

NHRC

VOL. 15, 2016

JOURNAL

of the National Human Rights Commission, India

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Chairperson, NHRC

From the Editor's Desk

Dr. Satya N. Mohanty
Secretary General, NHRC

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ISSN 0973-7596



NATIONAL HUMAN RIGHTS COMMISSION

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**JOURNAL OF THE
NATIONAL HUMAN RIGHTS COMMISSION
INDIA**

Volume – 15

2016

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New Delhi – 110 023, India

ISSN : 0973-7596

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The Journal of the National Human Rights Commission, Published by Dr. Satya N. Mohanty, Secretary General on behalf of the National Human Rights Commission, C-Block, GPO Complex, INA, New Delhi – 110 023, India.

Price Rs. 150 /-

Cover Design/Typeset & Printed at:

Mittal Enterprises

2076, Gokul Shah Street,

Bazar Sita Ram,

Delhi – 110 006

Ph. : 09811340726, 09811756181

Email : mittalenterprises92@yahoo.co.in

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CHAIRPERSON NHRC

PREFACE

Launched in 2002 by the National Human Rights Commission, the English Journal has its fifteenth volume introduced this year. The annual Journal is devoted to publication of articles reporting both theoretical and empirical research on a wide range of human rights subjects, including current concerns with the purpose of facilitating human rights discourse in the country. In addition, the Journal publishes book reviews and important recommendations of the Commission that are outcome of the conferences organized during 2015-2016. The Journal over the years has come to be widely recognized across the country for promoting high quality scholarship on human rights and bringing together well-known human rights scholars.

For the 2016 English Journal, it's Editorial Board which comprises NHRC and five other eminent scholars shortlisted six broad themes. These themes are – (i) sustainable development goals; (ii) human life cycle, vulnerability and rights; (iii) rights of vulnerable sections of society; (iv) Indian constitution and present reality; (v) criminal justice system; and (vi) surrogacy and human rights. The first theme has two articles, one on environmental protection and renewable energy with special reference to the promotion and protection of human rights. The other dwells upon development induced displacement issues, SEZs and the state of farmers in India, wherein the author gives insights from some recent experiences.

The second theme contains an article on rights for every child in India and talks about their right to survival, development and protection in the light of major laws and recent landmark judgments. The next theme focuses on rights of vulnerable sections of society and has four articles, one on economic growth and poverty in India followed by unravelling the poverty conundrum in line with the 2030 sustainable development goal of eradicating poverty. It, thereafter, has an article on positioning tribal people in the light of injustice experienced by them. And, the succeeding one centers on human rights and adivasis.

The articles given under the fourth theme traces the origin of the “essential practices doctrine” and analyses its application in various cases before the courts, and on environment as a basic human right. The fifth theme deals with two articles – restorative justice indicators and laws relating to sexual violence in India. The article in the last theme talks about commercial surrogacy.

Besides, the Journal carries two book reviews and important recommendations of three conferences, that is, on right to food, silicosis in endemic States and western region public hearing on right to health care. This year, a new feature has been added in the Journal wherein the major activities undertaken by the Commission during the current year is also being reported upon, with the hope that it would be welcomed by all the readers.

I sincerely acknowledge the valuable contributions made by all the authors. I also express my deep gratitude to all the Members of the Editorial Board for their overall contribution in bringing out this Journal. I am confident that the present volume of the NHRC English Journal, fifteenth in series, will go on to add to the existing repertoire of human rights knowledge and understanding in the best academic way.

New Delhi
10 December 2016

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(H. L. Dattu) . . .

Volume-15, 2016



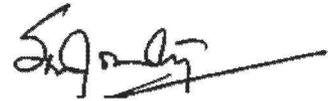
SECRETARY GENERAL NHRC

FROM THE EDITOR'S DESK

The Annual English Journal of the National Human Rights Commission is an important tool in sharing of information, knowledge and experience on diverse human rights subjects. It is one of the significant human rights journals giving an insight into contemporary issues concerning all rights impacting on the people of this country. With the passage of time, the Journal has proved to be a notable platform for scholarly work on human rights and in bringing together human rights scholars from across the country to write on issues plaguing the nation.

The 2016 Journal focuses on six cardinal themes. These are - sustainable development goals; human life cycle, vulnerability and rights; rights of vulnerable sections of society; Indian constitution and present reality; criminal justice system; and surrogacy and human rights. Besides, it carries important recommendations emerging from a consultation and two conferences organized by the Commission during 2015-2016 along with two book reviews. As mentioned by the Chairperson in his 'Preface', the Commission this year introduces to its readers a new feature in the Journal about the prominent activities carried out by it during 2016. This would give a bird's eye view about the work being done by NHRC.

I am extremely grateful to all the Editorial Board Members and authors for their contribution to this Journal. I am confident that the 2016 English Journal of the NHRC will generate new thinking on the cause of protection and promotion of human rights as well as upholding human dignity, which lies at the core of the struggle for human rights.



(Dr. Satya N. Mohanty)

New Delhi

10 December 2016

I – Sustainable Development Goals

Environmental Protection and Renewable Energy: Does it Promote Human Rights Too?

*Anupam Jha**

Abstract

The role of the energy sector is of great significance for a nation's economy. Traditionally, energy is derived from non-renewable sources such as, coal, fossil fuels, and natural gas, which are not infinite in volume and are unsustainable. These sources also cause environmental pollution by emitting carbon and other gases into the atmosphere. Renewable sources such as, sun, sea tide, river water, and wind are infinitely available, sustainable to produce environment friendly energy causing no damage to mother earth. The threat of climate change and its adverse effects have catalysed international co-operation in the field of alternative sources of energy to reduce carbon emissions. In this article, the currently available regulatory regime on renewable energy is analysed with special reference to the promotion and protection of human rights. It goes on to further assess the impact of the international framework in shaping the development of a legal regime in India on the subject matter of renewable energy, resulting in the indirect fulfilment of the human right to a clean environment.

Introduction

Renewable energy is now recognized as a promising solution to the vast energy needs of India and the international community. Many nations today have significant and ambitious programs for renewable energy development. These programs cover the entire gamut of technologies, including biogas plants, biomass gassifiers, solar thermal and solar photovoltaic systems,

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wind mills, co-generation, small hydro plants, energy recovery from urban, municipal and industrial wastes, geothermal energy, hydrogen energy, electric vehicles and bio fuels among others.

The need to boost the efforts for further development and promotion of renewable energy sources has been felt by the world over in the light of high prices of crude oil as well as the threat of climate change. However, a lot more needs to be done in order to make renewable energy available at an affordable price to the common man. It is imperative to take further steps to make the public aware of the potential of renewable energy and availability of various systems and devices, to make them less dependent on fossil oils.

In the last decade a huge manufacturing infrastructure has emerged for the manufacture and supply of non-conventional, renewable energy equipments. These include small scale and medium/large scale industries, both in the public as well as the private sectors. Many stakeholders and researchers have underlined the role of institutional frameworks and international cooperation in promoting the transition from the conventional to the non-conventional energy. Archaic and scant provisions in law hinder the growth of renewable energy.

At international level, the European Union Emission Trading System (ETS) of carbon control, the first multi-national carbon trading in the world, started in 2005. The Kyoto Protocol of 1997, which came into force in 2005, divided the whole world into predominantly industrialized (Annex 1) and developing (Non-Annex 1) countries. Emissions' trading was recognized by this Protocol. Non-Annex 1 countries do not have quantitative emission reduction commitments. However, Kyoto Protocol and ETS could solve the problem and threat of climate change alone. There needs to be a sound solution for a political, legal, and technological response – and there is, in fact, the technological response of renewable energy infrastructure to limit carbon emissions. This response has been available for three decades; it is the legal and policy response that has proved more elusive and has not been realized.

This research paper attempts to identify those rules and legal institutions that have promoted renewable energy in India and at the international level. It has examined in particular the role of the United Nations in convening important Conferences to protect the environment. Apart from examining the legal and institutional policies at domestic and international level, I have

also examined the landmark cases on renewable energy and the right to clean environment as has been recognized by the Supreme Court, National Green Tribunal and various electricity regulatory Commissions.

International Co-operation to Develop Renewable Energy

The first ever global environmental conference, the UN Conference on the Human Environment, was held in Stockholm in 1972. Among its major outcomes were the Stockholm Declaration, a milestone document as far as international environmental law is concerned, the Stockholm Action Plan, containing 109 recommendations on international measures against environmental degradation for governments (only one out of 109 recommendations had any sort of reference to climate change) and international organizations adoption of a group of five resolutions calling for a ban on testing nuclear weapons, creating an environmental databank, addressing actions linked to development and the environment, creating an environment fund, and establishment of United Nations Environment Programme (UNEP) as the central node for global environmental cooperation (Desai 2013). India was represented by her Prime Minister, Ms Indira Gandhi, who challenged the need for environmental protection at the cost of development needs of poor countries like India. At that time, world leaders did not appreciate the challenge of climate change and the need for adaptation and mitigation.

After 20 years another global conference, the UN Conference on Environment and Development (UNCED), was organized in Rio de Janeiro from 3-14 June 1992. This Conference was attended by more than 100 Heads of State as compared to only two in the Stockholm Conference. The principal outputs of UNCED were: The Rio Declaration on Environment and Development, Agenda 21 (40 chapter program of action), The Statement of Forest Principles, and two global treaties. Those treaties were: UN Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD). Chapter 9, paragraph 9 of Agenda 21 noted that much of the world's energy is currently produced and consumed in an unsustainable manner (UNEP 1992). It recognized that the need to control atmospheric emissions of greenhouse gases and other substances would increasingly need to be based on efficiency in energy production, transmission, distribution and consumption, and a growing reliance on environmentally sound energy systems, particularly new and renewable sources of energy (Id.). The then

India's Minister of Environment, Kamal Nath, actively took part in the deliberations and became the voice of the third world. The UN Framework Convention on Climate Change (UNFCCC) is aimed at protection of the earth's climate and is the first treaty to directly focus on the threat of climate change. It was, however, a 'Framework Convention', which means that it does not create substantive, hard obligations for states. It rather cultivated a platform for further negotiation and regulation. Consequently, its inherent limitation is that it relies heavily upon the voluntary cooperation of states to actually reach the required consent within the allotted time (Boyle 2012). Climate policy needs a radical reduction in GHG emissions worldwide. This can only be achieved through the comprehensive restructuring of global energy systems with co-ordinated institutional framework at international level. On the one hand, the developed countries consume most of the energy with only a quarter of the global population, on the other, the developing countries consume a quarter of global energy with three-fourths of world population.

Despite the fact that the UNFCCC was an important first step in addressing the issue of climate change, it became clear very quickly that it was an inadequate measure (Merkouris 2015). A legal instrument was felt to be necessary to bind the nations. In 1997, the Kyoto Protocol to the UNFCCC set out specific target to reduce greenhouse gas emissions by at least 5% by 2012 against the baseline year of 1990. Annex I of the Protocol stipulated a precise reduction target for each industrialized country (EU 8%, USA 7%, Japan 6%). India and China ratified the Protocol, but were not required to reduce carbon emissions under the agreement despite their relatively large populations. However, India has to earn carbon credit under Clean Development Mechanism (CDM) as enshrined in the Protocol and the developed countries would purchase these credits towards meeting their emission reduction targets. The Kyoto Protocol was to expire in December 2012, but it was extended to 2020 at the Doha Conference (2012).

The Government of India established the National CDM Authority (NCDMA) in 2003 with its Secretariat in the Ministry of Environment and Forests. As of 2012 in India, the highest number of Certified Emission Reduction (CER) was made in the energy sector, including renewable energy. The NCDMA mandates the projects, should also commit that it would share 2% of the CER for the development of the local communities. Further, the project should also promote sustainable development in a way that social, economic, environmental wellbeing of the area is ensured.

The World Trade Organization (WTO) also plays an important role in regulating international trade at a global level. The WTO functions according to the rule laid down in General Agreement on Trade and Tariff (GATT). Under the GATT Article III:4, non-fiscal measures to regulate renewable energy are called non-tariff barriers (UNCTAD 2009). When there is an obligation of the grid operator to purchase green electricity at a legally determined minimum fixed price, it amounts to subsidies. When the government mandates the market participants to purchase or sell a minimum quantity of electricity from renewable energy, this non-fiscal measure is a non-tariff barrier. According to Appellate Panel Ruling of the WTO, the minimum price should be set in such a way as to allow for equal competitive opportunities between domestic and imported sources of renewable energy (*Canadian Beer Case 2008*). Renewable portfolio standard (RPS) laws, which require retail sellers of electricity to include in their portfolios a certain percentage or amount of electricity from renewable sources, may violate the National Treatment provisions in the GATT, as electricity produced from conventional sources has the same qualities as electricity produced from renewable sources, and it is the same whether domestically produced or imported (Horlick, Schuchardt & Mann 2001).

Under the auspices of the UN, the 21st Conference of Parties (COP 21) was convened in 2015. The aim of the Paris COP 21 was to facilitate access to a low carbon pathway and resilient sustainable development for all, while keeping the global temperature rise to below two degrees centigrade. Countries across the globe were committed to creating a new international climate agreement by the end of summit (Jha 2015). The Paris Agreement, 2015 was the key outcome of this conference, according to which the traditional differentiation between developing and developed countries was not needed. For the first time, it was made a requirement that all parties report regularly on their GHG emissions and implementation efforts, and undergo international review. Binding commitments to adopt 'nationally determined contributions (NDC)' have been envisaged. These NDCs are to be submitted every five years, with a clear expectation that they will 'represent a progression' beyond the previous ones. Developed countries have to agree to support the efforts of developing countries, while for the first time voluntary contributions by developing countries are encouraged (Jha 2016). India has also ratified the Agreement in October 2016 along with the major carbon emitter countries, such as the U.S. and China, which ratified in early September 2016 (BBC 2016).

Human Right to Clean Environment and Renewable Energy

Clean energy is linked with the promotion of human rights. Put reversely, protection of human rights depends on the availability of more and more clean energy to every citizen of India and the world. The reason for making such a contention is that at present useful energy for human consumption is derived from dirty hydrocarbon derivatives, such as coal, oil, diesel, wood, and petrol. The ideal situation in that case would be that every citizen of India should have access to clean forms of energy that do not emit carbon-dioxide. However, that situation is not achievable, given the vast availability of coal, wood, and mineral oil in the country. India has the fifth largest coal reserves in the world, accounting for 301 billion tons (Government of India, 2014), and it has a significant amount of mineral oil, natural gas, and wood stock. Energy derived from coal, mineral oil, natural gas and wood stock causes carbon emission, which is responsible for climate change and air pollution. Pollution caused by the emission of carbon dioxide, and other gases result in injury to human health and degradation of the environment.

The Constitution of India has mandated the States under Article 48A to abide by the Directive Principles to protect and improve the environment. The Supreme Court, albeit after a long time, has recognized that the right to life under Article 21 of the Constitution includes the right to live in a healthy environment (Leelakrishnan 2005). Starting with *the Rural Litigation and Entitlement Kendra v State of Uttar Pradesh* (1985), the apex Court made several judicial pronouncements to promote the right to live in a healthy environment. These include the cases of *M.C. Mehta v Union of India* (1987), *Consumer Education and Research Centre v Union of India* (1995), *Indian Council for Enviro-Legal Action v Union of India* (1996), *Andhra Pradesh Pollution Control Board v M. V. Nayudu* (1999), *K.M. Chinappa v Union of India* (2003), *M.C. Mehta v Union of India* (2009), *Sterlite Industries Ltd. v Union of India* (2013), and *M.C. Mehta v Union of India* (2015).

While explaining the concept of the right to life enshrined in Art. 21 of the Constitution, the Supreme Court observed in *K.M. Chinappa v Union of India*:

Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution

of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution.

In *Andhra Pradesh Pollution Control Board v. M.V. Nayudu*, the Supreme Court again placed environmental concerns and human rights on the same pedestal and held that both are to be traced to Article 21. The Supreme Court has also tried to discourage the entry of unnecessary vehicular traffic into the National Capital Territory (NCT) of Delhi in view of the rising level of environmental pollution. In *M.C. Mehta v. Union of India* (2015), the Supreme Court ordered the levy of Environment Compensation Charge (ECC) on commercial vehicles (light duty vehicles, axle trucks, etc.) entering the city limits of Delhi. In this case, learned Attorney General of India, Mr. Harish Salve and Solicitor General of India, Mr. Ranjit Kumar, informed the Court that neither the Union of India nor the Government of NCT of Delhi had any objection to the imposition of ECC. The Court noted that vehicles that transit through Delhi did not adhere to the vehicular standards that are applicable in Delhi; namely, they were not Euro-II compliant nor were they using low sulphur and low benzene fuel. It further observed that there was no reason why very large number of goods vehicles should transit through Delhi thereby adding to the pollution level and the traffic on the road.

The newly established National Green Tribunal (NGT) has also reiterated the right to clean environment guaranteed under Article 21 in landmark cases. For instance, *Court on Its Own Motion v. State of H.P. & Ors.* (2014), where the matter involved the heavy volume of vehicular emission in Kullu-Manali region of Himachal Pradesh, the Tribunal held that the right to life included the right to a decent environment, and by necessary implication, it included the right against environmental degradation. It is in the form of right to protect the environment, as by protecting the environment alone we can provide a decent and clean environment to the citizenry, the Tribunal ruled. Such observation by the Tribunal has encouraged the environmental activists to focus on the environmental pollution caused by thermal power stations in our country.

Thermal Power plants deriving power from coal are major culprits of environmental pollution. By burning coal these plants emit greenhouse gases (GHG) such as CO₂, nitrogen oxide (NO₂), sulphur oxides (SO₂), which contribute to global warming.

The extent of global warming in the world will be determined by

how developing countries like India manage their energy generation plants. According to The Centre for Science and Environment, the thermal power plant of Badarpur in Delhi is one of the most polluting in the country (CSE 2015). The majority of these thermal power plants were found to be violating air pollution standards. Fly ash produced from the plants is highly toxic, injurious to human health and causes air, water and soil pollution. For example, the Raichur Thermal Power Station in Raichur district of Karnataka generates 1.5 Mt of fly ash annually. This ash needs to be disposed of every day, which puts huge strain on land (ENVIS Centre, Karnataka, 2007). Fly ash also contains radioactive material, such as radionuclide, which may cause injury to human health.

Suspended Particulate Matter (SPM) emitted by these plants is harmful to the ambient air quality of the region. For instance, Rajghat, Dadri and Badarpur thermal power plants had badly damaged the ambient air quality of Delhi. As a result, a bench headed by Justice Swatanter Kumar of NGT constituted a high-powered team to assess the ambient air quality of these thermal power plants (Jain 2015). The team was mandated to take samples of ambient air quality from these plants. Earlier, the NGT had ordered Rajghat, and Badarpur power Stations to bring SPM levels within permissible limits. This approach of the NGT has received accolades from many quarters.

Similarly, the NGT took a serious view when the matter related to the destruction of Amravati's environment. An application was filed in 2013 against the establishment of a coal based thermal power plant in the city of Amravati, which is culturally very rich (*Society for Environmental Protection, Amravati v. Union of India*). The applicant society contended that the plant would also deprive farmers of Amravati city of an irrigation facility from a dam nearby due to the plant absorbing most of the water available in the dam. It was held by the Tribunal that environmental clearance for a thermal power plant must involve effective public consultation.

In *Sudieep Shrivastava v Union of India & Ors* (2014), the NGT had to deal with diversion of forestland for coal mining in Chhattisgarh. The Tribunal had to quash the Minister of Environment's order permitting diversion of forestland and forest clearance for coal mining purposes. It directed the Ministry to seek fresh advice from the Forest Advisory Committee (FAC) relating to every aspect of diversion of forest land for coal mining. FAC was also given liberty to seek advice or opinion from authoritative sources, such as Indian Council of Forestry Research and Education, Dehradun.

From the analysis of above judgments of the Supreme Court and NGT, it can be concluded that the right to life as enshrined in the Constitution under Article 21 has been liberally interpreted to include the right to clean and healthy environment. By corollary, the right to clean and healthy environment includes the right to have clean forms of energy. Clean forms of energy are necessarily from renewable resources, such as sun, wind, biomass, and small hydro. Considering the fact that India is the fourth largest Greenhouse-Gas (GHG) emitter, India would have to take necessary steps to promote human rights by ensuring a clean and healthy environment. In the next section, the initiatives taken by the Union Government to promote renewable energy and the institutions and legal regime established by it has been discussed.

India's Institutional and Legal Framework on Renewable Energy

India has an installed power generation capacity of 2.29 lakh MW of which 12 % (28,184 MW) is fuelled by renewable energy (Small Hydro project, Biomass gasifier, Biomass Power, Urban and Industrial Waste Power, Wind Energy, Solar). Of this, 19618 MW is wind power capacity. The Jawaharlal Nehru National Solar Mission (JNNSM) started under the aegis of National Action Plan on Climate Change (NAPCC), India, plans to generate 1000 MW of solar power by 2013 (first phase) and 20,000 MW of grid connected solar power capacity by 2022 (under the second and third phases). Biomass energy has the potential of 18000 MW (Punjab, U.P., Haryana, Rajasthan, Maharashtra, M.P., Karnataka). Wind, Solar and Biomass power plants are eligible for carbon credits that translate into cash.

The private sector plays an important role in the renewable energy power production in India. Adani Power, Dhirubhai Ambani Power, Moser Baer, Tata Power, Azure Power, Mahindra & Mahindra, Kotak Urja Pvt. Ltd, Welspun Energy Ltd., Suzlon Energy, GE Energy. In order to attract foreign investments in the power sector, FDI up to 100% is permitted under the automatic route for projects of electricity generation (except atomic energy), transmission, distribution and power trading.

India's policy and legal regime on renewable energy is evolving gradually in the first few years of the 21st century by recognizing the potential of renewable energy. India is world's fifth wind power producer. The National Electricity Policy 2005 also promotes renewable energy by providing for purchase obligation from renewable energy sources. It encourages State

Regulatory Commissions to impose minimum renewable energy purchase obligation and increase it progressively. The Ministry of New & Renewable Energy provides Generation Based Incentives (GBI) schemes separately for wind and solar energy. The National Clean Energy Fund has been set up in 2011 and is funded by taxing coal production. This fund provides low cost loans to investors in renewable energy. Loans are given in the market at 12% interest and investors wanted this percentage reduced to around 8 %. 50% of the project funding can be obtained from these funds and the rest from banks. This will reduce the overall rate of interest. Furthermore, the Government is planning to establish a Green Energy Corridor for renewable energy, which would involve eight states, including Karnataka, Tamil Nadu, Andhra Pradesh, Himachal Pradesh, Rajasthan and others.

The National Tariff Policy (NTP) 2006, as amended from time to time, has also mandated the State Electricity Regulatory Commissions to fix a minimum percentage of RPO from such sources taking into account availability of such resources in the region and its impact on retail tariffs and procurement by distribution companies at preferential tariffs determined by the SERs. NTP has further elaborated on the role of Regulatory Commission, mechanism for promoting renewable energy and timeframe for implementation, etc. The policy was amended in 2011 to prescribe solar specific RPO be increased from a minimum of 0.25% to 3% by 2022. The NAPCC, 2008 suggests increasing the share of renewable energy in the total energy mix at least up to 15% by 2020. It suggests RPO to be starting from the year 2009-10 and to increase by 1% each year for 10 years. It further envisages transaction of renewable energy from surplus regions to deficit regions through Renewable Energy Certificate (REC) Mechanism, which would enable a large number of stakeholders to purchase renewable energy in a cost effective manner. The NAPCC further recommends strong regulatory measures to fulfil these targets.

The Electricity Act (EA) 2003 specifically provides for the promotion of non-conventional sources. It requires the State Electricity Regulatory Commissions to fix the percentage of electricity supply that the distribution licensees must include in their total energy sales from non-conventional energy sources. It also leaves it to the Commissions to fix the tariff for supply of electricity from these sources. However, it does not specify the methodology to be adopted in fixing tariff for these energy sources. To that extent, the Regulatory Commissions are left free to adopt their own

methodology within the general framework for tariff formulation mentioned in the Act. In this process, the regulatory institutions are fraught with many risks requiring subjective evaluation of information.

Under the previous legal framework, all private generation (including renewable), whether for captive consumption, third party sale or for supply to the state grid, required prior sanction from the SEB/State government. In contrast, under EA 2003, generation (except hydro) has been de-licensed. Thus, anyone can set up a power plant based on renewable energy sources and supply electricity either to a distribution licensee or to a captive industrial unit. As the commercial cost of the generation and wheeling of renewable energy to the grid is high vis-à-vis conventional source energy, the Act provides that any tariff regulation will incorporate the promotion of cogeneration and generation from renewable sources of energy. (Section 61(h)). But the Act does not lay down any prior quantitative targets to be achieved with reference to promotion of renewable energy. It leaves it to the State Electricity Boards to promote electricity generation through renewable sources by providing suitable measures for their connectivity with the grid and by specifying, if they consider appropriate, a certain percentage of the total supply of electricity to a distribution licensee's area to come from these sources (Section 86(1) (e)).

Apart from the above provisions, some best practices are adopted in India, such as net-metering, renewable purchase obligations (RPO), feed-in-tariff (FiT), and renewable portfolio standard (RPS). The net-metering based rooftop solar projects facilitates the self-consumption of electricity generating by the rooftop project and allows for feeding the surplus into the network of the distribution licensee. In the international context, the rooftop solar projects have two distinct ownership arrangements, (a) self-owned arrangement wherein the rooftop owner also owns the PV system, and (b) third party ownership in which a developer owns the PV system and also enters into a lease/commercial arrangement with the rooftop owner. The distribution licensee is given a permit to allow net metering arrangement for both self-owned and third party rooftop PV systems as long as the total capacity (in MW) does not exceed the target capacity determined by the State Regulatory Commission. In net metering, two meters are installed by the solar power generator. One is for measuring solar generation and the other is for export/import measurement (Delhi Electricity Regulatory Commission Proposal on Net Metering 2013).

In India, several regulatory Commissions have settled for RPO. RPO

scheme requires State Electricity Regulatory Commissions to set renewable energy purchase targets for obligated entities, typically distribution companies (dis-coms), consumers with captive plants, and open access consumers. The obligated entities are mandated to source a prescribed amount of electricity from specified renewable energy sources, i.e., directly purchase renewable energy, generate renewable energy by themselves, or purchase renewable energy certificates (RECS) from generators located anywhere in the country. Obligations are set for each financial year, and a penalty may be imposed in case of failure. For example, the Delhi Electricity Regulatory Commission has prescribed RPO targets as follows:

Year	Solar	Total
2012-13	0.15%	3.40%
2013-14	0.20%	4.80%
2014-15	0.25%	6.20%
2015-16	0.30%	7.60%
2016-17	0.35%	9.00%

(Source: Delhi Electricity Regulatory Commission Tariff Order for FY 2013-14, available at www.derc.gov.in)

FiTs effectively compensate generators of wind, solar and other renewable by setting a price per unit that covers their cost and guarantees a certain rate of return. On feed-in-tariff, the Central Electricity Regulatory Commission (CERC) issues Draft Generic Tariff Order in accordance with Clause (1) of Regulation 8 of CERC Tariff Regulations, 2012. The country has been divided into 5 wind zones for exploitation of wind energy. For hydro energy projects, Himachal Pradesh, Uttarakhand and North East States are grouped into one category and other States in other category. For biomass and biomass gassifier projects, 7 States are identified (Andhra Pradesh, Haryana, Maharashtra, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh) and their draft tariff is different than the remaining other states. For the solar sector, solar PV has a different tariff vis-à-vis solar thermal. Except for solar energy projects, capital cost and tariff for various other technologies are increased every year.

In addition to the measures taken by CERC on FiT, the Ministry of New & Renewable Energy introduced Generation Based Incentive (GBI) schemes

separately for wind and solar energy. Under the scheme for wind power, a GBI at Rs. 0.50 per unit of electricity fed into the grid is provided not less than 4 years and a maximum period of 10 years with a cap of Rs. 1 crore per MW. Under the scheme for solar energy, GBI is provided to support small grid solar power projects connected to the distribution grid (below 33kv) to the State utilities. The Indian Renewable Energy Development Agency (IREDA) has selected 78 projects with a total capacity of about 98 MW for which the Ministry will provide GBI of Rs. 12.41 per kWh to the State utilities when they directly purchase solar power from the project developers. Another tax benefit, called 'accelerated depreciation (AD)', is also being considered by the Union Government. Under domestic income-tax law, companies involved in renewable energy sector may be provided with AD at 80 per cent, whereby companies putting up such plants could write down 80 per cent of the cost of the plant as depreciation expenditure and hence reduce income tax substantially. However, a company can claim either AD or GBI, but not both. The government is of the opinion that the FiT has been raised to a level that there is no rationale for giving GBI or AD.

The Central Government has also given other fiscal and tax benefits to this sector. It has exempted these plants from customs and excise duties on specific goods required for setting up the projects. However, these exemptions are subject to the fulfilment of prescribed conditions and compliances to be undertaken by the Engineering Procurement and Construction contractor or independent power producer. Furthermore, some of the State governments have provided the incentives in the form of a value added tax (VAT) at a reduced rate (5%) whereas the other States levy a VAT of 15%. Before planning the capital expenditure (CAPEX), the power project developer plans and quantifies the tax cost at the tender/bid stage and also at the time of awarding contracts, so that tax costs are optimized.

Analysing the above policy, regulatory, and financial initiatives taken by the Union Government, it can be concluded that the Government of India is making every efforts to contain the menace of global warming and climate change by aggressively promoting renewable energy. An atmosphere has been successfully created where international stakeholders as well as domestic players provide affordable electricity from renewable resources. These efforts are further complemented by the Central and State Electricity Regulatory Commissions, to which I turn to in the next section.

Role of Regulatory Commissions in Promoting Use of Renewable Energy

Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERC) play a significant role in the promotion of renewable energy in India. In the matter of *Ambuja Cements Ltd. v. Rajasthan Electricity Regulatory Commission* (2012), the Rajasthan High Court led by Chief Justice Arun Mishra dismissed an appeal by Hindustan Zinc, Ambuja Cements, Grasim Industries and 14 other companies challenging the RPO Regulations, 2007 enacted by Rajasthan Electricity Regulatory Commission. However, the Court rejected the appeal by stating that the objective behind the imposition of such renewable energy obligations is in the greater public interest.

The Supreme Court held in *Hindustan Zinc v. Rajasthan Electricity Regulatory Commission* (2015) that renewable energy purchase obligation (RPO) on captive consumers is permissible. The Rajasthan Electricity Regulatory Commission had issued regulations in this regard. The Supreme Court laid down several important pronouncements on the promotion of renewable energy and linked it with the human rights. It held that imposing RPO is desirable in the larger public interest. While upholding RPO obligations, the Court stated that the right to live with healthy life guaranteed under Article 21 of the Constitution of India includes the right to live in a pollution free environment. The Court further held that the impugned regulations fell within the four corners of the Electricity Act, 2003 as well as the Electricity Policy, 2005. According to the Court, the object of imposing renewable energy obligations is protection of environment and preventing pollution by utilizing renewable energy sources as much as possible in larger public interest.

The Central Electricity Regulatory Commission has set up a fund to promote renewable energy projects, called National Renewable Energy Fund (NREF). This fund is aimed at compensating States if they fail to meet the target given under their schedule of renewable energy (RE) projects. All RE projects are required to provide a schedule of generation from 2012. As every state has to purchase 5 % of total power requirement from renewable sources, this fund may be very helpful. For example, if a state proposed to provide 50 MW power, but could supply only 40 MW, then the state in which the project is located have to draw 10 MW power from central pool and supply. This is termed as unscheduled interchange (UI) and is charged at a

higher rate. This extra cost will be borne by all state distribution companies, which would be compensated by REF. The logic is that some States like Gujarat, Rajasthan, or Tamil Nadu are preferred to set up RE projects. Thus, the contribution of that particular State in the central pool becomes higher, whether or not it is prepared to commit such supply. In case there is short supply, it has to make good the shortfall by drawing power from the central pool. Since the state is naturally endowed with such a resource, it is unfair to expect that it compensate for individual project's shortfall. Therefore, such a compensation plan is worked out to promote power projects in States, where there is a natural endowment of resources.

In *Rajasthan Rajya Vidyut Prasaran Nigam Ltd. v. Gujarat Fluorochemicals Ltd* (2013) CERC 62, it was held that renewable energy power plants are not subjected to Grid Code and UI Regulations, but if the entity in question declares itself subject to the grid Code, it would not claim exemption from the regulations on Grid and UI. Non-grid energy (or 'distributed energy') development is also very important. Non-grid energy not only reduces the huge amount of energy lost in grid distribution, it also helps lighten the load on the grid. Distributed energy is a critical part of the real energy revolution in achieving a cost-effective smart grid solution. All forms of distributed power, micro-generation and micro grids should be incorporated into the electricity supply system to make the system more reliable.

Power Grid Corporation is notified as Central Transmission Utility (CTU). It has the power to grant long term and short-term open access to the transmission customers. In *Tamil Nadu Electricity Board, Chennai v. Power Grid Corporation of India Ltd., Gurgaon* (2007) CERC 85, it was held that optimum development of transmission systems requires a close and cordial coordination between CTU, STU and Central Electricity Authority (Section 38(2)(b) and 39 (2)(b), Electricity Act, 2003). Long-term open access over a transmission system is required only when one is seeking a reservation or priority in use of an existing system, or system augmentation to cater to its projected requirement. If it relates only to additional connectivity for meeting growing loads around a city like Chennai, such case of connectivity to points of draw can be granted without going through the process of open access. Renewable energy power projects can obtain long or short term open access to CTU.

Green Certificates are also to be traded and the framework is provided

by the CERC Regulations. The National Load Despatch Centre (“NLDC”) of Power System Operation Corporation (POSOCO), a subsidiary company of Power Grid Corporation has been nominated as the Central Agency to perform functions under Clause (2) of Regulation 3 of the CERC Renewable Energy Certificate Regulations, 2010. It has issued the detailed procedure in terms of clause (3). Regulation 5 of the REC Regulations, lays down the criteria for registration of the eligible entity for issuance of RECs. (*Surajbari Windfarm Development Pvt. Ltd. v. National Load Despatch Centre* (2013) CERC 90). According to the detailed procedure of NLDC, the eligible entity shall apply for renewable energy certificates within three months from the month in which renewable energy was generated and injected into the electricity grid after issuance of monthly energy injection report by the concerned State Load Despatch Centre. First of all, the RE generator has to obtain accreditation with the State Agency (for example, if a wind farm is to be established in Gujarat, it has to take accreditation from Gujarat Energy Development Agency) and then it has to register with the Central Agency and then it has to apply for the issuance of REC for the complete month in sequential manner. An entity could approach the State agency for accreditation 6 months prior to commissioning and 3 months prior to commissioning for registration. The application process for issuance of RECs is online and can be made on 1st and 15th date of every month. Sometimes, energy injection certificates are delivered late by the State Load Despatch Centre and the delay is subsequently caused for getting receipt of REC.

Conclusion

At international level, the United Nations has played an important role since organizing The Stockholm Conference to protect the environment. The World Trade Organization (WTO) has also proved to be an important institution in creating a balance between the core principles of international trade and sustainability goals in the light of climate change threats. The recent COP 21 at Paris was successful in concluding the Paris Agreement to regulate GHG emission. Developing nations, such as India have also accepted the Agreement and has decided to abide by the commitments made under it.

The Constitution of India has also guaranteed right to life to all persons under Article 21. This right has been given a new dimension by the Court in the last three decades by interpreting the right to life in a liberal way. It has held in catena of cases that the right to life includes the right to live in

a clean and healthy environment. As an implication, this interpretation also includes the right to use clean forms of energy, which can promote a clean environment. Renewable energy sources play an important role in providing renewable energy to the people of the country.

India shines amongst the developing nations with respect to the development of renewable energy. When the institutions were created in the early 1970s to promote renewable energy, it was thought that India's population would gradually adopt renewable energy for their domestic and industrial needs. In the last couple of years, the pace of development has become faster, which is a good omen for sustainability goals set out for averting climate change. The Electricity Act of 2003 as well as National Electricity Policy of 2005 laid down the basic regulatory framework for the promotion of renewable energy. After that, the role of the Central Electricity Regulatory Commission, State Electricity Regulatory Commissions, Power Grid Corporation, and National Load Despatch Centre became very important. They have also made several orders and taken significant measures to promote the use of clean forms of energy, which indirectly fulfil the fundamental right of every citizen to live in a clean and healthy environment.

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Development Induced Displacement, SEZs and the State of Farmers in India: Some Insights from the Recent Experiences

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Abstract

Due to incessant scientific advancement, the era of globalization has attained a new degree of developmental height wherein governance is vying for 'inclusive growth' and 'capacity building'. But behind such admired development achievements lays the grave for the underdevelopment of millions of marginal farmers whose land is utilized for the sake of attaining the national goal; creating the paradoxical situation of 'crisis of success'. By virtue of a claim of sustainable and inclusive growth of marginal farmers and labourers, the development endeavours carried out in the recent past, contrarily, proved to be the bane, as it aggravated the problem of involuntary displacement, loss of land and livelihood, unemployment and human rights violation, and hence negating the chances of creation of an egalitarian society. By the introduction of SEZs in 2005 on the pretext of rural development, industrialization, augmentation of foreign currency reserves and employment generation, the government opened the flood gates to Multi National Corporations (MNCs) and big industries, further aggravating the problem of development induced displacement and making the situation worse for the farmers. This brings under sharp purview the politics of governance, which lacks social accountability by remaining apathetic to the plights of the farmers. The fluid condition of land acquisition and resettlement and rehabilitation Acts in India, despite many revisions and amendments, act as catalysts to strengthen hegemonic minorities against the feeble, majority representing proletariat. The situation has set-up a battle ground, wherein fierce struggle, protests and violence is seen on the streets of India between the government, MNCs, industrialists and planners on the one side and farmers, labourers, marginal communities supported by exponents

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of civil society, human rights activists, NGOs and environmentalists on the other, destroying the tranquil environment.

Introduction

The era of globalization envisages a new phase in the history of humankind. It also converges with the detonation in transportation and communication media, thus turning the world into a 'global village' (McLuhan 1962). Under the influence of global currents and to emulate the western developmental paradigm, in the post-globalization era, development policies in India marked a shift in orientation due to diffusion of neo-liberal ideas and conviction for social accountability towards the marginal and deprived communities. The 21st century evinces the complete transformation in policies of governance, which now vie with sustainable development, inclusive growth and 'capability building' (Sen 1999; Nussbaum 2011) in order to make life comfortable and establish an egalitarian society. In contrast to such admired and much hyped development initiatives another analogous demeaning phenomenon is also shaping up, which is a continuous source of challenge to development planners, NGOs and exponents of civil society. It is in the form of underdevelopment and involuntary displacement of millions of marginal farmers whose land is utilized for the accomplishment of development agenda and attaining a national goal that irrevocably undermines and questions the notion of social accountability. However, despite deep embedded paradoxes in the development paradigm and endeavours, people and nations are in a mad race to tame nature to produce luxury and comfort. As a result, 'the gigantic urge of development activities saw man reaching to such a threshold where their endless craving has not only resulted into the environmental squalor but also led to the exclusion and underdevelopment of their fellow brothers' (Verma 2012: 237).

Most ironically, at such a moment, when the contemporary global society has entered into the 'information age' known as the 'knowledge society' having 'reflex characteristics' (Giddens 1990) in terms of transparency, dissemination of information, awareness and social accountability; a large proportion of the socially marginalized and economically deprived populace, mostly relying on agricultural lands for farming activities and forests for natural resources, are involuntarily displaced due to development projects. They are forced to live in a communication vacuum having no information at all about their present and future destiny and thus get exposed to greater 'impoverishment

risks' (Cernea 1996) and eventually fall prey to 'development pathologies' (Oommen 2014).

Involuntary displacement, ecological alteration and environmental degradation have always been companions of development. 'All developmental projects require large chunk of land which is not easily available in the densely populated urban areas occupied by intellectually, economically and politically empowered populace' (Verma 2004: 15). Consequently, for the inception of development projects, the planners generally fall back to the rural and tribal regions inhabited by illiterate, unaware, poor and underprivileged natives. Hence, as an offshoot of scientific advancement, on the name of industrial development and attaining national goal, a large number of the marginal overtly lose their dwellings and livelihoods and covertly, their culture, civilization and bonding with the natal place. Forced displacement is a multifaceted, complex and intricate phenomenon. It is marred with hardship, trauma, and uncertainties and eventually transfigures into a breakdown of traditional socio-cultural and economic network of the dispossessed. The condition becomes more pathetic when, most ironically and in seer violation of basic human rights, the project-affected persons (PAPs) are not even consulted before, during or after the whole process. Paradoxically, in defiance of the spirit of globalization for being an information society, the land oustees remain ignorant and unaware about their future and oscillate between hope and despair. At times, bowing to the lures and with immense expectations, they dream of robust compensation packages from the rehabilitation agencies and on un-accomplishment of delusive wishes and cravings, intense resentment is often observed at the sites of development projects.

Even though, by the construction of mega projects, the developmental objectives and goals of governance seem to be achieved, at the same time on the micro level it relegates the liberal welfare perspective and social accountability to the background. By 'impoverishing' (Cernea 1996) a huge populace of displaced natives the construction of these mega projects have aggravated the eternally extant intricate quandary of poverty alleviation and marred the prospect of creation of a just and egalitarian society, especially in a developing country like India. It has also become a major source of deprivation of basic human rights and underlying social justice.

The rapid augmentation in instances of development induced displacement swiftly brings our sharp attention towards the intent politics which govern the planning of such development projects wherein the powerful

garner benefits and deprive the marginal to the extent of extinction. While analysing the discourse of such developments, the central issue that confronts us here is that of the 'relationship between knowledge and power' (Pieterse 2001: 8). In today's world knowledge is power and vice-versa. Eventually, someone who controls power invariably makes it operational through control over knowledge, science and technology and subsequently governs society to meet their own specific interests. This viewpoint evinces that, 'development thinking performs a role of representation, of articulation and privileging particular political and class interests and cultural preferences' (ibid.: 8). Such repetitive instances of involuntary displacement upsetting the global quest for sustainability opens up eternal debate about the morality of such development and raises a series of queries, which are most fundamental and apt in existing circumstances, 'why do we need development?', 'development for whom?' 'development for what purpose?' and last but not the least 'is development a mere tool to serve the urge of the powerful, rich, dominant and articulate or, contrarily has subtle responsibility towards the marginal, deprived and inarticulate also?' Keeping in praxis the above arguments, 'modernity no longer seems so attractive in view of ecological problems, the consequences of technological change and many other problems' and hence it would be more realistic to 'acknowledge crisis and to argue that crisis is intrinsic to development, that development knowledge is crisis knowledge' (ibid.: 1). In other words, the plethora of development can be acknowledged as 'crisis of success' that is bound to surface due to unholy, hegemonic and symmetric liaison between 'knowledge and power'.

With this background, for the convenience of analysis, the paper is broadly divided into four parts apart from the introductory section and conclusion. The introductory part begins with raising debate of the problems of involuntary displacement by placing the discussion in a theoretical domain. The first section, 'Development Induced Displacement in India: An Overview' provides retrospective analysis of development projects in India causing dispossession along with the implicated statistics. In the second part of the paper, 'Recent Developments in India: Introduction of SEZs in 2005', the post SEZ scenario is discussed by highlighting government prerequisite of incessant development for sustainable inclusive growth, employment generation, boost in revenue generation and to augment foreign currency reserve and; its backlash in terms of forced dispossession, loss of agricultural land and source of livelihood, increase in unemployment amongst the marginal and farmers and eventually loss of revenue. In what

way the inception of SEZs in India is proving detrimental to the rights of the farmers is underlined in the third segment, 'SEZs in India: Centre of Systemic Deprivation, Human Rights Violation and Violence'. The section emphasizes the issues of systemic deprivation caused to farmers and labourers through development policies triggering irreversible chain of human rights violation and violence inflicted on them. The penultimate fourth section, 'Changing Contours of Land Acquisition and Resettlement and Rehabilitation Policy in India' discusses at length the origin and evolution of land acquisition and resettlement and rehabilitation laws in India with their highlighted significance, the modifications and amendments done in the policies on pretext of making them more inclusive. Last, in what way these policies violate basic human rights of the dispossessed farmers. A summary of the entire discussion with highlighted findings is provided in the conclusion part of the paper.

Development Induced Displacement in India: An Overview

Development induced displacement is not a new phenomenon in India, however, earlier displacement were caused largely due to multipurpose river valley projects like dams and mining activities. We have ample evidences suggesting displacement dates back to the age of the Gupta dynasty. In the middle ages, Jai Samand Lake built near Udaipur in the eighteenth century removed many families from their habitat. However, displacements did not utterly shatter and disrupt lives of affected people because of the smaller population and abundance of barren land. In the colonial age, displacement was caused in various places in pursuit of raw material for the Industrial Revolution in England, 'for coal mines in Raniganj, tea garden in Assam, coffee plantations in Karnataka etc.' (Fernandes 2008: 89). Post independence intensified forced dispossession in India due to a population explosion, intensive agglomeration in density of populace and urgent need to fulfil development endeavours of millions of citizens. Apart from erection of mega industrial, mining, river valley dams and other infrastructural projects, some other construction initiatives embarked upon recently, have caused widespread involuntary displacement in India. Dubey (2008) rightly mentions in this regard, 'now human population are being uprooted by numerous other development activities; industrialization; infrastructure building including construction of highways, ports, airports, power stations; relocation of slums and, the more recent entry, the Special Economic Zones (SEZs). Now the land is being acquired for private companies for building factories, malls,

parks, swimming pools, hotels and night clubs' (Dubey 2008: xv).

Independent India is replete with instances of development-induced displacement for 'public purposes' in the name of attaining national goals. Be it dam construction in Narmada, Sardar Sarovar and Tehri involving more than one States or Hirakud, Pong, KoelKaro, Silent Valley, Tipaimukh, Dumbur, Pagladia; power and transmission projects executed by the National Thermal Power Corporation (NTPC), Power Grid Corporation of India Limited (PGCIL), electricity and transmission projects of different States; mining industries run by Coal India Limited (CIL), Mahanadi Coalfields Limited (MCL), Orissa Mining Corporation (OMC), mineral excavation in the States of Chattisgarh, Jharkhand and Orissa; steel plants like Rourkela, Bhilai, Tata Iron and Steel Company (TISCO), Steel Authority of India Limited (SAIL), Pohang Iron and Steel Company (POSCO), Nilachal Ispat Nigam Ltd., Jindal Steel Company, Arcelor Mittal, Birla, Essar; and more recently, Nandigram and Singur in West Bengal, Jhajjar in Haryana, Raigad in Maharashtra and Kashipur in Orissa for construction of SEZ. Out of them, 'the Narmada Sardar Sarovar Dam Project needs special mention which displaced more than 1, 27,000 people, has perhaps been the most widely discussed project involving forced displacement in the history of mankind' (Dreze et al. 1997). Under severe criticism from different quarters, including members of civil society, NGOs, environmentalists and social activists, for being insensitive and apathetic to the issues of resettlement and rehabilitation (R&R) and ensuing violation of human rights of the inhabitants, the World Bank has to withdraw from the Sardar Sarovar project as the donor agency.

Due to negligence and the apathetic attitude of the policy planners, at present, no precise figure is available for the number of people dispossessed. The estimates of the World Bank Environment Department indicate that every year roughly 10 million people are displaced worldwide due to dam construction, urban development and transportation and infrastructure programs. In an estimate the last decade has observed resettlement of 80 to 90 million people due to infrastructure programme. This number is shockingly high, but still fails to account for large numbers of the displaced living in the vicinity of or downstream from projects whose livelihood and socio-economic milieu might be adversely affected by the project and not directly physically ousted from legally acquired land.

While focusing on the Indian condition, 'alarmingly, the sheer magnitude

of the problem is staggering. According to one estimate, some 60 million people have been displaced in India since independence' (Dubey 2008: XV; Mathur 2011: 1), 'most of whom have never been properly resettled' (Mathur 2008: 3). Resettlement researches indicate that during the last four decades, over 20 million people have been resettled in India due to the inception of development projects, but as much as 75 percent of them have not been rehabilitated. Ironically, more than 40 percent of the displaced population was tribal and poor farmers dependent on agriculture and forests. In what way the development projects are taking their toll on the marginalised can be seen in the report of the Working Group on Development and Welfare of Scheduled Tribes. The report submitted during Eighth Five-Year Plan (1990-95); highlight the rehabilitation state of displaced Tribals by mentioning that out of the 16.94 lakh people displaced by 110 projects studied by them, about 8.14 lakh were Tribals. Taneja and Thakkar (2000) point out that estimates on displacement in India from dam projects alone range from 21 million to 40 million. The displacement enumerations clearly indicate that development planners have planted explosive landmines by ousting millions of farmers and marginalised people from their habitat. The emerging situation has set up a modern battleground wherein the bourgeois (MNCs and capitalists) and the proletariat (farmers and marginalised) will be fighting for the establishment of supremacy. The emerging situation 'cautions that the frustration of these settlers, an army of unemployed marginalized group, can be explosive and could unbalance the harmonious social equation. That people are "sacrificed" for the sake of biodiversity, wildlife and development, is not only unacceptable from the social and human rights perspective, but also from the ecological and economic point of view' (Modi 2009: 272-73).

The phenomenon of project-induced displacement has compounded many of the problems of social development in India. It has relegated to the background social objectives, which government was committed to until recently, of ensuring land rights and carrying out land reforms and land distribution. By impoverishing the large masses of displaced people, it has aggravated the already complex problem of alleviating poverty. The viewpoint is supported by Planning Commission statistics. In an estimate of poverty given by the Tendulkar Committee (Government of India 2009: 17) set up by the Planning Commission, 37.2 per cent of the country's populations still live below the poverty line divided into 41.8 per cent in rural areas and 25.7 in urban areas, notwithstanding rapid economic growth in national income during the liberalisation, privatisation and globalisation (LPG) era.

Recent Developments in India: Introduction of SEZs in 2005

Even though the state of development induced displacement is not portraying a rosy picture, nonetheless, the Government of India, in gross neglect of ground realities and by getting carried away by the wave of LPG, inviting MNCs to establish industries in India by offering agricultural land at concessional rates. Offering ‘old wine in a new bottle’ in the name of sustainable inclusive growth, acceleration of rural development, for linking agricultural society close to urban and industrial set-up, employment generation, improve foreign direct investment (FDI) inflows and thrust to export of goods, and for bringing overall prosperity and equity, the Government of India passed the act on Special Economic Zones (SEZs)¹ in the year 2005 under the influence of first modern zone set up for Shannon Airport in County Clare, Ireland.

‘India was one of the first in Asia to recognize the effectiveness of the Export Processing Zone (EPZ) model in promoting exports, with Asia’s first EPZ set up in Kandla in 1965. With a view to overcoming the shortcomings experienced on account of the multiplicity of controls and clearances, absence of world-class infrastructure and an unstable fiscal regime, and to attract larger foreign investments in India, the Special Economic Zone policy was announced in April 2000. Five years later, the SEZ Act, 2005 was also introduced and in 2006 SEZ Rules were formulated. According to the Act, a Special Economic Zone is a specially demarcated area of land, owned and operated by a private company, which is deemed to be foreign territory for the purpose of trade, duties and tariffs. SEZs enjoy exemptions from customs duties, income tax, sales tax and service tax. They are projected as duty free area for the purpose of trade, operations, duty and tariffs. SEZ units are self-contained and integrated having their own infrastructure and support services’ (Pandey 2015: 320).

