access to justice through courts may be noticed:

(A) Access to justice via judicial remedy in the matters of private agreements

Ordinarily, as a matter of course, the conflict problems arising out of private agreements are sought to be resolved in terms of stipulations laid down in the framework of agreements between the contracting parties. As such, the private conflict problems fall outside the realm of judicial remedies. However, in certain situations wherein the private agreements, prima facie, are lop-sided and thus resulting into clear exploitation of one party, which is usually the weaker (socially, economically, politically), by the other party, which is invariably always the stronger, intervention by the State becomes imperative in the larger public interest. Indeed, the State is obligated to intervene, as we, the people of India, have solemnly resolved to constitute India bearing, *inter alia*, the 'socialist' and 'secular' complexion, as proclaimed in the very Preamble of the Constitution.

One such situational predicament, somewhat in a precipitated form, arose in the 'real estate sector', which continues to fulfil the increasing demand for housing, especially in the expanding urban populous areas.[9] Though the real estate sector had grown significantly in recent years, yet there was hardly any effective substantive regulatory

7 *See*, the Scheme under the Constitution regarding courts - PART V - THE UNION, CHAPTER IV: THE UNION JUDICIARY; and PART VI - THE STATES, CHAPTER V: THE HIGH COURTS IN THE STATES and CHAPTER VI: SUBORDINATE COURTS.

8 Broadly, for all intents and purposes, State means and includes, as defined under Article 12, and reiterated under Article 36 of the Constitution, "The Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

9 The usual surmise on this count is that the share of urban population of the total is constantly increasing, and it is estimated that close to the year 2050, more people in India would live in urban areas rather than rural.

mechanism that could protect the interests of consumers institutionally with a certain degree of 'professionalism and standardisation'. It is this stance that has led to the enactment of the central legislation, namely, the Real Estate (Regulation and Development) Act, 2016, "in the interests of effective consumer protection, uniformity and standardization of business practices and the transactions in the real estate sector."[10] It seeks to provide "for the establishment of the Real Estate Regulatory Authority (the Authority) for Regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority."[11]

A bare perusal of the objective statement of the Act of 2016 reveals that regulatory measures of the real estate sector have been designed with the singular purpose to protect the interests of the buyers of plot/apartment/building by ensuring transparency of the deal processes between the buyer and the seller, lest the buyer should be duped by the seller through concealed clauses that may work out to be unfair or unjust to the buyer. In short, the whole ambit of contractual relationship of buyer-seller through the legislative measure has become justiciable for promoting access to justice.

This stance may be illustrated through a recent three-Judge bench decision of the Supreme Court in Experion Developers Pvt. Ltd. v. Sushma Ashok Shiroor (2022).[12] On fact matrix, in this case, the appellant, Experion Developers Private Ltd., booked an apartment of the respondent lady in Gurugram, Haryana, for a total consideration of more than 2.3 crore of rupees and agreed for construction linked payment plan. This led to the execution of the Apartment Buyer's Agreement. Under the terms of Agreement, the developers shall handover the possession of the Apartment within a stipulated period. Since there was failure to honour the contractual commitment, the respondent buyer, as a consumer, approached the National Disputes Redressal Commission by filing an original complaint, alleging that she had paid a total consideration of over two

10 *See,* the Statement of Objects and Reasons of the Real Estate (Regulation and Development) Act, 2016 (Hereinafter simply, the Act of 2016).

11 *Ibid.*

12 *Per* U.U. Lalit, S. Ravindra Bhat and Pamidighantam Sri Narasimha, JJ., MANU/SC/0433/2022: AIR 2022 SC 1824. Hereinafter simply *Experion Developers.*

crores of rupees, and possession was not granted even till the filing of the complaint. Accordingly, she sought the refund of the amount paid along with interest at 24 per cent per annum. The Commission decreed her claim with interest @ nine per cent per annum for failure of the developers to deliver possession of the apartment within the time stipulated as per the Apartment Buyers Agreement.

In appeal, the Developer vehemently pleaded that though the stipulated period of handing over possession had already expired, nevertheless, "the purchaser will only be entitled to delay compensation under Clause 13" of the Agreement.[13] The three-Judge bench of the Supreme Court has negated this plea by observing that "the Commission is correct in its approach in holding that the clauses of the agreement are one-sided and that the Consumer is not bound to accept the possession of the apartment and can seek refund of the amount deposited by her with interest."[14] For agreeing with the "approach" of the National Commission that prompted it to hold that in the instant case, "the agreement is one-sided, heavily loaded against the allottee and entirely in favour of the Developers," the Supreme Court bench has examined the catena of cases.[15] The following principles underlying those judicial precedents may be usefully abstracted as under:

(a) If the terms of agreement are "wholly one-sided, unfair and unreasonable", the same "could not be relied upon".[16]

(b) "A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder."[17]

(c) A buyer "cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him, along with compensation".[18]

13 *See*, Experion Developers, para 3.2.

14 Id., para 10.

15 Cited in id., para 5.

16 Id., para 8.2, citing Pioneer Urban Land Infrastructure Ltd. and Anr. v. Union of India and Ors. MANU/SC/1071/2019: (2019) 8 SCC 416, para 6.3. Hereinafter simply Pioneer.

17 Id., para 8.2, citing Pioneer (para 6.8). *See* also the observations to the same effect in, id., para 9.3, citing NBCC (India) Ltd. v. Shri Ram Trivedi, MANU/SC/0179/2021: (2021) 5 SCC 273. The same principle was followed in a subsequent decision in DLF Home Developers Ltd. v. Capital Greens Flat Buyers Association and Ors. MANU/SC/1003/2020: (2021) 5 SCC 537.

18 Id., para 8.2, citing Pioneer (para 6.1).

(d) An aggrieved buyer "cannot be compelled to accept the possession whenever it is offered by the builder".[19]

(e) The incorporation of "one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986, since it adopts unfair methods or practices for the purpose of selling the flats by the builder", the builder, therefor, cannot seek to bind the buyer "with such one-sided contractual terms".[20]

(f) For annulling or voiding one-sided clauses in an agreement, the Supreme Court exhorted the Consumer Forums to "take a robust and a common-sense approach by taking judicial notice of the fact that flat purchasers obtained loans and are required to pay EMIs to financial institutions for subserving their debts".[21]

In view of these principles as abstracted above, the Supreme Court has held that "the powers of the Consumer Court are in no manner constrained to declare a contractual term", such as the delay compensation clause, "as unfair and one-sided," and, therefore, "null and void," "as an incident of the power to discontinue unfair or restrictive trade practices".[22] And, thus, the Consumer is not bound to accept the possession of the apartment as per the one-sided contractual terms and can seek refund of the amount deposited by her with interest.[23]

(B) Access to justice via judicial remedy in the matters of choice of forum or jurisdiction

In fructifying the concept of access to justice, which comes into play whenever there is a violation of right, the issue of choosing the appropriate forum comes to the fore. This is so, because invariably there are various statutes providing different legal remedies in addition to the normal one, which is available in civil courts as a matter of course. In

19 Id., para 8.2, citing Pioneer (para 6.2).

20 Id., para 8.2, citing Pioneer (paras 6.8 and 7).

21 Id., para 9.2, citing Wing Commander Arifur Rahman Khan and Aleya Sultana and Ors. v. DLF Southern Homes Private Limited, MANU/SC/0607/2020: (2020) 16 SCC 512. In this case, the Delay Compensation Clause provided for Rs. 5 per square foot per month. The Supreme Court found such a stipulation clearly one-sided, as it did not maintain a level platform or even reflect a bargain between the parties. Accordingly, the Supreme Court granted additional compensation at six per cent per annum simple interest to each buyer therein, over and above the Delay Compensation Clause.

22 Id., para 9.2, citing IREO Grace Realtech (P) Ltd. v. Abhishek Khanna and Ors., MANU/SC/0013/2021: (2021) 3 SCC 241, per Nageswara Rao, Ms. Malhotra, Ajay Rastogi, JJ. (Para 35). The delay compensation clause (similar to the Clause in the present case), which provided that the Developer would be liable to pay delay compensation @ Rs. 7.5 per square foot, which works out to approximately 0.9 to one per cent per annum, was held as null and void.

23 Id., para 10.

other words, when there is a provision of legal remedies in the alternative, the question arises, how to choose the forum? Is the availability of a remedy under a specific statute a bar to the alternative remedy?

The question has often come for adjudication before various forums, whether the remedy which is available under the provisions of Consumer Protection Act, 1986, can be availed of as a remedy in addition to the one available under special statute? In *Experion Developers,* the three-judge bench has answered this question categorically in the affirmative by observing: "This question is no more res integra."[24] By specifically citing the authority of the three-Judge Bench of the Supreme Court in *Imperia Structures Ltd.,* it is conclusively stated*:* "It has consistently been held by this Court that the remedies available under the provisions of the CP Act are additional remedies over and above the other remedies, including those made available under any special statutes; and that the availability of an alternate remedy is no bar in entertaining a complaint under the CP Act."[25] This summation is premised on the comprehensive examination of the jurisdiction of Consumer Forums vis-à-vis the specific remedies created under the RERA Act by undertaking comparative analysis of both the statutes, namely the Consumer Protection Act, 1986, and the RERA Act, 2016.[26]

This position has also been affirmed in *IREO Grace,*[27] in which the three-Judge bench of the Supreme Court had an occasion to consider the question as to whether the provisions of the RERA Act must be given primacy over the Consumer Protection Act, 1986. The bench answered the question in the negative by considering the juxtaposition of both the statutes and construing them purposively.[28]

In the light of two three-Judge bench decisions in Imperia Structures Ltd. and IREO Grace, the Supreme Court in the fact matrix of the instant case has concluded by stating

24 *See,* id., para 12.

25 Id., para 12, citing Imperia Structures Ltd. v. Anil Patni and Anr., per Uday Umesh Lalit, Vineet Saran, S. Ravindra Bhat, JJ., MANU/SC/0811/2020: (2020) 10 SCC 783 (para 23 in which the Supreme Court has spoken through Justice Uday Umesh Lalit).

26 *Ibid.*

27 *See supra* note 22.

28 In this respect, the Supreme Court particularly noticed the fact that the absence of a bar under the provisions of Section 79 of the RERA Act to the initiation of proceedings before a forum, which is not a civil court, read with Section 18 of the RERA Act makes the position clear, in as much as Section 18 of the RERA Act specifies that the remedies are "without prejudice to any other remedy available," *see,* Experion Developers, para 13.2, citing IREO Grace Realtech (P) Ltd. (para 42).

that "the Consumer Protection Act and the RERA Act neither exclude nor contradict each other";[29] "they are concurrent remedies operating independently and without primacy."[30] However, the added merit of the three-Judge bench in Experion Developers, in our own view, lies, not in just reaffirming the settled principles of law but, in putting the seminal idea of 'access to justice' on firmer footing by theorising the whole process of decision-making in the matters of 'choice of forums':

> "When Statutes provisioning judicial remedies fall for construction, the choice of *the interpretative outcomes should also depend on the constitutional duty to create effective judicial remedies in furtherance of access to justice*. A meaningful interpretation that effectuates access to justice is a constitutional imperative and it is this duty that must inform the interpretative criterion."[31] [Emphasis ours]

> "When Statutes provide more than one judicial fora for effectuating a right or to enforce a duty-obligation, *it is a feature of remedial choices offered by the State for an effective access to justice.* Therefore, while interpreting statutes provisioning plurality of remedies, it is necessary for Courts to harmonise the provisions in a constructive manner."[32] [Emphasis supplied]

Acting on this abstracted principle, in the *Experion Developers* case, the Supreme Court had no difficulty in holding that the consumer (the respondent petitioner) was not barred from invoking the jurisdiction of the Commission under the Consumer Protection Act and could seek such reliefs as she considered appropriate, and that position was similar to the protection provided under Section 18 of the RERA Act.[33]

(C) Access to justice via judicial remedy in refining the principles of Justice

One of the most significant features of the common law tradition is the continual refinement of the principles of justice through successive courts (lower to higher) and from case to case. This practice principle is further institutionalised through the statutory provision of appeals from the lower court to the higher court in the hierarchy

29 Experion Developers, para 14.1.
30 *Ibid.*
31 *Ibid.*
32 Id., para 14.2.
33 Id., para 16.

of judicial system. We have formally adopted this common law tradition and woven it into the fabric of our own Constitution.

Moreover, the constitutional system of governance is characterised by the primacy of the Constitution. This implies that the notion of justice as a value principle needs to be refined by its continual evaluation on the measure of Constitution itself, that is, on the basis of core values lying embedded in the foundational principles of Fundamental Rights enshrined in the Constitution.[34] The mode and medium of exploration of constitutional values is perceived as the continuing *process of judicial interpretation*, which is manifested clearly under the provisions of Articles 141, 142, and 145 of the Constitution.[35]

We may again turn to *Experion Developers* case for elucidating, how the notion of justice has been refined in pursuit of moving upwards by making appeals to the Supreme Court against the judgement of the National Disputes Redressal Commission.[36]

The Consumer before the Commission prayed, *inter alia*, that the opposite party may be held "guilty of unfair and restrictive trade practice as despite taking more than Rs. 2,06,41,379/- they have not completed the construction in 42 months as promised in the apartment buyer's agreement".[37] Accordingly, the developers may be directed "to refund the amount ... paid ... along with interest @ 24% p.a".[38]

Recognising the right of the Consumer to ask for the solitary relief, namely, for return of the amount with interest and compensation, the Commission passed an order directing the Developer as under:[39]

> "The opposite party shall refund an amount of Rs. 2,06,41,379/- paid by the complainant along with interest at nine per cent per annum from the date of last

34 *See* generally, the author's article, "Statement of Indian Law – Supreme Court of India Through its Constitution Bench Decisions since 1950: A Juristic Review of its Intrinsic Value and Juxtaposition," Journal of the Indian Law Institute, Vol. 58:2 (2016) 189-233.

35 *See, ibid.*

36 *See,* Experion Developers, para 23.

37 *See,* Experion Developers, para 18, read with appended footnote 15.

38 *Ibid.*

39 *Ibid.*

deposit before the due date of possession till actual payment on the amount paid before due date of possession and after this date, if any amount is deposited, then from the date of deposit till actual payment."

Both the parties – the consumer and the developer – felt dissatisfied with the Commission's order. The consumer contended that the rate of interest at nine per cent per annum is too low, and that the payment of interest must be from the date of payment of each instalment, and not from the date of last deposit before the due date of possession till actual payment on the amount paid before due date of possession.[40] The developers, on the other hand, pleaded that the interest rate of nine per cent is higher than what is envisaged under the Interest Act, 1978, which specifically states that the awarded rate by the Court should "not exceed the current rate of interest",[41] and that the "period for interest should be linked to the estimated date of possession and not the date of payments".[42]

The Supreme Court refined the notion of justice by slightly modifying the Commission's Order. In their evaluative judgement, on principle, "the interest payable on the amount deposited [is required] to be restitutionary and also compensatory."[43] Accordingly, it is held that "interest has to be paid from the date(s) of the deposit of the amounts",[44] and not "from the date of last deposit", as the Commission granted in its Order.[45] Thus, subject to the provision that the "interests shall be payable from the dates of such deposits", the appeal filed by the purchaser, in the opinion of the Supreme Court "deserves to be partly allowed".[46] However, at the same time, the apex court has unreservedly stated: "we are of the opinion that the interest of nine per cent granted by the Commission is fair and just and we find no reason to interfere in the appeal filed by the Consumer for enhancement of interest."[47]

40 *See,* id., para 20.
41 Section 3 (Power of court to allow interest) of the Interest Act 1978.
42 *See,* Experion Developers, para 21.
43 Id., para 22.1.
44 *Ibid.*
45 Ibid, by citing DLF Homes Panchkula Pvt. Ltd. v. DS Dhanda and Ors. MANU/SC/0744/2019: (2020) 16 SCC 318 (at para 21).
46 *Ibid.* MANU/SC/0664/2022MANU/SC/0664/2022: AIR 2022 SC 2713.
47 Id., para 22.2.

In sum, the refinement of the value of justice in the pursuit of access to justice reaches its pinnacle in the evolution of the concept of inherent power of 'judicial review' of the Supreme Court. This is so even where either no provision of appeal is provided or is specifically barred by a statute.[48] We may decipher this principle in judicial attempt to construe access to justice as a fundamental right under the Constitution.[49]

(D) Access to justice via judicial remedy vis-à-vis inordinate delays in justice delivery system

However, there is one, perhaps the most, disturbing dimension of access to justice via judicial remedy, which is caused by the inordinate delays in our justice delivery system. We cannot do better to put across the grievous injury that delay causes to the whole notion of access to justice through courts than what is stated summarily by Justice Ranjan Gogoi, CJI, while reflecting upon the state of 'present judicial set up' in India:

"Delay and backlogs in the administration of justice is of *paramount concern* for any country governed by the Rule of law. In our present judicial setup, disputes often take many decades to attain finality, travelling across a series of lower courts to the High Court and ending with an inevitable approach to the Supreme Court."[50] [Emphasis our]

"Such crawling pace of the justice delivery system only aggravates the misery of affected parties. Although with nebulous origins, the adage *'justice delayed, is justice denied'* is apt in this context. Courts in this country, probably in a quest to ensure complete justice for everyone, overlook the importance of expediency and finality. This situation has only worsened over the years, as evidenced through piling pendency across all Courts. It would, however, be wrong to place the blame of such delay squarely on the judiciary, for an empirical examination of pendency clearly demonstrates that the ratio of judges

48 *See, Madhya Pradesh High Court Advocates Bar Association and Ors. v. Union of India (UOI) and Ors.*, per K.M. Joseph and Hrishikesh Roy, JJ., MANU/SC/0664/2022: AIR 2022 SC 2713 (para 12), cited in *L. Chandra Kumar v. UOI,* MANU/SC/0261/1997:1997 (3) SCC 261: "it has been categorically declared that the power of judicial review Under Articles 226, 227, and 32 are part of the basic structure of our constitution and the same is inviolable."

49 *See,* the 5-Judge bench judgment in Rojer Mathew v. South Indian Bank Ltd. and Ors., MANU/SC/1563/2019: (2020) 6 SCC 1, per Ranjan Gogoi, C.J.I., N.V. Ramana, Dr. D.Y. Chandrachud, Deepak Gupta and Sanjiv Khanna, JJ., para 378 (per Deepak Gupta J.), citing Anita Kushwaha v. Pushap Sudan, MANU/SC/0797/2016: (2016) 8 SCC 509. Hereinafter Rojer Mathew.

50 Rojer Mathew, para 10.

against the country's population is one of the lowest in the world and the manpower (support staff) and infrastructure provided is dismal."[51]

Besides the factum of dreadful disproportion or yawning gap between the number of judges manning courts and the bulging population in India, there are other serious impediments in meeting the goals of access to justice for providing justice to all. Most recently, at the 11th Chief Ministers and Chief Justices Conference, held in Delhi on April 30, 2022,[52] the issue of access to justice came up for deliberation in an inter-face between the Executive and Judiciary, while discussing the major challenges being faced by the judiciary. The Prime Minister solemnly maintained that for making justice-system more accessible, the language of law and of the courts should be made as simple as could be easily understood by the common man without the use of incomprehensible legal jargons. The Chief Justice of India, on the other hand, mooted that for avoiding the mounting pendency of cases, in which more than half of the litigation is credited to the government, "weakness in both legislative processes and executive capabilities" need to be removed.[53]

Obviously, there is a "desperate need" to overcome the hurdles of delay in the administration of justice.[54] In view of rising "specialisation" and increasing "complex regulatory and commercial aspects, which require esoteric appraisal and adjudication", creation of tribunals, "conceptualised as specialised bodies with domain-specific knowledge expertise," has been conceived as "one solution in the ever-constant strive to increase access to justice."[55] However, the very objective of providing "faster and more efficacious adjudication of issues" through specialised forum for specific type of disputes is awfully belied for reasons of huge pendency before a number of Tribunals,[56] coupled with the fact "when a litigant has to spend too much money, time and effort to approach the adjudicating authority to get justice."[57]

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51 Id., para 11.

52 This Conference took place after a gap of six years; it was last held on April 24, 2016.

53 *See,* Editorial: "Chief Justice Ramana is Right," Hindustan Times, May 2, 2022.

54 *See,* Rojer Mathew, para 13 (per Ranjan Gogoi, C.J.I.).

55 *See,* id., para 13 read with para 12, and para 339 (per Dr. D.Y. Chandrachud, J.).

56 *See* The 272nd Report of the Law Commission of 2017, highlighting the high level of pendency before the Tribunals like Central Administrative Tribunal, Railway Claims Tribunal, Debt Recovery Tribunal, Customs, Excise, and Service Tax Appeal Tribunal, Income Tax Appellate Tribunal, which affects the very objective of tribunalisation, cited in Rojer Mathew, para 251, per Dr. D.Y. Chandrachud, J., while pointing out shortcomings of the current framework of tribunals mainly due to systemic and administrative problems). *See* also, Madras Bar Association v. Union of India (UOI) and Ors., per L. Nageswara Rao, Hemant Gupta, and S. Ravindra Bhat, JJ., MANU/SC/0429/2021, para 59: "The main reason for tribunalisation, which is to provide speedy justice, is not achieved as tribunals are wilting under the unbearable weight of the exploding docket."

57 *See,* Rojer Mathew, para 378: "In India, where delays plague the tribunals, a client will not hurriedly approach a tribunal even if he has a genuine grievance," per Deepak Gupta, J.

The latest pendency of unresolved cases, sheer in gross numbers, in various courts across India is stated to be to the tune of: 4.1 crore cases pending in district and taluka courts; 59 lakh cases pending in high courts; and 71,000 cases await ruling in the apex court.[58] The rate of case pile-up comes up to 2.8 per cent annually from 2010 to 2020.[59] For meeting this "alarming rate of high pendency of cases",[60] "the dispute resolution mechanism like mediation is an important tool in increasing access to justice by providing redress and settlement of disputes in a non-adversarial manner, free from the formalistic procedural practices of the law."[61]

In fact, the mediation mode of resolving disputes is recognised as one of the favoured methods of settlement of disputes all the world over. This is so reflected clearly in the Singapore Convention on Mediation, which is an international agreement regarding the recognition of mediated settlements.[62] It was adopted on December 20, 2018 and opened for signature by all States on August 7, 2019. India is one of the States, who signed right on the opening day in the first instance.[63] The Convention entered into force on September 12, 2020.[64]

Pursuant to the international commitment, India promptly adopted the measure to bring about mediated settlements within the framework of existing formal system of administration of justice with the introduction of Mediation Bill of 2021.[65] The avowed objective of the Bill is to: (a) "promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise;" (b) enforce mediated settlement agreements, (c) provide for a body for registration of mediators, (d) to encourage community mediation and (e) to make online mediation as acceptable and cost effective process and for matters connected therewith or incidental thereto.[66]

Although, the mode of mediation hitherto has been one of the alternative modes of resolution of conflict problems under Section 89 of the Code of Civil Procedure, 1908, nevertheless with

58 These pendency figures have been cited by Justice D.Y. Chandrachud, while delivering 'Justice Y.V. Chandrachud Memorial Lecture' at the Indian Law Society in Pune on August 20, 2022. *See, The Sunday Tribune*, August 21, 2022

59 This rate of pendency is based on the study done by PRS Legislative Research. *See,* ibid

60 Ibid

61 *Ibid.*

62 Formally called The United Nations Convention on International Settlement Agreements Resulting from Mediation.

63 As of September 11, 2021, it was signed by 55 states.

64 That is, six months after the deposit of the third ratification instrument by Qatar, the first two being Singapore and Fiji.

65 Bill No. XLIII of 2021.

66 *See* the Preamble of the Bill.

the added initiative to move from the procedural Code to the realm of substantive law, in our own view, the mediation method with detailed directives, supported and facilitated by Internet technology (resolving the issues of space and time), is likely to gain the requisite momentum and, thereby, meaningfully expanding the arena of access to justice in the creation of inclusive society.

3. Creation of inclusive society by having Access to Justice without the intervention of Courts

Access to justice, as delineated above, is the underlying basic principle of the 'rule of law'. Following the common law tradition, it is often invoked whenever there occurs a violation of a 'legal right', that is a right (as stated jurisprudentially by the distinguished judge and jurist John William Salmond), which is recognised and applied by the State in the administration of justice. A clear manifestation of this facet of right is reflected in Article 32 and Article 226 of the Constitution. By virtue of Article 32 and its juxtaposition, this right is not only the fundamental right of every citizen to move the highest court of the land by appropriate proceedings for the enforcement of the Fundamental Rights enunciated in Part III of the Constitution,[67] but also, by reason of its inclusion in Part III, the remedial right itself becomes the fundamental right, implying thereby that the right to move the court is an inviolable fundamental right. Likewise, under Article 226, every High Court shall have the power to issue directions, orders or writs to any Government, authority or person for the enforcement of any of the rights conferred by Part III and *for any other purpose* throughout the territories in relation to which it exercises jurisdiction.[68] Here, the only jurisdictional caveat in case of High Court is that the cause of action, wholly or in part, must have arisen for the exercise of such power, "notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."[69]

The clear implication is that the whole notion of 'access to justice' means, nothing more and nothing less but, *'access to courts'*, because courts are the constitutionally recognised 'temples

67 Under clause (2) of Article 32 of the Constitution, the Supreme Court shall have power "to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate," for the enforcement of any of the rights conferred by Part III.

68 Clause (1) of Article 226 of the Constitution.

69 Clause (2) of Article 226 of the Constitution.

of justice'. Functionally speaking, the whole burden of 'access to justice' through courts is that it makes the 'Rule of Law' 'justiciable'; without it, the whole gamut of human rights would remain inchoate, incomplete, imperfect or merely a theoretical abstraction.

In this backdrop, we may raise a critical question of constitutional consequence for our exploration: What is the value of Directive Principles Of State Policy contained in Part IV of the Constitution,[70] which are categorically declared under Article 37 "not [to] be enforceable by any court," "but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." This question becomes all the more significant in relation to Fundamental Rights enunciated in Part III of the Constitution.

Unarguably, both the Fundamental Rights spelled out in Part III and the Directive Principles of State Policy delineated in Part IV of the Constitution are fundamental in the governance of the country. Both are to be given effect by the same State,[71] not arbitrarily, but through the making of proper legislative enactments by adhering to the constitutional theory of separation of powers premised on the principle of checks and balances. But, then, the vital question that still remains is: how to construe the distinctive import of the qualifying clause in Article 37, stipulating that directive principles, in spite of being fundamental in the governance of the country are "not [to] be enforceable by any court?"

This may be illustratively expounded by considering the implementation of the provisions relating to education contained in Article 45 (Part IV) of the Constitution, as originally adopted and enacted in 1949, and commenced on January 26, 1950 for all intents and purposes.[72] The one sentence directive of original Article 45 (a little bit longish!) provided: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." What does it reveal in respect to the subject of education?

70 The complex of Part IV of the Constitution extends from Articles 36 to 51.

71 As defined under Article 12 (in Part III) and replicated under Article 36 (in Part IV) of the Constitution.

72 The original Article 45 underwent changes subsequently. It was amended and substituted to the following effect: "Provision for early childhood care and education to children below the age of six years: The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years." Vide the Constitution (Eighty-sixth Amendment) Act, 2002, s. 3, for Art. 45 (w.e.f. 1-4-2010).

A bare reading of this provision reveals the following four key points in terms of its implementation and full fructification:

> *One*, to provide education shall be the prime responsibility of the State.
>
> *Two,* this responsibility shall be discharged within a stipulated period of ten years from the date of commencement of the Constitution.
>
> *Three*, education shall be free and compulsory, that is, it shall not be a saleable commodity.
>
> *Four*, all this shall be accomplished by the State through the enactment of a proper law.

A conjoint consideration of all the four identified counts of Article 45 un-mistakenly conveys the primacy that the founding fathers of the Constitution consciously accorded to the subject of education. Otherwise also, by all accounts, 'education' is a very well recognised and established strategy, tool, or contrivance, which can bear the burden of resolving all sorts of complex issues or problems – social, economic and political – and that too with a futuristic import! But, then, what did we do with the constitutional mandate of original Article 45?

Nothing happened substantially for about next 50-60 years since the commencement of the Constitution in 1950, and mercifully the citizens had no power to force the State to fulfil its obligation under Article 45, as the directive provisions contained in Part IV are not enforceable in any court of law. And this is in contra-distinction with the Fundamental Rights enshrined in Part III, which are enforceable in the court of law.[73] Could we call it a monumental institutional failure of the State to realise the objective of Article 45 as mandated by the Constitution?

Nearly, after more than four decades since the inauguration of the Constitution, there came a humane and benevolent intervention by the Judiciary. The Supreme Court, through constitutional interpretation, read the obligation of the State to provide 'free and compulsory education to all children' under Article 45 within the ambit of Fundamental Right contained in Article 21, which guarantees to all citizens 'protection of life and personal liberty'.[74] This has been done by the Court by holding ingeniously that that the term 'life' under Article 21 means 'life with dignity', which comes only with the provision of education as visualised

73 *See* generally, *supra,* Part II.

74 Article 21, which mandates that "No person shall be deprived of his life or personal liberty except according to procedure established by law," is perhaps the most productive source of protecting human rights innovatively.

under Article 45 of the Constitution.[75] Such a correlation clearly conveys that the provision of education under Article 45 has, in a way, acquired the status of a fundamental right,[76] and thereby transforming the State obligation to provide free education into the Fundamental Right of children to receive education.

This stance of the Supreme Court, to use the proverbial expression, had awakened the State (the Government and Parliament of India) from its 'dogmatic slumber'. Through the constitutional amendment, a new Article 21A was introduced, which provides: "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."[77] Alongside, Article 45 was also amended in order to bring its provisions in line with the provisions of the new Article 21A. The new substituted version of Article 45 reads: "The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."[78]

Pursuant to these constitutional amendments, the Government and Parliament of India enacted *The Right of Children to Free and Compulsory Education Act, 2009* (popularly known as RTE Act 2009) that came into force with effect from April 1, 2010, providing 'right to education' to all children of the age of six to fourteen years as their guaranteed enforceable fundamental right by enabling them to seek admission in their neighbourhood schools – government run, government aided, or government unaided private schools! However, this move of providing free and compulsory education to all children was impeded, as the constitutional validity of RTE Act 2009 came to be questioned before the three-Judge Bench of the Supreme Court in Society for *Unaided Private Schools of Rajasthan v. Union of India* (2012).[79] This was done by the private unaided schools on the ground that the provision of the Act, permitting children to seek 'free education' to the extent of 30 per cent of the class strength (even with some compensatory provision by the Sate) in their schools violated their fundamental right under

75 *See,* Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors.,1993 AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645, a five-Judge bench of the Supreme Court has held that the right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the directive principle on education (Articles 41 and 45). This judgement remained unaltered in this interpretation despite its being overruled by the majority court in 11-Judge bench decision in T.M. Pai Foundation (2002) by the majority of 6:5.

76 *See,* M.C. Mehta v State of Tamil Nadu &Ors., (1996) 6 SCC 756; AIR 1997 SC 699, following the Constitutional Bench decision in Unni Krishnan.

77 Inserted by the Constitution (Eighty-sixth Amendment) Act, 2002, s. 2 (w.e.f. 1-4-2010).

78 Substituted by the Constitution (Eighty-sixth Amendment) Act, 2002, s. 3, for art. 45 (w.e.f. 1-4-2010).

79 (2012) 6 SCC 1, per S.H. Kapadia, CJ, K.S.P. Radhakrishnan and Swatanter Kumar, JJ. Hereinafter simply cited as Society for Un-aided Private Schools.

Article 19(1)(g) of the Constitution, which guarantees fundamental freedom to all citizens "to carry on any occupation, trade or business".

This challenge was negated by the Supreme Court by holding that Article 19(1)(g) read with 19(6) of the Constitution permits the State to impose such a condition as admitting certain percentage of students belonging to weaker sections of the society. Such a condition is absolutely reasonable, excepting in the case of minority educational institutions.[80]

Having reached thus far, we need to ask and ponder over the plain pragmatic question: Have we succeeded in providing free and compulsory education to all children till today, notwithstanding the transformation of the provision of education from non-enforceable directive to enforceable fundamental right? Or, to put it more candidly: Has it ceased to be the responsibility of the State to provide free and compulsory education to all children? Isn't the concept of free and compulsory education being increasingly eroded, subsumed, or swept away by education as a tradable commodity? Hasn't education become perhaps one of the most lucrative money-minting commercial enterprises instead of a philanthropic activity of the State?

The State has denied all such allegations, albeit gently. The constitutional head of the State of Haryana, for instance, while addressing the Manthan School Leadership Summit-2021 organised by the National Independent Schools Alliance (NISA) in Ambala Cantonment has stated that "health and education sectors are not the source of money, but two important pillars of human resource development, which could neither be compromised nor traded".[81]

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80 *See* generally, the author's article, "The Right of Children to free and Compulsory Education Act, 2009: A juridical critique of its constitutional perspective," Journal of the Indian Law Institute, Vol. 55:1 (2013), 21- 44, arguing, inter alia, that the three-Judge Bench of the Supreme Court had excluded minority educational institutions from the reach of children belonging to poorer section of society seemingly more on the authority of the 11-Judge bench decision in T.M.A. Pai Foundation case (2002), rather than on the authority of reason! In this respect, the author has pleaded that by virtue of seeking State recognition, even the so-called unaided minority educational institutions come within the ambit of State power to regulate the admission process. *See* the author's critique of 11-Judge bench judgement of the Supreme Court in T.M.A. Pai Foundation case, Judgement Today 2002 (9) SC 25, published as, "Minorities' Rights to Run Educational Institutions: T.M.A. Pai Foundation in Perspective," Journal of the Indian Law Institute. Vol. 45, No. 2 (2003), 200-238.

This case dealt with the spurt of privately managed educational institutions imparting professional education, especially in such fields as medicine, dentistry and engineering. In the state of Karnataka alone, for instance, out of 84 educational institutions, 67 were privately managed charging hefty fees, and only 17 were managed by the Government! On the basis of my analysis, I have submitted that the majority court decision by a deeply divided Court 6:5, requires reconsideration.

81 *See,* The Tribune, November 28, 2021: "Governor: No compromise on education, health."

Likewise, the Jammu and Kashmir Lieutenant Governor, Manoj Sinha has said: "Education and health of children are the biggest responsibilities of the administration."[82]

However, notwithstanding the affirmative statements of the two constitutional heads of two States regarding the State responsibility to provide free and compulsory education to all children, the ground realities reveal the saga of sad stories. Even after the coming into force of the new National Educational Policy of 2020 formulated under the RTE Act 2009, the students belonging to Economically Weaker Sections (EWS) are still at the receiving end for their basic education. The private schools are blatantly denying admission to them despite their allocation under the rules framed by the State.[83]

We may now look back in retrospect and ask *de novo*, why has the State hitherto during the past 75 years of our Independence failed to provide free and compulsory education for all children? And this is happening notwithstanding the operation of new NEPs during the past two years, that is since July 2020, wherein the State has renewed its resolve to provide free and compulsory education to all children by the year 2025?[84]

We decipher at least two basic flaws. One, hitherto we have failed to comprehend the underlying value of the statement made by the founding fathers of the Constitution when under Article 37 of the Constitution, it is clearly and categorically stated that the provisions contained in Part IV, including the provision relating to education under Article 45, "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." If so, we may ask, what about the whole exercise of zealously undertaking in transforming the 'non-enforceable' principle relating to education into an 'enforceable' one? In our view, it is the "flawed thinking" (to borrow the expression

82 *See,* The Tribune, February 21, 2022: "Education govt.'s priority, says Lieutenant Governor."

83 *See,* The Tribune, December 23, 2021: "Not enrolled by private schools, EWS students at receiving end in Haryana." The private schools refused to give admission to the students of Economically Weaker Section (EWS), who have been selected under Rule 134A. ONLY one per cent kids enrolled: Only 272 (less than 1%) of 41,860 EWS students, who had been marked for admission to private schools under rule-134A in the state of Haryana were admitted.

84 The new NEP 2020, replacing the National Education Policy of 1986, is an ambitious and far-reaching policy that seeks to transform the Indian education system into the one that is on par with the best in the world. It promises to be implemented in a phased manner beginning with the year 2021 and implemented entirely by the year 2025, to be reviewed in 2030. *See* also author's article, "Revisiting Gandhi in Our Contemporaneous World," Sambhashan, Vol. 1, Issue 07, 2020, 104-126, commenting upon the new NEP as the tool of serving the basic needs of society as was conceived by Gandhi while opposing the British model of education.

of Chief Justice Ramana)[85] of the constitutional obligation of the State under Article 45 of the Constitution that led us to its misconstruction!

For due appreciation of the provisions of Article 45, we may raise another basic question: Why did the founding fathers of our Constitution place the subject of education in the very first instance within the ambit of Directive Principles of State Policy in Part IV, instead of Part III of the Constitution? Did the founding fathers make the subject of education non-enforceable by inadvertent omission, which was later corrected by the Supreme Court (by reading Article 45 in conjunction with Article 21) and the Parliament (through the Constitution (Eighty-sixth Amendment) Act, 2002? In our own understanding, the very purpose of placing Article 45 in Part IV of the Constitution was by design and not by default?

Even at the cost of repetition, we inquire again: What was the design in making the subject of 'free and compulsory education' non-enforceable for all children up to the age of 14 years? Our exploratory response is: vis-à-vis children, the State was considered in the position of, what is termed as *patria potestas* in Roman law, which literally means the "power of a father" over his children and family,[86] and likewise as *Karta* in the Hindu joint family system, who enjoyed the pivotal position in the matters of family, including the welfare of children, in the Indian classical tradition of Hindu law.[87] By putting the State into the position of *patria potestas* or *Karta* for fulfilling the constitutional mandate to provide free and compulsory education, do we need to make Article 45 justiciable; that is, to invoke the interventional provision of 'access to justice' through the instrumentality of court? The clear answer is not in the affirmative, but negative. Why? And this takes us to the second basic flaw.

85 *See,* Hindustan Times, July 3, 2022.

Recently, the Chief Justice of India, N.V. Ramana, while addressing the Indian diaspora at an event organised by the Association of Indo Americans, in San Francisco, USA, lamented the "flawed thinking" generally about "the roles and responsibilities assigned by the Constitution to each of the Institutions." Lest, the purport of his thoughts is misunderstood, his statement is quoted in full: "As we celebrate 75th year of Independence this year and as our Republic turned 72, with some sense of regret, I must add here that we still haven't learnt to appreciate wholly the roles and responsibilities assigned by the Constitution to each of the Institutions." In his own assessment, "this flawed thinking of all hues flourishes in the absence of proper understanding among people about the Constitution and the functioning of the democratic institutions." [Emphasis supplied]

86 In Roman law the "power of a father" over his children and family, was conceived as a fundamental principle of Roman society.

87 Hindu Law is acclaimed as having "the oldest pedigree of any known system of jurisprudence." *See,* Virendra Kumar, "Hindu Law: Overview," Published in The Oxford International Encyclopaedia of Legal History (Oxford University Press, USA, (2009)

Understanding the usage of the term 'duty' under Article 37 is of crucial significance. It is required to be construed, not in the sense in which it is used as a correlative of 'right'[88] but, in the sense of *dharma* (aggregate of duties) in the Indian classical tradition, wherein the notion of 'right' itself is defined in terms of 'duty' – your right is to perform your own duty. Such a comprehension of the notion of duty within the precinct of Article 37 obviates the need of construing 'access to justice' in respect of education in terms of enforceable right at the instance of children, as duties of the State are required to be enforced *ipso facto* (by the fact itself), without doing anything more. Under the traditional Hindu law, for instance, a *Karta* of the joint family is obligated to perform his duties from 'within' and not 'without'!

With a view to drive home this point, we may illustratively take the public policy measure recently adopted by a State for promoting 'free and compulsory education', especially for children belonging to economically weaker sections of society. The State of Haryana, for instance, has introduced a scheme, CHEERAG (CM Haryana Equal Education Relief, Assistance and Grant) Scheme, which provides for free education to economically weaker section (EWS) children in private schools from Class II to XII.[89] To utmost dismay of the State, only 1,470 applications have been received against 24,987 seats reserved under the CHEERAG scheme in 381 private schools across the state. This comes to just six per cent of the total seats.[90] Why has this scheme evoked such a tepid response?

In this respect, we need to learn a lesson from the Indian classical tradition. We need to learn to construe the status of State under Article 45 of the Constitution as that of a *Karta* of the big joint family, who understands the primacy of education in building new India, and does not require any prodding from outside. Accordingly, the State should not expect EWS children 'to apply' by invoking their right under the special scheme. Here, the State itself is assumed, as if, to be an applicant on their behalf! Such an understanding of the usage of 'duty' of the State under Article 37, in our view, completely subsumes the notion of the right to 'access to justice' through courts. In short, non-appreciation of this basic premise has hitherto been blocking the realisation of the objective of Article 45, and thereby we are losing the primacy

88 This is the notion which is often invoked and used in the Indian legal system by following the western jurisprudence, which overwhelmingly advocates that no duty can exist without a corresponding right, and vice versa. *See* for instance, the theorisation of Salmond, who strongly believed that in the regulation of modern society every duty which is performed is invariably always in respect of a correlated right attached to it. For understanding the basic concept, *see* generally, the textbook, Salmond's Jurisprudence.

89 *See,* The Tribune, July 13, 2022: "Haryana's scheme for EWS students fares poorly, only six per cent seats sought."

90 Under the CHEERAG scheme, the last date to apply was July 8. Not a single application was received in six districts — Rohtak, Karnal, Mahendragarh, Mewat, Palwal and Panchkula — and less than ten were received in Ambala, Jhajjar, Sirsa and Yamunanagar districts. *See, ibid.*

of education in nation building.[91] Although it may sound ironical and yet this is true that it is 'education' and education alone, which may strengthen the course of 'access to justice', rather than vice versa!

Conclusion: 'Access to Justice' — in quest for 'THE TRUTH'

'Access to justice', speaking metaphorically, is a continual quest for *The Truth*. In the domain of constitutional system of governance in which sovereignty lies in the Constitution, accessing 'justice', with or without the intervention of courts,[92] is indeed a quest for the truth. And 'the truth' mostly means an unrelenting exploration of constitutional values for discovering the newer and newer dimensions of justice. Here, for all intents and purposes, 'the truth' is synonym for the 'constitutional justice', that is, justice under the 'constitutional law',[93] which itself is premised on all such *perennial* values as of morality, ethics, rationality, equality, equity, just and fairness, et cetera.[94] All these values, commonly considered as essential attributes of justice, are broadly embodied in terms of "Justice", "Liberty", "Equality", and "Fraternity", as proclaimed in the Preamble of our Constitution.[95] At times, these values are also cumulatively called, although in a most generic manner, inhering the principle of 'constitutional morality'. Moreover, the very realisation of an inclusive social order via access to justice through constitutional values is an integral part of the implied

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91 Cf. Primacy of Education accorded by the British as the most powerful tool of governance in their Political Armory! Tony Blair, a distinguished British Labour Statesman (with victories in 1997, 2001, and 2005, Blair was the Labour Party's longest-serving Prime Minister), for instance, proudly proclaimed: "Ask me my three main priorities for Government, and I tell you: Education; Education; and Education." (From the speech at the Labour Party Conference, October 1, 1996). In India, on the other hand, for the persisting pathetic picture of school education, *see,* The Sunday Tribune, July 10, 2022: "4 years on, government school yet to get own building" — in the primary school, students at Ravidas Dharamshala in Karnal, there are only two teachers on deputation to accommodate 165 students of five classes; teaching all subjects, no toilets, no drinking water facilities! *See* also, Chandigarh Tribune, July 10, 2022: "Special kids have fundamental right to elementary education: HC." The Punjab and Haryana High Court had specifically stated that the State was "duty bound" to provide the same in accordance with the statutory provisions; The Tribune, September 8, 2022: "Parents lock school in Panipat village, protest shortage of teacher" – no teacher was left in the school to teach 200 students enrolled in Class VI-VIII in the government school; Hindustan Times, September 15, 2022: "Just 2 teachers for 300 students: Protest erupts at Karnal school"; The Tribune, September 19, 2022: "Two years on, Morni college sans building – With 30 students, lone teacher, classes being held in polytechnic"; The Tribune, September 28, 2022 "Students protest shortage of in Rohtak village" – in view of the shortage of teachers, a "peon had been deputed to teach the students as he had the requisite qualification," as per the statement of the school Principal.

92 *See, supra,* Part II and Part III.

93 In all modern developing societies, administration of justice means administration of justice according to law, for law and justice are coterminous.

94 Encyclopaedic notion of justice usually entails such set of values on which a society and the State must be based. In a formal sense, justice is the set of codified norms that the State, through the competent bodies, dictates, enforces and sanctions when they are disrespected, affecting the common good.

95 For their interrelation, *see* generally, *supra,* Part I.

irrevocable understanding between the citizen and the State (amounting to social contract) at the very threshold of our constitution making.[96]

However, fructification of 'fraternity' (that is, inclusive social order) through 'access to justice' is indeed a very complex constitutional phenomenon. It requires continual adjustment and accommodation of competing conflicting interests on the touchstone of Fundamental Rights and their foundational values (Basic Structure Doctrine) enshrined in Part III of the Constitution.[97] The responsibility of protecting as well as exploring hitherto unexplored constitutional values through the interpretative process has been exclusively entrusted to the Supreme Court. This role of the Supreme Court is proverbially described as, '*sentinel on the qui vive'* [a guard on the alert].

The apex court is not only the accredited spokesperson of the Constitution,[98] but also the supreme authority to resolve any 'substantial question of law as to the interpretation of this Constitution'[99] and virtually the transitory law-maker as it can "in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it."[100] The clear implication flowing from all the three attributes is: the Supreme Court plays perhaps the most crucial role in augmenting access to justice by investing the 'rule of law' with exploration of new constitutional values, especially through its Constitution Benches consisting of at least five or more judges.[101] This indeed is the design that makes our Constitution robust and full of futuristic import.

However, on a quick look at the constitutional journey of 75 years, we may decipher at least two counts on which we are found wanting and a course-correction is desiderated. That would strengthen and sustain the pace of access to justice in building up the inclusive society.

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96 Social contract theory goes back to an imagined or hypothetical state of nature to create an equitable just social order in which there is an implied irrevocable social contract between the State (King) and the citizens (subjects), the former protecting the latter, including particularly the most vulnerable ones, as per the agreement sanctified through a sacred document (Constitution). *See* John Rawls' A Theory of Justice (1971) based on the work of such philosophers as Locke, Rousseau, and Kant, using the social contract theory to say that justice, and especially distributive justice, is a form of fairness.

97 *See,* the author's article, "Basic structure of the Indian Constitution: The doctrine of constitutionally controlled governance [From His Holiness Kesavananda Bharati (1973) to I.R. Coelho (2007)]," Journal of the Indian Law Institute, Vol. 49 No. 3 (2007) 365-398.

98 Article 141 of the Constitution stipulates that declaring "the law" is the prerogative of the Supreme Court, which "shall be binding on all courts within the territory of India."

99 Under Article 145(3) of the Constitution, for this purpose, the minimum number of Judges "shall be five."

100 Under Article 142(1) of the Constitution, any such law made by the Supreme Court, however, "shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

101 *See, supra,* note 34.

Relatively speaking, there are two related counts on which we need to pay attention on priority for the fruition of access to justice for all.

The first count: For avoiding proverbial long delays and clogging of the wheels of administration of justice, it is imperative to have a crystal-clear vision of constitutional values by all the three organs of the State: The Parliament, the Executive, and the Supreme Court. And this vision has to emerge, oddly enough, from the Constitution Bench decisions of the Supreme Court, which is the constitutionally mandated prime responsibility of the apex court. In this respect, we need to remember, what Justice Shah stated in one of his conclusions now more than 20 years back in respect of interpretative role of the Supreme Court in the exploration of constitutional values: "It is established that Fundamental Rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience," and that "[t]he attempt of the Court should be to expand the reach and ambit of the Fundamental Rights by process of judicial interpretation."[102] However, this critical role of the Supreme Court through its Constitution Benches has relatively remained on backburners until most recently,[103] may be for the reasons of untold complexities and arduous task involved in the decision-making process!

With a view to elucidate the complex constitutional phenomenon, necessitating for the Supreme Court to visit the Constitution time and again for deciphering its true values, we may cite our critique of the five-Judge Constitution Bench judgement in the *Sabrimala Temple* case

102 *See, People's Union for Civil Liberties (PUCL) v. Union of India and Anr.* MANU/SC/0234/2003: (2003) 4 SCC 399, while striking down Section 33-Bof RPA Act, 1951 [inserted by the Representation of the People (Third Amendment) Act, 2002]. For elaborate analysis, *see* the author's article, "People's Right to Know Antecedents of their Election Candidates: A Critique of Constitutional Strategies," *Journal of the Indian Law Institute*, Vol. 47 No. 2 (2005) 135-157. Even the Appellate jurisdiction of the Supreme Court under Articles 132-134 in all matters — civil, criminal or other proceeding — would itself be substantially served with the clear vision of constitutional values.

103 *See,* The Tribune, August 28, 2022: Editorial — "Constitution Bench — SC focus back on critical aspect of interpreting laws." — It commends the initiative of the newly appointed 49th Chief Justice of India (CJI), U.U. Lalit, who on the very first day of taking over as CJI listed several five-judge Constitution Bench matters for hearing, and, thereby, "shifting the focus back on a critical aspect that has been overlooked in recent years." To "lay down the law with clarity," "the court would strive to have a Constitution Bench sitting throughout the year" with the singular aim at "avoiding the long delays". According to the Vidhi Centre for Legal Policy, a total of 492 cases are pending before the Constitution Benches of the Supreme Court, *see* The Tribune, August 25, 2022. The decisions rendered by the Constitution Benches in those cases, it is surmised, would help in quick decision-making in most of the connected cases and, thereby, reducing the pendency of cases before the Supreme Court that has crossed over 71,000, from a little over 55,000 in 2017, despite the sanctioned strength being increased to 34 judges in 2019.

(2018).[104] The critical issue involved in this case is whether barring women of menstruating age (10-50 years) from entering the Sabrimala temple, is constitutionally consistent? By a majority of 4:1, the Constitution Bench has held that exclusion of women of menstruating age from the Sabrimala temple is unconstitutional.[105] This judgement has turned out to be highly contentious, both in the judicial and popular public domain, leading to the filing of as many as 64 review petitions, including review pleas, seeking review of the verdict of the Constitution Bench.

In view of the social upheaval caused by the judgement of the divided court, the review petitions were heard in the open court in an unprecedented manner. The review judgement was, however, kept reserved on February 6, 2019 after the conclusion of arguments. It was pronounced after a gap of about nine months (full gestation period!) on November 14, 2019, referring the matter to seven-Judge Constitution Bench on seven issues, without deciding the review petitions, by a majority of 3:2!