¹ Special Economic Zones (SEZs) Act 2005, a modified version of the Export Processing Zone (EPZ) Policy in India, passed for the creation of physical territories within the country for the purpose of integrated development of industries and other commercial activities. Under the SEZ Act 2005, these areas enjoy special privileges from government like tax concessions, exemptions from labour and environmental legislations. The central dissimilarity between the policies of SEZ and EPZ is that even the private developers can build SEZs. Most importantly, up to 50 percent of the total space of SEZ can be utilized as non-processing area for the building of other commercial and social infrastructure.

In order to provide smooth sailing, the SEZs rules, inter-alia, provide for drastic simplification of procedures and for single window clearance on matter relating to central as well as State governments.

Owing to a significant shift in the economic policies, the government 'allowed the private sector a major role in the development process, which, until recently, was exclusively a public sector affair. The new policies proactively seek investment from domestic as well as multinational corporations by creating an investment-friendly environment. In order to touch greater heights in economic growth, policies are being further liberalized and laws amended overnight' (Mathur 2011: 1) to bestow space to the giant multinational companies. Under the existing situation, 'any large investment, especially foreign direct investment (FDI) coming to India, is now seen as the success of the economic reform agenda' (ibid.: 2).

'Government, obsessed with achieving higher and higher economic growth targets, is trying to attract private investments in sectors as varied as power generation, manufacturing, mining, roads, airports, and housing, to name a few. SEZs for large private corporations, including MNCs, are being set up to accelerate the development process,' (Mathur 2008: 3).

By shutting eyes to the appalling tribulations, under intense enthusiasm to set up SEZs, States of India put their best foot forward to woo investors especially MNCs by offering cheap agricultural lands situated at strategic locations like the vicinity of urban-industrial centres catering to sea, river or road for easy transportation to suit business. As a result, SEZs mushroom all across the length and breadth of the country, swallowing up millions of farmers mostly from economically backward and marginalized communities under constant scare of involuntary displacement. Notwithstanding the fact that approximately 70 per cent of the population in India today still depends on agriculture and land for sustenance and any move to push them out from their native place would directly snatch their bread and butter.

Nevertheless, falling in line with the new initiative 'the central government has given approval to a staggering 513 SEZs in 19 States; 250 of these have been notified. Reportedly hundreds more have been proposed to the Board of Approvals, and the majority have received what is known as "in-principle approval". The area being acquired by all the SEZs with "in-principle approval" is already close to 200,000 hectares (2,000 sq. km., or

greater than the area of Delhi in the National Capital Region' (Asher and Atmavilas 2011: 319-20). The effort to industrialize India by entertaining MNCs and opening floodgates for SEZs happened in utter laxity and deterrence to the intermittent situation which underlines that 'the population in India has grown rapidly over the years, and is currently growing more in one week than the entire European Union's population grows during a full year. Due to high population density it will not be possible any more to undertake a project without displacing huge numbers, even in the remotest forest and mountainous areas' (Mathur 2008: 3). As UpendraBaxi has rightly remarked in this context, "No development without displacement" is the mantra of the developers everywhere' (Baxi 2008: 17).

It was done in unseemly haste to create investor friendly conditions, regardless of what happens to the livelihoods of farmers whose lands will be gone for a pittance. Subsequently, just after the initial SEZ approvals in the year 2006, an estimation of displacement alarmingly reveals that 'close to 1.14 lakh farming households (each household, on an average, comprising five members) and an additional 82,000 farm worker families, who are dependent upon these farms for their livelihoods, will be displaced. The total loss of income to the farming and the farm worker families, then, is an astounding Rs. 212 crore a year' (Asher and Atmavilas 2011: 320). The fact that land lost to SEZs, predominantly agricultural and typically multi-cropped, is capable of producing close to 1 million tons of food grains simply implies significant amplification in food insecurity. The CAG report, ironically, unravels the truth behind the forced acquisition of land from farmers by pointing out the inherent flaws and misuse of land acquired on the name of SEZs. 'Out of 39245.56 ha of land notified in the six States (Andhra Pradesh, Gujarat, Maharashtra, Karnataka, Odisha and West Bengal), 5402.22 ha (14%) land was de-notified to be used for commercial purposes. The CAG report indicates that several of these lands were acquired using "public purpose" clause, they certainly did not serve the objectives of the SEZ act' (Singh 2015: 2).

Despite knowing that the

'performance of the Indian State in resettlement and rehabilitation (R&R) of those displaced by development projects is not satisfactory at all. The R&R policy hardly moves beyond monetary compensation as a remedy to undo development-induced-impoverishment. Compensation alone is structurally incapable of addressing the resettlement issue' (Bose 2014: 239).

The whole exercise is done on the pretext that

‘the power to acquire “land” for private parties in the name of “public purpose” already exists with the government, under the colonial and draconian Land Acquisition Act (LAA) 1894. Therefore, within a few months of passing the SEZ Act, State governments issued land acquisition notices under the LAA for some of the proposed SEZs. With the rampant use of the Act, Pandora’s box flew open, and what followed was a slew of coercive means for the seizure of land. These were met with protests. It was evidently highlighted then that the principle of “Eminent Domain” would be exercised by the State to make available land for SEZs. Several instances of opposition from land-owners and farmers, fisher communities, Dalits, and indigenous communities started to be reported. The stories that first hit the national news were from Jhajjar (Haryana), Raigad (Maharashtra) and Nandigram (West Bengal) in May 2006’ (Asher and Atmavilas 2011: 318).

What followed in the coming years is also well known. Agitation and protests from farmers against forced acquisition of land in POSCO (Orissa), Singur and Nandigram (West Bengal), Greater Noida (Uttar Pradesh), Jhajjar (Haryana), Navi Mumbai (Maharashtra), to name a few, were some of the most discussed SEZs that raised the eyebrows of civil society for large scale violation of human rights. The protests waged by farmers were largely against the failure of the government machinery to adequately address the issue of R&R, generate employment and inclusion of the stakeholders in the fruits of development. Three most promising objectives enshrined in the SEZ Act viz. employment generation, boost in global export and attracting investment including FDI failed miserably on all three accounts. ‘The CAG report shows in the sampled 152 SEZs, there were incidences of non-performances seen in employment (ranging from 65.95 to 96.58 per cent), investment (ranging from 23.98 to 74.92 per cent), and export (ranging from 46.16 to 93.18 per cent)’ (Singh 2015: 1). As a result, not only unemployment and protests increased after the inception of SEZs but also the government of India lost heavily on account of taxes and inflows of foreign revenue.

In utter laxity of innate flaws in involuntary dispossession, ironically, the States of India gave overwhelming responses by offering lands for SEZs on extremely cheap rates along with other freebies to woo investors to fathom

the prospect to industrialize. Four appallingly significant patterns of response are observed from Indian States in this context.

‘First, that which exists in northern States such as Haryana and Uttar Pradesh wherein a protest against the acquisition of land by the government and its allotment to the corporations has not crystallized. Second, that which exists in Goa, which led to the abandoning of the SEZ projects by the government because of the massive protest from civil society. Third is the west Bengal pattern wherein protests against SEZ are a conjoint expression of political parties, both in opposition and in coalition government and the civil society. Further, there are internal differences within the Communist Party of India (Marxist) with regard to facilitating the capitalist path of development. All these render the situation in West Bengal highly ambiguous and implementation of the SEZ policy tortuous. Finally, in Orissa where in spite of substantial protests from civil society and opposition from political parties, the government seems to be impervious and is forging forward with its agenda of massive industrialization’ (Oommen 2008: 81).

SEZs in India: Centre of Systemic Deprivation, Human Rights Violation and Violence

For the first time in the history of involuntary displacement a new trend was observed in India after the 2005 SEZ Act. It is noteworthy that the ‘adivasis alone constituted nearly 40 percent of the displaced population in the post-colonial period until the 1990s. But the location of the SEZs in agriculturally rich peripheries of urban centres has affected the middle class and small peasantry, who have been at the centre of the struggles against SEZs, be it in Raigad, Jhajjar, Gagret, Nandigudi, Vizag or Kakinana. While the stakes of agricultural labour, tenants, sharecroppers and other affected communities cannot be denied, the middle class land owners have been at the helm of the opposition in many areas,’ (Asher and Atmavilas 2011: 332). It is indicative that the ambit of victims of involuntary displacement has further expanded in the post SEZ regime by incorporating, not only the Dalits and Adivasis but also, middle class farmers, peasantry and share-croppers. Hence, the effect of globalization is seen more prominently amongst the stakeholders and issues of information about the proposed land acquisition, awareness about the rights and duties, ways of showing protest and demand for just

rehabilitation package surfaced much more persuasively with the addition of middle class farmers. They became more vociferous by the inclusion of NGOs, exponents of civil society and human rights activists with the aid of both electronic and print media.

By and large, with sustained effort, the exponents of the rights of the displaced manage to ascertain that the 'SEZ policy is inherently unfair and biased; its emphasis is on industrialization, science and technology, ruthless exploitation of natural resources and letting loose of market forces, completely ignoring and eroding the cultural and social sensibilities, identities and distinctiveness of its subjects' (Pandey 2015: 318). These acquisitions have immense implications on the agricultural sector; in terms of setback to farming, agriculture and allied activities, productive opportunities lost, food insecurity, rising unemployment in rural areas and displaced livelihoods. Farmers are not adequately compensated for the land acquired from them.

'In several cases, the land sought to be or actually was acquired was fertile, multi-crop agricultural fields providing the only means of livelihood to the small and marginal farmers owning the lands. The affected people see in this land grab a nexus between the State and the corporate sector' (Dubey 2011: xi).

Developers and promoters of SEZs get land cheaply – almost one-fourth or less of the market price. With the minimum required processing area being 35 per cent, it is likely that the policy may be misused for real estate development rather than for industry and generating exports. In all probability, it is a 'real estate scam' in the making, cautions an eminent economic expert. Alarming the 2014 (report no. 21) report of Comptroller and Auditor General (CAG) is eye opening. It asserts that,

'Big portions of land were lying idle in almost each State. Approximately 52 per cent of the land allotted remained unused even though some lands were allotted in 2006. In Andhra Pradesh 48.29 per cent, Gujarat 47.25 per cent, Karnataka 56.72 per cent, Maharashtra 70.05 per cent, Odisha 96.58 per cent, Tamil Nadu 49.02 per cent and West Bengal 96.34 per cent SEZ land remained idle. In descending hierarchy, State-wise the maximum number of operational SEZs are Andhra Pradesh (36), Tamil Nadu (28), Karnataka (22) and Maharashtra (19)' (Singh 2015: 1).

The data exposes the existing paradoxical nature of development paradigm wherein, on the one hand government is lamenting not having sufficient resources to implement social security and welfare schemes and, most ironically, on the other industries and business are provided a cosy environment for an exponential boost in income. The fertile, multi-cropped agricultural land remained unused after acquisition is proving sore to the farmers.

Rather than ushering comprehensive economic development the much glorified SEZs is resorting into clusters of heightened economic activity further widening the gulf between the zones experiencing swift development vis-à-vis impoverished surroundings boarded by the farmers and other marginal. 'A tragic manifestation of the malaise in the agrarian sector has been the incidents of farmers' suicide on an unprecedented scale' (Dubey 2011: xi). The global experiences support this by reiterating that, 'worldwide experience with resettlement has shown that people who are displaced do not easily recover, much less improve, their previous standard of living. Failed resettlement projects create new pockets of poverty where none existed before. For those affected, development has been too often experienced not as an opportunity, but as disruption and impoverishment. Such displacement not only puts affected people into grave impoverishment risks, but also causes a setback to the entire poverty reduction effort. As one observer puts it, "Truly, development is a very contradictory affair if it reinforces the very poverty that it aims of eliminate" (Mathur 2008: 3-4). Hence, critics rightly term SEZ as 'island of affluence' amidst the 'sea of deprivation'.

Smelling the paradoxical nature of development evolved by SEZs in India, resistance movements spread across the regions. In the southern region, Muthanga forestland struggle at Waynad in Kerala by Adivasi Gothra Maha Sabha figured up. Western and central India saw farmers protest against SEZ in Raigad against land acquisition by Reliance in Greater Mumbai. In the eastern region, violent struggle in Singur and Nandigram (West Bengal) made constant headlines against SEZs being held responsible for triggering large-scale dispossession along with adivasi struggle in Jadugoda against uranium mining and displacement. The Northeast region also joined the movement at Doyang and Tongani in Assam against forcible eviction from forests. Farmers protest against Reliance SEZ in Jhajjar, Haryana and farmers struggle against land acquisition for Trident SEZ at Barnala in Punjab is the most discussed instances of the northern region.

In the mistaken priority to accelerate growth, mainly through mega projects undertaken by private companies, the government has generally taken the side of the companies at the cost of displaced persons. Relocation has seldom been regarded as human problem involving fundamental rights, but considered a simple law and order problem with oustees always on the wrong side of the law. As a result, any reluctance to part with land has been regarded as a violation of law, and protests against displacement have been ruthlessly crushed as in the case of dam construction in Narmada and Tehri; power projects like NTPC; mining industries in the form of CIL or more recently, Nandigram and Singur in West Bengal and in Kashipur in Orissa. An ominous social polarization in the affected areas has emerged between the government, company and the beneficiary middlemen on the one side, and the project displaced persons and civil society organizations supporting them, on the other side. 'The Kalinga Nagar incident that occurred in January 2006 represents the worst form of brutality that the State can inflict on its own citizens. Twelve tribal people died on the spot when police opened fire on a crowd protesting over land acquisition for the construction of a steel plant in Kalinga Nagar industrial complex in Orissa. The government of West Bengal has even more deplorable record of atrocities against its people. Many people died when the police fired at them in Singur at protesters against an upcoming car factory, and in Nandigram where an SEZ was proposed for a foreign company' (Mathur 2008: 4). In a similar incident more recently, water cannons, lathi charges and rubber bullets were used against farmers demonstrating against the proposed acquisition of land for construction of a township at Geater Noida in Uttar Pradesh. These are not rare incidents of atrocities and violence committed against land oustees. History is replete with examples of such of human rights violation. Thukral has rightly put it,

'The psychological preparedness for displacement is never given consideration. What happened in the case of Nagarjuna oustees is bound to result. Even though they had been informed about their impending displacement, they did not vacate their land. Finally, many had to be forcibly evacuated by the army. In the case of the Rihand project, the oustees were not informed in advance. When the waters were released they had, literally, to run. In the case of the Koyna dam too, people were completely unprepared. The waters rose so quickly that the residents had to run for life barely giving time to bring out household goods. The water came and every one

cried Run! Run! So also the oustees of Pond dam caught unaware,' (Thukral 1992: 15).

In another incidence, for the construction of Rihand Thermal Power Project in the Singrauli region, the project authorities choose monsoon season for evacuation of land when it was raining heavily and the whole area was flooded.

'With the help of 200 police personnel the agricultural land was doused, standing crops were destroyed and people were forcibly thrown out of their places. The poor had no place to hide and had to spend days and nights in monsoon without roof over their head. By that time they had not even been paid the compensation for the land' (Verma 2004: 224).

Constant resistance and protests against the forced acquisition of agriculture land for SEZs started producing results. Bowing down to the fierce agitation waged by the farmers,

'Goa State government was forced to cancel creation of SEZs under pressure from popular and political protests. In September 2008, natives from 22 villages, which were targeted for the acquisition for the proposed Mukesh Ambani-led Reliance Industries' SEZ, participated in the first- ever referendum on the issue. The result of the referendum was a resounding "No" to the SEZ in Raigad. On 2 October 2008, eight villages in Tiruvanamallai district passed resolution at their gram sabha meetings against the government move to acquire 2,200 acres land – most of it under cultivation – for the expansion of the Cheyyar Special Economic Zone' (Asher and Atmavilas 2011: 333).

In addition to the forced dispossession, compensation payment in pittance, neglect of just and equitable rights and violation of human rights of the displaced, the impending SEZs are under constant attack for being replica of capitalism by evincing maltreatment of labour, violence exerted against them and eventually socially and economically excluding them from the fruits of development. Pandey affirm by mentioning that,

'Unregulated markets treat human labour as a commodity to be bought and sold, vulnerable to exploitation. The so-called modern welfare state is supposed to be inclusive in its approach towards the

poor and the marginalized. But the creation of SEZs as a product of neo-liberal policies of the Indian State has led to structural violence. People are excluded because they lack the means to participate in the market. This kind of development basically promotes “accumulation through dispossession” i.e. accumulation of material wealth through inequality and deprivation’ (Pandey 2015: 320).

Slavoj Zizek (2008) illustrates the contradictions of contemporary capitalism.

‘Violence, Zizek argues, takes three forms - subjective violence (acts of assault, murder, terror and war); objective violence (the “symbolic” violence embodied in language and its forms, racism, hate-speech, discrimination); and systemic violence (the catastrophic consequences of the functioning of our economic and political systems) - and often one form of violence blunts our ability to see the others. This systemic violence is called structural violence’ (Pandey 2015: 319).

As a matter of fact, more than 70 percent people in India depend on land and agriculture. Snatching land from them corroborate snatching source of employment. The underlying situation forces them to join SEZs as labourers in search of occupation only to get victimized in the hands of industrialist’s manifold violence. Hence, not only the farmers are falling prey to SEZs in India by loosing agricultural land but the labourers working in SEZs are also subject to incessant violence and exploitation.

Changing Contours of Land Acquisition and Resettlement and Rehabilitation Policy in India

The outburst in development-induced displacement is one of the most serious issue plaguing development planners causing widespread concern and demanding immediate attention in India. The acts concerning land acquisition and resettlement and rehabilitation (R&R) in India play an instrumental role in this regard. Let us have a critical look at these enactments:

Sensitization towards the ever growing and all pervasive problems of R&R began in the 1980s with a shift in orientation towards protection of human rights of the displaced. The attention of the NGO movement as well as that of some donor agencies have been drawn around the Sardar Sarovar Project during the early 1990s. Ensuing years have seen lots of hue and cry

favouring for enactment of a sound National R&R Policy (GOI 1995; 1996) in India, ingenious enough to solve the problems of the oustees. Subsequently, efforts are constantly paving toward the composition of a national policy on R&R. However, in the meanwhile, some states enacted state-wise R&R policies along with Company-wise and sector specific policies developed by some private and government infrastructure companies.

In 1989, a draft National Policy on Developmental Resettlement of Project Affected Persons was formulated with the initiative of NGOs, which was opened for discussion. The first major breakthrough in this regard took place in the year 2004, when the Government of India notified a national rehabilitation policy known as National Policy on Resettlement and Rehabilitation (NPRR) 2003 (GOI 2003). NPRR 2003 (GOI 2003) was applied to such projects that were displacing more than 500 families en masses in the plains and 250 in the hills or the schedule area. The policy guaranteed free site to the project-affected families (PAF), whose house has been acquired. In addition, various monetary packages were promised to affected families depending on the extent of their land loss. Most importantly, the policy recognized the claim of the rural artisan, small trader and self-employed PAF by promising financial assistance of Rs. 10,000/- for construction of shops or working sheds. The positive aspects underlying NPRR 2003 was its broad definition of PAF and 'agricultural family'. It made provision for a separate rehabilitation agency for the execution of R&R work. Lastly, it restricted R&R benefit to those who have resided in the affected area for 3 years before the notification under section 4(1) of the Land Acquisition Act. By this provision, it prevented outsiders from buying land in the affected area and in turn grabbing most of the rehabilitation benefits. But the act was under criticism for not making any provision to refute forced acquisition of land. It hardly gave any space to the farmers to be heard by the government machinery against forced acquisition.

In the aftermath of SEZ Act 2005, by the end of 2007 the National Rehabilitation and Resettlement Policy (NRRP) replaced the first central policy on R&R. 'It clearly mentions the principle of three "minima" - (i) minimize displacement; (ii) minimize acquisition of land, and (iii) minimize agricultural land for non-agricultural use. Under the new policy, a set of terms and conditions have been given for any project involving physical displacement of 400 or more families en masse in the plains to 200 or more families in tribal or hilly areas. It introduces the concept of Social Impact

Assessment (SIA) along with the current norm of Environmental Impact Assessment’ (Pandey 2015: 326). Other components of this policy solicit the following:

‘Ensuring adequate and expeditious rehabilitation with the active participation of the affected families; ensuring protection of the rights of scheduled castes and scheduled tribes; providing better standard of living with sustainable income to affected families; integrating rehabilitation concerns into development planning and implementation processes; and facilitating harmonious relationships between the acquiring body and affected families. While these are useful policy directions, they mean little in practice without specific laws mandating them. Despite acknowledgement of concern for the displaced and democratic process, the policy does not make the right to informed consent explicit. Panchayat or other local bodies resolutions find no mention in ascertaining the views of the affected communities’ (Sampat 2013: 43-44).

In another attempt to overcome controversy surrounding payment of compensation and rehabilitation issues in the cities of northern states (Noida and Singur) for the proposed SEZ, the Land Acquisition and Rehabilitation and Resettlement Bill 2011 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Bill 2012 (RTFCTLARR 2012) was introduced. The LAA Bill 2011 sought to replace the (Land Acquisition Act) LAA 1894 and bring R&R for the first time within the ambit of a land acquisition law. But the bill clearly conflated public purpose with industrialization, infrastructure development and urbanization.

In December 2012, the third version of the bill was released after several rounds of deliberations between various ministries and subsequently passed in 2013. The bill claims that:

‘... it is a bill to ensure, in consultation with institutions of local self government and Gram Sabhas established under the constitution, a humane, participative, informed consultative and transparent process for land acquisition for industrialization, development of essential infrastructural facilities and urbanization with the least disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such

acquisition and make adequate provisions for such affected persons for their rehabilitation and resettlement thereof, and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post-acquisition social and economic status.....' (GOI 2012).

The RTFCTLARR 2012 bill (LAAR Act 2013) allows for the acquisition of the land albeit with prior consent of Gram Sabhas or councils. However, no clear procedure as to how consent may be ascertained is mentioned and while Gram Sabhas and urban local bodies are to be consulted, resolutions taken by these bodies find no legitimate mention. The steps to be followed, if there is no consent, are also not mentioned.

As a filler to patch up the controversies and shortcomings surrounding the Act of 2013, the government brought another very ambitious bill in 2015 (LARR 2015) with much fanfare. Mr. Amit Shah, the president of the ruling BJP party hailed the LARR 2015 bill in a statement given to the Times of India on May 19, 2015 by mentioning that, 'not one inch of the land acquired under the proposed new law will be used to favour any company. The land bill is purely aimed at ensuring that development reaches villages. Roads, railways and defence production units will be set up. Land will be acquired only for projects that will create jobs' (Salve 2015: 1). However, the new bill of 2015 proved no less controversial and fatal and eventually pitted against farmers interests than the previous one.

A comparison between the LAAR Act 2013 and LAAR bill 2015 will prove helpful to unravel the controversies surrounding the latest bill of 2015.

'In the new bill, there is no approval required for schemes under these categories 1) defense, 2) rural infrastructure, 3) affordable housing, 4) industrial corridors and 5) infrastructure projects including Public Private Partnership (PPP) schemes of the central government; whereas the LARR Act 2013 requires that consent of 70 per cent of the land owners to be obtained for PPP projects and 80 per cent of the land owners to be obtained for private projects. The LAAR Act 2013 requires doing a social impact assessment to identify affected families and calculate the social impact when the land is acquired. The LAAR Act 2013 imposes certain restriction over irrigated multi-cropped land and agriculture land, whereas there

is no such provision in the LARR 2015. In LARR 2013, only those companies who are registered under Sec 3 of the Companies Act of 1956 could get permission to acquire land for private schemes; however as per the LAAR 2015 any private firm which is working in collaboration with a non-governmental organization or any other organization can get land for a private business. The LAAR 2013 states that if land remains unused for five years it should be either returned to the land owners or to the land bank, the LAAR 2015 removes the time restriction of five year period. The LAAR 2013 mentions that if an offence is committed by the government, the head of the department will be held responsible unless he could prove that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of that offence; the LAAR bill, however, replaces this provision and states that head of department cannot be prosecuted until the government puts a prior sanction. In a nutshell, the LAAR Bill 2015 makes the environment for business not just very comfortable but also gives them a way to creep in to people's land without much hassle' (Singh 2015: 2-3).

Under severe criticism from different quarters alleging infringement of rights of the farmers and land-holders, the LARR 2015 bill has been sent to a parliamentary committee for reconsideration.

In view of severe criticisms, the government further revised the LAAR 2015 bill and on March 10, 2015, the amended bill, also known as Land Bill 2015, passed by the Lok Sabha. The amended bill adopted nine amendments. These are: 1) Government to acquire land for government bodies, corporations, 2) Farmers may get right to appeal/ complain over land acquisition hearing and redressal of grievances at the district level, 3) Panchayat nod may be compulsory for acquiring tribal land, 4) Social infrastructure under PPP, not any more in exempted category, 5) Replacing the term 'private entity' with 'private enterprise', 6) Compulsory employment to one member of the affected family of farm labourers, 7) Limiting the industrial corridor to one kilometer on both the sides of the highways and railways, 8) Ceiling on land for acquisition in industrial corridors, 9) Hassle free mechanism for grievance redress for land losers.

On a higher note, 'a major criticism of the Indian land acquisition law is that it does not define 'public purpose'. This is left to the state agencies to

determine on a case by case basis, but their decisions regarding land requirement for projects can often be arbitrary, leading to the acquisition of land far in excess of actual requirement, causing displacement that is better avoided' (Mathur 2011: 27) for a payment of meagre compensation exposing oustees for greater impoverishment risks. Secondly, the existing land acquisition laws are vehemently criticized for not moving beyond monetary compensation and neglecting social issue. Thirdly and most importantly, the government failed to provide alternative sources of livelihood and employment to the dispossessed. As a result, despite manifold amendments to the R&R laws at close intervals, the government was not able to compensate farmers for their loss of land and its outcome is seen in the fierce movements waged by them in the contemporary times.

Conclusion

The most promising, pragmatic and fascinating progeny of development and scientific advancements, paradoxically, unravels an altogether contrary picture. Its credibility for bringing inclusive growth, sustainable development, equity and equality to society failed miserably. Empirical evidences across the nation bestow a solid indication that an unholy alliance between 'knowledge and power' is incongruously utilized by the powerful hegemonic bourgeois to amass personal wealth. It is manifest in most development planning wherein even a single penny of expenditure for erection of industry is calculated and the marketing of the product is planned well in advance for escalation of profit. However, the advance planning does not provide space for social issues including proper rehabilitation of the dispossessed on whose land the development project is constructed. As a result, the much publicized, glorified, people's friendly and poverty eliminating mega development projects considered as the product of a high degree of scientific advancement and the hallmark of excellence ends up bringing tribulations of involuntary dispossession, 'impoverishment risks', 'development pathologies' and eventually undermines the possibility of 'capacity building'. Movements of farmers, landless labourers and peoples hailing from marginalized communities are rampant in contemporary times against the forced acquisition of land, payment of compensation in pittance, unemployment, food insecurity and ultimately violation of human rights. The agitation against forced land acquisition further aggravated in the aftermath of SEZ policy in India with the inclusion of NGOs, exponents of civil society, environmentalist and human rights activists. Government inability to formulate a concrete and water-

tight land acquisition and R&R policy, despite their best effort in the last 3-4 decades, added fuel to the fire. In a mad quest of inviting MNCs, accelerating export and import and augmenting foreign currency reserves, the government by and large has remained apathetic and callous towards of the victims of development projects and as a result, the land acquisition and R&R policies formulated remain piecemeal and project specific and thereby provide greater space for discrimination and exclusion. Due to high population density, lack of barren land and development necessities, the problem is bound to be aggravated and reach beyond proportion in future. The volatile condition reminds us to rethink and re-plan our scientific development paradigm by making it more people's friendly. Only then, the goals of sustainable development and inclusive growth - socially, economically, ecologically and environmentally accountable - can be attained and its rewards be enjoyed by all citizenry in a homogeneous manner.

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II – Human Life Cycle, Vulnerability and Rights

Rights for Every Child in India – Legislative Framework on Right to Survival, Development and Protection

*Asha Bajpai**

Abstract

There is now a shift in focus from ‘control’, ‘welfare’ to ‘rights’ of the child. The Constitution of India and the United Nations Convention on the Rights of the Child (CRC) 1989 recognises that children require special measures of protection to take account of their particular vulnerability and needs. This paper analyses and discusses, from a rights based approach, some of the issues and concerns relating to recent major legislations and landmark judgements that deal with the right of survival, development and protection of every child. The main legislations include the Pre-Conception, Pre-Natal Diagnostic Techniques Act 1994 (PCPNDT Act), The Right to Free and Compulsory Education Act 2009 (RTE) and The Child Labour (Prohibition and Regulation) Amendment Act, 2016. The paper concludes with recommendations that include locating child rights violation as a human rights violation, rather than a private matter between families, to raise it as a grave public concern.

Introduction

Gone are the days of Oliver Twist, when an orphan who endured a miserable existence in a workhouse and then was placed with an undertaker. In those days children were under the ‘authority and control’ of their parents, employers or State. They were neglected, exploited and abused. Then came the concept of children being recipients or beneficiaries of welfare measures—the ‘*daya, dana, dharma*’ approach. Their basic needs of food, clothing and shelter had to be fulfilled. Now there is a shift in focus from ‘control’, ‘welfare’

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to 'rights'. Children are now 'right holders'.

A right is as an agreement or contract established between the persons who hold a right in this case, the children (often referred to as the 'rights-holders') and the persons or institutions which have obligations and responsibilities in relation to the realization of that right (often referred to as the 'duty-bearers'). These include parents, family, school, and the State (Save the Children 2005). Child rights are specialized human rights, a set of entitlements, principles or ideals that apply to all children below the age of 18 years (ibid: 2005). Child Rights are thus fundamental freedoms and the inherent rights of all human beings below the age of 18. These rights apply to every child, irrespective of the child's parent's / legal guardian's race, colour, sex, creed or other status.

There are 444 million children in India under the age of 18 years. This constitutes 37% of the total population in the country¹. Today recognition of children as a discrete group with identifiable rights and needs is an accepted legal principle. The Constitution of India is the basic law of the country, which includes the fundamental rights² and directive principles³ for every citizen including children. It is significant to note that in addition to the rights given to all citizens, the Constitution of India mandates special protection of children by adopting positive discrimination and affirmative action for them⁴.

The United Nations Convention on the Rights of the Child 1989 (CRC) is an international human rights treaty to which 195 countries, including India, are signatories.⁵ The CRC is built on the principle that 'ALL children are born with fundamental freedoms and ALL human beings have some inherent

1 Government of India, Ministry of Home Affairs, Census 2011, Available at: <http://censusindia.gov.in/> Accessed on Sept 2, 2016

2 Fundamental Rights if violated can be brought before the Courts. A writ petition can be filed in the Supreme Court and High Courts.

3 The Directive Principles lay down the guidelines, the Governments have to follow. If they are violated they cannot be taken before the Courts but because of judicial interpretation, many of the directive principles relating to children have now become enforceable through legal actions brought before Courts. Article 39(e)&(f) direct that the State policies be directed towards securing the tender age of children.

4 The Constitution of India, Article 15(3) - Special provisions for children. Available at: <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>. Accessed on Sept 6, 2016

5 UN lauds Somalia as country ratifies landmark children's rights treaty- UN News Center. United Nations 2016. Available at: <http://www.un.org/apps/news/story.asp?NewsID=49845#.V9aKH2WHP58>., Jan 20, 2015. Accessed on Sept 1, 2016

rights⁶. All rights in the CRC are interconnected and of equal importance.⁷ The CRC confers the following four basic rights on all children across the world that includes:⁸

- i. **The Right to Survival** to life, health, nutrition, name and nationality.⁹
- ii. **The Right to Development** - to education, care, leisure, recreation.¹⁰
- iii. **The Right to Protection** - from exploitation, abuse, neglects.¹¹

6 India ratified the Convention on the Rights of the Child in December 1992.

7 Understanding CRC, Available at: http://www.unicef.org/crc/index_understanding.html. Accessed on August 12, 2016.

8 Rights under the Convention on the Rights of the Child 1989. Available at: http://www.unicef.org/crc/index_30177.html. Accessed on August 2, 2016.

9 Convention on the Rights of the Child, 1989. Article 6, Children has the right to live. Governments should ensure that children survive and develop healthily. Article 24 (Health and health services): Children have the right to good quality health care - the best health care possible, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy. Rich countries should help poorer countries achieve this. Available at: http://www.unicef.org/crc/files/Survival_Development.pdf accessed on August 2, 2016

10 Convention on the Rights of the Child, 1989, Article 28: (Right to education): All children have the right to a primary education, which should be free. Wealthy countries should help poorer countries achieve this right. Discipline in schools should respect children's dignity. For children to benefit from education, schools must be run in an orderly way – without the use of violence. Any form of school discipline should take into account the child's human dignity. Therefore, governments must ensure that school administrators review their discipline policies and eliminate any discipline practices involving physical or mental violence, abuse or neglect. The Convention places a high value on education. Young people should be encouraged to reach the highest level of education of which they are capable. Article 29 (Goals of education): Children's education should develop each child's personality, talents and abilities to the fullest. Article 32:1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article. Article 31 (Leisure, play and culture): Children have the right to relax and play, and to join in a wide range of cultural, artistic and other recreational activities. Available at: http://www.unicef.org/crc/files/Survival_Development.pdf, Accessed on August 2, 2016

11 Convention on the Rights of the Child, 1989, Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials. Available at: http://www.unicef.org/crc/files/Survival_Development.pdf

iv. The Right to Participation - to expression, information, thought and religion.¹².

India ratified the CRC in 1992¹³ and is bound to make laws in consonance with the CRC. The twenty first century has heralded a number of important policy and legislative initiatives as well as significant Court interventions and there are important Bills pending before the Parliament of India to make the laws more rights based and children friendly. Provisions for children's right to survival, development and protection by reforming the laws or adding new laws, and removing any contradictions, barriers and constraints and also the review of procedures in legal and administrative institutions, is a legal strategy for implementing and enforcing the rights of the child. India has made new laws as well as amended the earlier ones as part of our constitutional mandate and CRC commitment.

This paper deals with some of the issues and concerns relating to a few recent major legislations that deal with the right of survival, development and protection of every child.

Right to Survival: Pre birth Sex Selection and Abortion.

Pre birth sex selection is a concern relating to a girl child's right to life and survival. Overall, the child sex ratio in the country is declining.¹⁴ As per the Census, 2011, the child sex ratio (0-6 years) has shown a decline from 927 females per thousand males in 2001 to 919 females per thousand males in 2011¹⁵. Haryana had the lowest sex ratio of 834 and Kerala had the highest sex ratio of 964.¹⁶ Some of the reasons for neglect of girl children and the low child sex ratio are son preference and the myths that it is only the son

www.unicef.org/crc/files/Survival_Development.pdf, Accessed on August 2, 2016.

12 Convention on the Rights of the Child, 1989, Article 12: States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. Available at:http://www.unicef.org/crc/files/Survival_Development.pdf accessed on August 2, 2016.

13 See: http://nhrc.nic.in/documents/india_ratification_status.pdf, Accessed on August 15, 2012

14 Child Sex Ratio (CSR) is defined as the number of females per 1000 males in the age group 0-6 years.

15 Press Information Bureau, Government of India, Ministry of Health and Family Welfare Available at:<http://pib.nic.in/newsite/PrintRelease.aspx?relid=103437>, accessed on Sept 7, 2016

16 Government of India, Press Information Bureau, Ministry of Health and Family Welfare, (2014) Census of India, Child Sex Ratio in India (2001-2011). Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=103437>, Accessed on September 5, 2016

who can perform the last rites, that lineage and inheritance runs through the male line and that sons will look after parents in old age, men are the bread winners. Dowry demand and inheritance rights are other reasons for female foeticide and infanticide. The easy availability of sex determination tests may be a catalyst in the declining child sex ratio.¹⁷

The practice of sex selective abortion has been a critical cause of skewed sex ratios. The main legislation dealing with sex selection is the Pre-Conception, Pre-Natal Diagnostic Techniques Act (PCPNDT Act 1994, amended in 2003). The Act not only prohibits determination and disclosure of the sex of the foetus but also bans advertisements related to preconception and pre-natal determination of sex. All the technologies of sex determination, including the new chromosome separation technique have come under the ambit of the Act. It regulates the use of pre-natal diagnostic techniques such as ultrasound and amniocentesis. Ultrasound can only be used for detecting genetic abnormalities metabolic disorders, chromosomal abnormalities, certain congenital malformations, haemoglobinopathies and sex linked disorders.

The main concern is the non-implementation of the PCPNDT Act. There has been zero convictions in many states. The situation in Jammu & Kashmir, Punjab, Chandigarh, Uttarakhand, Haryana, Delhi, Rajasthan, UP, Himachal Pradesh, Gujarat and Maharashtra is particularly alarming.¹⁸ A recently released report by the Asian Centre for Human Rights (ACHR) stated that child sex ratio (CSR) has seriously declined from 982 females per 1000 boys (0-6 years) in 1971, the period before the use of the ultrasound machines for sex selection and abortion, to 909 in 2011 in Himachal Pradesh.¹⁹ Similarly in the State of Uttarakhand, during 2009 to December 2014, not a single conviction was secured under the PCPNDT Act.²⁰

17 Stated by Shri Ghulam Nabi Azad, Union Minister for Health and Family Welfare in a written reply to the Rajya Sabha on February 11, 2014. Available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=103437> accessed on Sept 7, 2016.

18 AIR 2013 SC 1571. Affidavit submitted by the Union of India in the Supreme Court in Writ Petition (Civil) No. 349 of 2006, Voluntary Health Association of Punjab v Union of India and Others on prosecutions and convictions under PCPNDT Act and rules till June 2011 Available at: <http://www.hrln.org/hrln/peoples-health-rights/pils-a-cases/1277-supreme-court-orders-on-proper-implementation-of-pcpndt-act.html#ixzz4K5upYw33> accessed on Sept 2, 2016

19 *ibid.*

20 Asian Center for Human Rights, the State of Female Foeticide in Uttarakhand, New Delhi, August 2016. Available at: <http://www.stopfemaleinfanticide.org/files/Uttarakhand.pdf> accessed on Sept 7, 2016

Absence of witnesses and insufficient evidence are cited as major reasons that result in cases falling through, thereby resulting in low conviction rates. Offences under Sections 5 and 6 of the Act (determination and communication of sex of foetus) can be committed by a word, a sign or a symbol, for which there is no physical proof as, for example, when days of the week, or names of sweets are used to convey the sex of the foetus. This makes it difficult for the authorities to collect evidence in support of the court complaints and the evidence collected is often weak and therefore incapable of establishing beyond reasonable doubt that a crime was committed by the accused. In several decoy cases, witnesses turned hostile, as witness protection provided by the State is inadequate.²¹ Above all, the primary cause is the mind-set and attitude of the accused, as well as enforcers and implementers, regarding son preference.

There has been a series of decisions in petitions filed in which the Supreme Court and the High Courts have issued various directions and pronounced Orders to the Central and the State Governments for creating public awareness and for the effective implementation of this Act. As early as 2001, Cehat, a voluntary organization²², filed a Public Interest Litigation (PIL) under Article 32 of the Constitution of India²³, bringing to the notice of the Court that although the Act prohibiting sex determination had been passed by the Central Government in 1994 and rules were also framed in 1996, no steps for its implementation were taken either by the Central Government or by the State Governments.²⁴ The directions given by the Supreme Court in Cehat's case are as follows (Cehat 2003):²⁵

- i. Directions to the Central Government included creating public awareness and implementing the Act with all vigour.

21 Public Health Foundation of India and others, 2010, IMPLEMENTATION OF THE PCPNDT ACT IN INDIA -Perspectives and Challenges, New Delhi. Available at: <http://www.wbhealth.gov.in/download/IMPLEMENTATION%20OF%20THE%20PCPNDT%20ACT%20IN%20INDIA.pdf>. Accessed on August 15, 2016.

22 Centre for Enquiry into Health and Allied Themes (CEHAT), a research organization; Mahila Sarvangin Utkarsh Mandal (MASUM), a non-governmental organization and Dr. Sabu M. George, a civil society member filed the PIL

23 Article 32 provides the right to Constitutional remedies which means that a person has right to move to Supreme Court (and high courts also) for getting his fundamental rights protected. While Supreme Court has power to issue writs under article 32, High Courts have been given same powers under article 226 <http://www.gktoday.in/article-32-right-to-constitutional-remedies/>

24 Centre for Enquiry into Health and Allied Themes (CEHAT) & others v Union of India & Others, AIR 2003 SC 3309.

25 AIR 2003 SC 3309.

- ii. Directions to the Central Supervisory Board include calling meetings at least once in six months, review and monitor implementation of the Act, quarterly updates from State and Union Territory (UT) Appropriate Authorities regarding the implementation and working of the Act, examine the necessity of amending the Act keeping in mind emerging technologies and difficulties in implementation of the Act, lay down a code of conduct and Medical Professional Bodies/Associations to create awareness and to ensure implementation of the Act.
- iii. Directions to State Governments and UT Administrations include: appointment of fully empowered Appropriate Authorities at the district and sub district levels, appointment of Advisory Committees to aid and advise Appropriate Authorities, furnish a list of Appropriate Authorities in the print and electronic media, create public awareness against the practice of sex selection and sex determination and to ensure that Appropriate Authorities furnish quarterly returns to the Central Supervisory Board, giving information on the implementation and working of the Act.
- iv. Directions to Appropriate Authorities include taking prompt action against any person or body that issues or causes to be issued any advertisement in violation of Section 22 of the Act, take prompt action against all bodies and persons who are operating without valid Certificate of Registration under the Act and to furnish quarterly returns to the Central Supervisory Board about the implementation of the Act.

This was a landmark judgement passed by the Supreme Court for the implementation of the PNDT Act that was largely on paper. As a result of the order passed in this Petition, in the year 2003, the PNDT Act was amended to bring within its purview the misuse of pre-conception techniques and was titled the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act (PCPNDT 1994).

The Voluntary Health association of Punjab (VHAP), a NGO, again filed a writ petition in the Supreme Court of India in 2006 against Union of India and Ors. for effective implementation of Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994²⁶. The Supreme Court gave the following directions for the implementation:

26 **Voluntary Health Association of Punjab v Union of India & Others.**[(2013) 4 SCC 1 Available at: <http://www.hrln.org/hrln/peoples-health-rights/pils-a-cases/1277-supreme-court-orders-on-proper-implementation-of-pcpndt-act.html#ixzz4K5uT2bNx>. Accessed on August 15, 2016

1. The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16A of PC&PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PC&PNDT Act.
2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PC&PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PC&PNDT Act.
3. The Committees mentioned above, should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of license to practice.
4. The authorities should also ensure that all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, Infertility Clinics, Scan Centres etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the concerned District Authorities, in accordance with Rule 9(8) of the Rules.
5. States and District Advisory Boards should ensure that all manufacturers and sellers of ultrasonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the concerned State/Union Territory and Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Act.
6. A direction to all Genetic Counselling Centres, Genetic Laboratories, Clinics etc. to maintain forms A, E, H and other Statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.
7. Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultrasonography clinics, in three months time.

8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels.
9. Special Cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the Courts under the Act and take steps for their early disposal.
10. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules there under and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.
11. The various Courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow up action with due intimation to the concerned Courts.

In spite of directions by the Supreme Court and the existence of PCPNDT and Indian Penal Code 1860 (IPC) provisions²⁷, female foeticide and infanticide continue to violate the right to survival of a child. Witness protection under PCPNDT Act must be provided. It is recommended that the implementation of the PCPNDT Act must be made more stringent with the involvement of civil society organizations. The incentives must be reviewed and revised in the context provisions of education, health and financial support.

Maternal education has a strong impact on infant and child mortality. Several statistical surveys suggest that a high literacy rate is corollary to a high sex ratio. The lowering of female foeticide, fertility rate and morality rate, increased life expectancy and better health outcomes are the indirect benefits of education. Besides, the right to health must be made a fundamental right and monitoring of the implementation of the laws and schemes must happen periodically, and transparency and accountability must be inbuilt into the laws and system.

27 Indian Penal Code, 1860: Sections 315 & 316: Foeticide; Section 315: Infanticide - 0 to 1 year of age; Section 305: Abetment to suicide; Section 317: Exposure and Abandonment.

Right to Development; The Right to Free and Compulsory Education

Education is a fundamental human right and essential for the exercise of all other human rights. It promotes individual freedom and empowerment and yields important development benefits. Education is a powerful tool by which economically and socially marginalized children can lift themselves out of poverty and participate fully as citizens²⁸. It is the right of every child to enjoy access to good quality education, without discrimination or exclusion. The right to education is an indispensable means of realizing other rights. It enables the child to develop and realize its full potential as a human being, which is the right of every child.

To protect the right to education, the Constitution in Article 21A states that: ‘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 (Constitution of India, 86th Amendment Act)²⁹. Article 51A of the Constitution of India was supplemented with an additional clause (k) by the 83rd Constitutional Amendment Act which makes it a duty of the parent/guardian to provide opportunities for education for all children between the age of six and fourteen years.³⁰

28 The Right to Education, UNESCO. Available at: <http://www.unesco.org/new/en/right2education>. Accessed on August 10, 2016

29 86th amendment in December 2002 which inserted the following articles in the Constitution:

1. Insertion of new article 21A- After article 21 of the Constitution, the following article shall be inserted, namely:- Right to education.-‘21A. 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.’

2. Substitution of new article for article 45- For article 45 of the Constitution, the following article shall be substituted, namely: - ‘Provision for early childhood care and education to children below the age of six years.’45. The State shall Endeavour to provide early childhood care and education for all children until they complete the age of six years.’

3. Amendment of article 51A- In article 51A of the Constitution, after clause (J), the following clause shall be added, namely:- ‘(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.’ Available at: <http://indiacode.nic.in/coiweb/amend/amend86.htm>. Accessed on: August 20, 2016.

30 Constitution of India, ‘The 11th Fundamental Duty [51-1(K)] was added by the 86th Constitutional Amendment Act, 2002. The idea behind the incorporation of the Fundamental Duties was to emphasize the obligations of the citizens in exchange of the comprehensive Fundamental Rights enjoyed by them

Article 28 of the Convention on the Rights of the Child (CRC) states that every child has the right to a primary education, which should be free³¹. The Convention places a high value on education and states that young people should be encouraged to reach the highest level of education of which they are capable. Providing Right to Education to the children is thus our Constitutional mandate as well as our international commitment. It is really shocking to note that according to official data 1 in 4 children of school-going age is out of school in our country; 99 million children in total have dropped out of school (Census 2011)³². Out of every 100 children, only 32 children finish their school education age-appropriately (District Information System for Education (DISE), 2014-15)³³.

The Courts in India have also played an important role in promoting the right to education. The Supreme Court in *Bandhua Mukti Morcha v. Union of India*³⁴ had explicitly stated that the right to live with human dignity enshrines its life breath from Directive Principles of State Policy and therefore it must include educational facilities. In *Mohini Jain v. State of Karnataka*³⁵, the court observed that: The right to life under Article 21³⁶ and the dignity of individuals cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facility at all levels to its citizens. Again in *University*

31 CRC Article 28: States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

32 Statistics on Underprivileged children in India, Child Rights and You (CRY), Available at: <http://www.cry.org/rights-to-know/statistics-on-children-in-india.html>. Accessed on August 5, 2016

33 Ibid

34 1984 SCR (2) 67

35 1992 AIR SC 1858. Decided : 30 July 1992.

36 The Constitution of India 1949. Article 21: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

of *Delhi v. Ram Nath (University of Delhi, 1963)*,³⁷ it was pointed out that education seeks to build up the personality of the pupil by assisting his physical, intellectual, moral and emotional development. The word 'life' in Article 21, in its wide interpretation is much more than a mere biological existence. Life also includes education, personality and whatever is reasonably required to give expression to life, its fulfilment and its achievements. These judgements signify the right to education as the very essence of right to life.

The Right to Free and Compulsory Education Act, 2009 (RTE), includes the right of children to free and compulsory admission, attendance and completion of elementary education (EE). The Act defines 'free' as removal of any financial barrier by the state that prevents a child from completing eight years of schooling and 'compulsion' as compulsion on the state, rather than on parents. Not enrolled, dropout and special needs children are to be admitted to age appropriate classes. It provides for special training to enable such children to be on par with others and a child so admitted is entitled to completion of EE even after age 14. The RTE removes barriers like birth certificate and transfer certificates. A welcome provision is Section 17(1) of the Act that prohibits physical punishment or mental harassment of students including the provisions that no child shall be psychologically abused by calling him/her 'failed' in any class upto class 8, or expelling him/her from school and bars corporal punishment and mental harassment.

The Act makes it mandatory for schools to have one trained teacher for a maximum of thirty students. The pupil – teacher ratio which is normally set as 30:1 and for schools with students exceeding two hundred, the same shall not exceed 40:1. The Act strictly provides that, for the purpose of maintaining such ratio, no teacher posted in one school shall be made to serve in any other school or office or deployed for any non-educational purpose. The appointing authorities of a school owned or established, controlled or substantially financed directly or indirectly by the appropriate Government or by a local authority shall ensure that the vacancy of teachers shall not exceed ten per cent. The RTE Act specifies that the School Management Committees (SMC) should be constituted in which 75% per cent shall be parents and 50 per cent of the total member shall be women. Adequate representation is sought from weak and disadvantaged groups. This step was envisaged to result in the increase in transparency as well as accountability. But in practice in many schools SMC's are non-existent and even if they exist they are mostly on paper.

37 1963 AIR SC 1873

There is a huge controversy regarding the no detention policy³⁸. The no-detention policy, a key component of the RTE Act, was enforced with the aim of ensuring that every child between the age of 6 and 14 is in school and does not drop out. The idea behind the policy was to minimize the number of students who drop out of the schooling system because of failure and are too humiliated or de-motivated to repeat a year. It is a matter of grave concern that there is growing demand to bring back the regressive 'pass-fail system' in lieu of one that allows for non-threatening, holistic and innovative assessment. The CCE evaluation system is not being followed in all schools, in its true letter and spirit. The major reasons being lack of knowledge and skills related to evaluation, lack of facilities and expectations to rush to complete the syllabus in time. There is no study or research to suggest that the quality of learning of the child improves if she or he is detained or failed or humiliated. For the proper implementation of the RTE Act 2009, the no detention policy must be restored after proper CCE training to teachers and also special tutorial facilities for the children who need more attention. The ban on Corporal Punishment must be enforced completely in schools and region-wise grievance redress forums and monitoring bodies be established so that children do not drop out of schools. The National Commission on Protection of Child Rights (NCPCR) guidelines on corporal punishment must be followed in schools (NCPCR 2009)³⁹. These guidelines specify the need for multi disciplinary interventions by psychologists, educationists, schoolteachers, parents, social workers, lawyers with children and advocates and use of positive disciplining methods.

If the no detention policy is revoked there will be more dropouts and more out of school children, which will result in an increase in child labour and incidences of child marriage. For many children, the opportunity to have at least one nutritious meal in a day will be lost.

The RTE Act 2009 also does not include the early childhood care and education (ECCE) of 0-6 years and 15-18 years. According to the Law Commission Report on Early Childhood Development and Legal

38 Section 16 of the RTE Act, 2009, provides that No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.

39 National Commission for Protection of Child Rights (NCPCR 2009), Guidelines for Eliminating Corporal Punishment in Schools. Available at: http://www.ncpcr.gov.in/view_file.php?fid=108. Accessed on July 21, 2016.

Entitlements, the development of young children is recognized as a development and human rights issue of critical national importance. Early childhood development spanning from birth to the age of six years is the period that sees the most rapid growth and development of the entire human lifespan. It is during this period that the foundation of cognitive, physical and socio emotional development, language and personality are laid⁴⁰. India has ratified the CRC which states clearly that free education should be made compulsory to children of 0-18 years old hence the right to education of 15 or 18 years, which is a crucial age of development, cannot be ignored.

Lack of resources cannot be cited as the excuse. The Unnikrishnan judgement had observed that the right to education existed and would not be contingent upon the economic capacity of the State up to 14 years of age⁴¹. Article 21A said that it would come into force 'in such manner as the State may, by law, determine'. So, it was made contingent on a law that the State may bring in. The Right to Education must not depend on resources or economic capacity, it is a fundamental human right.

Another major concern is that The Right to Education Act 2009 does not link child labour and their right to education and rehabilitation. The Second National Labour Commission Report (GOI, Ministry of Labour 2002)⁴², established the link between child labour and education and stated that, 'All out of school children must be treated as child labourers or those who have the potential to become child labourers'. The Census 2011 shows that 33.9 million children are out of school and vulnerable to labour. Around 1.01 crore children in the 5-14 age group earn for their families. In some parts of the country, more than half the child population is engaged in labour (Census 2011)⁴³. There is a need for a legal and policy framework in support of child labour and education and battle for schools from a rights based perspective and against the gains of the market forces in perpetuating child labour. The policy must be recognized as non-negotiable and as a goal,

40 Government Of India, Law Commission Of India Report No.259, Early Childhood Development and Legal Entitlements, August 2015. Available at: <http://lawcommissionofindia.nic.in/reports/Report259.pdf>. Accessed on August 15, 2016.

41 Unni Krishnan, J.P. And Ors. v State Of Andhra Pradesh And Ors. 1993 AIR SC 2178, 1993 SCR (1) 594

42 Government of India, Ministry of Labour, The Report of the Second Indian National Labour Commission-2002. Available at: <http://www.prsindia.org/uploads/media/1237548159/NLCII-report.pdf>. Accessed on August 15, 2016

43 Census of India, 2011

which it is possible to achieve. Child Labour Legislation should not only be regulatory but also developmental.

Education thus has a vital role in empowering and safeguarding children in India from exploitative and hazardous labour and sexual exploitation, corporal punishment, child marriages and in promoting human rights and democracy, protecting the environment and controlling population growth.

The Child Labour (Prohibition and Regulation) Amendment Act, 2016, prohibits ‘the engagement of children in all occupations and of adolescents in hazardous occupations and processes’ wherein adolescents refers to those under 18 years; and children to those under 14. The Act also imposes a fine on anyone who employs or permits adolescents to work. Section 3 in Clause 5 allows child labour in ‘family or family enterprises’ or allows the child to be ‘an artist in an audio-visual entertainment industry’. Children below 14 will be allowed to work in family businesses, outside school hours and during holidays. Children between 15 and 18, now defined as adolescents, will be permitted to work except in mines and industries. It has also reduced the number of hazardous jobs that 15-18-year-olds are banned from doing from 83 to 3. The Act seems to have brought in a new concept of ‘part-time student, part-time child labour’ along with part-time teachers.⁴⁴

The government says the new law will help poor families earn a living and give children a chance to acquire skills. Now, some children will go to school, come back, study, play, learn, relax and otherwise enjoy life. But ‘some other poor children’ must wake up early in the morning, work before going to school, then run to school and come back and work again at home and sleep late in the night. They will have no leisure, no time to play or study, leading to serious short- and long-term physical, psychological and social consequences.⁴⁵

These tired, sleepy, unhealthy children may soon drop out from school. Is this joyful learning, quality education, a happy childhood? Will it not perpetuate a labour force of children and adolescents that will be cheap and vulnerable working in cottage and small-scale industries, manufacturing units

44 Asha Bajpai, Proposed amendments to Child Labour Act need review Hindu, Mumbai August 11, 2016. Available at: <http://www.thehindu.com/news/cities/mumbai/proposed-amendments-to-child-labour-act-need-review/article8972381.ece>

45 Asha Bajpai, Proposed amendments to Child Labour Act need review Hindu, Mumbai August 11, 2016, <http://www.thehindu.com/news/cities/mumbai/proposed-amendments-to-child-labour-act-need-review/article8972381.ece>

operating out of residential areas claiming to be family enterprises and the unorganized sector, which can now flourish unregulated as family enterprises and work out of hazardous units⁴⁶. They will not be protected under the Act. Why this discrimination among children? Is it only because he or she is poor? Many poor families send their children to work. Poverty has made parents sell children, send them begging and force them into child labour. The very premise that children can work in families is deeply flawed. Making children work is not the solution. There is a need for strengthening their families through dedicated poverty alleviation programmes.

How will the government enforce this new law? Which will be the implementing and monitoring agency? Under the current Child Labour Act, 1985, when labour inspectors would visit factories where children were found working, all turned out to be relatives of the factory owner. There were practically no prosecution for any violation of existing laws pertaining to child labour. The owners, in many cases, could not be prosecuted because there were no witnesses. Corruption among government officials charged with enforcement of labour laws is notorious and widespread. Labour inspectors, medical officers, local tehsildars, police and magistrates are known to be susceptible to bribery. This Act is open to exploitation and abuse of children⁴⁷.

Education is the most important factor in reducing child labour. There must be linkages between child labour and education laws. They cannot work in isolation. Article 24 of the Constitution of India⁴⁸, mandates that no child aged below 14 years shall be employed in any factory or mine or engaged in any other hazardous employment. That implies that children below 14 can work in non-hazardous industries. This is in contrast to Article 21A, which provides for free and compulsory education to or all children aged 6 to 14 years. Article 24 must be amended to prohibit all children from working in any industry, including family enterprises. The ILO Convention 182 on the worst forms of child labour and Convention 138 on the minimum age to work have still not been ratified by India. We need to establish an independent implementing and monitoring agency to oversee the enforcement of child

46 Asha Bajpai, Proposed amendments to Child Labour Act need review Hindu, Mumbai August 11, 2016 <http://www.thehindu.com/news/cities/mumbai/proposed-amendments-to-child-labour-act-need-review/article8972381.ece>

47 *ibid.*

48 Constitution of India Article 24:

labour law⁴⁹. Child labour is not a labour law issue but one of child rights and child protection. Education, play, sport, leisure and rest are not luxuries for a few; they are every child's right and must be taken seriously.⁵⁰

The document 'Some Inputs for Draft Education Policy 2016' was released by the Ministry of Human Resource Development (GOI, 2016)⁵¹. This draft policy proposes a framework for the development of education in India over 2016-2020. NEP 2016 places focus on significantly improving the quality of education at all levels and on ensuring that educational opportunities are available to all segments of society. It recognizes that long-term economic growth and development of the nation critically depends upon the quality of the products of the education system. The thrust of this policy is on quality of education⁵².

According to the draft NEP, protection of child rights goes beyond personal safety of children and includes prevention of corporal punishment, absence of emotional and physical harassment, precautions against injury during school activities' safe infrastructure, use of child friendly language and actions, non-discriminations, physical abuse, substance abuse, molestations, etc. It calls for creating the right kind of environment that is both sensitive and receptive to child rights. A zero tolerance approach for any breach of child rights will be adopted to ensure physical and emotional safety of children.

Some of the salient features of the Draft National Education Policy include: Revision of no-detention policy, promotion of Sanskrit and bringing back Class 10 board examinations. It further includes issues ranging from pre-school education, curriculum renewal, school assessment, quality assurance, internationalization, faculty development in higher education and language and culture in education. Overall, The New Education Policy (NEP) 'envisions producing students/graduates equipped with the knowledge, skills,

49 Proposed amendments to Child Labour Act need review Hindu, Mumbai August 11, 2016 09:59 <http://www.thehindu.com/news/cities/mumbai/proposed-amendments-to-child-labour-act-need-review/article8972381.ece>

50 Asha Bajpai, Proposed amendments to Child Labour Act need review Hindu, Mumbai August 11, 2016 <http://www.thehindu.com/news/cities/mumbai/proposed-amendments-to-child-labour-act-need-review/article8972381.ece>

51 Government of India, Ministry of Human Resource Development, Some Inputs for Draft NEP 2016 file:///C:/Users/Asha/Downloads/NEP_DRAFT%20FOR%20INPUTS%202016%20(1).pdf

52 Ministry of Human Resource Development, Govt of India Some Inputs for Draft NEP 2016 file:///C:/Users/Asha/Downloads/NEP_DRAFT%20FOR%20INPUTS%202016%20(1).pdf .The new draft National Education Policy, 2016 (NEP 2016) was released on 29 June 2016 and is now open to public for discussion.

attitudes and values that are required to lead a productive life, participate in the country's development process, respond to the requirements of the fast changing, ever-globalizing, knowledge-based economy and society,⁵³. The no detention policy will be limited up to class V and the system of detention will be restored at the upper primary stage. It also states that compulsory board exams should be held for class X in a new format. Further, all states and union territories may provide education in schools, upto class V, in mother tongue, local or regional language as the medium of instruction. The draft National Education Policy (NEP) has stated that it could be in the child's mother tongue, local or regional language, if the States 'desire' so⁵⁴. It also adds that facilities for teaching Sanskrit at the school and university stages will be offered on a more liberal scale.

The New Policy has reopened the debate on the medium of instruction. Concepts like 'values' are vague and need to be adequately operationalized. According to World Bank data, India spent only 3.7% of its GDP on education in 2015⁵⁵. The NPE has not spelt out how it intends to increase education spending in the next few years to achieve its target of 6% of GDP. It must also include the health rights of children. Any policy on education has to acknowledge the sectors and ministries working together. The Ministries of Health, Labour and Women and children must be involved in education.

Right to Protection – Addressing Child Sexual Abuse

Children require special measures of protection to take account of their particular vulnerability and needs. The study on Child Abuse in India in 2007 by the Ministry of Women and Child Development was the first national database on child abuse⁵⁶. It highlighted the serious issue of child abuse and neglect in the Indian context indicated a phenomenal percentage of abuse

53 Government of India, Ministry of Human Resource Development, Some Inputs for Draft NEP 2016 file:///C:/Users/Asha/Downloads/NEP_DRAFT%20FOR%20INPUTS%202016%20(1).pdf

Ministry of Human Resource Development, Govt of India Some Inputs for Draft NEP 2016 file:///C:/Users/Asha/Downloads/NEP_DRAFT%20FOR%20INPUTS%202016%20(1).pdf

54 L N Venkataraman Economic and Political Weekly, New Education Policy and the Continuing Contentions Draft Policy On Education 2016, Vol. 51, Issue No. 35, 27 Aug, 2016 See more at: <http://www.epw.in/journal/2016/35/draft-policy-education-2016/new-education-policy-and-continuing-contentions.html#sthash.lilMAX3F.dpuf>

55 The World Bank Group, Government expenditure on education, total (% of GDP), 2016. Available at: <http://data.worldbank.org/indicator/SE.XPD.TOTL.GD.ZS>. Accessed on August 20, 2016

56 Government of India, Ministry of Women and Child Development (2007) Study on Child Abuse India, New Delhi

experienced by Indian children⁵⁷. Over 50% children in all the 13 sample states were being subjected to one or the other form of physical abuse. As far as sexual abuse of children is concerned, this study revealed that 53.22 percent children reported having faced one or more forms of sexual abuse and the perpetrator in 50 percent of the cases is a person known to the child. This implies that every second child in the country is facing some form of sexual abuse from known persons.

The law dealing with child sexual abuse is the Protection of Children against Sexual Offences Act, 2012(POCSO). POCSO is a comprehensive law to provide for the protection of children from the offences of sexual assault, sexual harassment and pornography. This Act defines a child as any person below eighteen years of age. It defines different forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography and deems a sexual assault to be 'aggravated' under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority. It provides for Special Courts that conduct the trial in-camera and without revealing the identity of the child, in a child-friendly manner. Hence, the child may have a parent or other trusted person present at the time of testifying. Further, the child is not to be called repeatedly to testify in court and may testify through video-link rather than in a courtroom. Contrary to the other penal codes, this particular Act has an exceptional clause that states that, an individual accused of sexual offences against children is guilty unless proven innocent.

It also provides for mandatory reporting of sexual offences. According to Section 19 of POCSO, any person (including the child) who has an apprehension that an offence under the POCSO Act is likely to be committed, or has knowledge that an offence has been committed, has a

57 This study included nationwide empirical data on the nature and extent of child abuse in different settings and recommends immediate and appropriate responsive actions that can be undertaken by families, community, government, and civil society organizations. The study included a large sample of 12,447 child respondents, young adults and other stakeholders across 13 states of India. It covered children in the age group of five years to 18 years and young adults from the age group of 18 to 24 years. It has a fair representation across gender, mother tongue, caste, and religion. The children in the sample came from five different evidence groups: children in family environment but not going to school, children in schools, children in institutions, children at work, and children on streets. The study highlighted various forms of abuse experienced by the children and includes physical, sexual, and emotional abuse. In addition it also covers the neglect experienced by girls.

mandatory obligation to report the matter⁵⁸. An expressed obligation has also been vested upon media personnel, staffs of hotels, lodges, hospitals, clubs, studios and photographic facilities to report a case if they come across materials or objects that are sexually exploitative of children⁵⁹. Failure to report is punishable with imprisonment of up to six months, a fine or both. This penalty is, however, not applicable to a child. The Act also makes it an offence to report false information, when such a report is made other than in good faith. This obligation of reporting suspicions to the police is a controversial provision. The objective of mandatory reporting was to protect the child from further harm and provide him the required support, especially when the accused is close to the family and the child. Mandatory reporting can also prevent the abuser from harming other children

In many countries including the USA and Australia mandatory reporting is prevalent but it has been preceded by training and only certain specified professionals like teachers, doctors, counsellors and social workers are mandated to do so but the Indian law has mandated every person to do so. This has created confusion and fear. It appears that there has not been a significant increase in reporting since reporting became mandatory. Reporting to the police amounts to pushing the child into the criminal justice system. Further, police may not be the right agency to deal with such sensitive issue. Without proper intense training of police before they handle such cases it could lead to further trauma to the child and the family. If any person reports and if the victim turns hostile due to family or other pressures, the mandatory reporting serves no purpose.

Sexual offences against children are rampant but only a small percentage get reported. There have been some very recent initiatives for reporting sexual offences under POCSO⁶⁰. An online complaint box for reporting child sexual abuse has been launched. A POCSO e-Box is an online complaint management system for easy and direct reporting of sexual offences against children and timely action against the offenders under the POCSO Act. India's first internet hotline has been launched to help eliminate child pornography and prevent sexually explicit images or videos of children from being shared

58 Section 19, POCSO Act 2012

59 Sec 20, POCSO Act 2012

60 Press Information Bureau Government of India, Ministry of Women and Child Development, 26 august 2016. Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=149240>. Accessed on 27 August 2016

and going viral by allowing any citizen to easily report such content.⁶¹

Conclusion

Children have the right to survive, develop, and be protected. Laws and policies must be complemented by changes in attitude and approach towards children by civil society, law makers, law implementers and enforcers. Implementation of laws must be done jointly with the involvement of civil society. Any law or policy on children has to acknowledge the inter-sectoral and inter-ministerial nature of rights and the important role to be played by working together. Locating child rights violations as human rights violations also helps to raise it as a grave public concern rather than a private matter between families. Most of all, the human rights perspective helps to frame child rights violation as a crime. Above all without sufficient political backing, effective implementation, adequate budgets and robust enforcement, the laws and amendments could remain on the statute book without any impact. For India to become a world economic power it must put children first in all policies, plans and resource allocations.

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⁶¹ Aarambh India REPORT ONLINE CHILD SEXUAL ABUSE IMAGERY Disconnect The Abuse Available at: <http://aarambhindia.org/> accessed on Sept 2, 2016. Accessed on Sept 8, 2016

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www2.ohchr.or...ish/law/crc.htm](http://www2.ohchr.or...ish/law/crc.htm) Sept, 2016.

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4 SCC 1.

III – Rights of Vulnerable Sections of Society

Economic Growth and Poverty in India

*Prabhat Patnaik**

Abstract

Official poverty estimates in India started in 1973-74. Using the National Sample Survey data a poverty-line was estimated separately for rural and urban India as the level of per capita expenditure at which specified calorie norms were accessed, and all those below this line were considered poor. In later years however the official estimates, instead of using this same method, have used a different and rather spurious method for measuring poverty which brings the base year poverty-line forward using a Consumer Price Index. Since the Consumer Price Index understates the actual cost-of-living increase, by not taking into account the privatization that has occurred in essential services like education and health, these estimates have understated the magnitude of poverty and have even shown it to be declining. Using the method originally used in 1973-74 in subsequent years however shows a significant increase in the poverty ratio in the period of neo-liberal economic policies. The reason for this increase lies in the fact that under neo-liberalism the State has withdrawn the support it had extended to the petty production sector earlier, including to peasant agriculture. The spate of peasant suicides is a consequence of this withdrawal of support.

The belief that poverty will disappear if the current development trajectory is followed is misplaced. Even an acceleration in the growth rate along this trajectory will not prevent a worsening of poverty. What is required is a completely different development trajectory that would require a degree of de-linking from globalization. It is not just the trajectory, however, that needs changing, but the very approach to development: instead of apotheosizing GDP growth, we should institute a set of universal, and justiciable economic rights.

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Official poverty estimates began in India in 1973-74. Poverty was defined, on the basis of expert opinion, as the state of a family not being able to access through its actual consumer spending, at least 2100 calories per person per day in urban areas and 2200 calories per person per day in rural areas. (The rural nutrition norm was originally 2400 calories but was scaled down in actual application, for no apparent reason). The data collected from households by the National Sample Survey (NSS), which carries out a large sample survey every five years, were used. The information on various items of physical quantities of foods consumed gave the nutritional intake (calories, protein and fat) per household, and the information on the expenditure on these food items, plus on all non-food items per household, enabled this nutritional intake to be linked to actual spending on all items. These household data were then divided through by family size and grouped, in terms of ascending levels of average monthly per capita expenditure, which were obviously, associated with ascending average levels of daily per capita calorie intake. The daily calorie intake usually varied from around 1300 or less for the smallest spenders to over 2600 for the largest spenders. The particular level of average monthly per capita expenditure at which persons in households, were seen to reach these calorie intakes in rural and urban areas, were called the 'poverty lines' for the respective areas by the Planning Commission which then obtained the proportion of all persons falling below these poverty lines.

In later years, curiously, even though data were available for making similar direct estimates of the expenditure required to reach the calorie norms, and, from these poverty lines, obtain the proportions of urban and rural populations falling below these expenditure levels, such estimates were not made. Instead the original poverty lines for 1973-4 were brought forward using Consumer Price Indices to denote new 'poverty lines' for these later years; and persons falling below these 'poverty lines' in any particular year were defined as 'poor'. This has been the method used since then, though some refinements in this method have been effected in the last few years, with regard to the estimation of rural poverty, because of severe public criticism of the very low 'poverty lines', and hence the very low poverty ratios, that the earlier method yielded. These recent refinements however do not affect any of the claims made in this paper and hence need not detain us here.

What is quite striking from Table 1, is that the gap between the direct estimate of poverty (by simply counting the proportion of people below the poverty lines calculated, as above, for each year afresh on the basis of calorie

norms) and the indirect estimate of poverty (by taking the proportion of people falling below the 'poverty lines' upgraded from the base year, 1973-74, by the use of Consumer Price Indices) has been widening over time; and, what is more, while the indirect estimates show a decline in the poverty ratio, the direct estimates show a significant increase.

This raises two obvious questions: one, how do we explain the fact that at a time when the growth rate of the Gross Domestic Product of the Indian economy appears to have increased significantly, the proportion of persons both in urban and rural areas unable to access a minimum nutritional 'norm' has also increased quite significantly? And two, why should the divergence between the two estimates be increasing over time? The present paper addresses these two questions.

Let me take the first question first, which is the more important of the two in any case. The increase in the percentage of population unable to access minimum nutritional norms is perfectly in sync with what we find with regard to per capita foodgrain availability in the country, which has declined over roughly the same period. Let me locate this decline in an historical context.

The per capita foodgrain availability per annum, where 'availability' is defined as net output (i.e. gross output minus seed, feed and wastage) plus net imports (i.e. imports minus exports of foodgrains) minus net additions to stocks (where, owing to lack of information on private stocks, only government stocks are taken into account), was 199 kilogrammes for the quinquennium 1897-1902 for "British India". It then declined sharply during the last half-century of colonial rule to reach 148.5 kilograms for the quinquennium 1939-44 (though in the individual year 1945-46 itself, i.e. even before the disruptions caused by partition could have set in, it had already declined to 136.8 kilograms (Blyn 1966).

After independence, with great effort, the per capita annual availability of foodgrains for the Indian Union as a whole was pushed back up to 177 kilograms for the triennium ending 1991-92. (For comparison, it should be noted that the figure for the Indian Union as a whole was 152.72 during the quinquennium 1951-55). Since then, after the introduction of neo-liberal reforms starting from 1991, per capita foodgrain availability first reached a plateau and then declined to 164 kilograms in 2011-12, which was not only a good crop year but also the last year for which NSS large sample data on expenditure are available (which makes possible a comparison with calorie intake).

Table 1 : Rural and Urban Poverty, 1973-4 to 2009-10

		(Uniform Recall Period)				
		1973-4	1983	1993-4	2004-5	2009-10
RURAL						
Direct Poverty						
Ratio	(%)					
2200						
calories/day		56.4	56	58.5	69.5	75.5
URBAN						
Direct Poverty						
Ratio	(%)					
2100						
calories/day		60	58.38	57	65.5	73
RURAL						
Direct Poverty						
Line	(Rs.)					
2200						
calories/day		49	100	280	575	1075
URBAN						
Direct Poverty						
Line	(Rs.)					
2100 calorie/day		65	147	398	1000	2000
RURAL						
Official Poverty Ratio	(%)	56.4	45.7	37.3	28.3	23
Revised Ratio	(Tendulkar)				41.5	33.8
URBAN						
Official Poverty Ratio	(%)	49.2	42.2	32.6	26.7	20.9
RURAL						
Official Poverty						
Line	(Rs.)	49	86	206	358.6	557
Revised Official						
Line	(Rs.) (Tendulkar)				415	645
URBAN						
Official Poverty						
Line	(Rs.)	56.6	117.6	285	538.6	830

Source: U. Patnaik, 2013

It turns out that the proportion of rural population below 2200 calories per person per day, which was 58.5 per cent in 1993-94, has climbed up to 68 per cent in 2011-12. The proportion of the urban population below 2100 calories which was 57 per cent in 1993-94 has gone up to 65 per cent in 2011-12. In fact, the figures for 2011-12 are much better than for 2009-10 (as can be seen from Table 1) which is the year when the NSS was scheduled to collect, and did collect, its large sample data; but the 2009-10 figures presented such an abysmal picture that the government ordered a special round of large sample NSS data collection in 2011-12 which was a good crop year compared to 2009-10. The government explained this extraordinary step by arguing that the abysmal picture in 2009-10 was because it had been a poor crop year and hence did not present a correct picture; and indeed the data for 2011-12 showed a lower level of poverty. What is striking however is that even the 2011-12 data on the extent of calorie deprivation compare unfavourably with 1993-94, as mentioned above.

The question that naturally arises is: why should this be the case when the growth rate of the economy is supposed to have accelerated? This question acquires special pertinence since, as Table 1 shows, during the years of lower growth, in the so-called dirigiste period, the per centage of population below the calorie norms was rather stable, both in rural and urban areas; in contrast, it has started climbing up quite sharply during the period of high growth.

There have been several false answers to this question on why the direct measure of poverty should have shown an increase in the poverty ratio precisely in the period of neo-liberal reforms, which is generally hailed for its much higher GDP growth rates. These false answers should be got out of the way first.

One such false answer states that as people become better off they consume less of foodgrains and more of other goods. Their consumption in short becomes diversified as they become better off, in which case the reduction in net foodgrain availability reflects not a deterioration in people's living standards, but rather an improvement in these standards.

This argument however is palpably erroneous. While it is certainly true that people's direct ingestion of foodgrains goes down as they become better off, their total ingestion of foodgrains, taking both direct and indirect ingestion together, the latter through processed foods and animal products into whose production foodgrains enter as feedgrains, increases with per capita real

income. This is so across countries and also in specific countries over time. In the U.S. for instance, the annual net per capita foodgrain availability is close to 900 kilograms, compared to 164 in India for 2011-12. In Europe, the figure is between 600 and 700 kilogrammes. When we fit a curve to the pooled time-series and cross section data for several countries taken together, relating per capita cereal consumption to per capita real income, we find that this curve eventually reaches a plateau, but this happens at levels of real per capita income that are far higher than countries of the third world like India or China have experienced (Krishna 20). Hence for India, given its level of per capita real income, the per capita net total absorption of foodgrains should be increasing since per capita real income has been increasing; but we find that the precise opposite has been happening. (All the figures quoted above for India, it must be noted, refer not to direct absorption of foodgrains alone, but to direct and indirect absorption taken together; and likewise the calorie intake figures refer to the total calories obtained from all sources, including animal products).

A second false answer to the question on why nutritional deprivation has been increasing in a period of high GDP growth is that people have nowadays become more concerned with spending on education for their children and healthcare for their families; there is in short a 'change in tastes' that has occurred, because of which they have shifted spending from foodgrains to these other heads. The decline in per capita foodgrain availability therefore, should not be a cause for concern; it is only indicative of a change in people's preferences that has come with the process of 'modernization'.

While there is no gainsaying that people, even in rural areas, are far more conscious now than before about the need to provide their children with better education and their families with better healthcare, and also that the household expenditure on education and healthcare has gone up in relative terms, a 'change in taste' simply would not do as an explanation for the observed increase in nutritional deprivation. (It is difficult incidentally from published NSS sources to disentangle the exact data for each of these heads, since both these heads appear under a catch-all category called 'miscellaneous goods and services').

A 'modern' attitude towards the need for education and healthcare has been gaining ground in India in a gradual manner for quite some time. If this 'change in taste' reflecting a more 'modern' outlook was the sole or even the major explanation for the growth in nutritional deprivation, then we should

have observed a sustained and gradual growth in such deprivation over a prolonged period of time. This however, as we have already noted, is not the case.

Taking rural India for instance, we find a sudden and dramatic jump in nutritional deprivation only after 'liberalization', not before. As Table 1 shows, the per centage of rural population unable to access 2200 calories per person per day was quite stable for a long time: 56.4 in 1973-74, 56 in 1983, and 58.5 in 1993-94. But it suddenly jumped to 69.5 in 2004-05. Exactly a similar picture can be observed for urban India in Table 1.

This sudden jump in the course of merely one decade, 1993-94 to 2004-05, cannot be explained in terms of a change in 'tastes'. A far more obvious explanation is a reduction in real purchasing power: in fact for the terminal year 2004-05 which was a poor agricultural year, such a reduction in purchasing power in the hands of the rural population is quite indubitable. And since urban poverty typically represents a spill-over of deprivation from rural areas, clearly the loss of purchasing power in rural India would also raise urban poverty.

But once it is recognized that purchasing power in the hands of the population is a significant explanatory factor for changes in the extent of deprivation, and that it is affected inter alia by the size of the harvest, and hence the rate of growth of agricultural production, then we have to focus on this factor and accord at best a secondary role to any 'change of taste'. In fact even the government has implicitly accepted the role of agricultural output in determining the magnitude of poverty, since it ordered, as we have seen, a large sample survey in a good crop year, 2011-12, to counter the abysmal picture that had emerged from data collected in a bad crop year, 2009-10. (And the effect of the size of the harvest was actually confirmed when NSS data showed a decline in both rural and urban poverty in 2011-12 compared to 2009-10).

In fact, even the observed increase in healthcare and education expenditures of households, which was quite substantial (the 'miscellaneous goods and services' category within which these expenditures figure went up from 17.3 per cent of the total household spending in 1993-94 for rural India to 23.4 per cent in 2004-05, and from 27.5 per cent to 37.2 per cent for urban India), can scarcely be explained by 'a change of tastes' per se. Not that tastes have not been changing, but the substantial order of increase within such

a short time suggests that even more important than change of tastes was perhaps the operation of another factor, viz. a dramatic increase in the costs of education and healthcare.

This increase was mainly because of the increasing privatization of these essential services; and precisely for this reason, the increase in the cost of these services is not reflected in Consumer Price Indices. To see this point, consider an example: suppose in the base year, when government facilities were the only ones available, a particular surgery cost Rs.100, and in the current year too it still costs Rs.100 in the government facility. But suppose, because of the non-expansion of government health facilities, most patients now have to go to private hospitals where the same surgery costs Rs.200. Then the Consumer Price Index for this item of expenditure will show a zero rate of inflation while in fact there has been a 100 per cent effective rate of inflation under this head. The very method of construction of the Consumer Price Index which is a weighted average of price relatives (the weights being base-year expenditure shares under different heads), precludes reckoning with the consequences of the privatization of essential services, which therefore understates in the Indian context the extent of price-rise.

We are now in a position to answer the second question posed at the outset, namely, why should the poverty ratio measured by using the indirect method show a decline, while that measured by the direct method shows a significant increase? The answer lies in the fact that the Consumer Price Index by which the poverty line is updated understates the degree of inflation in the economy by not taking into the account the effects of privatization of essential services. The poverty-line therefore is kept lower than it should be and hence the poverty ratio too is shown to be lower than its true value. And since privatization of essential services is not a once-for-all measure but has been occurring through time, the indirect measure showing a decline in poverty, while the direct measure shows an increase, should not come as a great surprise. In short, the same phenomenon, namely the privatization of essential services, which largely explains the jump occurring in the share of education and healthcare expenditures (though these are lumped together, along with sundry other expenditures, under the head 'miscellaneous goods and services') in household budgets, also explains why official poverty estimates, using the indirect method, seriously underestimate the magnitude of poverty. The direct measure gives a more accurate picture of the extent of nutritional deprivation, which underlies even the official concept of poverty.

Let me now come back to the question with which I began: what explains growing nutritional deprivation in a period of economic growth whose rapidity has been quite unprecedented? I have moved some false answers to this question out of the way: but what is the true answer? I have suggested two factors that have no doubt been responsible, namely the languishing of agriculture and the privatization of essential services. But let me now locate these and other factors within an overall argument.

‘Liberalization’ means above all greater freedom for capital flows into and out of the country, including for finance capital flows (and not just capital flows for setting up production units). What it entails therefore is that while the State remains a nation-State, finance is globalized, moving from one country to another at will. Since such movement can occur with astonishing rapidity and in vast quantities, and can therefore precipitate a financial crisis for any country, the governments belonging to the various nation-States are particularly keen that they must not do anything that upsets finance, and must instead do everything that financial interests demand. They must, in short, as the saying goes ‘retain the confidence of the investors’.

Now, financial interests are generally opposed to any State activism other than via stimulating the capitalists to do what the State wants done. If employment is to be expanded, then they want the State not to undertake larger expenditure to stimulate aggregate demand, but to boost the ‘animal spirits’ of the capitalists, through giving them concessions, so that they invest more for expanding aggregate demand. Neo-liberalism in short does not entail, as is commonly supposed, a ‘withdrawal of the State’ and ‘leaving things to the market’; it entails a different kind of intervention by the State, which acts via promoting capitalists’ incentives.

This does not always succeed however in achieving what the State wants to achieve, such as for instance, a reduction of unemployment; but even then what the State is enjoined to do is to boost these incentives further, rather than acting independently on its own. This is why John Maynard Keynes, the renowned British economist of the twentieth century, had written: ‘Finance above all must be national’, i.e. the economy must not be exposed to unrestricted cross-border capital flows (Keynes 1933). He saw this as being essential for the nation-State’s autonomy to intervene in the economy for achieving social goals.

In the Indian context, the constraints on state policy imposed by

exposure to global financial flows have affected above all the State's relation with traditional petty production, of which peasant agriculture is a component. The post-independence Indian State had taken a number of steps to protect, promote and defend peasant agriculture, in contrast to the colonial State that had brought acute distress to this sector: it had imposed tariff restrictions, and even quantitative trade restrictions, to insulate domestic agricultural prices from the vicissitudes of world market price fluctuations; it had expanded public investment in irrigation and rural infrastructure; it had subsidized input prices including, after Bank nationalization, the price of credit; it had promoted research into better agricultural practices in public institutions; it had covered the country with a massive network of extension services to spread the benefits of such research, and information about better practices; it had provided remunerative prices, worked out by the Commission on Agricultural Costs and Prices, through public procurement operations in several crops; and in the case of commercial crops, not covered by the Food Corporation of India's procurement operations or those of other public agencies, it had used the various Commodity Boards to intervene in the market to ensure remunerative prices. One very important consequence of these measures was to keep peasant agriculture out of the reach of international agri-businesses and even of the domestic corporate sector.

What was true of peasant agriculture was also true of traditional petty production in general: the post-independence State had, under the 'planned' or dirigiste regime, taken a number of steps to protect and promote this sector, of which the policy of "reservations" towards handlooms was an obvious example. To be sure, not all sections of the agricultural producers or other petty producers benefited equally from these measures. The traditional landlords who converted themselves into capitalist landlords were of course the biggest beneficiaries, but even among the peasants the rich peasants got the lion's share of the benefits. But these measures did result in introducing a degree of dynamism into agriculture and other petty production sectors that had languished under colonial rule. The figures on per capita foodgrain availability quoted earlier testify to this fact.

With 'liberalization', the insulation of peasant agriculture from encroachment by international agribusiness and domestic corporates comes to an end. The other side of this coin is a winding down of the support, protection and promotion of this sector by the State; and the same is more or less true of the traditional petty production sector in general. It is not

surprising therefore that we find in the post-liberalization period: a reduction in tariffs (to levels even lower than the tariff-bounds allowed by the WTO) and a removal of quantitative restrictions on agricultural imports; a reduction in the scale of research undertaken in public institutions; a winding up of government extension services; a sharp fall in government investment in irrigation and rural infrastructure; a rise in input prices owing to the withdrawal of subsidies in the name of 'fiscal consolidation'; a drying-up of institutional credit for agriculture to a point where a new class of private money-lenders has emerged and is thriving; and an end of the marketing role of the Commodity Boards.

Three consequences of this shift are immediately apparent. One, international agribusiness and domestic corporates now have direct access to the peasantry and are increasingly encroaching upon the peasant economy. Two, peasant agriculture has ceased to be profitable, trapping peasants in debt, which has led to a spate of suicides. (An additional factor here has been the one mentioned earlier, namely the rise in the costs of essential services owing to their increasing privatization). And, three, the rate of growth of agricultural, including foodgrain, output has slowed down dramatically. The per capita foodgrain output in the 2011-12 was scarcely above the per capita foodgrain output in 1990-91 (both of these were good crop years and hence comparable).

This squeeze on peasant agriculture and petty production in general, it may be thought, is simply a part of historical progress. It has happened elsewhere, in countries where capitalism has developed and shifted the workforce out of these sectors into modern manufacturing and services. Indeed, it is supposedly the means through which an improvement in the living standards of the people has been historically effected, through a transfer of population from low-productivity traditional agriculture and petty production to higher-productivity activities.

Such a reading of the situation however, is wrong in our case for two obvious reasons. First, in Europe where the development of capitalism is supposed to have first decimated petty production and then absorbed the displaced petty producers into a modern proletariat, a very important role was played by emigration of workers into the temperate regions of white settlement, such as Canada, the United States, Australia and New Zealand (Bagchi 1972). The migrants into this 'new world' appropriated the land of

the original inhabitants and set themselves up as farmers with reasonable standards of living, which in turn helped push up the 'reservation wage' in their original countries and thereby strengthened the trade union movement. In short, not all displaced petty producers were absorbed into the capitalist sector; a substantial number migrated abroad. In the case of Britain for instance, the number of people who emigrated between 1821 and 1915 was more than one-and-a-quarter times the original population in 1821 (U. Patnaik 2012). Such emigration opportunities are not available to the Indian population in today's world.

Secondly, despite the high GDP growth that has been witnessed of late, the increase in the demand for labour has been much lower than even the natural rate of growth of the labour-force, let alone being able to absorb the displaced petty producers. Of course, since the unemployed typically appear as 'unemployed in disguise' rather than being openly unemployed, it is always difficult to estimate the rate of growth of demand for labour; one has to specify what "being employed" means. In India, the NSS has a category called 'usual status employment' which measures those who report being employed as their 'usual status'. If we focus on this category, then we find that between 2004-05 and 2009-10, a period of extraordinarily high GDP growth, 'usual status employment' went up at the rate of 0.8 per cent per annum. This was way below the rate of population growth (which approximates the natural rate of growth of the work-force), let alone absorbing the displaced petty producers, especially peasants, who, according to Census data, have left agriculture in lakhs.

The result of this tardy growth in proper employment opportunities has been a proliferation of casual employment, intermittent employment, part-time employment, 'self-employment' and 'petty entrepreneurship', all of which basically constitute labour reserves rather than proper employment. They also contribute towards keeping down the real wage rate of even those who have got proper employment, tying them to a subsistence level, even as labour productivity in the economy goes up. The result is a growing share of surplus in output and hence an increase in income and wealth inequalities.

The implications of the squeeze on traditional petty producers in a context where they have nowhere to emigrate and where proper employment is not being generated in sufficient numbers to absorb even the natural growth of the labour-force let alone the displaced petty producers coming into cities

in search of jobs, are profound as far as poverty is concerned. The squeeze on traditional petty producers together with the increase in the size of the labour reserves relative to proper employment, which in turn keeps down the real wages of those workers who do have proper employment, necessarily means an increase in the proportion of the population in absolute poverty, which is precisely what we have been observing. Programmes like the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) have at best acted as palliatives but they have not essentially altered the situation created by the dynamics of the system.

The view that the solution to the problem of poverty lies in attaining still higher GDP growth within the existing development trajectory is untenable. Apart from the fact that growth within a 'liberalized' economy cannot be ordered at will, since capitalists cannot be coerced into investing if demand is not growing rapidly (as is the case now owing to the world capitalist crisis), there is a further problem. The elasticity of employment with respect to output (i.e. the ratio of the percentage change in employment to the percentage change in output) in modern manufacturing and service sectors, tends to increase as the growth rate of these sectors increases. Even a doubling of their growth rate therefore, entails a less than doubling in the employment growth rate in these sectors, and hence a continued swelling of the relative size of the labour reserves, given our natural growth rate of labour force (even ignoring displaced petty producers seeking work). What is required therefore, is a change in the development strategy, the pursuit of an alternative development trajectory. It is instructive in this context, that the rate of growth of employment during the days of lower growth within the dirigiste economic regime was higher than it has been within the 'liberal' regime despite its higher GDP growth rate. The question that arises is: what should this alternative trajectory look like?

The essential component of any alternative trajectory must be an effort by the State once again to defend, protect and promote petty production, but with three additional provisos: first, income and wealth inequalities within this sector should be reduced through land reforms and other appropriate policies; second, an effort must be made to increase the scale of production through voluntary co-operatives and collectives, so that the country does not remain permanently stuck in a world of antiquated petty production with its economic limitations and narrow mind-set (for successful co-operativization the first proviso just mentioned constitutes a pre-condition); and third, industrialization must be undertaken, wherever peasant land is demanded

for the purpose or wherever it entails value-addition to agricultural products, within this framework of cooperatives, with the peasant co-operatives themselves being the owners of industry. In short, diversification of the economy must not entail a squeeze or expropriation, and displacement of the peasantry and other petty producers, as has happened historically in metropolitan capitalist economies, but an attempt to build upon the base of a revamped peasant and petty producer economy.

To the extent that such a trajectory entails a reduction in investment by capitalists, both domestic and foreign, this would have to offset through public investment, in addition to the co-operative sector investment mentioned above. Since, in any case, the current crisis in the world capitalist economy has so depressed private investment that economic revival requires alternative agencies for undertaking investment, a revival of public sector investment needs to be put on the agenda.

All this however can be attempted only when the State acquires a degree of autonomy vis-à-vis globalized finance capital. This requires controls on capital flows such as existed under the Bretton Woods system everywhere in the world, and before 'liberalization' in India. Of course capital controls would cause problems with regard to financing the current account deficit on the balance of payments; for countering these, a degree of trade control would also become necessary. In short, for the acquisition of autonomy by the State a degree of de-linking from globalization would become necessary.

I do not however, wish to dwell on these points any further here because to my mind the trajectory of development must follow from an approach towards development; and the current approach where GDP growth is apotheosized needs to be rejected. Instead, we should think of a set of justiciable economic rights that every citizen, irrespective of caste, community, gender, and ethnicity, should be entitled to. Indeed this seems to me to be the only way, not only to overcome poverty but also to build a concept of citizenship transcending caste, community and other differences that threaten to tear our society apart.

Among these rights, I would list at least five for immediate institution: a universal right to food; a universal right to employment (or an unemployment allowance corresponding to an appropriate living wage); a universal right to free, publicly-provided, quality healthcare (along the lines for instance of the National Health Service in Britain); a universal right to free, publicly-

provided, quality education, at least covering the primary and secondary stages; and a universal right to an adequate old-age pension and appropriate disability benefits.

The total amount of expenditure needed for instituting these rights would not exceed 8-10 per cent of the country's GDP (even this is an over-estimate since in practice the very provision of some rights would ipso facto achieve others partially, such as for instance the construction of school buildings providing employment); and even if the entire sum is raised through taxation, the total tax-GDP ratio in the country would go up merely to about a quarter, which is well below the ratios in European countries and just about equals the ratio in the United States. In short, these rights are achievable; what is needed is determined political will to institute them.

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Unravelling the Poverty Conundrum : to Reach the Sustainable Development Goal of Eradicating Poverty

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Abstract

The central argument of this paper is that to eradicate poverty not just by 2030 but in the long term, two things are required: one, to understand the concept of poverty and two to look at policies and programs which can clean up poverty in a sustainable manner. To prevent poverty eradication from being a perpetually repetitive exercise, it is necessary that the intervention is self-renewing and hence sustainable. However such customized interventions cannot be planned without deliberating on the relationship between the conceptual and real manifestations of poverty. This mapping of the conceptual universe is needed because each definition attempts to capture a particular dimension of the reality and any eradication program should be devised by knowing them all. This paper examines the concepts of poverty in order to deliberate on how a universally sustainable poverty eradication program should be designed.

Introduction

I feel surrounded by want and inequality as I start to write this piece. The populist accounts on the poor speak of: lack of resources causing parents to sell off children; lack of food forcing people to eat inedible poisonous plants, absence of shelter pushing people to make the street their home, with all the attendant perils of inclement weather and street violence. This dire narrative is supported by facts and figures be they of malnutrition, homelessness, violence, and widespread oppression and exploitation. This narrative enters my life and the lives of other people endowed like me as a flat narrative. It is a story that speaks about people being poor as though natural phenomena are being described when it has been demonstrated innumerable times that

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poverty does not just occur, it is caused. It is to highlight this etiology that Baxi asked for the terms 'poor and poverty' to be replaced by 'impoverished and impoverishment'¹ respectively. The altered terminology he hoped may encourage people to appreciate that the choice of policies, the allocation of funds, the distribution of resources all in their own way contribute to the impoverishment or empowerment of people. It is not divine phenomena but human choice. This paper builds on the Baxian insight, to search out policy perspectives that could assist in the process of wiping out poverty.

This reality of human choice stands acknowledged when the Sustainable Development Goals (SDGs) name eradication of poverty as the first goal. The goal is global, however each country may need to devise its own alleviation measures and though India does not figure in the list of least developed countries, its large population, poor performance on human development indicators accompanied by a functioning democracy and inequitable ownership of assets makes it a suitable site to reflect on SDG1.

To design a blueprint to eradicate poverty, it is necessary to describe the condition. The first section of this article therefore deliberates on the various approaches towards poverty alleviation and the strength and weakness of each approach. This exercise is being undertaken not to identify any one approach but to draw out the most suitable insight from each approach to be incorporated into the poverty eradication policy of the country. This methodology is being adopted because it is my contention that in a country as large and diverse as India, if the empowerment of all is the goal, a one size solution would not be suitable. It would be necessary to devise a menu card of laws, schemes and programs.

For poverty to be eradicated, it is not just necessary to devise measures that alleviate the condition but also to avoid policies that impoverish people. The State would not only be obligated to do things for people, it would also be required to renounce certain policies and programs. The third section would draw attention to the impoverishing laws and policies of the state and the need to exercise them from state policies as part of the effort to reach SDG1.

In the various definitions of poverty, there is one on relative poverty, which comes from Karl Marx where he speaks about the owner of a small

1 Upendra Baxi, *Law and Poverty: Critical Essays* (NM Tripathi 1988).

house feeling poor when a large mansion gets built in his vicinity² . Real as the agonies of the small house owner may be, they do not come within the aegis of poverty. Hence I am not dwelling on the same in this paper. I am however interested in the forces which foment that dissatisfaction and send humans on a never ending race for goods. For such consumerism a culture of frugality, contentment that sees merit in living off charity, would be anathema. Yet if a sustainable solution is to be found to the problem of poverty, there need to be well-planned exit routes from the waged labour economy. The following segment of the paper examines those alternative options and advocates their serious consideration.

The Conclusion, then draws from each of the above sections to design a sustainable working strategy to realize SDG1.

Defining, Measuring, and Alleviating Poverty

Income based Approach.

This approach of measuring poverty draws a correlation between the income of an individual, household or nation to determine whether these resources are sufficient for basic survival. The gross domestic product is the total monetary value of all goods and services produced within a country; it provides no information on how people fare within the system. An income based system needs to arrive at a figure that can be the ‘catch all’ for identifying who is poor and who is not. Paul Streeten³ has expounded on the veils that policy makers would need to pierce to reach the just figure. This figure would not be the same at all times and for all people. The effect should be that all conditions of poverty are covered.

Streeten points out that the determination of the figure should be per individual and not per household, as the latter would treat small and big households alike⁴ . The value of money changes according to the prices of goods to be purchased, the prices are not uniform across all parts of the

2 Karl Marx ‘Wage Labour and Capital’ in Karl Marx and Friedrich Engels, Marx Engels Selected Works at 83 (Progress Publishers 1986).

3 Paul Patrick Streeten, Thinking about Development (Cambridge University Press 1997). The income based approach in this paper has been described, primarily relying upon Streeten’s exposition.

4 Interestingly, due to its administrative convenience and financial viability policy makers prefer to address households rather than individuals. Section 3 of the National Rural Employment Guarantee Act 2005 allows any adult member of a household to apply to undertake unskilled work for a period of 100 days. The application can be made by all members but the entitlement of each member is linked to the aggregate entitlement of the household.

country. The price income linkage would need to be to the food or goods that people actually consume. The income should allow for the purchase of nutritious food rather than unbalanced, carbohydrate dominant diets. An individual or household that is unable to access the basic necessities of life could be considered in a state of absolute poverty. However what would be described as a state of absolute poverty could alter from country to country. The standard of living in a country would determine what might be the cost of living there, hence goods that may be termed luxuries in a less developed country could become necessities in a more developed one⁵. Therefore, it is not income but what can be done or not done with it that becomes critical⁶.

The income needs of individuals change according to different points in the human lifecycle. Thus students can address their temporary poverty by seeking loans when studying but the same would not do for people who have been trapped in poverty over a lifetime. Similarly, disasters whether natural or social, could push people into states of temporary poverty and if there are no schemes and programs to provide relief, the temporary poverty could transform into permanent poverty. On similar rationale, lack of provision for health care and education as a proper system of public support could result in people falling by the wayside. Streeten specifically points to the need to factor in the time costs whilst accounting for so called free services. Long queues and delayed access could mean loss of wages for many a daily wagers, therefore, the service can hardly be termed 'free'.

Similarly, the relative affluence of a household may not result in the needs of all members being met. In Streeten's view, the absence of scrutiny or concern for distribution of resources within the family is the last veil that needs to be lifted to determine how resources should be distributed to a household. The fact of women eating last and public employment being preferentially offered to male adult members of a household points to the inequities within the household. The insistence on joint land titles and equal opportunity for all adult members to obtain public employment could be seen as measures of alleviation.

Streeten has made a case for a multi-faceted definition of poverty. The

5 It is this phenomenon Sen captures in the phrase "Poverty that is relative in terms of commodities but absolute in terms of capabilities".

6 For report of a real life effort to determine what living on subsistence incomes mean see Harsh Mander "What living below the poverty line taught an investment banker and an MIT grad" <http://scroll.in/article/819320/what-living-below-the-poverty-line-taught-an-investment-banker-and-an-mit-grad>

income linkage, he holds, should take into account the vast number of cracks a person can slip through. And yet he does not endorse the replacement of the criterion of income with other standards for identifying poverty. He feels that the other standards lack the concreteness of an income based determination. They could, however, be used to close the gaps in determination of poverty on the basis of income and especially should be drawn upon to devise alleviation measures. This insight can be retained while other ways of approaching the poverty question are examined.

Capabilities Approach

The fundamental difference between income and capabilities based approaches to poverty is that the former provide the means to obtain freedom and the latter seek freedom. In distinguishing the two approaches Amartya Sen⁷ speaks of the capabilities approach as concentrating on ends and the income approach on the means to the ends. Sen contends that the benefit of the capabilities approach is that it seeks to remove barriers to the development of all humans and the quest for this freedom. Unlike the incomes approach it is not linked to the cost of reaching the freedom. Having set down the approach Sen resists naming the freedoms that should be pursued. These, he believes, need to be articulated by each society for itself.

In comparison to Sen, the other major exponent of the capabilities approach, Martha Nussbaum⁸, has devised a list of capabilities, which she believes is integral to a free and just society. Nussbaum tackles the charge of vagueness, which is often levelled against the capabilities approach. Even as she draws up the list of capabilities Nussbaum stays with a non-prescriptive capacious approach which allows countries and people to settle their own pitch⁹. Thus she seeks to make education compulsory on the basis that it is a function rather than as a capability. Nussbaum reasons that education should be made compulsory because it is a capability that enables people to choose between options and interventions that allow for judgments to develop.

To reiterate, the Capabilities approach does not seek to measure the lack

7 Amartya Sen, *Development as Freedom* (OUP Oxford 2001).

8 Martha C Nussbaum, *Creating Capabilities* (Harvard University Press 2011).

9 MC Nussbaum, *Frontiers of Justice: Disability, Identity, Species Membership* (Cambridge, MA: Belknap Press 2006).

of resources and set it right. The approach attempts to sever connection with the cost of freedom to assert freedom at any cost. Poverty eradication thus is seen as an interim outcome of the approach and there cannot be freedom without development.

The Culture of Poverty

This approach, unlike the other two perspectives, proposes that alleviation of poverty is not possible because for the poor poverty is not a degrading condition they need to escape. Rather it is a culture that the poor have created and that they practice. Since culture is not amenable to schemes and programs, the poor will remain poor because to be poor is their cultural choice¹⁰. The theory has significant repercussions for practice. Firstly, it lets the non-poor, whether the state or civil society, off the hook. If poverty alleviation will make no difference then there is no obligation to do anything about it. If the poor are the cause of their own poverty they can make no moral demand for interventions and have to bear the blame for their irresponsibility.

The theory influenced American public policy of the sixties and became the basis of denying public support to the poor, on the grounds that such support promotes dependence and laziness¹¹. The theory continues to feed debates on whether poverty is caused by social, political and economic conditions or the entrenched behaviour of the poor themselves¹². The theory has been criticized for the fact that it severs connections between structural conditions and behaviour, and consequently blames the poor for the very conditions of which they are victims¹³.