The centrality of seven issues, however, revolves around one basic, fundamental question of constitutional interpretation; namely, how to construe the interplay between the fundamental right to 'equality and non-discrimination' under Articles 14 and 15 on the one hand, and the Fundamental Right to 'freedom of religion' under Articles 25 and 26 on the other in our constitutional scheme of things?[106] When the seven-Judge Constitution Bench met for hearing on January 6, 2020, the seven-Issue Reference was instantly referred to be heard by the Constitution Bench of nine Judges, which would commence hearing from January 13, 2020. However, at the commencement of hearing on January 13, 2020, the nine-Judge bench of the Supreme Court clarified that "it will confine itself in answering the larger issues, and will not decide the review petitions," and then dispersed. The chiselled judgement of the nine-Judge Constitution Bench on the *inter se* relationship between the two sets of

104 *See* generally, the author's critique of Sabrimala Temple case (2018), which was presented by him as the "57th PANJAB UNIVERSITY COLLOQUIUM" – Special Lecture – on August 27, 2019, under the title, "Socio-religious Reform through Judicial Intervention: Its limit and limitation under the Constitution," and published as such in the form of a Monograph by the Panjab University (With a Foreword by Justice Ashok Bhan, Former Judge, Supreme Court of India) [Publication Bureau, Panjab University, Chandigarh. First Edition: 2020]. Hereinafter referred to simply, Critique. The Sabrimala Temple case (2018) refers to Indian Young Lawyers Association and Ors. v. The State of Kerala and Ors., [Writ Petition (Civil) No. 373 of 2006, decided on 28.09.2018] per Dipak Misra, CJI, A.M. Khanwilkar, Rohinton Fali Nariman, Dr. D.Y. Chandrachud and Indu Malhotra, JJ.

105 Per Dipak Misra, CJI (for himself and A.M. Khanwilkar, J.), Rohinton Fali Nariman, and Dr. D.Y. Chandrachud, JJ. (concurring); and Indu Malhotra, J. (dissenting).

106 *See* the author's analysis of the seven issues appended as an added post-script to his Critique, *ibid.*

Fundamental Rights under the Constitution is keenly awaited,[107] which would promote the process of access to justice by sharpening the contours of constitutional values.

Not with standing the complexities involved, for continually refining the constitutional values, the constitution of Constitution Benches is the assured constitutional course. Most recently, it is for this very reason, a three-Judge Bench of the Supreme Court led by the Chief Justice of India,[108] in order to refine the notion of 'mitigating circumstances', which are to be considered while imposing death penalty in 'rarest of rare' cases, referred the issue to the five-Judge Constitution Bench.[109] Doing so was necessitated as there was a clear conflict of opinion on this count between the two sets of three-Judge Bench decisions, and in the sagacious opinion of the Supreme Court in the instant case, "it is necessary to have clarity on the matter to ensure a uniform approach on the question of granting real and meaningful opportunity, as opposed to a formal hearing, to the accused/convict on the issue of sentence."[110] Moreover, whether such an opportunity should be granted to the accused/convict earlier than at the stage of sentencing, that is at the stage of trial itself, would bring about substantive clarity on judicially construed sentencing policy.[111] Herein lies the most fundamental critical value of the judgements of the Constitution Bench in the arena of access to justice.

The second count that requires reorientation relates to understanding the intrinsic value of the Directive Principles of State Policy placed in Part IV of the Constitution (Articles 36-51). The key to understand these directive principles is contained in Article 37, which makes the plethora of provisions enunciated in Part IV (Articles 38-51) simply as 'non-enforceable' by any court of law. Hitherto, we seem to have missed the profound significance of the element

107 In this scenario, our Critique on Sabrimala Temple case (2018) carries a distinctive critical functional value, in as much as in it we had not only anticipated the centrality of seven-Issue Reference by specifically raising three critical questions for exploring the interplay between the constitutional right to 'freedom of religion' (Articles 25 and 26) and the right to 'equality and non-discrimination' (Articles 14 and 15), but also responded to them in full measure. Since these very questions are yet to be answered principally by the nine-Judge Bench in response to the seven-Issue Reference, their response is most eagerly awaited as that would give us another opportunity of re-visiting our Critique and to *see* for ourselves in retrospect, how far we were justified in comprehending the constitutional jurisprudence and say with a certain degree of certitude that in the realm of 'freedom of religion' read with the 'right to equality', 'freedom *of* religion' should not be mistaken for 'freedom *from* religion'.

108 Besides Justice U.U. Lalit, Chief Justice of India, the three-judge Bench of the Supreme Court included, Justice S. Ravindra Bhat and Justice Sudhanshu Dhulia.

109 *See, The Tribune*, September 20, 2022: "Death penalty: Constitution Bench to frame rules on mitigating circumstances."

110 *Ibid.*

111 Writing the judgement for the Bench, Justice Bhat said, "It is also a fact that in all cases where imposition of capital punishment is a choice of sentence, aggravating circumstances would always be on record, and would be part of the prosecution's evidence, leading to conviction, whereas the accused can scarcely be expected to place mitigating circumstances on record for the reason that the stage for doing so is after conviction. This places the convict at a hopeless disadvantage, tilting the scales heavily against him." *Ibid.*

of 'non-enforceability', and that has led us to the strange adventures to finding ways, how to make them enforceable?[112]

What is the strategic significance of declaring directive principles in Part IV non-enforceable (as distinguished from the enforceable ones at the instance of individual citizens in Part III) and, at the same time, treating them as "fundamental in the governance of the country" and commanding the State that it would be its mandatory constitutional "duty" "to apply these principles in making laws"? The answer is provided concomitantly by the founding fathers of the Constitution themselves. This is by stating unequivocally that, that very State,[113] which is obligated to protect the Fundamental Rights of citizens under Part III, is mandatorily required "to secure a social order for the promotion of welfare of the people."[114] And the envisaged complexion of such a "social order" to be secured by the State is comprehensive in character; namely, "a social order in which justice, social, economic and political, shall inform all the institutions of the national life."[115] In this wise, the State is commanded, "in particular," to "strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."[116]

In view of this comprehensive constitutional character of the affirmative role of the State, read with the solemn resolve to create an inclusive social order (Fraternity) in the very Preamble of the Constitution, the message is 'loud and clear': the State is 'duty bound' to provide justice to all *ipso facto*, including particularly the ones who are vulnerable – socially, economically and politically. The State is not required to be prompted to implement the directives, unlike in the case of Fundamental Rights, by making them enforceable (that is, justiciable) in any court of law. The State action itself is expected to be 'self-justified.'

Finally, in our summation, we may decipher and crystalise the following four reasons in proximity, showing why the Directive Principles of State Policy have been envisioned in our Constitution simply as non-enforceable:

112 *See* generally, *supra,* Part III.

113 The definition of the State given under Article 12 of Part III, shall be the same for the purpose of Part IV by virtue of Article 36 of Part IV of the Constitution.

114 Article 38 of the Constitution.

115 Article 38(1) of the Constitution.

116 Article 38(2) of the Constitution. Inserted by the Constitution (Forty-fourth Amendment) Act, 1978, s. 9 (w.e.f. 20-6-1979).

Firstly, by reason of their very intrinsic nature, the directive principles, accommodated and included in Part IV of the Constitution, are not made enforceable in any court of law.[117]

Secondly, the avowed purpose of including various directives in the complex of our Constitution is to invest it (*Constitution of India*) clearly with the philosophy of Social Welfare State, implying thereby a socio-economic-politico system in which the state assumes the primary responsibility for the welfare of its citizens, as in matters of health care, education, employment, and social security. Such an engaging responsibility is evident from the very phraseology of Article 38, which affirms that the prime purpose of the State is "to secure a social order for the promotion of welfare of the people."[118] In social welfare State, thus, the State acts on behalf of indeterminate number of people even without their asking and invoking the intervention of any court.

Thirdly, to provide access to justice for all on equal footing through the operation of legal system via courts, there is a special directive, which directs the State to provide "free legal aid" "to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."[119] The underlying implication is that this directive, instead of itself being enforceable in any court of law, enables the needy and underprivileged members of the community to enforce their Fundamental Rights. In order to strengthen this enabling provision, only very recently, in view of the startling fact that over 70 per cent of the population is below poverty line, but only 12 per cent opt for legal aid, the National Legal Services Authority of India (NALSA) under the *Legal Services Authorities Act, 1987* have launched the special project called "Legal Aid Defence Counsel system" in all the districts of all the States in India.[120]

Fourthly, the very nomenclature of Part IV is indicative of its profound purposive objective. The indicted innate objective is to enunciate principles that would form the very basis of State

117 The non-enforceable nature of directives may be instanced and illustrated through the directives contained in Article 39, which commends the State to frame policy towards securing "(a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength." By virtue of their very nature, these policy measures are not amenable to enforcement by an order or decree of any court.

118 Article 38 of the Constitution.

119 Article 39A, inserted by the Constitution (Forty-second Amendment) Act, 1976, s. 8 (w.e.f. 3-1-1977).

120 *See,* The Tribune, August 22, 2022: Terming litigation a "bleeding wound", Chief Justice of India-designate and NALSA Executive Chairman Justice U.U. Lalit has launched Legal Aid Defense Counsel (LADC) system in 365 districts in 22 states across India to extend legal aid to the poor.

policies. This objective is elaborately reinforced by the clear statement that the enunciated principles are not enforceable in any court and yet fundamental in the governance of the country (Article 37). In contradistinction with the very title of Part III, their singular purpose is not enumeration of Fundamental Rights and their protection through courts (Articles 13 and 32).

It needs emphasis to state that the avowed objective of delineating the directives as non-enforceable is not to weaken their value in relation to Fundamental Rights. It is just the opposite. And this is manifest in the conscious usage of the word "duty" under Article 37, which needs to be construed, not as a correlative of 'right' as is done in western jurisprudential thought but, in the sense of 'Dharma' in which it is invoked in the Indian classical tradition. Such a construction subsumes the notion of right by defining that the States primordial right is to perform its pious 'duty', resulting into, say, the fulfilment of Gandhi's talisman, 'to wipe every tear from every eye.' This indeed is the core functional value of the directives, laying down the firm foundation of human rights jurisprudence.

This is how the quest for the Truth is quenched and concluded through the mode and medium of 'Access to Justice', to be expounded in unison with respect to both Fundamental Rights and Directive Principles of State Policy for redeeming the constitutional vision of inclusive society, and thereby, firmly securing human rights.

The Imbroglio of Legal Capacity in Indian Disability Law

Amita Dhanda*

Abstract

Subsequent to ratifying the Convention on the Rights of Persons with Disabilities (CRPD), India embarked on a programme of law reform, which entailed testing all Indian disability laws on the touchstone of the CRPD in order to bring them in harmony with it. A particularly contentious issue requiring close attention was the issue of legal capacity of all persons with disabilities. In order to understand how India addressed the issue, this article firstly constructs the CRPD mandate on legal capacity. Next, it examines how the Rights of Persons with Disabilities Act, 2016 and the Mental Health Care Act, 2017 have addressed the right and the extent to which the provisions of the two statutes are in conformity with the CRPD. Since the two statutes have not addressed the matter of legal capacity in the same way, the last section comparatively evaluates them in order to determine which of the two statutes seems closer to the CRPD paradigm, and the direction law and policy reform should take in the future to resolve the imbroglio of legal capacity in the Indian disability law.

1. Introduction

India ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD) on 01 October 2007. Subsequent to the ratification, the process of bringing the laws and policies of the country in conformity with the CRPD was inaugurated. The issue of universal legal capacity of all persons with disabilities was amongst the most contentious questions addressed by the ad hoc Committee drafting the text of the CRPD. The Indian law reform process did not escape that fiery discord either. Several innovative proposals, especially around the redrafting of the National Trust (Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities) Act 1999 (NTA) did not even make it to the Law

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Ministry for vetting.[1] This article is, therefore, limiting its attention to the two legislations —namely, Rights of Persons with Disabilities Act, 2016 (RPDA) and the Mental Health Care Act, 2017 (MHCA), which addressed the issue of legal capacity and were duly enacted by the Indian Parliament.

Since the article is aimed at assessing the extent to which the two enactments meet the CRPD mandate, the first section of the article spells out the mandate of the CRPD. Next, it looks at how legal capacity has been addressed by the RPDA and the Rules issued under the Act by the Union and the states. The following section undertakes a similar exercise in relation to the MHCA. In the last section, the focus shifts to the imbroglio created by the two statutes and reflects on ways of resolving the problem so that India respects both — the rights of its people with disabilities and fulfils its international obligations.

2. The Right to Legal Capacity in the CRPD

When Article 12 of the CRPD asserts that persons with disabilities have equal recognition before the law, it firstly clarifies that disability cannot cause deprivation of personhood. The Anglo-American jurisprudence makes this recognition of legal personhood a prerequisite to the possession of legal capacity.[2] The Universal Declaration of Human Rights (UDHR) as also the International Covenant on Civil and Political Rights (ICCPR) had expressly acknowledged the legal personhood of all humans.[3] Article 12(1) of the CRPD, by reaffirming that persons with disabilities have the right to recognition everywhere as persons before the law, clarifies that the personhood of persons with disabilities was never in question. With Article 12(1) declaring that the prerequisite for possessing legal capacity stands satisfied, Article 12(2) obligates all state parties to recognise that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".

To possess legal capacity means to be both a bearer of rights and duties and to have the agency to exercise those rights and duties. Even as some early jurisprudence ruled that persons with disabilities could not be bearers of rights, that disqualification was progressively dropped.[4]

1 For the text of these legislative proposals, see https://disabilitystudiesnalsar.org/nt.php (last visited 27 Oct. 2022).
2 Roscoe Pound Jurisprudence Vol. IV pp 191-405 (Law Book Exchange Ltd. 2000)
3 Article 7 of the UDHR and Article 26 of ICCPR.
4 *supra* note 2

However, persons with disabilities were still disqualified from exercising those rights when the CRPD was adopted. Article 12(2), in asking state parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others, was also seeking dismantling of legal regimes, which disallowed the exercise of agency by persons with disabilities. General Comment No. 1 (hereinafter General Comment) issued by the CRPD Treaty Body to provide normative clarity to state parties on the mandate of Article 12, identifies this denial as a discrimination practised against persons with disabilities.[5] The discrimination occurs, the Treaty Body points out, because both international and municipal laws conflate legal capacity and mental capacity and deny legal capacity to those believed to lack mental capacity. Legal capacity, the treaty body clarifies, is possessed by all humans as an essential attribute of their humanness. Mental capacity, on the other hand, "refers to the decision-making skills of a person, which naturally vary from one person to another."[6]

The denial of legal capacity due to the alleged deficiencies of mental capacity, the Treaty Body describes as controversial because these findings on mental capacity are not "objective scientific and naturally occurring phenomenon";[7] rather, they are "contingent on social and political contexts as are the disciplines, professions and practices",[8] which play a dominant role in making the assessment. The General Comment, then, specially draws attention to the functional approach of denying legal capacity to persons with disabilities[9] and finds it flawed because, one, it is discriminatorily applied against persons with disabilities. Thus, for example, persons with disabilities being denied the right to bear children because they are considered unfit to perform parental duties is an evaluation, which is made only in relation to persons with disabilities.[10] And two, it presumes that it is possible to assess the inner workings of the human mind. Asking for legal capacity to be delinked from mental capacity, the CRPD Treaty Body opines that "unsoundness of mind and other discriminatory labels are not legitimate reasons for denial of legal capacity."[11]

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5 General Comment No. 1(2014) "Equal recognition before the law" https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fGC%2f1&Lang=en (last visited 28 October 2022)

6 Id para 13

7 Id para 14

8 *Ibid*

9 Id para 15 the functional approach denies legal capacity on the reasoning that due to deficiencies in mental capacity, the person with disability cannot perform a vital function required for the exercise of that legal capacity. Thus, for example, persons lack contractual capacity if mental incapacity renders them unable to understand the terms of a contract or how they would affect their interests. For a comprehensive elaboration of this approach, see Amita Dhanda, Legal Order and Mental Disorder (Sage Publications, New Delhi. 2000).

10 The case of Sucheta v Chandigarh District Administration (2009) II SCALE 813 where a person with intellectual disability had to fight for her right to retain her foetus right up to the Supreme Court illustrates this bias.

11 *Supra* note 4 at para 13

Since the Article recognises legal capacity, it frowns upon any arrangement, which displaces that capacity. However, procedures, social arrangements, which support persons with disabilities to exercise their legal capacity have been encouraged in the General Comment. In clarifying the obligations of state parties under the Article, the Treaty Body asks states to facilitate access to support measures, while clarifying that the choice to avail the support or not remains with persons with disabilities. The primacy accorded to the will of persons with disabilities can be discerned from the manner in which the Treaty Body has addressed the matter of advance directives. Paragraph 17 of the General Comment requires that persons with disabilities be given the opportunity to undertake advance planning on an equal basis with others. But the opportunity should, in no way, compromise the agency of persons with disabilities, so "the point at which an advance directive enters into force (and ceases to have effect) should be decided by the person and included in the text of the directive; it should not be based on assessment that the person lacks legal capacity." This aspect of the General Comment would need to be revisited when the MHCA provisions on legal capacity are examined later in the article.

After placing the obligation of providing access to support on the state parties, paragraph (4) of Article 12 turns to look at safeguards and, here, the greatest emphasis is placed on respecting the will and preference of persons with disabilities. The Treaty Body seeks to replace best interests with the 'best interpretation of will and preference'. Even as the Treaty Body recognises the fact of undue influence and admits that safeguards for the exercise of legal capacity must include protection against undue influence, it also cautions that "the protection must respect the rights, will and preferences of the person, including the right to take risks and make mistakes."[12]

Even as paragraph (2) of Article 12 recognises that persons with disabilities enjoy legal capacity in all aspects of life, the incorporation of Paragraph (5) of Article 12 is to expressly recognise the legal capacity of persons with disabilities in an area where they face maximum exclusion. The paragraph requires state parties to take all effective and appropriate measures "to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms

12 Id para 22.

of financial credit, and shall ensure that persons with disabilities are not arbitrarily denied of their property." The Treaty Body in the General Comment asks state parties to replace provisions denying legal capacity in financial matters with procedures, which provide support.

In line with its analysis of Article 12, the Treaty Body asks states to replace substitution arrangements, such as guardianship, conservatorship with support. The provisioning of support parallel with substitution is seen as insufficient. To ensure that the supported decision-making is not notional or symbolic, the Treaty Body has provided a set of guidelines on the nature of support. Thus, the support is to be available to all; be based on the will and preference of persons with disabilities; must be provided either free or at nominal cost; the accessing of support should not result in loss of other rights and the providing of support should not be linked to any mental assessments.

Henry Shue has defined basic rights to be those rights which must be socially guaranteed to ensure the realisation of all other rights.[13] In Part IV of the General Comment, the CRPD Treaty Body has expressly commented on the relationship of the right to legal capacity with other rights of the CRPD and admitted that the denial of legal capacity could severely compromise accessing other rights in the CRPD, including but not limited to the right to access justice (Article 13); freedom from involuntary detention and treatment (Article 14); protection of physical and mental integrity (Article 17) liberty of movement and nationality (Article 18); live independently and in the community (Article 19); freedom of speech and expression (Article 21); right to marry and form a family (Article 23); to vote and stand for elections (Article 29).

The above description of the text of the Convention as interpreted by the Treaty Body in the General Comment and its concluding observation shows that the Committee has made an unqualified assertion of the new paradigm of legal capacity.[14] International human rights monitoring primarily relies upon naming and shaming to obtain conformity. Even as there are academic writings, which question the binding force of a Treaty Body's concluding

13 Henry Shue, Basic Rights Subsistence, Affluence and US Foreign Policy (Princeton University Press, 1980).

14 On the negotiating travails of Article 12 and the reason why the new paradigm of disability rights should be adopted *see,* Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future," Syracuse Journal of International Law and Commerce 34 (2007 2006): 429.

observation and general comments,[15] there is no gainsaying their persuasive value. I would return to this question in a later part of this article after narrating how the two Indian disability legislations have interpreted their duties under Article 12 of the CRPD.

3. Legal Capacity in the Rights of Persons with Disabilities (RPD) Act, 2016

The Preamble to RPDA states that the statute is being enacted to give effect to the CRPD. To that end, all the principles adopted by the CRPD have been expressly incorporated in the preamble, which declares that the Act was being enacted to implement the Convention, which India had ratified on the 1st of October 2007. Principle (a) which speaks of "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of person" and principle (h), which refers to "respect for the evolving capacities of children with disabilities" are of special relevance to the central inquiry of this article.

The preamble is particularly important because it is an established rule of interpretation of statutes that whenever the text of a statute is ambiguous, the preamble would be looked at by the courts to fathom the intention of the legislature.[16] The incorporation of the CRPD principles in the preamble of RPDA has made CRPD the ruling spirit of the Act.

Chapter II of RPDA, titled "Rights and Entitlements", includes the various civil-political rights incorporated in the RPDA. It is important to appreciate that these rights have been incorporated for the first time in the disability law of the country. The Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act of 1995 (PWDA) only

15 Helen Keller and Leena Grover, "General Comments of the Human Rights Committee and their Legitimacy," pp 116-198; Rosanne van Alebeek and Andre Nollkaemper, "Legal Status of Human Rights Treaty Bodies in National Law," 356-413 in Helen Keller and Geir Ulfstein (eds) UN Human Rights Treaty Bodies Law and Legitimacy (Cambridge University Press, 2012).

16 An examination of the case law under the RPDA shows that the Courts have relied upon the preamble and referred to the Articles of the CRPD to opt for a more pro-CRPD interpretation of the RPDA. See Deaf Employees Association v UOI (2014) 3 SCC 173; Court on its own motion v UOI 2017 SCC Online Del 9968; Court on its own motion v State of HP 2018 SCC Online HP 2897; Kamal Gupta v State of Uttarakhand 2018 SCC Online Utt 677. National Federation of the Blind v High Court of Bombay 2018 SCC Online Bom 931; Bank of Baroda v Susmita Saha 2019 SCC Online Del 7846; Purswaniv UOI (2019) 14 SCC 422; Ravi Kumar v UOI 2019 SCC Online Mad 9103; Amit K Aggarwal v UOI 2021 SCC Online Pat 2777; Avni Prakash v National Testing Agency 2021 SCC Online SC 1112; M. Sameeha Barvhv Jt Secy Ministry of Youth 2021 SCC Online Mad 6456; Vikash Kumar v UPSC (2021) 5 SCC 370; Net Ram v State of Rajasthan 2022 SCC Online SC 1022; Anu Jayapal v State of Kerala MANU / KE/1463/2022; T.R. Ramanathan v State of Tamil Nadu 2022 SCC Online Mad 3032.

incorporated the socio-economic rights guaranteed to persons with disabilities.[17] This incorporation is especially significant as a more inextricable connection is seen between legal capacity and civil and political rights.

Section 13 of the RPDA provides for legal capacity. The statutory sequence is at odds with the CRPD. The requirements of paragraph (5) of Article 12 have been incorporated as Sub-section (1) of Section 13. The text of paragraphs (1) and (2) have been amalgamated to create the text of Sub-section (2) of Section 13 whereby appropriate governments are required to ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and have equal recognition everywhere as persons before the law. Sub-section (3) addresses the issue of conflict of interest by requiring persons, who have such conflict, to abstain from supporting persons with disabilities. Though, significantly, possibly in recognition of the importance accorded to family ties in India, a family relationship is not equated with conflict of interest. The conflict of interest of a relation by blood, affinity or adoption would need to be established. Sub-section (4) of Section 13 accords complete freedom to a person with disability to alter, modify or dismantle any support arrangement. The only restriction on this freedom is that the effected change would apply prospectively. Sub-section (5) of Section 13 only exhorts the support person to not exercise undue influence and respect the autonomy, dignity and privacy of the person with disability.

Semantic quibbles aside, Section 13 could be seen as a faithful incorporation of the legal capacity rights of the CRPD. The difficulties arise with Section 14, which provides for guardianship.

The above narrative on Article 12 outlined how, in the opinion of the Treaty Body, the recognition of legal capacity ousts substituted decision-making for persons with disabilities and how regimes of substitution need to be replaced by systems of support. Contrary to the mandate of the CRPD, Section 14 (1) of the RPDA provides for a situation where a district court or any other designated authority finds that a person with disability is unable to take

17 The incorporation of the civil-political rights in the RPDA was controversial. Some disability groups feared that a statutory incorporation of their rights may result in the ouster of persons with disabilities from the constitutional discourse. The case law arising under the RPDA shows that Courts are using both the CRPD and the constitution to interpret the rights guaranteed to persons with disabilities in Chapter II. See the cases referred to in *supra* note 14.

a legally binding decision despite being provided adequate and appropriate support. In such a situation, the Sub-section allows the person to be provided further support of limited guardianship to take legally binding decisions. The proviso to Section 14 (1) goes a step forward and allows the District Court or Designated Authority to provide total support if limited guardianship also proves insufficient.

The situation provided for in Section 14 (1) and the proviso is contrary to the mandate of the CRPD, which required the barriers on capacity to be removed. Instead of removing the barriers, the Sub-section is providing for situations allowing for the reinstallation of barriers, which the CRPD asked to be dismantled. Section 14(1) and its proviso is even contrary to Section 13 of the RPDA, which has recognised that all persons with disabilities have legal capacity on an equal basis with others. After providing for the reinstatement of limited guardianship and total support, Section 14 (2) of the RPDA incorporates a legal fiction whereby after the commencement of the RPDA, every guardian appointed under any other law shall be deemed to function as a limited guardian. This provision could make sense as a transitory provision while India puts in place its support programme.[18] However, no such transfer from limited guardianship to support has been provided. Instead, a generic obligation has been placed by Section 15(1) on authorities designated by the appropriate governments to mobilise the community and create social awareness on support for persons with disabilities. And Section 15(2) requires the designated authorities to put in place suitable support arrangements for persons with disabilities living in institutions and with high support needs. And in one more illustration of doublespeak, Section 14 (3) grants to any person with disability aggrieved by the decision of being placed in guardianship, the right to appeal against such decision to an appellate authority designated by the state government.

Section 14 is a mish-mash of support, limited guardianship and total support. Persons with disabilities can be placed under any of these arrangements not according to their will and preference, but according to how the designated authority perceives the issue. Sections 13

18 A partial explanation for this provision could be derived from the umpteen drafts, which were floated for consideration before the final Act was enacted in 2016. The Ministry of Social Justice and Empowerment had established a multi-stakeholder Committee in April 2010 by notification F. No. 16-38/2006-DD.III dated 30 April 2010, to formulate a new disability law in harmony with the CRPD. Clause 19 of the Rights of Persons with Disabilities Bill 2011 incorporated such a provision to transition from plenary guardianship to support. For text of that provision, see https://disabilitystudiesnalsar.org/newlaw.php#19._Replacement_of_Plenary_Guardianship (last visited 26 Oct. 2022)

and 14 speak at cross-purposes. Whilst Section 13 has been drafted in accord with the CRPD mandate; Section 14 seems to be doing the exact reverse.

The confusion or ambivalence present in the statutory provisions again emerges in the Rules formulated by different state governments to implement this part of the Act. With some variations, the Rules of all states follow a common template. An application for limited guardianship can be filed by a parent, relative or an organisation registered under the Act. Assam and Tamil Nadu also allow for a person with disability to file the application. There is some variation in the authority to whom the application can be made. Whilst some states have conferred the power on a judicial body like the District Court, others have conferred the authority on executive agencies like the District Collector in Tamil Nadu and Uttar Pradesh or the Local Level Committee as in Chhattisgarh. In most places, the deciding authority is expected to decide on the matter in one month — Telangana has specified two months and Uttar Pradesh and Rajasthan have extended the time limit to three months. Parents, spouse, siblings, other relatives, a registered organisation or a prominent person in the locality have been specified as the category of persons, who can be appointed as limited guardians. Nearly all the rules require the guardian to consult with the person with disability and act jointly and in mutual understanding. The guardians are also to act in the best interest of the person with disability. The question of will and preference, which has been accorded such importance by the CRPD Treaty Body, is largely noticeable by its absence. Only the state of Tamil Nadu requires the District Collector to enquire from persons with disabilities whether they need a limited guardian; and Assam has an elaborate assessment system; otherwise, in all other states, the matter has been left to the sole judgement of the adjudicating authority.

Tamil Nadu, Telangana and Meghalaya have some system of oversight and procedure for removal of the limited guardian. In most other states, the appointment of a guardian has been further simplified. The Mental Health Act of 1987, even the Indian Lunacy Act of 1912 saw the appointment of a guardian as a deprivation imposed on the person with disability, which could not be undertaken without following the demands of fair procedure. The RPDA 2016 has made the appointment of a limited guardian like a benefit being provided to the person with disability. Consequently, the procedure of appointment has been largely simplified, with many State Rules not even designating an authority to whom the person with disability

could appeal against the order of limited guardianship. Section 14 has more deeply ensconced instead of prising out the institution of guardianship in the RPDA.

The next section examines how the MHCA has addressed the right to legal capacity.

4. Legal Capacity in the MHCA

The preamble to the MHCA, like the RPDA, also states that the statute was enacted to harmonise existing Indian laws with the Convention. Unlike the RPDA, the MHCA does not refer to the principles of the CRPD. In fact, Section 3 of the MHCA is a reproduction of principle 4 of the MI Principles.[19] The inclusion is significant because while the preamble of the CRPD mentions all soft law instruments on disability antedating the Convention, the MI Principles were omitted by plan as persons with psycho-social disability objected to its inclusion.

Section 4 of the MHCA addresses the matter of the capacity to make mental health care and treatment decision. Section 4(1) declares that every person including a person with mental illness shall be deemed to have the capacity to make decisions regarding their mental health care and treatment. This declaration is soon qualified by the proviso, which allows for the capacity if such a person "has ability to

(a) understand the information that is relevant to take a decision on the treatment or admission or personal assistance, or

(b) appreciate any reasonably foreseeable consequences of a decision, or

(c) communicate the decision" whether verbally or non-verbally.

Section 4 illustrates the very conflation between legal capacity and mental capacity that the Treaty Body warns against in the General Comment.

The linking of agency to mental capacity is again, in evidence, in the manner in which the MHCA has provided for advance directives. Section 5 of MHCA allows persons with mental illness to make advance directives to provide for periods when they lack capacity. Thus, the making of advance directives does not grant freedom to a person with psycho-social

19 Principles for the protection of persons with mental illness and the improvement of mental health care https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-protection-persons-mental-illness-and-improvement (last visited 28 Oct. 2022).

disability to manage their own affairs as they will, as suggested by the Treaty Body, but a mechanism to take care at times when persons with psycho-social disability lack mental capacity. The linking between mental capacity and legal capacity is again evident in Section 11, which permits a mental health professional, a relative or a caregiver not to follow an advance directive after obtaining an order to that effect from a Mental Health Review Board.

The Review Board is, then, authorised to uphold, modify or cancel the advance directive, depending upon whether the person making the advance directive made it out of their own free will, was sufficiently informed and had the capacity to make it. Section 12 has authorised the Central Authority to retain regulatory oversight over advance directives and Section 13 exempts all mental health professionals from any liability for following an advance directive. The chapter on advance directives permits persons with psycho-social disability (mental illness) to make advance directives, provided they meet all the conditions set by the statute, and provided further that all persons around them raise no objection. The mental health professionals and carers cannot *ipso facto* override the will of the person with mental illness, but need an endorsement from a Review Board. However, this protective procedure also need not be activated as Section 9 allows the bypassing of an advance directive in an emergency.

The design used by the legislation for advance directives is again repeated in Chapter IV, which makes provision for a nominated representative. Section 14(1) grants to every person, who is not a minor, the right to appoint a nominated representative. And where no nominated representative has been appointed, then Sub-section (4) of Section 14 provides a list of persons, who, in order of precedence, shall be deemed to be the nominated representative of a person with mental illness. The list starts with the person nominated by a person with mental illness by advance directive; followed by a relative, a caregiver, a suitable person appointed by the concerned Board or if no such person is available to be appointed as a nominated representative, then the Director, Department of Welfare, or their designated representative shall function as the nominated representative. The caregiver, who is third in the list of priority, is a person who resides with the person with mental illness and performs this service either free or for a remuneration. The statute makes no distinction between various kinds of nominated representatives, therefore, even this paid caregiver has been legally authorised to

consent to the treatment plans[20] and emergency treatment[21] and research interventions[22] on the person with mental illness.

After putting in place this elaborate surrogate arrangement for a person with mental illness, Section 21 (1) of the MHCA states that "every person with mental illness shall be treated equal to persons with physical illness in the provision of all health care", which includes emergency facilities[23] and ambulance services.[24] That a person with mental illness may be provided care and treatment against their will and preference is a matter, which brooks no concern. The statute allows for compulsory institutionalisation and treatment and addresses the matter of liberty deprivation by opting for the least restrictive alternative[25] and allowing for quasi-judicial[26] and judicial review.[27]

Since this article is focussing on legal capacity, I am not examining the provisions of MHCA providing for compulsory care and treatment for the deprivation of the right to liberty and integrity. Those provisions have been mentioned only to emphasise how the statute has been premised on persons with mental illness not possessing legal capacity.[28] And absence of legal capacity is deduced from the alleged absence or deficiency of mental capacity.

The mandate of the CRPD was to recognise the legal capacity of all persons with disabilities on an equal basis with others. The duty of support as also the assertion of all other rights has been inextricably woven with this recognition of persons with disabilities as persons before the law. The above narrative shows that the MHCA has made some notional assertions on the legal capacity of persons with mental illness, but in the main, it has continued with the jurisprudence of the MI Principles to create a surrogate regime for persons with mental illness and to allow for deprivation of liberty whenever absolutely necessary after the observance of fair process safeguards.

20 Section 89 (7) MHCA
21 Id Section 94.
22 Id Section 99(5)
23 Id Section 21(1) (b)
24 Id Section 21(1) (c)
25 Id Section 90 (5) (b)
26 Id Section 11(2)
27 Id Section 83
28 For an analysis of these other dimensions of the statute, see Amita Dhanda, "Legislating on Mental Health in India to achieve SDG3" in Laura Davidson (ed) The Routledge Handbook of International Development, Mental Health and Well-being (Routledge Oxon, 2019).

As already mentioned, legal capacity has been provided in two different ways by the MHCA and the RPDA. This situation raises the logical query: which is the operable law on legal capacity, especially for persons with psycho-social disability? Are they governed by the MHCA or the RPDA? Or do they have a freedom to choose between these two statutory regimes. The last part of this article dwells on this conundrum.

5. Paradigmatic Battles of Legal Capacity

The question raised in the previous section can be answered in several ways. The matter can be looked at just as a matter of statutory interpretation and the question answered, depending upon which of the two statutes is categorised as the special legislation. It can be contended that whilst RPDA is a legislation for all persons with disabilities, MHCA is only concerned with the care and treatment of persons with disabilities. So, when it comes to the care and treatment of persons with mental illness and questions of legal capacity associated with it, MHCA and not RPDA is the special legislation. The interpretation rule is that the special statute prevails over the general one. Further, RPDA was enacted in 2016, whereas MHCA became a law in 2017. Again, by virtue of the maxim that between the later and the earlier law, the later law, that is, MHCA prevails over RPDA, the earlier law. This situation is further strengthened by the fact that Section 120 of the MHCA states "that the provisions of the Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force." In comparison, Section 96 of the RPDA states that "the provisions of this law shall be in addition to, and not in derogation of, the provisions of any other law, for the time being in force." MHCA was not in force when the RPDA was enacted, but the Mental Health Act of 1987 with notions of legal capacity analogous to MHCA was a law in force as were several other statutes, which, contrary to the CRPD mandate, routinely disqualified persons with disabilities. In order to emphasise the paradigmatic shift it was making, it would have been in the fitness of things to include an overriding provision in the RPDA. However, whether due to oversight, negligence or plain laziness,[29] such overriding effect has not been incorporated in the RPDA.

29 I am saying this because Section 96 of RPDA has drawn from Section 72 of the PWDA, the statute which was replaced by the RPDA. Only Section 72 stated that the Act and its rules "shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefit of persons with disabilities" (emphasis supplied). Section 72 was saving the then existing entitlements of persons with disabilities. Section 96 fails to do that.

The above analysis, if pursued, would be a clear case of missing the wood for the trees. The maxims of interpretation referred to in the previous paragraph do exist; however, they are dwarfed by the presumption that domestic law has to be read in harmony with international law. The aforesaid analysis of the MHCA shows that the MHCA has breached every principle of the CRPD. Any challenge to the MHCA could result in these provisions being struck down, especially when the preamble to MHCA claims that the statute was being enacted to fulfil India's international obligations. That the MHCA does not meet the CRPD standard is also evident from the concluding observations of the CRPD Treaty Body on India's initial report.[30] The Committee is asking for the repeal of Section 4 of MHCA as also all provisions, which allow for substituted decision-making and involuntary psychiatric institutionalisation. The Committee has also asked for Sections 14 and 92 (f) of RPDA to be repealed as they allow for substituted decision-making. The basic difference between the two statutes being whilst the legal capacity provisions in RPDA need tweaking to be in harmony with CRPD, the MHCA has legislated the deprivation of legal capacity.

In order to obtain a rounded picture of the law, it is also necessary to look at how have courts addressed the issue of legal capacity of persons with psycho-social disability. In *State of West Bengal* v *Tathagatha Ghosh,* [31] the Calcutta High Court upheld job reservations for persons with benchmark psycho-social disabilities and in *Ravinder K. Dhariwal* v *Union of India,*[32] the Supreme Court insisted on the same job protection and rehabilitation for acquired psycho-social disability as is provided to other disabilities acquired during the course of employment. The courts in India are reading national legislations in harmony with the CRPD, which is causing legislative gaps to be judicially plugged. Insofar as the RPDA is a rights-based legislation, which has provided for the inclusion of persons with disabilities in all areas of life, it lends itself to a more progressive implementation of legal capacity in harmony with international law. Since courts are obliged to so read national law that it harmonises with international law, in my view, the RPDA construction of legal capacity as incorporated in Section 13 of the Act should guide the evolution of legal capacity jurisprudence in India. And Section 14 of the RPDA, which addresses the issue of guardianship needs to be struck down as

30 Concluding Observations on the Initial Report of India, OHCHR | CRPD/C/IND/CO/1: Concluding observations on the initial report of India (Advance Unedited Version) (last visited 28 Oct. 2022)

31 2019 SCC Online Cal 3482.

32 2021 SCC Online SC 1293

its provisions are in conflict with Section 13 and several other provisions of RPDA recognising the legal capacity of persons with psycho-social disabilities.

Conclusion

The aforesaid analysis has been undertaken to demonstrate that the construction of legal capacity in MHCA, despite claims to the contrary, is not in harmony with the CRPD and needs to be either repealed or struck down. The MHCA was enacted despite the disability community asking otherwise. The RPDA, in comparison, is a more forward-looking legislation; however, the incorporation of Section 14 in RPDA shows that the stranglehold of the old paradigm also haunted the RPDA legislative process.

The Indian judiciary has embraced the spirit of the CRPD in how it is developing the jurisprudence of disability rights in the country.[33] There are some forward looking interpretations, which give hope that the general comments and concluding observations of the Treaty Body may be creatively used by the Indian courts to resolve the imbroglio of legal capacity.

33 See the cases cited in *supra* note 16.

Child Rights in the Criminal Justice System: Need for Law Reform

Asha Bajpai*

Abstract

The current criminal justice system does not protect nor respects the rights of children including right to participation, development, protection from abuse and exploitation, right to access legal aid, protection from abuse and violence. It is too complex and harsh for children to understand. The Constitution of India and the Convention on the Rights of the Child, 1989, which India has ratified, provide several rights to children. Children are now right holders. Children who come in contact with the criminal justice system either as victims or witnesses or as offenders are at risk of physical, sexual and psychological violence. Certain provisions like the minimum age of criminal responsibility, age of sexual consent, preliminary assessment, mandatory reporting laws, challenges in accessing legal aid make them more vulnerable. By removing such children from the complex and harsh criminal justice system, the abuse and violence against them is clearly reduced and their rights protected. This article examines the violations of the child rights in the current criminal justice system. It provides suggestions for legislative reform to protect the child rights and builds a case for a child justice system that empowers children, and that they can trust and understand.

1. Introduction

Children come in contact with the criminal justice system either as victims or witnesses to a crime or as children in conflict with law (CICL). As CICL, they could be alleged of, accused or recognised as having broken the law by committing a crime. According to the National Crime Records Bureau[1] (NCRB) Report 2021, India recorded a total number of 1,49,404 instances of crimes against children in 2021 — a rise of over 16 per cent from the previous year. In terms of percentage, the top categories under crime against children were kidnapping and abduction,

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1 *See* Crime in India 2021 at https://ncrb.gov.in/en/Crime-in-India-2021

followed by cases registered under the Protection of Children from Sexual Offences (POCSO) Act.[2] Further, the NCRB report revealed that of the total cases, 53,874 were registered under POCSO Sections. Sexual offences against children shows a steady ascent, with 47,221 such cases being recorded in 2020, and 47,335 cases in 2019.[3] In 2019, as many as 32,269 cases were registered across the country, while the 2021 report registered a decline of 3.5 per cent recording 31,170 cases.[4]

The Criminal Justice system of any country broadly refers to agencies of the government charged with enforcing law, adjudicating crime, and correcting criminal conduct. The main objective of the criminal justice system is 'deterrence', i.e., to punish the 'transgressors and the criminals' and to maintain law and order in the society. Globally, children and young people are routinely exposed to various forms of violence if they are before the criminal justice system. They are at risk of physical and psychological abuse, sexual assault, and other harms, including inadequate educational opportunities, poor and outdated vocational training. They face several challenges including mental, emotional, and behavioural disorders. Children, who are victims of violence or exposed to violence during childhood, are more likely to have difficulty in school, abuse drugs or alcohol, act aggressively, suffer from depression or other mental health problems and engage in criminal behaviour as adults.

2. Minimum Age of Criminal Responsibility

Criminal liability means when a person can be held legally responsible for breaking the law. The Minimum Age of Criminal Responsibility (MACR) is the age below which a person cannot be held criminally responsible. According to the Indian Penal Code (IPC), 1860, the age of criminal responsibility is 12 years.[5] A child between 7 to 12 years of age has the defence of '*doli incapax*' if it is proved that the child didn't have the maturity to understand the crime.

2 The Protection of Children from Sexual Offences Act is a comprehensive Act that came into force in November 2012. The Act deals with offences related to children. This Act addresses heinous crimes and protects a child from sexual assault, sexual harassment and pornography. The enactment of this Act increased the scope of reporting sexual crimes against children. The POCSO Act, 2012, lays down the punishment for exposing children to any kind of sexual offence. The POCSO Act punishment is more stringent and covers all types of sexual abuse. *See* https://www.indiacode.nic.in/handle/123456789/2079?sam_handle=123456789/1362, visited on September 10, 2022

3 National Crime Records Bureau, Ministry of Home Affairs, Government of India, New Delhi, 2022, https://ncrb.gov.in/en/crime-in-india-table-addtional-table-and-chapter-contents, visited on Sept. 18, 2022.

4 A Special Home is an institution that is responsible for "housing and providing rehabilitative services" to children, who have been found guilty of a crime and ordered by the JJB or the Children's Court.

5 Section 82 in The Indian Penal Code (IPC) – Nothing is an offence, which is done by a child under seven years of age.

Basically, between the age of 7 and 12, the CrPC provides for a presumption of innocence in favour of children, but if the prosecution can prove and provide evidence on the contrary, then the child can be prosecuted. But if the child is below seven years, then he or she enjoys absolute immunity and can in no circumstances be held liable. Such a child is *doli incapax*.[6] In doli incapax under IPC, the presumption of Section 83 is rebuttable, and the burden of rebutting lies upon the defendant.

Before 2015, the age of juvenile in conflict with law was 18 years.[7] This was in consonance with the UN Convention on Rights of the Child which India has ratified.[8] But after 2015, The Juvenile Justice (Care and Protection of Children) Act 2015, was passed by the Parliament of India amidst intense controversy, prolonged debates and street protests by child rights groups, as well as some members of Parliament.[9] The need for this change and the shift in focus was the incident of 16 December 2012.[10]

6 Incapax in 'doli incapax' may refer to the inability to commit any crime because of the lack of understanding and nature of the act. This is a common law principle.

7 Juvenile Justice (Care & Protection of Children) Act, 2000.

8 The Convention on the Rights of the Child (CRC) was approved by the General Assembly of the United Nations on 20 November 1989. The Convention was formally opened for ratification on 26 January 1990, the Government of India ratified the CRC on 11 December 1992.

9 Bajpai, Asha, "The Juvenile Justice (Care and Protection of Children) Act, 2015: An analysis," *Indian Law Review*, 2:2, 191-203, DOI: 10.1080/24730580.2018.1552233

10 On 16 December 2012, a 23-year-old paramedical student was brutally gang-raped by six men in a private bus in New Delhi. The victim later died. Five persons were apprehended in connection with the crime. One of them, identified as Raju (name changed to protect identity), was below 18 years of age on the date of commission of the crime. He was just a few months away from turning 18, which was the age of majority under the then prevailing Juvenile Justice (Care and Protection of Children) Act, 2000 ('JJ Act 2000'). Accordingly, in compliance with the provisions of the JJ Act, 2000, he was referred for inquiry to the Juvenile Justice Board. India saw pitched battles over whether the law should be amended to treat juveniles between the age of 16 to 18 who had committed 'heinous' offences, as adult offenders. The reasoning was that if someone just below the legal limit of 18 commits a heinous crime like rape and murder, that merits harsh punishment, consequently their age should not give them an 'easy way out'. The verdict of the JJB dated 31 August 2013 handed down three years stay in a special home for reformation and rehabilitation, to the juvenile member, as per the provisions of the JJ Act, 2000. This generated a fresh round of debate on the legality and the very existence of juvenile justice laws. Questions were again raised as to why should juveniles above the age of 16 indulging in violent crimes like rape and murder not be treated, and given the same tough punishment, as adult criminals.

3. Juvenile Justice (Care & Protection of Children) Act, 2015 (JJ Act, 2015)[11]

The JJ Act, 2015 deals with two categories of children — those who are in conflict with the law ('CICL'),[12] and those who need care and protection ('CNCP').[13] The Act has several positive provisions, like change in nomenclatures to remove negative connotations; inclusion of several new definitions, such as orphaned, abandoned and surrendered children; setting timelines for inquiry by the Juvenile Justice Board; inclusion of new offences committed against children and mandatory registration of Child Care Institutions. The most controversial provision is the introduction of the provision of 'transfer of cases' of children aged between 16 and 18 years involved in heinous offences. After a preliminary assessment, such children are pushed into the adult criminal justice system. Various types of offences committed by children in conflict with law have been defined under the JJ Act, 2015.[14]

The classification of offences is based on the severity and duration of punishment,[15] and a 'heinous' offence is one that entails a minimum punishment of imprisonment for seven years. Any minor in the age group of 16–18, who has been accused of committing a heinous

11 The Juvenile Justice (Care and Protection of Children) Act, 2015 adopted by the Government of India takes a holistic approach towards protecting the rights of the children by providing for proper care, protection, development, treatment and social re-integration of children in difficult circumstances by adopting a child-friendly approach.

12 "Child in Conflict with Law" has been defined under Section 2 (13) of the Juvenile Justice (Care & Protection of Children) Act, 2015 as a child, who is alleged or found to have committed an offence and has not completed eighteen years of age on the date of commission of such offence.

13 Section 27 JJ Act, 2015 defines Child Welfare Committee. It states that the State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification. The Committee shall consist of a Chairperson, and four other members as the State Government may think fit to appoint, of whom at least one shall be a woman and another, an expert on the matters concerning children.

14 The various types of offences are classified as 1. Petty offences: Petty offences include the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years.

2. Serious offences includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is, (a) minimum imprisonment for a term more than three years and not exceeding seven years; or (b) maximum imprisonment for a term more than seven years but no minimum imprisonment or minimum imprisonment of less than seven years is provided.

3. Heinous Offences: Heinous offences committed by children in conflict with law include the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.

15 Sec. 86 JJ Act, 2015, classification of offences and designated court.— 1) Where an offence under this Act is punishable with imprisonment for a term of more than seven years, then, such offence shall be cognizable and non-bailable. 2) Where an offence under this Act is punishable with imprisonment for a term of three years and above, but not more than seven years, then, such offence shall be non-cognizable and non-bailable. 3) Where an offence, under this Act is punishable with imprisonment for less than three years or with fine only, then, such offence shall be non-cognizable and bailable. 4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or the Commission for Protection of Child Rights Act, 2005 or the Protection of Children from Sexual Offences Act, 2012, offences under this Act shall be triable by the Children's Court.

crime, can be tried like an adult. For this, the Juvenile Justice Board (JJB) would do a preliminary assessment to assess the child's physical and mental capacities, his/her ability to comprehend the consequences of the crime, etc. and determine whether the child can be treated as an adult. So a child is forced out from the 'specialised juvenile justice system' into the adult criminal justice system on the basis of the 'preliminary assessment'.

4. Violation of Rights of the Child during Preliminary Assessment

JJ Act, 2015, permits trying of juveniles between the ages of 16 and 18 years as adults for heinous offences.[16] As per Sec. 15(1) of the Act, the Juvenile Justice Board is to make the preliminary assessment on four aspects: one, mental capacity of the child in conflict with law to commit the heinous offence. The Juvenile Justice Board is given the option to transfer cases of heinous offences by such children to a children's court (or designated court of sessions) after conducting preliminary assessment.[17] The Act provides for placing such children in a 'place of safety' both during and after the trial till they attain the age of 21, after which his/her evaluation shall be conducted by the children's court. It empowers JJB to examine the nature of crime and decide whether it was committed as a child mind or as an adult mind. Based upon the preliminary inquiry of JJB, the child offender will either be dealt as a child under JJ Act and sent for rehabilitation or will be tried as an 'adult'. After he is 21 years, an evaluation is done. After this evaluation he/she is either released on probation and if not 'reformed', he/she will be sent to a jail for the remaining term.[18]

In practice, the experiences of civil society organisations working with children is that these children in CICL are unable to completely comprehend nor participate in their inquiry before the Juvenile Justice Board. Children are not able to comprehend nor respond to questions put to them at the Section 313 CrPC [19] at the statement stage, resulting in self-incrimination. Children are so scared when they come before the system as they do not know what is going to happen to them. They are generally manipulated by functionaries of the

16 Section 19 of the JJ Act, 2015.

17 Section 18(3) of the JJ Act, 2015 Where the Board after preliminary assessment under Section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.

18 Bajpai, Asha, *Child Rights in India: Law, Policy and Practice,* Oxford University Press, New Delhi, India,

19 Criminal Procedure Code Sec. 313

juvenile justice system so as to serve their own interests — the promise of an early release, lures the child to 'plead guilty' before the Juvenile Justice Board, even when they have not committed the offence.[20]

Article 40 of the Convention on Rights of the Child assumes great significance in this matter.[21] Article 40 states that the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in the society. The following guarantees must be ensured for the child in conflict with law:

(a) To be presumed innocent until proven guilty according to law;

(b) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(c) Not to be compelled to give testimony or to confess guilt, to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.

They are, thus, denied these very rights and guarantees by the preliminary assessment — 'right to participation', 'right to a fair trial' — which are the foundation principles of the juvenile justice system.[22]

This preliminary assessment provision also violates the general principle provided in administration of justice under the Juvenile Justice Act 2015.[23] Section 3 of the JJ Act, 2015,[24] states the principles of care and protection of children. One of the principle is of presumption

20 *Ibid supra* 18

21 Convention on the Rights of the Child, 1989 (CRC), Article 40. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child. Visited on 18 Oct. 2022.