Identity Based Determination

Whilst contending that all these faces of oppression have relevance for excluded groups, Iris Marion Young¹⁴ makes an illustrative demonstration.

10 Oscar Lewis, *Five Families: Mexican Case Studies in the Culture of Poverty* (Basic Books 1975); Oscar Lewis, *Vida: A Puerto Rican Family in the Culture of Poverty* (Ardent Media Incorporated 1983).

11 Eleanor Burke Leacock, 'The Culture of Poverty: A Critique.' <<http://eric.ed.gov/?id=ED068606>> accessed 23 October 2016.

http://liberalarts.utexas.edu/coretexts/_files/resources/texts/1965%20Moynihan%20Report.pdf

12 <http://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/sociology-general-terms-and-concepts/culture>

13 Eleanor Burke Leacock, 'The Culture of Poverty: A Critique.' <<http://eric.ed.gov/?id=ED068606>> accessed 23 October 2016.

14 Iris Marion Young *Justice and the Politics of Difference* (Princeton 1990)

Young juxtaposes the position of the woman at home with that of the worker at the workplace. How both are integral but not valued and how, whilst the woman is expected to provide care and support, she is not entitled to receive any. Unless the role of the homemaker is perceived to be of value, the person performing that role would be forever vulnerable and exploited in the system¹⁵. People whom systems of labour cannot or will not use, Young describes as marginalized.

This marginalization is further exacerbated by the social security system that in lieu of survival support robs people of their dignity and respect. Those who may have financial security but who are ousted from any kind of social participation again feel the loss of respect. The point being that the people can be rendered helpless or made to feel worthless even if they are not financially dependent. Persons who only take orders and are just required to exist to be a source of comfort and pleasure for others, evidently, perform such jobs because they have no other.

When menial labour or degrading jobs are built into the work hierarchy of a polity then using people as means to ends is acceptable and people are socialized into considering them worthless. Whilst elaborating on cultural imperialism Young speaks about how both racial and gender stereotypes coerce people to act according to social expectations, which may cast an individual as competent or not. The elevation of people who are socially categorized as inferior is made that much more difficult as the environment pushes the person towards failure rather than success¹⁶. This stranglehold can primarily be broken through the associational support that the excluded group is able to muster. Associational rights are not easy to assert by workers or by other excluded groups. One of the methods used to prevent such associational groupings is violence, which Young marks out as the last face of oppression. It is oppression because it is a systematic way of preventing any challenge of the status quo by the deprived. Despite its evident injustice, its long prevalence allows the practice of such violence without challenge.

15 Thus when women are brought up to get married and run households without any systemic support, a failed marriage has many of them join the ranks of the poor. Significantly, a number of them come from middle class backgrounds so, they do not have the survival skills, which a deprived life, sadly, acquires. For one of the early doctoral works forging a connection between economic independence and sex discrimination see Neeru Sehgal (nee Chadha) *Economic Independence for Women: the Foundation for Examining Sex Based Discrimination* (University of Delhi PhD Thesis 1991 Unpublished)

16 It may be interesting to compare this explanation with that provided by those who theorized on the culture of poverty. Those theorists looked at individual failure de hors the social environment.

Precautions for Implementing Poverty Alleviation Measures

Each of the four perspectives outlined above demonstrate that if a program of poverty eradication is to be a real and not a symbolic exercise, then a uni-dimensional construction of poverty is not feasible. Streeten shows how elusive is the concept of real income. Poverty entitlements built on income are definitely incomplete, whether or not they are arbitrary. This incompleteness needs to be understood whilst administering any income-based entitlement for the poor. For example, only by people who have income below a specified figure have access to several subsidized goods and services. That figure is uniformly applied with such rigidity that many a deserving candidate falls through the cracks. Streeten's analysis also demonstrates the necessity of floating alleviation programs for different times, circumstances and people. Thus educational loans, disaster relief and food supplements for women can all be seen as necessary.

Any serious engagement with income based poverty alleviation brings it close to the capabilities approach as the authors intention is to ensure that the money is commensurate for the purpose for which it is provided. Despite the in depth analysis, the danger of non-fulfilment remains with us. It is this uncertainty that causes Amartya Sen to remark that if the purpose of the means is to reach certain ends, then why not just concentrate on ends? Even as he makes the comment, Sen has to admit that the capabilities approach does not give up on income. Only it does not make the provision of income an end in itself. No development can happen without resources, the difference being that under this approach the success or failure of a program will be evaluated for the success achieved in relation to the outcome. Hence the short-changing, which is possible in the income based approach is difficult to do here. Sen does not spell out the capabilities and this silence may be seen as giving excessive leeway to the policy makers.

Whilst staying open to negotiation, Nussbaum has provided a list of capabilities. In the presence of a list the distinction between the income based and capabilities approach can be more sharply drawn. The capabilities approach is about the complete development of the human person; head, heart, body, mind and soul. The government is not just to provide resources; it is required to create the conditions for these capabilities to develop. It is thus not just an exercise of reducing deficits but an effort to allow for positive

development. Insofar as this approach speaks of capability development, it is a more sustainable mode of eradicating poverty.

This article is concerned with the eradication of poverty. I have referred to the theory on culture of poverty to flag how the poor tend to get blamed for their degradation, especially as poverty eradication programs are designed by the non-poor and stem from a passive understanding of poverty. This theory blocks out all structural causes of poverty and blames the victim. Whilst the explanation as a whole is no longer accepted the exercise of blaming the victim is still used. Hence a red flag on the theory is being raised to ensure that it does not colour analysis.

The culture of poverty theory is also useful other to Young's exposition of oppression. She has spelled out in sufficient detail the structural impediments to the advancement of the poor. This explanation demonstrates how the economic, social and cultural system entraps persons in the web of poverty and how non-strategic struggles only tighten the hold of the web. The systemic explanation provided by Young shows that if associational rights are not strengthened there is deprivation of the vital psychological strength that is needed by persons entrapped in poverty to break out.

Young's faces of oppression and theorizing around the culture of poverty drive home the point that no project of poverty eradication can take off without the active involvement of the poor as poverty is not about scarcity of resources but the denial of autonomy, dignity, and self-respect. Streeten, whilst making his elaboration on the measurement of poverty, refers to studies showing that the so-called disadvantaged prefer work that may pay less but where their worth is acknowledged and dignity respected.

As pointed out in the introduction, I agree with Baxi that the passivity of the terms poor and poverty camouflage the processes that push people into conditions of poverty. Whilst this part of the paper, drawing from some of the major theories on defining poverty, has dwelled on what governments should do to both pull people out of and prevent their falling into conditions of deprivation and disadvantage; with both initiatives being driven by the beneficiaries of the program. The next section elaborates on what governments should abstain from doing or rather be prohibited from doing so that people are not pushed into poverty.

If Cannot Give Do Not Take Away : the Duties of Avoidance

Human rights jurisprudence has often made a distinction between negative and positive rights. Those rights, which required the State to leave the people alone, were classified as negative rights; whereas those which required positive interventions from the State were categorized as positive rights. The distinction was then applied to refer to civil-political rights as negative and socio-economic rights as positive. Henry Shue in his treatise on *Basic Rights*¹⁷ has critiqued this distinction between positive and negative rights and demonstrated them as false by showing that the obligation of positive action was not limited to socio-economic rights, it as much applied to civil-political rights. He demonstrates the veracity of his claim by asking, could the right to security or the right to liberty be secure if the State had not put in place an elaborate system of policing, prosecuting and punishing?

Without the law enforcement system that evidently requires resources, the so-called right to liberty would not mean much. On similar reasoning, negative duties of abstention as much apply to socio economic rights, where the recognition of the right should often be that all that people are asking from the state is freedom; to be left alone to carry on with their livelihood pursuits. So, in the case of the right to liberty, the subsistence of the people is secure if the state does not interfere. This elaboration is also required to make the obvious point that if the global community is serious about eradication of poverty, then as it pulls out people who are in a state of poverty, it should also ensure that there are no fresh casualties. Unless the hole, which sucks people into poverty is plugged, the goal of eradication would remain unreachable.

Having demonstrated the falsehood of the classification of rights, Shue puts forth a taxonomy of duties. This tripartite classification consists of the duty to protect, the duty to avoid and the duty to aid. The previous section of this paper touched upon the duties to protect and aid, in this section the duties of avoidance are being addressed. A logical next question, in the context of poverty eradication would then be, how these duties of avoidance should be identified and enforced.

17 Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996).

One starting point could be the Gandhian Talisman¹⁸. This could either mean that any policy, program, or even administrative decision which makes life more difficult for the deprived, be avoided. If that is too paralyzing then every policy, program or law should be so implemented that no adverse consequences ensue to the most deprived. To ensure that such consequences do not follow, every law, policy or program should be subjected to a poverty audit and be implemented only after it clears the audit, whether by avoiding the project or by avoiding the consequences of the project.

The social audits required before a land is acquired for public purpose are efforts in that direction. Except that these audits are largely being conducted in an adversarial mode and with an unshakeable conviction in the present models of development. That the public that pays the cost is not the beneficiary of the project and is often not accorded adequate significance.

Shue in his elaboration on the duty of avoidance holds that when developmental choices take away from people their last means of subsistence then the State should desist. Again, in the administration of land acquisition laws, Collectors are required to take this into account whilst deciding whether to retain or release a land identified for acquisition. However this is largely a matter of administrative discretion, the small landowner has no entitlement. And for persons who are just workers on the land or other immovable asset even such discretionary concern is not shown.

These duties are also relevant to extending support to people who pursue vocations that do not have the respectability of middle class jobs; traditional streets performers, street magicians, jugglers and acrobats come to mind. Since the onset of terrorism they have been on the receiving end of substantial police oppression, and those persons, who could be powerful carriers of present day social messaging, are being robbed of their traditional vocations without a second thought¹⁹. A busking law may help in countervailing police pressure, which should not be exerted on people pursuing their livelihood²⁰.

18 Gandhi's talisman ran as follows: Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man [woman] whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him [her]. Will he [she] gain anything by it? Will it restore him [her] to a control over his [her] own life and destiny? In other words, will it lead to swaraj [freedom] for the hungry and spiritually starving millions?

19 See Concept paper on Preserving Culture, Protecting Livelihood- A Conference on the Magic of Street Performance NALSAR Hyderabad 7.2.2015 (on file with author)

20 It may be pertinent to compare the situation of traditional street performers with that of street vendors who were similarly on the receiving end of police violence. However some focused negotiation and concerted advocacy has helped them escape violence and pursue their livelihood on the streets with

Avoidance asks the endowed to turn to recognize and reflect on the interconnectedness of life, and how the choices of one can impact on the other. In compelling the endowed to look at the vulnerable the poverty audit in pursuance of the duty of avoidance could provide the much-needed space for recognition and reflection. It is harder for callousness to prosper in the face of distress and easier to practice indifference to a stranger²¹ .

The audit could also help shatter the size illusion of poverty. Jonathan Glover²² in one of his seminal pieces on consequential ethics mentions that one of the reasons for people not wishing to do anything about intractable problems also stems from their size. Since they cannot wipe out the whole, they also do not tackle the small part that they can solve. Poverty audits and dialogues have the potential of at least deliberating on the intractable, if not solving it. Further, the need to engage with the persons who could be impoverished by a policy choice counters most concretely the culture of poverty claims of the poor being responsible for their own impoverishment.

The Alternatives to Escape the Stranglehold of Goods and Services

Advocating Socialism

Bernard Shaw, in one of the significant chapters of the *Intelligent Women's Guide*²³, discusses the various systems of distributing wealth, reasoning that a general dissatisfaction with wealth distribution was not

respect and dignity. The importance of Associational Rights is yet again the force behind this success story. For the story behind the assumption of legality see <http://nasvinet.org/newsite/> (last visited 24.10.2016) And for the various Acts and Policies which were the mediums of negotiation see <http://nasvinet.org/newsite/street-vendors-policies/> (last visited 24.10.2016)

21 The UN Convention on the Rights of Persons with Disabilities (hereinafter UNCRPD) was negotiated in the presence of persons with disabilities and as the negotiation progressed even with persons with disabilities. Delegates who began with a patronizing dismissive attitude towards persons with disabilities found it increasingly difficult to perceive persons with disabilities as those helpless incapable characters they had imagined them to be. The process of negotiating the UNCRPD is a live example of the strength of participative decision-making. To access the negotiation process and appreciate the role of disabled people and their organizations in the making of the UNCRPD see

https://search.un.org/results.php?ie=utf8&output=xml_no_dtd&oe=utf8&Submit=Go&__utmt=1&__utma=84472006.2038286081.1477325864.1477325864.1477325864.1&__utmb=84472006.7.10.1477325864&__utmc=84472006&__utmz=84472006.1477325864.1.1.utmcst%3D%28direct%29%7Cutmccn%3D%28direct%29%7Cutmcmd%3D%28none%29&query=Negotiation+of+CRPD+&tpl=un&lang=en&rows=10 (last visited 24.10.2016)

22 Glover, J. "It makes no difference whether or not I do it" in Peter Singer(ed), *Applied Ethics* (Oxford University Press 1986).

23 Shaw, B; *The Intelligent Woman's Guide to Socialism & Capitalism* (Welcome Rain Publishers 2015).

enough. Unless an alternative system is provided, a critique of existing distribution systems means nothing. Shaw then runs through every major system of distributing wealth from communism to oligarchy to laissez faire to demonstrate the inefficiency and inequity of each system of distribution. No system can really put in place an equitable system that can clearly outline what each person deserves on the basis of what they have produced or what they merit or deserve. And a distributive system that depends on force is of necessity disadvantageous to those lacking the strength to both grab and run. Shaw undertakes this activity primarily to show the impossibility of determining of either what each person should get or how much is enough. The logic of this situation, Shaw contends, is to opt for socialism and provide everyone the same.

After the large-scale collapse of socialism with the collapse of the Soviet Union, to speak of socialism was, for a period, to speak of anachronistic ideas. The absence of incentive in the holding of common property and the tragedy of the commons were oft bandiedide as on why socialism as a system was not sustainable. However, even the world was abandoning socialism the proponents of the idea substantially modified it. In a course-correcting piece Hardin pointed out that the tragedy he spoke of related to an unregulated commons²⁴. This modification was endorsed by other ecologists who also acknowledged that any system of owning property, whether public, private or common, could be overexploited or be victims of the tragedy of commons. With regulation a system of common ownership was possible²⁵. The regulation would need to be non-authoritarian and participative. Thus the absence of freedom and transparency may have triggered the collapse but the people of the post socialist countries were seeking that freedom along with access to education, health care and social security. In the context of this article, the point I am making is that democratic socialism, which enables people to escape from degrading poverty, would be seen by many as a preferred route.

Eco-Friendly Consumption

If the socialist model with its emphasis on common goods and services is one model, then maximal utilization of goods and products with minimal

24 Garrett Hardin "The Tragedy of the Unmanaged Commons" in Dustin J Penn and Iver Mysterud, eds *Evolutionary Perspectives on Environmental Problems* at 105 (Transaction Publishers 2007). <http://science.sciencemag.org/content/280/5364/682> (last visited 25.10. 2016).

25 Feeny, D., Berkes, F., McCay, B.J. et al. *Hum Ecol* (1990) 18: 1. doi:10.1007/BF00889070

waste could be another model that could lend itself to poverty eradication. Since the stress is on maximal utilization the long usage of goods and the full utilization of products would be viewed in celebratory terms. The accent on recycling and conservation would also mean that the relationship to goods in non-acquisitive and functional. The Barefoot College in Rajasthan has been founded on these principles²⁶. Education is freely imparted to all and there are no age restrictions to learning. The engineering corps of the community is led by the community's grandmothers. It may be of interest that the use and throw mode of living has also come to be questioned in first world countries and whilst in Sweden the government has started giving tax rebates to its repair engineers, in other places groups have started to come together to have goods made that would last²⁷. If there is not a mad race to replace consumer goods that have broken down, but that could be repaired, then second hand goods would become available; and people who are seeking cheaper goods would be able to obtain them. However, in developed countries, where repair of broken goods had phased out, people were forced to buy more expensive products to fulfill needs, which could have been satisfied by cheaper goods.

Away From Waged Employment: UBI

Michel Foucault²⁸ whilst expounding on the use of imprisonment as punishment put forth the view that the onset of prisons and the factory coincided. The prison he contended was set as the alternative site for the workers who felt rebellious towards the mechanistic workplace. The workers came to accept the constraining workplace because the alternative was way worse. With industrialization waged employment was offered as the inevitable economic panacea for all; in so far as wages have always never been commensurate to the value of the goods produced but with the bargaining position of the worker. Capital has gravitated towards workers with lower bargaining positions as lower wages enhances profit. The flight of blue-collar jobs from the first world with the onset of globalization is a case in point²⁹.

With the invention of the Internet and other developments in information technology even the white-collar job market has changed in the

26 <https://www.barefootcollege.org/>

27 <http://www.mnn.com/lifestyle/responsible-living/blogs/website-only-stocks-products-last-lifetime> (last visited 25.10.2016).

28 Foucault, M; *Power/knowledge: Selected Interviews and Other Writings, 1972-1977* (Harvester Wheatsheaf 1980).

29 Chossudovsky, M, *The Globalization of Poverty and the New World Order* (Global Research 2003).

first world. Robotics technology is pointing towards a further shrinking of the employment scene as tasks that a machine can do with greater precision and accuracy will be done by it³⁰. The point of this brief paragraph is only to underscore that waged employment can no longer absorb the employment needs of the global populace and hence there is need to look for alternatives. These alternatives also need to be searched in order to conserve the environment, as the earth cannot absorb the carbons that an expanded production process would emanate. In this changing world eradication of poverty cannot happen by providing employment to all. In the circumstances the solution of Universal Basic Income offered by Philippe Van Parijs merits serious consideration³¹ .

In order to enable persons to opt out of the wage market and do other activities that make them happy, to transition from one job to another, Parijs moots a universal basic income so that survival constraints do not drive people into employment. Since it is universal, it averts the stigma of the dole, and yet provides opportunities for people to develop those capabilities that most defines them. Since a production process that accommodates all is ecologically not sustainable, the UBI allows for a dignified voluntary exit. The arguments of the proposal encouraging lazy surfers, free loaders and being economically unsustainable are raised by other scholars against the proposal, which is expected considering the long and hard sell on work and employment. Now if SDG1 is to be achieved then innovative solutions like the UBI³² would need to be considered, otherwise we can continue to present exclusion, unemployment and degraded living as personal failures of the poor.

Living with Respect on Charity

The inclusion of this section in the paper may seem beyond the pale especially as the trafficking of people for beggary is an acknowledged unintended effect of the culture of charity. Both the giving and receiving of alms or the practice of charity has an established place in the cultural, spiritual and religious space in India. It is anomalous to make beggary an offense

30 <https://roarmag.org/magazine/basic-income-and-the-future-of-work/>

31 Van Parijs, P, Cohen, J and Rogers, J What's Wrong with a Free Lunch? (Beacon Press 2001).

32 The Social Wage Theory is another alternative, only here the nature of work changes as the logic is to only help people escape exploitative work conditions.

in such a cultural ethos³³. The enactment of vagrancy laws by a colonial government obsessed with maintaining law and order, can be comprehended if not condoned. It is harder to defend the same choice being made by the independent state. Henry Shue, whilst outlining his tripartite of duties has named aid as the third duty. A duty that comes into play for those people who escape the safety nets mounted by the duties of protection and avoidance. In the performance of this third duty the state could rely on the cultural ethos, which considers itself responsible for the less fortunate. This impulse could be channelized towards evident needs of the deprived and protocols of giving and receiving created. Instead by criminalizing beggary the state not only fails to provide for the needs of its people, it also legally blocks the only legal way of seeking succour. Thus instead of deepening the wells of charity and compassion that naturally flow, we seek to close them.

India, like other countries, seeks civil society aid in times of disaster. However as a country with endemic hunger and institutionalized deprivation, there are several people who are in need of emergency support on an everyday basis. An acknowledgement of this reality would at least prevent death by hunger and chronic malnutrition. It may be that this building of social solidarity is misused by a few. So which direction should public policy take? Let no one misuse public support even if hundreds die due to absence of support or the other way around? This vital question of public policy needs to be addressed in a SDG prompted Poverty Eradication Plan.

Conclusion

This article has negated the view that poverty is like a poisonous weed, which can be wiped out with regular fumigation. Instead it is being argued that fumigation may cause some temporary shrivel of the weed but it does not destroy the roots and more resistant strains spring up elsewhere. The paper therefore seeks to jettison the process by which people are impoverished. It is with this objective that stress has been placed on the duty of avoidance. The eradication of poverty requires that public policy does not leave people worse off or helpless. Eradication efforts should shore up peoples efforts and keep them involved in the process of their own advancement.

Poverty has been both understood and alleviated from different lenses. The paper has not chosen to rely on one or the other perspective.

33 For questioning the constitutionality of Beggary laws and making a case for begging as livelihood see Ram Lakhanvs State 137 (2007) DLT 173

Instead effort has been made to learn from each standpoint to see how it can contribute to the creation of a more robust poverty eradication policy. In both identifying the poor and devising strategies of alleviation there has been heavy reliance on the income measure of poverty. Possibly due to the ease of application, the income measure is widely present to identify the poor and often poverty alleviation schemes move no further than providing monetary support. The analysis aims to demonstrate the incompleteness and arbitrariness of this game of naming a number. This arbitrariness needs to be acknowledged and every law, policy, scheme or program which relies on the income based measures should include a residuary clause whereby criteria other than income as well as support other than money should be provided for. I am not naïve enough to believe that just the incorporation would mitigate the oppression of numbers. The reason for asking for the residuary clause is to allow scope for taking on board additional criteria, if the particular individuals involved seek the same. This activist assertion by any one beneficiary or official could create the much-needed example for the future.

The importance of outcomes in poverty eradication and the need for a more ambitious standard for what constitutes need is what the paper draws from the capability approach. Thus lack of opportunity to play or develop creative imagination or develop relationships in the face of others who can assert it at will shows what an income based approach to poverty misses out. These same capabilities are asserted with ease by the endowed others. Nussbaum's list brings home that the absence of what is seen as poverty routinely embeds class entitlement in everyday life. The SDG1 program may not take on board the freedoms named by Nussbaum and this inequity in the heart of poverty eradications needs to be pointed out. The other two theories approached the culture of poverty and 'identity based discrimination', point towards the rootedness of social prejudice and hence alert states of the barriers confronting any poverty eradication program.

It is often said that the chances of reaching a goal improve exponentially when the barriers are turned around and used as opportunities and strengths. The ability to deal with scarcity, to be able to share, to make every good or product yield it's utmost and be sensitive to the pain of the other. There is need to make less more and the skills to be able live according to those principles with magnified carbon footprints and climate change. The goal of poverty eradication requires the adoption of a more frugal living style for all.

It is not really possible to address the lack of one without speaking to the opulence of the other. The right to receive and the obligation to give could be creatively used to make poverty eradication a gain for all. The various alternatives approaches to goods and services show that such like possibilities are really present.

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With The Gaze on Injustice

Positioning Tribal People in the Wider Social Context

*Savyasaachi**

Abstract

This article suggest that its time to scrutinize, from the standpoint of injustices, the process of mainstreaming tribal people. To what extent has the inclusion of tribal people been just? I have attempted to show that systematically legislation, academic discussions, acculturation programs and development initiatives have sought to replace the expressions of their language to know and live in the larger social context in India. On this basis the people have been wronged by undermining them in their capacity as knowers. This has been an assault on being-in-world, which is inclusive of the land question. The trauma from this assault has gone unnoticed. Why?

Today there are three modes to position the tribal people in the larger social context in India. These are studied here with an epistemological gaze. This is mode of observation that scrutinizes and identifies the refractions of knowledge that comes from political motivations, prejudices, false beliefs, lies and deception. Its concern is to locate epistemic injustices¹. According to Fricker this is a “wrong done to someone specifically in their capacity as a knower”. He discusses two forms such injustice, testimonial injustice and hermeneutical injustice.

Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker’s word; hermeneutical injustice occurs at a prior stage, when a gap in collective interpretive

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1 Miranda Fricker, *Epistemic Injustice-Power and the Ethics of Knowing*, Oxford University Press, Oxford, 2007.

resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences. An example of the first might be that the police do not believe you because you are black; an example of the second might be that you suffer sexual harassment in a culture that still lacks that critical concept. We might say that testimonial injustice is caused by prejudice in the economy of credibility; and that hermeneutical injustice is caused by structural prejudice in the economy of collective hermeneutical resources. The overarching aim is to bring to light certain ethical aspects of two of our most basic everyday epistemic practices: conveying knowledge to others by telling them, and making sense of our own social experiences².

The first mode brings about testimonial injustice. It is similar to the example given by Fricker. In the same way as the ‘police do not believe you because you are black’, the British colonial regime did not pay any attention to the tribal people’s protest because they were tribals. This mode begins from 1935. It has been concerned with pulling them into the mainstream of national life on the understanding that they lead a backward pre-political existence. Its method has been cognitive regulation and direction. Its intention is to counter insurgency of tribals.

According to Ranjit Guha, during the period 1783 to 1900 (117 years) “no fewer than 110 tribal peasant insurgencies were recorded by the British”³. He argues that these were the necessary “anti-thesis of colonialism during the entire phase of its incipience and coming of age.”⁴ “A record was created as first accounts that came to be written up as administrative documents of one kind or another...”⁵ to understand the nature and motivation an “adoption of measures deemed expedient” to prevent a recurrence⁶. This colonial discourse of power by making the “security of the State into the central problematic of... insurgencies assimilated the later as merely an element in the career of colonialism. In this way they were denied recognition as a subject of history”⁷.

2 *ibid.*, p. 1.

3 Ranjit Guha, *Elementary Aspects of Peasant Insurgency in Colonial India*, Oxford University Press, Delhi, 1983, pp. 1-2 & p. 13.

4 *ibid.*, p. 2.

5 *ibid.*

6 *ibid.*, p. 3.

7 *ibid.*

Motives were constructed with concepts ‘primitive’ ‘pre-political’ ‘backward’ and ‘animism’ derived from the category ‘other’. This was the hermeneutic injustice underlying the making of records. On this understanding measures were adopted to isolate the tribal people from the rest of the world. The most significant of these were the Government of India Act, 1935 and the demarcation of excluded and partially excluded. The category ‘tribal’ was created, to deny significance to expressions of their languages; these were classified as animism and replaced with expressions such as land and labour. These measures were an integral component of mainstreaming with counterinsurgency measures.

Neither these records nor these measures discuss what provoked these insurgencies and what these insisted on. This is another aspect of the hermeneutic injustice of the colonial power discourse. It sought to replace people’s language. Religious institutions, schools and developments programs on the one hand and mass movements on the other contributed to this genocidal assault. The trauma from this has gone unnoticed and therefore unattended.

This injustice violates the principle of epistemological gaze that safeguards trust in relationships especially with the ‘other’⁸ .

... for trust to play the fundamental role it does, it has to be buttressed by active epistemic vigilance⁹

This epistemic trust is grounded in the veracity of the modes and methods used for constructing true knowledge. Watchfulness is a necessary aspect of these modes, to not slip into false, deceptive, politically motivated knowledge.

The second mode seeks to critique the hermeneutical injustice that underlies the testimonial injustice of the first mode. It begins in 1983 when Ranjit Guha with his epistemological gaze sought to recognize them as subjects of history, steering clear of regulated and controlled mainstreaming. His epistemological gaze replaced the category ‘tribe’ with ‘peasants’ to emphasizing their labour. But he does not discuss the substance of the

8 Pierre Bourdieu, Jean-Claude Chamboredon and Jean-Claude Passeron, edited by BeateKrais and translated by Richard Nice, “The Craft of Sociology-Epistemological Preliminaries”, Walter deGruyter, Berlin, New York, 1991.

9 Dan Sperber, Fabrice Clement, Christophe Heintz, Olivier Mascaro, Hugo Mercier, Gloria Origgi and Dairdre Wilson, “Epistemic Vigilance”, *Mind & Language*, Vol. 25 No 4. September 2010, p. 361.

insurgencies articulated with expressions of their languages. On account of this, these subjects of history remain mute and cannot be known from what they have to say as self-conscious reflexive people.

This mode focuses on legal and administrative measures that deprived people of legal and political rights to land and labour, for instance, The Forest Rights Act 2006. This is only one aspect of the colonial discourse of power. It covers only one important aspect of tribal society.

This is a post-colonial formulation of the tribal question inspired by political movements for land reforms. Its emphasis on relation between land and labour, denies importance to expressions of peoples' language- the terms, categories, metaphors, symbols, analogies...etc. that describe the relation between labour and universe of the forest, landscapes, trees, air water, fire, earth, etc.

The third mode positions the tribal people centre stage as a knower. This mode was discernible when some contemporary tribal movements insisted on not being mainstreamed and on taking upon themselves to become self-conscious historical subjects. These movements are against the hydroelectric dam on the rivers Koel and Karo in Jharkhand, against the Netarhat military firing range, and against Vedanta bauxite mining in Orissa. These insist on expressing their sense of belonging in their languages.

In this article I have attempted to sketch these three modes

Replacement of language

The Linguistic Survey of India, which was undertaken towards the latter part of the insurgency period 1783-1900, does not acknowledge the many tribal protest. In 1898, an Irish linguistic scholar and civil servant Sir George Abraham Grierson began the linguistic survey of India. He got support from the International Congress of Orientologists held in Vienna in 1886. The survey was completed in 1928 after thirty years. It recorded 179 languages and 544 dialects. Of the 179 languages, 116 were enumerated as tribal languages and dialects...

This survey did not encourage the study of tribal languages to understand what was being said in the 110 recorded insurgences. It did not, therefore, contribute to the making of insurgency records. This 'deliberate omission' is a significant aspect of 'cognitive vigilance'. Perhaps an observation Grierson

made on the basis of the survey, suggested there was no need for this.

He said, 'It was noted that it was rare for one Indo-Aryan language to be replaced by another Indo-Aryan language. It was very often the case that a local tribal language was replaced by an Indo-Aryan language'¹⁰.

This observation suggested a historical trend.

Soon after, tribal people were territorially cordoned off and isolated when the Government of India Act of, 1935 was enacted and excluded and partially excluded areas that were demarcated to be governed by laws suitable to their (insurgents) special condition. These areas were inhabited by tribal populations and were conceptualized as backward, to which acts of the dominion legislature or the provincial legislature were to apply only through the authority of the governor of the province.

This political pronouncement made it clear that there was no need to 'listen' to insurgents. Insurgencies were conceptualised as revivalist-backward looking. Accordingly, tribal improvement institutions were designed to introduce reform and stimulate development. Administrators and Social Anthropologists were drawn in to suggest modes of cognitive regulation.

Grigson, Ghurye and Elwin were pioneers. They recommended that tribal people be brought within the fold of the Hindu caste system. This was in keeping with the historical trend pointed out by Grierson, namely the replacement of tribal languages with Indo-Aryan Languages.

Grigson outlined cognitive regulation and control,

In most of India aboriginal pressure groups are still unthinkable, for there has been no political education of the aboriginal. Political democracy, working through legislatures and local bodies created by direct election, is almost meaningless to him; hardly anyone has dreamt of 'economic democracy' and training for a democratic way of life, for instance through aboriginal co-operatives.

Our immediate objectives should therefore, I think, be threefold:
(a) to keep Indian thought increasingly aware of the aboriginal problem as its own 'colonial' problem and 'on its honor' to solve it;
(b) to take stock of the economic, cultural, political, administrative

10 Trinity Monday Discourse, 14 May 2001-George Abraham Grierson, 1851-1941 -https://www.tcd.ie/Secretary/FellowsScholars/discourses/discourses/2001_S%20Sen%20on%20A%20Grierson.pdf

and anthropological material and gauge what further enquiry is needed; and (c) to attempt to define for the new governments in India the aims to be pursued in their treatment of the tribes. I believe that for the attainment of these objectives¹¹

Ghurye positioned them under the regulations of the caste system.

With the exception of very small sections living in “the recesses of hills and the depths of forests”, the so-called aboriginals, sharing common interests in matters of faith and livelihood, had lived in “fairly intimate contact with Hindus over a long time”. The sociologist concluded that the “only proper description of these people” is that they are “the imperfectly integrated classes of Hindu society”, hence his own preference for the term ‘backward Hindu’ instead of ‘aborigine’ or ‘aboriginal’¹².

Similarly, Elwin positioned them into the caste system. In 1944 he wrote

Missionaries should be withdrawn from the Partially Excluded areas; we insist that all education in these areas should be taken over by the Government. ... We have no interest in keeping these people backward. If they are to take their place as Kshatriyas in the Hindu social system then they must be trained in the arts of liberal thinking and educated to courage and traditions of honour¹³.

What became of these recommendations?

A survey of the peoples of India undertaken in the 1980s under the guidance of the late K. Suresh Singh, the director-general of the Anthropological Survey of India identified 4,635 communities in India, of which 461 were tribal. Amongst other things it reported peoples’ awareness of their caste identity.

About 31.6 per cent of tribes were found to be aware of the varna system and 16.7 per cent placed themselves within it: nearly 8.3 per cent claimed to be Kshatriya; 7.5 per cent thought that they were Shudra; and 0.9 per cent placed themselves in the high caste

11 W V Grigson, “The Aboriginal in the Future” *The Journal of the Royal Anthropological Institute of Great Britain and Ireland*, Vol. 74 No. ½, 1944, pp. 37-38.

12 Ghurye quoted in RamchandraGuha, “Savaging the Civilised: Verrier Elwin and the Tribal Question in Late Colonial Times”, *Economic and Political Weekly Special Number*, September 1996, p. 2385.

13 Archana Prasad, *Against Ecological Romanticism-Verrier Elwin and the Making of Anti-Modern Tribal Identity*, Three Essays Collective, Delhi, 2003, pp. 91-92.

varna of Brahmin. Gaddi Brahmin, Pangwal Brahmin, Kagati, and some among the Jaunsari claimed to be Brahmin. The Pardhan (of Madhya Pradesh) called themselves Vaishya. ... 171 tribes (26.9 per cent) that thought they were of a high status; 298 (46.9 per cent) that perceived themselves as being in a middle position; and 161 (25.3 per cent) that saw themselves as being of low status. These self-perceptions were however not uncontested¹⁴.

Regulation of symbolic language and illiteracy

In post-colonial India the partially excluded and excluded areas became the fifth and the sixth scheduled areas under the constitution.

These schedules continued cognitive regulation of the tribal people.

The most recent is the Xaxa committee report. In my reading, it is pointing to the increase in illiteracy alongside mainstreaming.

The triumphs of and shortcomings of mainstreaming are reported over a wide range of subjects. These include the role of public policy and legal frameworks, geographical pattern of economic activity; changes in avenues of employment and livelihood due to rapid urbanization and shrinking of habitat; relative share of public and private employment; changes in the patterns of ownership; access to educational and health services, level of literacy and dropout rates; maternal and infant mortality rate and level of social infrastructure.

On illiteracy it reports,

Most of the tribal communities in India have their own mother tongue. But in most of the States, official/regional languages are used for classroom teaching and these are not understood by the tribal children at primary level of schooling. In the Vision 2020 document, there was an acknowledgement that Multi-Lingual Education (MLE) was necessary, in view of the low tribal literacy, high rates of dropouts and low learning achievements of the tribal children. The Model of Primers in the Tribal language was first developed in Odisha in 1996. Subsequently, several pilot projects

14 Vinay Kumar Srivastava, Religion and Development, India. Working Paper Series, Volume 01, Number 03, Indian Institute of Dalit Studies and Religions and Development Research Program, New Delhi, 2010, p. 11.

involving material production and training, aimed at promoting multilingualism in the classrooms were launched in Odisha, Andhra Pradesh and Assam.

The design of the Primer of Odisha has some aspects that should be noted for replication. One side of the text was in local script but used tribal language. The other side of the script was in local language and script. The student learnt the script because he/she understood the content. The teacher understood the tribal language because he/she could read in a known script. The contents were about local trees and fruits, local folk tales and festivals. Some of the text was also about functional literacy such as clean drinking water and common institutions. However, this initiative was not carried forward with change of personnel at the helm of Education Departments¹⁵.

Why did incentives to increase enrolment, attendance, get good teachers and reduce dropout rates not work? The Xaxa committee does not address this question. Neither does it dwell of the significance of illiteracy to understand mainstreaming.

The language barrier does not explain illiteracy. There is more to it!

To discuss this question it is necessary look at conversions to Hinduism and Christianity and the loss of language.

Predominantly Christians and Hindus have sought to convert tribal people.

.... Almost 100 per cent of respondents to the Census of India, 2001, gave a religious affiliation0.6 per cent were Other Religions, which includes the 'tribal religions and faiths'

Christianity had spread remarkably among the tribes of north-east India, in Manipur (94.55 per cent), Nagaland (93.09 per cent), Mizoram (88.46 per cent), and Meghalaya (66.32 per cent). There had also been a rise in the number of tribal followers of Christianity in Bihar (11.87 per cent), Kerala (5.62 per cent), and Tripura (3.95 per cent)¹⁶. P11

15 Report of the High Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities of India, Ministry of Tribal Affairs Government of India, May 2014, p. 184.

16 Vinay Kumar Srivastava, op cit. pp. 11-12.

Hindu Tribals are in larger proportions

..in Gujarat 97.8 per cent of tribals profess Hinduism, 1.7 per cent are Christians and 0.2 per cent are Muslim. In addition, there are 2,166 Jains, 390 Sikhs, 231 Buddhists, and 11, 678 tribespersons belonging to Other Religions and Persuasions¹⁷ .

There is a wide range of variations.

Some tribes follow only one religion. However, in many there are followers of more than one religion, such as Hinduism and tribal religion (90 tribes, 21 per cent), Christianity and tribal religion (55 tribes, 13 per cent), or more commonly, Hinduism, Islam, and Christianity. The survey was able to discern the following three trends, which are still continuing¹⁸

In many tribes, particularly the larger ones, different sections follow different religions; thus, for example, over half the Oraon are Hindu (58.43 per cent of the total population) and a fifth are Christian (21.05 per cent), with a minuscule proportion (around 0.04 per cent) following Islam, Sikhism or Buddhism¹⁹ .

Conversions endeavoured to replace the symbolic universe of the people. This gradually marginalised expressions of tribal languages, making them irrelevant. This is one factor that led to the loss of these languages.

More than eighty years back, George Grierson undertook the linguistic Survey of India in 1927. At that time he mentioned about 179 languages and 544 dialects. Subsequently the 1931 Census, the last enumeration done by the British, listed more than 2000 languages. ...

However, there is no denying the fact that the tribal languages were forced into a corner. Not a single language of vast tribal people in India had been accorded official status till 2004. Only Santhali language has been recognized very recently. Tribal languages like Gondi, Oraon/ Kurukh with millions of speakers are not yet scheduled in the Constitution of India. Historically and culturally, the tribal people in India and Orissa in particular have been playing important roles. Some of these tribal languages have more

17 *ibid.*

18 *ibid.*, p.11.

19 *ibid.*, p.10.

numerical strength than some of those mentioned in the Eighth Schedule of the Constitution. For instance, besides Santhali, the number of speakers of Gondi and Oraon/Kurukh languages is more than the speakers of Sanskrit, Kashmiri or Sindhi²⁰.

Furthermore, the UNESCO Atlas of World Endangered Languages (2009)

... identifies 196 languages that are endangered in India, which comprise 84 languages that are “unsafe”, 62 languages that are “definitely endangered” and six and 33 languages that are respectively “severely” and critically” endangered (Table 2). Nine languages – Ahom, Aimol, Andro, Chairel, Kolhreng, Rangkas, Sengmai, Tarao and Tolcha – have become extinct in India since the 1950s. Though these endangered languages are spread across the entire country there is some degree of concentration, with many of these languages being located in the Northeast as well as the tribal belts of West Bengal and Orissa, and in Himachal Pradesh, Jammu and Kashmir and Uttarakhand. These languages are also diverse in terms of the number of speakers, who range from zero to 27.14 lakhs (Gondi) as per the 2001 Census...²¹.

This is only the tip of the iceberg. A more detailed and nuance study of the status of tribal languages is necessary.

The replacement of the symbolic universe and the loss of language together undermined tribal’s epistemological and ontological imagination for determining what is true and differentiating between what is dependable and what is deception. This made them vulnerable.

How can this phenomenon be explained?

Isolation deprived people of the space to respond to representations that belittled and demeaned them and destroyed their pride in their culture. The popular ones that continue to be hurled are ‘the lazy native’, ‘perpetually drunk’; with lose sexual behaviour and inhuman cultural practices.

Several factors contributed to the making of these demeaning

20 Dr ChitrasenPasayat, “Language and Identity with Special Reference to the Tribal People”, Orissa Review, April 2008, pp. 63-65.

21 Quote taken from Papia Sengupta, “Endangered Languages: Some Concerns”, Economic and Political Weekly, August 8, Vol. XLIV, No 32, 2009.

representations.

Tribal languages were looked down upon because they lacked a written script on the one hand and because they were seen as being embedded in traditions and ways of life that were looked down upon, and for this reason were to be replaced. Conversions were thus legitimized.

As the absence of a written script, it has been stated that

Of these linguistic and cultural groups, the Aryan is the most important, both numerically and intrinsically. As a matter of fact, Indian civilisation has found its expression primarily through the Aryan speech as it developed through the centuries...After the Aryan speech, Dravidian has also very largely functioned as the exponent of Indian culture—particularly the earlier secular as well as religious literature of Tamil, which has some special characteristics of its own within the Indian orbit...

All the other languages were in a backward state, as the speakers of these were in a comparatively primitive condition in their way of life. Of course, they had some kind of village or folk culture, but no civilisation. Connected with this culture there developed in all these languages a slight modicum of folk-literature—of songs, religious and otherwise, of folk-tales, and of their legends and traditions. These were never written down as they lacked any system of writing...²²

Christian missionaries under the Colonial regimes used these so called ‘other languages’ to replace their worldview with the Christian.

A serious study of these ... began only during the middle of the 19th century when European scholars—anthropologists and linguists—as well as European Christian missionaries of various denominations (like Roman Catholics from Belgium, France, Germany, Italy, Spain, England and Ireland, German Lutherans, Scandinavian Lutherans, English Anglicans, Scottish Presbyterians, and Welsh Methodists) began to study these languages and take in hand the preparation of a Christian literature (both of translations from the Bible and other Christian sacred literature, and of original

22 Suniti Kumar Chatterjee, “‘Adivasi’ Literature of India: Uncultivated ‘Adivasi’ languages”, *Indian Literature*, Vol. 14, No. 3, September, 1971, p. 6.

compositions to a small extent) for the purpose of converting these backward peoples into Christianity. They succeeded in doing this to a very large extent as these peoples were neglected by the Hindu ruling classes who had contact with them²³ .

Conversion to Christianity was initiated with medical care and prayer services. Missionaries were not always trained doctors. With rudimentary medicines and health care they were able to cure people. Their success earned them credibility and also provided them the necessary ground to bring people for prayer services. According to the missionaries, tribal people would accept Christianity with little difficulty because, unlike Hindus and Muslims, tribal people had no dogmatic theology. In post-colonial India in reaction to the Christians, conversion to Hinduism, which was already underway, became aggressive. They too initiated processes for imitating rituals and ceremonies. In development programs tribal people were used for their labour power. The tasks given to them required minimal use of one's mother tongue or learning a language. In schools established by Christians and later by the State, tribal language was not a medium of instruction. In fact tribal students continue to be discouraged from speaking in their mother tongue.

As a result, for the people their language becomes associated with economic exclusion from mainstream societies. The social, cultural, economic, political and psychological pressures generated here contributed to the development of a disapproving, unconstructive attitude towards their language. It led speakers to doubt the usefulness of language in the business of everyday life. Amongst other things this inhibited the transmission of language. It has been observed that speakers in a minority language deliberately choose not to use their language when communicating with their children, instead they adopt a majority language thereby deliberately interrupting the transmission of their language to the next generation and reducing the social domains in which the language can be used.

The low prestige attached to tribal languages has contributed to linguistic suicide.

Linguistic suicide is a social process that is the net result of the behaviour of individual speakers as wilful agents within a speech community, and our recasting of the term is intended to reflect

²³ Ibid, pp. 6-7.

that agency²⁴ .

This has contributed to mainstreaming by mimesis-making them copy and imitate habits of eating, dressing, sitting, customary religious rituals and codes of conduct. Here cognitive vigilance over the symbolic is exercised by using tribal language to communicate to the tribal people the inferiority of the culture.

Suffocating the expression of ones own language traumatizes the ontological and epistemological imagination.

We know that a language come into being over several generations. The words used in speech go very deep to touch the subconscious, the unconscious, and the 'presence' of human beings and perhaps much more. This touch brings nourishment, care and belonging. Learning a new language is therefore gradual, it happens over several generations.

Does not the replacement of one language by another shake up the deepest recesses of human existence? The replacement of ones own language with a foreign language is, in fact, compelling people to become what they are not. This makes a significant contribution to the illiteracy reported. The aptitude to learn a different language is given in the language one grows up with. Conversely, this aptitude is severely damaged when the language one grows up with is looked down upon and gets associated with social exclusion. Incentives cannot heal the marks of trauma left by this assault on the being of the people.

Social asphyxiation

In the tribal areas conversions have become the basis for exchange of hostilities between the Christians and the Hindus. This has been overlaid since the 1960's with the exchange of hostilities between the militant left and the State. Insurgency and agency became inalienable shadows of each other. Agency defined in terms of the benefits of mainstreaming has generated its shadow 'insurgency as agency'. This mimesis between the agency and its shadow 'insurgency as agency' today determines the frame for the construction of the self of tribal people. It has also divided the nation vertically into the 'red corridor' on the eastern side and multi-coloured developmental landscape on the western side.

24 David Beck and Yvonne, *Language Loss and linguistic suicide: A case study from Sierra Norte de Puebla, Mexico*. See <https://sites.ualberta.ca/~dbeck/Chambers.pdf>

Deprived of expressions of their own language left the people with no option other than to choose between the mainstream and insurgency. One set of tribal people integrated with the mainstream partaking of all its benefits and its misgivings. The large majorities were marginalized on account of migration, forced displacement, poor school education and infrastructure building for development. Several languages were lost and several are under threat over the coming generations. To these people the social life of their ancestors in forest dwellings has become the 'other'.

This mainstreaming has generated its shadow in the denials and dispossessions of another set of tribal people. Their suffering became the basis of integrating with the political left militants-the naxalites and their most recent incarnation the Maoist. In their view, agency is in insurgence and not in the benefits of the mainstream.

This mainstreaming has also similarly deprived the Tribals inhabiting the North East region. The rest of the nation only knows of these people through demeaning racist stereotypes that pick on the physical features and eating habits to defame the people. This is a symptom of a double-edged trauma. Those who orient themselves are as much traumatised, as are the people who are victims of these stereotypes.

In contrast to other tribal regions in the interior of India, here the divide between the red and multicolour corridor is not there. In its place there is absolute military presence over-laid with comprehensive Christian conversion. This a thick crust that has isolated and suffocated the living traditions from the wider social context. This allows little space and time for people to speak up using expressions of their own language.

Irom Sharmila's long years of fasting has sought to draw attention 'frontier' North-East. It critiques the perception of frontier underlying the 'absolute presence of the military' derived from its geopolitical position. The violence generated from this perception has legitimized the Armed Forces Special Powers Act (AFSPA).

Her fasting is a mode of persuasion. It is an appeal to the diverse people of North East engaged in conflicts to recognize a cultural mode of persuasion as a cultural mode to prevent conflicts from spreading conflicts in the people's lives in this region. It is an appeal to the State to free the people from suffocation on account of AFSPA and have trust in people's capacity to

look after themselves and the region.

With breaking the fast frees this mode of expression from the State's gaze and appeal to the State to not suffocate people at large, suffocating by excess of regulation and control. Alongside this can also be read as a message to the people to make similar efforts to not be excessively conditioned by regulating frames.

To have 'no options' is social asphyxiation, for it removes people's sense of being-in-the-world from the expressions of it in their language and this is no different from denial of oxygen to the human body. This is "injustice of not being heard ²⁵". For being an "ethical loneliness ²⁶" it is unethical confinement, comparable to high security prisons for criminals or/and concentration camps. It assaults the ontological and epistemological core of their existence. I have tried to suggest that its foundation was laid in 1935 when the voices of 110 tribal insurgencies were disregarded in the formulation in of the tribal question.

The first step of social asphyxiation was isolation in demarcated protected geographical areas (the excluded and partially excluded and later the 5th and 6th scheduled areas). This limited the use of tribal languages to their material realm of everyday life in relation to forest materials, and customs and practices associated with it on the one hand, and it made several social domains out of reach for tribal languages and deprived them of the historical opportunity to grow and enrich. The second phase of asphyxiation was the process of assimilation by mimesis. It sought to replace tribal customs and practices with Christian and Hindu ones. This assault further suffocated tribal languages and rendered them obsolete for ordering their symbolic world. The final step of social asphyxiation was the replacement of the universe of forest materials with modern development infrastructures. This denied the language of the material existential ground from where it drew its nourishment. This further truncated domains for the use of language.

Each of these denials has been an assault on being-in-world. The trauma from these assaults is registered on the three critical elements of being-in-the-world, the conscious and the imaginary, the subconscious and the symbolic and the unconscious and the real. Isolation was suffocated the 'conscious'

25 Jill Stauffer, *Ethical Loneliness-the injustice of not being heard*, Columbia University Press, New York, 2015.

26 *ibid.*

self; mimetic assimilation replaced the ‘symbolic’ collective and the violence of integration destroyed the organic ‘real’ body.

This trauma begins with not communicating in their own language with their children. It goes on to adopting a majority language, deliberately not only interrupting the transmission of their language to the next generation but reducing the domains in which the language can be used’.

It develops into ‘forgetting that one has forgotten ones own language’.

In opposition to the cognitive regulation control (described above), which perpetuated the existence of tribal people as pre-political people, in 1983 eighty-three years after the colonial records of insurgency were created Guha’s exercised epistemological vigilance with a Garmscian perspective and studies them to understand the consciousness of the insurgent. However, there was one feature in common namely a denial of the significance of expressions of tribal languages in the making of this consciousness.

His epistemological vigilance is restricted by the language and representations of colonial records. Insurgent consciousness as derived here is framed with Sanskrit grammar and linguistics. For instance, the concept atidesa is used to describe the tendency of the negative consciousness to extend its domain by “process of analogy and transference”²⁷ . The one tribal language expression he discusses is ulgulan. Read with the concept atidesa, ulgulan “defines a negative identity for it excluded the dikus and discriminated against non-tribal households²⁸ ” This reading based on the record of an officer²⁹ .

The other side ulgulan is read as a ritual affirmation of the tribal identity of the peasantry involved in the uprising.

For the whole year before the Ulgulan Birsa led his followers on a pilgrimage to various ‘ancestral sites, collecting relics ...

This is read as an expression of ethnicity...Thus, discrimination becomes one its aspects. While use of the concept ethnicity is in keeping with the language of social sciences it is perhaps not an accurate and appropriate description of the meaning given to it by the people. Another way of reading could be explored. The expression Ulgulan belongs to the language of the

27 Guha, op cit., p. 23.

28 Ibid, p. 174.

29 Ibid.

Mundas. It's meaning here comes from the effort of 'connecting to' the several sites Brisa and followers went to. These sites define a situated ness of that gives meaning to a sense of belonging to the space that is alive-and not flat land. Ulgulan brings out this sense of belonging.

This is more than an expression of ethnicity. On the basis of my work with the Koitors, Kutia Khonds (referred to earlier in this article) and the Kharias of Similipal Orissa I would like to say that ancestors are not defined by the bloodline alone. In fact is this of secondary importance to labour. Anyone who contributes labour to the preparing the earth for habitation and for making of a household is its member and therefore an ancestor. These are sites visited by Birsa and his followers are the creations of the labour of ancestors. The visiting of these sites is thus a gathering of the all the energy of the labour of ancestors.

Registers of trauma

Two instances I witnessed in the course of my stay with Koitors in Abujhmarh, Bastar Chattisgarh and Kuttia Khonds in Phulbani Orissa, show that trauma is registered on 'expressions of language'. Perhaps there are many such instances!

The literature on trauma is vast. From here I have selected elements that focus on what it damages and where it is registered.

A trauma, whether physical or psychical, must create a breach in a protective covering of such severity that it cannot be coped with by the usual mechanisms by which we deal with pain or loss. The severity of the breach is such that even if the incident is expected, the experience cannot be foretold³⁰.

In Abujhmarh Bastar, women in interior villages tattoo their entire face. When asked why this defacement, they said 'to look ugly.... Not long ago outsiders would come to pick women and abuse them. This was the only way to protect us'.

In Phulbani, Orissa several Kuttia Khonds, without my asking, wanted me to see on site the residues of a recent human sacrifice. This went on for several months.

30 Juliet Mitchell, "Trauma, Recognition, and the Place of Language", *Diacritics*, Vol. 28, No. 4, Trauma and Psychoanalysis (Winter,) 1998, p.121.

It was very awkward.

Why did people want me to see these sites, I wondered!

On careful listening, I discovered that Kuttia Khonds have been frequently visited by a variety of researchers. Over time the Khond people learnt all their questions and the answers they expect to hear. One most frequently asked question was ‘is there any evidence of human sacrifice?’ In their perception I was also a researcher and this is the why people thought I would like to see these sites.

My lack of interest opened up conversations about this practice. After listening to several accounts it was clear that the numerous researchers wanted to see evidence of ‘ritual killing of human beings’. In contrast the cultural phenomenon described by the people was the natural death of people but different from the routine (aging, disease, illness). For instance, I was told of men and women who would go into the forest for no specific task and not return. This was described as ‘the spirits of the forest have taken human beings as an offering’.

The Khond people denied knowledge of any cultural practice of ‘ritual killing of human beings’.

Why did the people not refute the practice of ‘ritual killing of human beings’ and not correct the description of the phenomenon?

As I see the narratives of ‘ritual killing of human beings’ is a collective deception perpetuated in order to safe keep the cultural phenomenon of ‘natural death of human beings in non-routine circumstances’. The tattooing of faces to look ugly and collective deception are expressions of trauma from social suffocation. Both are instances of defacement. In both instances there is pain from the denouncing and demeaning of the body, the language and the culture of people. In both instances there is suffocation of the means of coping with this pain there is denial of speech to show resentment and protest. In the power structure, people are not in a position to express their protest and disagreement. In the first instance, trauma is expressed with defacement by tattoos and in the second instance by a deceptive collective representation. In both instances, the language by which an individual and a community deal with pain and loss is damaged. In the first instance, tattooing indicates the difficulty in narrating the experience and in the second the collective deception conceals the narrative.

In these instances, trauma is registered on the both the ontology (tattooing the face) and the epistemological (the untruth of human sacrifice) aspects of being-in-the-world.

Belonging to expressions of tribal language

What understanding of consciousness would emerges if the substance of their assertions were in expressions of people's languages?

Ranjit Guha's study unravelled six elementary aspects of "a somewhat inchoate and naïve state of consciousness³¹ " that is not "spontaneous" and/or "pre-political³² ". These aspects are negation, ambiguity, modality, solidarity, transmission and territoriality. With these insurgents is constructed as a subject of history. He argues that this was rebel consciousness and not 'revolutionary' consciousness.

He states,

... insurgency was indeed the site where two mutually contradictory tendencies within this still imperfect almost embryonic, theoretical consciousness-that is, a conservative tendency made up of inherited and uncritically absorbed materials of the ruling culture and a radical one oriented towards transformation of the rebel's conditions of existence-met for a decisive trial of strength³³ .

He has argued that the contradictory tendencies are manifest in a significant aspect of insurgency, namely, inversion. This he defines as uncritically absorbing the material of the ruling culture. According to Guha inversion is a way

'... to appropriate for themselves the signs of authority of those who dominate them³⁴

It violates the basic code by which relations of dominance and subordination are governed in any particular society³⁵

It turning things upside down... this is a necessary but by no means

31 *ibid.*

32 *ibid.*

33 *ibid.*, p. 11

34 *ibid.*, p. 28.

35 *ibid.*, p.36.

sufficient condition of violence³⁶... (italics mine)

...unlike crime ... it invariably public, collective, distinctive and total and communal³⁷

He further states that the intention of his work is to study,

.... elementary aspects of rebel consciousness in a relatively 'pure' state before the politics of nationalism and socialism begin to penetrate the countryside on a significant scale³⁸

The expression 'pure state' describes the epistemic vigilance exercised by Guha. It excludes from insurgent consciousness expressions of tribal language that would have constructed representations of colonial power structures that were of immediate consequence to their lives, namely the forest regimes....

What happened to 'pure state' after this penetration?

A large population joined the red (socialist/communist) corridor.

Did they overcome the tendency described by Ranjit Guha, namely 'uncritically absorbing materials of the ruling culture'? Does the uncritical absorption of materials of the ruling culture transform into mature theoretical consciousness?

A Hindustan times report on the gunning of Mahendra Karma will shed some light on this question

After they gunned down Mahendra Karma, the founder of the anti-Maoist vigilante group Salwa Judum, the rebels sang and danced around his body....³⁹.

This event has all the features of inversion described by Guha. The mimicking of violence shows an uncritical absorption of materials of the ruling culture) the violence of the ruling culture. How is one to explain this? Has the Maoist theoretical consciousness uncritically absorbed materials of the ruling culture! Or if such violence is an integral constituent Maoist

36 *ibid*, p. 77.

37 *ibid*, pp. 79 & 109.

38 *ibid*, p. 13.

39 Ejaz Kaiser, Maoist dances around congress leaders's body, in Hindustan Times, Indore Edition, May 27 2013 (reference taken from Saima Saeed (to be published) Media's Roamce of the reds'-Myth-Making, the Maoist Insurgency and the news 'text').

theoretical consciousness then is it any different from the 'pure' state' of 'rebel consciousness.

Not all tribal people joined the red corridor.

The movements against the hydroelectric dam on the rivers Koel and Karo in Jharkhand; against the Netarhat military firing range and against Vedanta bauxite mining in Orissa chose not to become part of the red corridor. Perhaps there are many more like them. Their protest against the thought, culture and worldview of the ruling culture has been grounded in the expressions of their language. All the six elementary aspects of insurgency listed by Ranjit Guha are discernible in these movements. Preliminary research shows the all the six aspects contribute to the making of a sense of belonging. This has been the strength of these movements.

This can be illustrated with the example of Dongoria Khond protest against Vedanta bauxite mining.

The Dongoria sense of belonging comes from Niyam Raja. Niyam Raja is an expression of their language. It is the basis of their critique of the ruling culture that uproots and destroys the sense of belonging. It gives meaning to their sense of territoriality. It is the basis of transmitting a sense of solidarity. It overcomes the ambiguity between rebellion and crime. Its modality is the inversion of three critical elements of being-in-the world namely the imaginary, the symbolic and the real of the ruling culture.

This is unprecedented and a paradigm shift is discernible here.

The first inversion is registered on the 'imaginary' aspect.

The Dongoria Khonds direct challenge to the Vedanta project is an articulation of their consciousness and shows that in their imagination their social body is at power with the corporate Vedanta and other such entities in India. This registers the shift from tribal passivity institutionalized and reinforced by legislation to an active conscious being-in-the-world. The Dongoria Khonds have not sought legitimacy from the provisions of the FRA 2006 or any other legislation. It is on record that no community claims have been received any Gram Sabha of district Rayagada⁴⁰.

The second inversion is registered on the 'symbolic' aspect.

40 In the Supreme Court of India, Civil Original Jurisdiction, Writ petition (civil) No.180 of 2011 para 54.

The Supreme Court judgment makes it clear that article 25 and 26 of the constitution is to guide and determine this claim. The Dongoria Khond community rights are thus to be determined in relation to the worship of the deity known as Niyam Raja.

If the BMP in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. We find that this aspect of the matter has not been placed before the Gram Sabha for active consideration, but only the individual claims and community claims received from the Rayagada and the Kalahandi districts, most of which the Gram Sabha has dealt with and settled⁴¹ .

The strength to challenge comes from the worldview and symbolic realm delineated by Niyam Raja.

Who is Niyam Raja? Niyam literally means regulatory conventions and norms and Raja is here not to be translated as King but as the presiding peer and caretaker of the realm circumscribed by these.

As a Dongria shaman tells his story: “There are five brothers, and the youngest one is Niyam Raja...Niyam Raja wondered what to do and decided to become the guardian of the streams and mountain range. So he decided to stay on the top of the mountain, and created mango, jackfruit, pineapple, orange, banana, and seeds. He said to us “Now live on what I have given you.” Actually Niyamgiri is the first Dongria, he is one of us, but he wants to stay at the top. We like to be here at his feet. At the top you have all the herbs and plants creating a magnetic force, which keeps us healthy. We worship Niyam Raja by sacrificing goats and pigs. We have to offer him the first taste, otherwise he won’t accept our offering. That is why we don’t disturb anything on the top part of the mountain. Niyamgiri is sacred for us⁴² .

The Supreme Court’s recognition of the right to worship Niyam Raja recommends that the symbolic universe of this and other similar deities

41 *ibid*, para 58.

42 Felix Padel and Samarendra Das, *Anthropology of a Genocide: Tribal Movements in Central India Against Over-Industrialization*, see <http://www.democraciaycooperacion.net/IMG/pdf/felixpadel-samarendradas.pdf>.

constitute the jurisdiction of community rights and not just the specific entitlements, tenures, modes of access, rights to disposal listed in the clauses (b), (c), (d), (e), (h), (i), (j), (k) and (l) of sub-section (1) of section 3 of the FRA 2006. More needs to be included; the whole landscape as well-its streams, mountain ranges etc designated by 'magnetic field' of Niyam Raga. This is another shift in the paradigm.

Finally, the third shift inversion is registered the real organic aspect.

The Dongoria Khonds have protested against cognitive vigilance that sought to replace time frames of state of nature that have defined animism with those of commodity production. By upholding Niyam Raja they have critiqued the construction of animism as 'state of nature'. They have in fact replaced this view with animism as defining inviolable amplifications of the active life forces and processes in nature. A close look at history shows that otherness of the tribal people has been constructed on account of the language and animism that frames their cultural and social practices, their world view and thoughts on social production and reproduction.

Dongoria Khond protest is an instance of transformative action. The shifts described above have challenged the narrative hegemony of socialism and nationalism. Here inversion is the opposite of mimicry. The norms of the ruling culture are turned upside down. Legitimacy for activism in expressions of people's language and the symbolic realm it circumscribes is an inversion of the legal-rational legitimacy of activism and of social boundaries; and animism is the inversion of 'state of nature' as the ground of knowledge and being in the world.

It is perhaps time to ask, has mainstreaming people been a triumph or has it been traumatic? ⁴³

The debates on mainstreaming have drawn on constructions of tribal people by Liberal and Marxist social and political theory as the 'other' in a 'state of nature'. In these theories the measure of time has dominated the political economy of the 'otherness of the state of nature'. That is to say, the otherness of tribal people is constructed on account of their modes of production and reproduction being structured in the rhythms of nature. This is the basis of the concurrence in their efforts to not leave them out or

43 PiotrSztompka, "The Ambivalence of Social Change Triumph or Trauma?", Polish Sociological Review, No. 131, 2000, pp. 275-290.

kept in seclusion and ‘pulling them out of the state of nature’. This effort is legitimized, as a historical, necessary step for them to become citizens and subjects. From here the category ‘marginalization’ has been derived. For this reason, it captures economic and political deprivations and injustices on account of shifts from a time of natural rhythms to time of industrial commodity. The pulling out is thus seen as a shift into the time frames of commodity production and reproduction.

The triumph of pulling out of the state of nature is in fact pulling them out of their language. It is for this reason that a significant aspect of mainstreaming is ‘replacement of language’. It is a taking away their the material means of subsistence that is demarcated by their cognition.

The Dongoria Khonds have asserted that any transformation is meaningful when embedded in the expressions of their language.

The tribal knower - Refractions and the epistemological gaze

In this article the epistemological gaze has scrutinised the three modes to identify refractions of knowledge that comes from political motivations, prejudices, false beliefs, lies and deception. On this basis it builds epistemological trust.

I have argued that Ranjit Guha critiques the testimonial injustice of the colonial mode and Dongoria Khonds correct his epistemological gaze by bringing the tribal knower center stage. The question now is-how to build the epistemological trust of the ‘tribal knower’?

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Fighting for their Lives: Human Rights and Adivasis Context

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Abstract

For more than a century, the human rights of the adivasis, or the Scheduled Tribes (STs), of central India have deservedly been the focus of extensive scholarly and activist attention. From documentation of the deprivation and discrimination that the adivasis suffer, to debates about policies for empowerment and improvement of their conditions, there is no dearth of literature addressing the rights of these social groups. This essay summarises the discussion about adivasi welfare within the wider context of India's politics of development. It argues that the human rights of adivasis are intrinsically linked to larger questions about the state and its institutional practices, and to policies of economic liberalisation and environmental extraction. Despite some recent progressive legislation, political, economic and cultural power remains out of the hands of these marginalised citizens. The essay examines the strategies used by the adivasis to resist and reform the unjust circumstances imposed upon them.

Introduction

On January 2, 2006, police opened fire on a group of adivasis in Kalinganagar, located in Jajpur district of central Odisha, killing twelve people and injuring many others. For 23 days, the adivasis had blocked the state highway, peacefully protesting against the takeover of their farmlands by a steel company. Their refusal to surrender their land was a red rag to an administration under pressure to expedite industrial development in the State. The police were brought in to forcibly clear the highway. In the confrontation that followed, twelve adivasi men and women lost their lives. Some of them were shot in the back as they were trying to run away. When the dead adivasis' bodies were returned to their families, it was found that the

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police had cut off their hands, the men's genitals and the women's breasts. The mutilation of the corpses was a warning: not only will we kill you if you defy us, we will desecrate your bodies and deny you even dignity in death.

The Kalinganagar incident, like other violent state reprisals before it and after, briefly made the headlines and then disappeared from public view. The lives and deaths of poor adivasis, the stigmata of state power on their bodies and their lands,¹ slid back into obscurity. Yet their struggle is worth revisiting since it encapsulates the key issues around the human rights of adivasis in India. Like many adivasi-dominated parts of the country, Kalinganagar is a paradox. Its wealth in natural resources is in sharp contrast with the poverty of most of its inhabitants. The rich iron ore deposits in the area are state property and their 'development' means that adivasi lands are compulsorily acquired by the state for a pittance. While a handful of local residents may get secure jobs on the lower rungs of the industrial sector, most are impoverished even further and survive on the edge of starvation as wage-labourers.

It is estimated that 30 million people, more than the entire population of Canada, have been displaced by this land acquisition policy since India became independent in 1947 (Fernandes 1991). Of these, almost 75 per cent are, by the government's own admission, 'still awaiting rehabilitation'. The process of land acquisition is justified as being in the public interest since the state is committed to promoting economic growth by expanding industrial production and infrastructure (Klingensmith 2007). This national goal has accelerated since the institution in the 1990s of policies of economic liberalisation, intensifying the demand for transfer of land for extractive industries, infrastructure projects and Special Economic Zones (Nielsen and Oskarsson 2016). With economic policy re-oriented to maximise foreign exchange earnings, and concessions and subsidies given to Indian and foreign firms to encourage investment in production for export, Kalinganagar's iron ore attracted increased interest due to the booming international demand for steel and spurred Tata Iron and Steel company, who had bought land from the Orissa state government, to start work on a new steel plant by building a wall enclosing the factory site. It was the construction of this wall that sparked off protests leading to the killing of adivasis. The state government had forcibly acquired this land from them years ago by paying a few thousand rupees per acre. Since the meagre compensation did not enable adivasis, who

1 See Baviskar (2001) for an analysis of a similar incident in Madhya Pradesh.

were small farmers and labourers, to invest in alternative livelihoods, they had continued to live in the area and cultivate the land that legally no longer belonged to them (after acquiring the land, the administration had not put it to any use). Tata's move in December 2005 to enclose this land directly deprived adivasis of their sole source of subsistence. Their desperation was fuelled by anger when they learnt that the state government had sold the same land for which they had been paid a few thousand rupees to the Tatas for several lakh rupees per acre, without any improvement. Protesting against the state profiteering by impoverishing the very citizens that it is supposed to protect, adivasis took to the streets, refusing to give up the land that they survived on.²

The struggle of adivasis in Kalinganagar, and the manner in which it was dealt with by the state reflects a pattern visible in conflicts over land and related natural resources in rural India. Kalinganagar can be marked alongside Kshipur, Chilika, Niyamgiri (Padel and Das 2010), and Posco in Odisha; Koel Karo, Suvarnarekha, Netarhat in Jharkhand,³ Sardar Sarovar, Indira Sagar and Maheshwar in Madhya Pradesh and similar sites in states like Maharashtra and Karnataka, on a map of India that shows the congruence between a rich natural resource base of forests, minerals and water, and poor, usually adivasi, populations. These regions are characterised by marked deprivation in terms of economic and social welfare, and sharply unequal, often oppressive, relationships between state functionaries and local people. In such circumstances, land acquisition that threatens to take away people's primary source of subsistence without offering meaningful compensation, has sparked off determined resistance that has usually taken the form of opposition to the proposed project. Faced with a loss of livelihood that would lead to further impoverishment and even destitution, and forced to negotiate with a state apparatus historically experienced as brutal, uncaring and obdurate, adivasi movements in the forested hills and farmlands of the subcontinent have generally chosen to assert their right to remain on the land and resist displacement as long as possible.

2 Although the movement against land enclosure was quashed, for the next ten years, the Tata steel plant being constructed at Kalinganagar continued to be the scene of protest and violent repression, as contract labourers fought for better wages and working conditions. See http://articles.economictimes.indiatimes.com/2014-06-24/news/50825827_1_trouble-mounts-kalinganagar-contract-workers. Accessed on September 9, 2016.

3 See <http://www.thehindu.com/todays-paper/tp-opinion/why-the-land-wars-wont-end/article5183838.ece> for an update on land struggles in Jharkhand. Accessed on September 9, 2016.

This analysis is endorsed by the 2014 Report of the High-level Committee on Socio-Economic, Health and Educational Status of the Tribals of India, submitted to the Ministry of Tribal Affairs, which states that

Tribal communities face disregard for their values and culture, breach of protective legislations, serious material and social deprivation, and aggressive resource alienation. ... The appropriation of tribal land and forests began during colonial rule and has continued to the present. Since tribal-inhabited regions are rich in mineral, forest and water resources, large-scale development projects invariably came to be located in tribal areas. No region in India illustrates this better than the States of Jharkhand and Odisha, which have considerable natural resources, but also the highest percentages of tribal people living below the poverty line. In 2004–05, the proportion of tribal people living below poverty line stood at 54.2 per cent in Jharkhand while the percentage was as high as 75.6 per cent in Odisha in the same year. Overcoming tribal ‘isolation’ through large-scale mining, industrial and infrastructure projects, as these States have witnessed, has clearly not resolved the problem of poor development indicators. Rather, these have led to further impoverishment and vulnerability.

Over the last two decades, there has been a massive push to this development agenda, which has coincided with economic liberalisation and the entry of private corporations into tribal areas. This has been met with considerable resistance by tribal communities. This is often interpreted as evidence that tribes are ‘anti-development’, which is far from the truth. What tribes have been questioning is the model of development that is being imposed on them. Laws and rules that provide protection to tribes are being routinely manipulated and subverted to accommodate corporate interests. Tribal protests are being met with violence by the State’s paramilitary forces and the private security staff of corporations involved’ (GoI 2014: 31-32).

Everyday injustice

Adivasi protests against specific projects have to be placed within the context of wider, more systemic deprivation and exploitation. On paper, adivasis are protected by legislation as members of the Scheduled Tribes.

In those parts of central India where they are a numerical minority, they are entitled to reservations in educational institutions and government employment in proportion to their percentage in the population (8.6 per cent according to the 2011 census).⁴ In those parts of Andhra Pradesh, Madhya Pradesh, Chhattisgarh, Jharkhand, Odisha, Gujarat, Rajasthan, Maharashtra and Himachal Pradesh where adivasis are numerically dominant, they are protected by the Fifth Schedule of the Constitution, which was strengthened in 1996 by the enactment of Provisions of Panchayats (Extension to Scheduled Areas) Act (PESA). In addition, the ‘historic injustices’ of adivasi forest rights being denied by the governments of colonial and Independent India have been addressed by the 2006 Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act (FRA) (Govt. of India 2006)⁵. These laws, enacted as the result of sustained adivasi political mobilisation⁶, recognise the rights of the gram sabha (body comprising all adults of the village) over the management of village resources, including forests, pastures and water bodies. Legally, the gram sabha must consent before land is acquired or community forests diverted for any other use, including mining. PESA declares that every gram sabha should be ‘competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution’ (GoI 1996). Taken together, these laws suggest a robust framework for protecting adivasi rights to not only their basic means of livelihood, but also their community and culture. Yet these legal measures have not lived up to their promise. Only the bare bones of PESA are implemented and its provision for adivasi self-government—the meat of the Act—has been melted away. The FRA 2006 has been deployed to grant land titles on a miniscule scale to individual adivasis, but recognition of community forest rights has been reluctantly granted and only to a small fraction of the claimants.⁷ For the

4 According to the 2011 Socio-Economic and Caste Census, conducted by the Government of India, only 3 per cent of adivasi households in central India have government jobs (GoI 2011a). See Xaxa (2002) for a discussion of why adivasis have not been able to benefit from reservations to the extent that Scheduled Castes have. Sundar (2016a: 9) supplements this by pointing to the debilitating effect of education imparted in dominant state languages that place adivasi children at a disadvantage. She adds that adivasis live in areas that are poorly serviced in terms of educational facilities.

5 There is also the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which attempts to address some of the most unfair aspects of the land acquisition process (GoI 2013). There is not enough information yet to evaluate the implementation of this law.

6 See Choubey (2016) for a detailed account of the organisations and individuals involved in this mobilisation.

7 See essays in Munshi (2012).

most part, adivasis continue to be denied rights to agricultural land and forest produce and increasingly migrate in search of wage labour to make ends meet (Mosse et al. 2005).

Some commentators attribute the poor implementation of these laws to the lack of state capacity in hilly, hard-to-reach areas. However, far more evident on the ground is the hostility of state officials to adivasi control and management of resources. Since the larger imperative before bureaucrats, and one by which their performance is measured and rewarded, is to smooth the path of resource extraction for industrial capital, adivasi rights are regarded as dispensable. Nandini Sundar makes a compelling case for the view that

Negative policies towards the STs far outweigh any protective policies. Despite the creation of a Ministry of Tribal Affairs and the presence of statutory commissions like the NCST, in fact, the ministries which really affect the lives of the STs are the Ministry of Environment and Forests, the ministries of commerce, coal, and mining, the Ministry of Home Affairs, and the various state police departments. As Adivasis in mainland India will commonly attest, the three biggest banes of their lives have been the land revenue department, the forest department, and the police' (2016a: 10-11).

In areas where there is no immediate threat of displacement due to industrial and extractive projects, adivasis still bear the brunt of a legacy of past oppression and present-day exploitation and neglect. Where adivasis occupied fertile agricultural lands, they were squeezed out by caste-Hindu cultivators and moneylenders.⁸ In some areas, this process of land alienation was often actively encouraged by the colonial government's policy of land grants and other incentives to attract more 'industrious' (read market-friendly) peasant castes who would grow cash crops such as cotton and contribute to the state's coffers. The migration and settlement of non-adivasis into Scheduled Areas has only accelerated since Independence as the expansion of jobs in the bureaucracy and in the burgeoning mineral extraction industries has been met by employing workers from elsewhere. Constrained to be

8 The term 'caste-Hindu' is used here to refer to communities such as the Patidar who went on to become the chief landowners in parts of central India such as Khargone, Barwani and Dhar districts in Madhya Pradesh. In these areas, adivasis were gradually absorbed into Hindu society as a low-ranking stratum, unlike the hills of the Narmada valley and elsewhere where they maintained a distance from caste-based society and emphasised their distinct ritual practices and lifestyles (see Baviskar 1995).

marginal farmers and wage labourers, there are few, if any, opportunities open to adivasis for improving their circumstances.

As mentioned above, another source of chronic deprivation is related to forest rights. Since colonial times, adivasi-inhabited areas have experienced the 'reservation' of forests by the state, ostensibly in the name of conservation but primarily to maximise revenues from timber felling. This policy of forest alienation has continued into recent times and has been intensified by the expansion of the network of National Parks and Sanctuaries. Since forest and wildlife laws classify the human inhabitants of forests as trespassers and interlopers, adivasis who enter these areas for age-old practices such as harvesting forest produce and grazing, find themselves treated as criminals; continuously persecuted, bullied and harassed. An even more vexed issue is that of the cultivation of forest-land, a practice that in many cases predated the settlement of forests but was not recognised by the state, thereby making even basic survival of adivasis illegal (see Baviskar 1995). The FRA 2006 has addressed this last problem to some extent, but mere legal title to small patches of land is not enough to sustain adivasis. In a monsoon-dependent agro-ecology, fragmented fields with thin and eroding soils require systematic soil and water conservation and agricultural support to provide year-round food and income. Such state support, potentially available through programmes such as the National Rural Employment Guarantee Scheme, has not been forthcoming on the scale and intensity that the situation demands. The average size of operational holdings among the Scheduled Tribes fell from 2.44 ha in 1980-81 to 1.53 ha in 2010-11 (GoI 2014: 105). The number of Scheduled Tribe cultivators has declined from 44.7 per cent in the 2001 census to 34.5 per cent in 2011, while the proportion of agricultural labourers has grown from 36.9 per cent to 44.5 per cent in the same period (Sundar 2016a: 10). It is no surprise, then, that adivasis continue to migrate in larger numbers and for longer periods, becoming another anonymous addition to the mass of underpaid, overworked and insecure labourers that keep the urban economy going.

Ranking as they do among the most deprived citizens of the country, adivasis should be entitled to concerted and substantive state welfare as a priority. This, however, is not the case. A major factor that aids in disregarding adivasi rights is the cultural stigmatisation with which Hindu caste society has treated adivasis, just as it has Dalits (Scheduled Castes). According to this dominant ideology, adivasis are *jangli* (wild). Savage and sub-human, ignorant

and indolent, addicted to drink and having a good time; the adivasi stereotypes over which caste Hindus (and Muslims) virtuously register their disapproval are deployed to systematically abuse and mistreat them (Baviskar 1995, 2001) or to proselytise and ‘improve’ them through religious conversion (Xaxa 2000; Baviskar 2005). Such identifications make it easy to blame the victim for the state’s failure to deliver welfare entitlements. They also legitimise the displacement of adivasis and denial of secure land-and forest-based livelihoods to them: the notion that these ‘backward’ communities need to ‘come out of the forest’ and join the ‘mainstream’ conveniently ignores the fact that such ‘assimilation’ exposes adivasis to even worse asymmetries of economic, political and social power.

It is therefore not surprising that adivasis remain among the poorest and most marginalised sections of Indian society. Although numerically only about 8.6 per cent of the population, they are disproportionately represented among people living below the poverty line, suffering from starvation and chronic hunger and disease (GoI 2014: 25). More than 90 per cent, the overwhelming majority, of India’s tribal population lives in rural areas (GoI 2011b). Only 14 per cent of this population has a source of drinking water within their premises and less than half (46 per cent) have electricity in their households. ‘Tribal communities in rural areas are undisputedly the most deprived social groups in India with poverty rates (47 per cent) similar to those found in the general population 20 years ago’ (UNICEF 2014). Another study estimates ‘a gap of at least 30 per cent between the human development index of Scheduled Tribes and the all-India figure, and the same difference in terms of the human poverty index which measures health, educational, and economic deprivation’ (Sarkar et al, c.f. Sundar 2016a: 8).⁹

UNICEF (2014: 5) reports that

India’s tribal communities continue to remain the most nutritionally deprived social groups in the country. It is undeniable that their deprivation is influenced by a cobweb of factors ranging from poverty and hunger due to loss of forest land and livelihood, poor re-habitation measures, poor reach and quality of essential food and nutrition services during critical periods of life, geographical remoteness, weak governance and inadequate accountability mechanisms.

9 Also see essays in Xaxa and Nathan (2012).

More than half (54 per cent) of all 11.5 million tribal children under five years are stunted, indicating the presence of chronic malnutrition. The incidence of severe stunting is potentially the biggest threat to children's growth and development since 'stunted children have stunted bodies, stunted brains and stunted lives. Stunted children are more likely to fall ill, fall behind in class and when they start work, do not perform as well and earn less than their non-stunted peers' (ibid.). Given the paucity of data on adivasi human development indicators, we can only surmise that the high incidence of stunting among children is an indicator of poor maternal health and nutrition as well. While there have been some strides in improving children's access to nutritious food through state welfare programmes such as the *anganwadis* (day care centres) and the school mid-day meals, the implementation of these schemes in adivasi areas is sketchy.¹⁰ In any case, these schemes do not address the fundamental issue of poverty and the inability of adivasi parents to provide adequate food at home because they lack productive assets and remunerative livelihoods. By all indices of deprivation and development, adivasis rank at the bottom of the socio-economic hierarchy. What makes this even more appalling is that the regions in which they live are going through a business boom, with better roads and communications (to truck minerals out and armed forces in), but little gain flowing into adivasi hands and homes.

Mobilisation for social change

The circumstances described above not only leave adivasis in poverty but also erode whatever power they once had by virtue of their close-knit community and cultural solidarity. Young people, in particular, are disoriented since farming is no longer an occupation that can support them, and the path of education and secure employment has been closed to them since childhood. Jobless or working in low-paying, back-breaking occupations, and estranged from the cultural beliefs that sustained their elders, young adivasis are living through a period of flux in which radical ideologies, political and religious, have increasing influence on their actions.

Of all the modes of mobilisation among adivasis, it is the expansion of Maoism and Hindu nationalism that has been the most divisive and violent. As the High-level Committee on Socio-Economic, Health and Educational Status of the Tribals of India reports,

¹⁰ And, of course, these welfare schemes are suspended in adivasi areas marked by political insurgency, thereby denying basic subsistence to a population already suffering from civil war (see Sundar 2016b).

Of the nine States considered to be seriously affected by LWE [Left-Wing Extremism], six are States with Scheduled districts. Among the 83 LWE-affected districts, 42 districts have Scheduled Areas. These regions are marked by the following features:(1) serious neglect and deprivation, widespread poverty and poor health and educational status;(2) exploitation and oppression by traders and money lenders, on the one hand, and absence of an effective and sensitive civil administration, on the other; (3) large-scale displacement of tribal people for development projects;(4) occurrence of all of the above despite the special Constitutional and legal provisions for the tribal people (in the form of the Fifth Schedule, laws to prevent alienation of tribal land and restoration of alienated lands, and in recent years, progressive legislations, such as PESA, 1996 and FRA,2006) (GoI 2014: 31-32).

The Committee goes on to advocate that

[T]here should be a perspective based on the explicit recognition that there has been subversion of the law by both government and corporations in order to appropriate tribal resources, and that this situation needs to be rectified. It acknowledges that State failures and the trust deficit have facilitated the entry of the Maoists into these areas and helped them gain some support among the people, particularly Dalits and adivasis. A large section of people in tribal heartlands have lost faith in the ability of the law and the willingness of the administration to protect their interests. Any solution, therefore, should begin with confidence-building measures through the redress of past wrongs and the guarantee of justice. This is necessary in order to restore the trust of the tribals in the government (ibid.).

Despite such enlightened views, the dominant state policy in areas affected by Maoist mobilisation has been that of military repression. Instead of ensuring the rule of law, which would entail upholding the Constitutional provisions and legislation that recognise the rights of adivasis, the state has focused on coercive order by deploying paramilitary troops and encouraging armed militias, such as the Salwa Judum in Chhattisgarh, that carry out raids, rape and loot, and kill villagers (Sundar 2016b). Those who oppose such illegal use of force, activists, journalists, as well as ordinary villagers, have been arrested and charged with false cases, detained without due process,

intimidated and harassed, and shot in encounters. Villagers caught in the struggle are compelled to choose sides, driven into the arms of the Maoists or the militias that operate with impunity. Both these brutal 'choices' break up communities and yoke them to an endless cycle of bloodshed. In order to escape the violence and the atmosphere of terror, many adivasis have been forced to leave their homes and villages for roadside camps or migrate to other areas in search of a more peaceful life, however impoverished it may be.

The increasing presence of religious evangelists, whether conducting gharvapasi (return to the Hindu fold) and shuddhi (purification) campaigns or converting adivasis to Christ, has been as divisive and fraught with violence. The violence is not only physical but is also cultural, as in the case of the murder of preacher Graham Staines and his two young children in Odisha or the rape of nuns and arson at a convent in Madhya Pradesh, or the destruction of Christian Dalit homes in Kandhamal (Odisha) and the attack on Muslim traders in the villagers in Godhra and Chhota Udepur districts in Gujarat. Upper-caste Hindu and Christian beliefs invariably decry adivasi community practices as primitive and superstitious, denying due place for cosmologies, myths and modes of negotiating with the world that have sustained adivasis for generations, and that have enabled them to hold onto their sense of self under the onslaught of dominant ideologies, secular and religious. Given the sharp social and economic disparities that adivasis face in their everyday lives, it is understandable that some have embraced religious affiliations that promise them greater respect and prospects for upward mobility. Yet this process of cultural transformation has been profoundly unsettling in many cases, with successive generations becoming estranged from each other, and groups of believers confronting each other violently, often cynically urged on by political parties.

It must, however, also be noted that adivasi modes of mobilisation are not confined to these two extreme strategies. Many adivasis are engaged in non-violent resistance against mining, dam and conservation projects that threaten to displace them. Their repertoire of contention includes street protests and demonstrations, hunger strikes and yatras (long marches), forms of satyagraha that India has inherited from Mahatma Gandhi and the freedom struggle (Guha 1997). Many more adivasis are members of small grassroots organisations such as Kashtkari Sanghatna in Maharashtra, Khedut Mazdoor Chetna Sangath and Jagrut Adivasi Dalit Sangathan in Madhya Pradesh that

address issues such as forest rights and the implementation of the Right to Work and the Right to Food. Adivasis supported by such organisations contest panchayat elections and strive to deliver welfare programmes efficiently and honestly to their constituents. Some of these organisations have worked over decades through the courts and by engaging with legislators to come up with laws such as the PESA 1996 and the FRA 2006. Gond adivasis in Madhya Pradesh are mobilising for fuller representation of their rights through the Gondwana Ganatantra Party, seeking separate statehood. Other adivasis in Jharkhand have joined hands with national and international rights organisations to present their case before global bodies dealing with the rights of indigenous people. Taken together, these strategies show that adivasis are using the full panoply of political and public forums to press for their causes. That they continue to do so, despite the tremendous adversities and reversals that they have encountered from the combined might of the state and private capitalists, is testimony to their courage as well as their desperation.

Conclusion

There is tremendous internal variation among adivasis. The 104 million total population of Scheduled Tribes in India is divided into 705 different listed communities. Besides large groups such as the Bhil, Gond, Santhal, Oraon, Meena and Munda, the number includes 75 small communities designated as 'Particularly Vulnerable Tribal Groups' such as the DongariaKondh who mobilised to protect their forests from the threat of bauxite mining in the Niyamgiri hills in Odisha. The Scheduled Tribes also include communities such as the Pardhi in Maharashtra that were formerly persecuted as 'criminal tribes' and are now referred to as 'de-notified tribes'. Further, the Scheduled Tribe category is internally stratified as some adivasi communities are better off compared to others. For instance, in eastern and central Madhya Pradesh, the Gond are more land-secure and politically mobilised than the Baiga; in southern Rajasthan, the Meena have more access to education and government jobs than the Bhil. Occupationally, too, while most adivasis are farmers and labourers, some of them are specialised artisans, performers, fisher folk, hunters and gatherers, and a tiny minority are part of the white-collar middle class in cities and towns. Despite these differences, there continues to be, for the most part, a 'commonality of conflicted lives' (Sundar 2016a: 7).

As Nandini Sundar points out, 'adivasis straddle different worlds simultaneously... former army personnel who staked their lives for the state

take up the leadership of anti-displacement struggles upon returning home, risking death at the hands of the police as in the Koel Karo movement in Jharkhand; and domestic workers from Jharkhand, Chhattisgarh, or Orissa long for the starry skies of their village homes even as they and their families are dependent on remittances from metropolitan centres'. (ibid.: 8)

The multiple worlds that adivasis traverse and inhabit: as rural farmers who shuttle tourban work on construction sites and in middle-class homes, as Maoists and military rank and file, as performers in Republic Day parades whose cultural repertoire is dying because the land and community that sustained it is gone (see Shekhar 2015), make a mockery of long-standing debates about whether the correct policy towards adivasis is that of 'protection' or 'assimilation'. Adivasis can no longer be 'protected' in isolation for they are already a part of dominant Indian political economy, albeit at the bottom. In addition to being empirically untenable, both the 'protection' and 'assimilation' points of view are paternalistic, since they deny adivasis agency and the right to decide for themselves. The only way forward is to empower them so that they can choose the lives they want, on terms more equal than has so far been the case. This demands supporting political mobilisation so that adivasis are able to act as citizens and make the state and its policies accountable to their rights, needs and concerns.¹¹ Strategies for upholding the human rights of adivasis can take several forms: political measures such as self-governance through statehood and local institutions, administrative measures to ensure that social welfare is more effective and responsive, economic measures to support sustainable livelihoods, and cultural measures to enable communities to keep alive their traditions of myth and music, knowledge of the forest and field. As Sundar argues, the changes and conflicts that adivasis are negotiating today relate to issues that have a wider resonance. These concerns are at the heart of India's vision of itself and its plans for the future—debates over industrialization, urbanization, and land acquisition of course, but also debates over conservation and climate change, patenting traditional knowledge, agriculture and food security, migration, religion and conversion, positive discrimination, the creeping militarism to more and more parts of the country, and the meaning of autonomy (2016a: 8).

11 See Sundar (2016a: 13-16) for an incisive analysis of the potential of various political strategies for realising adivasi human rights.

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IV – Indian Constitution and Present Reality

‘Essential Practices Doctrine’: Towards an Inevitable Constitutional Burial

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Abstract

This article is primarily concerned with the constitutional approach for protecting religious practices and determining permissible interference. It argues that the role of the courts in the context of religious practices should be limited to adjudicating whether the religious practice in question is a sincerely held belief, and any interference in such beliefs must be strictly in accordance with explicitly identified exceptions in Articles 25 and 26. It begins by tracing the origin of the “essential practices doctrine” to Justice Gajendragadkar’s opinion in Durgah Committee, and the marked departure the case makes from previous case law, particularly that of the seven-judge bench decision in Shirur Mut. The article then analyses the application of the doctrine in various cases before the High Courts and aims to demonstrate the difficulties that arise for courts in using the EPD in terms of its institutional competence and the unsuitability of the doctrine in balancing competing claims. Finally, it proposes an alternative model, which provides a coherent and judicially maintainable method of identifying practices deserving constitutional protection while also laying out a method to balance competing claims. The article concludes with a brief discussion of the relevance of the ‘sincere belief doctrine’ for the prominent claims of religious freedom currently before the Supreme Court.

Introduction

It will be argued in the paragraphs below that the ‘Essential Practices Doctrine’ developed through the jurisprudence of the Supreme Court of India is not a judicially maintainable standard for determining a.) the category

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This article has been possible only due to the exceptional research assistance received from Anwesha Choudhury and Maria George [V-year B.A., LL.B (Hons.) students] at NLU Delhi.

of religious practices that are constitutionally protected; and b.) the basis on which the State may interfere with religious practices. The 'Essential Practices Doctrine' (EPD hereafter) demands that courts undertake a course of action for which they are institutionally unsuited, while foreclosing other constitutional routes to determine the appropriate levels of constitutional protection for religious practices.

This article argues that the role of the courts in the context of religious practices should be limited, in the first instance, to adjudicating whether the religious practice in question is a sincerely held belief. The nature of this enquiry is very different from courts determining whether a religious practice is an essential part of the religion. The next step would be for courts to demand that any interference in any sincerely held beliefs be strictly in accordance with explicitly identified exceptions in Articles 25 and 26.

In Part I the origins and requirements of the EPD are discussed while tracing the course deviations on the test to be adopted. Of particular significance in this part is the dissonance between the ruling of the seven judge bench in Shirur Mutt and that of the five judge bench in Durgah Committee. This part also looks at the current position of the EPD doctrine in the Supreme Court with the judgment in Anand Margis-II case. Part II takes an extensive look at the manner in which the EPD has been invoked and applied in myriad fact scenarios in the High Courts. The aim in this part is to demonstrate the difficulties that arise for a court in using the EPD in terms of its institutional competence and the unsuitability of the doctrine in balancing competing claims. Part III proposes an alternative model that is based on returning to the constitutional logic in Shirur Mutt. The proposed 'sincere belief doctrine' seeks to provide a coherent and judicially maintainable method of identifying practices deserving constitutional protection while also laying out a method to balance competing claims. The article ends with a brief discussion of the relevance of the 'sincere belief doctrine' for the prominent claims of religious freedom currently before the Supreme Court.

I. What is the Essential Practices Doctrine?

The Essential Practice Doctrine (EPD) takes the position that only those religious practices that are 'essential and integral' to the religion receive the protection of Articles 25 and 26 in the Constitution of India. Crucial to the understanding of the EPD is the position that the courts will play a central

role in determining whether any given religious practice forms an ‘essential practice’ of the religion. The current avatar of the EPD owes its origin to Justice Gajendragadkar’s opinion as part of a constitution bench in *Durgah Committee Ajmer & Anr. v. Syed Hussain Ali*¹ As will be demonstrated in the following section, Justice Gajendragadkar made a significant constitutional break from the manner in which the protection under Articles 25(1), 25(2) (b) and 26(b) was envisaged before the decision in *Durgah Committee*. The following excerpt from Justice Gajendragadkar’s opinion lays out clearly the current role of the judiciary under the EPD in determining scope of protection available to religious practices under Articles 25 and 26:

‘Whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other.’

Justice Gajendragadkar made a subtle move in the above paragraph that completely changed the landscape of the judicial approach to religious practices. While the creation of the ‘essential practices doctrine’ is often attributed to Justice Mukherjea in *Shirur Mutt*² (incorrectly so, as will be argued below), it is Justice Gajendragadkar who opened the door for judicial determination of ‘essential practices’. The paragraph extracted above demonstrates that Justice Gajendragadkar viewed the judiciary playing a very active role in filtering out those practices that were not ‘an essential and

1 *Durgah Committee Ajmer & Anr. v. Syed Hussain Ali*, [1962] 1 SCR 383.

2 *The Commissioner Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, [1954] 1 SCR 1005.

integral part' of the religion, including those that were superstitious beliefs. Justice Ganjendragadkar's approach to the protection of religious practices was further cemented in his opinion as part of yet another constitution bench in *Tilkayat Shri Govindlalji v. State of Rajasthan*.³ This role of the judiciary in pronouncing authoritative determinations on the essential nature of religious practices has been firmly established in constitutional discourse over the last five decades through various decisions of the High Courts and the Supreme Court. Courts have become so comfortable in this role that the current version of the EPD requires judges to determine whether the religion itself would be changed if a particular religious practice was not given constitutional protection.

The Path to the Essential Practices Doctrine

Justice Mukherjea's opinion in the seven-judge decision in *Shirur Mutt* is often cited as the source of the EPD. However, a close reading of that opinion reveals that Justice Mukherjea did not envisage anything resembling the understanding of EPD developed by Justice Gajendragadkar in *Durgah Committee*. The approach adopted by Justice Gajendragadkar represents a significant break from the direction until then for the following reasons. In *Shirur Mutt*, Justice Mukherjea, in paragraph 23 of his opinion, made it amply clear that there was no question of any authority sitting in judgment over the 'essential' nature of a religious practice. The approach envisaged therein is quite different:

'It is to be noted that both in the American as well as in the Australian Constitutions the right to freedom of religion has been declared in unrestricted terms without any limitation whatsoever. Limitations, therefore, have been introduced by courts of law in these countries on grounds of morality, order and social protection. An adjustment of the competing demands of the interests of Government and constitutional liberties is always a delicate and a difficult task and that is why we find difference of judicial opinion to such an extent in cases decided by the American courts where questions of religious freedom were involved. Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of articles

3 *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan and Ors.*, [1964] 1 SCR 561.

25 and 26 is sufficiently clear to enable us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not. As we have already indicated, freedom of religion in our Constitution is not confined to religious beliefs only; it extends to religious practices as well subject to the restrictions, which the Constitution itself has laid down. Under article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.'

Paragraph 23 shows that the domain of the courts is to apply the restrictions explicitly identified by the drafters of the Constitution and the domain of determining religious practices lies with the religious denominations. Under the approach envisaged in Shirur Mutt, it is not the business of the courts to get into determining whether a particular religious practice is 'essential' to the religion (Dhavan and Nariman 2000: 259). Courts are to determine whether a particular religious practice gets protection of the Constitution by examining whether the interference is justified under any of the explicitly identified grounds in Article 26, i.e public order, morality and health.

The difference in approach outlined above in Shirur Mutt and the one developed by Justice Gajendragadkar should now be obvious. Under Justice Gajendragadkar's approach, the courts will first determine whether the practice is 'essential', and only if it is 'essential', will Article 25 or 26 come into operation. The question of whether Articles 25 and 26 come into operation is crucial because it would then further determine the grounds on which the interference might be justified. If Articles 25 and 26 do not come into operation, then the grounds for interference are not limited at all, and if those provisions are applicable, the interference must be justified only on the grounds identified therein. However, as will be discussed in the section below on the use of the EPD in the High Courts, courts primarily adopt the approach whereby religious practices are held to be not 'essential' practices and therefore not receiving the protection of Articles 25 and 26. Rarely is it seen that courts hold the religious practice to be essential and then proceed to invoke the grounds mentioned in Articles 25 and 26 to justify the interference.

The ‘Durgah Committee’ Case and After: An Erroneous Legacy

It is evident that seven judges in Shirur Mutt took the view that it was the religious denomination alone that could decide if any religious practice was essential. However, even on the question of the religious denomination claiming a religious practice to be essential, certain clarifications on Shirur Mutt are in order. It is important to recognise that the court in Shirur Mutt was primarily faced with the task of determining whether the practice in question was secular as the State claimed (as opposed to it being religious). Therefore, Justice Mukherjea’s opinion first gets into the test that must be adopted to determine the secular v. religious questions. It is only here that Justice Mukherjea envisages a role for the courts to engage with religious tenets. The engagement is limited to only determining whether the practice in question is religious and the enquiry stops there. If on such enquiry the practice is found to be secular in character, then the protection of Articles 25 and 26 is not attracted. The discussion on essential aspects of a religion in Shirur Mutt has to be understood in the context of the court grappling with practices that were a mixture of religious and secular aspects. The discussion on essential aspects in paragraph 20 of Justice Mukherjea’s opinion is accurately understood as throwing light on the ‘religious’ v. ‘secular’ discussion rather than as a move to draw distinctions among practices in the religious sphere. Given the question before the court in Shirur Mutt and the placement of the discussion in paragraph 20, the discussion on ‘essential part of a religion’ is not meant to create categories within the ‘religious’ sphere. There has been a long standing (and inaccurate) tendency to read Justice Mukherjea’s opinion as saying that even when there is no dispute that the practices in question are religious, there is another level of enquiry required to determine whether it is essential to the religion. However, as discussed earlier, paragraph 23 of Justice Mukherjea’s opinion does not leave any doubt that this determination is exclusively the domain of the religious denomination.

Ronojoy Sen (2010) has argued that the expanded role for the judiciary in determining religious practices as an essential part of a religion can be traced to Justice Venkatarama Ayyar’s opinion (Sen 2010: 53) in *Sri Venkatramana Devaru v. State of Mysore*.⁴ It is difficult to see the reading of Devaru that

4 *Sri Venkatramana Devaru v. State of Mysore*, [1958] 1 SCR 895.

Sen adopts. Sen (ibid) asserts that Devaru is the beginning of courts breaking away from Shirur Mutt's ruling that the determination of 'essential practices' is exclusively with the religious denominations with no role for any outside authority.⁵ However, this is a rather stretched reading of Devaru. Justice Ayyar in Devaru is more accurately only enquiring whether there exists a genuine religious belief and does not undertake any determination on the issue of it being essential or otherwise. As discussed in the earlier section, the major break in the judicial role envisaged in this context is Justice Gajendragadkar's opinion in Durgah Committee. Though bound by the approach adopted by the seven judges in Shirur Mutt that no outside authority has any role in determination of 'essential practices', Justice Gajendragadkar speaking for a five-judge bench in Durgah Committee radically altered the position. As indicated in the extract above, the courts would now not just determine whether the practice in question was religious in nature, they would have to go one step ahead and determine whether the practice was also an essential part of the religion.

After nearly four decades of working the approach laid down in Durgah Committee, the Supreme Court made yet another significant change to the EPD that further narrowed the protection available to religious practices. In 2004, the Supreme Court through a three-judge bench decision in *Anand Margis-II*⁶ decided that for 'religious practices' to be eligible for protection under Articles 25 and 26, the practice in question must be of such a nature that without such practice the very nature of the religion would be altered. This articulation of the EPD as excerpted below is significantly different from approach adopted by Justice Gajendragadkar in Durgah Committee, whereby the court had to determine whether the religious practice was an 'essential part of the religion':

'Essential part of a religion means the core beliefs upon which a religion is founded. Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion. Test to determine whether a part or practice is essential to the religion is - to find out

5 Also see generally: Sen, Ronojoy; 2016; "Secularism and Religious Freedom"; Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta; *The Oxford Handbook of the Indian Constitution*; 885-902; New Delhi; Oxford University Press.

6 *Commissioner of Police and Ors. Vs. Acharya Jagadishwarananda Avadhuta and Anr.*, 2004 (12) SCC 774.

whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part. There cannot be additions or subtractions to such part. Because it is the very essence of that religion and alterations will change its fundamental character. It is such permanent essential parts is what is protected by the Constitution.’

This understanding of the EPD meant that protection was available only to those practices without which the very nature of the religion would change. In effect, the EPD in *Anand Margis-II* came to mean that only when the very existence of the religion was in question would the religious practice get the protection of Articles 25 and 26. Therefore, after *Anand Margis-II*, petitioners seeking protection for religious practices from interference need to not only show that the practice is an ‘essential part of the religion’ (as per Justice Gajendragadkar), they also need to demonstrate that without the particular practice the very fundamental character of the religion would be altered.

This significant shift that Justice Rajendra Babu’s majority opinion undertakes is used by Justice Lakshmanan’s dissent in *Anand Margis-II* to launch a much broader attack on the manner in which the EPD has developed since *Durgah Committee*. The dissent in *Anand Margis-II* is absolutely right to voice the concern that the Supreme Court has walked down the wrong path on the EPD since *Durgah Committee* in 1962, in contravention of the ruling by the seven-judge bench in *Shirur Mutt*.