22 Bharti Ali, Enakshi Ganguly, "Why preliminary assessment is against the idea of juvenile justice," *India Development Review* (IDR), Sept. 27, 2022, https://idronline.org/article/rights/why-preliminary-assessment-is-against-the-idea-of-juvenile-justice/

23 Recognising the need for basic principles that need to guide the general administration of juvenile justice in India, the JJ Act in Section 3, lays down that the Central Government, the state governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by certain fundamental principles. One of the principles is the principle of presumption of innocence.

24 Section 3 of Juvenile Justice Act, 2015 — General and fundamental principles to be followed in administration of Act by the Central Government, the state governments, the Board, the Committee and other agencies, as the case may be, while implementing the provisions.

of innocence.[25] Under this principle, any child shall be presumed to be innocent of any mala fide or criminal intent up to the age of eighteen years. This is clearly violated by the preliminary assessment. The principle of non-waiver of rights[26] is also violated by the preliminary assessment. Under this principle there cannot be any waiver of any of the rights of the child. This is neither permissible nor valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee. By assumption of the accused as guilty by the preliminary assessment, the principle of equality and non-discrimination— is violated. This by itself is also a violation of the fundamental criminal law principle of presumption of innocence. 'Innocent until proven guilty beyond reasonable doubt' is the general legal principle adopted by courts in India. In a criminal matter, unless the State makes out a prima facie case of guilt, no unfavourable inference can be drawn against the accused.

The preliminary assessment is generally subjective depending on the findings of the expert, the methods used, based on the interpretation of the expert and his qualifications and experience. Such preliminary assessments should be forensic assessments that can answer psycho-legal questions and their validity and the findings must be subjected to legal scrutiny. Over-reliance on psychological assessment for judicial transfer has been questioned by the courts in cases where it found that the juvenile justice boards failed to apply their judicial mind in the assessment. For example, in some cases, the courts found the process inconsistent and age inappropriate.[27]

There were initially no guidelines as to how the Board would conduct the preliminary assessment. Each JJB would have its own 'procedure and experts'. Recently, the Supreme Court observed in the case titled *Barun Chandra Thakur v. Master Bholu And Anr*[28] that "*...we are of the view that where the Board is not comprising of a practicing professional with a degree in child psychology or child psychiatry, the expression "may" in the proviso to Section 15(1) would operate in mandatory form and the Board would be obliged to take assistance of experienced psychologists or psychosocial workers or other experts. However, in case the Board comprises of at least one such*

25 JJ Act, Sec 3(i)

26 JJ Act, 2015, Sec 3(ix)

27 Bharti Ali, Enakshi Ganguly, "Why preliminary assessment is against the idea of juvenile justice," *India Development Review* (IDR), Sept. 27, 2022, https://idronline.org/article/rights/why-preliminary-assessment-is-against-the-idea-of-juvenile-justice/

28 Barun Chandra Thakur v. Master Bholu & Anr. In the Supreme Court of India Criminal Appellate Jurisdiction Dinesh Maheshwari; j., Vikram Nath; j. July 13, 2022 Criminal Appeal no.950/2022 (Arising out of SLP(Crl.) No.10123 of 2018.. Available at: https://indiankanoon.org/doc/34328129/ accessed on 5 October 2022

member, who has been a practicing professional with a degree in child psychology or child psychiatry, the Board may take such assistance as may be considered proper by it; and in case the Board chooses not to take such assistance, it would be required of the Board to state specific reasons therefor."

The court further added that *"While considering a child as an adult one needs to look at his/her physical maturity, cognitive abilities, social and emotional competencies. It must be mentioned here that from a neurobiological perspective, the development of cognitive, behavioural attributes like the ability to delay gratification, decision-making, risk taking, impulsivity, judgement, etc. continues until the early 20s. It is, therefore, all the more important that such assessment is made to distinguish such attributes between a child and an adult. Cognitive maturation is highly dependent on hereditary factors. Emotional development is less likely to affect cognitive maturation. However, if emotions are too intense and the child is unable to regulate emotions effectively, then intellectual insight/knowledge may take a back seat."*

This implies that when the JJB does not comprise a practising professional with a degree in child psychology or child psychiatry, it would be obligated to take assistance from other experts. Noting that the preliminary assessment under Sec. 15 of the Act is a delicate task and appropriate and specific guidelines would be required for the same, the Apex Court was of the view that reasonable opportunity ought to be provided in a case where the Board is to make a preliminary assessment under Sec. 15. The Court was also of the view that a holistic assessment would be required to ascertain whether a child should be tried as an adult or not.[29] Courts found the process inconsistent and age inappropriate.[30]

The Supreme Court of India left it open for the Central Government, National Commission for Protection of Child Rights, and the State Commission for Protection of Child Rights to consider issuing guidelines or directions with respect to preliminary assessments for judicial transfer.[31]

29 Barun chandra thakur V. master bholu & anr. In the Supreme Court of India criminal appellate jurisdiction Dinesh Maheshwari; J., Vikram Nath; j. July 13, 2022 criminal appeal no. 950/2022 (Arising out of SLP(Crl.) No. 10123 of 2018. Available at: https://indiankanoon.org/doc/34328129/ accessed on Oct. 5, 2022

30 Bharti Ali, Enakshi Ganguly, "Why preliminary assessment is against the idea of juvenile justice," *India Development Review* (IDR), Sept. 27, 2022, https://idronline.org/article/rights/why-preliminary-assessment-is-against-the-idea-of-juvenile-justice/

31 Barun Chandra Thakur V. master bholu & anr. In the Supreme Court of India criminal appellate jurisdiction Dinesh Maheshwari; J., Vikram Nath; J. July 13, 2022 criminal appeal no. 950/2022 (Arising out of SLP(Crl.) No. 10123 of 2018. Available at: https://indiankanoon.org/doc/34328129/ accessed on Oct. 5, 2022

5. Legal Aid for Children in Conflict with Law

Another issue of concern is the access to legal aid and specifically quality legal aid to children in conflict with law.[32] Article 39A, Constitution of India, obligates the state to ensure that the operation of the legal system promotes justice, in particular, by facilitating access to free legal aid through legislation, schemes or other means, aid to the most vulnerable sections of society.[33] Over the years, the NCRB data clearly shows population of children in conflict with the law (CICL) in India is overwhelmingly poor and socio-economically deprived. In most cases, such children have neither the means nor the ability to secure legal counsel, particularly private legal counsel, which might be expensive. As per S. 12(c) of the LSA Act, children have been identified as one of the most vulnerable and marginalised categories of society, deserving of state support in filing or defending cases in a court of law, opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.[34]

Therefore, it is the duty of various State Legal Service Institutions to provide free legal aid to juvenile in conflict with law and work towards speedy disposal of cases.

Article 40 of the Convention on Rights of the Child provides that every child alleged as or accused of having infringed the penal law must have legal or other appropriate assistance in the preparation and presentation of his or her defence; Article 37(d) of the UNCRC further provides, "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." The Guidelines for Action on Children in the Criminal Justice System recommended by the Economic and Social Council specifically highlight the importance of providing legal aid to children, who become embroiled in the criminal justice system. It is also significant to note here that in Article 2

32 The term "legal aid" has been defined under the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice System, 2013 to include: "legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. Furthermore, "legal aid" is intended to include the concepts of legal education, access to legal information and other services provided for persons through alternative dispute resolution mechanisms and restorative justice processes."

33 Article 39A, Constitution Of India, 1950: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that.

34 Under Section 12 (c) of Legal Services Authorities Act, 1987, a child who has to file or defend a case is entitled to legal services.

of CRC, the Government has the responsibility to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

As per the JJA 2015, the role of legal services authorities in providing legal aid to children is very important. Section 8 (3)(c) of the Juvenile Justice Act, 2015, ensures that the function of the Juvenile Justice Board shall be to ensure the availability of legal aid for the child through the legal services institutions. Section 30 (xvii) says that the functions and responsibilities of the Child Welfare Committee shall include accessing appropriate legal services for children. Section 53(1) (viii) says that institutions registered under the Act for rendering the services of rehabilitation and reintegration to include legal aid where required.

Guidelines have been issued by the National Legal Services Authority (NALSA) for Legal Services in Juvenile Justice Institutions in connection with the compliance of the order dated 19.08.2011 of Hon'ble Supreme Court of India in case[35] to establish legal aid centres attached to JJBs.[36] As per this scheme, when a child is produced before the Board by the Police, the Board should call the legal aid lawyer in front of it, should introduce juvenile/parents to the lawyer, juvenile and his/her family/parents should be made to understand that it is their right to have legal aid lawyer and that they need not have to pay any fees to anyone for this. The JJB should give time to legal aid lawyer to interact with the juvenile and his/her parents before conducting hearing. The Juvenile Justice Board should mention in its order that legal aid lawyer has been assigned and name and presence of legal aid lawyers should be mentioned in the order.[37]

In practice, studies have shown that majority of children in the criminal justice system nor their parents are aware of this right to legal aid and many of them do not receive it and if they receive, the quality is poor as lawyers are not aware of the juvenile justice laws. Many of these legal aid centres are only on paper. The lack of legal aid many a times has resulted

35 Sampurna Behrua V. Union of India & Ors. W.P. No. (C) No. 473/2005

36 Available at : https://nalsa.gov.in/acts-rules/preventive-strategic-legal-services-schemes/nalsa-child-friendly-legal-services-to-children-and-their-protection-scheme-2015. Accessed on Oct. 20, 2022

37 Available at : https://nalsa.gov.in/acts-rules/preventive-strategic-legal-services-schemes/nalsa-child-friendly-legal-services-to-children-and-their-protection-scheme-2015. Accessed on Oct. 20, 2022

in children being wrongly charged, serving time in detention on remand where it could have been avoided, being held on remand in adult prisons, and spending extended periods of time on remand. Studies have also indicated that these children are often treated harshly by the police, and the police largely abide by the procedure laid down in the Code of Criminal Procedure, 1973,[38] rather than the Juvenile Justice (Care and Protection) Act, 2015.[39]

General Comment No. 10 [2007] regarding Children's rights in juvenile justice, issued by the Committee on the Rights of the Child,[40] is very articulate in this respect — Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children.[41]

The international legal framework requires that States afford children specialised justice responses, in recognition of the distinct physical, psychological, emotional and educational characteristics of childhood, and children's evolving capacities. Article 40 (3) of CRC, requires that State parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law.

Therefore placing 16-18 years old children, who have committed heinous offences in the criminal justice system offences is violative of constitutional mandate, rights of the child under CRC, and other legal instruments of international law ratified by India.

38 The Code of Criminal Procedure commonly called Criminal Procedure Code (CrPC) is the main legislation on procedure for administration of substantive criminal law in India.[1] It was enacted in 1973 and came into force on 1 April 1974.[2] It provides the machinery for the investigation of crime, apprehension of suspected criminals, collection of evidence, determination of guilt or innocence of the accused person and the determination of punishment of the guilty. Available at: https://www.indiacode.nic.in/handle/123456789/16225?sam_handle=123456789/1362. Accessed on Oct. 20, 2022

39 Legal Aid Among Children in conflict with law in Karnataka, Centre for Child and Law, NLSIU, Bangalore, 2018

40 The Committee on the Rights of the Child (CRC) is the body of 18 independent experts that monitors the implementation of the Convention on the Rights of the Child by its states parties. For details see: https://www.ohchr.org/en/treaty-bodies/crc/introduction-committee, visited on 24.9.2022.

41 UN Commit on the Rights of the Child (CRC), General Comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, available at: https://www.refworld.org/docid/4670fca12.html [accessed 24 September 2022]

6. Recommendations for Law Reform in the MACR in IPC, 1860 and Preliminary Assessment in JJ Act, 2015

A child in conflict with the law should "be treated in a manner consistent with the promotion of the child's sense of dignity and worth, and which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."[42]

In India, in Sections 82 and 83 of the Indian Penal Code, we have two minimum ages of criminal responsibility of the child — 7 years and 12 years. The CRC Committee in General Comment 10 has expressed concern about the practice of allowing exceptions to a minimum age of criminal responsibility, which permits the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible. The Committee strongly recommends State parties to set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.[43]

Section 82, IPC, 1860 must be amended so that there is only one age of criminal responsibility. The upper age limit of the juvenile justice system/criminal majority is universally fixed at 18 years of age and corresponds to the definition of a child contained in Article 1 of the Convention. This means that every person under the age of 18 years at the time of the alleged commission of an offence has the right to be treated in accordance with the rules of juvenile justice, in a specific and specialised system, different from the criminal one applicable to adults.

Article 15(3) of the Constitution of India provides for special provisions for children. Justice Verma Committee report takes a sincere effort to resolve the injustice happening in society by giving some contentions and assertions in their report. Justice J.S. Verma Committee report on 'Amendments to Criminal Law' has noted that "the Juvenile Justice Act has failed miserably

42 UNCRC, 1989, Article 40(1).

43 UN General Comment 24 in para 35. Available at : https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf Accessed on Oct. 1, 2022.

to protect the children in the country. We cannot hold the child responsible for a crime before first providing him/her the basic rights given to him by the Indian Constitution."[44]

There are several other crucial developmental aspects of adolescence that are associated with changes in physical, cognitive, and psycho-social characteristics, as well as with attitudes toward intimacy and independence.[45] A paper written by Laurence Steinberg concluded that the age of criminal responsibility for juveniles should not be reduced to 16. There is scientific evidence that the part of the frontal lobe that helps a person understand consequences of actions only starts developing in late adolescence and matures by 24-25 years. Thus, risky behaviour is common among adolescents. According to him 'adolescent brain is malleable, adolescence is a period of both tremendous opportunity and risk'.[46]

The essence of the Juvenile Justice Act is to reform. Harsh punishment cannot be a deterrent and this, in turn, could make the juveniles hard core criminals. We have come far from the age of Oliver Twist and Charles Dickens and based on understandings of child rights and child psychology, we know that children in conflict with law can be reformed and restored in mainstream society. We—the family, community, school, society, the State — have failed in preventing the child in need of care and protection from turning into a child in conflict with law. There is a hue and cry over the release of a juvenile offender. We have followed the rule of law even while dealing with terrorists, so why should constitutional norms and international human rights standards be violated in these cases? Certainly, justice has to be done to the victim and rule of law has to be followed but because we have failed, we must take responsibility.[47]

The JJ Act, 2015, must be amended in the best interest of the child. The age of criminal responsibility must be increased to 18 years and children should be protected from the harshness of the criminal justice system and prevented from turning into hard core criminals.

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44 Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law, Government of India, 2013, Available at: http://csrindia.org/images/download/Amendments-To-Criminal-Law.pdf. Accessed on Sept. 20, 2022.

45 Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu, and Sushil Sharma, *Maturation of the adolescent brain,* Neuropsychiatr Dis Treat. 2013; 9: 449–461. Published online 2013 Apr 3. doi: 10.2147/NDT.S39776. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/. Accessed on Sept 20, 2022

46 Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence*, New York; Houghton Mifflin Harcourt Publishing Company; 2014. Available at https://www.psychiatrictimes.com/view/adolescent-brain. Accessed on Sept. 20, 2022.

47 Bajpai, Asha, "We as a society have failed," *The Hindu,* Mumbai, 28.11.2015, Available at: https://www.thehindu.com/news/cities/mumbai/asha-bajpai-on-juvenile-crimes/article7924266.ece. Accessed on Sept. 1, 2022. UPDATED: NOVEMBER 28, 2015 02:15 IS

Violence can occur when children are apprehended, during transfers in police vehicles, while in police custody, during pre-trial detention, and when placed in institutions before and after conviction.[48] Children are more likely to become victims of crime than adults, in the criminal justice system, this must be avoided.

7. Adolescents in Criminal Justice System under Protection of Children from Sexual Offences Act, 2012 (POCSO)

In order to address child sexual abuse, the POCSO Act was passed in 2012. It is the first comprehensive statute addressing child sexual abuse. The earlier IPC provisions were inadequate and not suitable for sexual abuse of children. POCSO was enacted to protect children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of children. It defines a child as any person below eighteen years of age. Some significant provisions of the POCSO Act, 2012 include:

- The Act is Gender Neutral with regard to both the accused and the child victims.
- The Act has expanded the list of sexual offences against children to include all kinds of sexual offences against children that were not previously included by the Indian Penal Code. Provisions
- It has included aggravated penetrative sexual assault to include punishment for abuse by a person in a position of trust or authority, such as public workers, police, members of the military forces, managers, or employees of educational or religious institutions. The 2019 amendments to POCSO Act included strengthened penalties under different provisions of the Act, including the death sentence for aggravated penetrative sexual assault.
- The Act was amended in 2019. The amendment has made anti-child pornography provisions stricter. Penalties have been prescribed for possessing child pornographic material in any form involving a child.
- It has included mandatory reporting for anyone who was aware of a child being sexually abused or likely to be abused. Penalties are provided for failing to report a case or for false reporting.

48 Marta Santos Pais, *Violence Against Children in the Criminal Justice System*, Edited Wendy O Brien, Cedric Foussard, Routledge, USA, 2020.

- There are child friendly procedures that include recording a child's statement by the police and court, provision of a support person, police not in uniform, statement in the language of the child.

As per Section 28 (1) of the POCSO Act, the state governments, in consultation with the Chief Justice of High Courts, should designate a Sessions Court as a special court to try offences under the POCSO Act to facilitate speedy trial.

8. 'Criminalisation 'of Adolescents under the Protection of Children from Sexual Offences (POCSO) Act, 2012

The minimum age of sexual consent is that age from which someone is deemed capable of consenting to sexual activity. The objective of the minimum age of sexual consent is to protect adolescents from sexual abuse and the consequences of early sexual activity on their rights and development. The Protection of Children from Sexual Offences Act, 2012 (POCSO) defines a "child" as anyone under the age of 18. The minimum age of sexual consent under POCSO is therefore 18 years.

In practice, under POCSO, the increase in age of sexual consent to 18 years has resulted in a number of young couples in consensual and non-exploitative relationships, who have found themselves embroiled in the criminal justice system. These boys/young men are charged with sexual offences under the Indian Penal Code, 1860. The girls are treated as victims and sent back to their parents or institutionalised in children's homes when they refuse to return to their parents or their parents refuse to accept them.[49]

Many parents use this age of sexual consent to complain against the adolescent boys in a consensual relationship with their daughters, when they disapprove of the relationship. Many young couples in consensual, non-exploitative relationships are treated on a par with rape because the consent of a "child" is irrelevant. The only option the couple has when facing criminal charges and imprisonment is to ask the High Court to drop the case by using

49 Swagata Raha, Shruthi Ramakrishnan, "Changing the age of consent," *The Hindu*, September 05, 2022.

its inherent authority under Section 482 of the Criminal Procedure Code,[50] which states that it has the authority to prevent abuse of the process of any Court or otherwise to secure the ends of justice.[51]

There have been several such cases before the Special POCSO courts known as 'romantic cases' or 'Romeo Juliet cases', or 'teen romance cases'. A study of 1,715 "romantic" cases under the POCSO Act determined between 2016 and 2020 by Special Courts in Assam, Maharashtra, and West Bengal were examined by Enfold Proactive Health Trust, and it was discovered that these instances made up 24.3 per cent of all cases decided by the courts.[52] The study further reveals that:

- 80.2 per cent of the complainants were the girls' parents and relatives. After the female went "missing", eloped with her lover, or a pregnancy was discovered, they went to the police.
- Only 46.5 per cent of the cases involved the victim and the accused being married to one another.
- The females said that the relationships were consensual in 85.5 per cent of the situations.[53]

9. Judicial Response to Victimisation of Adolescents

Is a child of 17 years of age, a criminal, deserving rigorous imprisonment because he had consensual sexual relations with another 17-year-old? This is an outdated moral viewpoint being imposed on children. Several High Courts have taken proactive stand on cases where adolescents are being victimised. They have recognised the normalcy of these relationships and the futility of prosecuting 'romantic cases', owing to the consensual nature of the relationships as well as the harmful impact of continued prosecution on both parties. The High Courts have observed that the cases of mutual consent and teenage attraction are not an uncommon occurrence at an adolescent age, and, therefore**,** the age of consent should

50 Section 482 in The Code of Criminal Procedure, 1973 – Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

51 Swagata Raha, Shruthi Ramakrishnan, "Changing the age of consent," *The Hindu,* September 05, 2022.

52 Swagata Raha, Shruthi Ramakrishnan, "Changing the age of consent," *The Hindu*, September 05, 2022

53 Swagata Raha, Shruthi Ramakrishnan, "Changing the age of consent," *The Hindu*, September 05, 2022

be reduced from 18 years to 16 years. In some cases, the courts have quashed the FIRs against the minor accused.

In the case of *Sabari v. Inspector of Police (2018)*, the Madras High Court has said in passing, or as obiter dicta, that consensual sexual activity between minors above the age of 16 years of age should not be considered to be a criminal activity. Since it was said as obiter dicta, it cannot be enforced as law, but it has persuasive value for future judicial and legislative decisions. The Court considered this a logical conclusion from a consideration of ground realities and post-modern moralities of this decade. The High Court had suggested as an obiter dicta that the definition of 'Child' under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18. Any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act. Such sexual assault, if it is so defined, can be tried under a new provision. This was said in passing, or as obiter dicta[54] by the High Court, and does not construe as the law before passing of the appropriate Amendment to POCSO.

Recently, in *Bande Rama v. the State of Karnataka,*[55] the Karnataka High Court struck down criminal proceedings for rape, kidnapping, and penetrative and aggravating penetrative sexual assault under the Protection of Children from Sexual Offenses (POCSO) Act, 2012. In the present case, the father of the prosecutrix had registered a missing complaint of her back in 2019, alleging offences punishable under Section 363 (kidnapping) of IPC and Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. The accused was remanded to judicial custody and a charge sheet was filed against him. About a year after the alleged incident, the prosecutrix attained the age of 18 years. In June 2020, the prosecutrix filed an affidavit that the petitioner and the prosecutrix were involved in a consensual relationship and that she had married the defendant after turning 18. A child born to the couple after their marriage was legally recognised.[56]

After the said evidence, the petitioner accused was granted bail.

54 A judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and, therefore, not legally binding as a precedent.

55 Criminal Petition no. 6214 of 2022.

56 Criminal Petition no. 6214 of 2022 between: Rama @ Bande ...and: State of Karnataka. And M Nagappa

This case was in response to a complaint from the father of a 17-year-old girl against her 20-year-old partner. The girl said in court that the actions were mutual and that she had married the defendant after turning 18. A child born to the couple after their marriage was legally recognised. The High Court, while quashing the complaint against the accused, observed that several Courts have closed proceedings against such accused, who get married to the prosecutrix during the pendency of the trial. The court further opined, "*In the light of the marriage between the prosecutrix and the accused; a certificate being issued per law depicting the couple to be a legally wedded husband and wife; a girl child being born from the wedlock to which a birth certificate issued by the Competent Authority being placed on record. In such cases, the prosecution can hardly prove the guilt against the petitioner. If the victim is going to turn hostile in a trial at a later point in time and the petitioner gets acquitted of all the offences, the sword of crime would have torn the soul of the accused.*"

Unfortunately, POSCO Act 'does not distinguish between rape and consensual sexual interactions'. The mandatory reporting cases have led to High Courts often exercising extraordinary powers to quash cases to protect the family and the child. There are high rates of acquittals in such cases as the girls turn hostile in courts, as the act was done by mutual consent. The age of sexual consent and the blanket criminalisation of adolescent boys and girls has not taken into account field realities. These cases also increase the burden on the courts and the enforcement system.

The victims and witnesses under POCSO also are left unprotected while waiting outside the courtrooms, while travelling back and forth to the courts. The administrative and service staff are not sensitised.

It is clear that the POCSO Act enacted for preventing child abuse have inflicted considerable unintended harm and trauma on young persons, for whose protection they were enacted. Law reform is necessary for purposes of reducing the ambit of criminalisation.

10. Conflicting Provisions between Mandatory Reporting under POCSO Act (Sec. 19) and Non-disclosure of Identity under Medical Termination of Pregnancy Act (MTP) (Sec. 5A(1))

Another issue of concern were the conflicting provisions between Sec. 19 of the POCSO Act and Sec. 5 A(1) of the MTP Act. Under Section 19 of the POCSO Act, reporting of child sexual abuse to law enforcement is mandatory for anyone, who has an apprehension of such an act being committed or has any knowledge of such a case.[57] This includes NGOs, educators, health professionals, parents, neighbours, and legal professionals who might be aware of such cases. As per the law, consent of a minor is immaterial and the police is bound to register an FIR against the "accused".

POCSO Act also provides for mandatory reporting of sexual offences. This casts a legal duty upon a person who has knowledge that a child has been sexually abused to report the offence; if he fails to do so, he may be punished with six months' imprisonment and/or a fine. The objective of the provision relating to mandatory reporting was to ensure reporting of child sexual abuse cases and not brush them under the carpet under the guise of "tarnishing reputation" and "parents' consent". This provision is also an acknowledgement of the prevalence and severity of child sexual abuse, and a means to prevent continuing violence.

On the other hand, Rule 3B (b) of the Medical Termination of Pregnancy (MTP) Rules allows minors to seek abortion of pregnancy of the term 20-24 weeks. Section 5A (1) of the MTP Act states that no registered medical practitioner (RMP) shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act – except to a person authorised by any law.

57 POCSO Act, Sec. 19. Reporting of offences: (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to — (a) the Special Juvenile Police Unit; or (b) the local police. (2) Every report given under Sub-section (1) shall be — (a) ascribed an entry number and recorded in writing; (b) be read over to the informant; (c) shall be entered in a book to be kept by the Police Unit. (3) Where the report under Sub-section (1) is given by a child, the same shall be recorded under Sub-section (2) in a simple language so that the child understands contents being recorded. (4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same. (5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty four hours of the report, as may be prescribed. (6) The Special Juvenile Police Unit or local police shall, without unnecessary delay, but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard. (7) No person shall incur any liability for giving information in good faith about an offence under POCSO Act as required in above Sec 9 (1)

Recently, the SC has read down the mandatory reporting requirement under the Protection of Children from Sexual Offences (POCSO) Act. It held that a doctor need not disclose the name and identity of the minor girl while reporting to the police.[58] The judgement has called for a harmonious reading of the MTP Act and the POCSO Act and held that an RMP — on request of the minor and the guardian, is exempt from disclosing the identity and other personal details of a minor in the information provided under Section 19 of the POCSO Act and any criminal proceedings which may follow from such reporting. As per the judgement, such an interpretation would prevent any conflict between the statutory obligation of the Registered Medical Practioner (RMP) to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 21 of the Constitution.

The judges took note of the fact that the POCSO Act does not recognise consent in sexual activities for minors, but this does not prevent adolescents from engaging in consensual sexual activity and sometimes this leads to pregnancy. "The taboos surrounding pre-marital sex prevent young adults from attempting to access contraceptives. Young girls who have discovered they are pregnant are hesitant to reveal this to their parents," the verdict said.

The judges went on to observe that mandatory disclosure deters minors from approaching qualified doctors as they may not want to entangle themselves in the legal process. This can make them approach an unqualified doctor for an MTP and it could not possibly be the legislation's intent to deprive minors of safe abortion, the court argued.[59]

11. Need for Law Reform to protect Rights of Children in the Criminal Justice System

Children in contact with the criminal justice system, justice are often in a situation of vulnerability and many of their rights are violated. These children are often unaware of their rights and/or not in a position to claim their rights. As such, it is important to identify

58 X Appellant v The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr, Civil Appeal No. 5802 of 2022, (Arising out of SLP (C) No 12612 of 2022), Supreme Court of India, Civil Appellate Jurisdiction. Available at: https://indiankanoon.org/doc/123985596/. Accessed on Oct. 20, 2022.

59 X Appellant v The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr, Civil Appeal No. 5802 of 2022 (Arising out of SLP (C) No 12612 of 2022), Supreme Court of India, Civil Appellate Jurisdiction. Available at: https://indiankanoon.org/doc/123985596/. Accessed on Oct. 20, 2022

their specific needs and the protections that they should be accorded.[60] The Criminal Justice System is not suitable for children; we need reform to protect the rights of the child.

In the JJ Act, 2015, we need an alternate system, different from the current criminal justice system to deal with 16-18 years old children who have committed a heinous crime. The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters,[61] as well as the United Nations Handbook on Restorative Justice Programmes[62] have provided an international framework for work in this field. In different regions, there are significant developments in the process of law reform and restorative justice programmes for child offenders. We need to adapt a suitable model of restorative justice. Alternative dispute mechanisms also need to be explored keeping the best interest of the child in mind.

In Norway, where the minimum age of criminal responsibility is 15 years, a legislative amendment on the Juvenile System was enacted in December 2011.[63] It applies to children between 15 and 18 years, who have committed serious or repeated offences. In the new system, the sanction will be imposed locally, where the convicted young person lives. Imprisonment sentences will be replaced by social control and close follow-up, including full involvement of the offender, the offender's "private network", the various elements of the justice system and other public bodies, all of which will contribute to an individualised follow-up process. Victims may also be involved at their own request. The objective is to give the convicted child an enhanced understanding of the consequences of his/her act for everyone affected, while guaranteeing him/her the necessary aid and support. The key factor is to strengthen the young person's resources to deal with his or her own criminal act. The legislative changes also introduced extensive community service orders for offenders between 15 and 18 years as an alternative to unsuspended prison sentences.[64]

60 Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system. Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-25_en.pdf. Accessed on Sept. 10, 2022

61 Economic and Social Council Resolution 2002/12.

62 UNODC Handbook on Restorative Justice Programmes, available from: http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf

63 *Ibid supra* 44

64 *Ibid supra* 44

The alternatives must begin with primary prevention measures, such as support for disadvantaged and at-risk families and early childhood initiatives proposed alternatives to detention such as community-based diversion programmes. There must be criteria laid down for staff selection; training and remuneration accountability; registration, monitoring and investigation; and complaint mechanism for children in the criminal justice system. The victims and witnesses must be protected outside the courtrooms as well, while travelling back and forth to the courts and in institutions, before and after trial and conviction of the accused.

The POCSO Act was never intended to prosecute teen romance.

Article 12 of the Universal Declaration of Human Rights ("UDHR"), of which India is a signatory, holds that everyone has the right to the protection of the law against arbitrary interference with his or her privacy. Consensual sexual acts fall under the purview of right to privacy of a human being. This has been recognised under Article 21 as a Fundamental Right by the judgement of the Supreme Court in the landmark case of *Justice Puttaswamy v. Union of India (2017)*.[65] Considering consensual sexual acts as a crime violates the right to privacy of the minors, in addition to other rights of the children.

There is a need for law reform to revise the age of consent and prevent the criminalisation of older adolescents engaging in factually consensual and non-exploitative acts. In order to change the age of consent and avoid criminalising older teenagers, who engage in factually consensual and non-exploitative behaviours, the age of sexual consent must be lowered to 16 years. Most of the American states, Europe, Japan, Canada, Australia, China, and Russia have 16 years as the age of consent. There must be guidelines laid down for mandatory reporting.

As stated in the Convention on the Rights of the Child, every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provide specifically that States should establish child-friendly legal aid systems that enable children to contact their parents or guardians at once and to prohibit any interview in the absence of a parent or guardian, and lawyer or other legal aid provider.

65 AIR 2017 SC 4161

The current criminal justice system does not protect nor respects the rights of children including protection from abuse and violence. This system is neither understood nor trusted by children. By removing such children from the current criminal justice system, the violence against them is clearly reduced and their rights protected. Laws, policies and procedures must be reviewed and revised with the child-rights based perspective to ensure a child justice system that protects, safeguards, reforms, rehabilitates, uses positive disciplining methods, instead of perpetuating violence and criminalisation of children. We need a child justice system that has inbuilt accountability, trained and sensitive personnel. A system that children understand, trust and feel empowered.

References

- Bajpai, Asha. Child Rights in India, Law, Policy and Practice, Oxford University Press, New Delhi, India,
- Bajpai Asha. "We as a society have failed," *The Hindu*, Mumbai, 28.11.2015
- Bajpai, Asha. "The Juvenile Justice (Care and Protection of Children) Act 2015: An analysis," Indian Law Review, 2:2, 191-203, DOI: 10.1080/24730580.2018.1552233
- Barun Chandra Thakur v. Master Bhou & Anr., Supreme Court of India, Criminal Appellate Jurisdiction.
- Bharti Ali, Enakshi Ganguly. "Why preliminary Assessment is against the idea of juvenile justice," India Development Review (IDR), Sept. 27, 2022
- Crime in India 2021, National Crime Records Bureau, Ministry of Home Affairs, Government of India, New Delhi, 2022
- Economic and Social Council Resolution 2002/12.
- Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system.
- Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law, Government of India, 2013,
- Justice Puttaswamy v. Union of India (2017). AIR 2017 SC 4161
- Laurence Steinberg, *Age of Opportunity, Lessons from the New Science of Adolescence,* New York; Houghton Mifflin Harcourt Publishing Company; 2014.

- Legal Aid Among Children in conflict with law in Karnataka, Centre for Child and Law, NLSIU, Bangalore, 2018
- Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, et al., *Maturation of the adolescent brain, neuropsychiatry Dis Treat* 2013; 9: 449–461.
- Published online 2013 Apr 3. doi: 10.2147/NDT.S39776.
- Rama @Bande .... And State of Karnataka and Nagappa Criminal Petition 6214 of 2022, High Court of Karnataka.
- Sampurna Behrua V. Union of India & Ors. W.P. No. (C) No. 473/2005
- Swagata Raha, Shruthi Ramakrishnan, "Changing the age of consent," *The Hindu*, September 05, 2022.
- The Constitution of India, 1950.
- The Convention on the Rights of the Child (CRC) 1989
- The Criminal Procedure Code, 1973
- The Indian Penal Code, 1860
- The Juvenile Justice (Care & Protection of Children) Act, 2000
- The Juvenile Justice (Care & Protection of Children) Act, 2015
- The Legal Services Authorities Act, 1987.
- The Protection of Children from Sexual Offences Act, 2012,
- UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10.
- UN General Comment 24 in para 35
- UNODC Handbook on restorative justice programmes,
- Wendy O Brien, Cedric Foussard (ed), *Violence Against Children in the Criminal Justice System,* Routledge, USA, 2020
- X Appellant v The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr, Civil Appeal No 5802 of 2022, (Arising out of SLP (C) No 12612 of 2022), Supreme Court of India, civil appellate jurisdiction.

Adoption Laws: Challenges Concerning Procedure from Human Rights Perspective

Devinder Singh*

Abstract

Adoption is a legal method to create parental rights in favour of childless adoptive parents including respect to orphan, surrendered, and abandoned child or child of a relative. Initially, it was practised among the Hindus to procure a son either from family or relative to fulfil pious obligations as deciphered in religious scriptures or to ensure succession of property. It was a direct adoption and used to be a private matter amongst giver and taker, performed with confidentiality. However, to regulate such adoptions, the Guardian and Wards Act, 1890, was enacted. Later, to consolidate various practices that existed under different schools of Hindu jurisprudence and to provide harmony amongst provisions, the law was codified as the Hindu Adoption and Maintenance Act, 1956, to secure the paramount interest of a child. The Act, though regulated direct adoption, the issues of child trafficking, illegal adoptions, violation of child rights in case of inter country adoption increased due to unavailability of provisions concerning foreigners and NRI adoptive parents. Therefore, to keep a check, the Juvenile Justice Act, 2000, then Juvenile Justice (Care and Protection) Act, 2015, was enacted and CARA, i.e., Central Adoption Resource Authority was established with Adoption Guidelines. The present paper will trace the evolution of the institution of adoption to analyse how we have come to a stage where the proximity in relationship and human touch have been lost to achieve transparency and regularity in adoption and reflect upon the reasons of undue hardship and delay caused in adoption process to present recommendations.

Keywords: Adoption, welfare, inter-country adoption, CARA, human rights

1. Introduction

Adoption is a legal and social construct that creates a connection between families; the birth family and adoptive family may be belonging to different cultures and to different racial,

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ethnic, and national groups as well.[1] For a long time, it has been practised among communities to facilitate a childless couple to have a child, especially son, for the continuation of family lineage, succession, to perform some obligations or for spiritual purposes, etc. However, with the passage of time, adoptions have become child centric as also stated in the report on the inter-country adoption that 'the paramount consideration and well-being of child' is the core subject matter of adoption. The inter-country adoption has not been practised to a great extent in India due to the socio-economic backwardness of the society and legal technicalities, and it has always been acknowledged as a close family matter. Therefore, children who have been given in adoption in foreign countries were found to be exploited by being employed in domestic services and in child trafficking. Inter-country is the most controversial, complex and sensitive aspect of adoption that involves the principles and procedures over citizenship, migration, socio-economic status of the adopting parents, community and cultures of the society of the adoptive parents and, therefore, it had become necessary to regulate it by legislative measures and achieving streamlined collaboration between qualified and authorised state and responsible social authorities. The same approach has been followed and due considerations has been given to the Public and Private International Laws. The Guardians and Wards Act, 1890, and Hindu Adoption and Maintenance Act, 1956, and international instruments related therewith for formulation of laws to regulate such adoptions as reported[2] by CARA.[3] The Hague Convention on Protection of Children and Co-operation in respect of inter-country adoption is the *grundnorm* that lays down provision for protection of children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad.[4] This Convention, operating through a system of national central authorities, reinforces the United Nations Convention on the Rights of the Child (Article 21) and seeks to ensure that inter-country adoptions are made in the best interests of the child and with respect to his or her Fundamental Rights and to prevent the abduction, the sale of, children. The Hague Convention promotes private and independent adoptions, inter country adoptions through competent authorities, and prospective, eligibility and suitability of adoptive parents.[5] Child adoption was considered as an emotional act for both parties, but

1 K. March & C. Miall, "Adoption as a Family Form," 49(4) Family Relations 2000 available at: https://www.jstor.org/stable/585830 (Visited on October 5, 2022).

2 Central Adoption Resource Authority Report: Bench Book for Adoption (2017).

3 The Law Commission of India, 153th Report on Inter-Country Adoption (1994).

4 The Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (1993).

5 Satyajeet A. Desai, Mulla, Hindu Law, Lexis Nexis 269 (2011).

later exploitation started. The customary practices of adoption in India are placed under the legal regulation to prevent the misuse and an attempt to reduce the gender biases.

1.1 Evolution and Development of Adoption

Adoption is the creature of customs among Hindus. The institution of adoption is social and customary. Adoption seems, originally, to have been preferred for spiritual motives rather than secular. The act of adoption transfers all parental rights, responsibilities and privileges permanently from biological parents to the adoptive parents of child. The whole Hindu adoption law has evolved from the texts of *Manu, Vasishtha, Banddhyayana, Saanaka* and *Sakala*. The ancient Hindu law recognised twelve kinds of sons including five kinds of adopted sons. The modern Hindu law recognised the adoption of the legitimate son *(Aurasa)* begotten by the man himself on the lawfully wedded wife. Daughters were not the subject matter of adoption because they were not qualified to perform the religious ceremonies, but some Hindu texts mentioned about the adoption of the daughter also. This is supported by the principle of giving daughter in marriage that is known as *kanyadan* and a son given in adoption, is called *putradana*.[6] After looking at the purpose of adoption, it would seem that an unmarried man was not recognised eligible for adopting a son.[7] The existence of a son or grandson made an adoption not only needless, but illegal. If a couple loses his son by reason of conversion to another religion or even becoming a *sanyasi*, the gap so created may be filled in by adoption. One of the most essential conditions of a person's capacity to adopt is that he should be sonless and that only a Hindu child can be taken in adoption. The institution of adoption was used to be a confidential and private arrangement amongst family members guided by the patriarchal mores of society in which children from extended families were adopted, therefore, establishing a kinship arrangement. There were no major concerns as to the welfare of children and it was based on a parent centric approach with the father having unrestricted power over the child. Manu has also spoken about it in following words, *"By a son, a man obtains victory over all people, by a son's son, he enjoys immortality and afterwards by the son of a grandson, he reaches the solar abode."*[8] Similarly, according to *'Vedas',* a man blessed with a son is entitled to endless heavenly bliss and *'Dharamshastra of Baudhayana'* also stipulates

6 Dinshah Fardunji Mulla, Principles of Hindu Law, Creative Media Partners, 309 (2013)

7 Surendra Keshav v. Doorga Sundari Dassee, (1920) L. R. 19 I. A. 108

8 Sir W.H. Rattigan, The Hindu Law of Adoption, Oxford University Press, 1873.

that by swearing to following words, i.e., "take therefore the fulfilment of any religious duties; I take thee to continue the line of ancestors," one can perform temporal duties.[9] Therefore, it was obvious that in early times, adoption was a means to achieve religious benefits. The same principle was recognised by the Hon'ble Justice, G. Lowndes, while mentioning that under the *brahminical* influence, the act of adoption of son has been given a religious significance for the "spiritual welfare of the souls of his immediate ancestors with an extensive class of subsidiary sons being admitted to the family, all of whom could perform the necessary ceremonies, though only some of them were allowed full rights of inheritance."[10] The doctrine of religious efficacy of son-ship was stressed by the Privy Council in *Amarendra v. Sanatan*[11] that helps a father to adopt when his only son is a *patita* or disqualified person according to Smritis. It is also clear from the Hindu texts when it is stated that a daughter could also provide for the continuance of the line through her son, and the religious requirements of the deceased can then be met.[12] In *Bal Gangadhar Tilak v. Shriniwas Pandit*,[13] the Privy Council observed that among the Hindus, the ceremony of adoption is held to be necessary not only for the continuation of the lineage of childless father, but as part of the religious means whereby a son can be provided, who will make those oblations and religious sacrifices, which would permit the soul of the deceased passing from *'Hades'* (hell) into 'Paradise'.[14] Through the Guardians and Wards Act, 1890, an attempt was made to cater to the Hindu practices relating to adoptions to other communities. The customary practices of adoption were not found to be concentrating on the welfare of the adopted child as it was treated as secondary consideration and performed majorly for religious and spiritual purposes. In many cases, it had been seen that the fate and position of the adopted son remained miserable and subjected to a lot of suffering if a male child is born subsequently to such adoption to the adopted parents. Such anomalous features of the customary practices of adoption were then done away with the introduction of Hindu Adoption and Maintenance Act, 1956, a piece of the legislative form of the customary law in progressive character on matter of adoption. The striking features of the Act are that in adoption, both son and daughter and adopted parents are placed on equal footing and subject to the same legal regulations and obligations.[15]

9 P.V. Kane, History of Dharamshastra (Ancient and Medieval Religious and Civil Law India), Vol. 1 (1968)
10 Amarendra Man Singh Bhramarbar and Another v. Sanatan Singh, (1933) 35 BOMLR 859
11 (1933) 60 I. A. 242
12 Chanbasappa v. Madiwalappa, (1937) I.L.R. Bom. 642
13 (1915) 17 BOMLR 527
14 Gopalchandra Sarkar, Sastri's Hindu Law, S.C. Sarkar & Sons Ltd. 653 (1940)
15 P.V. Kane, History of Dharamshastra (Ancient and Medieval Religious and Civil Law India), Vol. 1 (1968)

1.2 From Parent-Centric Adoptions to Child's Welfare

The legislative adoption is an advancement in the customary adoption. For providing a more secular way for people belonging to other religions and communities to enjoy parenthood, the Guardian and Ward Act, 1890, was enacted for the appointment of a guardian to a child, irrespective of religion and nationality. But in real sense, the jurisprudential aspect of adoption in India started changing over the period and was streamlined with the introduction of Hindu Adoption and Maintenance Act, 1956. The object of the State to legislate on customary adoption is to ensure paramount welfare of the child adopted, while the purpose of the customary adoption was all about the *son-ship* and spiritual benefits. It laid down that only Hindu parents or guardians can give or take a Hindu child in adoption. The adoption now can be made by a widow in her own right. The physical act of giving and receiving of the son or daughter is absolutely made necessary as a condition to valid adoption to ensure that there shall not be sale and purchase of child. Mere expression of consent, or the execution of a deed of adoption through registration, but not accompanied by the actual physical delivery of the adopted child does not constitute a valid adoption. The effects and results of adoption are notable. An adopted child is deemed to be a biological one for all purposes with effect from the day of adoption, and from such day, all the ties of the adopted child are severed from the family of his or her birth and the same are replaced in the adoptive family.[16] Though provided for everything, but not much was done for the larger interest of the children, especially the abandoned or destitute and the bar of religion has actually made it a vehicle to steer the desire of Hindu parents for a child. Later, a change in attitude was seen across the globe with recognition of adoption of unknown children, who may be an orphan, surrendered or institutionalised child. Now, the States have moved from principle of *patria potestas* to paramount welfare of children, and policies have been made to ensure rehabilitation of such children who have no home or families. However, to protect such vulnerable children from further hardships and exploitation at the hands of adoption or social agencies working for their welfare, the Hon'ble High Court in *St. Theresa's Tender Loving Care Home & Ors. v. State of Andhra Pradesh,*[17] has laid down that a child is a precious gift and merely because he or she, for various reasons, has been abandoned by the parents should

16 Gopalchandra Sarkar, The Hindu Law of Adoption, General Books, 185 (2013)

17 (2005)8 SCC 525

not be further neglected by the society.[18] The States while formulating policies to provide a safe roof over an abandoned child must ensure that agencies purporting to be working for social service or upliftment of children shall not be aiding child trafficking. It is the foremost duty of the State to work for the welfare of the child and all possible efforts should be made by the State Governments to explore the possibility of adoption under the supervision of the designated agency. Later, a trend towards more openness in adoption is seen with the increase in international, interracial and special needs adoption, and a rising number of step-parent, single parent, and gay-lesbian adoptive families can be seen.[19] The Juvenile Justice (Care and Protection) Act, 2015, is aimed to achieve some of these objectives by establishing provisions ensuring gender neutral and secular way of adoption. Even this secular character is criticised by All India Muslim Personal Law Board in *Shabnam Hashmi v Union of India,*[20] by arguing that the Act provides for adoption of child in need of care and protection and it explicitly recognises foster care sponsorship. It was further contented that Islamic Law does not recognise an adopted child to be at par with a biological child and under *"Kafala"* system, the child is placed under a *'Kafil',* who only provides for the well-being of the child including financial support and the child remains the true descendant of his biological parents and not that of the "adoptive" parents. It is also recognised by the United Nations Convention on Child Rights and, therefore, a direction should be issued to all the Child Welfare Committees to keep following the principles of Islamic Law before declaring a Muslim child available for adoption under Section 41(5) of the Juvenile Justice Act, 2000. It shows that adoption is a religious act of parents and continues to be so even if a legislation has come.

1.3 Inter-country Adoption: A More Progressive Way to Rehabilitate a Child

The concept of inter-country adoption was new till the beginning of 21st century. In the absence of a specific law to regulate adoption, the decisions in respective cases were usually made on the basis of precedents set by the Supreme Court with the help of provisions laid down in Indian Constitution and the Guardians and Wards Act, 1890. The usual practice was to appoint non-Hindus and foreigners as the guardians only of children under the Guardians and Wards Act, 1890. In the garb of existing ambiguities and fallacies in domestic

18 Appeal (civil) 6492 of 2005 decide on 2 Sarkar 24 October 2005, The Hindu Law of Adoption, General Books, 185 (2013) (2005)8 SCC 525 Appeal (civil) 6494 24 October 2005, by the Supreme Court, bench comprising Justice Arijit Pasayat and Justice Arun Kumar.

19 Sir W.H. Rattigan, The Hindu Law of Adoption, Oxford University Press 1873

20 Writ Petition (Civil) No. 470 of 2005

laws concerning foreigners, overseas citizens or Non-resident Indians as adoptive parents, and unavailability of streamlined procedure to regulate such adoptions, the issues of child trafficking, illegal adoptions, violation of child rights and statelessness on being left by foster parents on grounds of adjustment and disruptions in foreign State caused great upheaval and gathered the attention of law makers, Non-government Organisations, social activities and other interest groups.[21] The Law Commission of India in its 153rd report on inter-country adoption stated that the paramount consideration is the core subject matter of the inter-country adoption. The constitutional position on the welfare of children is clearly mentioned in the Article 15(3), 23, 24 and 39. These Articles covers the two important parts of the Constitution of India, i.e., Fundamental Rights in Part III and the Directive Principles of State Policy in Part IV of the Constitution. The Report stated that adoption is not so popular in India due to the socio-economic backwardness of the society and, to some extent, the legal technicalities. It further stated that the Indian children given in adoption in foreign countries are exploited by employing them in domestic services and in child trafficking. Inter-country is the most controversial, complex and sensitive aspect of adoption. The report further stated that these aspects cover the principles and procedures over citizenship, migration, socio-economic status of the adopting parents, and community and cultures of the society of the adoptive parents. The report further stressed that there is a necessity to regulate inter-country adoption by legislative measures and strict collaboration between qualified and authorised state and responsible social authorities. The report pays due considerations to the Public and Private International Laws, The Guardians and Wards Act, 1890, and Hindu Adoption and Maintenance Act, 1956 and international instruments related therewith.[22]

2. Judicial Articulation on Inter-country Adoption

The shortcomings of inter-country adoptions were there and rightly so pointed out by the judiciary from time to time. In *Re Rasik Lal Chhagan Lal Mehta*,[23] the Gujarat High Court acknowledged the complex situation of inter-country adoptions as also portrayed by the Indian Council of Social Welfare. It stated that such adoptions encompass "a variety of principles and procedures over migration, citizenship, the socio-economic situation

21 Hari Dev Kohali, Supreme Court on Hindu Law, Universal Law Publishing Co. Pvt. Ltd. 324-334 (2010)

22 The Law Commission of India, 153th Report on Inter-country Adoption (1994).

23 AIR 1982 Guj. 193

of adoptive parents, matching parents with the child, and the acceptance of the child in a different community and culture", and to ensure the best interest of child, legal requirements of both countries with respect to adoption must be satisfied. The Hon'ble Division bench then laid down guidelines such as thorough investigation into the economic status and social conditions of the family, questions of health and psychological preparedness for adoption, the child's acceptance within the community must be done; periodical report pertaining to the maintenance and well-being of the child in the hands of the adoptive parents; the courts must ensure that the adoption is legally valid under the laws of both the countries and that the child should be able to immigrate to that country and also obtain the nationality of the parents, etc. It further stressed that on failure to achieve compliance of such guidelines, the *"end result shall be either an abortive adoption having no validity in either country or a limping adoption, i.e., an adoption recognised in one country but having no validity in another, leaving the adopted child in a helpless state."*[24] The gravity of problems associated with and the malpractices performed by adoption agencies and social organisations by offering Indian children to foreigners was put to notice again in *Laxmi Kant Pandey v. Union of India,*[25] and directives were issued to the Government of India, the Indian Council of Social Welfare and the Indian Council of Child Welfare to carry out their obligations in the matter of adoption of Indian children by such parents. The enormous guidelines and detailed procedure to be followed by adoption agencies were laid down on the basis of the United Nations Convention on the Rights of the Child, 1989, Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoptions, 1993 and the Guardians and Wards Act, 1890.[26]

Hon'ble Justice P.N. Bhagwati while elaborating upon the necessity of giving child in adoption, stressed upon the fact that – First, efforts shall be made to search for prospective adoptive parents within the country so that it would be easy for the child to adjust unlike in case of foreign parents where problems might arise due to cultural, racial or linguistic differences. However, if it seems impossible to find former ones then instead of putting such child in an institution or orphanage that lacks love, affection and warmth of a family, later ones should be preferred with utmost care and caution for best interest of child.[27] It was also

24 *Ibid*, Para 9
25 1987 AIR 232
26 (1915) 17 BOMLR 527
27 *Ibid*, Para 8,9

mentioned, on account of statistics provided by agencies engaged in adoptions that the usual practice among Indian parents is not to opt for stranger child and their preference is always a boy, therefore, leaving behind a majority of abandoned, destitute or orphan girls and handicapped children with bleak chances of finding prospective adoptive parents within the country. There comes in picture nasty and malicious organisations or individuals committing the act of child trafficking in the guise of providing child in adoption to foreigners without even considering emotional and psychological needs of child that get affected in phase of assimilation in new culture and foreign land.[28] The Hon'ble Bench also laid down the genesis of CARA, i.e., Central Adoption Resource Agency. The Central Government was directed to establish it along with regional branches to regulate inter-country adoptions and to act as a nodal agency with all information concerning children, who are available for inter-country adoption, to cross-check every application sent by the social or child welfare agency in the foreign country for adoption of an Indian child and then to forward them to one or the other of the recognised social or child welfare agencies in the country.[29] It led to the formulation of normative safeguards and procedures for inter-country adoptions in India.