II. The Legacy of ‘Durgah Committee’ in the High Courts

A very clear understanding of the problematic evolution of the EPD is evident from the manner in which it has been used in the High Courts. Various religious practices have come before the High Courts for adjudication and an analysis of those decisions makes it rather evident that the EPD is not a judicially maintainable standard. While the analysis in this section is certainly not exhaustive of the instances in which High Courts have invoked the EPD, it fairly illustrates the difficulties that emerge in the application of the doctrine.

A preliminary argument to consider is the nature of claims that must be adjudicated under Articles 25 and 26. It must be immediately evident that text of Article 25 protects the ‘right freely to profess, practise and propagate religion.’ These guarantees need to be distinguished from claims that are based on offending religious sensibilities. Questions of insulting and disrespecting religious beliefs cannot be settled through the EPD doctrine under Article 25. A perfect example of this error is *Sri Gopi Nath v. The Director General Doordarshan & Ors*⁷ decided by the Allahabad High Court. Here the petitioner sought to restrict the broadcasting of a certain episode of the ‘Ramayana’ on the ground that the depiction of Sita being banished was distorted. The court took the view that Sita’s banishment by Ram is a basic text of the Ramayana and any alteration would result in destroying the religious scripture. Rejecting the respondent’s argument that it was a more progressive representation, the court explicitly upholds the claim of the petitioner under Article 25 by arguing that even for purposes of social welfare/reform, the rights under Article 25 cannot be eviscerated. It is difficult in this case to understand the nature of the Article 25 claim being protected because such a claim objects to the cinematic depiction of mythological figures on television. The reasons for that claim falling under the ambit of ‘profess, practise or propagate’ under Article 25 are not evident at all. A far more appropriate analysis would have been for the court to restrict its examination to whether the broadcasting of the episode could legitimately fall under the restrictions envisaged under Article 19(2). By examining and upholding the claim under Article 25, the Allahabad High Court has erroneously extended the protection of Article 25 against causing religious offense.

Essential Practices Doctrine and the Balancing of Competing Claims

With that preliminary argument on the scope of Article 25 protections out of the way, we can now proceed to the difficulties that have arisen in the application of the EPD in appropriate cases. Conceptually, one of the immediate challenges for the EPD are cases in which there are competing claims from within the same religion or religious denomination. As a test, EPD does not really provide a framework to resolve two competing claims seeking constitutional protection. A few cases from the High Courts illustrate this difficulty.

⁷ *Sri GopiNath v. The Director General Doordarshan&Ors*, 1989 (87) ALJ 1002.

In *S. Mahendran v. Secretary, Travancore Devaswom Board*,⁸ the petitioner challenged the practice of the temple board permitting some well-known women to offer prayers in the Sabarimala temple. While the rules under the relevant legislation specifically barred women from entering the temple during three specific occasions during the year, the court was asked to decide if women should be barred for the entire year. Though the temple board took the position that women should be allowed into the temple all through the year except the three occasions identified in the rules, the court decided that it would invite the opinion of the head-priests in order to determine the issue. The head-priests in turn took the view that women had to be barred all through the year.⁹ Accepting the rationale provided by the head-priests, the Kerala High Court took the position that it was the right of the denomination under Article 26(b) to exclude women all through the year. In response to the Indian Federation of Women Lawyers' intervention submitting that the right of the women to practise their religion under Article 25 had to be protected,¹⁰ the court ruled that the individual right under Article 25 was subject to the right of the denomination under Article 26(b). The court made the determination that excluding women is an essential practice of the denomination but does not really find any use for the EPD in adjudicating the claim of women under Article 25. As a result, we only have an assertion from the court that Article 25 claims are subject to denominational claims under Article 26(b). This assertion leads to the conclusion that once essentiality is established under Article 26(b) balancing any other competing consideration becomes very difficult. The pure focus on essentiality prevents the court from finding the constitutional space to factor competing claims.

However, it is interesting to look at the *Haji Ali*¹¹ case in this context. While the court did not examine the trust's claim under Article 26, the court examined the claim of the trust under Article 25 using the EPD. The competing claim of women asserting anti-discrimination protections in Articles 14 and

8 *S. Mahendran v. Secretary, Travancore Devaswom Board*, AIR 1991 Ker. 42.

9 The Court further examined the rationale behind such restriction. It was held that since a pilgrim starts trekking the Sabarimala only after completing penance for a period of 41 days, a woman of the age group 10 to 50 years would not be in a position to observe the Vatham for physiological reasons. Further, it is held that since the deity in the Sabarimala temple is in the form of a Naisthik Bramchari, young women particularly should be excluded so as to avoid even the slightest deviation from austerity and celibacy.

10 Although an argument was raised that the prevention of entry of women would violate the fundamental right guaranteed under Article 15, this was not engaged with by the Court.

11 *Dr. Noorjehan Safia Niaz And Anr. v. State Of Maharashtra And Ors*, P.I.L. No. 106 of 2014, Decided on 26 Aug., 2016 (Bombay High Court).

15 protections was not balanced against the freedom of religion rights in this case. Analysing the freedom of religion claim under Article 25, the court held that the prohibition of women inside the shrine did not form an essential or integral part of the religion. The balancing of competing claims in the Haji Ali case is avoided by resorting to the argument that the practice in question is not an ‘essential and integral’ part of the religion.

Both the Mahendran and the Haji Ali case demonstrate the difficulty of using the EPD to balance competing interests. The only option that the EPD seems to present courts with is to either uphold the religious practice entirely to eviscerate any competing claim or vice versa. The manner in which the EPD has evolved through judicial discourse does not allow the recognition of a religious practice while balancing it against competing claims. As a result, there is no possibility of a religious practice being trumped by a competing claim in one context but not being trumped by some other competing claim in another context. It has developed into an all-or-nothing test that provides very weak protection to religious practices as will be seen in the following sections.

Applying the Essential Practices Doctrine

The attempt in this section is to examine the manner in which EPD has been applied across different contexts in the High Courts. To be clear, the argument here is not that it was incorrect for the High Courts to invoke and apply the EPD. They are, of course, bound by the law laid down by the Supreme Court but the reason for using High Court cases is to examine the broader spectrum of situations in which the EPD is applied, and also examine the different ways in which the High Courts understand and use the EPD. The EPD is not a judicially maintainable standard due to the burdens it places on courts, primarily because it demands courts to carry out enquiries for which they do not possess the institutional competence.

Appearance/ Dress and Freedom of Religion

In this sub-section, the application of EPD in select cases concerning dress and appearance is analysed as symptomatic of the concerns that arise. In cases concerning the petitioner’s claim to grow a beard while being in the police force, the application of the EPD runs into some obvious difficulties.

In Mohd. Fasi¹² and Zahiroddin Bedade,¹³ the Kerala and Bombay High Courts invoked the EPD to determine whether growing a beard is an ‘essential practice’ under Islam. The courts undertook this enquiry in response to the claim by the petitioners that the rules preventing them from keeping a beard in the police force is unconstitutional. While in Fasi the Kerala High Court resorted to analysing the hadiths to come to the conclusion that growing beards is only optional and not mandatory, in Bedade the Bombay High Court only observes that the petitioners have placed no material to support their claim. But in these cases it is evident that the courts were not concerned only with the essentiality of the practice. It was explicitly stated that the claim of the petitioners is not being allowed because the ‘image’ of the police weighed heavily with them. Ideas of secularism, national integration, discipline and concerns about the police force in situations of communal violence were brought into the constitutional adjudication of the matter.¹⁴ Obviously these considerations are extraneous to the EPD but it is clear that these factors contributed to the manner in which the religious practice in question was analysed under the EPD.

The sheer subjectivity of requiring judges to evaluate religious texts emerges from decisions of the Kerala and Bombay High Courts on the issue of headscarves in Muslim dress. In Fathema Sayed,¹⁵ the Bombay High Court rejected the claim of a Muslim girl challenging the direction of an all-girls’ school principal prohibiting wearing of headscarves. Meanwhile, in Amnah Basheer¹⁶ the Kerala High Court upheld the challenge by a Muslim female student to the dress code prescribing mandatory half-sleeves for all candidates appearing in the All India Pre-Medical Entrance Test. The court took the view that the wearing of headscarves and full-sleeve dress is an essential part of Islam for women.

In both Fathema Sayed and Amnah Basheer, the judges had relied on the same verse from the Koran to arrive at diametrically opposite conclusions. In Fathema Sayed the court adopted a reading that the Koran does not mandatorily require a girl studying in an all-girls environment to wear the headscarf, whereas the Kerala High Court placed the wearing of headscarves

12 Mohammed Fasi v. Superintendent of Police, (1985) KLT 185.

13 Zahiroddin Shamsoddin Bedade v. State of Maharashtra, [2013] 3 Mah LJ 701.

14 Fasi, (1985) KLT 185, 13; Zahiroddin, [2013] 3 Mah LJ 701, 9.

15 Fathema Hussain Sayed v. Bharat Education Society, AIR 2003 Bom 75.

16 Amnah Bint Basheer v. Central Board of Secondary Education, WP(C) No. 6813 of 2016, Decided on, 26 April, 2016 (Kerala High Court).

and full-sleeve dress among the highest tier of obligation in Islam. The issue here is certainly not the ‘correct’ interpretation of the Koranic verse but rather the institutional competence to undertake that task.¹⁷ The absurdity of judges interpreting religious texts in the context of freedom of religion claims is typified by the decision of the Punjab & Haryana High Court in Gurleen Kaur.¹⁸ The petitioners were denied the benefit of reservations set aside for Sikhs on the grounds that they had not maintained *sikhiswarup*¹⁹ (Sikh appearance). Here the court analysed various sources of religious interpretation in great depth and established that unshorn hair was an essential component of the Sikh religion and the petitioners, by virtue of having shorn hair, could not claim the reservations set aside for Sikhs. It really is an incredible move by the court to use the EPD to determine the membership of a religious group. The court transforms a doctrine that was developed to restrict State interference in religious practices into a doctrine that will be used to determine the practices that need to be necessarily followed for membership in a religious group.

Should Essential Practices Be Long-Standing?

Once again the courts have been unable to provide any judicially manageable standard on this issue. In certain contexts, courts have placed great reliance on the requirement that practices should be long-standing whereas in certain other contexts courts have viewed the long-standing nature of practices unfavourably. The contrast between the approaches adopted by the Himachal Pradesh High Court in Ramesh Sharma²⁰ and the Calcutta High Court in Maulana Mufti Syed²¹ brings this to the fore. In Ramesh Sharma, the court refused to give any weight to the fact that the particular animal sacrifice practice was a long-standing religious practice among the concerned Hindu denominations. The court instead invoked Hindu philosophy to determine whether the practice formed an essential part of the religion and argued that religious practices must evolve with time. On

17 Also see, Peeran Saheb v. Special Officer-cum-Collector, Punganur Municipality, AIR 1988 AP 377. The Court upheld the challenge against a voter-ID law requiring voters to obtain photo identity cards in order to exercise franchise. It was held that the taking of photograph was haram as per the Koran, and formed an integral part of the religion.

18 Gurleen Kaur and Ors. v. State of Punjab and Ors., ILR (2010) 1 P&H 52.

19 He/she does must not cut or trim hair, and a male must also wear a turban.

20 Ramesh Sharma v. State of Himachal Pradesh, CWP. No. 9257 of 2011, Decided on 26 September, 2014 (High Court of Himachal Pradesh).

21 Moulana Mufti Syed Md. Noorur Rehman Barkati and Ors. v. State of West Bengal and Ors., AIR 1999 Cal 15.

the basis of this evolution of society, it was of the view that such practices of animal sacrifice were abhorrent and had no place in the 21st century. However, in *Maulana Mufti Syed* the Calcutta High Court adopted a very different approach to evolution of religious practices in the context of *azan* (call to prayers in mosques). Rejecting the challenge to the prohibition on use of microphones between 9pm to 6pm under the Environment Protection Rules 1986, the Calcutta High Court ruled that the use of microphones by mosques for *azan* was not an essential part of Islam. The court argued that since historically *azan* was only given by human voice before microphones were invented, the use of microphones could not be an essential religious practice. In *Ramesh Sharma*, the court was willing to abandon historical religious practices to enforce the idea that certain religious practices must necessarily evolve whereas in *Maulana Mufti Syed* the court sought to tie the religious practice to very ancient times.

Evaluating the Application of the Essential Practices Doctrine

The question that arises from the discussion above is the following: whether the appropriate way to protect religious freedom is to ask judges to determine the essentiality of religious practices by interpreting religious texts. The discussion above must not be misunderstood as arguing that the concern is with the outcomes in each of those cases. The concern is with the constitutional method adopted to adjudicate these claims. Of course, the competing claims raised in each of the cases above are valid but the use of the EPD is wholly unsuited to balancing these competing claims. The analysis of the use of EPD gives rise to three main concerns: a) The bar is set extremely high for religious practices to get the protection envisaged under the Constitution. Petitioners have to produce material that unequivocally establishes that the practice in question forms an essential part of the religion. Not only is the bar very high, cases like *Fathema Sayed* demonstrate that the EPD leaves it open for judges to demand an extremely narrow fit. As was seen in *Fathema Sayed*, the court rejected the claim on the basis that petitioners failed to establish the practice of wearing headscarves in an all-girls environment was essential to Islam; b) The courts cannot in any authoritative or judicially maintainable manner undertake the interpretation of religious sources required to sustain the demands of the EPD. The cases above have shown that courts repeatedly resort to invoking grounds that have hardly

anything to do with the EPD. Judges are not trained to interpret religious texts or sources and their discomfort with the task is rather evident. As a result, we see courts supplementing their religious analysis with reasons that have no religious basis to determine the essentiality of a practice to a religion; c.) The strategy that courts adopt to trump religious practices in favour of competing claims is to negate the importance (essentiality) of the religious practice itself rather than provide constitutional reasons for balancing the religious practice and the competing interest in a certain manner. As the next part will demonstrate, the courts in the above cases could have reached the same conclusions in a far more constitutionally sustainable manner. However, that would necessarily mean abandoning the EPD for a new approach that is capable of far better protection of religious freedoms.

III. Adjudicating Freedom of Religion Claims: The Way Forward

In this section an alternative constitutional method for adjudicating freedom of religion claims is proposed. The proposed method represents an approach that is judicially maintainable in recognising, adjudicating and balancing religious practices. The method would comprise two steps:

- i) The court will first determine if the ‘religious practice’ is a sincerely held religious belief
- ii) If it is a sincerely held religious belief, any restrictions on it would have to be justified only on the terms provided within Article 25 or Article 26 (depending on the nature of the claim).

Taking the liberty of labelling it the ‘sincere belief doctrine’,²² this approach to adjudication of religious freedom claims overcomes the difficulties posed by the EPD. Under the first step of ‘sincere belief doctrine’, courts do not have to undertake an analysis of religious texts and sources with the kind of burden that the EPD imposes. It is a much lower level of judicial scrutiny that limits itself to courts determining whether the practice in question is ‘religious’ in nature and if it is ‘sincerely held’. The second step would require the court to demand a justification for interference that is

22 This is an accepted test used by the Courts both in the United States, see Ben Adams and Cynthia Barmore, *Questioning Sincerity*, 67 *Stan. L. Rev. Online* 59, accessed at <https://www.stanfordlawreview.org/online/questioning-sincerity-the-role-of-the-courts-after-hobby-lobby/>; as well as South Africa, see *Garreth Anver Prince v. The President of the Law Society of the Cape of Good Hope*, 2000 (3) SA 845 (SCA), 49-51.

limited to the grounds provided in the relevant provisions. Therefore, if it is a claim under Article 25, the justifications for interference have to be limited to public order, morality, health, any other provision of Part III or Article 25(2). However, if it is an Article 26 claim, interference can be justified only on grounds of morality, public order and health, and no other ground.

In very important ways, the 'sincere belief doctrine' returns to the Shirur Mutt position that no authority can go into questions of essentiality or centrality of religious practices. The doctrine also lends itself a lot better to a consistent approach to balancing of interests. It clearly marks out the considerations that are relevant for balancing and does not leave the door open for judges to bring in considerations that have no constitutional relevance. Further, by limiting permissible interference to the grounds explicitly identified in the Constitution it also streamlines the manner in which the balancing of religious freedom and competing interests has to take place. It is evident from the text of Articles 25 and 26 that the grounds of interference are exceptions and therefore they have to be read very narrowly. The significance of a doctrine like the 'sincere belief doctrine' can be understood if we were to apply to some of the cases discussed above. For example, on the issue of maintaining beards, the court will first only have to enquire if it is a sincerely held belief. It will then have to seek the grounds for interference into this practice and determine if the justifications offered by the State satisfy the explicitly identified grounds in the Constitution. Similarly, on the issue of Muslim dress, the focal point of the Court's enquiry under the 'sincere belief doctrine' will not to determine the exact position in the religious texts but will rather be on evaluating the justifications on offer to restrict the religious practice. The azan case provides an interesting test for the 'sincere belief doctrine'. Here the most obvious ground for the State to invoke would be 'health' since the restriction is coming in through the Environment Protection Rules, 1986. However, as with most questions of substantive judicial review, the issue is on the exact burden on the State in this context. Is it sufficient for the State to just invoke the ground and make a very basic connection between the interference and ground invoked? Or given that the interference is to be read as an exception, should the burden of justification on the State be of a different nature? The issue of standards of judicial review in different constitutional contexts is a complex one and must be reserved for a more detailed examination on another occasion.

A crucial constitutional issue remains to be clarified for the effective use of the ‘sincere beliefs doctrine’, on the use of the word ‘morality’ in Articles 25 and 26. To enable the court to undertake meaningful balancing exercises in this context, it is imperative that the Supreme Court moves towards understanding ‘morality’ as ‘constitutional morality’ rather than the existing understanding of the courts trying to determine the existing moral standards in society. The pitfalls of courts trying to determine existing moral standards in society have emerged in various contexts and it is only appropriate that courts be guided by standards set out in the Constitution. The idea of ‘constitutional morality’ is yet to take roots in Indian judicial discourse though some attempts have been made. Limitations of space prevent a detailed consideration of the idea of ‘constitutional morality’ in adjudication, and for the current purposes it might suffice to say that it refers to the “substantive moral entailment any constitution carries.....In this sense, constitutional morality is the morality of a constitution.”(Mehta: 2010)

Concluding Remarks: Current Constitutional Conundrums

Currently there exist multiple constitutional questions on freedom of religion before the courts. The difficulty of using the EPD once again comes to the fore with the difficult balancing tasks that await the Supreme Court in these cases. The Jain santhara practice, admitting women into Sabarimala temple, excommunication practices of the Dawoodi Bohra community, validity of triple talaq are all opportunities for the Supreme Court to revisit the constitutional validity of the EPD. The Supreme Court must go back to the decision of the seven judge bench in Shirur Mutt to revisit the ‘essential practices’ doctrine developed since the judgment in Durgah Committee. In each of the cases mentioned above, the enquiry into essential practices represents a constitutional minefield for the Supreme Court. The court is not an institution that can determine the centrality of such practices in the respective religions/denominations because judges do not possess the level of expertise required for such religious interpretation. There exists a much more judicially maintainable alternative for adjudicating such difficult questions on freedom of religion and it only requires the court to return to the wisdom of Justice Mukherjea in Shirur Mutt.

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Wholesome Environment as a Basic Human Right: An Analysis of Judicial Interpretation with Special Reference to Protection of Natural Resources

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Abstract

Gradual developments, from the Stockholm Declaration in 1972 onwards, show that clean environment is perceived as necessary to the enjoyment of basic human rights. The international obligation for promotion and protection of human rights has contributed a significant role to strengthening this interrelationship. As far back as 1968, the UN General Assembly had adopted a Resolution acknowledging the relationship between the environment and human rights. It has been widely accepted that environmental degradation adversely affects the enjoyment of human rights such as the right to life and right to health. Even though the right to environment is not articulated in a legally binding international instrument, the linkage between environment and human rights is being increasingly recognised at the international level. The right to a healthy environment (or a related formulation) has been formally recognised by several countries in their national Constitutions. In 2002, the Office of the High Commissioner on Human Rights, published a report on the linkage between human rights and environment against the background of Agenda 21. Internationally, there is a trend towards recognition of human rights to wholesome environment in soft law. India in 2016 signed the historic "Paris Climate Agreement" along with more than 170 nations, marking a significant step that has brought together developing and developed nations to begin work on cutting down greenhouse gas emissions to combat global warming.

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In the Indian context, though the protection of the environment figures in Part IV dealing with Directive Principles of State Policy, the Supreme Court by its interpretation has elevated the right to a clean and healthy environment to the status of a Fundamental Right within the meaning of 'right to life' under Article 21 of the Constitution of India. The wholesome environment as a basic human right essentially includes many dimensions in relation to effective enforcement of legislative, judicial and quasi-judicial parameters.

The present paper is an analysis of one of the most important and emerging areas of sustainable development, which affects the human being in terms of enjoyment of the right to dignified life with a wholesome environment in India. It starts with establishing the relation of human rights and environment, highlighting the worth of natural resources to be protected for future goals. Further, it explores legislative contributions and judicial interpretations in reference to protection of natural resource on few major areas, establishing the reality, that the exploitation of natural resources creates real threats and adverse impact on human rights. The judicial contribution in this regard is commendable but there are areas in which we still need effective policies and legislative obligations.

Prologue

Every human being depends on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the right to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity. At the same time, protecting human rights helps to protect the environment. When people are able to learn about, and participate in, the decisions that affect them, they can help to ensure that those decisions respect their need for a sustainable environment¹.

As the world urbanizes and industrializes, and as effects of climate change intensify, environmental crises will increasingly devastate the lives, health, and livelihoods of people around the globe. In recent years, recognition of the

1 Special Rapporteur on Human Rights and Environment (Former Independent Expert on Human Rights and Environment), <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>, retrieved on 14.10.2016.

links between human rights and the environment has greatly increased. The number and scope of international and domestic laws, judicial decisions, and academic studies on the relationship between human rights and the environment have grown rapidly.

All over the world, people experience the negative effects of environmental degradation and ecosystems decline, including water shortage, fisheries depletion, natural disasters due to deforestation and unsafe management and disposal of toxic and dangerous wastes and products. More than 2 million annual deaths and billions of cases of diseases are attributed to pollution. Indigenous people suffer directly from the degradation of the ecosystems that they rely on for their livelihoods. Climate change is exacerbating many of the negative effects of environmental degradation on human health and wellbeing and is also causing new ones, including an increase in extreme weather events and an increase in spread of malaria and other vector born diseases. These facts clearly show the close linkages between the environment and the enjoyment of human rights, and justify an integrated approach to environment and human rights.

There are three main dimensions of the inter-relationship between human rights and environmental protection:

- The environment as a pre-requisite for the enjoyment of human rights (implying that human rights obligations of States should include the duty to ensure the level of environmental protection necessary to allow the full exercise of protected rights);
- Certain human rights, especially access to information, participation in decision-making, and access to justice in environmental matters, as essential to good environmental decision-making (implying that human rights must be implemented in order to ensure environmental protection); and
- The right to a safe, healthy and ecologically-balanced environment as a human right in itself (this approach has been debated).

The Stockholm Declaration, and to a lesser extent the Rio Declaration, show how the link between human rights and dignity and the environment was very prominent in the early stages of United Nations efforts to address environmental problems. That focus has to some extent faded away in the ensuing efforts by the international community to tackle specific

environmental problems, with more focus being placed on developing policy and legal instruments, both at the international and national levels.

The Indian Constitution is perhaps one of the few constitutions of the world that reflects the human rights approach to environment protection through various constitutional mandates². In India the concern for environment protection has not only been raised to the status of fundamental law of the land, but it is also wedded to the human rights approach and it is now well settled that it is the basic human right of every individual to live in pollution free environment with full human dignity. The Constitution of India obliges the State as well as citizens to ‘protect’ and ‘improve’ the environment.

There is no doubt that living in a polluted atmosphere or environment is like dying every moment. The problem of environmental pollution has posed the highest threat to the very existence of human beings. After all it is an established fact that there exists a vital link between life and environment. The permanent peoples’ Tribunal regards the “anti-humanitarian effect of the exiting industrial system, but rather a pervasive and organized violation of the most fundamental rights of humanity. For, most among them are the right to life, health, expression ad access to justice.”³

The Hon’ble Supreme Court of India has interpreted this on many occasions. Recently in *Akhil Bhartiya Upbhokta Congress v. State of Madhya Pradesh &Ors.*⁴ and *Sachidanand Pandey & Anr. v. State of West Bengal &Ors*⁵ the Bench pointed out:

‘In conclusion, we hold that the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good.’

In the process of exploring the natural resource as to the best of its

2 See article 14,21,47,48-A and 51-A(g) of the Constitution of India. See also Paramjit S. Jaswal and Nishtha Jaswal, “Making Right to live in Healthy Environment as Fundamental Right: An Assessment of Judicial Attitude and People’s Concern”. In B.P.S. Sehgal (Ed.), *Law Judiciary and Justice in India*, 396-408 (1993).

3 Asia’ 92 Permanent People’ Tribunal Findings and Judgment – Third Session on Industrial and Environmental Hazards And Human Rights:19-24 October, Bhopal-Bombay (India) at 14 (1992).

4 (2011) 5 SCC 29

5 (1987) 2 SCC 295

utility, the concern of stakeholders and their basic rights must be taken account of. In this context it is rightly interpreted at length by the Supreme Court in *Re: Special Reference No.1 of 2012*;

“..... no part of the natural resource can be dissipated as a matter of largess, charity, donation or endowment, for private exploitation. Each bit of natural resource expended must bring back a reciprocal consideration. The consideration may be in the nature of earning revenue or may be to ‘best subserve the common good’. It may well be the amalgam of the two. There cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth. One set of citizens cannot prosper at the cost of another set of citizens, for that would not be fair or reasonable.’

Natural resources are available to sustain the very complex interaction between living things and non-living things. Human beings also benefit immensely from this interaction. All over the world, people consume resources directly or indirectly. The role of natural resources in sustaining life on earth is extremely important and we must ensure that we protect the environment and also make it easy for it to replenish itself naturally.

The Role of Judiciary in Protecting Basic Human Rights to Sustainable Environment

In India, like any other developing country, there has been environmental degradation due to over exploitation of resources, depletion of traditional resources, industrialization, urbanisation and population explosion. However, India has never been oblivious of this fact. In fact, India has always been in the forefront of taking all possible steps for the protection and improvement of the environment and aiming at sustainable development. Since man is the creator and moulder of his environment, his conduct can be regulated through the instrument of law. Thus, it can be seen that in India, there has been a regular development of the law regarding the protection of the environment. However, neither the law nor the environment can remain static. Both are dynamic in nature. The changing pace of the environment is so fast that in order to keep the law on the same wave-length either laws have to be amended quite frequently to meet the new challenges or they have to be given new direction by judicial interpretation. This becomes all

the more important in view of ever-increasing scientific and technological development and advancements.⁶ India has enacted various laws at regular intervals to deal with the problems of environmental degradation. At the same time, the judiciary in India has played a pivotal role in interpreting the laws in such a manner that not only helped in protecting the environment but also in promoting sustainable development. In fact, the judiciary in India has created a new 'environmental jurisprudence.'⁷

The tide of judicial considerations in environmental litigation in India symbolizes the anxiety of courts in finding out appropriate remedies for environmental maladies.⁸ The adherence to the principle of sustainable development is now a constitutional requirement. How much damage to the environment and ecology has been done has got to be decided on the facts of each case. Therefore, the courts are required to balance development needs with the protection of the environment and ecology. It is the duty of the State under our Constitution to devise and implement a coherent and co-ordinated programme to meet its obligation of sustainable development based on inter-generational equity⁹.

It is true that in a developing country there will have to be developments, but development should be in closest possible harmony with the environment. Otherwise, there will be development but no environment, resulting in total devastation. Although, may not be felt immediately it will at some future point, by which time it would be too late to control. There has to be a balance between development and the environment so that they can co-exist.¹⁰

In the 21st century, it is neither feasible nor practicable to have a negative approach to the development process, but that does not mean development without any consideration for the environment. Society has to prosper, but not at the cost of the environment. Likewise, the environment must be protected, but not at the cost of development of society. Thus, sustainable development is the only answer and administrative actions ought to proceed accordingly.¹¹

6 See Paramjit S. Jaswal, "Developments in Environmental Laws: The Case of India in Proceedings of the Workshop on Development and Planning, University of London, U.K. (1992).

7 Paramjit S. Jaswal, *Directive Principles Jurisprudence and Socio-Economic Justice in India*, 543(1996). See also, Paramjit S. Jaswal and NishthaJaswal, *Human Rights And the Law*, 172-180 (1996).

8 See T.K. GodavarmanThirumalpad v. Union of India,(2002) 10 SCC 606 at 625.

9 See T.N. GodavarmanThirumalpad v. Union of India, (2008) 2 SCC 222.

10 See *People United for Better Living in Calcutta v. State of W.B.*, A.I.R. 1993 Cal. 215 at 217.

11 *Ibid.*

The problem of environmental degradation is a social problem.¹² Law courts have a social duty, since it is a part of society and as such, must always function having due regard to the present day problems which the society faces. The benefit of the society ought to be the prime consideration of law courts and socio-economic conditions of the country cannot be ignored by a court of law. Thus, the courts must take cognizance of the environmental problem.¹³ This does not require the courts to embargo all development projects, but does require them to strike a balance between development and ecology with minimal compromise to either.¹⁴ In other words the courts, while dealing with the problem of environmental degradation, must apply the principles of sustainable development.

It may be relevant to mention here that Principle 10 of the Rio Declaration of 1992, specifically provides for 'effective access to judicial and administrative proceedings, including redress and remedy.'

The judiciary in India has played a very important role in environmental protection and has applied the principles of sustainable development while deciding a number of cases, some of which I analyse below. It is also worthwhile mentioning that most of the environmental cases have come before the courts through Public Interest Litigations (PIL).

Quarrying, Mining, Stone Crushing, Tree Felling and Sustainable Development

The Supreme Court has observed that the time has come when the constitutional 'doctrine of proportionality' must be applied as a part of the process of judicial review, rather than merit review, to matters concerning

12 *Calcutta Youth Forum v. State of W.B.*, 1986 (2) C.L.J. 26.

13 *People United for Better Living in Calcutta v. State of W.B.*, A.I.R. 1993 Cal. 215 at 228.

14 *Ibid.*, at 230. See also *Goa Foundation v. Konkan Railway Corporation*, A.I.R. 1992 Bom. 471 where the writ petition was filed against the laying of new broad gauge railway line. The petitioner had the apprehension that small lake would be filled up, thus preventing migratory birds from reaching State of Goa. The High Court declined to interfere on the basis of such imaginary apprehension. In *Tehri Bandh Virodhi Sangarsh Samiti v. State of U.P.*, 1992 Supp. (1) SCC 44, a public interest litigation was filed challenging the construction and implementation of Tehri Hydro Power Project and Tehri Dam on the ground to non application of mind by Government to safety and ecological aspects, the site being within the earth-quake prone zone. But the facts showed that the project was considered by Environmental Appraisal Committee of Ministry of Environment and Forests and by other renowned experts of international repute. Hence, the Supreme Court refused to interfere. The Court observed that it does not possess the requisite expertise to render any final opinion on the rival contention of the experts. The court can only investigate and adjudicate the question as to whether the government has applied its mind to the safety of the dam.

the environment. It cannot be said that utilization of the environment and its natural resources has to be done in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision?

Thus, the court should review the decision-making process to ensure that the decision of Ministry of Environment and Forests is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of “margin of appreciation” in favour of the decision-maker would come into play¹⁵.

People have responded well to the environmental crisis caused by indiscriminate quarrying, mining stone crushing and felling of trees resulting in deforestation and other environmental degradation near populated areas or near the National Highways.

The case popularly known as Doon Valley Case, was the first case of its kind in the country involving issues relating to environment and ecological balance. The Doon Valley is an area in the Mussoori Hills in which mining had denuded the area of trees and forests cover and accelerated soil erosion resulting in landslides and blockage of underground water which fed many rivers and springs in the river valley. This case brought into sharp focus the conflict between development and conservation and in its deliberations the court emphasised the need for reconciling the two in the larger interest of the country. The Court appointed an expert committee to advise the Bench on the technical issues and on the basis of the report of the committee. As a result, the Court ordered the closure of number of limestone quarries.

The Court was also conscious of the consequences of the order, which rendered workers unemployed after the closure of the limestone quarries

15 *Lafarge Umiam Mining Pvt. Ltd. v. Union of India*, Writ Petition (c) no. 202 of 1995, decided on 6.7.2011.

and caused hardship to the lessees. The Court observed that ‘this would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in a healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment’.¹⁶

The Supreme Court was cautious in its approach when it pointed out that it is for the Government and the nation and not for the Court to decide if the deposits should be exploited at the cost of ecology and environmental considerations or if industrial requirements should be otherwise satisfied.¹⁷ However, the concern of the Court towards ecological balance was evident when it observed:

‘We are not oblivious of the fact that natural resources have got to be tapped for the purposes of the social development but one cannot forget at the same time that tapping of resources have to be done with requisite attention and care so that ecology and environment may not be affected in any serious way, there may not be depletion of water resources and long term planning must be undertaken to keep up the national wealth. It has always to be remembered that these are permanent assets of mankind and are not intended to be exhausted in one generation’.¹⁸

The Supreme Court’s concern for sustainable development is self-evident as the Court also recorded a sounding note that preservation of the environment and keeping the ecological balance unaffected is a task that not only government but also every citizen must undertake.

The Court further took note of the fact that mining activity has to be permitted to the extent that it is necessary for the economic and defence interests of the country and for safeguarding of the foreign exchange position. The Court directed the government to file an affidavit of responsible

16 Ibid., p. 656 (emphasis supplied). For critical analysis of this case see Alice Jacob “Responsible Development And Ecological Balance”, 27 J.I.L.I. 483-486 (1986). See also Nishtha Jaswal, “Comments on Rural Litigation and Entitlement Kendra v. State of U.P. (1986) 4 SCC(Journal) 23-26; M.K. Ramamurthy, “Environment as a Public Interest Cause : The Case of Doon Valley” in J. Bandyopadhyay et al.(ed.) *India’s Environment Crisis And Responses*, 241-44 (1985).

17 R.L. and E. Kendra v. State of U.P., A.I.R. 1987 S.C. 359 at 363.

18 Ibid., at 364 See also Kinkri Devi v. State, A.I.R. 1988 H.P. 4 at 8-9 and General Public of Saproon Valley v. State, A.I.R. 1993 H.P. 52; Mukti Sangarsh Movement v. State of Maharashtra, (1990) Supp. SCC 37.

authority as to whether it is keeping to the principles of ecology¹⁹ .

Regarding environmental protection and safeguards and anti-pollution measures, it is in the interest of the society that economic and defence requirement should be met by import or by tapping other alternative indigenous sources. Also mining activity in the area should be permitted to a limited extent.²⁰ In subsequent cases,²¹ the Supreme Court directed a total halt to the operation of mining in certain areas on the grounds of environment protection.

In one case the Supreme Court allowed a mine, as an exceptional case, to operate until the expiry of the lease on an undertaking by the lessee that afforestation would be done on the same land by the lessee. When it was brought to the notice of the Court that he had made a breach of the undertaking and mining was being done in a most unscientific and uncontrolled manner causing damage to the area and environment, the Court directed the lessee to pay rupees three lacs to the fund of the monitoring committee which had been constituted earlier by the Court to supervise the afforestation programme to be undertaken by the lessee.²² The order of the Court was based on the 'Polluter Pays Principle', which is one of the essential principles of sustainable development.

Similarly, in a public interest litigation it was alleged that unscientific and uncontrolled quarrying of limestone has caused damage to the Shivalik Hills and was imposing danger to the ecology, environment and inhabitants of the area. The Himachal Pradesh High Court relied on the Doon Valley case and pointed out that, if a just balance is not struck between development and environment by proper tapping of natural resources, there will be a violation of Articles 14, 21, 48-A and 51-A(g) of the Constitution. The Court rightly observed that natural resources have got to be tapped for the purpose of social development but the tapping must be done with care so that ecology and environment may not be affected in any serious way. The natural resources are permanent assets of mankind and are not intended to be exhausted in

19 R.L. and E. Kendra v. State of U.P., A.I.R. 1987 S.C. 2426.

20 Ibid., p. 2428. See also *Ambika Quarry Works v. State of Gujarat*, A.I.R. 1987 S.C. 1073 where the court dealt with the question as to "how to strike balance between the need of exploitation of the mineral resources lying hidden in the forests and the preservation of the ecological balance and to arrest the growing environmental deterioration".

21 R.L. and E. Kendra v. State of U.P., A.I.R. 1998 S.C. 2187. See also *R.L. and E. Kendra v. State of U.P.*, A.I.R. 1989 S.C. 594.

22 R.L. and E. Kendra v. State of U.P., A.I.R. 1991 S.C. 2216; (1991) 3 SCC 347.

one generation. If the industrial growth is sought to be achieved by reckless mining resulting in loss of life, loss of property, loss of amenities like the water supply, and creation of ecological imbalance, there may ultimately be no real economic growth and no real prosperity. The Court issued an interim direction to the State Government to set up a Committee to examine the issue of proper granting of mining leases and the necessity of granting leases keeping in view the protection of environment.²³

There are examples in which the Supreme Court took a strong view and did not permit a cement factory to run in the Doon Valley area where mining operations had been stopped. In order to restore the Doon Valley to its original character a direction was given to declare it 'non-industrial' land. However, the government was asked to provide an alternative site for shifting the cement factory of the petitioner²⁴. The courts further have taken a serious view of illegal quarrying and mining, where, in violation of the law, a large number of permits had been granted even though quarrying and lifting sand from the river beds and streams has resulted in reduced percolation of ground water to nearby lands, The Court directed the State Government to take appropriate preventive measures immediately by arresting the illegal operations that were being carried out in the State. The Court further observed that no such permit could be granted if it violates Article 21 of the Constitution of India.²⁵

The judiciary has always tried to balance environment protection on the one hand and development on the other hand. Where a PIL filed before the High Court alleged that blasting and crushing of granite had affected nearby localities, reservoir and lake, the High Court, acting on the report of the expert committee observed that the distance of one kilometre is a safe distance between the site under quarry lease and residential locality. But in order to be safer than expert committee had observed, the High Court increased the distance by another kilometre. The Pollution Control Board also had filed an affidavit stating that if proper safeguards are adopted it will not cause any air, water or noise pollution. Accordingly, the order of the High Court was modified by the Supreme Court, directing that a distance of one kilometre between the site of the quarry and the residential locality issafe

23 *Kinkri Devi v. State*, A.I.R. 1988 H.P. 4.

24 *A.R.C. Cement Ltd. v. State of U.P.*, 1993 Supp. (1) SCC 57. See also 1993 Supp. (1) SCC 426.

25 *Bheemagiri Bhaskar v. Revenue Divisional Officer Bltongir*, A.I.R. 2001 A.P. 492.

enough.²⁶ While accepting the recommendations of the expert body, the Supreme Court restricted mining operation with a direction that within 2.5 km. beyond the boundaries of Narayan Sarovar Wildlife Sanctuary it should not be allowed.²⁷

The Supreme Court has also noted with concern the operation of certain mining industries in blatant violation of environmental laws and directed for their closure.²⁸

Mining in Reserved Forests

Forests constitute a very important part of ecology. Certain areas are declared 'reserve forests' so as to protect the flora and fauna of that area and ensure that no activity should be carried on there which is detrimental to the flora and fauna of the area. Mining activity is one such activity that adversely affects the reserved forest. When any case has been brought before a court regarding the operation of mining in the reserved forest, the Court has always directed it to best opped.

Where a petitioner, through a public interest litigation (PIL), brought to the notice of the Court that the State Government of Rajasthan, though professing to protect the environment by means of the notifications and declarations, was itself permitting the degradation of the environment by authorising mining operations in the area declared a 'reserve forest'. In order to protect the environment and wildlife within the protected area, the Supreme Court issued directions that no mining operation of whatever nature shall be carried on within the protected area.²⁹

In 1980, the Forest (Conservation) Act, came into force, the object of which is to preserve and maintain the ecology of the forests. Under Section 2 of this Act, for any activity in the forest area, prior approval of the Central Government is mandatory. In 1966 a mining lease was granted for extraction of limestone. After twenty years the State Government agreed to renew the lease on the same terms as the original lease. This was done without

26 Mohd. Haroon Ansari v. District Collector, Rangareddy District, A.P., (2004) 1 SCC 491.

27 Consumer Education and Research Society v. Union of India, (2005) 10 SCC 185.

28 See, for example, Goa Foundation (I, II, III, IV & V) v. Union of India, (2005) 10 SCC 559, 560, 561, 563 and 564.

29 Tarun Bharat Sangh v. Union of India, 1992 Supp (2) SCC 448. See also Tarun Bharat Sangh v. Union of India, 1993 Supp (1) SCC 4; Tarun Bharat Sangh v. Union of India, 1993 Supp (3) SCC 115; Tarun Bharat Sangh v. Union of India, 1994 Supp (2) SCC 342; R.K.Ramaswamy v. State of T.N., (2004) 13 SCC 369.

obtaining prior approval of the Central Government.³⁰ Prior to 1980, the authorities had the power to grant the renewal of the mining leases as per the terms of the lease, however after the Forest (Conservation) Act, 1980, the mining lease fell within the reserved forest area and hence, if the authorities were allowed to refused to grant the renewal of the lease. It was held by the Court that the refusal by the authorities was the proper exercise of power by a public authority in fulfilment of its duty.³¹ But in *Golden Granites v. K. V. Shanmugam*³² it was held that for granting of lease for quarrying minor minerals, prior approval of the Central Government is mandatory under the Forest (Conservation) Act, 1980. Therefore, the lease granted by the authority, which is subject to grant of approval of the Central Government, is illegal.

PIL Shave played a significant role in environment protection and in various other areas. For example, a PIL was filed seeking direction from the Court to stop mining activities in the vicinity of touring resorts of Badkal Lake and Suraj Kund in Haryana. The Haryana Pollution Control Board recommended that mining activities within a radius of 5 km from the tourist resorts should be stopped. Similar recommendations were made by the National Environmental Engineering Research Institute (NEERI). Having regard to the opinion of two expert bodies, the Court held that mining activities in the vicinity of tourist resorts were bound to cause severe impact on the local ecology and therefore, mining activities should be stopped within 3 kilometres of such tourist resorts.³³ While dealing with the effects of mining activity in the area of up to 5 km from the Delhi-Haryana border and also in the Aravalli Hills, the Supreme Court has pointed out that mining is hazardous in nature. It impairs the ecology and people's rights to natural resources. The entire process of setting up and functioning of a mining operation requires good intent and honesty on the part of the entrepreneur. The regulatory authorities have to act with the utmost care to ensure that compliance with

30 State of M.P. v. Krishandas Tikaram, 1995 Supp (1) SCC 587. See also State of Bihar v. Banshi Ram Modi, (1985) 3 SCC 643; A.I.R. 1985 S.C. 814; T.N.Godavarman Thirumalpadv. Union of India, (2002) 10 SCC 606.

31 State of A.P. v. Anupama Minerals, 1995 Supp (2) SCC 117. See also Divisional Forest Officer v. S. Nageswaramma, (1996) 6 SCC 442; State of Bihar v. M/s. RMC Dill and Co. (P) Ltd., A.I.R. 1998 Pat. 20.

32 A.I.R. 1998 Mad. 150. See also T.Veerabhadrapav. Ministry of Mines & Steel, New Delhi, A.I.R. 1998 Kant. 412.

33 M.C.Mehta v. Union of India, (1996) 8 SCC 462. See also M.C. Mehta v. Union of India, (1997) 3 SCC 715. See also State of A.P. v.Obulapuram Mining Co. (P) Ltd., (2013) 8 SCC 208, 209, 212 and 213; Samaj Parivartana Samudayav. State of Karnataka, (2013) 8 SCC 154 and 211; Goa Foundation v. Union of India, (2014) 6 SCC 590 and 738.

safeguards, norms and standards by entrepreneurs³⁴. Further, the Supreme Court banned mining activity in Aravalli Hills, especially in that parts that have been regarded as forest areas or are protected under the Environment (Protection) Act, 1986.³⁵

There are instances, where the courts have issued specific directions also. In *Govt. of A.P. v. Obulapuram Mining Co. (P) Ltd.*,³⁶ the Supreme Court directed illegal mining to be stopped. It further directed that the joint team constituted for the purpose, demarcate the entire area, illegally encroached by mining lessees. Whereas, the Supreme Court took note of illegal and uncontrolled/unmonitored mining affecting the environment and observed that a cap be put on annual excavation of iron ore in the State of Goa. The court further directed the constitution of a committee to conduct a macro Environmental Impact Assessment (EIA) study to recommend a ceiling for annual excavation of iron ore from the State of Goa, considering all relevant factors and principles including sustainable development and intergenerational equity.³⁷

Shifting of Stone-Crushers

The stone crushing industry is an important industrial sector in the State. Crushed stone is a raw material used for various construction activities like construction of roads, highways and bridges. These stone crushers, though socio economically an important sector, have given rise to a substantial quantity of fugitive fine dust emissions posing health hazards to the workers as well as to the surrounding population. This dust also adversely affects visibility, reduces growth of vegetation and hampers the aesthetics view of the area. Additionally, environmental pollution is caused by the stone-crushing activities and thus affects the right of the citizens to fresh air and to live in pollution free environment.

34 *M.C. Mehta v. Union of India*, (2004) 12 SCC 118. See also *M.C. Mehta v. Union of India*, (2004) 12 SCC 186.

35 *T.N. Godavarman Thirumulpad (60) v. Union of India*, (2009) 17 SCC 764. See also *T.N. Godavarman Thirumulpad v. Union of India*, (2009) 17 SCC 776; *T.N. Godavarman Thirumulpad (103-B) v. Union of India*, (2009) 17 SCC 169; *T.N. Godavarman Thirumulpad v. Union of India*, (2010) 11 SCC 599, *T.N. Godavarman Thirumulpad v. Union of India*, (2012) 12 SCC 236 and 297.

36 (2011) 12 SCC 493. See also *Deepak Kumar v. State of Haryana*, (2012) 4 SCC 629. In this case the court held that all leases of minor minerals including their renewal for an area of less than five hectares could be granted only after getting EIA (environmental impact assessment) clearance from MoEF.

37 *Goa Foundation v. Union of India*, (2014) 6 SCC 738. See also *Goa Foundation v. Union of India*, (2014) 6 SCC 590.

In *M. C. Mehta v. Union of India*³⁸, the Supreme Court issued directions for stopping mechanical stone-crushing activities in and around Delhi, Faridabad and Ballabhgarh complexes. However, keeping in view the need for sustainable development, directions were also issued for allotment of sites in new crushing zone set up at Palivillage in the State of Haryana.³⁹ The High Court issued directions for closing down the stone crushing business of those that were not situated within the identified zone. The Court further directed that those who wanted to carry on their business of stone-crushing, should shift to the identified zones. One of the most important directions given by the High Court was regarding the claim of compensation for those persons who had suffered due to the pollution caused by stone-crusher owners. The Court directed that stone-crusher owners were liable to pay, within two months, compensation to citizens of the area who had suffered. Failure to do so would result in cancellation of their businesses licences.

Generally the Courts aim to protect the environment and promote sustainable development. Karnataka High Court demonstrated this in a case of unplanned stone crushing activity⁴⁰. Though the stone crushing units held proper licenses and the necessary permissions, they were causing pollution, which was affecting the health of human beings, animals and vegetation. The Court directed the State Government, inter alia, to immediately formulate a policy regulating the carrying on of stone crushing businesses in the State and to identify safer zones. The Court directed that existing crushers be shifted to safer zones within one year and that all other stone crushing units which do not fall in the safer zones should be closed after one year. The most important aspect of this case is that the Court ruled that the citizens of the area, who have suffered due to pollution, are authorised to prefer the claim for compensation. Accordingly, the State was directed to appoint an authority to entertain and adjudicate such claims, if any. The stone crushing units found liable were required to pay within two months and the licenses of such units were to be cancelled in case of default. Another important

38 (1992) 3 SCC 256. See also *Surindra Kumar Singh v. State of Bihar* 1991 Supp (2) SCC 628; *M. C. Mehta v. Union of India*, 1992 Supp (2) SCC 85; *M.C. Mehta v. Union of India*, 1992 Supp (2) SCC 86 and *M.C.Mehta v. Union of India*, (1996) 8 SCC 462, *M.C.Mehta. v. Union of India*, (2004) 12 SCC 118.

39 *Ishwar Singh v. State of Haryana*, A.I.R. 1996 P. & H. 30. See also *Deepak Grih Udyogv. State o Haryana*, A.I.R. 1996 P. & H. 177 where the Court thwarted an abortive attempt on the part of the wealthy section of the society against the closure and shifting of stone-crushing units to the demarcated zones.

40 *ObayyaPujari v. Member Secretary, KSPCB, Bangalore*, A.I.R. 1999 Kant. 157.

aspect of this case is that the fact that units were licensed and held necessary permission did not prevent the court from issuing directions to protect the environment from pollution.

Protection of Forests and Felling of Trees

The history of the exploitation of forests is as old as man himself, but during earlier times it was balanced through a natural growth process due to forest cutting being done only for personal or community use. But with the expansion of agriculture, forest lands have been cleared. More destruction has been done after the industrial revolution and urbanisation. During the colonial period commercial exploitation began and this was the main cause of the depletion of forests. The Supreme Court also has shown its concern for protection and conservation of forests and in different cases issued directions to stop the illegal felling of trees.

In *T.N. Godavarman Thirumulkpad v. Union of India*⁴¹ (popularly known as Forest Conservation case), the Supreme Court issued interim directions that all the on-going activities within any forest in any State throughout the country, without the permission of the Central Government must be stopped forthwith. Running saw mills, including veneer or plywood mills, within the forests was also stopped. Felling of trees in the State of Arunachal Pradesh was totally banned in certain forests whereas, in other forests it was suspended in accordance with the working plan of the State Government. Movement of cut trees and timber from any of the seven North-Eastern States to any other State was completely banned. The Court issued directions to stop felling trees in the State of Jammu & Kashmir, Himachal Pradesh and Tamil Nadu, with a view to protecting and preserving the forests. The Supreme Court modified some of these directions subsequently.⁴² The Court called for a comprehensive statement of all the States about their past activity and their future programme to tackle the problem of degradation and degeneration of forests causing adverse impact on human beings.⁴³

The perception of the Ministry of Environment and Forests was that

41 (1997) 2 SCC 267. See also *T.N. Godavarman Thirumulkpad v. Union of India*, (2000) 6 SCC 413.

42 See *T.N. Godavarman Thirumulkpad v. Union of India*, (1997) 5 SCC 760; *T.N. Godavarman Thirumulkpad v. Union of India*, (1997) 7 SCC 440 and *T.N. Godavarman Thirumulkpad v. Union of India*, (1999) 9 SCC 151, *T.N. Godavarman Thirumulkpad v. Union of India*, (2012) 10 SCC 344.

43 See *T.N. Godavarman Thirumulkpad v. Union of India*, (1997) 10 SCC 775; *T.N. Godavarman Thirumulkpad v. Union of India*, (1998) 2 SCC 341 and *T.N. Godavarman Thirumulkpad v. Union of India*, (2000) 10 SCC 579.

even though the proliferation of wood-based industries has been the main cause of degradation of forests in the North-Eastern States, considering the extent of forests (64 per cent of the geographical area) and dependence of the local people on the forest resources in the region it is neither feasible, nor desirable, to ban completely either the timber trade or running wood based industries. However, their numbers and capacities need to be regulated qua the sustainable availability of forest produce. They were also required to be relocated to specified industrial zones. The Court pointed out that industrial requirements had to be subordinated to the maintenance of environment and ecology as well as to bona fide local needs.⁴⁴

The Supreme Court appreciated the perception of the Ministry of Environment and Forests and issued certain further directions for protection and preservation of the forests.⁴⁵ It was directed that there should be a complete moratorium on the issue of new licenses by the State Governments or any other authority for the establishment of any new wood-based industry for the next five years after which the situation will be reviewed. Principal Chief Conservator of Forests and Chief Forest Officer would prepare an action plan for forest protection. The Court has also stressed the scientific management of the forests. It has directed the State to identify ecologically sensitive areas, which are totally excluded from any kind of exploitation. The minimum extent of such area should be 10 per cent of the total forest area in the State. The State Governments had been directed to identify all those forest divisions where illegal felling had taken place and to initiate disciplinary/criminal proceedings against those found responsible.⁴⁶ The States were required to ensure that sufficient budgetary provisions were made for the preservation of biodiversity and protection of wildlife.⁴⁷

It was brought to the notice of Supreme Court that, under the garb of removing infected trees in accordance with the orders of Supreme Court, trees having no disease were also cut. Thus, the Supreme Court in this case directed the State Government and its functionaries to restrain from cutting any trees till further orders, even if it was found to be diseased trees. The Court took serious note of the State Forest Report of 1997, which indicated

44 T. N. Godavarman *Thirumulkpad v. Union of India*, (1998) 2 SCC 59. See also, T. N. Godavarman *Thirumulkpad v. Union of India*, (1999) 9 SCC 121.

45 *Id.*, at 61-66. See also *Mukesh Ali v. State of Assam*, (2006) 5 SCC 485.

46 See *Environment Awareness Forum v. State of J. & K.*, (1999) 1 SCC 210. See also *Environment Awareness Forum v. State of J. & K.*, (2001) 10 SCC 90.

47 T.N. Godavarman *Thirumulkpad v. Union of India*, (1998) 2 SCC 61-66.

that between 1995 and 1997, dense forest to the extent of 17,777 sq. Km. had been lost to the country. According to the report, the States of Andhra Pradesh, Madhya Pradesh, Assam, Manipur, Nagaland, Orissa and Meghalaya were the main defaulters.⁴⁸

The Supreme Court has noticed on the basis of various reports and affidavits that the deforestation and illicit mining has caused immense damage to the environment and ecology. Accordingly, from time to time, the Supreme Court has been issuing directions to stop illegal felling of the trees and to protect and preserve the forests.⁴⁹ In *Sabia Khan v. State of U.P.*,⁵⁰ the petitioner claimed that directions issued in the Forests Conservation case were not judicial verdicts but were ad-hoc orders. The petitioner further submitted that these orders were violative of the fundamental rights of the citizen under article 19 (1) (g) of the Constitution to operate sawmill. The Supreme Court rejected the contention of the petitioner with costs of Rs. 10,000/- and further held that the petition was an abuse of the process.

In another case⁵¹, the Supreme Court took note of reports of large scale felling of trees in Thatkola Reserve Forest despite its earlier orders prohibiting the cutting of trees. The Court issued directions to the State of Karnataka to furnish information district wise by way of affidavit regarding (i) extent of encroachment in the said reserve forests; (ii) preventive measures taken by the Government and measures to retrieve land encroached upon and (iii) non-forestry use to which encroachers had put the land. Further, the Supreme Court directed the State of Arunachal Pradesh to seal M/s. Neelam Wood Industries with immediate effect as it was involved in transport of illegal timber. The State was also asked to take possession of stock lying in the unit and file the 'Action Taken Report'(ATR) within two weeks.⁵² Another important aspect of this case is that the Supreme Court took notice of the killing of a senior Forest Officer who worked with all the zeal and dedication. The Supreme Court directed the Union of India to pay rupees 5 lakh as compensation to the family and provide permanent employment to the widow keeping in view her academic qualifications, if necessary. It was

48 T.N. Godavarman Thirumulkpad v. Union of India, (1998) 9 SCC 660.

49 See T. N. Godavarman Thirumulkpad v. Union of India, (1998) 6 SCC 190. See also T.N. Godavarman Thirumulkpad v. Union of India, (1998) 9 SCC 672; T. N. Godavarman Thirumulkpad v. Union of India, (1998) 9 SCC 632 and T.N. Godavarman Thirumulkwd v. Union of India, (1999) 9 SCC 216.

50 A.I.R. 1999 S.C. 2284, See also Tata Engineering & Locomotive Co. Ltd. v. State of Bihar, (2000) 5 SCC 346.

51 T.N. Godavarman Thirumulkpad v. Union of India, (2000) 10 SCC 494.

52 T.N. Godavarman Thirumalpad v. Union of India, (2002) 9 SCC 502.

also directed to provide her residential accommodation. Further, the Supreme Court has once again emphasized the principle of sustainable development. The court held that the Forest Policy, 1998, which has a statutory flavour, dictates that deprivation of economic benefit must be subordinated to ensuring environmental stability and maintenance of ecological balance. Non-fulfilment of this principle would be violative of Articles 14 and 21 of the Constitution.⁵³ The point at issue in this case was whether before diversion of forest land for non-forest purposes and consequential loss of benefits accruing from the forests, should not the user agency of such land be required to compensate for the diversion? Answering affirmatively, the Court suggested levying an appropriate 'Net Present Value' (NPV) of such diverted forest land. The NPV is a method by which future expenditures (costs) and benefits are weighed in order to account for the time-value of money. The object behind NPV is to level costs. The court further directed that whatever the NPV to be charged as determined by the expert committee in terms of this judgment, the amount shall be updated every three years. The court also took note of the role of the Central Empowered Committee (CEC) and the Compensatory Afforestation Fund Management and Planning Authority (CAMPA) constituted by the Ministry of Environment and Forests in exercise of the powers conferred by Section 3(3) of the Environment (Protection) Act, 1986. The judiciary has made tremendous efforts to secure the human rights of the individuals in this regard and walked a long way through different dimension of interpretation of various legislations, international documents and government notifications to ensure its effectiveness. The courts have always tried to strike a balance between development and environment protection. Sustainable development has always been reflected in a variety of decisions but never given priority over human rights concerns in terms of environment degradation causing adverse impact on the right to life.

There are many cases in which it is visible, such as the mining company that was permitted to carry on the operation of mines in the forest area, national parks and sanctuaries, subject to deposit of Rs. 50 crores towards NPV with CEC and an undertaking to deposit the remaining amount of NPV when determined. In this case the Court also permitted the Railways to

53 T.N. Godavarman Thirumalpad (87) v. Union of India, (2006) 1 SCO. See also T.N. Godavarman Thirumalpad (86) v. Union of India, (2006) 5 SCC 25. In this case power company was permitted to lay transmission line through the national park subject to the deposit of Rs. 1 crore in Compensatory Afforestation Fund. The company was further directed to pay additional NPV for the use of forest land as and when determined by the Supreme Court.

use about 13 hectares of forest land in a national sanctuary subject to deposit of such amount of NPV which may be directed. An undertaking was given to deposit Rs. 7.57 crores in this case.⁵⁴ In another, a case of in which the petitioner claimed that restrictions imposed on him running a saw-mill and cutting and converting timber and wood from green trees was unreasonable. The Allahabad High Court, held that this activity resulted in disturbance of the ecological balance and therefore the restriction is reasonable and the rights of the petitioner were not infringed.⁵⁵ Similarly, the Court held that no felling of any type should be permitted in the forest area falling inside national parks and sanctuaries and natural forest falling outside the national parks and sanctuaries.⁵⁶

From time to time the Supreme Court has considered various issues involving the use of forest land for non forest purposes. For example, in *Goa Foundation v. Union of India*⁵⁷, the applicant sought permission for conversion of forest land for factory use. The matter was referred to Ministry of Environment & Forest for consideration and subject to payment of NPV and fulfilment of other conditions. The court has permitted eco-friendly viable projects in eco-fragile area. For example, the court permitted an aerial

54 T.N. Godavarman Thirumalpad (91) v. Union of India, (2006) 5 SCC 23. See also T.N. Godavarman Thirumalpad (80) v. Union of India, (2006) 5 SCC 45; T.N. Godavarman Thirumalpad (100) v. Union of India, (2006) 5 SCC 57, T.N. Godavarman Thirumalpad (101) v. Union of India, (2006) 5 SCC 59; T.N. Godavarman Thirumalpad(98) v. Union of India, (2006) 5 SCC 28; T.N. Godavarman Thirumalpad (86-A)v. Union of India, (2006) 10 SCC 480; T.N. Godavarman Thirumalpad (88) v. Union of India, (2006), 10 SCC 482, T.N. Godavarman Thirumalpad (89) v. Union of India, (2006) 10 SCC 486; T.N. Godavarman Thirumalpad (90) v. Union of India, (2006) 10 SCC 490; T.N. Godavarman Thirumalpad(92) v. Union of India, (2006) 10 SCC 49; T.N. Godavarman Thirumalpad(104) v. Union of India, (2008) 7 SCC 126; T.N. Godavarman Thirumalpad(105)v. Union of India, (2008) 7 SCC 133.

55 *Baleshwar Singh v. State of U.P.*, A.I.R. 1999 All. 84., T.N. Godavarman Thirumalpad (49) v. Union of India, (2009) 17 SCC 772. Where the sawmills and wood-based industries were not permitted to cut trees but the court held that opportunity should be given to these sawmills and industries to utilize their existing stock of logs of wood and sawn timber for which payment had been made to Government. See also T.N. Godavarman Thirumalpad v. Union of India, (2009) 17 SCC 534; T.N. Godavarman Thirumalpad (29) v. Union of India, (2009) 16 SCC 593; T.N. Godavarman Thirumalpad v. Union of India, (2010) 6 SCC 710.

56 T.N. Godavarman Thirumalpad (93) v. Union of India, (2009) 17 SCC 178.

57 (2009) 17 SCC 654. See also T.N. Godavarman Thirumalpad v. Union of India, (2010) 12 SCC 65; T.N. Godavarman Thirumalpad v. Union of India, (2009) 17 SCC 776; T.N. Godavarman Thirumalpad v .Union of India, (2010) 12 SCC 65.T.N. Godavarman Thirumalpad v .Union of India, (2009) 16 SCC 760; T.N. Godavarman Thirumalpad (82) v. Union of India, (2009) 17 SCC 521; T.N. Godavarman Thirumalpad v. Union of India, (2009) 17 SCC 376.T.N. Godavarman Thirumalpad (69) v. Union of India, (2009) 17 SCC 577; T.N. Godavarman Thirumalpad v. Union of India, (2009) 16 SCC 717; T.N. Godavarman Thirumalpad v. Union of India, (2009) 16 SCC 755; T.N. Godavarman Thirumalpad v. Union of India, (2009) 16 SCC 760; T.N. Godavarman Thirumalpad v. Union of India, (2010) 6 SCC 747.

ropeway transportation from Tirupati to Tirumala being an eco-friendly mode of transportation involving a noiseless, pollution free, efficient, time-saving and novel way of transporting pilgrims to the Holy Shrine in the eco-fragile area. This however was subject to deposition of 5 per cent of project cost and net present value (NPV) of forest land diverted for the project in the Compensatory Afforestation Fund.⁵⁸

Epilogue

In recent years the relationship between human rights and environment issues has become a subject of vigorous debate. Environment degradation and human rights was first placed on the international agenda in 1972, at the UN Conference on the Human Environment. Principle 1 of the Stockholm Declaration on the Human Environment establishes a foundation for linking human rights and environmental protection, declaring that man has a 'fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'

Natural resources are those components of the environment that are inherently created for supporting life. These resources are essential for sustaining life on earth. Natural resources relatively undisturbed by mankind, in a natural form, exist naturally within environments in the atmosphere, lithosphere, biosphere and hydrosphere. A natural resource is often characterized by amounts of biodiversity existent in various ecosystems.

Clean environment is necessary for healthy life, proper use of the natural resources helps to protect the environment. The constitutional perspective of dignified life can only be enjoyed within a healthy environment. The exploitation of natural resources is posing a great threat to existence and human survival in future. Sustainable development is the process by which we can keep a balance between development and protection of natural resource. The judicial interpretations, in this regard, are the epitome of hope for future generation.

The role of National Green Tribunal (NGT) is pivotal as it has always strengthened the judicial interpretation through similar opinion in its decisions and orders on all dimensions as discussed above.

⁵⁸ T. N. Godavarman Thirumalpad (69) v. Union of India, (2010) 17 SCC 577.

Thus from the perusal of the above-mentioned judicial interpretations it is evident that judicial activism has led to the development of a new “environmental human rights jurisprudence” in India. But still a lot more is to be achieved, which is possible but only with mutual cooperation and coordination.

V – Criminal Justice System

Restorative Justice Indicators, Criminal Justice and Human Rights

*B.B. Pande**

Abstract

In the later half of the last century 'restorative justice' ideas and practices emerged as an alternative to the formal criminal justice system. By the late 1970 in countries in Europe, the United States, Australia and parts of Canada, both civil law and common law victim offender reconciliation programmes were already in place. In India, the idea of restorative justice gained acceptance rather slowly. A few explicit measures like 'Plea Bargaining' and 'Compounding' and many more implicit measures that appeal to justice rather than legalism, focus on the victims of wrongdoing rather than the wrong and accord primacy to restoration of disequilibrium by award of compensation rather than punishment. Restorative justice ideas also gained recognition as human rights by virtue of reconciliation of conflicts by several off beat and humane solutions. However, despite all these positive and pro restorative justice developments, the real breakthrough would require a conscious and express legislative decision to deploy restorative justice procedures in respect of certain categories of wrongdoings/offences. The decision to apply restorative justice procedures may be based on central legislation that may be operated by state agencies or jointly by state and civil society agencies. Obviously, the restorative justice procedures will be greatly facilitated by voluntary initiatives coming particularly from students and youth.

Primarily, the Criminal Justice System (CJS) is designed to provide an appropriate response to every kind of harm-doing perpetrated by a 'criminal' against a 'victim', but the public discourse on harm-doing is often dominated by harms of a serious nature, such as murder, rape, dacoity and robbery, that draw greater media, Governmental and societal attention. Such a slant in the dominant discourse tends to ignore the many other non-heinous forms of crimes and diverse possible ways of responding to them in day-

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to-day justice administration. Furthermore, even in respect to the serious crimes, the operations of the CJS leaves much to be desired, because the CJS often gets associated with long delays, skewed crime processing, in favour of the resourceful and privileged, and an irrational and erratic punishment system. All this has been responsible for generating a constant sense of disillusionment and disappointment against the CJS the world over. As a sequel, the institutional response has been two pronged, the first, aims to address the functional shortcomings of the agencies of the CJS and the second, looks for appropriate alternative to the CJS itself.

I. What is ‘Restorative Justice’?

In the latter half of the last century the idea of ‘restorative justice’ emerged as an alternative to the traditional CJS. The restorative justice idea is premised on a thinking that every wrongdoing or crime incident creates a state of disequilibrium in the social harmony that tends to disturb the balance of interest not only between the victim and the wrongdoer but society as a whole. The resultant imbalance needs to be restored to ensure order and peace in the society. The task of restoring balance is secured best by bringing the victim and the wrongdoer face to face to sort out matters between themselves, in a reconciliatory frame, without caring much for the requirements of legalism and the formal punishment. Commenting upon the growing acceptance of the idea of restorative justice in Europe and America in the 1970s David Miers observes:

Providing opportunities for certain victims of crime and their offenders to meet face to face to talk about the crime, to express their concerns, and to work out a restitution plan is now occurring in a growing number of communities in North America and Europe. In the late 1970s, there were only a handful of victim offender reconciliation programs. Today, there are more than 1000 programs throughout North America (N=315) and Europe (N=712). While many victim offender mediation programs continue to be administered by joint community based agencies, an increasing number of probation departments are developing programs, usually in conjunction with trained community, volunteers who serve as mediators. Victim service agencies are beginning to sponsor victim offender medication programs as well. Many thousands of primarily property related offences and minor

assaults, involving both juveniles and adults, have been mediated during the past two decades since (the early 1970s)... Some victim offender mediation programs continue to receive only a relatively small number of case referrals. Many others consistently receive several hundred referrals a year. Some of the more developed programs receive more than a thousand referrals a year.¹

Thus, restorative justice had already made a place for itself, both in civil law countries and in the common law countries of the Europe, the United States, Australia and parts of Canada. However, across the country jurisdictions the concept of restorative justice differs in its meaning and scope. As described by Miller and Blackler, the phrase ‘restorative justice’ is used to refer to an extraordinarily wide and diverse range of formal and informal interventions including:

1. Victim/offender conferences in criminal justice context
2. Disciplinary problem solving policy initiatives in disputes between citizens
3. Conflict resolution workshops in organizational context
4. Team building sessions in occupational settings
5. Marital advice and counselling services
6. Parental guidance and admonishment of their misbehaving children.
7. Apologizing for offensive or otherwise hurtful remarks in institutional and other settings ².

As these uses illustrate, one can approach restorative justice from a variety of standpoints: First, it may be conceived from the victim - offender standpoint; second, it may be conceived from the standpoint of the problem on hand or the conflict to be resolved; third, it may be conceived from the standpoint of the conflict-resolving agency; fourth, it may be conceived from the standpoint of the process that may be deployed; and finally, it may be conceived from the standpoint of the outcome of the exercise itself.

1 An International Review of Restorative Justice, Crime Reduction Research Series 10, Home Office, London, 2001, pp. 5-6.

2 S. Miller and J. Blackler, “Restorative Justice : Retribution, Confession and Shame”, *Restorative Justice: Philosophy to Practice*, H. Strong and J. Braithwaite (eds.), 2000, p. 77.

II. Explicit Restorative Justice Measures

Traditional CJSs follow an adversarial nature of proceedings, apply formal processes and culminate in the verdict of guilt. All these leave very little room for the application of restorative justice. However, situations arise when the formal CJS gives way to the operation of restorative justice ideas on grounds of moral, ethical or social considerations. Such resort to restorative justice may be on a permanent basis or merely as a temporary measure. Furthermore, withholding the formal system may be the outcome of a duly considered legislative measure, or flow from a mere administrative order. The best example of a legislatively sanctioned resort to restorative justice can be found in the famous South African legal measure, namely, The Promotion of National Unity and Reconciliation Act 35 of 1995 (hereinafter the Reconciliation Act).

The Reconciliation Act in terms of Section 20(7) (a) provided blanket immunity for all the acts, omissions or offences with these words, “No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organization or the state shall be liable, and no person shall be vicariously liable for any such act, omission or offence.” Similarly Sections 20(8), 20(9) and 20(10) extended immunity even in cases in which a person is charged, convicted and awaiting passing of sentence or from any kind of civil liability or in respect of expunction proceedings.

The actual operation of the Reconciliation Act is in three phases. In the first phase, the perpetrator of the offence/wrongful act or omission is required to make a truthful and unambiguous confession of the facts and seek forgiveness. In the second phase, the victim is required to extend pardon, and finally, in the third phase, the Amnesty Committee grants amnesty by passing an appropriate order. The expectation that South Africa society had of the formal criminal justice, that every wrongful act/omission or offence ought to be tried and duly punished, led to a constitutional challenge to the Reconciliation Act in the Azanian Peoples Organization (AZAPO) and ors. v. President of the Republic of South Africa and ors.³

The matter was heard by the Constitutional Court of South Africa. They considered whether a comprehensive amnesty manifestly involved inequality of sacrifice between the victims and the perpetrators or infringement of the

3 1996, ZACC 16, 1996 (8) BCLR1015; 1996 (4) SA672 (hereinafter AZAPO Case).

fundamental rights of such victims and their families. Or, whether the course of comprehensive amnesty would enable the country the real prospects of enjoying, in future, some of the human rights denied to the generations that preceded them. The Majority decision of Mahomed DP (concurring by the eight fellow judges) was that ‘the epilogue to the Constitution authorized and contemplated an “amnesty” in its most comprehensive and generous meaning so as to enhance and optimize the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future’. This, way the AZAPO case stands out as an example of a strong legitimization to the ideas of restorative justice within the South African justice system.

In India too, restorative justice ideas have been recognized in the newly introduced Plea Bargaining measure, which enables the accused, involved in a case punishable with less than seven years imprisonment, not being an offence affecting socio economic condition and not an offence against women or a child below 14 years, to make an application for Plea Bargaining under Section 265B of the Cr.P.C., any time after the police have forwarded their report under Section 173 or the Magistrate has taken cognizance on a complaint and issued process under Section 204 (as amended by Act-2 of 2006). A valid Plea Bargaining application can be made before the Court in which the case is pending for trial and will entitle the Public Prosecutor, the complainant and the accused to work out a mutually satisfactory disposition of the case, which may include giving to the victim compensation and other expenses during the case and thereafter (under Section 265 B(4) (a)). The Court receiving the voluntary Plea Bargaining application shall be obligated to provide time to the parties to come together for mutually satisfactory disposition. The guidelines for mutually satisfactory disposition provide that the Court will issue notice to the Public Prosecutor, the investigating Police officer, the accused and the victim to participate in a meeting to work out a satisfactory disposition of the case. The Court has a duty to let the parties act voluntarily without any influence; only the report of the mutually satisfactory disposition is to be submitted before the Court for the final disposal of the case. This way Plea Bargaining provides recognition to a real possibility of deviating from the formal course of a criminal trial in the traditional sense.

Like Plea Bargaining, the ‘Compounding of Offences’ measure also creates space for the parties to a crime to secure justice outside the formal system. Section 320 of the Cr. P.C. provides for the categories of compoundable offence, namely, those that are compoundable under clause

(1) by the concerned parties and those that are compoundable under clause (2), by the concerned parties with the permission of the Court. Under clause (1) as many as 39 kinds of offences are made compoundable; similarly under clause (2) as many as 13 kinds of offences are compoundable. Furthermore, to give a wider sweep to the measure, clause (3) provides that abetment and an attempt to commit compoundable category of offences are also compoundable. Similarly clause (4) (a) and (b) permit the compounding by the guardian or legal representative of the party below 18 or already dead, with the permission of the Court. The current legislative trend of expanding the scope of the compoundable offences, by including new categories of bodily and property offences in the Table 1 and Table 2, is an indicator that the policy of the law is to let the parties settle the matters between themselves, rather than face formal trial.

In addition to Plea Bargaining and Compounding measure that accord recognition to restorative justice ideas, mediation and settlement of disputes measure provided in the Legal Services Authorities Act, 1987 also opens up possibilities for deploying restorative justice ideas. In the resolution of disputes, Section 20(4) provides that Lok Adalats are constituted to 'arrive at a compromise or settlement'. As per the 1994 amendment, such a compromise is treated as final and no appeal could lie to any court against the award (this has been reiterated by section 22E of the 2002 amendment to the Act). The amended provision gives to the Lok Adalat jurisdiction over petty matters to 'any matter'. The creation and conferment of a wide jurisdiction to the Lok Adalat was an exigent measure with a view to reducing the pendency of cases, but has also played a significant role in introducing restorative justice ideas in the formal justice system.

Furthermore, restorative justice ideas may be introduced in the formal system even without any kind of legislative incorporation. This may arise in the cases of informal initiatives by the lower or the appellate judiciary favouring out of court settlement or resolution of disputes through compounding of cases. In the late 1990s, the Delhi Magistracy under the initiatives of the chief Metropolitan Magistrate of the Tis Hazari Courts had worked out a compounding of cases project that settled with the help of student volunteers over 900 cases, some of which had been pending for over ten years in the lower courts. The Chief Metropolitan Magistrate had been inspired to take up the project mainly because of an activist Delhi High Court ruling that had desired that in view of the growing pendency in the lower courts, the lower courts should make efforts to settle cases informally.

III. Implicit Restorative Justice Measures

The formal CJS, apart from the explicit/express transformation, is constantly subjected to implicit transformations brought about by the regularly undertaken legislative and judicial changes, that may be described as those that fall short of qualifying as explicit transformations, but such transformation tacitly endorse one or the other restorative justice element. For example, the appeal to a different and higher ideal of justice, rather than sheer legalism, may not be good enough to alter the system, but it does succeed in transforming the system incidentally. Similarly, the wide range of legislative changes brought about to alter the status of victim may not as such transform the formal system, but it does pave the way for restorative justice in the long run. Furthermore, the implicit transformations may emanate more from judiciary rather than the legislature, because it is the judiciary that ultimately fine-tunes the justice component in dispute resolution. Though implicit transformation may assume diverse forms and characters, we shall presently focus on the three, namely:

- (a) Appeal to 'Justice' rather than legalism
- (b) Focus on the victim of the wrongdoing
- (c) Primacy to restoration of disequilibrium by compensation rather than punitive sanctions.

Appeal to 'Justice' rather than Legalism

'Justice' in the formal CJS has more or less a technical connotation, which means justice as per formal law. Thus, more often mere compliance with the rule is treated as sufficient evidence of justice in terms of the law. However, such a narrow and technical view may elude the broader and ideal sense of justice that tends to vary from situation to situation. The broader and ideal sense of justice may mean: First, the ability of the legal resolution to stand to higher values; second, a sense of fairness that the legal resolution may evoke, and third, a personal sense of satisfaction derived by the parties, both the wronged and the wrongdoer that they have received their due. While the first and second relate to ideas of justice that depends upon external factors, the third idea of justice is premised on the personal or internal feelings of the parties. Commenting on the experience of the parties involved in mediation

experience, Tony Peters and Ivo Aertsen⁴ have observed: “Parties involved in mediation experience a different type of ‘justice’ and get the feeling that they themselves are creating justice instead of passively undergoing ‘justice’.” Commenting in the same vein the authors further observe, “For the victim it is of great importance to express emotions, rage and to comment on the effects which include fear, insecurity and shame. From the offenders side, it is first important to accept to listen to the victim to show that he is prepared to bear responsibility and to show willingness to collaborate in a reparative approach”.⁵

The notion of ‘justice’ as appeal to higher values or fairness is dependent upon developing an alternative way of thinking about justice that is essentially related to broadening the horizons to the idea of justice itself. The alternative way of thinking includes resort to alternative processes and outcomes as well. An excellent example can be found in a Delhi High Court decision of 2007 *Ram Lakhanv. State*⁶, which had disagreed with the Metropolitan Magistrate and Additional Session Judges finding that the petitioner was a “beggar” under Section 5(5) of the Bombay Prevention of Begging Act, 1959 (as extended to the Union Territory of Delhi) and also the duration of detention as punishment. Justice Buder Durrez Ahmed found more than one reason for refusing to accept the otherwise technically correct findings as follows:

(i) Need for a humane language

Ordinarily, the positive law is appreciated and expressed in the commonly used language, which may at times reflect a negative mind-set of the concerned official. In the present case, the Metropolitan Magistrate had in his judgment used the following language: “The accused was found begging by raising his front paws before passersby”. Justice Ahmed, in the context of the language used by the Magistrate has observed: “To describe their hands as, “front paws,” is nothing short of contempt for them. Beggars are not beasts with claws! They are human beings and they should be treated as such”⁷.

(ii) Need for a purposive understanding of the social legislations

4 Tony Peters, et al. *Restorative Justice: In Search of New Avenues in Judicial Dealing with Crime*, A Project Presentation of Mediation for Reparation, The European Forum for Victim-offender Mediation and Restorative Justice, Luven Univ. Press, 2000, pp. I. 311 - I. 342.

5 *Ibid*, p. I 336.

6 137 (2007) *Delhi Law Times* 173 (hereinafter *Ram Lakhan*)

7 *Ibid*, p. 176.

Social legislations such as the Prevention of Begging Act need to be creatively understood by going into the reasons of begging, rather than merely satisfying the enquiry as to whether there was solicitation and receiving of alms in terms of Section 5(1) of the Act. Once the enquiry is shifted to reasons, the act of solicitation or receiving alms can fall in one of the four categories, namely: First, who is downright lazy or a person who is not interested to work. Second, that of an alcoholic or a drug addict in search for the next drink or dose. Third, that of a person at the mercy of exploitative ring leader of a beggary gang. Four, that of a person who is starving, or helpless. In this context Justice Ahmed observes: “Although apparently, the said Act does not distinguish between the four different kinds of ‘beggars’ mentioned above. In my view, there is enough scope in the provisions of the said Act to treat them differently, as indeed, they should be”.⁸ Speaking in the context of the aforesaid fourth category, the Court observed as follows:

“They are persons who are driven to look for alms or food as they are starving as their families are in hunger they beg to survive, to remain alive. For only civilized society to have persons belonging to this category is a disgrace and a failure of the state. To subject them to further ignominy and deprivation by ordering their detention in a Certified Institution is nothing short of de-humanizing them”⁹.

This way the Court went far beyond the ordinary legal understanding of the concerned social legislation by giving to it a purposive and creative interpretation that unfolded new dimensions of justice in respect to a given fact situation.

(iii) Need for the Court to assume a social activist role

The traditional neutral role of the Courts, premised on the adversarial context is required to undergo a change in the interpretation of social legislations. This is particularly relevant in the light of the fact that the target population of social legislations happens to be poor and without resources and thus in need of legal assistance and support. In the Ram Lakhani case, the Court built the foundations of activism in their view of the objective of the law as follows:

“The duty is, therefore, cast upon the Courts to satisfy themselves that the accused did not have a defence of necessity as prevention

8 Ibid, pp. 177-178.

9 Ibid, p. 178.

of begging is the objective of the said Act. But, one must realize that embedded in this object are the twin goals” - Nobody should beg and nobody should have to beg’.

Thus, the Court in Ram Lakhan, has not only invented a socially relevant and justice oriented meaning for a usually unexciting and dry piece of social legislation such the Prevention of Begging Act, but opened up ways for a new and creative role for the judiciary in handling it.

Focus on the Victim of Wrongdoing

The formal CJS is known to be largely accused-centric, in the sense that it is first over obsessed by the powers of the executive and the judiciary in controlling the accused; and second, by providing statutory and constitutional protections to the accused against possible excesses is the exercise of the regulatory powers. In comparison the scheme of the formal CJS, the victims of wrongdoing are more or less relegated to the margins. It is paradoxical that the CJS assumes powers to control the accused on behalf of the victim, but in the process the victim himself is virtually pushed out of the system, he neither has a say nor is assigned any role in the system. Restorative Justice aims to reverse this unhappy situation by trying to re-locate the victim in the scheme of justice.

Re-locating victims in the justice system is largely dependent upon a proper and comprehensive conceptualization of the victim. In this respect the U.N. Declaration for Justice to the Victims of Crime and Victims of Abuse of Power, 1985 is the most useful guide. The U.N. Declaration had clearly recognized two distinct categories of victims, namely: (a) Victims of Crime, and (b) Victims of Abuse of Power. Victims of crime relate to the bulk of victims who may be subjected to various bodily crimes and property crimes.. This may include gender victims, child victims, caste victim and racial victims. However, in addition to the above there are the victims of abuse of power.

The Indian Supreme Court has already carved out a constitutional right to compensation for violation of the victim’s rights in the course of abusive exercise of executive power in Rudul Sahv. State of Bihar¹⁰, Nilabati Beharav. State of Orissa¹¹. The appropriate conceptualization of victims

10 (1983) 4SCC 141.

11 (1993) 2SCC 746.

has been further recognized by the measure of statutorily defining victims for the purpose of giving legal status to their entitlement and compensatory remedies. For example, under the Section 2(Wa) of the Cr. P.C. (as amended in 2009) a 'Victim' has been defined as 'a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir'. The restrictive definition of 'victim' under Section 2(Wa) has been given an expansion by Section 357A(4) which expressly states 'where the offender is not traced or identified, but the victim is identified and where no trial takes place, the victim or his dependents can make an application to the State or the District Legal Service Authority for award of compensation.'

Once the concept of 'victim' is established the next enquiry relates to the identification of range and nature of his needs and entitlements. The U.N. Declaration had identified four major entitlements or needs of the victim, namely:

- (i) Access to justice and fair treatment: This includes access to the mechanisms of justice and prompt redress, right to be informed of the victim's rights, right to proper assistance throughout the legal process and right to protection of privacy and safety.
- (ii) Restitution: This includes return of property or payment for the harm or loss suffered; where public official or other agents have violated criminal laws, the victim should receive restitution from the state.
- (iii) Compensation: When compensation is not fully available from the offender or which result in bodily injury, for which national funds should be established.
- (iv) Assistance: Victim should receive the necessary material, medical, psychological and social assistance through governmental, voluntary or community based means. Police, justice, health and social service personal should receive training in this regard.

In India too, efforts are underway to address victims' needs. However the need for 'access to justice' and the 'compensatory justice' seem to have been afforded greater attention. The 'access to justice' need is carried into effect by several measures; first, a victim's right to inform and report

crime. In sync with clause 4 of the U.N. Declaration, which requires that victim of crime should have adequate opportunity to bring their grievances before the state machinery, under Section 154 Cr. P.C. elaborate provision for bringing information relating to cognizable offences before the police and an obligation on the part of the police officers to register an F.I.R. is provided. This provision has been interpreted by a five judge bench of the Supreme Court namely *Lalita Kumari v. State* as creating a mandatory obligation on the part of the police to register an F.I.R.¹² The victim's right to render information and report crime, has been further fortified by a legislative amendment under Section 166A(c) of the Penal Code that makes non-recording of a F.I.R. in respect of select sexual offences in terms of the Criminal Law (Amendment) Act, 2013. The *Lalita Kumari* ruling and the legislative amendment under Section 166A(c) go a long way towards strengthening the victim's right to report crime. Secondly, a victim's right to counsel and to have legal representation; In the pre-2009 period, the Central or the State Governments were conferred powers under Section 24 of the Cr.P.C. to appoint a Public Prosecutor/Additional Public Prosecutor or represent in a criminal case, but the victim was given no say in the matter. In the wake of a growing demand for access to justice for the victim the Criminal Procedure (Amendment) Act, 2009, for the first time, introduced the victim's right to counsel, in Section 24(8) Proviso, which reads: 'Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub section'. Similarly, under Section 301(2) a victim's counsel shall have a right with the permission of the Court, to submit written arguments after the evidence is closed in the case. These two provisions recognize the victim as an independent and competent party in matters of right to legal representation.

However, there remain gaps in providing access to justice to the victim, because of lack of victim representation at the bail proceedings stage and denial of legal-aid benefits in criminal proceedings to the victim. Why can a victim not be treated as an indigent party for the purpose of legal aid at state expense? Further, the victim's right to appeal under Section 372 Proviso; The Code of Criminal Procedure subjects all the rights to appeal strictly to the provisions of the Code, but the Proviso states "the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or for convicting for a lesser offence or imposing inadequate compensation,

¹² *Lalita Kumari v. State* (2014) 2SCC 1.

and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court”.

In order to ensure better access to justice to the victim, it may be useful to keep in mind the following measures:

- a) Legislate to entitle victims with information about release, bail or remand of the offenders and progress of their cases.
- b) Enable victims to submit a “victim personal statement” to the Courts and other Criminal justice agencies setting out the effect of the crime on their lives.
- c) Establish a victim’s Commissioner (Ombudsman).
- d) Enable victims to report minor crimes on line and track the progress of their case on line.

The Indian criminal justice system, both at the legislative level and judicial decision level, has taken significant steps in the direction of compensation to the victims for their injuries and losses. Section 357A (introduced by the Amendment Act, 2009) envisages a complete victim compensation scheme, that provide for a State Compensation Fund (S. 357A(1)), procedure for compensation (S. 357 A (2) and (3)), compensation procedures, even in cases of untraced and unidentified accused (S. 357A(4) and (5)) etc. In order to keep the compensation amount intact the legislature has by introducing Section 357B clearly laid down, that compensation payable under Section 357A Shall be in addition to any fine imposed under Section 326A or 376D of the Penal Code. Obviously the “fine” referred to here would include fine payable under Section 357(1) (b) and (c) as well. The amended law has created sufficient basis for taking care of the compensatory need, in addition to the constitutional compensatory remedy created by the judicial decisions such as Rudul Sah (1983 S.C.) and Nilabati Behera(1993 S.C.).

Primacy to Restoration of Disequilibrium rather than Punitive Sanction

In the early 1990s, John Braithwaite wrote a path-breaking book concerning punishment, ‘Crime, Shame and Reintegration’¹³. The main thesis of the book is that all modern forms of punishments are stigmatizing

13 John Braithwaite, *Crime, Shame & Integration*, Cambridge University Press, Cambridge, 1989.

in nature, which leads the punished accused to be disintegrated from society. Therefore, if the nature of punishment undergoes a change, so that it leads the accused to be better integrated then the results are likely to be more desirable. According to Braithwaite, in communitarian societies punishment is replaced by 're-integrative shaming,' which takes a better care of the disequilibrium created by criminal conduct. The 're-integrative shaming' objective can be achieved equally by the wrongdoer either displaying expiation, or atoning or making good the loss or harm suffered by the victim. In the modern context making the wrongdoer pay compensation to the victim is considered the best way of atonement. The Indian judiciary is much more inclined to fall back on compensation rather than to insist on imprisonment as a form of punishment. In *Ankush Shivaji Gaikwad Vs. State*¹⁴ The Supreme Court, speaking through Justice. T.S. Thakur (Justice Gyansudha Mishra concurring), observed:

“The provisions dealing with compensation to the victims of crime confer a power coupled with a duty on the Courts to apply the mind to the question of awarding compensation in every criminal case. The Trial Judge must record his reasons for awarding/ refusing compensation. The grant of compensation to the victim of a crime is equally a part of first sentencing”¹⁵.

The changing judicial approach of preference for compensation was reflected in *S. Mahaboob Basha vs. State*¹⁶, where for an offence under Section 498A the Trial Court awarded one years imprisonment and a compensation of Rupees 3000/-, The High Court reduced the sentence to, six months and enhanced the compensation sum to Rupees 10,000/- The Supreme Court reduced the sentence to already undergone, period of one month, but enhanced the compensation amount to Rupees 2,00,000/-. The compensation amount was to be paid to the victim, the first wife who had been treated cruelly. The same concern for compensation to a victim was witnessed in two public interest petitions preferred on behalf of acid attack victim recently. In the first writ petition, *Laxmi v. Union of India and Ors*,¹⁷ multiple prayers relating to the social menace were proffered before the Supreme Court. From 2011 to 2015, The Court passed several orders,

14 (2013) 6 SCC 770.

15 Ibid, p. 797.

16 (2014) 10 SCC 244.

17 (2016) 3 SCC 669.

to finally dispose the petition in 2016. Since the petition was filed in 2006 the law relating to crime of acid attack and compensation has undergone substantial changes. Supreme Court Order IV has taken note of the gross variation in the range of monetary compensation for acid attack from as low as Rs. 25,000/- in the State of Bihar. Therefore, the Court laid down that at least Rs. 3 lakh compensation should be paid in every case of acid attack. In their final Order the Court laid down that:

“Therefore in case of any compensation claim made by any acid attack victim, the matter would be taken up by the District Legal Service Authority, and will include the District Judge and such other co-opted persons who the District judge feels will be of assistance, particularly the District Magistrate, the Superintendent of Police and the Civil Surgeon or the Chief Medical Officer of that District or their nominee. This body will function as the Criminal Injuries Compensation Board for all purposes’.¹⁸

The Laxmi ruling appeared to be totally inappropriate in the context of actual expenses incurred by the victim that was highlighted through another public interest petition in *Parivartan Kendra v. Union of India*.¹⁹ The petition highlighted the plight of two Dalit girls of Bihar who were attacked by acid at mid-night. The elder sister received 28 per cent burn injuries in her body and 90 per cent in her face and required extensive medical attention. The younger sister received injuries that required medical attention too. The parents of the girls spent around five lakh rupees on their medical treatment. The Court, speaking through Justice M. Yusuf Eqbal (Justice Chokalingam Nagappan concurring), found rupees three lakh limit laid down in Laxmi as too low, holding that:

“We are of the opinion that the victim (Chanchal) should be compensated to a tune of at least Rs. 10 lakhs. Suffice it to say that the compensation must not only be awarded in terms of physical injuries, we have also to take note of the victims inability to lead a full life and to enjoy those amenities which is being robbed of her as a result of the acid attack’²⁰.

IV. Projecting Restorative Justice Indicators as Human Right

18 Ibid, p. 679.

19 (2016) 3 SCC 571.

20 Ibid, p. 581.

Human Rights can be described as the higher or aspirational ideal that the positive criminal justice system strives to achieve. But human rights themselves keep on changing in the light of the needs and expectations of the society. Describing the changing nature of human rights the Supreme Court of India in *Ramdeo Chauhan vs. Benikant Das & Ors.* rightly observed as follows:

‘One must accept that human rights are not like edicts inscribed on a rock. They are made and unmade on the crucible of experience and through irreversible process of human struggle for freedom. They admit of certain degree of fluidity. Categories of human rights, being of infinite variety, are not really closed. That in why the residuary clause of Sub-Section (j) has been so widely worded to take care of situations not covered by Sub-Section (a) to (i) of Section 12 of the 1993 Act²¹

Once we accept that human rights are broad-based and all encompassing, the possibilities of pushing some of the key restorative justice ideas such as quest for higher ideals of justice, victim-centricism, surrender and pardon to dacoits, consensual justice, compensation as a means of justice, rise of restitutive laws at the cost of repressive laws through the human rights framework can be explored further.

Quest for Higher Ideals of Justice

Justice as per formal law and justice as an ideal construct are two distinct notions that vary in terms of their content and import. As a higher ideal, justice may be, or even bound, to differ from justice in the routine sense. In the South African Constitutional Court ruling *AZAPO Case*, the Court considered reconciliation a higher ideal than litigation for the crimes committed in the past. In the context of the case the Court refers ‘shame of the past’ as to the sordid tale of the large number of apartheid crimes committed under the earlier regime, which constituted crimes to be tried and punished by the criminal Courts. But it was realized that merely punishing for past crimes might only mean compliance with legal justice, at best, not justice in the essential sense. The raising of the strife ridden society to a higher level required taking the bold step of upholding the Reconciliation Act, that would lead society to the ‘promise of future’ under which the human rights of all could be better protected.

21 2011 Cri.L.J. (Supreme Court) , p. 292.

Similarly, in the Ram Lakhan Case, strict compliance with the beggary law would have required the High Court to merely endorse the Trial Court and Session Court Orders. But what made the ruling unique is its appeal to higher elements of justice. The High Court pulled up the lower Courts on the issue of language, interpretation of the law and its lack of judicial activism. As a consequence, the otherwise dry, offbeat statutory law adjudication was turned into a lively justice debate.

Thus, rising to the higher levels of justice means an appeal to the human rights of the parties, as well as of the community. After all, higher justice is as much an essential component of the human rights in the true sense.

Victim Centricism

The formal system of criminal justice is known for its partisan approach to victims of crime. But in the last decade several pro-victim trends are underway that have considerably transformed the system from the victim's standpoint. First, several victim-centric laws such as the POCSO Act 2012, the Criminal Law (Amendment) Act, 2013 have been enacted that have ushered an era of criminalizing and victimization for a specific category of offending. Second, victims have been conferred specific enabling procedural rights such as right to report crime, right to a counsel, right to appeal. Third, the compensatory claims of victims have received recognition through wholesome compensatory orders.

According to the victims, a right bearing status has, to a considerable extent, offset the disadvantages faced by victims under the traditional system. Victim remain a weaker section within the criminal justice system, but the trend of shifting the focus towards them is decidedly a move in the direction of actualizing the human rights of victims of crime. Human rights that stand violated when the victim of crime is left without remedy or when the agencies either deny her remedy or ignore her claims to justice because of extraneous considerations.

Surrender and Pardon of Dacoits

Surrender by dacoits, extremists and other serious and non-serious criminals, and their subsequent commutation or pardon can be viewed as a restorative justice measure. The surrender by the dacoits of the Chambal

valley under the influence of Sarvodaya leaders in the 1960s and 1970s is an example of restorative justice ideas being put to the test for resolving some of the most intricate law and order problems that had been faced by the Indian society for a long time. The threat posed by the dacoit problem can be assessed from the dacoit related crime statistics. In 1971 alone, India's dacoits committed 285 murders, 352 kidnappings and 213 robberies. But in the wake of surrender by as many as 511 dacoits in 1972 in Chambal Valley and in Rajasthan, the Government promised commutation of all death sentences and lenient terms of imprisonment for the rest, in addition to education for children and resettlement for the families. After the mass surrender of dacoits in the 1970s and 1980, we no longer hear much about dacoit problems in the traditional sense of the term. The successful results of dacoit surrender operations were the combined effects of immense faith in the essential human goodness, Governments' resolve to take a compassionate approach and providing opportunities for rehabilitation for the dacoits and their families. Prof. Ishwar Bhatt has commented in this context 'Sympathetic approach put forward by voluntary action and Governmental support to rehabilitate the surrendered dacoits within the legal framework provided a comfortable situation. What could not be attained by police force could be achieved by an approach of munificence, correction and amelioration'.²²

Like the dacoit surrender the administration encourages and permits voluntary surrender by extremist groups and civil society dissenters. For students indulging in routine acts of vandalism and hooliganism the Governments often offer amnesty schemes in order to wean away youth and students from a possible life of criminality.

Thus, self realization, remorse and regret and in return compassion and munificence constitute the essence of the human right to surrender and pardons, which has immense possibilities in an egalitarian and multi-layered society like ours.

Consensual Justice

Usually parties to justice share a conflicting relationship. But in consensual justice the parties agree to come together to seek justice. The cases in point are Plea Bargaining and Compounding of offence proceedings. In Plea Bargaining the application by the accused/wrongdoer is not contested

²² Ishwar P. Bhatt, *Law and Social Transformation*, Eastern Book Company, 2009, p. 150.

by the victim, but he volunteers to be a part of the mutually satisfactory disposition and takes part in the deliberations. Similarly, in compounding of offence proceedings too, both the parties at the instance of the victim agree to the proposal of compounding the case. The success of plea-bargaining and compounding measures lies in both the parties feeling an equal involvement in the rendering of justice, rather than the external agency like the judge or the arbitrator. The element of consent by both parties is the essence of justice in most of the indigenous systems of justice, which are based on total involvement of the justice seeker and the justice maker. Professor N.R. Madhava Menon has strongly espoused the cause of restorative justice, recently, in these words:

“India needs to experiment with more democratic models aimed at reconciliation and restoration of relationships. Restorative justice is a welcome idea particularly in matters of juvenile justice, property offences, communal conflicts, family disputes etc.. What is needed is a change of mindset, willingness to bring victim to centre stage of criminal proceedings and to acknowledge that restoring relationships and correcting the harm are important elements of criminal justice system”.²³

Compensation as a means of justice

The pre-occupation of the formal criminal justice system with punishment, leaves little scope for restoration of harm or compensatory justice ideas. However, of late with the better realization of victim needs, legislative and judicial attention has been drawn towards the restoration of harm or compensatory justice. The idea of restorative justice is premised on the need to redress the harm suffered by the victim, rather than look for the punishment to the wrongdoer, that hardly helps the victim to really reduce the trauma of harm suffered by her. Compensation to the victim or restoration of harm is the underlying philosophy of the recent legislative change that has for the first time introduced a right to compensation under Section 357A of the Cr. P.C. (inserted by the Act 5 of 2009). In addition to this legislative amendment, the Indian judiciary, particularly the Supreme Court, has taken lot of interest in making restorative or compensatory justice a reality in the day-to-day administration of compensation claims. *Laxmi v. Union of India*, and *Parivartan Kendra v. Union of India* are the two notable

23 N.R. Madhava Menon, “Towards Restorative Criminal Justice”, *The Hindu* (Allad, Ed.) 5/4/2016.

Apex Court rulings that are solely devoted to the issues as to how, why and what amount of compensation should be granted to victims of acid attacks. In both these public interest petitions the Courts neither discussed the issue of liability, nor of standing, but only focused on how much compensation was needed in such cases. The Parivartan Kendra case is more relevant for the present discussion. In this case the Court worked out the quantum of compensation on the basis of the actual expenses incurred by the parents in the treatment of the victim. That is why the Court found it appropriate to raise the quantum of compensation to Rs. 10 Lakhs.

To restore the harm suffered by the victim is a laudable objective for the law to aspire, and a law that really cares for the human rights of the victim. Mere notional restoration provides no real satisfaction.

Rise of Restitutive laws at the cost of repressive laws

Long ago, Emile Durkheim had predicted that as society progresses, restitutive laws will replace the repressive laws. With the increasing resort to mediation and reconciliation to resolve civil and criminal disputes the prediction of Emile Durkheim appears to be coming true. Restitutive laws are characterized by private party initiation, civil processes of dispute resolution and imposition of non-punitive sanctions. However, in societies where restitutive systems have not adequately evolved or the political resolve to switch over to the restitutive laws is still weak, the restitutive transformation has not really caught on. In India too, the restitutive laws have been applied selectively, without adequate rationalizations. For instance, the black money disclosure scheme or the IDS, the emphasis is only a monetary sanction in the form of higher tax rate deductions, which could be described as a classic case of restitutive reform. But how paradoxical it is to deploy restitutive measures in the cases of huge sums of illegally obtained wealth, while the ordinary petty money thief continues to be subjected to elaborate repressive criminal proceedings. In this context it is interesting to cite a recent Supreme Court decision in which the Court rejected the constitutional challenge to the offence of criminal defamation under the Penal Code. Pratap Bhanu Mehta²⁴ has critiqued the above decision in these words: “In the evolution of law, the trend is usually towards decriminalization of more crimes and institution of civil remedies. India seems to be moving in the opposite direction”. Further, the author says of this curious tendency: ‘Underlying these punitive responses

24 Mehta, Pratap Bhanu, “The Punishing Society” *The Indian Express*, 18/5/2016, p. 15

is the large fact of institutional decay and incapacity... Our punitive impulses are an expression of deep institutional failures'. Therefore, the need is to rationally transform the repressive law system into restitutive law system. For it is the restitutive system of laws that ensures a better environment for the human rights of citizens.

According recognition to restorative justice ideas as a human right, may at best, be an important measure for legitimizing the multiple ways of responding to wrongdoing in the society. It may constitute the basis for filing a petition by the victim for the violation of their human rights before the Human Rights Commission under Section 12 of the Protection of Human Right Act, 1993. It may also constitute the basis for a suo-moto inquiry, intervention, visit etc. by the Commission in respect to a human right violation by a public servant. In both the cases the victim would be under an obligation to establish that the non-compliance with the restorative justice line would lead to a violation of her human rights. However, it will always depend upon the Court or the Commission to arrive at a conclusion as to whether non-compliance with the restorative justice leads to the violation of human rights.