The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Adoption Convention) protects children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad. This Convention, which operates through a system of national Central Authorities, reinforces the UN Convention on the Rights of the Child (Art. 21) and seeks to ensure that inter-country adoptions are made in the best interests of the child and with respect for his or her Fundamental Rights. It also seeks to prevent the abduction, the sale of, or traffic in children. India became signatory to this convention in the year 2003. The conclusions and recommendations of the Hague Convention are promoting the private and independent adoptions, inter-country adoptions shall take place between the competent authorities, and prospective, eligibility and suitability of adoptive parents.[30]

28 *Id.* Para 14

29 *supra* note 26

30 Central Adoption Resource Authority Report: Bench Book for Adoption (2017).

3. CARA: Scope and Operational Aspects

The Central Adoption Resource Agency is a statutory body of Ministry of Women and Child Development, established in June 1990 to regulate, monitor and promote adoption of orphaned, abandoned or surrendered children with the primary objective of providing families to children in need of care and protection.[31] Further in 2015, the process of adoption underwent a great transition and with the Child Adoption Resource Information and Guidance System, i.e., CARINGS, it became more streamlined and transparent. The Ministry of Women and Child Development established it as a centralised system and with the help of agencies, a database for adoptable children and prospective parents was created to ensure smooth process of adoption. However, the data gathered over last year suggests that 26,734 prospective adoptive parents have registered with CARA and are waiting for referral for in-country adoption and 1205 prospective adoptive parents are awaiting inter-country adoption[32] and as per the information furnished by the Ministry of Women and Child Development, the average time taken for prospective adoptive parents to get a referral for children in the age group of 0-4 years is approximately two years.[33] The main reason behind such gap is because majority of abandoned or surrendered children are either not under the care of institutions or under un-registered Child Care Institutions (CCI) and, therefore, fall outside the scope of adoption procedure.[34] The Parliamentary Standing Committee on Personnel, Public Grievances and Law and Justice has also pointed out the huge mismatch between the number of children willing to be adopted and the number of children legally available for adoption, and suggested that the way to address this would be to ensure that "orphans and abandoned children found begging on the streets are made available for adoption as soon as possible".[35] The National Commission for Protection of Child Rights data show that there are 5,850 registered CCIs in India, but if unregistered ones are also counted, there are more than 8,000 such functioning institutions, and as per regulations, only registered CCIs can be linked to adoption agencies.[36] The loopholes like these are reasons that prospective adoptive

31 Central Adoption Resource Authority, Ministry of Women and Child Development, Government of India Available at: https://cara.nic.in/about/about_cara.html (Visited on October 7, 2022).

32 118th Report of the Parliamentary Standing Committee on Review of Guardianship and Adoption Laws 2022, p. 31

33 *Id.*, p. 32

34 Sara Bardhan and Neymat Chadha, "The Challenges and Unaddressed Issues of Child Adoption Practices in India," The Wire, 16 September 2021 available at: https://thewire.in/society/challenges-issues-child-adoption-practices-india (Visited on October 7, 2022).

35 Review of Laws on Adoption – Observations and Recommendations of the Parliamentary Standing Committee Report, 2022

36 NCPCR data shows over 1,300 unregistered child care institutions in India, July 15, 2018

parents, especially foreigners, fall in the trap of child traffickers to avoid long waiting of two to three years. However, to revamp the procedure in 2016, a list called as immediate placement was also introduced to bypass a long waiting period if they chose to adopt children from this list comprising of older children (above five years of age) and children with special needs, but it also didn't prove to be effective. Adoption statistics on the working of CARA is revealed as under:[37]

Year	Inter-country Adoption	In-country Adoption
2015-2016	3011	666
2016-2017	3210	578
2017-2018	3276	651
2018-2019	3374	653
2019-2020	3351	394
2020-2021	3142	417
2021-2022	2991	414

3.1 Critical Analysis of Functioning of CARA

The statistics show that both inter-country and in-country adoption has decreased at a striking rate in recent years to 2991 and 414, respectively. The declining rate of adoption as per numbers provided by CARA itself highlights the complex procedure of adoption in India. The picture gets grimmer in knowing that with depleting rate of adoption, disruption or dissolution are on rise as suggested by an information obtained under the Right to Information Act, 2005, that in the two years between April 2017 and March 2019, 275 children had been returned to the system across states—almost five per cent of the number of children adopted in India in the same period.[38] Now to understand the issues in entirety, the author has critically analysed the following provisions:

Labelling or Branding of Children: The labelling or branding of children as abandoned, orphaned or surrendered is not appropriate for the child's psychology, as it creates trauma in

37 *supra* note 30

38 Shrabonti Bagchi, 'The Returned' available at: https://www.livemint.com/mint-lounge/features/the-returned-1569587584096.html (Visited on October 10, 2022)

being grown up with such labels. In the wake of generating openness in adoption procedure, we have not realised that a class of children has been created and the stigma that such label carries is difficult to vanish with time. A child is god's creation and should be accepted, as it is irrespective of its status as to how he or she has been found or to what religion they belong. When the Juvenile Justice Act, 2015 and Adoption Rules, 2017 have been recognised as secular Acts where there is no bar on ground of religion, then why to signify religion of a child. In case of surrendered child, it can be considered as reasonable requirement on behalf of parents, but it should not be preferred in case of other children. A child in institution must be brought up in an environment where every religion is respected so that it will not create hindrance in assimilation of such child in adoptive family. The author suggests that terms like 'orphan, surrendered and abandoned' should be dropped and only child care institutions and specialised adoption agencies should keep it to themselves and should not disclose it to adoptive parents. All such references may be replaced by 'institutionalised' children.

Digitalisation of Adoption Procedure: The present adoption procedure with centralised online system working in the whole territory of India through e-filing of applications on the portal under CARA doesn't fall in line with the true meaning of adoption as human intervention and a true bond has been lost. It actually presents a shift in process, "from helping children by finding them loving and caring families to a system that operates to provide a service for western couples increases commercialism and profit, and arguably creates the 'ultimate form of imperialism', which raises questions about the real motives behind transnational adoption."[39]The agencies can no longer select the prospective parents as they are selected on first come and first served basis. It also affects their chances of getting child according to specifications (if any) and creates difficulties in scenarios where they want a child from a particular state as there are no concerned filters in system. A Senior Manager from a Bengaluru based adoption agency also commented upon this shortcoming and said, "As far as possible, the system needs to be tweaked to favour adoptions within the state that could help agencies to stay updated with the status of parents and children and can interact with them easily, because if they are from different state then the requisite help needs to

39 G. Misca, (2014) The "Quiet Migration": Is Inter-country Adoption a Successful Intervention in the Lives of Vulnerable Children? Family Court Review available at: https://core.ac.uk/download/pdf/19438245.pdf (Visited on October 12, 2022).

be taken from such state agencies."[40] The child care institutions and specialised adoption agencies are not allowed to have much interaction with prospective adoptive parents (PAPs), thus causing conflicting situation in later stage as, sometimes, they expect a few things by looking at photographs of children and child study report and when they actually meet children, the reality strikes differently with a few differences in the child's physique or intelligence quotient. The procedure is not child-centric in its entirety, as on the basis of parent's requirements and after studying their home study report, the profiles of children are shared with them instead of prior understanding and looking at the child's need. The digitalisation of adoption procedure has actually made it difficult for both adoptive parents and children to understand each other's emotional and psychological needs before taking final decision, especially when there are cultural and language barriers unlike traditional adoption system where prior meetings and visits were used to take place to sensitise both the parties. The author is of the opinion that the digitalisation process is fine to the extent of registration by parties with CCIs and suggests that interactive sessions at the special adoption agency or child care institutions after the stage when three or two profiles of children have been shared with prospective adoptive parents in case of inter-country and in-country adoptions, respectively, should be arranged to provide an opportunity of interaction and to see if a level of comfort can be achieved for children, especially for children above seven years of age, who are capable of understanding and developing a relationship. In *Laxmi Kant's case*,[41] the Hon'ble Supreme Court has also asserted that at least in case of in-country adoption, whenever an Indian family visits a recognised social or child welfare agency for adoption, provisions shall be made to ensure that PAPs can meet and interact with a child, who is in adoption pool and if requested, the child study report of respective child should also be provided to them so that decision can be made effectively. Further, in case of inter-country adoption of older children, the facilities shall be arranged for foreigner PAPs to visit and meet him/her in person so that knowledge about their behaviour, environment can be learnt at first hand and adjustments can be made prior to escorting such child to their own nation. The respective practice would surely enable PAPs and the child to develop a cordial relationship in child's own comfortable space, so that the primary objective of adoption – child's welfare is the first and foremost, which can be achieved.

40 S. Sastry, Adoption: Online, but without a soul? available at: https://www.deccanherald.com/specials/insight/adoption-online-but-without-a-soul-791471.html (Visited on October 13, 2022).

41 *supra* note 3

Prior and Post Adoption Counselling of Child: The Adoption Rules, 2022, don't provide much space for counselling of children that could help them in preparing themselves for adjustment. It is only mentioned under the provision of preparation of home study report and functions of specialised agency that the State Adoption Resource Agency or District Child Protection Unit shall be responsible for providing pre-adoption counselling to PAPs.[42] The counselling centres, however, should be established under the CARA where pre and post adoption counselling can be done of PAPs and children, especially above seven years of age. It shall be made mandatory when there are linguistic and cultural differences or when the child is of special need or an older child because it takes a lot of efforts on the part of PAPs as well as the child to bring changes in their attitude and lives and, therefore, external guidance and support is a must and such sessions must be registered by respective agencies. The term 'older child' should be defined to ensure that there shall be no misunderstanding. Further, in case of in-country adoption, the provision of counselling for adoptee child is only available in case of non-adjustment and that too to avoid disruption or dissolution and once dissolved, no provision exists for counselling of children for their reinstatement and to help them in trauma that they might have faced during the transition phase.[43] Moreover, the provision stipulated under Section 20(4) of the Act, stating that on dissolution of adoption, the adopted child should be provided with necessary counselling, care, protection and rehabilitation[44] for inter-country adoptions should also be implemented in case of in-country adoptions where, sometimes, even before finalisation of adoption, the child is sent back to the institution on account of non-adjustment.

Commercialisation and Mechanisation of Adoption: The process of adoption under the Hindu Adoption and Maintenance Act, 1956, has a humane touch and Adoption Rules, 2022, actually present adoption as a soul-less act of taking the child by looking at his/her photographs and child study reports. The entire life of a baby and the home he or she will go to depends on one photograph that CARA will upload along with a bunch of documents on the child's health status and basic background and what kind of justice is this in asking parents to pick one or children getting refused mostly on the ground of their looks.[45] Moreover,

42 Regulation 10(7) of Adoption Rules, 2022

43 Regulation 14(4) and 14(6) Adoption Rules, 2022

44 Follow-up of progress of adopted child by Non-resident Indians, Overseas Citizens of India Cardholder and foreign adoptive parents, Adoption Rules, 2022

45 Dr. Aloma Lobo, Adoption available at: https://www.thenewsminute.com/article/adoption-must-stop-being-about-saviours-and-focus-child-rights-instead-107850 (Visited on October 15, 2022)

the process becomes exhausting and tiring for PAPs while waiting for the photographs of child for months. Sometimes, the staff responsible for preparing child study reports are not equipped with necessary knowledge and skills and, therefore, it lacks necessary information that must be included concerning the child, especially in case of special needs category. The author feels that along with detailed report highlighting problems or deficiencies or disability that the child is facing, provisions should be made to ensure that prescriptions by medical practitioners must also be attached with that report. It would help PAPs to prepare themselves beforehand and meetings should also be arranged with the respective doctor, who has been treating such child or prepared the report, if requested.

Post adoption Support and Follow-ups: When the adoption is in-country, the voluntary coordination committees, various child rights activists and the adoption agency may have an access to find out the post adoption status of the child in his/her foster home. In this way, child exploitation, the securities of health and nutrition, mental development of the child can be taken care of, but when the child is given for inter-country adoption, post adoption follow-ups become increasingly difficult. Even though CARA guidelines outline the role of the Indian diplomatic missions, foreign accredited agencies and professional social workers in protecting a child from post adoption maltreatment, it has virtually not helped anyone. Even in *Seva Bharti Matruchhaya, Durg vs XXX,*[46] it has been held that though it has been made mandatory in Regulation 19(1) of Adoption Regulations, 2017, that the authorised foreign adoption agency or the Central Authority or Indian Diplomatic Mission or Government Department has to report the progress of the adopted child for two years from his or her arrival, it is also necessary that in supplement to that, a welfare report and detailed educational report of adopted child shall also be provided every six months till that child becomes major. The child's age at adoption has significant implications on the development of executive functioning, language and the sensory processing and attention and combined with long-term placement in an institution can also increase the risks of poor emotional control and similarly increase both internalising and externalising behavioural problems; therefore, post adoption counselling for children especially aged 12 years or above must be made mandatory.[47] Even the Committee has recommended mandatory post adoption follow-

46 Criminal Revision No.97 of 2018

47 J. Masson, (2001). "Inter-country adoption: a global problem or a global solution," Journal of International Affairs, 55(1), 141-166.

up because in the absence of such follow up, it is not possible to ascertain the progress and well-being of the child in the adoptive family. It could result in vulnerabilities and distress being experienced by the child remaining unnoticed, which may not be in the best interest of the child.[48]

Age Criterion to Determine Adoption: The regulation determining eligibility of adoptive parents provides that in case of couples, their composite age shall be counted and, therefore, whose count is 85 years, they are eligible to adopt a child up to two years; for 90 years, it shall be a child of above two years and up to four years; for 100 years, it shall be above four and up to eight years; and for 110 years, a child of age above eight and up to 18 years shall remain accessible.[49] This rule of composite age of PAPs to determine the age group of child has categorised unreasonably; for example, if a couple wanted a child in the age group of 0-2 years and their composite age is above 90, it is not possible for them to adopt a child below the age of two, therefore delimitating their preferences.[50] Furthermore, "when potential parents look to adopt, they fill out a form describing the *perfect-match* for them and the Central Adoption Resource Authority of India doesn't have a department to follow up with prospective parents on these matches. In absence of a separate division to follow up, it lacks the means to check if these parents would be interested in adopting a child, who does not 'exactly' meet the original specifications, leading to a sharp decline in domestic adoption."[51] The Delhi High Court has even given directions to CARA to ensure that the applications for approval/NOC are processed in a child-friendly manner and, that too, in a strict time frame to avoid harassment and delay. It also suggested that a panel of Psychologists, Lawyers as well as NGOs shall be appointed in all the States so that the Child Study Report and Home Study Reports in the case of domestic adoptions in India are prepared scientifically in a time-bound manner. The local police as well as Anti Trafficking Unit of the Ministry of Home Affairs should be asked to give their response to the Adoption application within a strict time frame and if response is not received from statutory/government authority within the time-frame prescribed, it should be presumed that the said authority has no objection to the adoption.[52]

48 One Hundred Eighteenth Report on Review of Guardianship and Adoption Laws available at: https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/18/164/118_2022_8_16.pdf (Visited on October 17, 2022).

49 Regulation 5(4) of Adoption Regulations, 2022

50 Deepika Kolluru, Our 'Unwanted' Children available at: https://www.newindianexpress.com/states/andhra-pradesh/2022/mar/18/our-unwanted-children-2431432.html (Visited on October 17, 2022)

51 D. Halder and K. Jaishankar, Inter-country Adoption and Human Rights Violations in India available at: file:///C:/Users/hp/Downloads/INTER_COUNTRY_ADOPTION_AND_HUMAN_RIGHTS.pdf (Visited on October 18, 2022)

52 PKH v. Central Adoption Resource Authority: MANU/DE/1646/2016

Myriad of provisions Governing Adoption and Guardianship: The diverse provisions of adoption and guardianship provided by the Guardians and Wards Act, 1890; Hindu Adoption and Maintenance Act, 1956; Juvenile Justice Act, 2015; Hindu Minority and Guardianship Act and the personal laws of Muslims, Christians and Parsis and the customary practices recognised by the Courts has created a never ending web of hassles. What is disheartening is that their grey matter is often used to transgress the rights of children, especially in case of inter-country adoptions. If we compare them, one can easily find that though children welfare is given priority, but not much has been achieved on part of gender justice and religion parity. To achieve a safe haven for children, it is a must that a comprehensive legislation governing every single aspect shall be framed so that the anomalies prevalent in the above-mentioned legislations can be done away with. No doubt, the Adoption Regulations, 2017, were framed to achieve that clarity, but it has created hassles for in-country adoptions by providing a free ticket to either opt for it or not. Even in the *Ashwini Kumar Upadhyaya v. Union of India,*[53] it has been pleaded that multifarious personal laws are causing delay and confusion during judicial adjudication of cases. Therefore, to control fissiparous tendencies, and to promote fraternity unity and integrity, which is the aim and objective of the Constitution of India, uniform guidelines of "Adoption and Guardianship" in the spirit of Articles 14, 15, 21 and 44 of the Constitution and international conventions must be framed."[54]

Conclusion and Suggestions

The institution of adoption was started to serve the social institution of son-ship among the Hindus. It was considered essential for a Hindu for religious purposes to have a son. There seems to be two reasons for having sons: For carrying the name of the family ahead, as the Hindu family is a male dominated family for the purpose of property. It was also considered essential that the last rites after the death of an individual must be performed by the son. The practice based upon religion was so strong that it was transferred to the other religious communities in India as well. Other religious communities accepted the institution in a very restricted way. The Guardians and Wards Act, 1890, helped a bit in this regard to familiarise adoption in other religious communities. The Act, 1890, has made an attempt to regularise

53 Writ Petition (C) No. 1000/2000,

54 PIL under Article 32 of the Constitution available at: https://www.livelaw.in/pdf_upload/pdf_upload-380682.pdf (Visited on October 20, 2022).

adoption through the government institutions and, to some extent, it was successful as well. The Hindu Adoption and Maintenance Act, 1956, steered the way for significant changes in the law of adoption. Apart from sons' adoption, girls can also be adopted and a female can also adopt both son and daughter. This adoption was an attempt to make the law more reasonable. But still it continues to be a private affair of parties as far as adoption for the purpose of property, name and spiritual benefits were concerned. By the implementation of the Guardians and Wards Act, 1890, and Hindus Adoption and Maintenance Act, 1956, certain problems started arising in inter-country adoption. The problem of trafficking of children from India to other countries and, probably, girls were adopted and taken away from the country. At this stage, the Judiciary made a significant contribution towards regularising inter-country adoption through guidelines in *Laxmi Kant Roy v. Union of India.*[55] In the year 2000, Juvenile Justice Act, which was subsequently, amended in 2015 and named as Juvenile Justice (Care and Protection) Act, was enacted and through that Act, the adoption, both inter-country and in-country, were regulated through this Act. An attempt was made to make the adoption equally applicable to all. Moreover, the whole adoption process has been institutionalised. The Central Adoption Resource Agency (CARA) was established by the Government of India in 1990 and various rules were framed. These rules were amended till 2022. Under CARA, now, we can say that the adoption process is very transparent, responsive and time-bound. However, the nature of the proceedings under CARA have become technical and a few issues and doubts arise, which lead to delay and breach of privacy of the parents.

CARA guidelines had named the children as surrendered, orphan, abandoned, etc.,[56] which needs to be avoided, considering that the child is a precious gift by the God and to be nurtured in the same way. These children may be named as "Institutionalised Children". Their background is not necessary as it amounts to name calling and will carry as a stigma throughout their life. It must be avoided.

The whole adoption process under CARA has been digitalised through which the main objective of Act 2015 is being defeated. The welfare of the child as paramount is being compromised because it is the parents who have been given choice under the CARA guidelines to select the child for adoption out of three-four children offered to them by the Child Care

55 AIR 1987, Supreme Court 232

56 Regulation 6 & 7 of Adoption Regulations, 2022

Institutions.[57] It should be the other way round, the child should be counselled, keeping in view his age, for his preference to go with the adoptive parents. To make the CARA guidelines more effective, continuous interactive sessions must be held with the children to prepare them for adoption with the perspective parents. The digitalisation has made the adoption process mechanical and there is now less emotional act in this process as the child can be adopted under the CARA guidelines by showing photographs to the perspective adoptive parents and online meetings. It is suggested that there must be enough physical meetings of adoptive parents with the child to make the emotional connect between them.

For inter-country adoptions, the post adoption follow-ups[58] of the child must be made more effective so that the child could be well adjusted in the family and the main objective of the adoption guidelines that the welfare of the child is of paramount interest must be taken in letter and spirit.

In the end, it is submitted that adoption started among Hindus, for spiritual and property benefits but, essentially, it was based upon the privacy, emotions and relationship of both parties: those who give a child in adoption and those who take him/her in adoption. It is the essence of the time that to stop the exploitation of the system, which was misused for trafficking of children, mainly girls, in the name of adoption in the inter-country and in-country adoptions. Therefore, CARA guidelines become essential, but it still has to be based upon the emotional act of all parents, who give the child in adoption and the adoptive parents. In that matter, the main concern must be child-centric and children must be prepared that they are going into the family for their well-being.

57 Regulation 10, 11, 16 of Adoption Regulations, 2022

58 Regulation 20 of Adoption Regulations, 2022

Bibliography

- Dinshah Fardunji Mulla, *Principles of Hindu Law*, Gale, Making of Modern Law (2013)
- Paras Diwan, *Modern Hindu Law, Codified and Uncodified*, Law Universal Publication (2014)
- Torkel Brekke, *The Oxford History of Hinduism: Modern Hinduism* EPZI C, Oxford University Press (2019)
- Surendra Malik and Sudeep Malik, *Supreme Court on Family Property, Partition, Succession, Will and Inheritance*, Eastern Book Company (2016)

Research Paper/Articles

- A. Anand, "Covid-19 leaves hundreds orphaned. What you need to know about adoption," *India Today*, June 2, 2021.
- A. Pandit, "Few kids in adoption pool, couples' wait gets longer," *The Times of India*, August 11, 2022.
- B.N. Sampath, "Pseudo Scheduled Castes: A Gift of the Adoption Law," *Journal 1of the Indian Law Institute*, Vol. 23, No. 4, 1981
- J. Chandra, "Explained | The tedious process of adoption," *The Hindu*, September 11, 2022.
- John D. Mayne, "Adoption in India," *Journal of the Society of Comparative Legislation*, Vol. 1, No. 2, 1899
- Kusum, "Gender Bias in Adoption Law: A Comment on Malti Roy Chowdhury v. Sudhindranath Mujumdar," *Journal of the Indian Law Institute*, Vol. 49, No. 1, 2007
- P. Katiyar, "Indians remain averse to accepting children with special needs," *The Economic Times*, June 4, 2022.
- R. Jaganmohan Rao, "A Uniform Law of Adoption: A Critique on the Adoption of Children Bill," *The Journal of the Indian Law Institute*, Vol. 17, No. 2, 1972
- Rachael M. Schupp-Star, "The Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption: the Need for a Uniform Standard for Inter-country Adoption by Homosexuals," *Methodological Approaches to Comparative Law*, Vol. 16, No. 1 2011
- S. Aarthi Anand and Prema Chandra, "Adoption Laws: Need for Reform," *Economic and Political Weekly*, Vol. 37, No. 38, 2002
- S. Radhakrishnan, "Long-waiting period, social stigma force couples into illegal adoption: Expert," *The New Indian Express*, July 11, 2022.
- Vibha Sharma, "Inter-Country Adoptions in India – An Appraisal," *Journal of the Indian Law institute*, Vol. 45, No. 3/4, Family Law Special Issue, 2003

Reports

- Law Commission of India, Report No. 153- Inter-Country Adoption, 2013
- United Nations Report, Child Adoption: Trends and Policies, Department of Economic and Social Affairs, Population Division, 2013

Gender Rights vs Personal Laws: Issues and Challenges

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Abstract

This paper focuses on feminist articulations situated within the contemporary women's movement, of the situation of women's rights vis-à-vis family laws. The contemporary women's movement struggles emerged forcefully after the Shah Bano judgement of 1984. But with the resurgence of fundamentalist forces of all hues, the women's movements in India have felt greater necessity to pose gender justice for women outside of the domain of religious identities. Autonomous women's organisations as well as those organisations that have been working for reform within communities have attempted to campaign for family laws. Over the years, however, an understanding of the pursuit of both paths travelling alongside each another is evident. In the last couple of decades, the emergence of queer movements and struggle for transgender rights have furthered the debate around gender justice, rights in intimate relationships, new ways of imagining families and living arrangements. The criticality to these debates on intimacies and families gaining strength is paralleled in several recent judgements of the courts. Significantly, for a majority of women, marriage is the only means of economic security, but contribution to the household through unpaid and unrecognised labour leaves them without any entitlement in the event of a breakdown of a marriage. Therefore, the focus of laws dealing with the personal realm has to be on providing gender justice, especially ensuring that women's invisible labour within the domestic (private) sphere is recognised and compensated.

1. Introduction

The question of gender rights or the rights of women and other marginalised communities has emerged and been situated in opposition to the rights of communities or group rights. This has especially manifested itself in the debates over personal laws, where the debate has been posited in a manner that privileges group identities and their notions of security and status rather than the rights of individuals, specifically women seeking justice. Personal laws

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deal with issues and practices governing relationships of people within familial structures, encompassing marriage, separation or divorce, maintenance, inheritance, succession, adoption, custody and guardianship.

The history of secularisation of these practices that govern relations in the personal sphere of the family, can be traced to the debates around the Hindu Code Bill introduced in 1947, when Dr. B.R. Ambedkar met with resistance in the Constituent Assembly. It was referred to a Select Committee in 1948, and there was no discussion on it thereafter till 1949, when piecemeal discussions took place. Dr. Ambedkar's intention to move the Hindu family laws from a personal realm into that of a secular code, was among the critical steps to accord gender justice. It involved access of women to property rights, instituting the practice of monogamous marriage irrespective of caste, and to provide divorce rights. But the resistance within the Constituent Assembly and the lackadaisical attitude of the Cabinet led to its adoption in a truncated form. A deeply troubled Ambedkar finally resigned from the Cabinet sensing the lack of political will for a transformation of the social and familial lives of the majority of Indians, mostly women (Rege, 2013).

2. Feminist Claims to Equality Not Uniformity

The contemporary women's movements' articulation emerged forcefully after the Shah Bano judgement of 1984. Prior to this, the women's movements had focussed on the objective mentioned in Article 44 for the development of a Uniform Civil Code. This was mentioned in one of the earliest reports of 1946, *Women's Role in a Planned Economy* that emerged from the National Planning Committee (1939-46), and subsequently in the report on the status of women in India of 1974 titled *Towards Equality*. These highlighted the patriarchal nature of family/personal laws that draws from religious communities and their fundamentalist principles. Further, since the 1980s, while women were increasingly visible in the public sphere due to increasing access to education, employment, migration, economic and political visibility, it was also a period of strained social and economic lives due to the state policy initiatives of the structural adjustment programme along with liberalisation of markets (Rege, 2003). Simultaneous to this rise in economic conservatism was the rise of religion-based public assertions. The *sati* in Deorala in 1987 marked a public display of caste and

communal assertions changing the political climate in the country. In these assertions, gender justice is often sidelined at the altar of community identity, to allay the perception of communities being threatened. It is always women's rights that stand to be sacrificed at the altar of community survival and integrity.

The women's movements in India have since felt that there was greater necessity to pose gender justice for women outside of the domain of religious identities. It is clear that the positions taken on the need for a common civil code or seeking reforms within personal laws cannot be seen in isolation from the context in which these debates are conducted (Sunder Rajan, 2003). For the women's movement this meant that there needs to be caution as to how gender justice might be hijacked by a liberal agenda of uniformity or communitarian or fundamentalist agenda.

In the subsequent years, diverse positions emerged on the common civil code among different women's groups, sometimes resulting in sharp divisions. While gender justice was the objective following the realisation that all religious personal laws were gender discriminatory, some preferred the route of reforms within personal laws, while others chose to tread a path that distinguished equality of rights from legal uniformity – from common code to a gender just law. Lived realities of women should guide the changes in law. Nivedita Menon (1998) catalogues these varied positions but broadly demarcates these as: legal reforms within the communities versus a gender just law, both driven by feminists. Autonomous women's organisations as well as those organisations that have been working with communities, or conducting campaigns for gender justice have attempted to dialogue and campaign for family laws. Over the years, however, an understanding of the pursuit of both paths travelling alongside each another is evident. For instance, in 2016, when Shayara Bano went to court challenging the triple talaq or *talaq-e-biddat,* among the petitioners were Bharatiya Muslim Mahila Andolan, that prefers reforms from within the community and Bebaak Collective, that strives for a gender just law (SC Observer n.d.).

3. Imagining Families

What constitutes gender justice within the terrain of the family and intimate relationships? Even though questions such as these were earlier dealt with when structures of family and

marriage were governed by customs led by membership in religious communities, changing realities altered the focus of such questions and the structures they addressed. Since the 1990s, individuals and communities from even further margins became visible and began making efforts towards seeking rights and justice in the personal and private realm. Incidents of lesbian marriages and gay partnerships, and the lives of hijra and transgender communities emerged within the public discourse.

In 1997, feminists felt the need, even as newer voices began expressing notions of the family and intimate partnerships that went beyond the hetero-normative, to imagine and discuss homo-relational partnerships and contracts, with rights to matrimonial home, property acquired at the time of forming the contract, responsibility for the well-being of the other partner as well as guardianship of children jointly adopted. These initial efforts raised questions as to whether these relationships were going to resemble and be institutionalised like structures of marriage and family, especially when non-heteronormative relationships did not even have legal recognition (Fernandez, 1999). Nevertheless, a discussion in the public realm had ensued about alternative forms of partnerships and familial arrangements.

In the last couple of decades, the emergence of queer movements and struggle for transgender rights have furthered the debate around gender justice, rights in intimate relationships, new ways of imagining families and living arrangements. In the interregnum, the women's movement too has changed considerably. Diverse feminist articulations and from diverse social locations have lent a complexity and richness to the debate. The hetero-patriarchal structure of the family and the ideologies that support it have been called into question. The notions of family have to move beyond this to incorporate living arrangements outside of marriage, in diverse forms of partnerships and contracts, and arrangements in community formations (FAOW, 2017). In an incident of a fire in 2011 in East Delhi that killed nearly 14 members of the hijra community, the hospital staff settled on the guru-chela tradition among the hijras to draw up a list of next of kin as the Chief Minister announced Rs 2 lakh compensation to next of kin of each hijra killed (Chatterjee, 2011). Such instances are strong reminders of how we need to keep up with lived and living realities of women, transgender persons, queer individuals and learn from their lives to envision gender justice. These lived realities include same sex partnerships, communal living arrangements among

transgender communities, families that include the very old and the very young, single women headed households. Similarly, can partnerships be understood as going beyond marriage as a sacrament?

In this connection, in the wake of the debate on UCC opening up following the Triple Talaq judgement, the Law Commission of India in 2018 hurriedly invited detailed submissions from citizens on formulating a Uniform Civil Code (Ohri, 2018). While the debates over the years as well as the emerging voices from the margins had complicated the situation for claiming rights, the landmark NALSA judgement of 2014 with its verdict that upheld the transgender persons' right to self-identified gender and directed the Central and State governments to grant legal recognition of gender identity such as male, female, or third gender, was extremely useful to bring a coherence to the debate on gender justice. Several women's rights and queer rights organisations made submissions that proceeded from existing laws, such as the Special Marriage Act, inheritance and succession laws, and adoption regulations. In addition, within the present context, due to its absence within existing law, civil partnership contracts and a proposal to define different forms of familial/living arrangements was also proposed. Some versions of these are also circulated for public discussion (Orinam, 2019).

The criticality of these debates on intimacies and families gaining strength was evident in several recent judgements of the Supreme Court. In holding that privacy is a constitutionally protected right, the Court states that it includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Also making clear that privacy was not an elitist construct, but a powerful guarantee for the sanctity of marriage, the liberty of procreation, the choice of family life and the dignity of being for persons irrespective of social strata or economic well-being. In another judgement on granting maternity leave for a woman's biological child when she had already availed maternity leave for non-biological children of her husband, the court said that the predominant notion of a family as an unchanging unit with a father, mother and children, neglected the varied circumstances that can result in change of people's familial structures, where several such families do not fit this expectation. They further defined families that assume the form of domestic unmarried partnerships, queer relationships and single-parent households (Bhaskar, 2017; Rai, 2022). These observations from the highest court of the land

are a welcome boost to feminist campaigns for gender justice within intimate relationships and living arrangements.

4. In Lieu of a Breakdown

Finally, what happens when these unions and partnerships break down? Even as far back as 1887, we have the example of Rukhma Bai, who challenged the restitution of conjugal rights and refused to live with her husband, claiming that she cannot be forced as she was married off as a child. But what of those women for a majority of whom marriage is the only means of economic security for themselves. In addition, women contribute to the household through the unpaid and unrecognised labour, which leaves her without any entitlement in the event of a breakdown of a marriage. The focus of laws dealing with the personal realm has to be on providing gender justice, especially ensuring that women's invisible labour within the domestic (private) sphere is recognised and compensated. Hence, the matrimonial home as the residence of a married woman has to be ensured in law, along with equitable right of ownership and access to property belonging to the partners at marriage. Additionally, the domestic work that women put into maintaining the household and the care of the dependent and ailing members of the household should be part of the maintenance. Proper calculations have to be made via inclusion of all the contributions of women into the household (FAOW 2017).

In this connection, it is worth recalling a significant judgement of the Madras High Court in 2009 in the case of compensation awarded to a child following her parents' death in an accident by the insurance company, where the court dismissed the company's objection to providing compensation for the mother's death saying since both parents died in the same accident, only the father needs to be compensated. The court was emphatic that both claims have to be dealt with independently and on its own merit. The judgement is particularly significant for the campaigns for gender justice within the family and the home, as Justice Prabha Sridevan went ahead to comment that the monetary computing of the work done by women is something that has not been really assessed, and says that the time has come to scientifically assess the value of the unpaid homemaker both in accident claims and in the division of matrimonial property. She refers to the UN Convention on Elimination of all Forms

of Discrimination Against Women (CEDAW) to recommend that research be undertaken to evaluate the unremunerated domestic activities of women to quantify and include this in the GNP (Sunder Rajan, 2015). While compensation and maintenance have to be an integral part of gender justice, feminists emphatically claim that women deserve social security for their life long contribution into maintaining families and nurturing it with their labour.

Just a social security for the rural poor is assured via a public works programme, such as the employment guarantee schemes like MGNREGA, similar provisions should exist for providing social security for women and other marginal individuals within the marital home and family. In a society where all women's lives are defined using marriage as a standard, those who find themselves deserted and abandoned will be assured of a maintenance, that seeking access to justice will prove less burdensome. In a situation where marriage is the only means and sustenance for women, alternatives need to be provided by the state such as housing facilities through working women's hostels, preferential housing for single women at reasonable rates, and short stay homes for migrant women (FAOW, 2017). The civil law for protection of women against domestic violence does provide material entitlements as a means of relief, including access to residence, monetary compensation, and maintenance, thereby recognising the woman's right and equal entitlement to the familial space and relationship (NCW, 2022). However, it was a 30 year long drawn battle by feminist activists, lawyers and scholars to achieve this deserved claim for justice from the courts and society.

In the final analysis, given the impetus by the courts and a groundswell of articulations that are rising from the margins, it can be hoped that the state will recognise the merit of according women their rights and access to justice. On the other hand, if the forces of conservatism prevail, as they are at present in an ascendence, with impunity accorded by the state, then regressive forces are likely to shift the discourse in their favour. This would mean the resurgence of patriarchal dominance, control of the heteronormative familial structure over the dependent members of the family, lack of sustenance in the event of destitution and desertion, lack of property or social security for women and children in such situations. This would indeed reflect a sorry state of affairs for gender justice. Additionally, while Ambedkar's vision of secularisation and modernisation would stand compromised, the developments on the contrary are worrisome at another level. In Maharashtra, the BJP-led

government has been working towards a separate legislation to govern Buddhist marriages and inheritance laws, to maintain the distinction of Buddhist religious rituals from Hindu rituals. Buddhists who form under one per cent of the country's population are at present governed by the Hindu Marriage Act of 1955. There was a lack of unanimity seen in this proposal, with Prakash Ambedkar, then leader of the Bharip Bahujan Mahasangh, insisting that there should be a uniform code for all religions (Phadke, 2015). As if this itself was not to be, in furthering the extension of personal laws of minorities, in 2012, the Manmohan Singh-led UPA government moved an amendment to the Anand Marriage Act of 1909, to provide for registration of marriages of Sikhs. This was following long-pending representations from the Sikh community, especially those in the diaspora who did not wish their marriages to be registered under the Hindu Marriage Act, since they belonged to the Sikh religion. In 2018, the Delhi government also notified the Act, so that members of the Sikh community could register their marriages (Basu, 2018).

This essay has been a concise attempt to foreground feminist visions for gender justice, including campaigns that attempted to use secular and constitutional means to secure for women their rights and entitlements within the familial and intimate relationships. These efforts in the last couple of decades also gained impetus following resonance with newly emerging voices of the queer and trans communities, as also women from minority, Muslim and Christian groups. A further in-depth elaboration of these concerns and a sustained public campaign is the need of the moment to advance gender justice in a deeply caste-based heteropatriarchal and capitalist society.

References

- Basu, Indira (2018), 'Need for Anand Marriage Act for Sikhs and Why its in the News Again,' *The Quint*, January 21, accessed at https://www.thequint.com/explainers/explainer-anand-marriage-act-anand-karaj-sikh-hindu-marriage-act-delhi-govt#read-more
- Bhaskar, Anurag (2017), 'Key Highlights of Justice Chandrachud's Judgement in the Right to Privacy Case,' *The Wire*, August 27, accessed at https://thewire.in/law/justice-chandrachud-judgment-right-to-privacy
- Chatterjee, Pritha (2011), 'Who are eunuchs next of kin? Hospital works on guru-chela list,' *Indian Express*, November 22, accessed at https://indianexpress.com/article/news-archive/print/who-are-eunuchs-next-of-kin-hospital-works-on-guruchela-list/
- Fernandez, Bina (ed.) (1999), *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India*, edited and compiled by Bina Fernandez, India Centre for Human Rights and Law, accessed at http://feministlawarchives.pldindia.org/category/sexuality/lgbti-rights/reports-on-lgbt-rights/ p. 83-88
- Forum Against Oppression of Women [FAOW] (2017) 'Envisioning and Striving towards Gender Justice,' *Economic and Political Weekly*, October 7, vol. 52, no. 40, pp 12-14
- Menon, Nivedita (1998), 'State/Gender/Community: Citizenship in Contemporary India' in *Economic and Political Weekly,* 31 January: PE 3–10.
- National Commission for Women [NCW] (2022) Laws related to Women, 2022, accessed at http://ncw.nic.in/important-links/List-of-Laws-Related-to-Women
- Ohri, Raghav (2018), 'Uniform Civil Code: Law Commission invites "detailed submissions",' *Economic Times*, March 20, accessed at https://m.economictimes.com/news/politics-and-nation/uniform-civil-code-law-commission-invites-detailed-submissions/articleshow/63376499.cms
- Orinam (2019), 'Response to Law Commission of India on Uniform Civil Code,' Our Voices: The Orinam Blog, March 5, accessed at http://orinam.net/lci-response-lbt-2018/
- Phadke, Manasi (2015), 'Maharashtra mulls separate law for Buddhist marriages,' *Indian Express*, Mumbai edition, December 25, accessed at https://indianexpress.com/article/india/maharashtra/maharashtra-mulls-separate-law-for-buddhist-marriages/
- Rai, Anshritha (2022), 'Chipping away at conservative notions of family,' *Deccan Herald*, September 16, accessed at https://www.deccanherald.com/opinion/in-perspective/chipping-away-at-conservative-notions-of-family-1145805.html
- Rege, Sharmila (2003), 'More than Just Tacking Women on to the "Macropicture": Feminist Contributions to Globalisation Discourses,' *Economic and Political Weekly*, October 25, pp.4555-4563
- Rege, Sharmila (2013) (ed.), *Against the Madness of Manu: B R Ambedkar's Writings on Brahmanical Patriarchy*, Navayana Publishing, New Delhi.
- Sunder Rajan, Rajeswari (2003), 'Women Between Community and State: Some Implications of

the Uniform Civil Code Debates' in *Scandal of the State: Women, Law and Citizenship in Postcolonial India*, Duke University Press, London, p.147-173

- Sunder Rajan, Rajeswari (2015), 'A Woman's Worth,' *Granta*: The Online Edition, May 22, accessed at https://granta.com/womans-worth/
- Supreme Court Observer (n.d.), Triple Talaq: Shayara Bano v Union of India, updated 21 July 2022, accessed at https://www.scobserver.in/cases/shayara-bano-union-india-triple-talaq-case-background/

The Impact of Climate Change and Natural Disaster on Climate Refugees: A case study on the Sundarban Delta

S. Shanthakumar and Mrinalini Banerjee*

Abstract

Climate refugees are one of the mainstream stakeholders who bear the burden of the worldwide challenge of climate change. As per the IDMC 2021, World Bank 2021, and IPCC 2014 and 2022 reports, there has been an exponential growth in the number of climate displacements. Climate change has a domino effect that starts with natural disasters and ends with the creation of climate refugees. In this article, the authors have tried to draw a connection between climate changes, natural disasters, violation of the human rights of the climate refugees, and also examine how climate change and natural disasters have affected the human rights of climate refugees in the Sundarban Delta, India. This article also focuses on exploring ways to mitigate the effect of natural disasters on the Sundarban Delta and how to protect the rights of the inhabitants. Lastly, the authors have also summarised a few global practices followed by other countries to protect their land from drowning. Hence, the authors suggest that if a similar kind of approach is adopted in the Sundarban Delta, then it can save the human rights of the people living in the Delta.

Keywords: Human Rights of Climate Refugees, Natural Disaster, Climate Change, Sundarban Delta

1. Introduction

Climate change is one of the biggest challenges for the present and future generations. The temperature change is only the story's beginning, a primary parameter to understanding climatic conditions' differences. This temperature rise has connected effects on Earth where changes in one area can influence changes in other areas, such as causing intense droughts, water scarcity, severe fires, rising sea levels, flooding, melting polar ice, catastrophic storms, declining biodiversity, which then has a lasting effect in various regions impacting the entire

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ecosystem including human beings.[1] Over the last decade, there has been a drastic increase in surface temperature. It is no surprise that the decade from 2011 to 2020 was the warmest decade the Earth has ever witnessed since the inception of thermometer-based readings.[2]

Moreover, globally 2020 was recorded as the second-warmest year after 2016.[3] This sudden increase in temperature is the reason for the unexpected escalation in the number of natural disasters.[4] As per the World Metrological Organization, 2021[5] global report, in a time frame from 1970 to 2019, "*50% of the diseases, 45% of the reported death, and 75% of the economic losses are a consequence of the drastic change in the climate, weather and water hazards.*"[6] It is pretty alarming to know that in the last five decades, the number of natural disasters has increased five-fold, though death rates have decreased due to technological advances.[7] At the same time, the number of stranded and homeless people has also increased manifold because of the strict immigration laws and inadequacy of legal protection for climate refugees. The national government takes care of the international displaced people's rights during such emergencies. On the contrary, the climate refugees face the harsh brunt of climate change and natural disasters as their rights are not recognised. Sadly, climate refugees are a victim of this crisis only due to inadequacy in the international and domestic legal frameworks.

In this part, the researcher will address the following research questions:

(a) To conceptualise the connection between climate change, natural disasters, and climate refugees?

(b) To examine whether climate change and natural disasters have affected climate refugees' lives in the Sundarban Delta?

1 United Nations, 'What is climate change? United Nations (2022) <https://www.un.org/en/climatechange/what-is-climate-change > accessed 1 October 2022.

2 Environmental Protection Agency (EPA), 'Climate Change Indicators: U.S. and Global Temperature (2021) <https://www.epa.gov/climate-indicators/climate-change-indicators-us-and-global-temperature#:~:text=Global%20average%20surface%20temperature%20has,faster%20than%20the%20global%20rate> accessed 1 October 2022.

3 National Aeronautics and Space Administration, 'World of change: Global temperatures (2021) <https://earthobservatory.nasa.gov/world-of-change/global-temperatures> accessed 1 October 2022.

4 'UN News Global perspective Human stories' (United Nations, 1 September 2021) <https://news.un.org/en/story/2021/09/1098662 > accessed 1 October 2022.

5 World Meteorological Organization, 'Weather-related disasters increase over past 50 years, causing more damage but fewer deaths' (9 September, 2021) <https://public.wmo.int/en/media/press-release/weather-related-disasters-increase-over-past-50-years-causing-more-damage-fewer> accessed 1 October 2022.

6 *Ibid.*

7 *Ibid.*

To research the above questions, the researcher has divided this segment into two parts. In the first part, the researcher addressed the first research question by narrating how the three components (climate change, natural disaster, and climate refugees) are interdependent. In the second part, the researcher has provided a detailed case study on the Sundarban Delta, highlighting the devastating effect of climate change and the number of natural disasters the region has faced over the years. This chapter also illustrates the climate refugees' vulnerability and their status as permanent victims of this crisis.

The primary focus of this part of the chapter is to explore various means by which the Sundarban Delta can be restored and prevented from further degradation. The researcher has carried on an extensive range of literature reviews to provide feasible and economical solutions.

2. Critically analysing the connection and interplay between climate change, natural disasters, and climate refugees

Climate change and natural disasters both function hand in hand, and these are the most pressing issues for the present and future generations.[8] Moreover, their connection is not simple but somewhat riddled with complexity. Furthermore, natural disasters lead to mass displacements and the host country's social, cultural, economic, and political imbalance.[9] The evidence of a relationship between climate change, natural catastrophes, and migration is ambiguous, and it fluctuates depending on the type of shock and its spread over the area.[10]

The researcher agrees with the speculations that there would be drastic changes in the global climate, which will continue in the future decades and millennia.[11] However, local changes in average temperature and precipitation due to climate change have already been seen in many areas, and reasonably accurate estimates for the future can be produced from the

8 Vinod Thomas, 'Climate Change and Natural Disasters' (2017) <https://doi.org/10.4324/9781315081045 > accessed 1 October 2022.

9 Elizabeth Ferris, 'Displacement, natural disasters, and human rights' Brookings (10 May, 2017) <https://www.brookings.edu/on-the-record/displacement-natural-disasters-and-human-rights/> accessed 1 October 2022.

10 Linguere Mbaye, 'Climate Change, Natural Disasters and Migration' (2017) IZA World of Labor <https://doi.org/10.15185/izawol.346> accessed 1 October 2022.

11 'The Intergovernmental Panel on Climate Change (IPCC) is the United Nations body for assessing the science related to climate change — Climate Change 2022: Mitigation of Climate Change' (Sixth Assessment Working Group II) < https://www.ipcc.ch/ > accessed 1 October 2022.

same.[12] Climate change is not only about gradual shifts, but also the significant consequences of increased climate variability and weather extremes, resulting in natural catastrophes.[13]

The most devastating consequence of global warming is increased natural disasters, ultimately leading to mass migration.[14] The mass climate migrations are of two types: one occurs within the territorial borders of the country (internally displaced persons), and the second occurs inter-country (refugees). Internal migration, as well as international migration, might be triggered by disasters and climate-related conditions. To migrate, people ought to be financially able to relocate, which puts liquidity limitations as a crucial part of the disaster-migration link.[15] The researcher believes that as global warming continues to cause drastic variations in local living circumstances, inhabitants in areas where situations are deteriorating may contemplate relocating to a better location if the relocation expenses are affordable and permissible. Nevertheless, due to the lack of alternatives, rapid climate changes and natural calamities may necessitate enforced migration decisions instead of being the outcome of a well-planned effort.[16] Moreover, the host country may not cope with the mass influx of people as it will affect the region's socio-economic, political, and cultural perspectives.

Even though conflict, persecution, and poverty have compelled populations to flee their homes in unprecedented numbers, since recording began, climate change and natural catastrophes have substantially impacted migration flows.[17] Climate-induced displacement was also a contentious issue during the United Nations Climate Change Conference in 2015. As shown in Figure No. 1, the statistics for disaster-related displacement in India in 2020 are alarming. Nearly 3.9 million people have been displaced in the country due to natural disasters, such as cyclones Amphan and Nisarga.[18] While such events were considered

12 National Aeronautics and Space Administration, 'World of change: Global temperatures' (2021) <https://earthobservatory.nasa.gov/world-of-change/global-temperatures> accessed 1 October 2022.

13 Maarten K. van Aalst, 'The impacts of climate change on the risk of natural disasters' (Climate Centre, 2022) <https://www.climatecentre.org/downloads/files/articles/Article%20Disasters%20Maarten.pdf> accessed 1 October 2022.

14 Michael Berlemann and Max Steinhardt, 'Climate change, natural disasters, and migration—a survey of the empirical evidence' (2017) CESifo Economic Studies, 63(4), 353–385 <https://doi.org/10.1093/cesifo/ifx019 > accessed 1 October 2022.

15 Linguere Mbaye, 'Climate Change, Natural Disasters and Migration' (2017) IZA World of Labor <https://• Mbaye, L. (2017). Climate change, natural disasters, and migration. IZA World of Labor. https://doi.org/10.15185/izawol.346> accessed 1 October 2022.

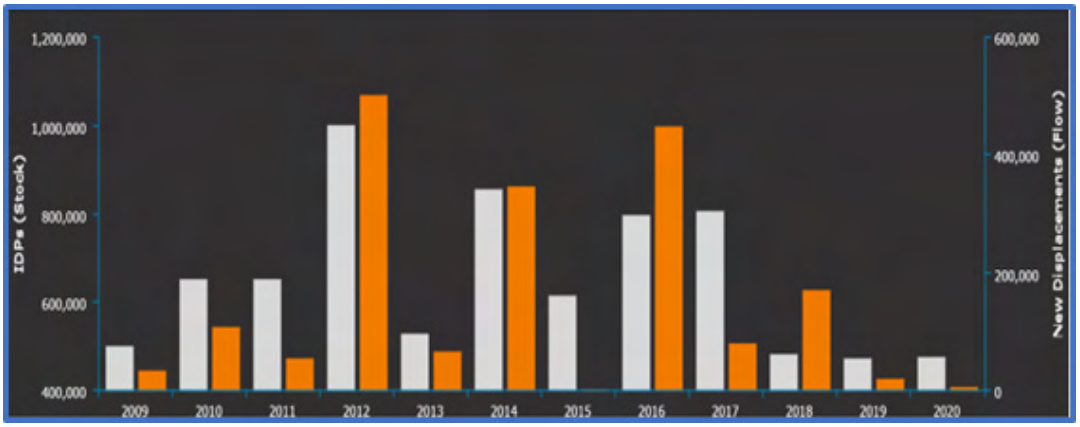
16 Micheal Berlemann and Steinhardt, 'Climate change, natural disasters, and migration—a survey of the empirical evidence' (2017) 63(4), 353–385 <https://doi.org/10.1093/cesifo/ifx019> accessed 1 October 2022.

17 Environmental migration. Migration data portal (2021) <https://www.migrationdataportal.org/themes/environmental_migration_and_statistics> accessed 1 October 2022.

18 Internal Displacement Monitoring Center, India (2020) <https://www.internal-displacement.org/countries/india> accessed 1 October 2022.

exceptional in earlier times, the same has become a common occurrence today and is expected to increase in the future.[19]

Figure 1: Depicts the quantum of displacement that has occurred due to climate disasters. (Internal Displacement Monitoring Centre (IDMC, 2020)



The driving factor for such migration may be divided into two categories: rapid-onset triggered natural calamities and slow-onset started natural calamities. Rapid onset disasters, also known as sudden-onset disasters, include cyclones, coastal floods, earthquakes, volcanic eruptions, tsunamis, etc. On the other hand, slow-onset disasters range from rising sea level, rising temperatures, acidification of ocean, salinisation, etc.[20] Natural disasters cause immediate disruption and disrupt migratory patterns, as well as various climate-related crises, which, combined with multiple socio-economic circumstances, prompt more people to migrate within and beyond borders.[21]

The statistics of the mass movement of climate refugees across the globe are pretty alarming. Around seven million people were displaced by the end of 2020 in 104 countries and

19 Abrahm Lustgarten, 'The Great Climate Migration has begun,' The New York Times (23 July 2020) < https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html> accessed 1 October 2022.

20 UNHCR, 'Key Concepts on Climate Change and Disaster Displacement,' <https://10. UNHCR. (n.d.). (rep.). Key Concepts on Climate Change and Disaster Displacement. United Nations High Commissioner for Refugees> accessed 1 October 2022.

21 Liz Heimann, 'Climate change and natural disasters displace millions affect migration flows' (2019) <https://www.migrationpolicy.org/article/climate-change-and-natural-disasters-displace-millions-affect-migration-flows> accessed 1 October 2022.

territories due to calamities that occurred not only in 2020, but also in prior years.[22] Disasters accounted for over three-quarters (30.7 million) of all new internal displacements globally in 2020.[23] Weather-related catastrophes, including storms and floods, accounted for more than 98 per cent of the 30.7 million additional displacements in 2020, with the majority occurring in East Asia, the Pacific, and South Asia.[24]

A glaring example in front of us is Kiribati, which can potentially become the first country to get drowned due to the rising sea level resulting from climate change.

"Kiribatians have already begun to emigrate in response to what they believe to be an unavoidable situation."[25]

A prominent region in India that bears the brunt of climate change and natural disasters, causing an influx of climate refugees, is the Sundarban Delta.[26] The Sundarban Delta straddles the border between India and Bangladesh. It is another example that is speculated to drown in the Bay of Bengal due to drastic climate change, leading to rapid natural calamities (floods, cyclones, and rise of sea level).[27] According to the research undertaken by Hazra et al.,[28] the temperature in the Sundarban area is growing at a rate of 0.0190C each year, and the severity of cyclones is also escalating. This is a consequence and a cause of the degrading mangrove cover. In May 2020, when Cyclone Amphan hit the Delta, the wind speed reached as high as 185 km per hour. Increasing wind speeds lead to an increase in the probability of the formation of cyclones.[29] Sea surges and coastal floods are caused by rising temperatures and

22 Environmental migration. Migration data portal (2021) <https://www.migrationdataportal.org/themes/environmental_migration_and_statistics> accessed 1 October 2022.

23 *Ibid.*

24 *Ibid.*

25 I. Corporativa 'Kiribati, El primer país que engullirá el cambio climático por la subida del mar,' (Iberdrola, 2022), <https://www.iberdrola.com/sustainability/kiribati-climate-change> accessed 1 October 2022.

26 Nicolas Muller, 'In the Indian Sundarbans, the sea is coming,' (The Diplomat, 1 May 2020) <https://thediplomat.com/2020/05/in-the-indian-sundarbans-the-sea-is-coming/> accessed 21 September 2022.

27 Ritwika Mitra, 'In the Sundarban, climate change has an unlikely effect – on child trafficking.' The Wire Science (2022) <https://science.thewire.in/politics/rights/sundarban-delta-climate-change-child-trafficking/> accessed 1 October 2022.

28 Shaberi Das and Sugata Hazra, 'Trapped or resettled: Coastal Communities in the Sundarbans delta, India,' Trapped or resettled: coastal communities in the Sundarbans Delta, India (25 February 2022) <https://www.fmreview.org/issue64/das-hazra> accessed 1 October 2022.

29 Joydeep Thakur, 'Sunderbans losing dense mangrove cover, reveals key government report,' Hindustan Times, 13 January 2022. <https://www.hindustantimes.com/cities/kolkata-news/sunderbans-losing-dense-mangrove-cover-reveals-key-government-report-101642067698012.html> accessed 1 October 2022.

storm severity in the Sundarban area. In addition, the increased rate of soil erosion causes physical land loss in this region.[30]

The Sundarbans, the only mangrove forests wherein royal Bengal tigers inhabit, have been facing growing natural catastrophes and habitat loss as climate change intensifies.[31] During the field study, the researcher witnessed individuals being forcibly uprooted via severe loss of livelihood, resulting in crushing poverty.

"Through research and media accounts have made the plight of the environmental migrants from the vanishing islands of the Sundarbans well-known in the last few decades, policy responses have been inadequate. There is no mechanism to recognise, record and register forced migrants, let alone a comprehensive plan to rehabilitate them."[32]

Hence, the researcher feels that without curbing the various factors, including but not limited to, carbon emissions and increasing global temperatures, leading to the escalating rate of climate change, no mitigation plans can stop natural calamities.[33] This can very well be understood with the example of the Sundarban Delta. The Mangrove Plantation has been instrumental in limiting the wind speed in the region, thereby reducing the intensity and frequency of cyclones occurrences.[34] The same has also proven helpful in checking and mitigating the occurrence of floods in the region. However, reducing tree cover has increased

30 M.K. Bera, 'Environmental Refugee: A Study of Involutionary Migrants of Sundarbans Islands.' Proceeding of the 7th International Conference on Asian and Pacific Coasts (2013) <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.979.9810&rep=rep1&type=pdf> accessed 1 October 2022.

31 Lindsey Jean Schueman, 'Bengal tigers in the Sundarbans mangroves,' One Earth, 2022. <https://www.oneearth.org/bengal-tigers-in-the-sundarbans-mangroves/> accessed 1 October 2022.

32 Abdulali Sumaira & Abdulali Laika, 'Victims of the weather: How climate change is creating more refugees than other conflicts,' (2022), <https://www.forbesindia.com/blog/climate-change/victims-of-the-weather-how-climate-change-is-creating-more-refugees-than-other-conflicts/> accessed 1 October 2022.

33 Soumen Ghosh and Biswaranjan Mistri, 'Assessing coastal vulnerability to environmental hazards of Indian Sundarban delta using multi-criteria decision-making approaches' (2021) Environmental Science and Ocean & Coastal Management < https://www.semanticscholar.org/paper/Assessing-coastal-vulnerability-to-environmental-of-Ghosh-Mistri/3d8807ca3b83a2b11bc7830be177ffaf7358cda5> accessed 1 October 2022.

34 Mark Spalding, Anna McIvor, Femke Tonneijck, Susanna Tol and Pieter van, 'Mangroves for coastal defence Guidelines for coastal managers & policy makers,' Wetlands International and The Nature Conservancy (2014) <https://www.nature.org/media/oceansandcoasts/mangroves-for-coastal-defence.pdf> accessed 1 October 2022.

cyclones and floods.[35] Moreover, the rising sea levels are alarming, and the future predictions are bleak.[36]

Consequently, the issue of climate-induced migrants and refugees has become a matter of grave and urgent concern. These migrants can either be internal, in the form of internally displaced persons, or external, in the form of refugees.[37] The same can potentially have disastrous and catastrophic consequences for the region, impacting Bangladesh and India, mainly West Bengal and Odisha. As per the researcher's opinion, in addition to addressing and mitigating the climate crisis, it is essential to strengthen domestic laws and the international legal framework to ensure that the persons displaced due to climate change-induced consequences are accorded adequate and necessary protection.

3. Findings and Analysis

(A) The pattern of natural disaster over the Sundarban Delta:

The researcher has listed below some of the natural disasters that have affected the Sundarban Delta, spreading over Bangladesh and India:

Table No. 1: Highlights of some of the major natural disasters affecting the Sundarban Delta

S. No.	Name of the cyclone and the affected area	Year	Loss and Challenges faced
1.	Bangladesh cyclonic storm waves Bangladesh: Cox's Bazar	1909 (October 16)	• Bangladesh: 698 people died. Seventy thousand six hundred fifty-four cattle were lost.[38] • Migration of people (mainly cross-border displacement) occurred in a large number.

35 Soumen Ghosh and Biswaranjan Mistri, 'Assessing coastal vulnerability to environmental hazards of Indian Sundarban Delta using multi-criteria decision-making approaches,' Ocean & Coastal Management, 209 (105641) (2021) <https://www.semanticscholar.org/paper/Assessing-coastal-vulnerability-to-environmental-of-Ghosh-Mistri/3d8807ca3b83a2b11bc7830be177ffaf7358cda5> accessed 1 October 2022.

36 Johan Augustin, 'On the front line of climate change in India's Sundarbans,' Mongabay Environmental News. 17 October 2019 <https://news.mongabay.com/2019/10/sundarbans-climate-change-tigers-india/#:~:text=Satellite%20pictures%20show%20that%20the,families%20have%20become%20climate%20refugees.> accessed 1 October 2022.

37 'Refugees, migrants and internally displaced people,' World Vision, 19 September 2016 < https://www.wvi.org/disaster-management/blogpost/refugees-migrants-and-internally-displaced-people > accessed 1 October 2022.

38 'Cyclone – Banglapedia,' (En.banglapedia.org, 2021) <https://en.banglapedia.org/index.php/Cyclone> accessed 29 June 2021; Mizanur Rahman Bijoy, 'Cyclone effects on Sundarbans' (Network on Climate Change, Bangladesh) <http://cdn.cseindia.org/userfiles/presentation3_sundarbans.pdf#:~:text=1909%2816October%29Khulna%3Bcyclonicstorm waves%3Bkilled698peopleand,70%2C654cattle%201917%2824September%29Khulna%3Bhurricane%3B432personskilledand28%2C029> accessed 18 November 2022.

S. No.	Name of the cyclone and the affected area	Year	Loss and Challenges faced
2.	Great Bhola cyclone – Bangladesh, mainly affecting the Borishal district.39	1970	• 3,00,000 – 5,00,000 people died. • Migration of people (mainly cross-border displacement) occurred in a large number
3.	Super Cyclone – India (State of Odisha and State of West Bengal) and Bangladesh (Chittagong District)40	1999	In the Chittagong District, the cyclonic wind has blown at a speed of 650 km for nine hours leading to a large number of displacement. • 1,37,000 people died • Migration of people (mainly cross-border displacement) occurred in a large number.
4.	Khulna flood Thirteen districts were affected, four in India, nine in Bangladesh.	2000	• 150+ people died. • The flood lasted for a month. • Flooding on Nadia caused the January dam to break.[41] • Migration of people (mainly cross-border displacement) occurred in a large number

39 Cameron Norris, 'The Deadliest Storm in History: The Great Bhola Cyclone,' Weather Pro Live, 25 October 2021 <https://weatherprolive.com/2021/10/the-deadliest-storm-in-history-the-great-bhola-cyclone/> accessed 05 September 2022.

40 Margherita Fanchiotti, Jadu Dash Emma, L. Tompkins Craig and W. Hutton, 'The 1999 super cyclone in Odisha, India: A systematic review of documented losses,' (2020)51 IJDRR <https://www.sciencedirect.com/science/article/abs/pii/S2212420920312929> accessed 29 June 2021.

41 2000 India–Bangladesh Floods - Wikipedia' (En.wikipedia.org, 2021) <https://en.wikipedia.org/wiki/2000_India–Bangladesh_floods> accessed 29 June 2021.

S. No.	Name of the cyclone and the affected area	Year	Loss and Challenges faced
5.	Bangladesh flood Regions affected: (Dhaka, Rajshahi, Khulna, Barisal, Sylhet, Chittagong)	2004	The 2004 floods lasted from July to September and, at their peak, covered 50% of the country. • While 40% of Dhaka was under water. Seven hundred thirty deaths were reported, and 30 million people were homeless.[42] • Rural areas suffered, and the • rice, jute, and sugar crops were devastated. • The floods had severe socio-economic • impacts. • Economic activity was affected by infrastructure damage and loss of capital. • Bridges were destroyed, and the airport and significant roads flooded, which hampered relief and recovery. • Over 14,000 km of roads were damaged. • The total loss was estimated at $2.28 bn. • Migration of people (mainly cross-border displacement) occurred in a large number

42 'Disaster Recovery Case Studies Bangladesh Floods 2004,' (Axaxl.com, 2020) <https://axaxl.com/-/media/axaxl/files/pdfs/campaign/reinsurance-outlook/downloads/axa-xl_re_disaster-covery_bangladesh-floods_uccrs.pdf?sc_langn&hash=8C1331CF6A16DBB0049B24C3A68EA5B3> accessed 29 June 2021.

S. No.	Name of the cyclone and the affected area	Year	Loss and Challenges faced
6.	Aila India (The storm moved over the districts of North and South 24 Parganas, East Medinipur, Howrah, Hooghly, and Bardhaman, to the west of Kolkata. Orissa received heavy rainfall for many hours) Bangladesh (Offshore 15 districts of the south-western part of Bangladesh)	2009 (May 25)	• India: 1325 villages were affected, and 617,516 populations were affected. Twenty seven human lives were lost, and 30,069 houses were damaged completely.[43] • Bangladesh: 150 people died • Two hundred thousand houses were damaged in the storm.[44] • Combined with high tides, the cyclone surge caused widespread flooding and damage in the southern districts. • The wind speed was 120 mph. Migration of people (mainly cross-border displacement) occurred in a large number

43 (Reliefweb.int, 2021) <https://reliefweb.int/sites/reliefweb.int/files/resources/751035026530164D852575C4006799C9-Full_Report.pdf>accessed 29 June 2021.

44 'Cyclone — Banglapedia' (En.banglapedia.org, 2021) <https://en.banglapedia.org/index.php/Cyclone> accessed 29 June 2021.

S. No.	Name of the cyclone and the affected area	Year	Loss and Challenges faced
7.	Cyclone Amphan – India (State of West Bengal) and Bangladesh.	2020	The press briefing provided by the honourable Chief Minister to the State of West Bengal is as follows:[45] • 1200sq km of the 4263 sq. km of the Sundarban forest in the Indian territory was destroyed. • Sixteen thousand trees have been uprooted. • In total, around 28% of the Sundarban Delta has been damaged. • Some other damages or challenges which have occurred are as follows:[46] • The livelihood of the habitants of the Sundarban region is affected adversely • The rate of infiltration (mainly cross-border displacement) is generally high after any such calamity hence that needs to be monitored. • The fence needs to be reconstructed in order to the royal Bengal tigers from coming into the villages.

45 Associated Press, 'Sundarbans Devastated by Cyclone Amphan, As Virus Halts Migration,' (India Today, 2020) < https://www.indiatoday.in/india/story/sundarbans-devastated-by-cyclone-amphan-as-virus-halts-migration-1684742-2020-06-02 > accessed 29 June 2021.

46 Shiv Sahay Singh, 'Over 28% of Sunderbans Damaged in Cyclone Amphan,' The Hindu (2020) <https://www.thehindu.com/news/national/other-states/over-28-of-sunderbans-damaged-in-cyclone-amphan/article31760595.ece> accessed 29 June 2021.

S. No.	Name of the cyclone and the affected area	Year	Loss and Challenges faced
8.	Yaas India (landfall at the State of West Bengal (Dhigha and 24 Pargana district) and the coastal state of Odisha) Bangladesh (in the Sundarban area)	2021 (May 26)	• West Bengal Chief Minister Mamata Banerjee said, "Some 20,000 homes were damaged in the state, with the town of Digha' swamped' by four-meter-high (13ft) waves." [47] • One person was killed there after being dragged out to sea, while another died after their home collapsed. • In Orissa, some reports that uprooted trees killed two people. • Bangladesh: According to an official quoted by the Associated Press news agency, more than 20 villages in the southern Patuakhali district in the Barishal Division were submerged after waters washed away two river dams, and at least 15,000 people had gone to cyclone shelters.[48] • Officials told the AFP news agency that one man was killed in Bangladesh by a falling tree as waters swept over defences.[49] • More than 150,000 people became stranded, 20 kilometres (12 miles) of embankment areas were damaged, over 3,000 hectares of shrimp enclosures were flooded, and hundreds of homes were damaged due to the cyclone's effects on the south-western coastal district of Satkhira.[50] • According to the district administration, around 2,570 homes on the southeast coast of Cox's Bazar district were damaged.[51] • The migration of people (mainly cross-border displacement) occurred in large numbers.[52]

47 BBC News India, 'Cyclone Yaas: Severe Storm Lashes India and Bangladesh,' (2021) <https://www.bbc.com/news/world-asia-india-57237953> accessed 25 June 2021.

48 BBC News India, 'Cyclone Yaas: Severe Storm Lashes India and Bangladesh' (2021) <https://www.bbc.com/news/world-asia-india-57237953> accessed 25 June 2021.

49 'Tropical Cyclone Yaas - May 2021,' (ReliefWeb, 2021) <https://reliefweb.int/disaster/tc-2021-000058-bgd> accessed 29 June 2021.

50 Dhaka Tribune, 'Cyclone Yaas a Double Trouble For Bangladesh, India,' (2021) <https://www.dhakatribune.com/world/2021/05/26/cyclone-yaas-a-double-trouble-for-bangladesh-india> accessed 25 June 2021.

51 S.M. Najmus Sakib, 'Bangladesh's Coastal Areas Bear Brunt of Cyclone Yass,' Asia-Pacific (2021) <https://www.aa.com.tr/en/asia-pacific/bangladeshs-coastal-areas-bear-brunt-of-cyclone-yass/2256738> accessed 29 June 2021.

52 Adam Voiland, 'Cyclone Yaas Swamps India and Bangladesh,' (Earthobservatory.nasa.gov, 2021) <https://earthobservatory.nasa.go/images/148371/cyclone-yaas-swamps-india-and-bangladesh> accessed 25 June 2021.

(B) Menaces on Sundarban Delta

Sundarban Delta is a natural calamity-prone area with repetitive cyclones and floods. Moreover, drastic climate change has completely changed the wind and monsoon patterns. The Sundarban delta witnessed maximum monsoon, and it is low-lying; hence the rise of the sea level is a significant problem in this region. The researcher as per her observations during the field investigation has listed below some of the menaces of the Sundarban Delta as follows:

(a) The steady increase in temperature

(b) The rising sea-level

(c) Increase in salinity which is ultimately changing the agriculture pattern and also affecting the flora of the region.

(d) Increase in natural calamities like, cyclones and floods

(C) Mitigation Plans

To save the Sundarban Delta, the researcher opines that neither a human-centric nor pure conservation approach would be suitable.[53] The West Bengal Action Plan on Climate Change addresses the problem of Climate Change and its impact on the Sundarban Delta and poverty alleviation; however, a more strategic and comprehensive plan is required to mitigate the effect of climate change on the Sundarban Delta. It is of utmost importance to protect the Sundarban Delta because of its biological significance and for the sustenance of inhabitants of the Sundarban Delta, as they are highly dependent on the flora and fauna of this region.

Initially, the locals were the Sundarban Delta's saviours, as they protected the Delta through sustainable development and intra and intergenerational equity. However, as time passed, the locals adopted various survival practices, such as aquaculture, forest land for living, illegal logging, and so on, harming the Sundarban Delta. However, one cannot entirely blame the local and indigenous communities because poverty has forced them to engage in such activities. The researcher believes that the only way to prevent locals from engaging

53 Kanksha Mahadevia Ghimire and Mayank Vikas, 'Climate Change – Impact on the Sundarbans, a Case Study,' (2012) 2(1) International Scientific Journal: Environmental Science, 7-15 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389022 > accessed 24 July 2022.

in such activities is for the government to develop a set of short- and long-term policies that protect the Sundarban Delta's biodiversity while also improving its residents' living standards. The researcher has developed a few mitigation strategies, as stated in Table 2. These mitigation plans are prepared as per the respondents' responses during the survey and in-depth interview. The researcher has analysed the problems faced by the residents of Sundarban Delta and divided the mitigation strategies into two parts, i.e., the plans that can be executed with immediate effect and the ones with a long-term goal.

Table No. 2: Elaborates on the mitigation strategies to overcome the immediate and long-term problems related to natural disasters in Sundarban Delta, India (Primary Source)

CATEGORIES	SOLUTIONS
Mitigation strategies can be implemented immediately.	Demarcation of the vulnerable areas within the Sundarban Delta, India: Cyclonic Areas There should be proper delimitation of the areas in the Sundarban Delta, which are highly affected whenever there is a natural calamity. This will help the This will help the inhabitants to understand which areas they need to be aware of. Built concrete bundhs as the mud bundhs, which are not strong enough to withstand the heavy flow of water, especially during floods. Quick resettlement of the habitants living in the vulnerable areas Many families are unaware of the vulnerable areas and continue to live there; therefore, it is the government's responsibility to relocate them to a safe location while also providing some means of livelihood. Sundarban Delta also comprises the Sundarban National Park, though there is a proper boundary of the National Park. There are a number of times when the wild animals enter the villages or are often seen by the water bodies regularly used by the villagers. Hence there should be proper fencing to protect the villagers from the wild animals. Moreover, the steady rise of sea level is drowning many islands, e.g., Lohachara, Kutubdia, Bholar Dweep, Suparibhanga island etc. Consequentially this is leading to scarcity of land both for human beings and animals, leading to conflict between them. Hence, a proper demarcation of the area occupied by the inhabitants wild animals and the level to which the , sea and can rise is of utmost importance. Relocation and Rehabilitation As the sea level rises, the low-lying islands are submerging; hence, there is constant pressure on the remaining islands to accommodate the migrants. The government should make some arrangements to at least provide the basic standard of living to the victims of the adverse effect of climate change. Promotion of Eco-tourism

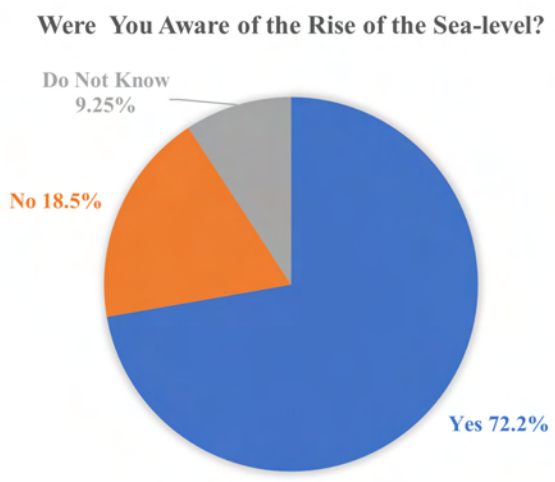
CATEGORIES	SOLUTIONS
Mitigation strategies can be implemented immediately.	The researcher opines that half of the problems faced in Sundarban Delta can be sorted out if there is a steady income for the inhabitants. Therefore, tourism can be a mode of earning revenue. Some of the preferable ways to promote tourism are as follows: • Wild Life Safari • River Cruise • Eco-retreat • Viable Career Opportunities Apart from regular jobs like (farming and fishing), some alternative job opportunities in and around Sundarban Delta need to be created. This will promote the habitants' willingness to stay in the Sundarban Delta and protect it from the adverse effects of climate change. Furthermore, the Sundarban Delta's economic growth must be strategically planned, preferably with the participation of locals who are well-versed in the region's flora and fauna. Involving locals would also give them a sense of ownership over the Sundarban Delta. Proper Execution of Disaster Management Rapid Action Forces (RAF) with expertise in dealing with natural disasters should immediately be deployed in the Sundarban Delta. This will prevent any delays in the evacuation process. Modernised equipment should be provided to the RAF to complete the evacuation process quickly. Proper monitoring and surveillance of the illegal activities prevalent in the Sundarban Delta. For example., illegal logging, illegal shrimp trading, etc.

CATEGORIES	SOLUTIONS
Mitigation strategies that have a long-term goal	Strengthening the living standards of the residents. There must be progressive and feasible policies and strategies, particularly for the habitants of Sundarban Delta. This will not only help to receive and retain the biodiversity of the Sundarban Delta, but also improve the living standards of the inhabitants. The government should take immediate action to desalinate the Sundarban Delta's fertile soil. The crops are not growing correctly due to the regular infiltration of saline water into the paddy lands, resulting in significant food and job crises. The government should set aside funds and devote time to the research and develop high-yielding saline-resistant seeds. Such seeds are critical, especially as it becomes increasingly difficult to control the adverse effects of climate change. Additionally, the saline-resistant seeds should be distributed uniformly amongst the locals to benefit all the local habitants and support their livelihood earnings. In addition to providing saline-resistant seeds, the government should plan for proper marketing techniques to sell their products in the market with minimal waste. Construction of Pucca houses During the field investigation, the researcher discovered that most of the houses in this neighbourhood are kutcha houses made of mud. As a result, during a disaster, these houses collapse very quickly, and the habitants become homeless. The government should supply more fresh water in the Sundarban Delta to reduce the soil's salinity; this water can also help in better yield in agriculture. Moreover, this freshwater can also be used to preserve the mangroves, which are on the verge of extinction due to excess salinity in the soil.

CATEGORIES	SOLUTIONS
Mitigation strategies that have a long-term goal	Sundarban Delta is a cyclonic-prone area; hence it has witnessed several cyclones and floods over the years as stated in Table No. 1. However, cyclones followed by floods have occurred almost thrice a year in the last three years. The locals have been devastated as they lost their homes, belongings, cattle, crops, etc. Furthermore, the economic condition of these people is below the poverty line, making it difficult for them to rebuild their infrastructure without assistance from the government or an NGO. Therefore, the researcher suggests that the government should take the initiative to construct disaster-resilient dwellings so that these vulnerable people are not compelled to leave their homes during such natural Calamities. Capacity-building training and workshop Regular training and workshops should be conducted on various topics of importance to the local people. For example: how to use modern technology for agriculture; how to market their products; how to evacuate during natural calamity quickly, etc. There should be a mass drive for afforestation to protect flora and fauna from being endangered and extinct. Supply of more fresh water Sponsorship and funding The government should assign a fund for the overall welfare of the inhabitants of Sundarban Delta, whose livelihoods were affected due to the natural calamities. In fact, the researcher suggests that there should be a proper discussion on the same in the United Nations so that a budget can be allocated for any such climate-induced natural calamities used for the benefit of the climate refugees and their wellbeing.

Data Analysis

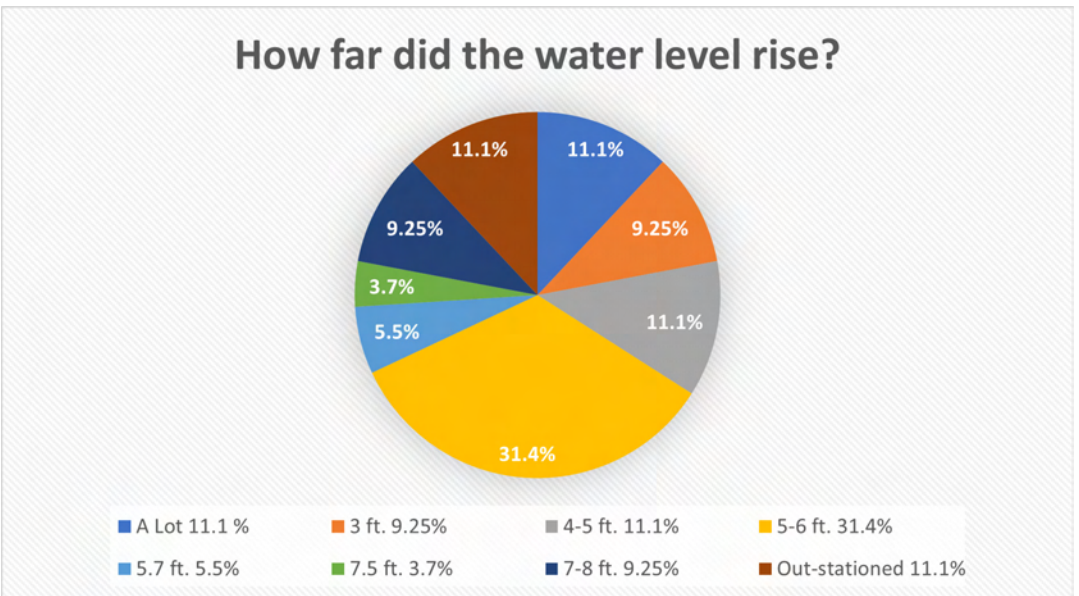
Figure 2: Depicts the number of respondents who were aware of the rising sea level (Primary Source)



The researcher was inquisitive to know whether the respondents were aware of the rising sea level. The researcher opines that unless the respondents are well-versed with the climatic changes and their effects, they would not be able to fight it out. However, as per the survey, the results showcased that 9.25 per cent of the respondents were unaware of the rising sea level, 18.5 per cent of the respondents did not know and 72.2 per cent of the respondents

were aware of the rising sea level as stated in Figure 2. Initially, the researcher was astonished to know how come some of the respondents did not know about the rising sea level when they had to leave their livelihood and original home because of the same. However, after much more discussion, the researcher realised that some of the respondents were unable to draw the connection amongst: climate change, rising sea levels and natural calamities like cyclones and floods. The understanding of some of the respondents is that due to cyclones, or monsoon floodings, their lands and homes are submerging. However, the researcher wishes to make a point that it is true that even due to floods and cyclones, low-lying lands do submerge; however, after some time the water retreats. But in the case of the Sundarban Delta, the rising sea level is an add-on challenge for inhabitants as the flood water does not retreat that easily. Moreover, during high tide, the sea water gushes into the land leading to the loss of the personal belongings of the people staying near the coastline.

Figure 3: Depicts the respondents' responses based on their examination of how much the water level increased whenever there was flooding following a natural calamity. (Primary Source)



The researcher was aware of the regular flooding in the Sundarban Delta; hence, she wanted to enquire about the same from the respondents and also understand, how deep the flooding water used to be. There were various responses from the respondents; hence, the researcher

has divided the responses into eight themes. The themes and the percentage of respondents responding to those are mentioned below as stated in Figure 3:

- A lot – 11.1%
- 3ft. – 9.25%
- 4-5ft. – 11.1%
- 5-6ft. – 31.4%
- 5-7ft. – 5.5%
- 7.5ft. – 3.7%
- 7-8ft. – 9.25%
- Out stationed – 11.1%

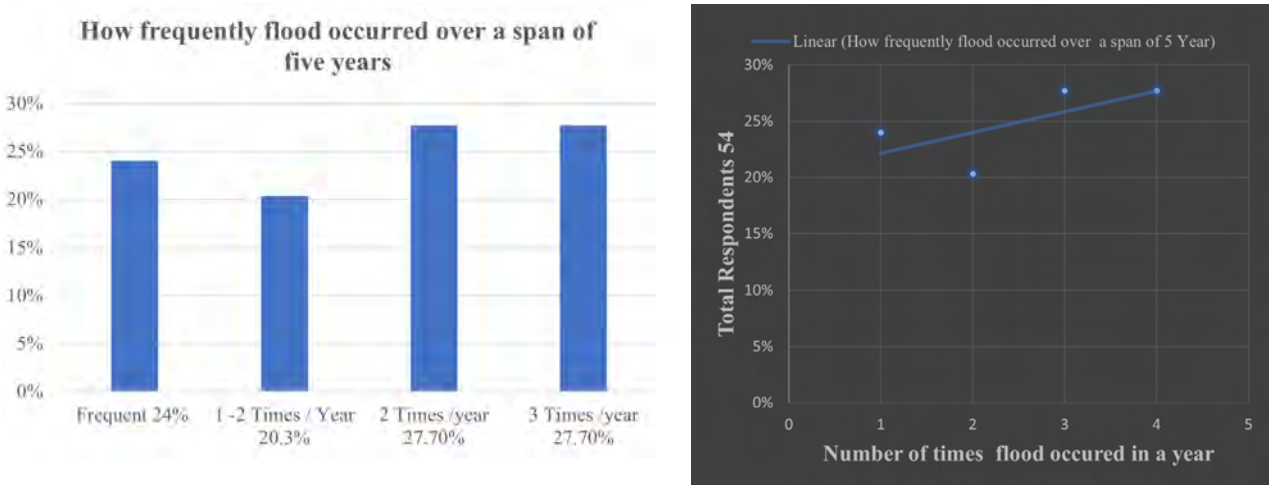
The themes were divided as per the frequency of words stated in the responses, in which 11.1 per cent of respondents were unsure about the feet to which the water rose, but they did quantify the same stating that there was a lot of water and it was synonymous to the same. Hence, the researcher had categorised all those answers under the heading (*A lot)*. Moreover, 11.1 per cent of people were working out of Sundarban Delta; hence, they did not have first-hand experience of the flooding, and they opted not to answer. A maximum of the respondents, i.e., 31.4 per cent stated that, in general, during most of the flooding or aftermath of a cyclone, the water rises up to 5-6ft. on the streets. The researcher is astonished to know that water rises to an average of 5-6 ft., especially when flooding is too common in the region. There are times when there is flooding almost three times a year. If this continues then that day is not far when the entire Sundarban Delta would be deserted, because during every flooding, the respondents take shelter in the government schools leaving behind their belongings. Moreover, such natural calamities are welcoming more climate refugees across the border and gradually the locals and the climate refugees of the Sundarban Delta, Indians, are migrating elsewhere in the country for their survival and sustenance. The researcher has further analysed the responses to find out the word frequency using the NVivo software. This analysis enabled the researcher to understand the number of times the same words have been used in the responses by the respondents. This analysis also helped the researcher to understand the weightage percentage of the words; hence, this enabled the researcher to identify the gravity of the words through which the researcher analysed the situation

prevalent in the Delta during and after any natural calamity. The word frequency query test is mentioned below in Figure 4.

Figure 4: Word Frequency query result of the responses stated in Figure 3 (Primary Sources)

Word	Length	Count	Weighted Percentage (%)	Similar Words
feet	4	45	21.23	Feet
street	6	39	18.40	Street
coast	5	5	2.36	Coast
measure	7	5	2.36	Measure
high	4	4	1.89	High
know	4	4	1.89	Know
tide	4	4	1.89	Tide
except	6	2	0.94	Except
higher	6	2	0.94	Higher
rise	4	2	0.94	Rise
rose	4	2	0.94	Rose
water	5	2	0.94	Water
increased	9	1	0.47	Increased
last	4	1	0.47	Last
level	5	1	0.47	Level
metres	6	1	0.47	Metres
nadu	4	1	0.47	Nadu
tamil	5	1	0.47	Tamil
working	7	1	0.47	Working
year	4	1	0.47	Year

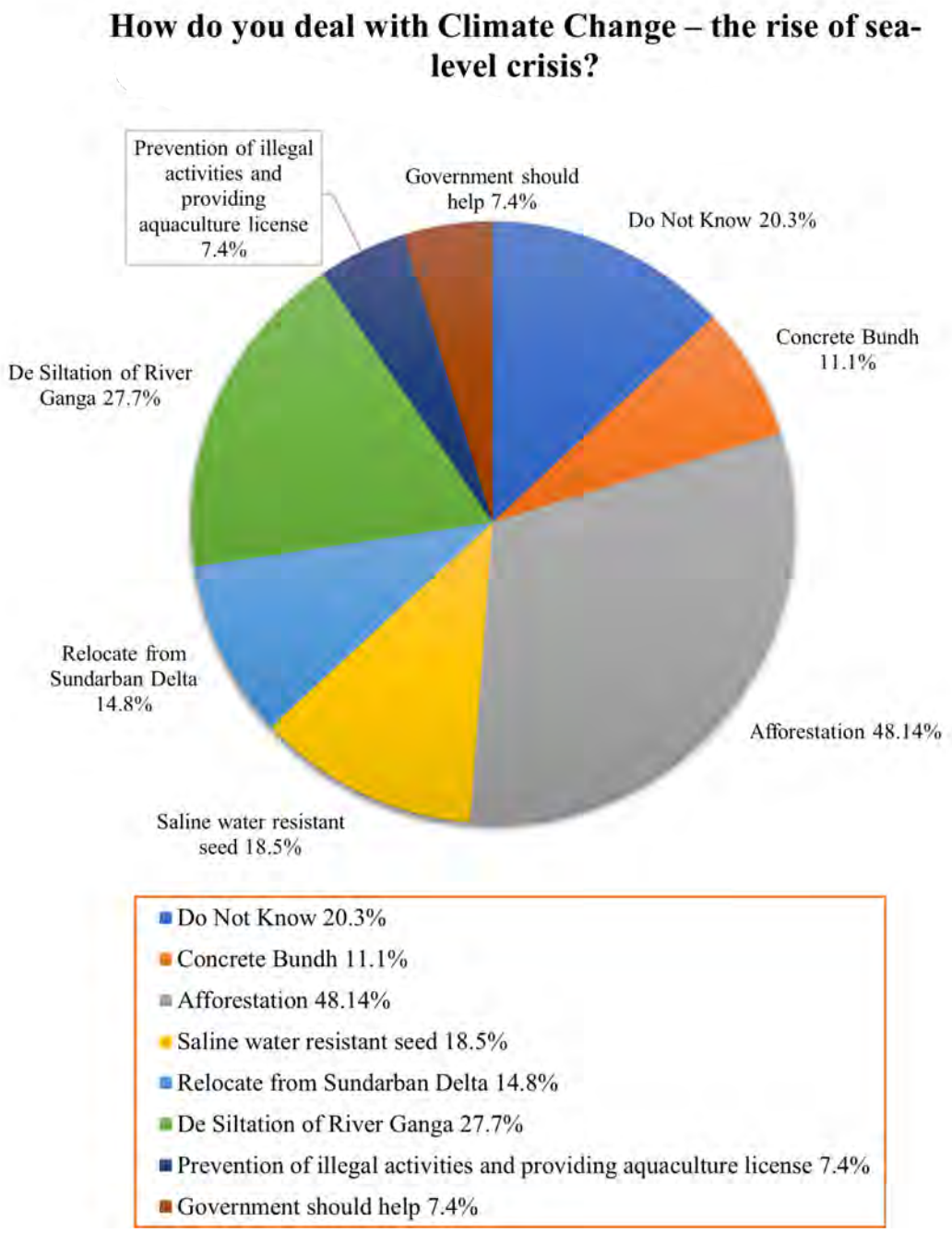
Figure 5: Depicts the frequency of the floods that occurred over a span of five years. (Primary Sources)



There has been frequent flooding in the Sundarban Delta. At times, there are many calamities which are duly reported and aid is provided however, there are times when the effect of the flooding is not that Devastating, but it does create difficulty for the respondents. This question has been answered by all 54 respondents. There have not been many variations in the answers. The researcher has demonstrated the response in two graphical diagrams: one in a bar graph form and the other in a linear line manner. The responses of the respondents were categorised into four categories. However, the responses were themed under an average understanding of floods per year. There were a few respondents, who were sure about regular flooding in the Delta, but could not recollect the number; hence their responses were recorded as frequently and there was 24 per cent of respondents answered under this theme. 27.7 per cent of the respondents answered stating two or three times a year and 20.3 per cent of the respondents answered as one to two times a year. So, on average, a minimum of two times flooding per year is guaranteed in the Delta. The figure below denotes the word frequency query result of the responses gathered during the survey as stated in Figure 5.

Figure 6: Word Frequency query result of the responses stated in Figure 5 (Primary Sources)

Word	Length	Count	Weighted Percentage (%)	Similar Words
times	5	55	22.54	Times
year	4	39	15.98	Year, years
floods	6	15	6.15	Flood, floods
frequent	8	13	5.33	Frequent, frequently
number	6	12	4.92	Number
unaware	7	12	4.92	Unaware
every	5	2	0.82	Every
last	4	2	0.82	Last
regular	7	2	0.82	Regular, regularly
2019	4	1	0.41	2019
2021	4	1	0.41	2021
acute	5	1	0.41	Acute
Bangladesh	10	1	0.41	Bangladesh
coast	5	1	0.41	Coast
country	7	1	0.41	Country
crossed	7	1	0.41	Crossed
cyclone	7	1	0.41	Cyclone
depression	10	1	0.41	Depression
happening	9	1	0.41	Happening
India	5	1	0.41	India
minimum	7	1	0.41	Minimum
nowadays	8	1	0.41	Nowadays
origin	6	1	0.41	Origin
place	5	1	0.41	Place
previous	8	1	0.41	Previous


How do you deal with Climate Change – the rise of sea-level crisis?
Prevention of illegal activities and providing aquaculture license 7.4%
Government should help 7.4%
Do Not Know 20.3%
Concrete Bundh 11.1%
De Siltation of River Ganga 27.7%
Relocate from Sundarban Delta 14.8%
Afforestation 48.14%
Saline water resistant seed 18.5%
Do Not Know 20.3%
Concrete Bundh 11.1%
Afforestation 48.14%
Saline water resistant seed 18.5%
Relocate from Sundarban Delta 14.8%
De Siltation of River Ganga 27.7%
Prevention of illegal activities and providing aquaculture license 7.4%
Government should help 7.4%

Word	Length	Count	Weighted Percentage (%)	Similar Words
record	6	1	0.41	Record

Figure 7: Depicts how to deal with Climate Change, especially with the rise of the sea-level crisis. (Primary Sources)

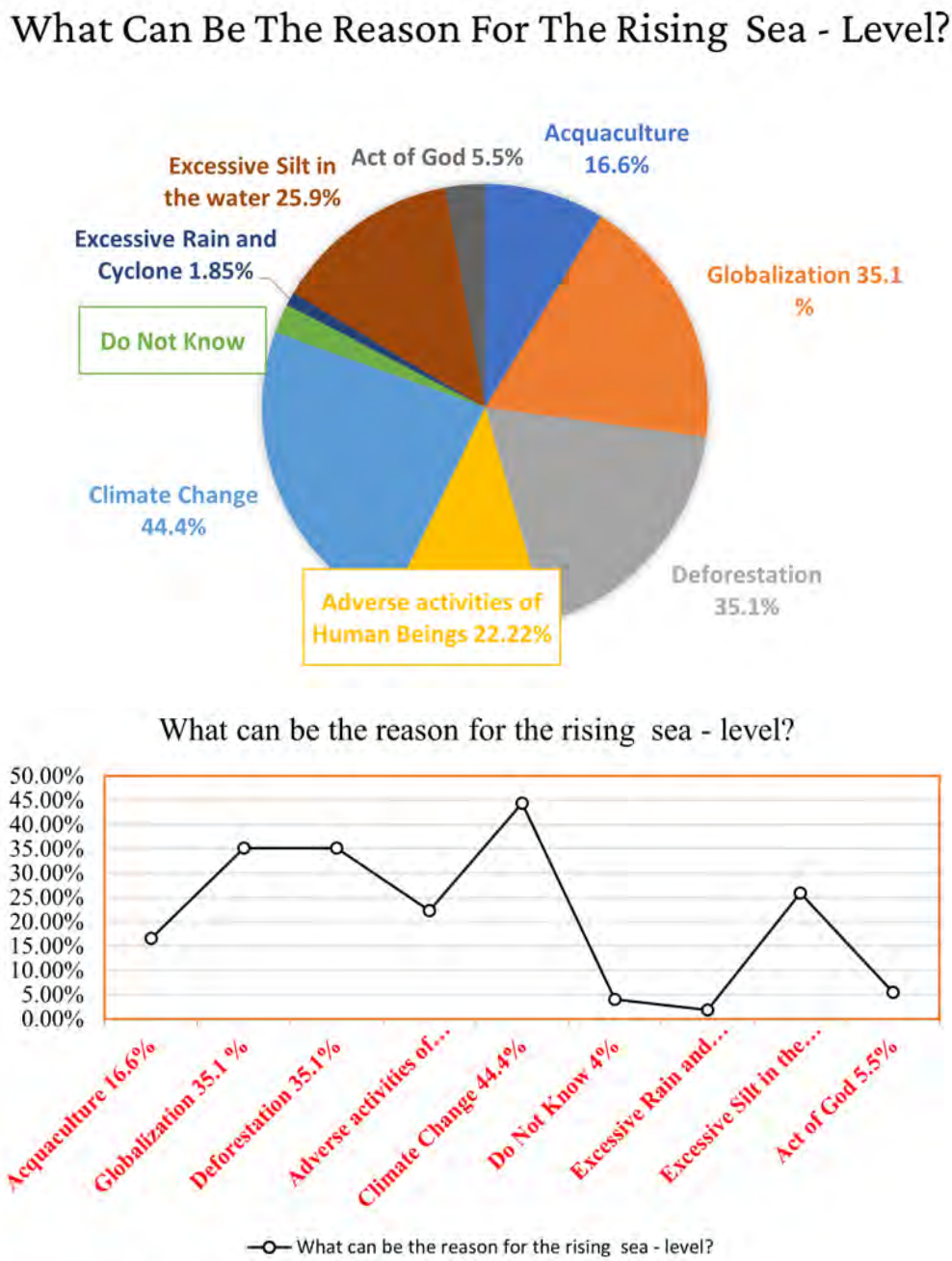
The researcher further asked the respondents about their opinion on how to deal with climate change. The respondents provided various elaborative answers. The researcher further classified the responses into eight themes as stated in Figure 7. The researcher has also analysed the responses by finding out the word frequency query and the weightage of each word using the NVivo software.

Figure 8: Word Frequency query result of the responses stated in Figure 7 (Primary Sources)

Word	Length	Count	Weighted Percentage (%)	Similar Words
afforestation	13	25	10.04	Afforestation
deep	4	25	10.04	Deep
rooted	6	25	10.04	Rooted
trees	5	25	10.04	Trees
know	4	14	5.62	Know
river	5	14	5.62	River
siltation	9	14	5.62	Siltation
place	5	7	2.81	Place
relocate	8	7	2.81	Relocate
safer	5	7	2.81	Safer
concrete	8	6	2.41	Concrete
bundh	5	5	2.01	Bundh
height	6	5	2.01	Height
high	4	5	2.01	High
aquaculture	11	3	1.20	Aquaculture

Word	Length	Count	Weighted Percentage (%)	Similar Words
government	10	3	1.20	Government
license	7	3	1.20	License
stopped	7	3	1.20	Stopped
flooding	8	2	0.80	Flooding
frequent	8	2	0.80	Frequent, frequently
prevent	7	2	0.80	Prevent, prevention
rise	4	2	0.80	Rise
shelter	7	2	0.80	Shelter
take	4	2	0.80	Take
action	6	1	0.40	Action
agriculture	11	1	0.40	Agriculture
area	4	1	0.40	Area
barricade	9	1	0.40	Barricade
business	8	1	0.40	Business
change	6	1	0.40	Change
climate	7	1	0.40	Climate
crisis	6	1	0.40	Crisis
deal	4	1	0.40	Deal
forest	6	1	0.40	Forest
illegal	7	1	0.40	Illegal
kalagachi	9	1	0.40	Kalagachi
level	5	1	0.40	Level
line	4	1	0.40	Line
resistant	9	1	0.40	Resistant
roads	5	1	0.40	Roads
saline	6	1	0.40	Saline

Figure 9: Depicts the reasons provided by the respondents as a reason for the rising sea level. (Primary Source)



Word	Length	Count	Weighted Percentage (%)	Similar Words
schools	7	1	0.40	Schools
seeds	5	1	0.40	Seeds
streets	7	1	0.40	Streets
stringent	9	1	0.40	Stringent
used	4	1	0.40	Used
village	7	1	0.40	Village
water	5	1	0.40	Water
wood	4	1	0.40	Wood

The researcher further went into detail to understand the reasons contemplated by the respondents for the rising sea level. To analyse this question, the researcher has conducted three variations of representation as stated below:

- Graphical representation
- Word Cloud
- Frequency query test

Figure 10: Depicts a word cloud of the responses stated in Figure 9 (Primary Sources)

In this question, the respondents were allowed to choose more than one answers as there can be more than one reason for the rising sea level. Most of the respondents stated that globalisation and deforestation are the two main reasons for the rising sea level. An interesting fact was that only four per cent of people did not mention any reason for the rising sea level. All other respondents stated some reasons for the rising sea level and the researcher finds that all the reasons mentioned by the respondents are genuine and do play a role in the rising sea level.

Figure 11: Word Frequency query result of the responses stated in Figure 9 (Primary Sources)

Word	Length	Count	Weighted Percentage (%)	Similar Words
change	6	23	6.59	Change
climate	7	23	6.59	Climate
government	10	20	5.73	Government
owners	6	20	5.73	Owner, owners
deforestation	13	17	4.87	Deforestation
global	6	16	4.58	Global
warming	7	16	4.58	Warming
beds	4	13	3.72	Beds
river	5	13	3.72	River
shrimp	6	13	3.72	Shrimp
siltation	9	13	3.72	Siltation
trading	7	13	3.72	Trading
local	5	12	3.44	Local
people	6	12	3.44	People
human	5	11	3.15	Human
know	4	10	2.87	Know
aquaculture	11	9	2.58	Aquaculture

Word	Length	Count	Weighted Percentage (%)	Similar Words
illegal	7	9	2.58	Illegal
logging	7	9	2.58	Logging
traders	7	9	2.58	Traders
conglomerate	12	7	2.01	Conglomerate
area	4	5	1.43	Area
encroaching	11	5	1.43	Encroaching
excessive	9	5	1.43	Excessive
forest	6	5	1.43	Forest
rain	4	5	1.43	Rain
almighty	8	3	0.86	Almighty
level	5	2	0.57	Level
rise	4	2	0.57	Rise, rising
blame	5	1	0.29	Blame
globalisation	13	1	0.29	Blobalisation
reason	6	1	0.29	Reason
think	5	1	0.29	Think

Figure 12: Depicts the response from the respondents stating whom they blame for the rise of sea level. (Primary Source)

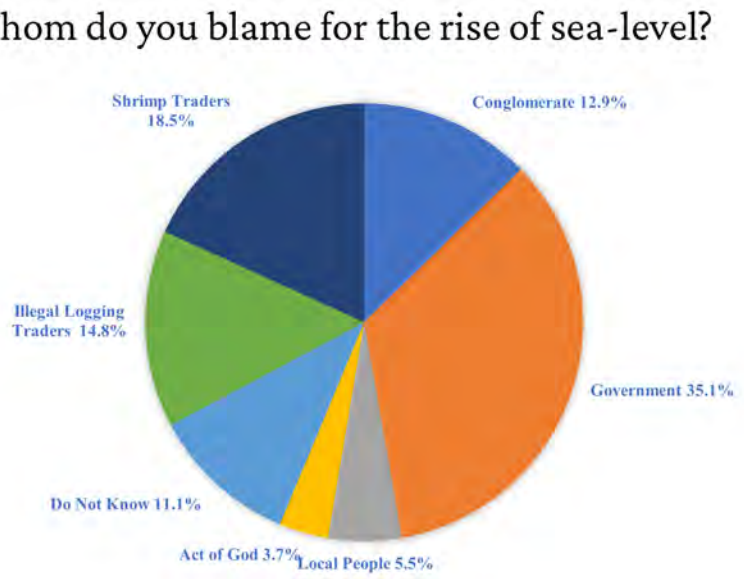
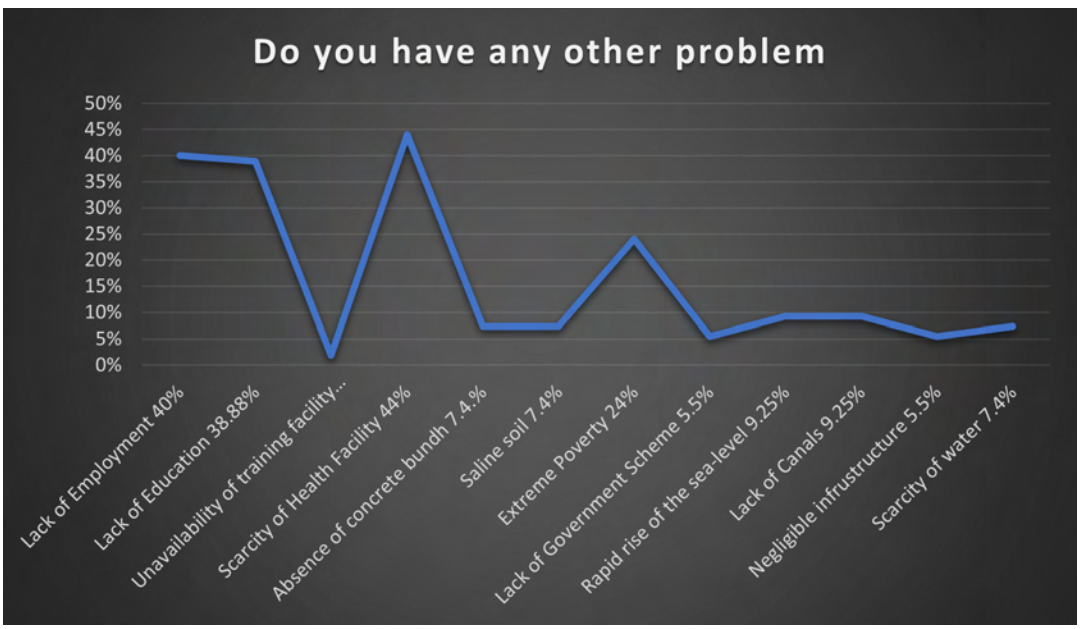


Figure 13: Depicts the other problems of the respondents apart from the rising sea level. (Primary Source)



The researcher, on purpose, asked the question stated in Figure 12, though it is quite similar to the question asked earlier. The researcher was quite happy to know that the answers were appropriate and different. Moreover, the researcher also seconds the response of the respondents. To analyse the responses, the researcher divided the answers into seven themes. The themes were created according to the maximum number of similar words repeated in their answers. Moreover, the respondents were allowed to choose more than one answers as there can be more than one reasons for the answers. While analysing the responses, the researcher found out that 35.1 per cent of the responses blame the government for their sorry status as if there would have been no climate change due to globalisation, urbanisation, etc. Then, their lives would not have been miserable.

Figure 14: Depicts a word cloud of the responses stated in Figure 13 (Primary Sources)

It is very saddening for the researcher to witness the struggle and challenges that the respondents face on a daily basis as stated in Figure 13. To analyse this question, the researcher has conducted three variations of representation as stated below:

- Graphical representation
- Word Cloud
- Frequency query test

Figure 15: Word Frequency query result of the responses stated in Figure 13 (Primary Sources)

Word	Length	Count	Weighted Percentage (%)	Similar Words
facilities	10	42	10.34	Facilities
inadequate	10	42	10.34	Inadequate

Word	Length	Count	Weighted Percentage (%)	Similar Words
lack	4	36	8.87	Lack, lacking
employment	10	25	6.16	Employment
doctors	7	23	5.67	Doctors
health	6	23	5.67	Health
quack	5	23	5.67	Quack
educational	11	19	4.68	Education, educational
extreme	7	15	3.69	Extreme
living	6	15	3.69	Living
poor	4	15	3.69	Poor
poverty	7	15	3.69	Poverty
standards	9	15	3.69	Standards
building	8	5	1.23	Building
canal	5	5	1.23	Canal
floods	6	5	1.23	Floods
frequent	8	5	1.23	Frequent
infrastructure	14	5	1.23	Infrastructure
irrigation	10	5	1.23	Irrigation
level	5	5	1.23	Level
proper	6	5	1.23	Proper
rise	4	5	1.23	Rise
sudden	6	5	1.23	Sudden
bundh	5	4	0.99	Bundh
concrete	8	4	0.99	Concrete
saline	6	4	0.99	Saline
soil	4	4	0.99	Soil

Word	Length	Count	Weighted Percentage (%)	Similar Words
dedicated	9	3	0.74	Dedicated
government	10	3	0.74	Government
habitants	9	3	0.74	Habitants
policies	8	3	0.74	Policies
schemes	7	3	0.74	Schemes
Sundarban	9	3	0.74	Sundarban
drinking	8	2	0.49	Drinking
scarcity	8	2	0.49	Scarcity
water	5	2	0.49	Water
problems	8	1	0.25	Problems
training	8	1	0.25	Training

Speculated Future of the Sustenance of Sundarban Delta

The Sundarbans is an archipelago of about 200 islands with around 60 per cent of it falling into Bangladesh territory and the remaining 40 per cent in the territory of India. According to the last Census 2011, the area houses around 4.5 million people.[54] Over a period of time, as the population grew denser, climate change and geographical limitations served as a major challenge for the habitants and their livelihoods.

The main sources of income for the inhabitants of the Sundarbans include agriculture, fishing, and seed, honey and wood gathering, as well as ecotourism. Twenty per cent of islanders are thought to be dependent on fishing to make ends meet, and about 60 per cent of the population depends on agriculture.[55] It is clear that the bulk of the population relies on biodiversity and natural resources to survive. Their way of life is endangered by climate change, sea level rise, and the frequency and severity of cyclones, among other natural disasters.

54 'About Sundarbans,' (World Wildlife Fund India, 1969) <https://www.wwfindia.org/about_wwf/critical_regions/sundarbans3/about_sundarbans> accessed 07 October 2022.

55 Santadas Ghosh, 'Climate Change, Ecological Stress and Livelihood Choices in Indian Sundarban,' (2022), Climate Change and Community Resilience, <file:///C:/Users/sandh/Downloads/9789811606809.pdf > accessed 07 October 2022.

The overall amount of agricultural land increased dramatically between 1996 and 2006, from 16.9 to 20.93 per cent. Also dramatically rising by 101 per cent between the years 2003 and 2009 was ecotourism.[56] This agricultural land, however, saw a decrease to 16.36 per cent due to a rise in sea levels and cyclones. According to a study[57] in 2013, the relative sea level rise approached around 3.44 mm per year and it was contended that this could increase to 3.5 mm per year due to the irreversible impacts of global warming. This is pertaining to the Bangladesh part of the Sundarbans. Due to such sea level rises, not only fishing, but the quality of agricultural produce is also adversely affected.

It is vital to highlight that the Sundarban delta lacks capabilities for artificial irrigation, leaving the area's agriculture completely dependent on the monsoons. The Paddy crops also suffers harm as a result of water's increasing salinity because they are not salt-resistant. The survey also noted an increase in surface water temperature, with a trend of 6.14 and 6.12 per cent, respectively, in the western and central regions. All of this directly affects the quality and quantity of fish caught, which in turn affects the residents' way of life. The inner delta has experienced saltwater intrusion due to increase in salinity and a rise in sea level, which damages the ecology and also contributes to the over exploitation of pool resources. The reduced freshwater flowing in the central region of the Sundarbans have resulted in increased salinity of the river waters and have made the rivers shallower (particularly Matla) over the years.

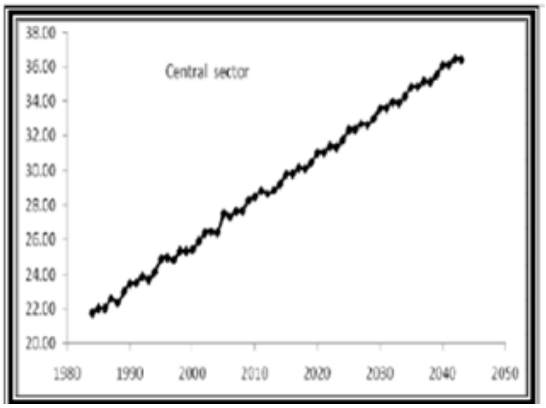
In addition to the aforementioned effects, the rising sea level and failing to raise the height of the embankments defending the communities will cause floods during rainy seasons. People leave the delta region for other states in pursuit of better economic opportunities as a result of such issues. According to research, about 75 per cent of migrant workers cross state lines to work in the western and southern Indian states. They generally work as construction labourers and return to Sundarban during the monsoon season to cultivate paddy. Nearly 95 per cent of them are male.

56 Armin Rosencranz, Raghuveer Nath and Abhiroop Chowdhury, 'Protecting the Indian Sunderbans in a global Health Crisis,' (2020) APPS < https://www.policyforum.net/protecting-the-indian-sundarbans-in-a-global-health-crisis/> accessed 07 October 2022.

57 Atanu Kumar Saha, 'Climate Change and Sustainable Livelihood Programmes: A case study from the Indian Sundarbans,' (2013) 107 The Journal of Ecology. Photon 335-348 <https://www.researchgate.net/profile/AtanuRaha/publication/260198049_Climate_changer_and_Sundarban_-_adaptation_mitigation_strategies/links/02e7e5301ec5585169000000/Climate-changer-and-Sundarban-adaptation-mitigation-strategies.pdf> accessed 07 October 2022.

According to a study by the International Food Policy Research Institute, in around 120 years, the world's coastal areas housing around 1.3 billion people are likely to be inundated due to the dangerous rise in sea levels. It is also speculated that increased salinity will lead around 2,00,000 peple residing in the Sundarbans delta to migrate out of the area to other places, both within the district and outside.[58]

Figure 16: Depicts the speculated saline level of the Sundarban Delta (Abhijit Mitra, 2016)



The Sea level rise rate in the coastal areas of Bangladesh seems higher than the average global SLR during the last century. The Institute of Water Management (IWM) in Bangladesh developed a salinity model to track the effect of salinity on the sea level rise. It has been considered that with the sea level rise of 23 cm, the isohaline lines enter inland. The penetration into the inland would be significant as per indication where the minimum salinity is one ppt or more than that in the rivers of the western and central Sundarbans. If the seal level increases to 44 cm, the penetration would be higher as expected for the isohaline limits of one, five and ten ppt. However, the model has some limitations as it used a fixed salinity boundary in downstream of the rivers.[59]

Global Best Practices Undertaken by Countries to Mitigate the Impact of Rising Sea-Levels

The researcher has listed out a few of the practices followed by other countries that are similarly affected as the Sundarban Delta due to the adverse impact of climate change, leading to the rise in sea levels. The researcher is of the opinion that the Sundarban Delta can also be saved to a great extent if some of the best practices can be incorporated in the Delta.

58 Jena Manipadma, (2018) 'Saline Land will drive People out of Sundarbans,' <https://www.thethirdpole.net/en/climate/saline-land-will-drive-people-out-of-sundarbans/> accessed 15 November 2021.

59 Jahan Amreen, 'The Effect of Salinity in the flora and fauna of the Sundarbans and the impacts on local livelihood,' (2018) <http://uu.diva-portal.org/smash/get/diva2:1261398/FULLTEXT01.pdf > accessed 19 November 2021.

Example 1:

Fiji faces the harsh reality of global warming implications. It is confronted with increasing temperatures and sea levels, as well as worse events. The South Pacific archipelago has relocated a few towns and intends to relocate more. Graves and dwellings are being shifted, but some of them perished in the water before any action could be taken. It is predicted that by 2100, Fiji might have seen a meter of sea-level increase, leading to coastal flooding. However, Fiji being a victim of climate change has not stopped the arrival of visitors. Fiji's Prime Minister, Voreqe Bainimarama recently dedicated a brand-new hybrid seawall for the protection of its citizen from the rising sea level.[60] This showcases that the present Government is keeping no stone unturned to protect all Fijians from the dreadful potential impacts of climate change, especially sea-level rise. Moreover, they do believe that this advanced project of a hybrid seawall would protect them to a great extent.[61]

Additionally, the Ministry of Waterways and Environment cleverly combined man-made and natural solutions to construct this seawall, which offers protection that is more efficient and less expensive than a concrete wall. Lastly, their Attorney General announced that the country is spending tens of thousands of euros to build a legal framework to assist in relocating future climate refugees from other Pacific Island nations during extreme circumstances.[62]

Example 2:

The Maldives is the world's lowest-lying country. As a result, the island country faces an existential threat from rising sea levels due to global climate change. By 2050, about 80 per cent of the Maldives might be uninhabitable due to global warming occurring at its present rate. The Maldives commenced development on the island of Hulhumale through land reclamation in the late 1990s. This island is likely to be used to relocate Maldivians displaced by rising sea levels.[63] The Maldivians refer to their artificial island as the City of

60 'Hybrid Seawall Helps Address Sea-Level Rise,' (The Fijian Government) <https://www.fiji.gov.fj/Media-Centre/News/Feature-Stories/Hybrid-Seawall-Helps-Address-Sea-Level-Rise> accessed November 14, 2022

61 'World Bank Climate Change Knowledge Portal,' (Sea Level Rise | Climate Change Knowledge Portal) <https://climateknowledgeportal.worldbank.org/country/fiji/impacts-sea-level-rise> accessed November 14, 2022.

62 S. Taylor, 'Fiji prepares for 'climate refugees,' (Euronews, 17 November 2017) <https://www.euronews.com/2017/11/17/fiji-prepares-for-climate-refugees> accessed 19 November 2021.

63 Konovalov AP, 'The Maldives Are Sinking, What Can Be Done about It?,' (New Eastern Outlook, June 11, 2021) <https://journal-neo.org/2021/06/11/the-maldives-are-sinking-what-can-be-done-about-it/> accessed November 14, 2022.

Hope. Moreover, their present government is supporting the construction and assembly of the world's first actual floating city that has already been constructed, which is only a few kilometres from Male.[64] Additionally, the Republic of the Maldives has invested roughly $10 million USD a year in coastline reinforcement and the construction of dams. However, the Maldives government is also considering to buy property in neighbouring nations as a precaution against the sea level rise. All these plans are taken to make the Maldives resilient to the rise of sea-level.[65]

Example 3:

Kiribati, a lovely island nation in the Central Pacific, is in the final generation or two before the ocean completely swallows it due to global warming. Rising sea levels put a strain on both coastal habitats and the physical shoreline. Saltwater intrusions have the potential to contaminate freshwater aquifers, which supply municipal and agricultural water sources as well as natural ecosystems. Kiribatian officials have made every effort to adjust to changing weather patterns.[66] It recently launched the KJIP, a comprehensive joint implementation plan on climate change. Kiribati has also leased around 5,000 acres of forested areas in Fiji in 2014 to be used for crop cultivation or use the land on an emergency basis to shift its citizens if sea levels rise to an extreme level, which would make human living impossible.[67]

Example 4:

Vietnam has really prepared itself well to combat the adverse effect of climate change. Vietnam has developed a number of solutions to deal with the effects of climate change on sea level rise, as the phenomenon poses major dangers to the ecosystem, biodiversity, and natural resources, as well as human life. It has an excellent well-grounded institutional and policy apparatus and an evident and pragmatic response to the possible implications

64 Manzo, D., Zee, G., Uddin, S., & Jovanovic, D. (2021). ABC News <https://abcnews.go.com/International/facing-dire-sea-level-rise-threat-maldives-turns/story?id=80929487#:~:text=Atper cent20theper cent20currentper cent20rateper cent20of,theper cent20Maldivesper cent2Cper cent20toldper cent20theper cent20U.N. > accessed 19 November 2021.

65 'Preparing for Rising Seas in the Maldives,' (NASA) <https://earthobservatory.nasa.gov/images/148158/preparing-for-rising-seas-in-the-maldives> accessed November 14, 2022

66 Webadmin and Webadmin (Climate change March 27, 2014) <https://www.climate.gov.ki/2014/03/27/water-supply-in-kiribati-local-solution/> accessed November 14, 2022.

67 Kenneth R. Weiss, 'Kiribati: Casualties of Climate Change,' (Pulitzer Center, 23 January 2015) <https://pulitzercenter.org/projects/kiribati-casualties-climate-change> accessed 08 April 2022.

of climate change. The government of Vietnam is quite swift in combatting and relocating people residing in disaster-prone locations of the country.[68] They have come up with ecosystem-based adaptation measures, such as increasing mangrove and coastal protection tree planting and investing in wetlands to stop the sea from claiming land. Refilling beachfront property is commonly used in Vietnam. Other options which are tried by Vietnam are: improving infrastructure and changing farming practices. These measures are made to reduce vulnerability and increase community adaptation to climate change and mitigate the sea level rise.[69] Moreover, Vietnam has been open to changing management policies and standards related to building land use, and protection of the environment. They have tried to relocate households and infrastructure facilities away from locations with high submersion danger.

Conclusion

Climate change has a lasting effect that starts with natural disasters and ends with the creation of climate refugees. Anthropogenic activities leading to climate change will further lead to outbursts of natural calamities. There is a chain reaction whenever there is an outburst of a natural disaster, it will influence more climate displacements. Hence, this cycle of events leads to devastating consequences, like creating huge numbers of climate refugees, and developing social and cultural problems in the host State, etc. Sadly, national governments and the comity of countries have not agreed to create distinct or specialised legal mechanisms for environmental/climate migrants' protection and treatment. Moreover, there is not a single definition or generally agreed-upon standards or guidelines for their protection and welfare; hence, these climate refugees face the brunt of the adverse effect of climate change. Over the years, a variety of techniques for evaluating climate displacement have emerged, including migration studies, refugee protection, security narratives, and adaptation techniques. These methods, however, have a state-centric perspective and they frequently examine the problem from positivist practical provisions, unable to take into account climate justice and the protection of every person impacted by climate change. However, the researcher urges for an expansion of the present CSR, 1951, to include climate refugees.

68 Édes Bart W. 'Addressing climate change and migration in Asia and the Pacific,' (Asian Development Bank 2012) <https://www.adb.org/sites/default/files/publication/29662/addressing-climate-change-migration.pdf > accessed 24 September 2022.

69 Vna VNA, "Various Solutions to Sea Level Rise in Vietnam: Environment: Vietnam+ (Vietnamplus)" (Vietnam Plus June 19, 2018) <https://en.vietnamplus.vn/various-solutions-to-sea-level-rise-in-vietnam/133147.vnp> accessed November 14, 2022.

What can we do as a Country in Providing Quality Education Towards Achieving Global and National Goals: Learning for All

Rukmini Banerji*

Abstract

"Every child in school and learning well." How far has India come in achieving these goals? How much further do we still have to travel? Against the backdrop of national policies and global goals, how do we measure up against the milestones of universal enrollment and quality education for children? This paper traces India's journey over a period of twenty-five years and focuses on progress over time in the provision of universal schooling to children across the country and on efforts to ensure learning for all.

The paper has three sections. First, major national goals and international guidelines are traced to understand the evolution of priorities for children and education. Second, focusing on the last two decades, the progress towards these objectives are outlined and summarised. In the third section, the focus is on the challenges and opportunities that lie before us as a country, till the end of the current decade.

Section 1:

Global Declarations

1990 was International Literacy Year. As part of the global celebration, there was an international conference in Jomtien in Thailand. Representatives of 150 governments, international agencies and civil society organisations made a call for all countries to universalise adequate basic education. Article 1 of the World Declaration on Education for All (also referred to as the Jomtien Declaration) states that:

Every person — child, youth and adult — shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such

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as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning (World Declaration on Education for All 1990).

Ten years later in 2000, in Dakar, the World Education Forum re-affirmed the vision of the World Declaration on Education for All adopted in Jomtien, and laid down that:

"All children, young people and adults have the human right to benefit from an education that will meet their basic learning needs in the best and fullest sense of the term, an education that includes learning to know, to do, to live together and to be. It is an education geared to tapping each individual's talents and potential, and developing learners' personalities, so that they can improve their lives and transform their societies" (Dakar Framework for Action, 2000).

The Dakar 2000 Framework for Action committed to the "attainment" of six comprehensive goals. These included comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children, all children, particularly girls, children in difficult circumstances and those belonging to ethnic minorities, have access to and complete, free and compulsory primary education of good quality, to appropriate learning and life-skills programmes for youth and adults, improving adult literacy, continuing education for adults, removal of gender differences in primary and secondary education and to "improving all aspects of the quality of education and ensuring excellence of all so that recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills" (The Dakar Framework of Action 2000, p.8).

In September 2000, a Summit was held in the UN headquarters in New York City to discuss the role of the United Nations at the turn of the 21st century. At this time, the United Nations Millennium Declaration was adopted by the UN General Assembly. Of the six goals articulated in the World Education Forum in Dakar in 2000, two became part of the Millennium Development Goals (MDGs):

To ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling and that girls and boys will have equal access to all levels of education (UN Millennium Declaration 2000 p.5).

In September 2015, the UN General Assembly announced the declaration of the post-2015 development agenda. The document titled "Transforming our world: the 2030 Agenda for Sustainable Development" is commonly referred to as the Sustainable Development Goals (SDGs). Building on what was achieved and what was not achieved as part of the MDGs, 17 Sustainable Development Goals were laid out that were to be achieved in the next fifteen years. The statement recognised that "targets are defined as aspirational and global, with each Government setting its own national targets guided by the global level of ambition, but taking into account national circumstances. Each Government will also decide how these aspirational and global targets should be incorporated into national planning processes, policies and strategies"[1] (p.13).

There are several indicators for the Goal on education (Goal 4), which specify what countries across the world should aim to achieve. The overall goal speaks about ensuring "inclusive and equitable quality education" and promoting "lifelong learning opportunities for all". But more precisely under Goal 4.1, the document states that "by 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education, leading to relevant and effective learning outcomes." Even more concretely, Goal 4.1.1 states that the "proportion of children and young people (a) in grades 2/3; (b) at the end of primary; and (c) at the end of lower secondary achieving at least a minimum proficiency level in (i) reading and (ii) mathematics, by sex"[2](p.8).

A quick review of global guidelines suggests that access to education and quality of education have both been mentioned in documents over the last two-three decades. However, to date, the most concrete and measurable indicators for children's learning have been outlined in the SDG documents in the last five years.

1 A/RES/70/1 Transforming Our World: the 2030 Agenda for Sustainable Development

2 A/RES/71/313 Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development – Goals and Targets

National Policy Pronouncements

In India, the national policy documents also mentioned the twin issues of quantity and quality in education in a variety of ways in the last two-three decades. The quality of education has been a recurring theme through most policy documents in the history of independent India. The 1986 National Policy on Education referred to "(i) universal enrolment and universal retention of children up to 14 years of age, and (ii) a substantial improvement in the quality of education"[3]

"The measures proposed to improvement in quality of elementary education include reform of the content and process of education, improvement in school buildings and other facilities, provision of additional teachers and the comprehensive programme of teacher education. Minimum levels of learning are to be laid down for each stage, which would naturally include laying down such norms for the primary and upper primary stages" (NPE 1986 p.15).

The 1986 document's explicit mention of minimum levels of learning (MLL) led to the formation of a Committee which laid out "what children should have learnt by the end of every stage of education." The MLL document outlines three major concerns that led to the formulation of the framework. First, it was hoped that "well-defined levels of learning is expected to introduce a sense of direction and a greater element of accountability in the system." Second, it was "expected that MLL will provide an effective tool for programme formulation for school improvement." Third, "that all children … reach a minimum level of learning before they finish primary education" (MLL document; Section 2).

Through the 1990s, the government's District Primary Education Programme (DPEP) worked on the dual goals of ensuring provision and improving quality of delivery. The focus on the "quality" side was on curriculum reform, teacher training and motivation, developing academic support mechanisms. Attention was also paid to non-formal and alternative schooling modes. Sarva Shiksha Abhiyan (SSA) was launched in 2000 with a clear aim to universalise elementary education across the country. While "quality elementary education" is mentioned as one of the objectives. Much of the thrust of SSA was to ensure that every child is in school. A decade later in 2010, the Right to Education Act became a law,

3 https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/npe.pdf

which guaranteed the right of children to free and compulsory education till completion of elementary education in a neighbourhood school. The RTE Act laid down the conditions that every school must have in order to function, including the rights and responsibilities at different levels.

The latest policy development in India's educational history is the 2020 National Educational Policy (NEP), which was launched in July 2020. While the policy covers many aspects of education from primary to secondary and tertiary levels, one of the most significant recommendations are for primary years. The policy document recognises the widespread nature of the learning crisis and states that:

Attaining foundational literacy and numeracy for all children will thus become an urgent national mission, with immediate measures to be taken on many fronts and with clear goals that will be attained in the short term (including that every student will attain foundational literacy and numeracy by Grade 3). The highest priority of the education system will be to achieve universal foundational literacy and numeracy in primary school by 2025. The rest of this Policy will become relevant for our students only if this most basic learning requirement (i.e., reading, writing, and arithmetic at the foundational level) is first achieved" (National Education Policy 2020 document; Section 2.2. Page 8).

Like the international recommendations and guidelines, a brief overview of India's policy documents also indicates that decision-makers and planners have juggled with the twin tasks of tackling provision on immense scale along with concerns of how to improve quality. As access issues have increasingly been solved, perhaps more attention has been focussed not only on the broad landscape of quality, but also more specifically on outcomes of education like children's learning. At least as far as primary schooling and children's learning is concerned, the NEP provides the most urgent call to action.

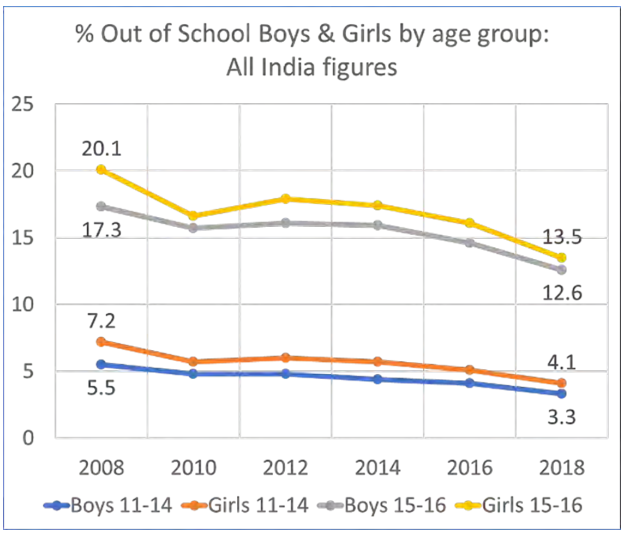
Section II

Is Every Child in School? Tracking Progress Towards the Objective of Universal School Enrollment

For a country as large and diverse as India, it is indeed impressive to see how in the last two-three decades, the provision of schooling has expanded across the country. By the time the Right to Education Act became a law in 2010, elementary school enrollment levels were already well above 90 per cent in most states (ASER reports). Out of school figures for girls in the adolescent age group, especially in states like Bihar and Rajasthan, were still high in the period 2005-2006. However, by 2010, the proportion of girls (age 11 to 14) not enrolled in school dropped substantially and by 2018, not only were these numbers low, but in many cases not very different from similar numbers for their male counterparts.

Graph 1: Out of school children – boys and girls by age ASER 2008-2018

What is even more striking and lesser known is the fact that increasingly children are staying on in school till the end of elementary education. Based on the 2011 Census, there are roughly 25 million people in each age group in India. This means that there are 25 million six year olds, 25 million seven year olds and so on. According to official figures, in 2008, there were approximately 11 million students enrolled in Grade 8. In recent years, 2017 or so, this number is close to 22 million. These numbers indicate that almost everyone, who enters school in Grade 1, is still enrolled in school eight years later in Grade 8.



With respect to out of school children, the last-mile problem still remains. There are scattered pockets where access to school, especially for upper primary grades, is a problem. There continue to be migrant populations for whose children schooling is discontinuous and difficult. It is often very hard to find solutions for children, who are homeless. It is also challenging to help children with special needs in a way that is appropriate and helpful as far as their education is concerned. Child labour is still rampant, especially in specific industries and in specific locations. Working children suffer a double disadvantage; they do not get the opportunity to get schooled, at the same time, often they acquire skills that are of a low level and without adequate mentoring or guidance. Solutions to the last-mile problem are often the toughest to devise and sustain.

Interestingly, in the 1990s, some of the most interesting work on innovative pedagogy and instructional practice came from efforts to bring out-of-school children to school. Under Government of India's efforts to promote "back to school" campaigns, "bridge courses" of different types and for different age groups were implemented. The Madhya Pradesh government was in the limelight with their large scale community based and demand driven Education Guarantee Programme. The EGS demand was primarily designed to provide access to primary schooling.[4] MV Foundation's residential bridge course model for rural and working children was perhaps the most famous model at the time. The Foundation evolved effective methods to enable children to pick up basic skills in a short period of time. Central government's own efforts included the "Janshala" programme, which enabled multi-year mainstreaming programmes often in partnership with other organisations.[5]

As a senior government official (who was part of the Central Government's Ministry for Human Resource Development in the late 1990s) recounts,

Two documents published at that time, 'Every Child Learns (DPEP, 1999) and the EGS & AIE Guidelines became important resource material for states. EGS & AIE also included funding norms for back to school campaigns (apart from other interventions for out-of-school children). Early on in SSA, guidelines for seasonal migration were developed as an addendum for EGS & AIE

4 https://www.epw.in/engage/discussion/was-education-guarantee-scheme-madhya-pradesh

5 Pratham partnered with the Janshala programmes in two urban areas – Lucknow and Jaipur in the early 2000s. The mainstreaming work included initial work in the community and then later in school and was part of the state government's effort to universalise primary education.

and formalised as a part of the SSA black document (with some support from AIF). These included seasonal hostels etc., but also support for children who came back to the source village school following migration. The focus initially was on residential and non-residential bridge courses (RBC and NRBC) for children, who came back to school before/during their attendance in school (Jhingran 2021; Personal communication with author).

Interestingly, the same senior government official pointed out, it was through the experiments that were being done in the "mainstreaming" programmes that it became obvious that "the same kind of learning deficits exist in children who are enrolled, but have been irregular or not learning for other reasons. We got bridging accelerated learning programmes approved under EGS & AIE for in-school children also." (Jhingran 2021; personal communication).

Is Every Child Learning? Tracing Progress Towards the Objective of Quality Education for All

"Quality" means different things to different people. For some, even infrastructure is an important component of quality. For others, the educational qualification of teachers and the exposure they have had to good training is an important contributor to quality. For yet others, it is the nature of the teaching-learning activities in the classroom, which provides the biggest signal of "quality".

Over time, policymakers and practitioners have moved from a broad based appreciation of what "quality" means towards sharper attention on children's learning outcome. The government began national achievement surveys in 2001. These school based, pen and paper measurements of children's learning levels have been done repeatedly with a space of a few years in the last two decades. States also conduct their own versions of the state level achievement surveys. Further, there are stand-alone research studies as well as studies that have repeatedly explored the question of learning outcomes.

For the purposes of illustration in this section, most of the data cited will be from ASER (the Annual Status of Education Report 2005-2018). Three facts about student learning outcomes stand out for India. First, basic learning levels are worryingly low and remain persistently low. Data from every ASER report from 2005 to 2018 points to this fact. About half of all

children enrolled in Grade 5 in 2005 could not fluently read a short text in a language of their choice. This number has hardly changed much in twelve years (as seen in ASER 2018 data).[6]

Second, for a few years, after the Right to Education Act became law, a decline in learning levels became visible over time.[7] Apart from the ASER data and estimates from the government's national achievement survey, the "Young Lives" study, which is perhaps the longest run longitudinal study in India, also showed this drop in learning levels in the years before the pandemic.[8]

Third, existing data shows that children's learning trajectories, over time, is flat.

Overall, while the movement to ensure "every child in school" has been strong and the action on the ground relevant to the conversation has been effective, the impetus for "every child learning well" has been weaker.

Section III

Where are we now? Opportunities and challenges that lie ahead

After a long period of almost two years, schools began to open and stayed open in India from January 2022 onwards. Different states opened government schools at different points of time from January to April 2022. The current school year, 2022-23, has some unique features. Children in Grade 1 have probably had no pre-school exposure. Most children in Grade 2 also did not have much exposure to early childhood education, and went into Grade 2 after a few months, if they were in Grade 1. Similarly, those in Grade 3 had a few months of schooling for Grade 2 before transitioning to Grade 3. Thanks to the disruptions and school closures during the pandemic, all grades, who are in school today, are like no others before them. It is important to remember that the status of basic learning was not at all satisfactory even in pre-Covid times, now that situation has, in all likelihood, become worse.

6 See estimates from other studies: Data & analysis from PISA: Pritchett article in https://ajayshahblog.blogspot.in/2012/01/first-pisa-results-for-india-end-of.html. Also see, Education Initiatives study of elite schools in metros: https://www.ei-india.com/wp-content/uploads/2017/03/India-Today-printable-November-27-2006-Whats-Wrong-With-Our-Teaching.pdf

7 *Ibid*

8 See http://www.younglives.org.uk/sites/www.younglives.org.uk/files/INDIA-UAP-Education%26Learning-Factsheet.pdf

The ASER field survey was conducted in three states in 2021. Estimates from these exercises indicate that learning losses were substantial (*see* Table X).

Table: Percentage of Children in Std. III enrolled in government schools who can read a Std. II level text. **ASER 2014, 2016, 2018, 2021**

Year	Karnataka	Chhattisgarh	West Bengal
2014	16.4	15.4	32.9
2016	19.0	22.2	34.0
2018	19.4	25.0	36.6
2021	9.8	9.4	27.7

The current moment in India's history is also a time of immense promise.

The strengthening of quality education begins at the primary level. Like with any construction project, without a strong base, it is difficult, if not impossible, to construct a durable, high rise building. In terms of a child's growth and development, a strong foundation built in early years are of paramount importance. One of the key features of our current system is that a majority of children get "left behind" even before the child reaches Grade 3. If we believe that India needs to provide quality education for all children, then it is the early years in the schooling system that need strengthening and need to get high priority.

The policy thrust on achieving foundational literacy and numeracy can be seen in terms of two major goals that need to be translated into practice: the first relates to how young children can make a strong start in the formal schooling system. In other words, it entails helping children "leap forward". The second goal is concerned with helping children, who have already spent several years in school and not as yet acquired foundational skills. This goal can be termed "catch up". Although the NEP 2020 document is more explicit about the first goal, it can be argued that achieving foundational literacy and numeracy for all children is implicit in the overarching statements about the importance of foundational learning in the policy document.

Understanding "Leap Forward": What Do We Need to do Next to Guarantee Quality Education?

With regard to major thrusts for improving primary schooling for the youngest children, there are a number of important elements in the National Education Policy 2020 document that need to be highlighted. First, it recognises the importance of early childhood education and its role in enabling building a strong base for learning. Second, it acknowledges that a child's foundation for learning needs to be built on a breadth of skills. Further, it accepts that the education system needs to be seen as a set of "stages" rather than a linear progression through grades. NEP 2020 envisages a "foundation stage" that spans the age group three to eight that should be seen as a continuum. Finally, the document also prioritises the achievement of basic learning goals (foundational literacy and numeracy) in a time bound manner.

Each of these elements outlined above addresses a major weakness in the education system today. The policy recommendations provided for the "early years" in school points towards a possible direction and a coherent solution for tackling the "learning crisis" in a meaningful way. It is worth spending some time laying out, both the opportunities and the challenges that lie ahead in implementing the policy in the true sense in which it has been stated.

While the importance of early childhood education is well known, until NEP 2020, it was usually left out of the mandate of the formal education system. The RTE Act focussed on the age group 6 to 14; the mandate of compulsory and free education did not cover children under the age of six. By bringing the importance of the foundational stage, age range three to eight years, into sharp focus, the policy document intends that the continuum of provision and access, curriculum and instructional practices will be translated from policy into practice so that children's pathways can seamlessly move from the foundation stage to the next stage in the elementary school system.

Interestingly, the data on enrollment for the age group three to eight shows interesting variations by age group and state. If the figures from ASER 2018 are analysed, we find that there are a number of options for children, especially in the age group three to six. These options include enrolling in an *Anganwadi* (government run early childhood development

programme that is part of the Integrated Child Development Scheme of the Ministry of Women and Child), attending a private pre-primary facility (which can be part of a primary school or a stand alone centre), attending a pre-primary class in government schools (in recent years, several state governments have included pre-primary grades as part of their school systems, for example, Himachal Pradesh, Punjab and Delhi), or even Grade I in a regular school.

Table: Percentage of Children enrolled in different types of pre-school & school: ASER 2018 – India

Age	*Angan-wadi*	Govt. LKG /UKG	Pvt. LKG/ UKG	Govt. School	Pvt. School	Not attending anywhere	Total
	%	%	%	%	%	%	%
3	57.1	1	10	2	1	28.8	100
4	50.5	2.1	23.4	5.3	3	15.6	100
5	28.1	2.8	27.5	23.3	9.8	8.1	100
6	7.6	1.9	16.4	49.5	20.7	3.3	100
7	1.8	0.8	7.3	59.1	28.7	1.8	100
8	0.7	0.4	3.3	62.6	30.8	1.5	100

Enrollment patterns across these different options vary across states depending on the availability of the pre-schooling services in each location. The state-wise variations are significant as indicated through the examples cited below.

ODISHA: ASER 2018

Age	AW	Pvt. LKG/ UKG	Govt. School	Pvt. School	Not enrolled	Total
3	90.3	3.1	0.1	0	6.3	100
4	87.3	10.3	0.1	0	1.1	100
5	52.8	11.8	27.2	6.8	0.9	100

ODISHA: ASER 2018						
6	7.9	4.4	71.5	14.6	1.3	100
7	0.7	1.2	81.1	16.2	0.7	100
8	0.2	0.4	84.7	14	0.6	100

UP						
Age	AW	Pvt. LKG/ UKG	Govt. School	Pvt. School	Not enrolled	Total
3	19.2	12.5	1.9	1.2	64.7	100
4	19.2	26.4	6.5	4.1	42.3	100
5	11.1	32.2	24.3	12.8	18	100
6	3.3	24.2	39.4	25.3	6.4	100
7	1	13.4	44.6	35.9	3.6	100
8	0.4	5.3	45.5	44.8	2.3	100

Context specific planning for pre-primary provision: State by state decision-makers need to analyse and plan their early years strategy. In some states, where *Anganwadi* enrollment is high and has been stable for a number of years, the government needs to strengthen the early childhood education component in the daily functioning of the *Anganwadi*. In other states, where there still are children who are not enrolled in *Anganwadi* at the age of three or four, this needs to be ensured first. Once all children are in *Anganwadi*, then moving into formal school at the right time can be ensured.

There are also some states like Himachal Pradesh or Punjab, where children enroll in private schools from age three or four. Many private schools start with lower and upper KG classes and provide schooling all the way up to Std. 10 or 12. This means that once a child is enrolled in a school like this, there is no need to change schools till the end of the child's schooling career. In contrast, in many government school systems, children study from Std. 1 to 5 in one school, then move to an upper primary school which has classes for Std. 6 to 8 and then to yet another school, which provides secondary and higher secondary education. If affordable and accessible, many parents prefer to enroll their children into the pre-primary classes in private

schools. But for parents, who cannot afford private pre-schooling, their options are limited to government schools, where the first class into which young children can be enrolled is Standard. 1. In these situations, creating a new layer of pre-school classes in the government primary school system makes good strategic and practical sense. Indeed, data from recent years from Himachal and Punjab (where pre-primary classes have been introduced since 2017-18) shows that there has been an influx of children into the government schools via the pre-primary sections.

Collaboration across Ministries: In India, different Ministries are responsible for children of different age groups. While the formal school system has been responsible for the provision of education from age six upwards, the Ministry of Women and Child Welfare is responsible for children from when they are born till they are six years of age. Through the *Anganwadis* (or Integrated Child Development Scheme (ICDS) centres) the government provides health, immunisation, nutrition services and also early childhood development outreach. In many cases, the other responsibilities of the *Anganwadi* worker take up most of her time; the early childhood education part of her duties get lower priority.

To successfully translate the foundational stage part of the National Education Policy into practice will require close collaboration of the two Ministries to ensure achievement of the common goal of foundational learning. This will need to be done at all levels from the local level, to district, state and centre. Both Ministries have resources and manpower that can be converged for this purpose.

Continuum of curriculum and breadth of skills: As outlined earlier, the NEP 2020 policy refers to the age three to eight as the foundational stage. The assumption is that both access or provision as well as curriculum and instructional practice should be seen as a continuum. In the last year, several documents from the Education Ministry, such as the Nipun Bharat guidelines or the Bal Vatika and Vidya Pravesh (NCERT, 2021, 2022) booklets show that education at this stage is being seen in a continuous way.[9] The recent release of the curriculum framework of the foundational stage is a very crucial signal for highlighting the crucial importance of this stage for future development of the child and of the country.

9 https://ncert.nic.in/ComicFlipBookEnglish/nipunbharat/mobile/index.html and also see https://ncert.nic.in/pdf/VidyaPravesh_Guidelines_GradeI.pdf

Apart from being visualised as a continuum, there is also a strong effort to ensure that it is not only literacy and numeracy that is of vital importance, but a "breadth of skills" including cognitive, socio-emotional and physical activities that need to be a part of the child's daily life in school.

In *Anganwadis*, the current activity framework includes all five domains of holistic development. It is true that the implementation of holistic activities needs to be strengthened a great deal. In contrast, by the time the child reaches Std. I, the entire focus of teaching-learning is on academic skills, particularly on language and maths. In fact, studies have found that the private pre-schools also tend to have a predominantly literacy and numeracy focussed daily schedules (IECEI study, 2017). Over time there is clear evidence of "schoolification" of the pre-primary stage. Instead, what the National Education Policy is pointing to is the need for "pre-schoolification" of the early grades in primary school.

The operationalisation of these tenets – "continuum" and "breadth of skills" approach, will depend crucially on how as a country we are able to change teacher training practices in government and private teacher training institutions. Further, how to change parental perceptions about what is important in the early stages of a child's development is also going to be crucial.

Availability and Selection of Teachers for Early Grades

If the process of "leap forward" in the "foundation stage" has to be effective and durable, then appropriately prepared manpower needs to be in place throughout the continuum. Even if the differential payment between *Anganwadi* workers and school teachers is put aside for the moment, usually *Anganwadi* workers do not receive sufficient training or on-going and on-site support for the early childhood education part of their work. Similarly, in schools, care has to be taken that if there is a pre-primary grade built as part of the school system, it should be manned by satisfactorily oriented and trained staff to ensure that children acquire the strong foundations of learning that the country is aspiring for. Past history from states like Assam ("*ka shreni*" intervention) and Bihar ("*baalvarg*" initiative) show that although provision for pre-primary grades was made in the school, the class could be manned by specially appointed or prepared teachers.

In schools, especially government schools, the junior most teacher is usually given the task of handling Std. 1, which is considered to be a difficult job. Transitioning into a formal structure is often difficult for young children, who are leaving home and family for the first time. Getting them oriented to school and then being able to teach according to the curriculum are daunting tasks. In order to implement the key elements of the new curriculum framework for the foundational stage, we will need a different kind of teacher preparation and stronger on-site and ongoing support mechanisms. Specially trained teachers, who are responsible for working with children in the three to eight age category, will be the need of the day.

It is possible that state governments use the post- Covid, NEP 2020 implementation as an opportunity to move away from "business as usual" and structure the delivery of the foundational stage education in a new and child-oriented way. For example, Andhra Pradesh is proposing to start what they are calling "foundational" schools, which will have pre-primary classes as well as Grade 1 and 2 in the same building and move Grades 3 and above to be attached to the middle school.

Unpacking "Catch-Up": What Do We Need to Do Next to Ensure Basic Skills also for Older Children?

Across the country, most of the recent attention on NEP 2000-FLN has been on different facets of how to implement NIPUN Bharat on the ground. While these energetic moves are very welcome, the other grades in primary school (and in upper primary school) also need attention. It is well known that the "learning crisis" was deep even before Covid. Available data, whether from the ASER reports or NAS (National Achievement Surveys) suggest that basic skills are weak across the board. "Learning loss" has been reported by several studies during the long period of school closure, which suggest that for each grade, the current situation is likely to be worse than in previous grades in previous years.

Concerted efforts need to be made to help children in Grades 3 to 5 and also those in the middle school to "catch up". In 2021, many states attempted to do this by "lightening the load" of the curriculum (like shortening the syllabus, skipping topics, deleting chapters) or by revising content from the previous grade. Efforts were also made to make examinations easier. The fact is that, even before Covid, across the country, roughly half of all children in Grade 5

could still not read Grade II level text with fluency, confidence or comprehension (ASER, 2018 report). This indicates that children were not one grade level, but several grade levels behind. While there may be many reasons for why over time, India has been such a chronic and deep learning deficit, this situation is a negative consequence of an "overambitious curriculum" (Beatty & Pritchett, 2012). A critical piece of ensuring foundational literacy-numeracy for all children at least in primary school stage will be the priority that state governments give to this "catch up" and the capability that they can build within their systems to ensure that this happens year on year for the next few years till no child is left behind.

There are models and approaches that have been tried in India for "catch up" that have shown substantial and significant learning gains. One of them has been "teaching-at-the-right-level" (TaRL), an indigenous innovation that has been evolved by Pratham.[10] This approach has been used in many states in India and now is increasingly being contextualised and used in countries of sub-Saharan Africa, North Africa and in other parts of Asia.

Recent examples of implementation in India include Odu Karnataka (in the early months of 2021), Teaching-at-the-Right-Level that is currently being implemented in Andhra Pradesh and a very successful initiative called Mission Buniyaad in Delhi government schools, which used the TaRL methodology to help children in upper primary grades to "catch up". More such initiatives are urgently needed on scale to enable a durable and widespread "catch up" to be completed across the country.

Concluding Thoughts

Over the years, discourse and discussion about the framework and constituent elements supporting improvement in learning outcomes has evolved. However, for actual change to occur, thoughts and ideas have to be translated into interventions for action and into effective practice. It is not incremental changes that are needed, but big shifts in minds, hands and hearts. "Quality education" at the base of the pyramid is essential if India has to achieve national or international goals in this decade.

10 https://www.pratham.org/about/teaching-at-the-right-level/

Situational Analysis of Tribals and their Rights in India

Subhram Rajkhowa*

Abstract

Tribals constitute one of the most marginalised sections of the Indian society. Considered to be the aboriginals of India, they share similar traits with people identified as indigenous in different parts of the world. Their historical roots and unique lifestyles based on their rich cultural heritage, at times, remain unrecognised and are even subjected to ridicule despite their immense contributions to India's traditional and ethnic legacy. Several of them suffer hardships, and even their identities are often at stake.

The present article discusses their plight in the light of the historical past and analyses the role of the state and society in providing an enabling and effective legal regime for them to flourish. In doing so, the constitutional and legal aspects have been analysed with the purpose of identifying the existing lacunae either in the law or in its implementation. The article, in particular, stresses upon the fifth and sixth Schedule of the Indian Constitution. It reasons that the vast majority of tribal population in four states of the North East have unique cultural traditions, land rights and rich customs which, in fact, comprise a tapestry of civilisation. Further, the article also analyses the plight of forest dwelling tribals, and those displaced because of development activities in the country.

Additionally, a couple of important judgements of relevance that highlight the need of adequate recognition of their rights with regard to natural resources, traditional knowledge systems apart from adhering to the recognised right of free and informed consent have also been addressed.

Keywords: Tribals, indigenous people, survival, constitutional rights, laws, traditional knowledge systems, judiciary

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1. Introduction

The population of India comprises people belonging to diverse ethnic groups and identities, some having their roots in ancient lineages, while others coming as new settlers from time to time. They are repositories of distinct cultures and ways of life, based on ancient traditional knowledge and customs, which are fundamentally linked to a specific territory.[1]

Being an ancient civilisation, India has witnessed many invasions, bringing along invaders, many of whom settled in its fertile lands. The deteriorating condition of the tribals, over the centuries, has been attributed to lack of recognition of their relationship with land and other natural resources and culture.[2] The original inhabitants of the country, the aboriginals, are known as tribals and are considered as a vulnerable population. Therefore, one finds that all people identified either as indigenous, aboriginals or tribals share common characteristics.

The 'indigenous people' in India are declared as 'Scheduled Tribes' by the Government of India under the Constitution. There are also Denotified Nomadic Tribes and others known for their antique cultural identity since times immemorial. They possess certain very unique traits, and wherever they reside, they practice them and contribute to enrich the heritage of food, medicines, arts, philosophy, bio-diversity conservation and environment management. They possess certain characteristics that extend to their life and modes of livelihood. They are considered to be the treasure trove of precious knowledge systems termed as traditional knowledge, being the bearers of valued traditions, customs and cultures.

2. Tribes and Tribals

In the context of Indian tribals, generally, the intermingling of people and cultures has led to the emergence of an ambiance of peace and development. However, when it partakes the character of invasion or intrusion into tribal territories, with new customs, cultures, religious faith and values along with rules and regulations, it often results in real threat to their mode of life and livelihood. This even extends to being a threat to their very existence due to hegemonistic policies apart from other consequences of colonisation. In the process,

1 Erica Dias, E/CN.4/sub.2/000/5/000 quoted in SUR Journal on Human Rights, 2006 No. 5 year 3, p 59.
2 *Ibid.*

the portents of racial and ethnic purity stands jeopardized in technocratic states.[3] Many minorities and indigenous and tribal people, thus, are subjugated for want of effective affirmative actions that have the propensity of resulting in the 'Tower of Babel' effect. Though legislations exist, lack of their effective implementation comes in the way of taking protective and ameliorative measures. Even within states, migration has often led to domination by outsiders. At times, the tribal people are forced to relocate, thereby threatening their identity and livelihoods. Hence, their existence has been of prime concern, given their relative backwardness and seclusion. They have different characteristics that extend to the realm of their political, economic, social and cultural attributes, marked by uniqueness of their traditions that differentiate them from the majority communities. Yet, regardless of the challenges, they have survived with a distinct identity despite constituting a minority. There are, however, a few exceptions where they comprise a majority.

The present study aims at exploring the status of tribal people in the situational context. Hence, it makes an attempt to look at their mode of livelihood in historical context, as they have been among the most threatened and exploited communities for centuries. The approach undertaken shall primarily centre around their legal and constitutional recognition through enabling legislations that facilitate their distinct identity while promoting their well-being. This should enable a proper understanding of the extent of effective implementation of the laws and policies of the state in translating the constitutional mandate of establishing an egalitarian society. To place matters in proper perspective, the laws and policies adopted through international instruments apart from the thrust placed by the Bretton Woods institutions have also been taken into consideration.

3. Tribals and Indigenous Peoples — The Nomenclature in Text and Context

Since the terminology used for those constituting the indigenous peoples vary from country to country, it is difficult to arrive at the exact estimates. The magnitude or gravity can be visualised from their numbers worldwide. At the maximum, they are estimated to total

3 Rudolfo Stavenhagen, "Building Intercultural citizenship: A Challenge for our times," in S. Rajkhowa and M. Chakraborty (eds.) Indigenous Peoples and Human Rights The Quest for Justice 2, R. Cambray and Company Pvt. Ltd, Kolkata, 2009

around 600 million in 2022.[4] Said to spread across 90 countries, from the Arctic to the South Pacific, comprising about five per cent of the world's population, they account for about 15 per cent of the people suffering from poverty.

Their diversity can be gauged from the fact that they speak about 7000 languages, professing more than 5000 cultures.[5] The above figures do not include the tribals from India as the official policy of the country does not use the terminology 'indigenous' to refer to them. This is despite India having voted for the UN Declaration on the Rights of Indigenous Peoples that was adopted on 13 September 2007. These people happen to be the most marginalised and dispossessed, hence they are perennially prejudiced and discriminated, which calls for effective acknowledgement of their rights.[6]

Tribals of India constitute about nine per cent of the population with over 700 recognised and notified[7] tribes with deep cultural imprints, who are heterogeneous in nature, with a mosaic of languages, at least spoken (maintaining oral tradition if not script),[8] though miniscule in numbers. The term 'tribal' denotes a group of people that includes families and clans with a common ancestry and culture, who normally reside in a shared or common geographical area and have a common dialect and, at times, practice a unique common religion. Bound together by kinship, usually traced through decent from common ancestors with common history, they live in common or clustered areas, and communicate through a common dialect, but are generally endogamous. They are also termed as Primitive Tribes or native marginalised people, Adivasis[9] or Janjati, Vanavashi, Girijan or hill or plains tribes, as identified during the Census of 1941.

The non-acculturised tribes are classified as Forest Dwellers, while the acculturised known as Ruralised tribals, Acculturised tribals and Assimilated tribals[10] normally possess distinct features, like nature of the physical region, communications in that region, language,

4 https://www.google.com/search?q=indigenous+peoples+in+2022&oq=indigenous+peoples+in+2022&aqs=chrome..69i57j0i22i30l9.13805j0j7&sourceid=chrome&ie=UTF-8 accessed on .10.202 at 7.53 pm

5 https://www.google.com/search?sxsrf=ALiCzsbFaJoRy8rbZFbU9t-HeWC6j-Wssg:1664806720071&q=How+many+indigenous+people+are+in+the+world%3F&sa=X&ved=2ahUKEwjCkK2poMT6AhWy9DgGHQJYB2EQzmd6BAgUEAU&biw=1366&bih=657&dpr=1 accessed on .10.2022 at 8 pm

6 S. James Ananya & Siegfried Wiessner quoting Lousie Arbour, former High Commissioner for Human Rights.

7 National Commission for Scheduled Tribes as on 16.9.2022

8 Kaushik Deka, "A status report on India's tribals | Key indices," India Today, 8 August 2022

9 Dr. Ambedkar opined in the Adivasi Constituent Assembly that Adivasi is a general term without de jure connotations in contrast to Scheduled Tribe, which has a fixed meaning as it enumerated tribes.

10 H.B. Mehta, "Historical Background of Tribal Population," IJWs online, Sir Dorabji Tata Memorial Library, 237

economic life, religion, social organisation and type of marriage and family life, cultural pattern of the group, its traditions and modes of living.[11] The term Adivasi implies or can be said to be associated with a heterogeneous set of people identified through ethnicity or certain similarities, who belong to aboriginal population, though they possess certain core values akin to the main culture. The Adivasis are considered to belong to Australoid and Negrito groups that reside mainly in the central belt of India, while those from the North East trace their ancestry to people of Mongoloid origin. There is substantial concentration of tribal population in South India as well. They are bound together by the bond of kinship and personality and follow a traditional lifestyle in stark contrast to others, who are identified through heredity; hence, the significance of the term, 'tribe' which has conceptual variations. The concept was initially identified by scholars through traits of universality, applicability and validity, though with varied meanings based on historical contexts or structures (Leach, 1954), and determined by the stages of evolution characterised on the basis of the tribes being recognised as classical, mediaeval or modern or through community of people, namely 'Janah' in Vedic and Sanskrit (Choudhury, 1977; 6-12). Gradually, it came to be associated with social formations. A keen observer often identifies the term through anthropological, sociological or ethnographic lineage including cross-cultural purposes.

In present day parlance, the legal resources depend on Census data concerned with the identified tribal communities. Initially, in the first Census of 1891, all groups were identified as 'Forest Tribes'. Subsequent Census of 1901 used the term 'Animist' followed by 'Animist Tribals' in 1911, and later as 'Hills and Forest Tribes' in 1931. However, the Government of India Act, 1935, introduced the term 'Backward Tribes'. Of late, anthropologists have identified them as 'indigenous people'. Despite the distinction in terminology, the affinity can be gauged through the identified characteristics.

Being victims of prejudices, tribal people face various problems, at times, due to development and modernisation initiatives. They may not be averse to some changes, but not primarily at the cost of their ancient rights, collective existence and cultural and spiritual practices, which they assert and hold very dear. They also feel threatened of being robbed of their legitimate wealth and cultural patrimony.[12]

11 *Ibid*

12 *supra* n 1, Subhram Rajkhowa, "Declaration on Indigenous Peoples: Result of a Long Drawn Struggle," 39

Globally, the aboriginal people or those tracing their ancestry through being rooted to the soil since early days are identified as indigenous people. Yet, in modern parlance, it can be traced to the setting up of the Committee of Experts on National Labour, just prior to the adoption of the ILO Convention No. 50 through the International Labour Organisation's initiative in the year 1921. This initiative can be considered as a precursor to the debate on indigenous people, centering on their human rights, and on their subjugation and destabilisation.[13] Related and subsequent developments will be traced in the course of the present work, being of much relevance to the study of the tribal population in India. Yet, it is considered apposite to address the terminology as put forth by individual scholars, experts and organisations at the international and regional levels.

There has been much deliberations, considering the threat to their existence emerging from their struggle at maintaining their identity and cultural heritage, partly attributed to friction and misunderstanding due to demographic changes. This has put to peril the rights of the original settlers, and of their sense of belonging; thus, subjecting them to alienation.

3.1 Description of Indigenous People

The characteristic traits that they are identified with and the constitutional status conferred upon them will be alluded[14] to in detail in the following pages.

Though the term eludes a uniformly acceptable definition, as in the case of the tribal people, the indigenous people, too, are recognised through certain geographical areas having historical roots. Hence, they are considered to possess certain identified characteristics as evident from the definition of the United Nations Working Group on Indigenous People, which is as follows:

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13 ...their access to justice, conflict resolution displacement and issues pertaining to cultural expressions, customary rights and intellectual property rights.

14 FICN.41 Sub.211983121 Adds. Para 379

Characteristics of Tribal Community:

- Common Territory
- Collection of Families
- Common Name
- Common Language
- Common Ancestor

Indigenous population are composed of the existing descendants of the people who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcome them, by conquest settlement or other means, reduced them to a non-dominant or colonial condition: who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure, which incorporates mainly national, social and cultural characteristics of other segments of the population, which are predominant.

The aforementioned definition[15] reflects the continuity and connection with their ancestors in relation to customs and traditions incorporating the following:

(a) They are the descendants of groups, which were in the territory at the time when other groups of different cultures or ethnic origin arrived there;

(b) Precisely because of their isolation from other segments of the country's population, they have almost preserved intact the customs and traditions of their ancestors, which are similar to those characterised as indigenous;

(c) They are, even if only formally placed, under a state structure which incorporated national, social and cultural characteristics alien to their own.

The above traits came to be reconsidered in the year 1986 by the Working Group to include individuals, provided the said person was accepted by the group or the community as one of its members.[16] It was followed by the International Labour Organisation's Convention No. 169 pertaining to the indigenous people in 1989. Prior thereto, mention about the indigenous people finds place in ILO Convention No. 107 as well. Its[17] significance lay in its extension to the tribal people. It provided that the tribal people whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is relegated wholly or partially by their own customs or traditions or by Special Laws or regulations, and to people who are regarded as indigenous on account of their decent

15 *Ibid*

16 E/CN. 4/Sub.2/1986/7/Add, p 82

17 ILO Convention No. 169

from the population, which inhabited the country at the time of conquest or colonisation.[18] The World Bank came to consider these people through a criteria by way of an operational directive[19] through the following five identified characteristics:

(a) Close attachment to ancestral territories and to the natural resources in these areas;
(b) Self-determination and identification of others as members of a distinct cultural group;
(c) An indigenous language, often different from the national language;
(d) Presence of customary social and political institutions; and
(e) Primary subsistence oriented production.

This highlights the economic criteria in terms of subsistence level production in addition to the political, besides the identifying criteria of language apart from tradition, knowledge and culture in terms of land and natural resources for their as well as their progeny's benefit. Yet, one has to recognise that the conceptual development pertaining to the indigenous needs to be furthered through capacity building by in situ visits.

A comparison of the distinguishing features or characteristics between the tribals and indigenous people leads one to conclude that the identifying features are very much akin. Therefore, the said perception, more so in relation to ILO Convention No. 169 gains ground that despite the differences in terminology, they have unique traits. Hence, if in future, any harsh law at the international or regional level is adopted, the country should not have much difficulty in ratifying or acceding thereto. The basic premise of these two sets lie in highlighting the need for their protection and recognising the same through a legal regime. In particular, emphasis has to be laid on effective implementation of human rights based instruments that focus upon extending equality and non-discriminatory provisions recognised therein so as to translate the concept of inherent dignity into reality. In particular, the significance of protecting the cultures as well as cultural diversities along with that of lands and natural resources has to be translated into reality in letter and spirit. Both the declaration and the legal provisions in India that sets the minimum standards has to be

18 *supra*, n. 6, p 41
19 4.12.1991

honoured as a pre-condition for meaningful realisation of such standard settings, ensuring their survival while protecting their distinct identity in an environment that facilitates their well-being. Of course, the country has constitutional provisions and some legislation. If need be, certain amendments towards reshaping them besides adoption of policies and programmes should enable the tribal people meet and safeguard their identity, culture, language, among others. It is essential to consider their recognised rights as basic human rights and ensure their effective implementation.

The above discussion fairly reflects the need to ensure that the past historical injustices perpetrated upon them that constituted a hindrance to their development needs to be removed on the basis of principles of justice and rights facilitating their harmonious existence and to combat their marginalisation and discrimination through building of just and positive relations by the state.

4. Historical Developments

Towards ensuring the rights of the tribal people an onerous duty is cast upon the state to adopt effective measures to facilitate the traditional cultures and customs that are in consonance with their belief systems. This has to be done by recognising their right to self-determination, lands, territory and resources among others. Such measures should enable the protection of their identity besides alleviating past injustices.

It is well established that tribal influence was very much marked in the early period of Indian history, and it continued thereafter during the successive invasions of the country. However, historical evidence of the early period is found to be wanting including occupation of lands during the early period, though accounts of the Aryans being confronted by tribes like the Chandals, Mahars, Nishadas are ascribed by Sarat Chandra Roy. The major tribes that exist today are considered to be offshoots of the earlier concentrated tribal groups. A case in point happens to be the Soligaru and Jenu Kuruba tribes in Karnataka apart from others identified as Primitive Tribal Groups. In the North East, mention may be made of several tribes with rich traditions and practices. Apart from those already mentioned, the Mishimis of Arunachal Pradesh and the Hmars of Manipur reflect the special relation with regard to their land holding systems.

The advent of Muslim rule saw the coming together of different hill tribes, but they were not much affected as they continued to live independently. They continued to remain so even with the advent of the East India Company. Initially, they remained under the crown who engaged a skeletal administration mainly responsible for tribal and forest areas.[20] However, the development of commercial interests, exploitation of forests and the policy of permanent settlement led to conflicts with the tribal people, which became evident during the Sepoy Mutiny. Independent tribal kingdoms like those of the Nagas could not be subdued by the colonial masters. Yet, in other areas, the system of absentee landlords in tribal areas either led them to shift to agriculture through jhum and shifting cultivation or resulted in their migration.[21] Others like the Todas in the Nilgiris in South India led a pastoral livelihood. They, however, were occupied with religious and cultural activities, their unique traits, besides magic and witchcraft.

Undoubtedly, the tribals are very much rooted to the natural environment and traditional knowledge systems. Animism and worship of nature are very much in evidence, being considered among the primary motivating factors. The standard of life, in particular, has been a matter of concern that has led many to destitution. Similar concerns emerge with respect to formal education. These have been alluded to by way of passing reference for a proper appreciation of their distinct way of life.

Being close knit societies, they followed a distinct system of administration. Simple in itself, different tribes possess attributes of administration.[22] In certain cases, they have a system similar to an Assembly as in the case of the Kebangs among the Mishings. The Khasis under the autonomous Syiemships too held their Durbars and unique system of administration of justice, primarily based upon their culture and customs. A kaleidoscopic pattern of such societies is beyond the scope of the present article. In so far as administration of justice is concerned, in most cases, they believe in conciliation rather than retributive mechanisms to settle scores. Yet certain tribes were considered to possess different characteristics, like being somewhat aggressive. Of course, natural resources extending to salt wells among some

20 In the initial stages, they continued to be self-governed.

21 *supra* n, 10

22 Raj dorbar or hima dorbar and dorbar chnong functioned effectively.

Naga tribes[23] led to resistance and occasional raids by the Nocte Nagas on the Ahom kings, despite being claimed by the Ahom kings as their subjects.[24] Some such tribal formations having influences of the Indo-Aryan and Indo-mongoloid tribes led to crystallisation of rudimentary state formations. This indicates that tribal polity, such as Dimasas , Tripuri[25] and Meities,[26] Khasis, Jaintias, Mishings, Bodos and Garos, to mention a few, had Tribal Chieftains and Kingdoms governed by their customs during pre-colonial times. Such tribes could not reach statehood during those times, that is their pristine stage.[27] However, due to migration in most cases, the new settlers came to exert their influence on certain aspects. Yet it has been documented that the local Naga Chieftains were also provided military support by the kings to resolve inter-tribal conflicts. There is a belief and perception of some tribes from the North East being headhunters, which has unnecessarily cast a shadow on them.

4.1 Impact during Transition

Subsequently, the transition of power during the British Raj from the Mughals in relation to Assam has a unique history, as it was based on the concept of excluded area in relation to the tribal people. The alienation of the tribals due to varied factors led the colonial masters to adopt certain measures. Coupled therewith, the line system came to be introduced due to ominous indications of conflict between tribals and the new settlers.[28]

Some were termed 'Criminal Tribes' for their inability to adjust to a law and order society. Towards this end, Regulation XII of 1793, was enforced followed by the Criminal Tribes Act, 1871 (now repealed) and thereafter the enactments of 1897, 1911 and 1924, which mainly were meant to address aspects involving non-tribal population with predatory habits.

23 They still act in certain unique ways through customs and cultural formations.
24 B. Samah, B. Dutta (ed.) History of Judiciary in Assam, Law, Law Courts and Lawyers, 42
25 Resided in Hill Tipperah
26 Divided into six administrative units known as Panna
27 *supra* n 21, Amalendu Guha, quoted in 49
28 *supra* n 21 ,137

5. The Context of North East India Prior to Independence

The plight of the tribal people in India at the time of Independence happened to be quite deplorable. Hence, the founding fathers laid special emphasis on providing them with constitutional rights. This was followed up with certain statutory measures backed up by policies and programmes. Elaborate provisions were adopted in the core document to provide for their promotion and protection so that they could equally partake in the process of development of the nation without any feeling of alienation, following unregulated encroachment resulting in disappearance of many tribal villages.[29] Protecting the interests of the indigenous and tribal people through special measures was called for to protect them from extinction, since they were unable to protect themselves without state intervention. However, it received a setback under the Saadullah government, the then premier of Assam in 1940 till 1945 when a resolution was adopted aimed at protecting the tribal classes by way of a land settlement policy.[30] It was indicative of the possibility of having tribal belts and blocks. However, these had to be put on hold due to the resignation of the Saadullah government till such time the matter was taken up in right earnest by the G.N. Bordoloi government in 1946. Consequently, the Land and Revenue Regulation came to be amended in the year 1947,[31] providing for the protection of the backward classes. Meanwhile, certain developments were witnessed from time to time. The most significant one being the provision under the Government of India Act, 1935 to provide for Partially and Fully Excluded Areas, its genesis being traced to the system of non-regulation,[32] that, however, facilitated centralised administration being dominated by the military officers.[33] In fact, way back in 1869, the enactment of the Garo Hills Act XXII by way of Letters Patent excluding the district from the jurisdiction from Civil and Criminal Courts paved the way for direct administration through the Governor General in Council. The measure, though challenged, the Privy Council in Queen v Burah & anr,[34] upheld the validity of the Act. Subsequent measures included the application of the Assam Frontier Tract Regulations, 1880. This was followed by measures recommended in the Montagu-Chelmsford Report of 1918, thereby facilitating exclusion of

29 B.N. Bordoloi, Report on the Survey of Alienation of Tribal land in Assam, p 6 Line System Enquiry Committee, 1938.
30 It has its genesis in the Land Revenue Regulation of 1886
31 Earlier amendments were effected in 1889, 1897, 1095, 1911
32 H. Borpujari, Comprehensive History of Assam, Vol IV, 27-28
33 *Ibid*
34 (1879) ILR

applicability of the Government of India Act, 1919 to those areas classified as backward areas, effectively placing control of such areas with the Governor of the Province. Subsequently, based upon the recommendation of the Simon Commission, the designated or to be designated areas as Excluded or Partially Excluded Areas as provided for under Section 91 and 92 of the Government of India Act, 1935, came to be incorporated. In effect, instead of terming the areas as backward classes, they adopted the terminology of Excluded and Partially Excluded Areas, the jurisdiction of the provincial legislature came to be excluded.

During the process of drafting the Constitution, the members examined some of the provisions of the Government of India Act, 1935, in particular, the special provisions for these areas.[35] This led to the setting up of three Sub-committees including one on Tribal, Excluded and Partially Excluded Areas of Assam. The said committee known as the Bordoloi Sub-committee after holding extensive discussions with the stakeholders in particular submitted its report on 28 July 1947. It recommended that those areas predominantly inhabited by the tribes be named as 'Scheduled Areas'. Further, the hill areas were to be classified as autonomous districts and if found necessary into autonomous regions besides recommending for recognition of frontier tracts. The recommendations formed the basis of the Sixth Schedule to the Constitution of India.[36]

6. Relevant Schedules under the Constitution

6.1 The Bordoloi Sub-committee and the Sixth Schedule

The necessity of setting up the Sub-committee arose as the tribal people were considered to be much behind the general population. The need for a detailed study as envisaged in the initial draft placed before the Assembly was felt.[37] During the course of the debates, Dr. Ambedkar observed and stated that there was a difference between the tribals in Assam and the tribals in rest of India as the latter were more or less Hinduised, besides adopting or assimilating with the culture to a certain extent. For instance, this was very much in evidence in respect to marriage and inheritance. At the same

35 P. Chakraborty, Fifth and Sixth Schedules to the Constitution of India, 5

36 *Ibid*

37 Brajeswar Prasad, Jaypal Singh, Kuladhar Chaliha, R.K. Choudhury, Prof. Shiben Lal Saxena and Lakshmi Narayan Sahu

time, there was a need to protect their distinct identity since the said draft provoked mixed response in the Constituent Assembly. The Sub-committee held wide ranging discussions and forwarded more than twenty recommendations. These were processed through the Drafting Committee. After some changes and modifications, it was agreed upon to be incorporated in the draft of the Sixth Schedule and placed before the Constituent Assembly and accordingly adopted and incorporated into the Constitution. The members of the Drafting Committee were generally of the view that the Sixth Schedule offered the only agreeable democratic solution to an otherwise difficult and complicated problem of the hill areas of North East India.[38] This was evolved upon the principle of integration.

Pursuant to the provisions of the fifth Schedule, the thickly populated tribal areas have been declared as Scheduled Areas in respect of all states other than the then Assam. Besides providing for an annual report to be sent to the President under para 3, it also provides for a Tribal Advisory Council in accordance with para 4. The Scheduled Tribes Order, 1950 as revised from time to time has significantly contributed to the development process through recognition of their livelihood and natural resources that result from a symbiotic relationship of the tribal people with their lands and forests, which seem to be as old as their very roots. Despite such measures, the overall development process has had devastating consequences, particularly due to massive deforestation. The people in particular have much emotional attachment with their lands as these are intricately associated with religious activities, rituals, customs and habits.

Tracing the historical background of the term Scheduled Tribe, as used in the Constitution, it may be stated that during the debates in the Constitution Assembly, Jaipal Singh, representing the tribal interest, had favoured the use of the term 'Adivasi' instead of 'Scheduled Tribe'. It was, however, not accepted. The term Scheduled Tribe was unanimously adopted instead of Adivasi. The reason, as explained by Dr. B.R. Ambedkar, Chairman, Drafting Committee of the Constitution, was that "the word Adivasi is really a general term which has no specific legal de jure connotation. Whereas, the word Scheduled Tribe has a mixed meaning, because it enumerates the tribes." In the event of the matter being taken to a court of law, there should

38 Dipak Talukdar, Bordoloi Sub-committee and Sixth Schedule of the Constitution of India, p 175, Vidhijyoti, Vol IV 2019-20

be a precise definition as to who these Adivasis are. It was, therefore, decided to enumerate the Adivasis under the term 'Scheduled Tribe' (Beteille, 1986).

7. Constitutional Provisions

As enumerated heretofore, specific provisions were made along with exceptional measures towards this end through the Fifth and Sixth Schedules to the Constitution. This despite the fact that the various provisions[39] were expected to be implemented based on the cardinal principles of equality and non-discrimination in terms of the Fundamental Rights and Directive Principles of State Policy in promoting and adhering to the constitutional philosophy enshrined in the Preamble. Hence, the significance of Article 46 that casts a mandate upon the state to commit itself for the welfare of the Scheduled Tribes along with the Scheduled Castes aimed at protecting them from socio-economic exploitation. This despite the fact that the framers could not specifically define the term 'tribe', leaving it to the President of India, rather empowering the President to so notify any tribe or tribal community as provided for under Article 342(1)[40] of the Constitution to be included in the relevant Schedule to constitutional entitlements by way of safeguards and protection. It bears mention that the basic thrust was to maintain their command over and access to natural resources endowed to them while assuring the tribal people to take advantage of development.[41]

Article 366 specifies the meaning of Scheduled Tribes that pertain to 'such tribes or tribal communities as are deemed to be Scheduled Tribes for the purposes of the Constitution'. To give practical effect to the aforesaid provision in relation to the sixth Schedule, applicable to certain states in North East India, provisions for special grants by the Government of India are being implemented for the welfare of such tribal people. Besides financial measures, the Constitution has ensured for special administrative and legislative measures, the latter aimed at providing for reservation of seats in legislatures to ensure their effective representation.

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39 Articles 14-17, 19 23-25, 29,46, 164, 244, 175, 30,33, 334, 335, 338, 339, 340, 341, 34, 366, 271.

40 (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities, which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

41 N.K. Behura, N. Panigrahi, Tribals and the Indian Constitution, Rawat, 57

A few of the significant provisions bear mention. These include Articles 244[42] and 330.[43] Article 244(1), in particular, makes provision of administration of scheduled areas within the jurisdiction of the Fifth Schedule areas other than that of Assam. Article 331 that provided for reservation of seats in the legislators has been removed. Although a perception prevails among a few that the Constitution has been tinkered with through frequent amendments, the approach to do away with reservations for the Anglo-Indian community appear to be more pragmatic. Further, Article 335 of the Constitution relates to claims of the members of the Scheduled Castes and the Scheduled Tribes[44] and 338A relates to setting up of the National Commission for the Scheduled Tribes. In order to ensure its effective functioning,

42 Administration of Scheduled Areas and Tribal Areas

(1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram.

43 Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People

(1) Seats shall be reserved in the House of the People for:

(a) the Scheduled Castes;

(b) the Scheduled Tribes except the Scheduled Tribes in the autonomous districts of Assam; and

(c) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union Territory or part of the State or Union Territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union Territory

(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts bears to the total population of the State Explanation. In this Article 332, the expression population means the population as ascertained at the last preceding Census of which the relevant figures have been published: Provided that the reference in this Explanation to the last preceding Census of which the relevant figures have been published shall, until the relevant figures for the first Census taken after the year 2000 have been published, be construed as a reference to the 1971 Census.

44 The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. The Commission was established through the 89th Constitution Amendment Act in the year 2003.

it has been conferred with certain powers[45] that inter-alia include those of investigation and enquiry besides making of recommendation.

8. Meeting the Challenges, Complexities and Contestations

Tribal and indigenous people have, for long, been subjected to a perilous existence. Their richness and variety of cultural heritage,[46] both tangible and intangible including Traditional Cultural Expressions though a testimony of the civilisational progress have been subjected to brazen exploitation that calls for protection of the rights of those creators and practitioners, being repositories of traditional knowledge. It calls for a legal and cultural policy framework towards their recognition, while enabling them to partake in the profits thereof.

A few instances mentioned hereunder drive home the fact of their continued hardships. These happened either due to erosion of their lands or natural calamities, conflict or development induced displacement on account of human intervention. While erosion induced displacement has largely been attributed to natural factors, development induced displacement has occurred due to industrial, infrastructural and related projects in locales of natural resources, leading to alienation of people from their traditional livelihood. Such people, who draw their sustenance from natural sources, such as lands, forest and village habitats, have to move elsewhere to lead a new life. Hence, land acquisition of the tribal people has been a major cause of concern. In fact, the provision of free, prior and informed consent is seen to be applied more in its violations on the purported plea of national interest. Jharkhand

45 (5) It shall be the duty of the Commission:

(a) to investigate and monitor all matters relating to the safeguards provided for the Scheduled Tribes under this Constitution or under any other law for the time being in force or under any order of the Government and to evaluate the working of such safeguards;

(b) to inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled Tribes;

(c) to participate and advise on the planning process of socio-economic development of the Scheduled Tribes and to evaluate the progress of their development under the Union and any State;

(d) to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

(e) to make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Tribes; and

(f) to discharge such other functions in relation to the protection, welfare and development and advancement of the Scheduled Tribes as the President may, subject to the provisions of any law made by Parliament, by rule specify.

46 T.K. Saha, "Traditional Knowledge and Cultural Expressions of Indigenous Peoples: Their Protection, Promotion, Preservation and Commercialisation," in Indigenous Peoples and Human Rights, 22

can be cited as an instance in regard to Jaduguda mining and so too the Dam induced displacement of tribal people from their ancestral lands in North East India. Such process is often aggravated by the influx of outsiders to such project areas, resulting in deprivation of the tribal people. In the North East, the practice of common ownership of property rather than individual ownership has further compounded the problems, as ownership of such lands by the tribal population is unaccounted for. Apart from land alienation, environment related issues, education and health concerns often arise. Moreover, for lack of reparation and reintegration, the tribal people have to entail a lot of difficulties in adjusting to a new environment alien to their mode of life and livelihood due to change in their life style that they practice in their habitats. Further, they stand deprived of their cultural and customary practices[47] and stand totally denuded in their new surroundings, thus effectively crushing their tribal autonomy and identity. The plight of the indigenous people not designated as tribals have been highlighted by the Asiatic Society.[48] Similarly, the significance of forests for tribals is immense. Hence, aspects of joint forest management play a vital part in the protection and regeneration of forests. The Forest Policy of 1988 has led to some improvement, but what matters is their continued habitation in a conducive environment. Mention, by way of passing reference, may be made of the Indian Forests Act, 1927 and the Wild Life (Protection) Act 1972. The former enables declaration of Reserved Forests, Protected Forests and Village Forests, the latter empowers the government to constitute certain areas as 'Protected Area', for instance, national parks, wild life sanctuary, tiger reserve and community conservation area.[49] As forests occupy an important place among the tribals in respect to natural resources that these people depend upon for their livelihood. Till the enactment of the Forest Act Rights Act, 2006, also known as Tribal Rights, a key piece of forest legislation, over decades, the forest dwellers had to remain at the whims of the local administration. With the notification of the Act, the dependent forest dwelling tribals communities have received recognition as forest dwellers with certain rights over lands and natural resources to eke out their livelihood in the shape of meeting their needs that include habitation and socio-cultural needs. It has been able to partially address some of the concerns of such tribal people being regarded as forest dweller tribes. They have been provided with title rights over up to four hectare of cultivated lands besides user rights in respect of extraction of minor forest produce and grazing. In addition,

47 Fuel, wood and water to interpersonal problems of conjugal adjustments and selection of partner for marriage besides dress patterns, etc.

48 Debasis Poddar, "IPR of Indigenous People in India... Human Rights Jurisprudence in Indigenous Peoples and Human Rights," Ed. 69.

49 Infra, n 48

relief and development rights in case of eviction or forced displacement have been provided for. Considering their intricate association with the lands and natural resources, they have to be associated in forest management relating to protection, regeneration or conservation of forests. However, a view prevails that the law will lead to massive forest destruction and should be repealed.[50]

Conclusion

The *non scripta* of tribal customary laws that have been able to carve out a niche calls for their effective codification as integral part of the corpus juris. Hence, it may be observed that the dynamic concept of tribal associated with rich cultural attributes and prized heritage needs to be codified. Their survival, progress and development need to be ensured through a holistic approach, while simultaneously facilitating their traditional systems and intellectual property rights as well.

50 S. Kanungo, Tribal and Human Rights, 40

Access to Medicine: A Critical Review of Intellectual Property Protection and Human Rights Concern

Gargi Chakrabarti*

Abstract

Medicines are needed by mankind to treat illnesses. Research and development of a medicine requires huge infrastructure, scientific equipment and a pool of human resources, which is a costly affair. Intellectual property protection for medicine is necessary to gain incentive out of the fruit of such research and development. But the intellectual property protection for medicine should not hinder the accessibility and affordability of medicine. The very purpose of medicine is failed if it does not reach the patients, who need them for treatment. Here comes the human rights concern. This article will analyse the factors related to access to medicine from the human rights point of view.

1. Introduction

Medicines are not luxury goods, medicines are the goods of need; rather, they are the goods of extreme need for a patient with disease. The cost of medicine and availability of medicine should be such that all patients can access and afford them for treatment purposes. Research and development of a medicine requires huge infrastructure, scientific equipment and a pool of human resources, which is a costly affair. Intellectual Property Right (IPR) protection for medicine is necessary to gain incentive out of the fruit of such research and development. But intellectual property protection for medicine should not hinder its accessibility and affordability. The very purpose of medicine would fail if it does not reach the patients, who need them for treatment. That will also be a breach of human rights. This article will focus on the legal perspectives of IPR protection and the human rights in relation to access to medicine.

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2. IPR Protection for Medicines

The purpose of patent protection is to encourage new invention by granting the inventor a limited period of exclusive rights. The situation is complicated in the area of pharmaceutical industry; as the duty of the government is to give proper incentive for research and development and also to make sure that new drugs are available for all people in need in affordable prices. However, the discussions of patent regime for pharmaceuticals, especially the evolution of national patent regimes is important to understand.

2.1 Evolution of Pharmaceutical Patents

Patent has a long history in Europe; the first ever patent was granted in Greek city of Sybaris as early as 500 BC for new dishes for a period of one year (Anton 1841). Germany has been a prominent name in world history in terms of pharmaceuticals since a long time. The first German Patent Act was adopted on 25 May 1877; under this Act, it was made mandatory to establish an authority for reviewing and granting patents; according to this requirement on 01 July 1877, the Imperial Patent Office was established in Berlin.[1] Most of the European countries did not allow patent or at least product patents for chemicals and Pharmaceuticals, such as: (i) Holland had revoked their patent act since 1869 till 1910, so that the domestic companies can freely copy the inventions in different field, including pharmaceuticals (Konder, 2013); (ii) pharmaceutical patent was banned in France in nineteenth century; in early twentieth century, only process patent were allowed; then the Executive Order of 04 February 1959 and the law of 02 January 1966 allowed limited product patent; and finally the ban on patenting pharmaceutical product was completely taken off in 1978 (Boldrin and Levine, 2005); (iii) in Germany, process patent for pharmaceuticals was introduced since 25 May 1877, but products were completely excluded; then, patent for product by process was allowed since 04 April 1981; and product patent for pharmaceuticals was accepted since 04 September 1967 (Boldrin and Levine, 2005); (iv) Chemical and pharmaceutical product patents were prohibited by the Constitution in Switzerland, but because of German pressure, the Swiss law adopted process patent for pharmaceuticals on 21 June 1907; since 25 June 1954, the process patent term for pharmaceuticals increased from 10 to 18

1 F/12/1028 (1817): Printed on the patent document.

years; and finally permitted product patent since 1977 (Boldrin and Levine, 2005); (v) Italy had prohibited both product and process patents for pharmaceuticals until 1978 (Boldrin and Levine, 2005); (vi) Spain, though allowed process patents, but prohibited pharmaceutical product patent until 1986; though Ley de Patentes of 1986 initiated product patent in Spain, but it was not implemented until 1992 (Boldrin and Levine, 2005).

In the USA, until the end of 18th Century, there were no specific laws regarding patent. During that time, states started formulating patent law; including standardised procedure for application, examination and general terms. The Constitution of United States was adopted first in 1787,[2] which had a provision for protection of IPR, the provision is found in Section 8, Article I. The first ever federal patent statute was enacted in the USA in 1790 titled as "An Act to promote the Progress of Useful Arts."[3] The pharmaceutical industry flourished in the USA in the middle of 19th Century; the then pharmaceutical companies were not interested to take patents, as they wanted to copy each other's products. The German companies dominated the pharmaceutical industry since the end of 19th century and they protected their invented molecules in the USA by patent. During World War I, in 1917, the US Government enacted the "Trading with Enemy Act;" by virtue of this Act, the US Companies could produce the patent protected products of companies of enemy countries (Worthen, 2003). From 1890 to 1930, the US Courts were in favour of granting patents, but from 1930 to 1950, the approach of the Court towards patent was associated with a good amount of suspicion; the modern patent law structure started shaping up in the USA since 1952 (Watson, 2013).

Indian patent legal regime had a long history since pre-independence era. In 1856, Act VI was formulated based on British Patent Law 1852, and was enacted for the protection of inventions, providing certain exclusive rights for inventors for a period of 14 years.[4] Then after the Indian legal regime was renovated several times, e.g., The Patents and Designs Protection Act, 1872, The Protection of Inventions Act, 1883, Consolidated Inventions and Designs Act, 1888, and The Indian Patents and Designs Act, 1911. In 1930, the Act was further amended to introduce patent of addition, to give power to Controller to rectify the

2 The Constitution of United States, 1787, http://www.archives.gov/exhibits/charters/constitution.html.

3 See Patent Act of 1790, Ch. 7, 1 Stat. 109 (April 10, 1790) CHAP. VII. – An ACT to promote the Progress of useful Arts. Retrieved 26 March 2022.

4 Govt. of India Website update, History of Indian Patent System, https://ipindia.gov.in/history-of-indian-patent-system.htm.

register of patent and to increase the term of protection of patent from 14 years to 16 years (Saikia, 2016). In 1945, the option of filing provisional specification and subsequent filing of complete specification within nine months had been incorporated by an amendment.[5] The 1911 Act was amended in 1950 (as Act XXXII of 1950) to include the working of inventions, grant of licenses and revocation provisions. Further amendment was made in 1952 (as Act LXX of 1952) to provide compulsory licensing in relation to food, medicine, and chemicals like insecticides, germicides, fungicides, etc. (Saikia, 2016). The Patents Act, 1970 was brought into force on 29 April 1972 and the Patent Rules was also published in 1972 (Saikia, 2016). The most notable feature in the 1970 Act was its repeal of patentability of pharmaceutical products; though pharmaceutical process remained patentable, but the term was reduced to a very short period (Bhatnagar and Garg, 2007). The 1970 Act was further amended three times till date to make necessary changes to comply with the TRIPS provisions; in 1999, the amendment was made to introduce product patent for pharmaceuticals and agro-chemicals; in the Patent (Amendment) Act, 2005, two extra grounds were introduced for compulsory licensing, namely (i) Compulsory licensing of mailbox application related patents; and (ii) Compulsory licensing of pharmaceutical patents with a view to enabling exports to countries with no manufacturing capabilities (Bhatnagar and Garg, 2007).

2.2 Product Patent Regime for Pharmaceuticals

The rationale behind the stricter patent regime, including product patent mandate by WTO through TRIPS Agreement is the incentive for pharmaceutical industry. More or less, all these European countries have strong domestic pharmaceutical industry, and over the time, they had introduced themselves as large medicine exporter as well. But with careful analysis of time line, since the end of World War II (by which all European countries were seriously damaged) in 1945, till 1977-1980, most of the European countries were not allowing product patents, if not process patent as well (for example, Italy).[6] Interestingly, without product patent gear, the pharmaceutical industry had flourished hugely in continental Europe in twentieth century. This fact leads us to the obvious question of whether the importance of product patent is really providing enough incentive for pharmaceutical industry; and if yes, then without existence of that how the European pharmaceutical industry sustained with introduction of a lot of 'blockbuster'

5 Govt. of India Website update, History of Indian Patent System, https://ipindia.gov.in/history-of-indian-patent-system.htm.

6 Refer to section 2.1 of this article.

medicines? The analysis will be unfolded into two ways: i) all developed countries were in the different stages of development at that time and less strict patent regime (specially lack of product patent) helped in the development of large pharmaceutical industry, but now the concern is the growth of generic industry in developing countries like India, China, Brazil, South Africa, Thailand and so on. ii) Now, in the later stage of development, strict patent regime and mandatory product patent regime will help in the sustainability of the pharmaceutical companies of developed countries, but how far that will be justified for the further development of pharmaceutical industry of those developing countries.

2.3 Patenting Incremental Innovation and Evergreening of Pharmaceuticals

It is evident that the growth of pharmaceutical industry and accessibility and affordability of medicine has some direct relation with the IPR protection for medicines, especially in post-TRIPS era. Innovation is the pillar of the research-based pharmaceutical industry (IFPMA, 2012). 'Innovation' here means the application of knowledge of research and development to produce a unique therapeutically effective pharmaceutical product (IFPMA, 2012). Pharmaceutical innovations can be 'block-buster innovations', which are rare, or can be 'incremental innovations' which are more common. Similarity of the new molecule with the other molecules of the same class is not only in chemical structure, but also in the mechanism of action; but the new molecule usually differs in terms of therapeutic profile, mechanism of its metabolism, adverse effects, dosage schedule, delivery system, etc. (Report GSK, 2008). This kind of innovation is termed as 'incremental innovation' and it is said to provide major advancement in the prevention and treatment of diseases. One study showed that more than 50 per cent of drugs listed in World Health Organization's (WHO) Essential Drug List are actually incrementally innovated drugs from some prior drugs (Dorland, 2000). But interestingly, TRIPS Article 27 did not mention anything about patentability of 'new forms of known substances' or 'new uses of known substances'. It is left on the discretion of individual Member Country to deduce the patentability requirements and apply the best method of implementation according to the public health need and the public health policy of the country. The Ministries of Health of Chile, Argentina, Uruguay and Paraguay along with the Brazilian Ministry of Health and other developing

countries showed concern regarding this (Correa, 2007). The concern was genuine as the tendency of pharmaceutical companies to extend the effective patent term for their originator molecules by patenting the incremental innovation (which is also termed as 'evergreening') was worrisome. One good example is the story of the patent of 'Lamictal' (active ingredient is lamotrigine, which is used as anti-convulsant) by GSK (Report GSK, 2007). GSK had the patent for invention of the active ingredient in many countries in 1980, which expired in 2000; in some countries (such as in UK), they obtained patent term extension for five years and the patent was extended up to 2005 (Report GSK, 2008). In 1992, they developed chewable/dispersible tablets and obtained patent for that preparation, which is an incremental innovation and because of the 'second patent', the effective patent term for 'lamictal' was extended up to 2012.

India's position regarding patent protection of second use of the known substance or new form of known substances has its statutory basis in Section 3(d), which is included in Patent Act of India by 2005 amendment. Section 3(d) says that, "The mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant." Generally, these types of inventions are prevented from patent protection, unless the invention shows significant difference in 'efficacy'. The aim of Section 3(d) is to grant carefully the patent for incremental innovation and to prevent 'evergreening' by pharmaceutical companies. Novartis v Union of India[7] is a landmark case, which discussed the different important facets of S. 3(d). In India, Novartis filed patent application for 'Imatinib Mesylate', specifically the beta crystalline form (Glivec), which is a polymorph of the free base ('Imatinib') disclosed in 1993. Novartis' application of patent for 'Glivec' was rejected by the Indian Patent Office, whereas Novartis already secured patent for the same polymorph in about 35 countries.[8] The reasons for the rejection was (i) the crystalline form of the salt 'Imatinib Mesylate' was anticipated and hence devoid of novelty, due to the disclosure of the free base 'Imatinib', (ii)

7 WP No. 24759 of 2006, www.indiakanoon.org/doc/165776436.

8 In pleadings before Madras High Court, Novartis claimed that it filed application in about 50 countries for beta crystalline form of 'Imatinib Mesylate' and received patents in 35 countries. See Novartis AG and Anr. v Union of India and Ors, WP No. 24759 of 2006, High Court of Judicature at Madras, paragraph 9.

lack of significant enhancement of therapeutic efficacy, (iii) obviousness of the invention, and (iv) unjust priority. Novartis AG did not agree with the decision and they filed two writ petitions in the Madras High Court. The petition for reversal of order of Indian Patent Office was transferred to Intellectual Property Appellate Board (IPAB). IPAB upheld the decision of Assistant Controller by rejecting the appeal (Ahuja and Ahuja, 2013). Even the Supreme Court rejected the appeal of Novartis; the Supreme Court held that Imatinib Mesylate is a known substance (reference Zimmermann patent) and pharmaceutically acceptable salts of Imatinib, and according to the Supreme Court, 'significant enhancement of efficacy' has not been proved by the supportive documents in the Court (Ahuja and Ahuja, 2013). It may be said that S 3(d) is deliberated to improve the patentability criteria by addressing the issue of patent protection of pharmaceutical 'evergreening'. From that point of view, the 'enhanced efficacy' can be taken as fine-tuning of 'non-obviousness'; as new forms of known substances are fundamentally obvious if there is no enhancement of therapeutic efficacy. While coming to the point of access to medicine, the meticulous examination of all patent application with the help of S 3(d) is reasonable from public interest and human rights point of view.

2.1 Supplementary Protection Certificates (SPC) and Patent Term Extension (PTE)

The patented inventions are protected for 20 years and that 20 years are calculated from the date of filing of the application of patent. However, it takes a few years from the date of application to receive the grant of patent; also on top of that, medicines need to go through certain regulatory requirements (such as multi-phase clinical trials to establish safety and efficacy of the medicine) to obtain the marketing authorisation before it can hit the market. Hence, the effective patent term for the owners are much less than 20 years. Supplementary Protection Certificates (SPC) and Patent Term Extension (PTE) are the mechanisms by which the industry gets compensated in part. SPC is different from the PTE, as it is a sui generis right, granted by certain jurisdiction (like USA, EU, UK, Switzerland, Norway, Iceland and Japan) (Brandes and Naukkarinen, 2020). SPC comes into effect upon patent term expiry, for a period of maximum five years or for another added six months if the pediatric extension criteria is satisfied. SPC confers the same rights as that of the basic patent, with the exception that protection through SPC does not cover the entire scope of the patent claims; only the product in concern, which

is the 'active ingredient' and having 'the therapeutic effect of its own'.[9] PTE is available under the 1984 Drug Price Competition and Patent Restoration Act (Hatch-Waxman Act). Intention of PTE is to reinstate some part of the patent term, which is lost because the patent holder has to wait for the regulatory approval from the authority. The eligibility requirements: the patent is claimed for product, or for a method of using the product, or for a manufacturing method; patent term is not finished; the patent term has not been extended earlier; patent owner of his agent has submitted the application; and the regulatory review is done period before marketing or use. PTE can be maximum for five years, and the total patent term should not be more than 14 years from the date of marketing approval, and it is granted after consultation between US Patent and Trademark Office and the Regulatory Agency. The implementation of SPC or PTE is beneficial for the patent holder, but can be considered as destabilising the balance between patent exclusivity rights and human rights. Neither SPC nor PTE is available till date in India.

3. Some Patent-Allied Factors for Access to Medicine

Patent related factors are discussed in the last part of this article, but there are certain factors which are indirectly linked with patent or IPR. Such factors are also impacting the accessibility and affordability of the medicine.

3.1 Data Exclusivity

Data exclusivity is a market exclusivity provision for the test data related to pharmaceutical products. But because of the provisions of data exclusivity, the monopoly over medicine is magnified. During free trade agreements developed countries were trying to impose the clauses of data exclusivity on the developing and the least developed countries. The availability and affordability of medicine is affected as a result. Data exclusivity term is not explicitly available in the TRIPS Agreement, but many legislators and researchers tried to link Art. 39.3 of TRIPS Agreement with it.[10]

9 This concept is clarified by CJEU in GlaxoSmithKline Biologicals v Comptroller-General of Patents (C-210/13).

10 TRIPS Article 39.3 states that "Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, members shall protect such data against disclosure, except where necessary to protect the public or unless steps are taken to ensure that the data are protected against unfair commercial use."

Data exclusivity may create a hurdle for the market entry of cheaper generic drugs as it is provided on top of regular patent provisions. In some countries, it even extends for ten years. Data exclusivity in the USA is provided by the Hatch-Waxman Act and Section 355 of the Federal Food, Drug, and Cosmetic Act, 1997 (Clift, 2009). In EU, protection is available for data supplied during marketing approval for medicines since 1987. Article 8 of Council Directive 65/65/EEC (as amended by Council Directive 87/21/EEC) provided minimum six years of data exclusivity for originator company's clinical trial data and provision of ten years exclusivity is available for products of high-end technology, biotechnology, and NCE. During this period, the concerned regulatory authority should not rely on such data to approve other's application, provided they have the originator's consent. Belgium, France, Italy, UK, Netherlands and Sweden provided ten years exclusivity (IFPMA, 2012). The availability of data exclusivity protection varies widely among the Asian countries. A few of the countries are primarily providing the data exclusivity provisions, e.g., Japan and Singapore; some of the countries are forced to implement data exclusivity as they have entered into the FTA with developed countries with higher bargain power, like Thailand, Korea and Malaysia; and rest of the countries are yet not provided the data exclusivity provisions, like India, Pakistan, Philippines, Taiwan (Guideline EC, 2009).

3.2 Patent Linkage

Patent linkage is a policy of linking the marketing approval of a drug with its patent status. Patent is granted by Patent Office and marketing approval is granted by the Drug Regulatory Authorities (DRA); these two governmental bodies work differently under different governmental departments in each and every state. Patent linkage proposes for the compatibility of these two authorities and suggests that DRA should check the status of patent of the medicine prior to grant of marketing approval of generic product and should not allow the same before expiration of patent term of the originator molecule. According to the interpretation of TRIPS, some Member States suggest that provision of patent linkage is given in Article 28. Article 28 (1)(a) states, 'where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product.' The phrase 'to prevent third parties not having the

owner's consent' is the basis of this interpretation; hence, according to the patent linkage system, generic manufacturer companies should be prevented from obtaining marketing approval while original drug's patent is still valid, unless consent is taken by them from the patent holder. This is implemented by the active participation and cooperation between the Patent Office and DRA. Hatch-Waxman Act, 1984, statutorily applies patent linkage in the USA. Accordingly, FDA publishes the list of pharmaceutical products with their current patent status as well as data exclusivity status in 'Orange Book' (Krumplitsch, 2020). FDA would not give market authorisation to the generic version of a drug, which is still protected by patent. Patent linkage in EU is considered as anti-competitive practice, so it is not allowed in the territory of European Union.

Patent linkage is not allowed in India; the judiciary established this fact by concluding some interesting cases. In Bristol-Myers Squibb (BMS) v Hetero Drugs[11] case, an ex-parte injunction was granted by Delhi High Court in favour of BMS and, as a result, Hetero Drugs was restrained from production and marketing of the generic anti-cancer drug, 'dasatinib'; Delhi High Court also ruled that Drug Controller General of India (DCGI) has to stop processing of the marketing approval application of Hetero Drugs for generic 'dasatinib'. The Court ruled that, DCGI is not allowed to process any application of drug approval if such application is infringing any patent of Originator Company.[12] This decision of Delhi High Court created a huge debate and it seemed that the precedent has been given in favour of patent linkage in India. But in Bayer Corporation and Ors v Cipla, Union of India and Ors[13] case, the stand of India regarding patent linkage was clarified. The High Court held that no 'patent linkage' regime can be deduced from the provisions of either Drug and Cosmetics Act or Patent Act; while further explaining this matter, the court added that the Drug and Cosmetics Act is for public regulatory measure, which provides standard of safety before market entry of a drug and the Patent Act provides the standard of patent monopoly for the inventors; so the officials of DRA are not expected to have expertise regarding patent system and, hence, judgement regarding patent infringement of a drug is beyond the scope of their duties and responsibilities (Mittal, 2010).

11 CS(OS) No. 2680/2008
12 CS(OS) No. 2680/2008.
13 2009 (41) PTC 634 (Del).

3.3 Patent Pooling

Patent pooling is nothing but an agreement between two or more patent holder companies allowing cross-license of their patents to each other or to a third party. This practice is usually related with the complex technological fields, where various patents are owned by various companies and it is impossible to manufacture certain goods using required technology without infringing others' patent rights or without having obligatory license to use various patents. Other reason being that, the competitors should not waste time and money for suing each other to stop using their technology. It may have many advantages, like reduction in the transaction costs, more access to patented technology, and minimising the costly infringement litigation, etc., but it creates a market monopoly more impactful than a single patent, which may be significant for an industry like pharmaceuticals. Generic manufacturers might face severe hurdles to acquire and use certain technology by paying significant negotiation costs due to patent pool.

4. Flexibilities to Counter Patent Exclusivity

Patent is a state provided monopoly for the right holders, but there are certain flexibilities to this monopoly.

4.1 Compulsory Licensing

Certain flexibilities are provided by the TRIPS Agreement for the pharmaceutical products, such as compulsory licensing[14] and this is reinforced during DOHA Declaration on 'TRIPS and Public Health' in 2001 (WTO, 2001). Paragraph 4 of Doha Declaration reaffirmed that the intention of TRIPS is not to provide any monopolistic right in such a manner which will unreasonably prejudice the issue of public health; the liberty has been given to Members to take appropriate measure to address respective Nation's public health problems; and "TRIPS Agreement does not and should not prevent Members from taking measures to protect public health" (WTO Ministerial Conference, 2001). Even it is reassured that the interpretation and implementation of TRIPS Agreement should be

14 Article 30 of TRIPS provides some 'limited exception to the exclusive rights' to the patent right provided for the patentee.

> done in such a manner that it is "supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all" (emphasis added) (WTO MC, 2001). Again in Paragraph 5(b), it is stated that: "Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted." Paragraph 5 of Doha Declaration conform that "Members have the right to determine the meaning of national emergency/other circumstances of extreme urgency, which is practicable, as the health situation and disease burden vary from region to region and country to country according to their socio-economic status and climate. This kind of general guideline will be helpful for individual Member countries to formulate their own health and IPR policy according to the need of that country."

Paragraph 6 is devoted to the developing and least developed countries who have 'insufficient or no manufacturing capacity'. It supersedes the condition mentioned in Article 31(f) in TRIPS Agreement saying that the "authorisation of production of medicines under compulsory licensing shall be authorised predominantly for the supply of the domestic market of the Member authorising such use;" and clarifies that the WTO Ministerial Committee has identified the need of the WTO Members with 'insufficient or no manufacturing capacity' in the medicine sector and would face problems while implementing the compulsory license if the condition of 'manufacturing predominantly for domestic market' is levied on them and they are not permitted to import the medicine from other country. The General Council for TRIPS has suggested the solution in "Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health" on 30 August 2003 (August 30 Decision). According to this August 30 Decision, 'eligible importing Member' country can successfully import the needed medicine under compulsory licensing, with prior formal notification to Council of TRIPS about the purpose of use of this system. The 'exporting Member' country also would have waiver of the obligation of compliance with Article 31(f), provided certain conditions are met.

The Indian Patent Act has provisions of compulsory licensing in S 82 and S 94. Broadly, the grounds are divided into two categories: (i) Abuse of patent rights as per S 84 and (ii) Public interest concern as in S 92; the three years waiting period from grant of patent before

applying for compulsory licensing is waived under S 92(1).[15] Another ground added in 2005 amendment has included in S 92A, which is enabling the companies to get the compulsory licence for export of patented pharmaceutical products, "to any country having insufficient or no manufacturing capacity in the pharmaceutical sector," but the export of that medicine has to address public health problems, and the export will be subject to grant of compulsory by importing country to allow importation of the patented pharmaceutical products from India.[16] The fact is that, India is the highest exporter of generic medicines, currently exporting to more than 200 countries over the whole world, which includes developed countries like the US, Japan and Australia and European countries and also developing and least developed countries of Latin America, Africa and Central and Eastern Europe (Patnaik, 2010).

The first Indian case of compulsory licensing is the Bayer v Natco case[17] for the cancer drug 'Sorafenib;' in which the Controller found that Bayer's patented drug is available for only two per cent of all patients; its price was too high for Indian economy and compared to Natco's generic version (Rs. 2,80,428/- per month against Rs. 8,800/- per month); and non-working of the patent had been proved in this case as 90 per cent of the patented version was imported

15 92. Special provision for compulsory licenses on notifications by the Central Government

(1) If the Central Government is satisfied, in respect of any patent in force in circumstances of national emergency or in circumstances of extreme urgency or in case of public non-commercial use, that it is necessary that compulsory licenses should be granted at any time after the sealing thereof to work the invention, it may make a declaration to that effect, by notification in the Official Gazette, and thereupon, the following provisions shall have effect,that is to say—

(i) the Controller shall, on application made at any time after the notification by any person interested, grant to the applicant a license under the patent on such terms and conditions as he thinks fit;

(ii) in settling the terms and conditions of a license granted under this section, the Controller shall endeavour to secure that the articles manufactured under the patent shall be available to the public at the lowest prices consistent with the patentees deriving a reasonable advantage from their patent rights.

16 Section 92A. Compulsory license for export of patented pharmaceutical products in certain exceptional circumstances

(1) Compulsory license shall be available for manufacture and export of patented pharmaceutical product to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation of the patented pharmaceutical products from India.

(2) The Controller shall, on receipt of an application in the prescribed manner, grant a compulsory license solely for manufacture and export of the concerned pharmaceutical product to such country under such terms and conditions as may be specified and published by him.

(3) The provisions of sub-sections (1) and (2) shall be without prejudice to the extent to which pharmaceutical products produced under a compulsory license can be exported under any other provision of this Act.

Explanation: For the purposes of this section, 'pharmaceutical products' mean any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address public health problems and shall be inclusive of ingredients necessary for their manufacture and diagnostic kits required for their use.

17 CS (OS) 1090/2011 dated 06/05/2011.

to India by Bayer;[18] hence, compulsory licence was granted to Natco, Bayer's application to IPAB opposing that was also rejected.[19]

5. Health as a Fundamental Human Right

The assessment of impact of patent system and transactional intellectual property on access to medicine is done in this article from all legible point of view; but the analysis will be incomplete if the topic is not discussed from the point of human right to health. Human rights principles and legal measures in international arena accepted the 'right to health' as a fundamental human right.

5.1 WHO Constitution: Health as a Fundamental Human Right

The WHO Constitution affirmed the enjoyment of the highest achievable standard of health is a fundamental human right (preamble). The text of WHO Constitution, 1946 says, "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition. Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures." Within WHO, the Health and Human Rights Team, in the Department of Ethics, Trade, Human Rights and Health Law, works to: reinforce the capacity of WHO and its member States to assimilate a human rights-based approach to health; spread the right to health in international law and international development processes; and promote for health-related human rights.

Since the 1970s, WHO has promoted equitable access to basic health services through the concepts of primary health care and essential medicines. In 1977 the first Model list of essential medicines is published, which is prior to the 1978 Alma Ata Declaration on 'Health for All'. The Alma Ata Declaration is one of the most significant public health achievements. List of Essential medicines have all the priority medications in it. They are nominated carefully by considering following factors: disease prevalence, efficacy evidence, safety profile, and proportional cost-effectiveness. The intention behind this list is to make the medicines

18 Conditions as per Section 84(1)(a), 84(1)(b) and 84(1)(c) of Indian Patent Act are hereby met.

19 M.P.Nos.74 to 76 of 2012 & 108 of 2012 in OA/35/2012/PT/MUM dated 14/09/2012.

available always and in sufficient amounts, in the proper dosage forms, with guaranteed quality, and affordable price. Currently more than 150 countries are having national list of essential medicines, and more than 100 countries had the national medicines policy. The concept of essential medicines is relevant for low, middle, and high income countries of the world.

5.2 Right to Health in Universal Declaration of Human Rights

Article 25 of the Universal Declaration of Human Rights, 1948 (UDHR) summarised the 'right to health' in the following words: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[20] This declaration has pronounced the essential elements of public health, it is not binding in nature for the members of the United Nations.

5.3 Right to Health in International Covenant on Economic, Social and Cultural Rights

The right to health concept is assimilated in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was presented before the UN General Assembly in 1966 and adopted in 1976. The International Covenant on Economic, Social and Cultural Rights (ICESCR) validates the importance of 'right to health' in Article 12.1, which states that, "the State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." In other words, every State Parties to this Covenant have to ensure healthy, disease-free life for their citizens. To attain the disease-free, i.e., healthy life for very human being, the State has to ensure the supply of accessible and affordable medicines for every kind of illnesses, which may have negative impact on the health of human being. According to the interpretation of The Committee, the 'right to health' is seen as a comprehensive right encompassing not only to time-bound and proper health care,

20 Article 25.1 of the Universal Declaration of Human Rights, 1948.

but also to the basic determinants of health, such as access to medicine, access to safe and potable water and adequate sanitation, supply of safe food, nutrition and housing, occupational and environmental settings as per health need, and access to health education including sexual and reproductive health.

6. Access to Medicine: Human Rights Perspectives

6.1 Elements of Human Right to Health

All forms of right to health comprises of the following interconnected and vital elements, like:

(a) Availability – public health planning and implementation, infrastructure of health-care facilities, goods and services, and different public health programmes, have to be existing within the State party; which is incomplete without proper supply of affordable medicines for all the citizens.

(b) Accessibility – Health related goods and services need to be reachable to everyone without discrimination, within the State party. Accessibility has some intersecting dimensions: (i) Non-discrimination, (ii) Physical accessibility: health facilities, goods, services and medicine, and (iii) Economic accessibility (affordability): Price of medicine has direct relation with this issue. The price of medicine, and various services need to be provided following the principle of equity, and these services should be affordable for all.

(c) Acceptability – Health related goods and services should follow the medical ethics and should be culturally appropriate.

(d) Quality – Health related goods and services must be of good quality. This requires, inter alia, supply of quality medicines, skilled medical professionals and hospital apparatus, etc.

6.2 International Perspectives: International Covenant on Economic, Social and Cultural Rights

Article 12.2 (c) of ICESCR – The right to prevention, treatment and control of diseases speaks about "The prevention, treatment and control of epidemic, endemic,

occupational and other diseases." Art. 12.2 (c) requires the formation of prevention and education programmes for behaviour-related health issues, such as sexually transmitted diseases, in particular, HIV/AIDS, and those harmfully affecting sexual and reproductive health, and the advancement of social factors of good health. The right to treatment includes the establishment of a system of vital medical care in cases of accidents, epidemics and other health problems, and the provision of disaster relief and humanitarian aid in emergency circumstances. The system of urgent medical care is impossible to take place if quality medicine is not available at affordable prices. The control of diseases is referred to individual and combined efforts get existing pertinent technologies, using and refining epidemiological surveillance and data collection, the application or augmentation of immunisation programmes and other strategies of infectious disease control.

Article 12.2 (d) said that, "the right to health facilities, goods and services deals with the creation of conditions which would assure to all medical service and medical attention in the event of sickness," in case of both physical and mental ailments, which comprised of the delivery of equal and apt access to basic preventive, curative, rehabilitative health services and health education; proper screening programmes; suitable treatment of prevalent ailments, injuries and infirmities, preferably at the community level; the delivery of essential drugs; and correct mental health treatment and care. Article 12 also mandates the obligation of States to ensure non-discrimination for which a comprehensive and repetitive training is required. Accessibility and affordability of medicine is one of the prime policy, which has to be ensured by the State to comply with the mandate of Art. 12 of ICESCR.

6.3 National Stand: Asian Countries

Asian countries incorporated human right to health concept in their respective constitution, but the type of rights and duties varies from one country to another. Broadly, two types of countries are found in Asia in this context, which are as follows: (i) right to health incorporated as a constitutional right – in DPR Korea, Indonesia, Nepal, Thailand (WHO, 2011); and (ii) health care as a constitutional obligation of the State as mentioned in the Directive Principle for the State, but the word 'right' is not mentioned – Bangladesh, Bhutan, India, Myanmar, Sri Lanka (WHO, 2011). Specific

mention about access to medicine is found in selected countries of this region. Article 9 of the Constitution of Bhutan ensures that the State would provide unrestricted access to basic public health services.[21] Article 56 and Article 72 of Korean Constitution ensure the system of universal free medical service and free medical care to all persons without any discrimination.[22] Indonesian Health Law No. 36 has detailed provisions for constitutional rights and obligations linked with health; for instance, Article 4 of the Health Law states that "every person shall have the right to health".[23] The Article 28H(1) of their Constitution has mentioned that "each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a good and healthy environment, and to receive medical care" and Article 34(3) mentions that "the state has the responsibility to provide proper medical and public service facilities."[24] The Constitution of Nepal identified the right to health as a fundamental right and ensured that every citizen has a right to get free basic health services and the same has to be provided by the State.[25] In the Constitution of the Republic of Maldives, as of 2008, the economic and social rights provisions can be considered as "positive right" to health, but the constitution does not mention the right to health as such.[26] Article 23(c) gives mandate to the State to provide good standards of health care, both physical and mental, for the citizens of Maldives, for which the accessibility and affordability of medicine should be the prerequisite.[27] Sri Lankan government has to abide by the constitutional requirement of provision of public health services for all their citizens which should include access to medicine as well.[28] The Constitution of Thailand mandated right to health, and also the right of all citizens to get public health services with identical opportunity, and it also mandated the free medical treatment for needy patients.[29]

21 Article 9, "The Constitution of the Kingdom of Bhutan," 18 July 2008, http://www.constitution.bt/html/constitution/constitution.htm.

22 Socialist Constitution of the Democratic People's Republic of Korea, 5 Sep. 1998 (http://www1.korea-np.co.jp/pk/061st_issue/98091708.htm.

23 Chapter XA Fundamental Human Rights, Article 28H and Section XIV National Economy and Social Welfare Article 34(3) of Constitution of the Republic of Indonesia, certified translation of the 1945 Constitution, including amendments until the 4th amendment (2002), Asia Human Rights Commission, http://indonesia.ahrchk.net/news/mainfile.php/Constitution/34/?alt=english

24 Id.

25 Interim Constitution of Nepal, which came into force since January 2007, http://www.undp.org.np/constitutionbuilding-archive/specialinterest/translator/file/IC%20Final%20version.pdf

26 Chapter II Fundamental Rights and Freedoms, Article 23. Economic and Social Rights of Constitution of Republic of Maldives.

27 Id.

28 Article 27 Constitution, Democratic Socialist Republic of Sri Lanka http://www.priu.gov.lk/Cons/1978Constitution/Index.html

29 Section 30 (para 3) and Section 51 (part 9) (Rights to Public Health Services and Welfare from the State) Constitution of Kingdom of Thailand http://www.opm.go.th/OpmInter/content/cplo/data/picture/Constitution_50_En.pdf.

6.4 Stand of India

The Constitution of India has some provisions regarding right to health. They are mentioned in the Directive Principles of State Policy – Articles 47, and in Chapter IV, and are therefore non-justiciable. Article 47 states, "Duty of the State to raise the level of nutrition and the standard of living and to improve public health – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health." There should be a clearly defined right to health for the citizens, so that individuals can have this right enforced and desecrations can be rectified.

The Indian judiciary has contributed for interpretation of right to health in different ways; through public interest litigations and the litigations rising from claims that individuals have made etc.

Article 21 of the Indian Constitution talked about the fundamental right to life. The Supreme Court has construed this fundamental right and stated that the Article 21 also called for right to live with dignity and "all the necessities of life such as adequate nutrition, clothing...." It has also held that the act which is affecting the dignity of a person will also disrupt her/his right to life. In Bandhua Mukti Morcha v Union of India,[30] the Supreme Court held that the Right to life includes the right to live with dignity.

The acknowledgement that the right to health is vital for human survival and is, therefore, an essential part of the Right to Life, is laid out evidently in the Consumer Education and Resource Centre v Union of India.[31] It held in the same judgement that humane working situations and health services and medical care are an indispensable part of Article 21. Further, in State of Punjab and Others v Mohinder Singh,[32] "It is now a settled law that right to health is integral to right to life. Government has a constitutional obligation to provide health facilities."

30 1984 AIR 802, 1984 SCR (2) 67
31 AIR 1995 SC 636
32 AIR 1997 SC 1225

Apart from identifying the fundamental right to health as an essential component of the Right to Life, there are many case laws both from the Supreme and from High Courts that sets down the responsibility of the State to deliver medical health services. The above articles act as guidelines that the responsibility of the State is obligatory to achieve some standards of living for its citizens'. It also confirms evidently that nutrition, settings of work and maternity benefit are fundamental to health. This has been clearly held in regard to the provision of emergency medical treatment in Parmanand Katara v Union of India.[33] It was held that "Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life".

The issue of suitability of medical health services was also addressed in Paschim Banga Khet Mazdoor Samiti v State of West Bengal.[34] The question posed before the court was whether the non-availability of services in the government health centres amount to a violation of Article 21. It was held that Article 21 proposes a compulsion on the State to protect the right to life of every citizen. The protection of human life is thus of supreme importance. The government hospitals run by the State and the medical officers working therein are duty-bound to provide medical treatment for protection of human life. If government hospitals fail to provide time-bound medical treatment to a patient in necessity of such management results in violation of his right to life guaranteed under Article 21, and hence is violation of a patient's right to life. It has also been said in this judgement that the deficiency of financial resources should not be a reason for the State to wary from its constitutional duties.

The State government is duty bound to guarantee that needy and weaker sections of society have access to treatment for rare and chronic diseases. The father of seven year old Mohammed Ahmed Khan, Sirajuddin, described the wretched story of the loss of four of his children to Gaucher's disease, a rare genetic disease that needed lifelong and hugely costly enzyme replacement therapy. A petition filed before the Delhi High Court in November, 2014 alleged that the denial of treatment to the petitioner (Mohammed Ahmed Khan) on account of the failure of his parents to pay the exorbitant costs of the treatment violated the right to life guaranteed under Article 21 of the Constitution. Mohammed Ahmed was in need of glucocerebrosidase enzyme replacement therapy, costing the family Rs. 4.8 lakh per

33 AIR 1989 SC 2039
34 AIR 1996 SC 2426

month. In a landmark judgement, Justice Manmohan said that the State government had a constitutional duty to deliver free treatment to the child in this case at the AIIMS and stated that the government needed to ensure that needy and weaker sections of society had access to treatment for rare and chronic diseases, such as Gaucher's disease. The court supported the right to health and access to health care as part of the right to life guaranteed under Article 21. Accordingly, every person has a fundamental right to quality and affordable health care.

It was pointed out that the issue was related with the absence of acceptable funding for public health programmes: "Though health is a State subject, there is no legislation explicitly recognising a right to public health at the State level. In 2009, Assam enacted a Right to Public Health Act, but it only mandated the State government to pay in case of an emergency."

The mandate of the National Human Rights Commission of India is to safeguard and endorse rights guaranteed by India's Constitution and international treaties. The Commission has been largely pro-active to ensure the right to health for every citizen of India. It has encouraged advancement of health care facilities in the country and assignment of medical staff for rural people. It has also made numerous deliberations to the Government to confirm that the policies implemented to respect the right to health. Such as, the recommendations made to create treatment facilities in villages; to establish a proper mechanism to supply the essential drugs primary health centres; to encourage public-private partnerships with the aim of maximising the benefits of health care facilities; and betterment of immunisation programmes, so that childhood diseases are controlled at the earliest occasion. In a report published in February 2007, the Commission also condemned the deficiency of safe drinking water in many areas of the country.

7. Lessons from Pandemic: Human Rights for Access to Medicine yet to Achieve

Since 2019, the mankind suffered from the viral disease Covid-19; it was a pandemic – all the countries of the world suffered loss of lives, and all kinds of the human activity and movement including business, travel, etc. was at halt for several months worldwide. Total number of cases till date is reported as over 600 million (634,601,370 total cases) with the USA accounting for 15.66 per cent (99,281,954 cases) and India accounting for 7.04 per cent

(44,649,088 cases) and total death of over 6.5 million people (6,589,480 deaths).[35] The severity of infectiousness of the disease, varied range of symptoms, huge morbidity and mortality rate, non-availability of known anti-viral medicine or vaccine for this new disease, and requirement of huge number of healthcare infrastructure was an overwhelming problem for the health authorities. People learnt how important it is to follow the human rights approach for access to medicine during this dreadful journey of Covid-19.

Covid-19 posed a serious challenge to the authorities of developed as well as developing and least developed countries in handing the situation. World Health Organization (WHO) and World Trade Organization (WTO) had a major role to play during this crisis of global public health and global trading system to ensure the availability of a wide range of affordable healthcare products (Kumar et al., 2022). Tab Remdesivir was claimed to be a treatment for Covid-19; but in spite of satisfying the conditions of Article 31(b) of the TRIPS Agreement, no compulsory license was issued; hence the price of the medicine was higher. But non-exclusive licenses were issued by the patent holder of Remdesivir to many pharmaceutical companies of India and other countries, to ensure the availability of generic Remdesivir (Kumar et al., 2022). Vaccine for Covid-19 was a more viable option to control this pandemic, but again the IPR protection came into the way. India and South Africa urged WTO to waive the IPR for Covid-19 related medicines and vaccines to ensure the accessibility and affordability of such vaccines, medicines, and other new technologies for developing and least developed countries; which would help all countries to adopt necessary measures to protect public health, as urged by Article 8 of TRIPS Agreement, and would also serve the human right to health in this critical hour (WTO, 2020). Many developing and least developed countries supported this proposal; but it was opposed by the developed countries like the UK, the USA, Canada, Norway, and the EU, as according to them, without IPR incentive, the new inventions related with Covid-19 vaccines, medicines, diagnostics, and treatment linked technologies would stop (World Report, 2020). This patent waiver proposal was presented to WTO TRIPS Council on 16 October 2020 and discussed again by the Council on 20 November 2020 (World Report, 2020). Later on, the USA supported the IP waiver proposal in April 2021 after the surge of Omicron-variant cases of Covid-19 (Report ALLEA, 2021). The Waiver Proposal was later revised on May 21, 2021 ('co-sponsored waiver' proposal) and supported

35 See the data published online by WorldOMeters https://www.worldometers.info/coronavirus/worldwide-graphs/#total-cases

by majority of the least developed countries (63 of which are WTO Members) (WTO, 2021). Finally, in 12th Ministerial Conference, the matter of IP waiver for Covid-19 was discussed in June 2022, and the Ministerial Decision had given Member States the scope to take action regarding Covid-19 vaccines to override the exclusive rights of the patents through the targeted waiver over the next five years (WTO News, 2022). Accordingly, any "Member State may limit the rights provided for under Article 28.1 of the TRIPS Agreement by authorizing the use of the subject matter of a patent required for the production and supply of COVID-19 vaccines without the consent of the right holder to the extent necessary to address the COVID-19 pandemic" (WTO, 2022). Though this decision can be taken as a welcome step by WTO, but one important point is to be noted regarding this decision, the waiver is given for Covid-19 vaccine only, not for anything else, like medicines, or diagnostic technology or products needed for treatment like ICU equipment, etc. As of now, the vaccine is the most important tool to prevent the spread of Covid-19, so this waiver option will help developing and least developed countries to get the supply of vaccine in an equitable manner. But this is not enough on the part of the international community, because the data says, till July 2022, in spite of all our efforts, only 67.9 per cent of the world population received at least one dose of the Covid-19 vaccine; and among the population of least developed countries, only 23.1 per cent people have received at least one dose of the vaccine.[36] That percentage is showing that 'health for all' is not yet achieved; it is also showing how TRIPS Member countries failed to follow the TRIPS Agreement 'principle' of 'formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition' (Article 8); and in spite of the Constitutional mandate, the WHO failed to provide mankind the chance of "enjoyment of the highest attainable standard of health" which "is one of the fundamental rights of every human" at the time of Covid-19 pandemic.

Conclusion: The Way Forward

Access to medicine is a topic of debate for long; it placed the intellectual property right and human right to health in a face-off, and it posed a challenge for the policy makers to balance between the private interests of pharmaceutical companies and public health. This becomes more critical during the global suffering of Covid-19 pandemic. The need of supply of medicine, sanitizers, Personal Protection kits (PPE Kits) and masks, health care infrastructure,

36 Website update, Coronavirus (Covid-19) Vaccinations, Our World in Data, Oct. 2022, https://ourworldindata.org/covid-vaccinations

especially, Intensive Care Units and separate wards/hospitals for Covid cases, healthy health care personnel (doctors, nurses and other staffs) and lastly the need of vaccines mounted almost overnight. The requirement superseded manifold than the manufacturing capacity. This overwhelming situation reminded us more than ever that medicine, vaccine and other diagnostic and therapeutic technologies are essential commodities; no one doubts that IPR protection is important to incentivise research and development of those commodities; but formulation of strong public health policy is imperative for the health officials and policy-makers – specifically keeping in mind the human rights of each citizen towards health as a fundamental human right.

References

- Ahuja, S.D. and Ahuja, D.P., 2013, 'Indian Supreme Court Rejects Novartis Crystalline form Patent, International Protection for the Protection of Intellectual Property,' AIPPI e-News, https://www.aippi.org/enews/2013/edition30/Sudhir_Ahuja.html
- Anthon, C., 1841, A Classical Dictionary, New York: Harper and Bros. p 1273.
- Bishop, J. W., 1949, 'Judicial Construction of the Trading with the Enemy Act,' Harvard Law Review, Vol 2, No. 5, pp. 721-759, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3836&context=fss_papers
- Bhatnagar J. and Garg V., 2007, 'Patent Law in India,' Mondaq, https://www.mondaq.com/india/patent/54494/patent-law-in-india
- Boldrin and Levine, 2005, 'Against Intellectual Monopoly,' Chapter 9: The Pharmaceutical Industry, p.3, available online http://levine.sscnet.ucla.edu/papers/ip.ch.9.m1004.pdf
- Brandes, L.M. and Naukkarinen, T.H., 2020, 'Patent Term Extension,' SterneKessler e-News, https://www.sternekessler.com/news-insights/publications/patent-term-extension
- Chamber of Deputies, CSSD, 2013, 'Brazil's Patent Reform: Innovation towards National Competitiveness,' Center for Strategic Studies and Debate, Brasilia.
- Clift, C., 2009, 'Data Protection and Data Exclusivity in Pharmaceuticals and Agrochemicals,' IP Handbook of Best Practices, Chapter 4.9, p 433, http://www.iphandbook.org/handbook/chPDFs/ch04/ipHandbook-Ch%2004%2009%20Clift%20Data%20Protection%20and%20Exclusivity.pdf

- Constitution of the United States, 1787, available at http://www.archives.gov/exhibits/charters/constitution.html
- Correa, C., 2007, 'Guidelines for the examination of pharmaceutical patents: Developing a public health perspective,' Working Paper for ICTSD–UNCAD, http://ictsd.org/i/publications/11393/
- Council Directive 65/65/EEC, 26 January 1965, on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products, http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31965L0065:EN:HTML.
- Council Directive 87/21/EEC, 22 December 1986, amending Directive 65/65/EEC on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31987L0021:EN:HTML
- Dorland, 2006, 'Healthcare Information,' Market Category A: Pharmaceuticals and Related All Ethical Pharmaceuticals, 16th Ed., Vol 1, pp. 95-96
- Guideline EC, 2009, 'Summary of Product Characteristics,' European Commission, Enterprise and Industry Directorate-General, http://ec.europa.eu/health/files/eudralex/vol2/c/smpc_guideline_rev2_en.pdf
- IFPMA Report, 2011, 'Data Exclusivity: Encouraging Development of New Medicines,' International Federation of Pharmaceutical Manufacturers and Associations, http://www.ifpma.org/fileadmin/content/Publication/IFPMA_2011_Data_Exclusivity__En_Web.pdf
- IFPMA Report, 2012, 'The new frontiers of biopharmaceutical innovation,' International Federation of Pharmaceutical Manufacturers and Associations
- Konder, F., 1984, 'A transferência empresarial de tecnologia,' COMPARATO.
- Krumplitsch, S., 2020, 'Hatch-Waxman Litigation 101: The Orange Book and the Paragraph IV Notice Letter,' DLA Piper e-News, https://www.dlapiper.com/en/us/insights/publications/2020/06/ipt-news-q2-2020/hatch-waxman-litigation-101/
- Kumar, M. et al., 2022, 'Access to Medicine and Medical Equipment during COVID-19: Searching Compatibility between the WTO and WHO,' India Quarterly: A Journal of International Affairs, Vol 78, https://journals.sagepub.com/doi/full/10.1177/09749284211068461
- Mittal, A., 2010, 'Patent Linkage in India: Current Scenario and Need for deliberation,' Journal of Intellectual Property Rights, Vol 15, p. 191.
- Patnaik, N., 2010, 'India tops exporting generic medicines,' The Economic Times, http://articles.economictimes.indiatimes.com/2010-03-07/news/28443868_1_generic-medicines-india-tops-pharmaceutical-industry
- Report GSK, 2007, 'Global Public Policy Issues – GlaxoSmithKline's Position, Evergreening,' A publication of GlaxoSmithKline Government Affairs, Public Policy and Patient Advocacy, http://www.gsk.com/content/dam/gsk/globals/documents/pdf/GSK-and-evergreening.pdf

- Report GSK, 2008, 'Global Public Policy Issues: GlaxoSmithKline's Position,' A publication of GlaxoSmithKline Government Affairs, Europe and Corporate.
- Report ALLEA, 2021, 'ALLEA Statement on Vaccination Bottlenecks in the Global South and a Patent Waiver for Covid-19 Vaccines,' All European Academics e-News, https://allea.org/portfolio-item/allea-statement-on-vaccination-bottlenecks-in-the-global-south-and-a-patent-waiver-for-covid-19-vaccines/
- Saikia, M., 2016, 'India's patent laws: Journey from British Raj era,' Daily Pioneer, https://www.dailypioneer.com/2016/columnists/indias-patent-laws-journey-from-british-raj-era.html
- Watson, J., Retrieved 26 March 2013, 'A History of the United States Patent Office,' Historical Makers e-News,www.historical-markers.org
- Website update, 2022, 'Coronavirus (COVID-19) Vaccinations,' Our World in Data, https://ourworldindata.org/covid-vaccinations
- World Report, 2020, 'South Africa and India push for COVID-19 Patents Ban,' The Lancet, Vol 396
- Worthen, D.B., 2003, 'American Pharmaceutical Patents: From a Historical Perspectives,' International Journal of Pharmaceutical Compounding, Vol. 7 No. 6
- WHO, 2011, 'The Right to Health in the Constitutions of Member States of the WHO Organization South-East Asia Region,' SEA-HHR-02
- WTO, 2001, 'Negotiations, implementation and TRIPS Council Work 24,' DOHA Press Pack.
- WTO Ministerial Conference, 2001, 'Declaration on the TRIPs Agreement and Public Health,' WT/MIN(01)IDEC/2, http://www.wto.orglenglishlthewto_e/ministe/min0 l_e/mindecltrips-e.htm
- WTO, 2020, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, Communication from India and South Africa,' WTO Doc. IP/C/W/669.
- WTO, 2021, 'Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19, Communication from the African Group, the Plurinational State of Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Jordan, Kenya, The LDC Group, Malaysia, Maldives, Mongolia, Mozambique, Namibia, Pakistan, South Africa, Vanuatu, The Bolivarian Republic of Venezuela and Zimbabwe,' WTO Doc. IP/C/W/669/Rev.1
- WTO News, 2022, 'TRIPS Council Welcomes MC12 TRIPS Waiver decision, discusses possible extension,' WTO News, https://www.wto.org/english/news_e/news22_e/trip_08jul22_e.htm
- WTO, 2022, 'Ministerial Decision on the TRIPS Agreement,' WTO Doc. WT/MIN(22)/30, WT/L/1141

Nursing Personnel and the World at Work: A Sustainable Human Rights Discourse from ILO

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Abstract

The discourses on the vital role played by the nursing personnel assumes significance in the wake of any health crisis, particularly so during Covid-19 when the world is trying to recoup from the devastating aftermath of the pandemic. The violence perpetrated against the nursing personnel, be it physical or psychological, is one of the contentious issues around the world. Workplace driven violence and harassment leads to devastating consequences, perpetuating inequities, discrimination, stigmatisation, and conflict at the workplace in general, and affects the dignity of human beings at the personal level. The article strongly suggests bridging gaps within the sector specific Convention No. 149 by outlining the need for developing concrete responses and interventions, moulding policies surrounding the psycho-social risks endured by the nursing personnel taking cue from Convention No.190, thereby ensuring dignity and freedom from violence and harassment at the workplace as a central human rights issue.

Keywords: Nursing personnel, psycho-social risks, health care, workplace, human rights

1. Setting the tone

"Nursing is one of the fine arts: I had almost said 'the finest of fine arts'."
—Florence Nightingale, Founder of Modern Nursing

The year 2020 was commemorated by the World Health Organisation as the International Year of the Nurse and the Midwife, in honour of the 200th anniversary of the birth of Florence Nightingale with a clarion call to invest in education, jobs and leadership roles in this sector. Coupled with a gendered dimension, the nursing personnel with their popularised role of

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care-oriented approach and often not fitting into the so called rights holders status, stand as an epitome of feminisation of labour phenomenon. From times immemorial, services rendered by the nursing personnel is inextricably linked with the day-to-day life stages of a human being, irrespective of man-woman difference, ranging from the birth of a child, carried forward through different stages of hospitalisation instances immaterial to severity or non-severity of the medical conditions, special emphasis to be laid on the role played by them in the context of ageing related co-morbidities, whether through institutional or personalised home care. The significance of the role played by the nursing personnel in the health care delivery sector has increased multi-fold, in the wake of the pandemic and its aftermath.

They represent the highly underrated, invisible, and overlooked population when socio-economic policies are framed at the national or institutional levels, or when human rights discourses of the vulnerable population occur. A uniform definition of what goes to make the definition of workplace violence remains elusive, and includes homicide, abuses, discrimination, assault, threats, mobbing and bullying as commonly referred instances of violence and harassment at work.[1] The psycho-social risks associated with the occupational safety and health issues of the nursing personnel gets the least attention.[2] The multifaceted workplace hazards or occupational safety issues of the nursing personnel is hardly discussed as they are providing health care services, which gets categorised under the culture of care, too moral, the concept is downsized as holding on to the lowest rung of the societal hierarchy. Alongside the commonly referred work place hazards that a nursing personnel is potentially prone to at the workplace, ranging from being infected with the diseases from the patients or the overstress and mental wellbeing that gets affected due to long drawn duty hours and shifts with no rest/leisure, the human rights violations of migrant nursing personnel, there exists another dimension arising from the public interface, i.e., the day-to-day violence and harassment perpetuated either by the employer, the patients/bystanders/relatives of the patient and the third parties involved.

The emotional and mental stress driven by such situations could be referred to as the psycho-social hazards associated with the nursing personnel while at work. Such instances at the

1 ILO refers to frequently used terms of violence in the field of health sector through its Framework Guidelines for Addressing Workplace Violence in the Health Sector, 2002

2 Masoudi Alavi N. (2014). "Occupational hazards in nursing. Nursing and midwifery studies," 3(3), e22357. https://doi.org/10.17795/nmsjournal22357

workplace, largely reflect conflicts of interest over which nursing personnel do not have independent control, due to the intimidating or abusive atmosphere.[3] Very often, violence or harassment or sexual harassment perpetrated against the nursing personnel remains shrouded in silence, as reporting of such instances to the higher ups can result in losing ones' livelihood option. Situations of forced/bonded labour are identical to this scenario. The violence triggered due to illness of the patients, who themselves become the perpetrators, miscommunication, and alcohol use by the colleagues or bystanders to the patients, working in the out-patient unit, trauma and emergency unit, operating room, or medical or surgical unit increased the odds of violence.[4]

A conducive workplace should be addressing the all-encompassing rights, characteristics, traits, issues, the vulnerabilities faced by the workers therein and many more complex kind of relationships involved. A nursing personnel, irrespective of the gender dimensions, ought to be acknowledged as a human being with one's own value of self, dignity, and fundamental freedoms like any other human being. There arises the need for gender neutral norms/policies guaranteeing freedom from violence and harassment at the workplace. The health and well-being of people at all ages lies at the heart of sustainable development. Nursing staff as well, without being the exceptions. Sustainable Development Goal 3 of 2030, stands as a reflection of the progressive worldview.[5] Ensuring universal health coverage globally envisions the idea of quality health care and its inclusive strategy necessitates the realisation of decent work to be promoted to its key actors. The interlinkages of sustainable development converges with an appropriate blend of the ILO framework, i.e. the Nursing Personnel Convention (No. 149) way back in 1977 (hereinafter referred to as the Nursing Personnel Convention), the most recent Violence and Harassment Convention, 2019 (No. 190) (hereinafter referred to as the Violence and Harassment Convention), and the associated Recommendation No. 206 that attempts to bridge the gap between the *is* and the *ought* proposition.

3 B.K. Redman, C. Donovan, "Ethical and human rights concerns of Connecticut nurses: survey and implications for the profession." *Nursing Connections*. 1999 Fall;12(3):41-6. PMID: 10788903 Available at https://pubmed.ncbi.nlm.nih.gov/10788903/ Last visited on 13/06/2022

4 C. Kamchuchat, V. Chongsuvivatwong, S. Oncheunjit, T.W. Yip, R. Sangthong, "Workplace violence directed at nursing staff at a general hospital in southern Thailand." *J Occup Health*. 2008;50(2):201-7. doi: 10.1539/joh.o7001. PMID: 18403873.

5 SDG 2030 Goal 3 reads as: Ensure healthy lives and promote well-being for all at all ages

2. The Convention, 1977 (No. 149) and Convention, 2019 (No. 190) Juxtaposed

The sector specific ILO standards as emanating from the Nursing Personnel Convention (No. 149), way back in 1977, had acknowledged the vital role played by nursing personnel in the field of care economy sector, considering the specificities of the work and the working conditions under which it is carried out by them.[6] The Convention builds upon the fact of shortage of qualified persons and that the existing staff remain underutilised, and this deficiency reflects as an obstacle to the development of effective health services. The Convention anchors on the three-pronged areas of well-coordinated development, i.e., nursing education, training and the supervision of the same.[7] The nursing personnel stands defined as including all categories of persons at work, providing nursing care and nursing services.[8] The national policies and legislative framework ought to focus on the aspects of education and appropriate trainings, employment and working conditions, including career prospects and remuneration with core emphasis on attracting personnel to this sector, retaining them without leading to frequent attrition levels.[9] The strategy followed by the Convention is social dialogue and participatory approach of workers and employers, while framing conducive policies in the field.[10] The general standards emanating from ILO like those relating to employment and conditions of work, such as instruments on discrimination, on forced labour, on freedom of association and the right to bargain collectively on voluntary conciliation and arbitration, on hours of work, holidays with pay and paid educational leave, on social security and welfare facilities, and on maternity protection and the protection of workers' health are equally applicable to the nursing personnel.[11]

The Convention mandates that the determination of conditions of employment and work specifically ought to be settled by negotiation between employers' and workers' organisations concerned and the dispute settlement instances to mandatorily involve alternate dispute resolution systems like mediation, conciliation and voluntary arbitration.[12] The Convention

6 Preamble, Nursing Personnel Convention, 1977 (No. 149)
7 Article 3, Nursing Personnel Convention, 1977 (No. 149)
8 Article 1, Nursing Personnel Convention, 1977 (No. 149)
9 Article 2 (a) and (b) Nursing Personnel Convention, 1977 (No. 149)
10 Article 2(3) Nursing Personnel Convention, 1977 (No. 149),
11 Preamble, Nursing Personnel Convention, 1977 (No. 149)
12 Article (2) and (3) Nursing Personnel Convention, 1977 (No. 149)

rolls out certain conditions for consideration while at work for the nursing personnel like: (a) hours of work, including regulation and compensation of overtime, inconvenient hours and shift work; (b) weekly rest; (c) paid annual holidays; (d) educational leave; (e) maternity leave; (f) sick leave; (g) social security, which stands prescribed as to be on par with the equitable standards in other countries, during the process when ratifying countries frame national policies and regulations.[13] An enabling power is granted to the ratifying countries as well to improve the existing laws or regulations on occupational health and safety to suit the special nature of work of nursing and the atmosphere in which it is carried out.[14]

No aspect of violence and harassment that could be perpetuated against the nursing staff in the course of their work is addressed through Nursing Convention. Hardly any discourse has gone behind the unique conditions under which the nursing personnel work. The occupational specificities and vulnerabilities from the viewpoint of a human being at the world of work remain unaddressed. India has neither ratified the Nursing Convention nor does a national legislative framework exists in the above lines. The present Code on Occupational Safety Health and Working Conditions, 2020 has not included any sector specific regulations in this regard. The psycho-social risks perpetuated against the nursing personnel remains unaddressed, till date. It is at this juncture the question of feasibility of applying Violence and Harassment Convention, 2019 (No. 190) to the Nursing personnel comes in.

The Violence and Harassment Convention, 2019 (No. 190), and the associated Recommendation No. 206 assumes a huge significance, with its sensitivity towards recognising the dignity of human beings at work, reaffirming, and acknowledging that violence and harassment at workplace constitute a human rights violation or abuse, which ultimately reflects as a threat to equal opportunities, and hence is unacceptable and incompatible with decent work.[15] The Convention guarantees a violence and harassment free workplace for all human beings, irrespective of the sector or gender differences. The strategy to be worked out by national regimes to shape policies to combat violence and harassment is envisaged through collective bargaining, ensuring representative character of employers

13 Article 6 Nursing Personnel Convention, 1977 (No. 149)

14 Article 7 Nursing Personnel Convention, 1977 (No. 149)

15 Preamble, Violence and Harassment Convention, 2019 (No. 190)

and workers. The Convention assumes significance to the psycho-social hazards and risks attached to the workplace that has the potential of affecting a person's psychological, physical and sexual health, dignity, and family and social environment.[16] The Convention No. 190 addresses the term "violence and harassment" in the world of work as a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment into its domain.[17] Gender-based violence and harassment assimilates the gendered dimensions like the discrimination/abuses supported by the misogynist approaches affecting the human beings disproportionately and includes sexual harassment.[18]

The scope of the Violence and Harassment Convention is too broad and applicability of the labour standards are immaterial to the sector and the nature of jobs or irrespective of public and private, formal or informal economy workers brings in the inclusivity approach, enabling the nursing personnel to be guided by the norms.[19] The standards laid down therein has huge potential in transforming the working landscape of nursing personnel to provide them with violence and harassment free work places. The Convention empowers the ratifying countries to build a strong workplace through legislative framework, encapsulating appropriate strategies following the policy of prohibition and not regulation.[20] Accessibility to justice through different ranges of remedies depending on the need of the survivors[21] is ensured by strengthening enforcement mechanisms and providing for sanctions. Support measures like legal, social, medical, and administrative support for complainants and victims for aiding the process is as well ensured therein.[22] Appropriate development of tools, guidance, education, training, and awareness programmes[23] amongst the stakeholders at the workplace in accessible formats[24] and language adds on to the aspect of accessibility to justice.

16 *Ibid*
17 Article 1(a) Violence and Harassment Convention, 2019 (No. 190)
18 Article 1(b) Violence and Harassment Convention, 2019 (No. 190)
19 Article 2 Violence and Harassment Convention, 2019 (No. 190)
20 Article 4 2(a) Nursing Personnel Convention, 1977 (No. 149)
21 Para 14 Violence and Harassment Recommendation, 2019 (No. 206) read with Article 10(b) Violence and Harassment Convention, 2019 (No. 190)
22 Article 10(b) (v) Nursing Personnel Convention, 1977 (No. 149)
23 Article 11(a) and (b) Nursing Personnel Convention, 1977 (No. 149)
24 Article 9(d) Nursing Personnel Convention, 1977 (No. 149)

The core principles upon which the Convention rests itself is the inclusive, integrated and gender-responsive approach, leading to the prevention and elimination of violence and harassment in the world of work. A well-coordinated blueprint of the components of an effective policy is outlined through this Convention. Those components include the concept of affirmative policies to combat the same, prevention, protection and enforcement measures.

3. The Convergent Reflections

> Work is about more than making a living, as vital as that is. It's fundamental to human dignity, to our sense of self-worth as useful, independent, free people.
>
> — William J. Clinton

The ILO Centenary Declaration adopted in June 2019 declared that "safe and healthy working conditions are fundamental to decent work." The way the world of work is defined under the Convention No. 190, and the inclusivity aspect brought in by incorporating the different instances of interactions that are potentially possible to occur between the nursing personnel and various stakeholders involved daily, is commendable. The workspace could be the actual one defined by four walls of room, including public and private space or spaces like employer provided accommodation or spaces allotted for rest break or a meal or using sanitary facilities, or washing or changing facilities, the work related trips and communications including those enabled by information and communication technologies or while commuting to and from home are all deemed falling within the extensions of the actual workplace, which effectively fits in the care services provided by nursing personnel within an institutional setting or during domiciliary visits, reaching out to the patients.[25]

A workplace violence includes any action, incident or behaviour that departs from reasonable conduct in which a person is assaulted, threatened, harmed, injured in the course of, or as a direct result of, his or her work: firstly, includes internal workplace violence, which takes place between workers, including managers and supervisors; and secondly, includes external workplace violence, which takes place between workers (and managers and supervisors)

25 Article 3, "Violence and Harassment Convention," 2019 (No. 190)

or any other person present at the workplace.[26] A much-detailed guiding idea regarding the nature of violence and harassment and who could be the perpetrators is found outlined under Recommendation No. 206. Special mention is made to the circumstances of violence and harassment that are likely to lead to psycho-social hazards arising out of working conditions and arrangements, work organisation and human resource management, those that involve third parties, such as clients, customers, service providers, users, patients and members of the public; and arising from discrimination, abuse of power relations, and gender, cultural and social norms that support violence and harassment. These guidelines, indicative of abusive instances, are in tune with the kind of vulnerabilities associated with the nursing personnel across the world. Internal workplace violence like the psychological and verbal violence has a negative impact on the nursing personnel which ought to be handled through adequate proper organisation-level measures.[27]

The organisational measures needs to reflect on a three pronged approach: firstly, incorporating zero tolerance policies, developing proper incident reporting procedures, counselling therapy for the survivors; secondly, maintaining detailed database, public condemnation of such instances, helping the nursing personnel recoup, enabling prosecution of perpetrators and thirdly targeted interventions that is individual centric, which encourages reporting of instances, adequate training for self-defence and all the more, a compassionate and empathetic community support.[28] External violence needs to be taken care of through institutional and national legislative policies.

Many discourses are happening for the upliftment of health care services to the masses nationally[29] and internationally, focussing on framing policies and regulation of standards for the governance of nursing and midwifery education and training. Hardly discussions happen about the human rights discriminations and abuses perpetrated against the nursing

26 D. Chappell; V. Di Martino, "Violence at work." Third edition. Geneva, International Labour Office, 2006 P.10; https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221108406_en.pdf

27 L.C. Pien, Y. Cheng, W.J. Cheng, "Internal workplace violence from colleagues is more strongly associated with poor health outcomes in nurses than violence from patients and families." *J Adv Nurs*. 2019 Apr;75(4):793-800. doi: 10.1111/jan.13887. Epub 2018 Nov. 12. PMID: 30375031. Also refer to N. Ielapi, M. Andreucci, U.M. Bracale, D. Costa, E. Bevacqua, N. Giannotta, S. Mellace, G. Buffone, V. Cerabona, F. Arturi, M. Provenzano, R. Serra, "Workplace Violence towards Healthcare Workers: An Italian Cross-Sectional Survey." *Nurs Rep*. 2021 Sep. 30;11(4):758-764. doi: 10.3390/nursrep11040072. PMID: 34968266; PMCID: PMC8715454.

28 O.A. Bhatti, H. Rauf, N. Aziz, R.S. Martins, J.A. Khan, "Violence against Healthcare Workers during the Covid-19 Pandemic: A Review of Incidents from a Lower-Middle-Income Country." *Annals of Global Health*. 2021;87(1): 41, 1–11. DOI: https://doi. org/10.5334/aogh.3203

29 The National Nursing and Midwifery Commission Bill, 2020 https://main.mohfw.gov.in/sites/default/files/DraftNursingbill_1.pdf

personnel, while formulating national health programme, hospital care services, primary health services, community, and family health nursing services of the population. The agenda or the thrust remains on the optimum healthcare delivery system with the least mention about occupational safety and mental health of the health care professionals involved. Investment in the mental wellbeing of the nursing personnel has huge transformative potential to attract good hands to the profession, and enable necessary and conducive health care services on a time bound basis to the patients involved. The hospital authorities, public or private, are to be made bound by national laws and regulations/policies to this effect for targeted interventions, failing which strict penalty and legal actions could be adopted against them. Effective, well- coordinated, conducive work environment can reduce violence against nursing personnel and the reduction of violence and harassment in turn contributes to creating a better nursing work environment.[30]

The pandemic provided a watershed moment to track the need-based rights perspective to be evolved for the nursing personnel, and the importance for investment in critical non-negotiable right of freedom from violence and harassment at the workplace. The apex regulatory body in India, the Indian Nursing Council as a forum or the National Nursing and Midwifery Commission, envisaged in the National Nursing and Midwifery Commission Bill, 2020[31] in its legislative framework ought to take the lead in bringing in measures of occupational safety to the nursing personnel across the country. ILO Framework Guidelines for Addressing Workplace Violence in the Health Sector, 2002, which incorporates an integrated, participative, cultural/gender sensitive, non-discriminatory, and systematic approach, could be taken up as a foundational framework to build upon. Integrated approach brings in the ideas of inclusivity, preventive measures to carry forward a zero tolerance to abuses and discrimination at the workplace hazards, measures to improve work arrangements, communications and interactions. A participatory approach incorporating concerted roles and responsibilities of the different stakeholders involved, in building up safe workplaces and working together to combat workplace violence through designing and

30 M. Park, S.H. Cho, H.J. Hong, "Prevalence and perpetrators of workplace violence by nursing unit and the relationship between violence and the perceived work environment," *J Nurs Scholarsh.* 2015 Jan;47(1):87-95. doi: 10.1111/jnu.12112. Epub 2014 Oct 28. PMID: 25352254.

31 https://main.mohfw.gov.in/sites/default/files/DraftNursingbill_1.pdf

implementing anti-violence initiatives,[32] ought to be promoted. Equitable gender relations and the empowerment of all genders, regardless of socially assigned roles and expectations, are vital to successfully preventing violence at the workplace. Systematic action and affirmative policies should include identifying violence and harassment perpetuated against the nursing staff, how the risks and hazards gets assessed, the appropriate individual centric and sensitive interventions that are required periodically and the consistent monitoring and evaluation measures.[33] To keep the consciousness raising intact, various NGOs dealing in health and health related aspects or causes of women and children and other civil partnership organisations could be instrumental in drawing up appropriate tool kits at the workplace to combat the social scourge. Enabling appropriate competent authorities empowered through Ministry of Health and Family Welfare to inspect and investigate the issues of violence and harassment to the nursing staff/health care providers could act as a feasible measure to be acted upon.

The limitations arising out of the Nursing Personnel Convention, 1977, in addressing the psycho-social risks associated with the work ought to be cured through evolving policies/laws with enforcement mechanisms that converge with the ideas inculcated from the Violence and Harassment Convention, 2019. India ought to ratify both the above referred Conventions, i.e., Convention No. 149 and Convention No. 190. A regulatory framework encapsulating legislative policies anchored on the ILO Framework Guidelines for Addressing Workplace Violence in the Health Sector, 2002 and the Violence and Harassment Convention, 2019 is the need of the hour. Nursing professional forms the vital part of the human resource during a health crisis and their safety and dignity ought to be prioritised as a major component of value-based health care delivery system for sustainable development. An appropriate psycho-social environment, providing nursing personnel with better quality of life and giving them a broad sense of social inclusion, identity, and status, as well as career development opportunities and greater confidence[34] can go a long way in the realisation of human rights.

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32 International Labour Office/International Council of Nurses/World Health Organization/Public Services International Framework Guidelines for Addressing Workplace Violence in the Health Sector. Geneva, International Labour Office, 2002 https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/-- sector/documents/normativeinstrument/wcms_160908.pdf

33 *Ibid* P.11

34 M.C.S. Scozzafave, L.A. Leal, M.I. Soares, S.H. Henriques, "Psychosocial risks related to the nurse in the psychiatric hospital and management strategies," *Rev Bras Enferm* [Internet]. 2019;72(4):834-40.doi: http://dx.doi.org /10.1590/0034-7167-2017-0311

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