V. The Way Forward

In the earlier parts we have described how the restorative justice ideas have made inroads into the formal CJS, either explicitly or implicitly or have been projected as new human rights. All such inroads may constitute an important prelude to the transformation of the system towards restorative justice as an alternative system. But such measures alone are not good enough to bring about a formal restorative justice transformation. What is required is a clear and conscious decision to usher in a regime of restorative justice procedures in respect to certain categories of wrongdoings/offences. The restorative justice decision will be required in respect to two things: First, which offences would be subject to restorative justice; and second, what procedures would be followed in restorative justice proceedings. The categories of offences that would be subject to restorative justice need not be very restrictively defined. For instance, petty offences (punishable with less than 3 years imprisonment) and serious offences (punishable with less than 7 years imprisonment) could easily fall within the sweep of a restorative justice ambit, but even certain kinds of heinous offences (punishable with more than 7 years imprisonment) such as voluntarily causing grievous hurt to extort

property/valuable security or counterfeiting Indian coin etc. (both punishable with 10 years imprisonment) may qualify to be suitable for restorative justice. What goes to decide the gravity of the offence? It is the potential of harm to the individual or society, or the amenability of the harm to a restorative processes? Ultimately it is the question of the mind-set with which the harm is viewed. Once the issue of eligibility of the wrongdoing is decided, we move on to the issue of procedure for restorative justice. Should there be a compulsory resort to restorative justice procedure in respect of every eligible category of harm? The compulsory restorative justice procedure would be important for imparting to restorative justice the ability to resolve criminal conflicts through expeditious procedure and thus effectively deal with the problem of pendency. The compulsory restorative justice resort will bring in the question of availability of a system or institutional infrastructure through which the restorative justice cases will be processed. The restorative justice system would need to be evolved along the lines of the Probation System. However, in the restorative justice system the major initiative will have to come from the parties, particularly the victim who would stand to gain considerably from the right operation of the system. But unlike the Probation System, the restorative justice system would depend more upon the non-state or NGOs and CSOs. In the European jurisdiction many victim/offender mediation programmes are administered by private community based agencies. In India too, NGO-run restorative justice programmes can be encouraged. However, for eliciting uniformity and standardization the restorative justice operations of NGOs and CSOs, restorative justice activities will need to be subject to central legislation in this respect.

Whether the restorative justice cases are a product of compulsion or free option of parties, the more important issue would be the mind-set or the inclinations of the individuals manning the system. For effective restorative justice the persons processing cases, presiding over mediation sessions and recording the outcome of cases must display robust faith in restorative justice values. They must believe that justice through a restorative process can be as effective as justice through a formal system. It is not only the mind-sets of functionaries that is important but also of the parties who should feel equally drawn to the processes of restorative justice, as well as its outcome. We can appreciate this much better in the light of our experience in the compounding of cases project in Tis Hazari, Delhi, where the Chief Metropolitan Magistrate's faith in the compounding of cases was so strong

that the parties and even the volunteers felt drawn towards her resolve.

Equally important would be creating a stake on the part of NGOs/CSOs and a large army of volunteers to the restorative justice cause. NGOs/CSOs need to be encouraged and facilitated in respect to restorative justice programmes. Some District Legal Services Authorities have already taken useful initiatives in the direction of organizing Lok Adalats, the need is to activate NGOs to take up individual criminal conflicts for mediation. Students of Law, Social Work, Sociology and others can serve useful functions as mediation volunteers: The whole idea is to create an environment in which the more democratic, informal, re-integrative and expeditious system of rendering justice will get a chance.

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Laws Relating to Sexual Violence in India : Constitutional and Human Rights Dimensions

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Abstract

This article examines the approaches adopted by the Criminal Law (Amendment) Act, 2013 to deal with sexual violence. It examines whether the amendments to the criminal law are human rights-enhancing, focusing both on victims as well as offenders. The article analyses the conceptual framework that informed the 2013 amendments, provides a critique of some of the amendments, and discusses some specific changes made to the law, in order to analyse the approaches utilized to prosecute and punish sexual violence. It argues that changes to the procedural laws are human rights enhancing, since their objective is to provide victims with easier access to the legal system. The article also presents a critique of the new sentencing framework, and argues that removing judicial discretion in sentencing was not the solution to dealing with existing problems with the sentencing framework.

Introduction

Rape law reform in India has been reactionary and sporadic. The infamous decision of the Supreme Court in the Mathura rape case¹ led to amendments to rape laws in 1983, with insertion of provisions relating to aggravated rape. Thereafter, over the next three decades, the broadening of the definition of rape became an issue of discussion and debate. The discussion began primarily after the Delhi High Court's decision in *Sudesh Jhaku v. K.C.J.*² The accused in Jhaku was charged under Section 354 of the Indian Penal Code (IPC), for forcibly inserting his penis into the mouth of his young daughter. The prosecution argued that the act amounted to

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1 *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143.

2 1998 Cri.L.J. 2428 (Del).

rape, and that the accused should be charged accordingly. However, the Court refused to interpret Section 375, IPC in that manner, noting that it was in the legislature's domain to make such a change. The matter reached the Supreme Court,³ and the Court referred the issue to the Law Commission of India for its opinion. The Law Commission in its 172nd Report, suggested many changes to the rape law (Law Commission of India 2000). This included broadening the definition of rape, not only to cover penile-vaginal penetration, but also to cover penetration of other orifices, as well as penetration by objects and body parts (other than the penis). The Supreme Court, although recognising the need for broadening of the definition of rape, left it to Parliament to make such changes.⁴ Amendment Bills were introduced in Parliament in 2008 and 2010, which lapsed. The Criminal Law (Amendment) Bill had been introduced in the Lok Sabha in December 2012, a few days before the incident of December 16, 2012. This Bill became the focus and foundation for the changes that occurred after the next watershed moment; the incident of December 16, 2012.

The brutal gang rape and homicide of a young woman in Delhi in December 2012, led to calls for urgent change in the laws. The Government of India set up a committee headed by Justice J.S. Verma, former Chief Justice of India, to suggest amendments to the relevant criminal laws. The Committee submitted its report within a month and the Criminal Law (Amendment) Act, 2013 was enacted thereafter, based partly on the recommendations of the Justice Verma Committee. The Act made major changes to the Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (Cr.P.C.) and the Indian Evidence Act, 1872. The definition of rape was broadened, new offences were added, procedures in relation to reporting, investigation and trial of sexual offences were changed, and a new sentencing regime was introduced. In this piece, I map the changes made by the Criminal Law (Amendment) Act, 2013, in relation to sexual offences. I discuss the rationale of the changes introduced, and analyse possible interpretations of the new/amended provisions. I critique the changes to the law, and approaches to dealing with sexual violence. In the process, I examine whether the new approaches are human rights enhancing. The focus is to analyse whether the changes to the law succeed in providing victims of sexual violence better access to the legal system, and whether rights of the accused are adequately safeguarded.

3 Sakshi v. Union of India, (2004) 5 SCC 518.

4 Ibid., 542.

Setting the Foundation for the Amendments

Prior to its amendment in 2013, Section 375 of the IPC stated that sexual intercourse by a man with a woman amounted to rape, if such intercourse was against the woman's will, or without her consent. It also provided four other circumstances where the consent given by the woman was vitiated. These were: first, if the consent had been obtained by putting the woman or anyone she was interested in, in fear of death or hurt; or second, if she was deceived into believing that the man she was having intercourse with was someone she was, or believed herself to be, lawfully married; or third, if at the time of giving consent, the woman was not in a position to understand the nature and consequences of such consent, either because of unsoundness of mind, intoxication, or the administration of a stupefying or unwholesome substance by the accused or any other person; or lastly, if the woman was under sixteen years of age. 'Sexual intercourse' came to be interpreted as penile-vaginal penetration,⁵ and the explanation to Section 375 clarified that penetration was sufficient to constitute 'sexual intercourse'. Hence, ejaculation was not required for an act of penile-vaginal penetration to amount to rape.

The primary evidence in most cases of rape was (and continues to be) the testimony of the victim. A court adjudicating a case of rape has to determine the weight and importance to be given to the testimony of the victim. This has been a challenge in rape adjudication. The Supreme Court of India in *Rameshwar v. State of Rajasthan*,⁶ ruled that a conviction can be based solely on the uncorroborated testimony of the victim, although such testimony should be treated with circumspection.⁷ Courts were advised, however, to test the reliability and credibility of the victim and her testimony. The defence often invoked Section 155(4) of the Indian Evidence Act, until it was repealed in 2003, to impeach the creditworthiness of the victim. The victim was cross-examined on her past sexual history and on that basis an argument was made that she was of a 'generally immoral character', and hence not reliable (Satish 2017: 38). Various stereotypes relating to rape victims were also invoked by courts. For instance, the Supreme Court in *Rafiq v. State of Haryana*,⁸ ruled that 'when a woman is ravished what is inflicted is

5 *Sakshi v. Union of India*, (2004) 5 SCC 518.

6 AIR 1952 SC 54.

7 *Ibid.*, 56-57.

8 (1980) 4 SCC 262.

not merely physical injury, but the deep sense of some deathless shame'.⁹ In *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*,¹⁰ the Supreme Court provided various reasons because of which, it opined, Indian women would not lie about rape. It also provided reasons why 'western women' would however, be motivated to falsely allege rape. In *Madan Gopal Kakkad v. Naval Dubey*,¹¹ in sentencing an offender for rape of a ten-year old girl, the Supreme Court ruled: 'We are told at the Bar that the victim who is now 19 years old, after having lost her virginity still remains unmarried. Evidently, the victim is under the impression that there is no monsoon season in her life and that her future chances of getting married and settling down in a respectable family are completely marred.' Thus, the Court attached more importance to the perceived marriage prospects of the young girl, rather than the offence committed on her. More recently, in *State of U.P. v. Chhoteylal*,¹² the Court observed: 'The important thing that the Court has to bear in mind is what is lost by the rape victim is face. She loses value as a person.' Thus, courts conceptualized rape as a crime against the honour, chastity, virginity, and marriageability of a woman, rather than as a crime against her bodily integrity and sexual autonomy (ibid: 42-44). The Justice Verma Committee noted the existence of such stereotyping (Verma Committee 2013: 83), and advocated approaching the issue from a constitutional perspective (ibid: 92). It recommended that rape be viewed as a crime against the bodily integrity of the woman (ibid: 94). Such characterization provided the conceptual foundation to the recommendations of the Justice Verma Committee report for changes in the law.

Amendments to the Indian Penal Code

The Definition of Rape

The Criminal Law (Amendment) Act, 2013 made major changes to Sections 375 and 376 of the IPC. One of the important issues faced by the Verma Committee was whether to change the nomenclature of the term 'rape' and term it 'sexual assault,' as was recommended by the Law Commission of India in its 172nd Report. The Criminal Law (Amendment) Bill, 2012 on the basis of the Law Commission's recommendations had replaced the term

9 Ibid., 265.

10 (1983) 3 SCC 217.

11 (1992) 3 SCC 204.

12 (2011) 2 SCC 550.

‘rape’ with ‘sexual assault.’ The Verma Committee recommended against such a change. It opined that ‘rape’ expresses a strong moral condemnation, which the term ‘sexual assault’ does not. It however recommended that non-penetrative acts, currently referred to as ‘outraging the modesty of a woman,’ by Section 354 of the IPC should be termed as ‘sexual assaults’. Parliament accepted the recommendation to retain the term ‘rape,’ but did not replace the term ‘outraging the modesty of a woman,’ with ‘sexual assault’.

The Criminal Law (Amendment) Act, 2013 broadened the definition of the offence of rape. Although, the Verma Committee recommended that the offence be defined in a manner wherein it could be committed against any gender, Parliament did not make that change. Hence, it is only possible for a man to rape a woman. The offence covers four types of sexual acts: first, penile penetration of the vagina, mouth, urethra or anus;¹³ second, insertion of an object or a body-part, other than the penis, into the vagina, urethra or anus;¹⁴ third, manipulation of any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of the woman;¹⁵ fourthly, application of the man’s mouth to the vagina, anus or urethra of the woman.¹⁶ The definition also contemplates situations where the offender makes the woman commit these sexual acts with a third person. The Amendment Act increased the age at which a girl could consent to a sexual act from 16 years to 18 years.¹⁷ It also provided a definition of consent.¹⁸ Consent is defined as ‘an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in a particular sexual act’. The section also clarifies that lack of physical resistance to penetration shall not be considered as implying consent. I discuss each of these changes in detail below.

Expanding the Actus Reus

The expanded actus reus of the definition of rape follows from the recommendation of the Law Commission of India, and the Justice Verma Committee. It recognises that sexual violence is not confined to the penetration

13 Section 375(a).

14 Section 375(b).

15 Section 375(c).

16 Section 375(d).

17 Section 375, Sixthly.

18 Explanation 2 to Section 375.

of the vagina by the penis. The focus is on violation of the bodily integrity and sexual autonomy of the woman. However, in defining the offence of rape, Parliament chose to use the definition in the Protection of Children from Sexual Offences Act, 2012 (POCSO), rather than the definition as recommended by the Justice Verma Committee. Consequently, some parts of the section seem overly broad, and are more appropriate in the context of forced sexual acts committed on children. For instance, Section 375(c) defines rape to include manipulation of any part of the body of a woman (for instance, her finger) to cause penetration into any part of the body of such woman (for instance, her nostril). Should such an act be considered to be rape? Laws in other jurisdictions, such as the UK, consider penetration or contact with a woman's body to be rape/sexual assault, if the act is done with a sexual intent.¹⁹ In the absence of such a requirement, the last limb of Section 375(c) appears to equate criminal force that involves penetration, with rape.

Defining Consent

The Indian Penal Code, prior to 2013 did not provide a definition for consent. Section 90, listed circumstances that vitiated consent. It stated that consent given under fear or misconception, the consent of an 'insane person,' or consent given by a child, does not amount to consent as intended by any section of the Code. In the context of rape law, a definition of consent was provided by the Punjab High Court in *Rao Harnarain Singh v. State of Punjab*.²⁰ In *Haranarain*, the Court held that consent implies voluntary participation by the woman, after the exercise of intelligence, and after having 'exercised a choice between resistance and assent.'²¹ This formulation of consent was followed by courts in assessing evidence in relation to the issue (*Satish* 2017: 37).

The Criminal Law (Amendment) Act, 2013 now provides a positive definition of consent. Communication of consent to sexual acts is the primary focus of the definition. A woman may signify her consent to engage in the sexual act either through words, gestures or any other form of verbal or non-verbal communication. Importance is given to an unambiguous agreement to engage in a sexual act. Voluntariness also remains a crucial factor, with

19 Sections 2-4 [UK]Sexual Offences Act 2003

20 AIR 1958 Pun 123.

21 Ibid., Paragraph 6.

coercion or misrepresentation continuing to negate consent. A significant feature of the definition is the focus on consent for a specific sexual act. Consequently, consent to engage in one sexual act does not imply consent to engage in other sexual acts as well. For instance, if a woman consents to the man penetrating her vagina with his finger, this does not imply consent to penile-vaginal penetration.

Another issue with respect to consent was that courts often required additional signs to indicate non-consent, such as injuries on the body of the woman.²² Although in more recent judgments, the Supreme Court held that injuries are not required to establish non-consent, some courts continued to insist on injuries to show non-consent (Mitra & Satish 2014: 56-57). The IPC now clearly specifies that lack of resistance does not imply consent. Consequently, courts can no longer seek resistance as evidence of non-consent.

Age of Sexual Consent

The age of sexual consent was another point of divergence between the Verma Committee and Parliament. Prior to the 2013 amendments, 16 was the age at which a girl could consent to sexual intercourse. In 2012, Parliament enacted the Protection of Children against Sexual Offences Act (POCSO). This legislation defined a child as a person under the age of 18.²³ The Act covers penetrative and non-penetrative sexual acts, and is not confined only to penile-vaginal penetration. Hence, there was a conflict between POCSO and the IPC. The Justice Verma Committee recommended against increasing the age of consent in the IPC from 16 years to 18 years. However, Parliament did not accept the recommendation and increased the age to 18. The rationale appears to have been to stop all underage sexual activity, even if it is otherwise consensual.

Rape statistics post-2013 clearly indicate the impact of such a change. With the definition of rape being broadened, acts of young people engaging in consensual sexual experimentation, sometimes not involving penile-vaginal penetration as well, fall within the purview of rape [Rukmini S 2014]. A study of rape cases registered in Delhi indicated that out of 460 cases argued before Delhi courts in 2014, 189 involved consenting couples [ibid].

22 Pratap Misra v. State of Orissa, (1977) 3 SCC 41.

23 Section 2(d), POCSO.

The broader question in this regard is the approach to be followed in dealing with underage sexual activity. Legislations often provide for age-proximity clauses (Oberman 2000: 743-752). This implies that if the age difference between the accused and the victim is within the range specified in the statute, and the victim accepts that the sexual act was consensual, a different penal approach is followed. Long terms of incarceration are not advocated. Instead, probation or other non-incarcerative forms of punishment are provided. In the Indian context, however, the minimum punishment provided is seven years, with judges having no discretion to reduce the sentence.

Marital Rape

The Verma Committee recommended that marital rape be criminalized. This was based on its conceptualization of rape as a crime against a woman's sexual autonomy and bodily integrity. The Committee also recommended that the fact that the accused and victim are married to each other should not be considered as a mitigating factor in sentencing (Verma Committee 2013: 117). Parliament, however, did not accept the recommendation. In fact, it appears to have expanded the scope of the marital exemption. As discussed earlier, prior to its amendment in 2013, rape covered only penile-vaginal penetration, and the marital rape exemption provided that a man could not be prosecuted for raping his wife, which implied penile-vaginal penetration. Any other form of penetration would be covered under Section 377 of the Indian Penal Code and would be punished accordingly. However, with the actus reus of rape being expanded in 2013, the exemption also appears to have been broadened. Exception 2 to Section 375 now reads: 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.' Since the exemption now extends to sexual acts as well, the marital rape exemption stands broadened. It can be argued that since there is no marital rape exemption under Section 377, non-consensual acts between husband and wife that are not penile-vaginal can be prosecuted under that section. However, since Section 375 already covers sexual acts that fall within the purview of Section 377, such argument may not be tenable.

Another amendment that appears to further strengthen the marital rape exemption is the insertion of Section 198B in the Cr.P.C. The Verma Committee had recommended the insertion of this section, as a corollary to the criminalization of marital rape. The provision as recommended by the

Verma Committee stated that cognizance of a complaint against a man to whom the woman was married could only be taken if such complaint were to be made by the wife against her accused husband. Since the recommendation of the Verma Committee to criminalize marital rape was not accepted, it would have been logical for Parliament to not add Section 198B to the Cr.P.C. However, Parliament not only added Section 198B, but made modifications to it as well. Section 198B, as enacted prohibits courts from taking cognizance of an offence under Section 376B of the IPC (which criminalizes rape during separation), 'except upon prima facie satisfaction of the facts which constitute the offence'. This appears to require a higher standard than generally required for filing a complaint under Section 200 of the Cr.P.C. Hence, Indian rape law, instead of being progressive and prioritizing constitutional values, still continues to differentiate between victims who are married to their rapists, and victims who are not.

Aggravated Rape

Provisions relating to aggravated rape were inserted into the Indian Penal Code by the Criminal Law (Amendment) Act, 1983. The background was the Mathura rape case, and the law reform movement that followed thereafter. The focus was on custodial rape, especially rapes by police officers and other persons in positions of authority. The Criminal Law (Amendment) Act, 2013 added more categories to this offence. The focus still remains on the power differential between the accused and the victim, and the vulnerable position of the victim vis-à-vis the accused.

Rape by armed forces in their places of deployment has been a matter of concern and was noted by the Justice Verma Committee [Verma Committee 2013: 149]. It recommended that the continuance of the Armed Forces Special Powers Act (AFSPA) and AFSPA like-laws should be reviewed [ibid: 149]. At the same time, it recommended that rape by a member of the armed forces in the place of deployment should be considered an aggravated form of rape. This recommendation of the Committee was accepted by Parliament,²⁴ although it did not accept the recommendation to review AFSPA.

The Verma Committee also took note of rape being used as a tool of subjugation, especially in the context of sectarian and communal violence. The use of rape as a tool of war is well documented [Brownmiller 1975: 31-

²⁴ Section 376(2)(c).

113], especially in the context of violence in Rwanda.²⁵ In the Indian context, there have been allegations of rape during communal and section violence, be it in Gujarat, Muzzafarnagar, or in the sectarian violence in Haryana in 2016. A rape committed during such communal or sectarian violence is considered to be aggravated.²⁶ The provision would apply in situations where rape is used as a tool of communal or sectarian violence; not in cases where the rape is unrelated to violence in the area.

Another situation where the victim is in a vulnerable position is when she is subjected to rape by a close acquaintance. Rape statistics show that most rape accused are known to their victims. The National Crime Record Bureau's statistics for 2015, indicate that the victim was acquainted with the accused in 95 per cent of cases reported (National Crime Record Bureau, Crime in India 2015: Table 5.4). It is in this context that rape by a relative, guardian, teacher, or any other person in a position of trust or authority has been categorised as an aggravated form of rape.²⁷ Along similar lines, rape by a person in a position of control or dominance is considered to be aggravated.²⁸ The extreme vulnerability faced by a person who is physically or mentally challenged has been taken note of in categorising rape of a woman suffering from a physical or a mental disability as an aggravated form of rape.²⁹ Rape of a woman incapable of giving consent is also considered aggravated.³⁰ Such incapacity is not confined to physical or mental disability, and could possibly overlap with circumstances listed in Section 375, intoxication and other factors that lead to the woman not being in a position to communicate consent or non-consent.

Three other circumstances were added to Section 376(2). If the man when committing rape causes grievous bodily harm to the woman, maims or disfigures her or endangers her life, the rape is considered aggravated. What is important here is that the focus is solely on causation, not on whether the accused had the mensrea to cause the injury. Further, the term 'grievous bodily harm' used in the section is not used elsewhere in the IPC. The intention appears to be to distinguish 'grievous bodily harm' from 'grievous hurt' as defined in the Code. The former is a broader category, compared to the eight

25 See: *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T

26 Section 376(2)(g).

27 Section 376(2)(f).

28 Section 376(2)(k).

29 Section 376(2)(l).

30 Section 376(2)(m).

circumstances listed in the latter. The Criminal Law (Amendment) Act also made the act of repeatedly raping the same woman an aggravated form of rape.³¹ It also increased the age of aggravated rape in relation to underage sexual activity from 12 to 16 years.³² This change leads to a conflict between the IPC and POCSO, since POCSO continues to retain the age at 12 years.³³

Causing Death or Injury Leading to Persistent Vegetative State

The Criminal Law (Amendment) Act, 2013 added Section 376A to the IPC. If during the commission of rape or aggravated rape, the accused inflicts an injury that causes the death of the woman or leads her to being in a persistent vegetative state, he is liable for punishment under Section 376A. The maximum sentence is death, with the mandatory minimum being twenty years imprisonment. The Verma Committee had recommended the introduction of this new offence, although it did not recommend the death sentence.

Section 376A introduces the concept of felony murder/constructive malice into Indian criminal law. Felony murder (US homicide law) and constructive malice (English homicide law)³⁴ imply that if a person commits homicide in the course of committing another offence, he/she is guilty of murder (A.P. Simester et.al. 2013: 383). The mensrea for commission of murder is not required to be proved. It is sufficient for the prosecution to establish that the offender had the mensrea for committing the felony/other offence. In the context of Section 376A, since the offence of rape does not require mensrea, the test is solely one of causation. If the prosecution is able to prove that the offender is guilty of commission of rape or aggravated rape and during such commission caused an injury which ultimately led to death or led to the victim being in a persistent vegetative state, that is sufficient to find him guilty of the offence under Section 376A. With the death sentence being a sentencing option in this context, Section 376A involves situations where a person may be sentenced to death without having the mensrea to commit murder. The irony in Section 376A is that it does not cover cases of gang rape. In what appears to be an oversight, Parliament confined Section 376A

31 Section 376(2)(n).

32 Section 376(2)(i).

33 Sections 5(m) and 9(m), POCSO Act, 2012.

34 Constructive malice was abolished by the [U.K.] Homicide Act, 1957.

to cases where the offender causes an injury while committing an offence punishable either under Section 376(1) or (2) of the IPC. With gang rape no longer being one of the sub-sections of Section 376(2), but a separately numbered section, it has been left out of the purview of Section 376A.

Gang Rape

The Criminal Law (Amendment) Act, 2013 modified the definition of gang rape. Prior to 2013, gang rape was defined as follows: ‘Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape’.³⁵ Section 376D, which was added in 2013 defines gang rape as follows: ‘Where a woman is raped by one or more persons constituting a group or acting in furtherance of common intention each of those persons shall be deemed to have committed the offence of rape...’ The new definition appears to distinguish between constituting a group and acting in furtherance of common intention. The definition pre-2013 was an articulation of the principle of group liability, which is defined in Section 34 of the IPC. The common intention is the crucial factor in group liability.³⁶ Section 376D in distinguishing between membership of a group and common intention seems to have confused the principle of group liability. This conceptual confusion is bound to create interpretative issues in cases involving gang rape.

Section 376E: Repeat Offenders

The Criminal Law (Amendment) Act, 2013 provides a separate provision to deal with repeat rape offenders. The Section states that if a person has been previously convicted of an offence punishable by Section 376, 376A or 376D and is subsequently convicted of an offence punishable under any of the said sections, he will be liable to imprisoned for the rest of his natural life or with death. The penal justification behind punishing repeat offenders could be twofold; first, incapacitation and second, lack of reformation. It could be argued that a person who reoffends is too dangerous to be released into society; hence, he either needs to be imprisoned for the rest of his natural life or executed. Thus, the person is incapacitated from committing another offence (Ashworth 2005: 182-218). In relation to reformation, it could be argued that the person is beyond reform, hence, longer incarceration or the death sentence is justified.

³⁵ Explanation 1 to Section 376(2).

³⁶ *Barendra Kumar Ghosh v. King Emperor*, AIR 1925 PC 1.

An interesting scenario with respect to Section 376E arose before a Sessions Court of Mumbai in the Shakti Mills rape case. In that case, the offenders were accused in August 2013 of committing gang rape on a photojournalist in the Shakti Mills compound in Mumbai. Subsequently, another woman came forward and reported that she too had been gang raped in the same location in July 2013. The accused were first convicted under Section 376D for the July 2013 rape. Subsequently, a charge under Section 376E was added to the case of the photojournalist. The accused were found guilty under that provision and were sentenced to death. Although on a bare reading of the section, the decision of the court to convict under Section 376E may be justified, if the court were to examine the penological approach behind provisions for enhanced punishments for recidivist acts, its decision could be questioned. As noted earlier, higher punishments are provided for repeat offenders on the ground that they are too dangerous or beyond reform. Since in this case, the accused had not been convicted of rape earlier, they had not been provided an opportunity to reform.

Non-Penetrative Sexual Acts

The Justice Verma Committee recommended the addition of a new set of offences dealing with non-penetrative sexual acts. The Committee noted that there is a need to deal effectively with acts such as voyeurism and stalking, and to provide adequate punishments for them. It noted that the perceived impunity to commit such acts leads the accused to commit more heinous sexual acts like rape. The Committee recommended addition of offences relating to public disrobing of a woman, voyeurism and stalking.

The Criminal Law (Amendment) Act, 2013 added Section 354A to the IPC, which criminalizes sexual harassment. The definition that the section provides is similar to the Supreme Court's definition of sexual harassment in the Vishaka³⁷ case, and the definition in Section 2(n) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. Note that the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 had been passed by the Lok Sabha on September 3, 2012 and was pending approval by the Rajya Sabha when the Criminal Law (Amendment) Act, 2013 was enacted by Parliament (Verma

37 AIR 1997 SC 3011.

Committee 2013: 119). The Verma Committee had stated that the definition in Section 2(n) was satisfactory and should be retained in future Bills relating to sexual harassment at the workplace (Verma Committee 2013: 130). However, it did not recommend adding a separate section on sexual harassment in the Indian Penal Code, and consequently, did not define sexual harassment for the purposes of the IPC.

Section 354B criminalises assaulting or using criminal force with intent to disrobe a woman. The Verma Committee had recommended inserting a section to criminalize assaulting or using criminal force with the intention of disrobing a woman in a public place. The provision as enacted by Parliament does not require the act to occur in public. Although this makes the provision broader, it also leads to an overlap between Section 354 (assault or criminal force on a woman intending to, or knowing that it will outrage her modesty) and Section 354B, as also the offence of attempt to rape. With the punishment for Section 354B being higher (minimum of three years and maximum of seven years' imprisonment), it could be argued that a gradation has been created between Sections 354, 354B and attempt to rape (Section 376 r/w 511). A procedural issue arises in sentencing under Section 354B. The offence is triable by any Magistrate. However, except a Chief Judicial Magistrate, other Magistrates are not empowered by the Cr.P.C. to sentence an offender to imprisonment for more than three years.³⁸ If a Magistrate, after convicting the offender, is of the view that he deserves a sentence more than one year (in the case of Judicial Magistrates of the Second Class)³⁹ or three years (in the case of Judicial Magistrates of the First Class),⁴⁰ he/she will have to use Section 325, Cr.P.C and forward the accused to the Chief Judicial Magistrate for sentencing.

The act of voyeurism is criminalized by Section 354C of the Indian Penal Code. The focus of the offence is the act of watching, or capturing the image of a woman engaged in a private act in circumstances where she has an expectation of privacy. The provision also criminalizes situations where a third person watches the woman at the behest of the perpetrator. The Section defines a private act as including an act of watching carried out in a place, which in the circumstances would reasonably be expected to provide privacy, and where the victim's genitals, posterior or breasts are exposed or

38 Section 29, Cr.P.C.

39 Section 29(3), Cr.P.C.

40 Section 29(2), Cr.P.C.

covered only in underwear. It also covers situations where the victim is using a lavatory, or doing a sexual act that is not of a kind ordinarily done in public. Thus, various physical spaces are brought within the ambit of the definition – the only caveat being the expectation of privacy. The Section also covers situations where the victim consents to being watched and for images being taken, but not to their subsequent dissemination. The act of dissemination is criminalized and is treated as voyeurism. This covers situations of ‘revenge porn,’ wherein estranged partners of women share intimate photographs of the women taken with their consent during their relationship. On the relationship souring, the men share these photographs on the internet or in other digital media. Such acts of dissemination are now criminalized by Section 354C.

Stalking is criminalized by Section 354D. The act of physically stalking a woman is dealt with by the first limb of the definition. If a man follows a woman and contacts her, or attempts to contact her, in order to foster personal interaction, repeatedly, despite a clear indication of disinterest by the woman, the act amounts to stalking. The focus of the provision is on the attempt to foster personal interaction inspite of the clear disinterest of the woman, as also the repeated nature of the act. The second limb of the Section covers online stalking. The definition states that monitoring the use by a woman, of the internet, email or any other form of electronic communication, amounts to stalking. Since the second limb of the Section provides for a wide ambit, it could arguably cover situations where a man spies on the usage of the email of a woman, or persistently monitors her social media interaction or monitors other similar online activities of the woman.

Criminalizing Inaction

The Criminal Law (Amendment) Act, 2013 introduced two provisions into the IPC, which criminalize omissions and inaction. Section 166A provides for punishment in cases where a public servant fails to record a FIR in cases relating to acid attacks, rape, trafficking and offences under Sections 354 and 354B. The purpose of introducing such a provision was possibly to deter police officers from refusing to register FIRs in cases of sexual violence. However, not many cases have been registered under this Section since its addition in 2013 (National Crime Records Bureau, Crime in India 2015: Table 1.3). The statistics possibly indicate the futility of requiring the police themselves to register cases against their colleagues for inaction. Section 166A also punishes

situations where a public servant disobeys any direction of the law which prohibits him/her from requiring the attendance of a person at any place for the purposes of investigation or for any other matter. This will apply, for instance, where a police officer violates the prohibition under Section 160, Cr.P.C. against summoning a woman to a police station. The Section can also be applied in situations where a police officer knowingly disobeys directions of law relating to the investigation of cases, thus prejudicing any of the persons concerned. This again can be used in cases of rape, where police officers violate statutory provisions or directions of the Supreme Court relating to the manner in which investigations are to be conducted.

Inaction of hospitals is punished by Section 166B of the IPC. The section punishes the contravention of the provisions of Section 357C of the Cr.P.C, which requires all hospitals, both public and private to provide first aid or medical treatment free of cost to victims of acid attacks and rape. Thus, doctors and hospitals cannot turn away a victim who approaches them for first aid or treatment. However, Section 357C also requires hospitals to immediately inform the police of such incident, thus introducing a 'mandatory reporting' provision. Such requirement of mandatory reporting takes away the choice of the victim to decide whether or not to report an offence against her. It is noteworthy that Section 39 of the Cr.P.C., which mandates the public to report certain offences, does not include rape as one of the offences. Thus, the burden of mandatorily reporting falls solely on medical professionals. A provision that was probably intended to guarantee medical care to victims of rape, may ironically lead to the victim not seeking medical care, if she does not want to initiate legal proceedings, for her own reasons.

Amendments to Criminal Procedure and Evidence Laws

Criminal Procedure Code

The Criminal Law (Amendment) Act, 2013 made important changes to the Code of Criminal Procedure, 1973 (known as Cr.P.C) and the Indian Evidence Act, 1872. Most of the changes made were based on the recommendations of the Justice Verma Committee. They were aimed at providing victims of rape better access to the legal system.

Section 154 of the Cr.P.C. was amended to provide that a FIR in cases of acid attacks and sexual offences shall be recorded by a woman police

officer or a woman officer. The same mandate applies if statements under Section 161, Cr.P.C. are to be recorded. Further, Section 164 of the Cr.P.C. was amended to require that the statement of the victim of a sexual offence be recorded by a Magistrate as soon as the commission of the offence is brought to the attention of the police. These provisions aim to make the reporting of a sexual offence easier for women.

Changes were also made to ensure that the process of giving evidence does not become traumatic for victims of rape. Section 273 of the Cr.P.C., which requires that evidence be taken in the presence of the accused, was amended to mandate that if the victim is under eighteen years of age, the court shall take steps to ensure that she is not confronted by the accused. This practice had been suggested by the Supreme Court in *Gurmit Singh v. State of Punjab*,⁴¹ and guidelines to this effect had been issued by the Delhi High Court in *Virender v. State of N.C.T. of Delhi*.⁴² The Delhi High Court for instance has established special courtrooms in Delhi district courts ('vulnerable witness courtrooms'), wherein the victim testifies from a separate room altogether, which is connected to the courtroom via video-link. The practice can also be successfully put in place by judges by following simple methods, such as using curtains, almirahs etc., to ensure that the accused and the victim do not come face to face in court.

The Criminal Law (Amendment) Act also attempts to change the time-lines involving trial of rape cases. Section 309 of the Cr.P.C was amended to provide that the trial should as far as possible be completed within two months of the filing of the chargesheet. It is of course debatable whether this is practically possible, even in courts designated to try only cases of sexual offences. Another concern is also whether such fast-tracking of cases provides adequate time for lawyers of the accused to prepare for their cases. These concerns should inform any attempt to fast-track cases. Procedural lapses and irregularities that may arise due to the perceived urgency to complete trials, may also lead to convictions being overturned at the appellate stage – a trend that has been observed in relation to trials in fast track courts.⁴³

Another important change was the amendment of Section 197, Cr.P.C, which requires that the sanction of the government be obtained before

41 (1996) 2 S.C.C. 384.

42 Criminal Appeal No. 121/2009 (Judgment dated September 29, 2009).

43 See for instance: *Digambar Iranna Majkure v. State of Maharashtra*, MANU/MH/0628/2006. Criminal Appeal No. 196/2002, decided on September 26, 2006.

cognizance is taken of offences committed by public servants. The Criminal Law (Amendment) Act, 2013 now clarifies that sanction is not required if the public servant is accused of committing an offence punishable under Sections 166A, 166B, or of committing a sexual offence.

Changes were also made in the Cr.P.C in relation to physically and mentally challenged persons and their interaction with the criminal justice system. The first change was with respect to identification parades. Prior to its amendment in 2013, Section 54A of the Cr.P.C, which provides the framework for conducting an identification parade, did not account for situations where the identifying witness was physically or mentally challenged. Hence, on the recommendation of the Justice Verma Committee, Section 54A was amended to provide for identification parades to be conducted under the supervision of a Judicial Magistrate, who is tasked with the responsibility of using identification methods that the witness is comfortable with. For instance, if the witness is visually impaired, he/she may be able to identify the accused through his/her voice. The Magistrate using Section 54A may design an appropriate procedure to facilitate the process of identification. The section also mandates that identification by a physically or mentally challenged person should be videographed.

If a FIR for rape is sought to be filed by a physically or mentally challenged woman, the police officer is now mandated by Section 154 to record the FIR either at the woman's residence or at a place of convenience to her in the presence of an interpreter or a special educator. The Section also requires the recording of such a statement to be videographed. The police officer is required to get the statement recorded by a Judicial Magistrate under the amended Section 164(5)(a), Cr.P.C. While recording such a statement, the Magistrate must take the assistance of an interpreter or a special educator to record the statement. Moreover, the recording of the statement has to be videographed. Of vital importance is Section 164(5)(b), Cr.P.C., which states that the statement recorded by the Magistrate shall be considered as a statement in lieu of an examination-in-chief of the victim, and she will only be subjected to cross-examination at the trial. This procedure ensures that the victim does not have to repeatedly appear in court to testify. All these provisions are intended to assist witnesses and victims of crime so that they are not re-victimized during the investigation and trial process.

Changes to the Evidence Act

The focus of the changes made to the Indian Evidence Act, 1872 was to ensure that past sexual history does not play a factor in rape adjudication. Section 155(4) of the Indian Evidence Act, which permitted the defence to impeach the creditworthiness of the victim by alleging that the victim was 'of generally immoral character', had been repealed in 2003. Consequently, the victim could not be asked questions about her past sexual history during cross-examination. However, Section 146 permitted counsel to ask questions to (1) test the witness' veracity, (2) to discover who the person is and the person's position in life, and (3) to shake the person's credit by injuring his/her character. The Criminal Law (Amendment) Act, 2013 added a proviso to Section 146 stating that when consent is an issue in rape cases, it is not permissible to adduce evidence or ask questions relating to the 'general immoral character' or the previous sexual experience of the victim. A similar change was made by the adding Section 53A to the Evidence Act, which states that evidence of character or past sexual experience is not a relevant fact in rape cases. Thus, these amendments ensure that the focus of the trial remains on whether the victim consented to the sexual act in question, with the particular individual on trial. It treats as irrelevant any other sexual interaction that the victim may have had with the accused or any other person.

Amendments to the Sentencing Framework

One of the important changes made by the Criminal Law (Amendment) Act, 2013 was to increase the minimum and maximum sentences for many sexual offences and to remove judicial discretion in sentencing. The following notable changes were made to the sentencing framework:

- (1) Section 354, IPC: Minimum punishment of one year was introduced, and the maximum punishment was increased from two years to five years imprisonment
- (2) Section 376(2), IPC: Maximum punishment was increased to imprisonment for the rest of the person's natural life.
- (3) Section 376A: Minimum sentence of twenty years imprisonment, and the death penalty is a sentencing option.
- (4) Section 376D: Minimum sentence of twenty years imprisonment introduced for gang rape, and the maximum punishment is imprisonment for the rest of the person's natural life

- (5) Section 376E: Minimum punishment of imprisonment for the rest of the person's natural life and the death penalty is a sentencing option.

Thus, the Criminal Law (Amendment) Act, 2013 increased sentences for sexual offences, appearing to favour a deterrent framework for rape sentencing. The intention of the Government to provide for an enhanced sentencing regime is clear from the notification appointing the Justice Verma Committee, which stated that there appeared to be a need to review the laws 'so as to provide...enhanced punishment in cases of aggravated sexual assault.' [Ministry of Home Affairs, Gazette Notification dated 23.12.2012].

There were many problems with the judicial approach to rape sentencing in India [Satish 2017: 61-105]. Prior to the 2013 amendments, courts had the discretion to reduce sentences below the minimum by providing 'adequate and special reasons.' Various irrelevant reasons were often cited by courts as 'adequate and special reasons' to reduce sentence [Satish 2017: 81-87]. Factors such as past sexual history of the victim, her marital status at the time of the crime and at the time of sentencing of the offender, the relationship between the victim and the offender, were some of the factors considered [Satish 2017: 73-78]. Consideration of irrelevant factors led to arbitrariness in sentencing. The attempt of the Criminal Law (Amendment) Act, 2013 appears to have been to remove the possibility of arbitrariness, by getting rid of judicial discretion. As I argue in detail elsewhere, [Satish, 2017], removing all sentencing discretion is not a solution to reducing unwarranted sentencing disparity. The focus of sentencing remains individualization. If mitigating or aggravating factors are present, a judge should have the discretion to increase or decrease the sentence for the offender. The sentencing framework put in place by the Criminal Law (Amendment) Act, 2013 provides courts with the discretion to increase sentences if aggravating factors are present, but not to decrease sentences if mitigating factors are found. It also does not focus on reasoning in sentencing. As the Supreme Court has often noted, sentencing in India has become judge-centric and is not principled.⁴⁴ The cause for this, as the Court has noted, is the lack of reasoning in sentencing decisions.⁴⁵ The current framework does not require judges to provide reasons, especially if they impose the minimum sentence. Treating every case similarly and providing the same punishment is as arbitrary as treating like cases differently.

44 Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498.

45 State of Punjab v. Prem Sagar, (2008) 7 SCC 550.

A nuanced approach is required to deal with the issue of sentencing, which the Criminal Law (Amendment) Act, 2013 did not provide. This often leads to debates about whether the law is too harsh, leading to some questioning whether changes in the law were required at all.

Amendment to Protection of Children from Sexual Offences Act, 2012

The Protection of Children from Sexual Offences (POCSO) Act had been enacted in 2012 and had come into force in June 2012. It had for the first time in India, changed the definitions relating to sexual offences, going beyond penile-vaginal penetration. It followed the framework for sentencing that existed in the Indian Penal Code in 2012. With the amendments in 2013, the aggravated rape provisions in the Penal Code provide for higher maximum punishments, in comparison to POCSO. For instance, if a 15 year old girl alleges rape by her father, the father if found guilty will be convicted under Section 376(2)(f). The minimum punishment would be ten years imprisonment and the maximum would be imprisonment for the rest of the man's natural life. However, under POCSO, the charge would be under Section 6, wherein the minimum punishment would remain 10 years, but the maximum would be life, which does not mean imprisonment for the rest of his natural life. Noting this contradiction, Section 42 of POCSO was amended by the Criminal Law (Amendment) Act, 2013. It states that if an act or omission constitutes an offence under POCSO, as well as sections relating to sexual offences in the IPC, the offender will be sentenced under the law that provides for higher punishment. Although this appears simple, to be able to do so, the prosecution has to charge the offender both under the IPC and POCSO (in those cases where the punishment in the former is higher than the latter) to be able to invoke Section 42. This defeats the very purpose of having a special law, with separate procedures, prosecutors, and courts. It would have been more prudent to amend POCSO to increase punishments for offences that overlap with the IPC.

Conclusion

Much-needed changes were made in 2013 to laws relating to sexual violence. The new approach to dealing with sexual violence; viewing sexual violence from a constitutional perspective recognises the fundamental right of women to bodily integrity and sexual autonomy. This is exhibited by the

change made to the definition of rape, criminalising acts such as stalking and voyeurism, and providing a positive definition of consent. Changes to criminal procedure and evidence laws also ensure that victims of sexual violence have better access to the legal system. They also ensure that women are not re-victimized during the investigation and trial process. However, laws require more changes; for instance, marital rape not being criminalized leads to the sexual autonomy and bodily integrity of married women not being recognised. When increasing the age of consent, Parliament did not take into account nuances relating to underage sexual activity. A similar approach was followed in relation to mandatory reporting, not taking note of issues of sexual autonomy in that regard. In overhauling the sentencing framework, the law ignores basic principles of criminal law (in the case of Sections 376A and 376E) in some cases, whereas in others, it does not take into account literature and studies which argue against removing judicial discretion in sentencing. Some of these issues will have to be re-examined by courts and Parliament in the near future.

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VI – Surrogacy and Human Rights

Commercial Surrogacy: Comprehending the Language of 'Rights'

*Debashri Sarkar**

Abstract

Discourses on beginnings and ends of human life have always been couched with considerable moral questions, especially when both the otherwise natural processes are interjected by artificial means. Developments in medical technologies within the genre of obstetrics and gynaecology have brought with it a spectrum of different yet interconnected areas of academic discourse. As the reproductive process has been opened up to more intensive scrutiny, and as the opportunities for its external manipulation multiply, law has assumed an evergreater significance. The vital facet of such technologies has been the opening up of the process of procreation from the zones of mutual exclusivity of the married partners to external collaboration with third-parties. These procedures in terms of family, tend to exponentially expand not only the pool of potential parents but also the number of individuals, both men and women, who could contribute genetically or through their gestational services to the creation of babies that they did not intend to raise. This paper seeks to examine the value of rights of such persons involved and delve into the normative clash that such arrangements tends to create.

Surrogacy is understood as an arrangement whereby one woman carries a child for another with the intention of giving-up the child after birth. The practice has invited consistent criticism for altering the basic premise of a heterogenous family structure and the sanctity of motherhood and pregnancy. With the onset of commercialization of surrogate pregnancies and the medical advancements, the practice has assumed novel dimensions- wherein the technological intervention with the woman's body has multiplied manifold.

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The most difficult dilemma that surrogacy generates, is with regards to the permissible ways of using the human body. This dilemma is a yet another standpoint of a clash between the revered notions of autonomy (of individual choice) and right against exploitation (paternalistic concerns of the state). Then there is a yet another un-settled dimension of the rights of the child.

This paper thus attempts to analyze the phenomenon of surrogacy in the context of bodily autonomy of a woman, the problem with commercialization and the much-valued right to found a family of one's choice. The intermingling of all these variations along with social dynamics of fertility, patriarchy and changes in the urban family structures makes surrogacy a quintessential subject of socio-ethical-legal prominence.

Introduction

Human reproduction, in the contemporary times, is one of the most fascinating areas of legal discourse. In the past three decades, the subject has witnessed an unprecedented dynamism with the advent of Assisted Reproductive Technologies (ARTs). Such technological advances within medicine have brought about greater control of a human being over the decision-making capacity over his body and life. Traditionally, the human reproduction and procreative outcome was a matter of fate, which was largely out of human control. It was with the invention and acceptance of contraception, birth control and other surgical methods that the reproductive process underwent a sea change, from the domain of 'nature' to the territory of 'choice and control'. As the reproductive process has opened up to more intensive scrutiny, law has assumed an ever greater significance¹ directed towards the governance of human procreation. The need for governance especially arises when the subject-matter gives rise to rights, and more specifically, competing rights.

Human reproduction and law has connected on wide-ranging topics like prevention, termination, assistance, questions of foetal-health, patient-autonomy, bioethics and so on.

The ARTs refer to the methods of reproduction that range from the simple Artificial Insemination to variants of In-vitro fertilization (IVF),

1 Jackson, Regulating Reproduction: Law, Technology & Autonomy, Hart Publishing, 2001: 1

more commonly known as “test-tube baby technology”². The pregnancy is achieved sans ‘coitus’ and with medical intervention. These techniques make it possible for men and women to separate their sperms and eggs from their bodies and let them mature and fertilize in glass containers in laboratory conditions. These techniques are either used individually on the patient or there could be a combination of more than one technique for achieving a viable pregnancy. The ARTs enable another type of collaboration, wherein the intending parents supply the gametes, but a third party provides gestational services. This process of bringing a child to life is known as Surrogacy. Such collaboration for the purposes of procreation brings forth a unique agenda of rights that seem to collide with another set of equally viable rights, of the intending parents.

ARTs have given rise to a host of novel legal issues and challenges. The toughest aspect in this jigsaw is that the law has to continuously evolve to match-up with the speed of medical developments, cater to the societal dynamics and address the arising uncertainties in this regard.

Within the panorama of ARTs, the unfolding of surrogacy particularly raises number of unique questions. Fundamental among these is the conceptual shift in the reproductive policy-making, which initially connected the procreative question with the woman and her body. Surrogacy shifts the site of reproductive rights outside the woman’s body and inside the lab or inside another woman’s body, which brings about the most potent ground of contesting claims and normative clashes. The essence of this arrangement lies in the involvement of two women (at least) in different capacities with respect to the child; thus bringing ART-Surrogacy to a new space of jurisprudential examination.

Surrogacy within the fold of ARTs

Surrogacy, as noted, is an arrangement whereby one woman carries a child for another with the intention of giving-up the child after birth.³ The practice of surrogacy has existed even sans technology. In India,

2 Qadeer, *Technology in Society: A Case of ART/Surrogacy in India*, in *New Reproductive Technologies and Health Care in Neo Liberal India- Essays*, by Imrana Qadeer (ed.), Center for Women’s Development Studies, 2010:4

3 Report of the Committee of Enquiry into Human Fertilisation & Embryology 1984, (Warnock Report), <http://www.hfea.gov.uk>, Chapter 8.1: 42.

customary practices like the naata tradition⁴, niyoga⁵ etc. cater to the woman's substitution tendencies for childbearing an answer to infertility or pre-mature spousal demise. All of this very clearly reflects the existence of indigenous non-medicalised versions of surrogacy that could be called as the traditional form of surrogacy.

As of today, there are two-types of surrogacy practices that are recognized. The first is 'traditional surrogacy', wherein, a man's sperm (usually that of the husband of a woman unable to conceive) is introduced (usually artificially) into a woman, who conceives and gestates a child with the intention of giving that child up to the genetic father and his partner, if any, at birth.⁶ The second type of surrogacy is known as 'gestational surrogacy' where the surrogate is implanted with the embryo of the commissioning couple. Both the genetic components i.e. the egg and the sperm are of the intending parents⁷ and the surrogate simply gestates the child. Within the umbrella of these two categories, surrogacy can take many forms, with the help of ARTs including: (1) a surrogate serving as a gestational mother who is impregnated with intended parents' gametes; (2) a gestational mother using genetics from one intended parent with help from a donor; (3) a gestational mother who has genetics from two donors but has two intended parents who will not be biologically related to the child; (4) a traditional surrogate mother who is both genetically related as well as a carrying a child who has genetics from an intended father; and (5) a traditional surrogate who uses donor sperm but will give the child up to a different intended father and intended mother.

So, the basic difference between ARTs and surrogacy is that the former refers to medical techniques and the latter refers to an arrangement between individuals that is capable of existing without any technology. When this technology meets with this socially prevalent arrangement, it generates an enterprise based on human emotions, cultural prejudices, and personal priorities.

4 Naata Prathais a system where woman has no claim on husband, child, his house etc. It is generally towards achieving a child or alternate relation, in case of dead wife or infertility.

5 Niyoga is an ancient Hindu tradition, in which a woman (whose husband is either incapable of fatherhood or has died without having a child) would request and appoint a person for helping her bear a child.

6 Cook et. al. (ed.) Introduction, in *Surrogate Motherhood: International Perspectives*, Hart Publishing, 2003:1

7 A further distinction can be drawn between 'contract' or 'commercial' surrogacy in which a formal contract for some consideration is involved, and 'altruistic' surrogacy where relatives, friends or acquaintances arrange surrogacy as a non-financial and non-contractual relationship among themselves.

The discussion on the ARTs has always been in the social context. It is a medical as well as a social issue in equal parts. Surrogacy receives its validity due to the magnetic glorification of a biological progeny. The pressure, stigma and trauma associated with infertility and childlessness breeds fertile ground for the surrogacy industry to germinate and prosper. The patriarchal definitions of women that place emphasis upon the significance on motherhood and child bearing further this demand. All of this, coupled with medical advances, non-coital ways of conception and state of the art medical infrastructure makes surrogacy quite an acceptable and respectable mode of family building. In the span of 10 years, beginning in 2005 when the first set of guidelines by the Indian Council of Medical Research were laid down, surrogacy has metamorphosed into an industry of almost 10 billion-dollar.⁸

On the other hand, there have been strong ethical concerns that also have been a compelling part of the social and institutionalized history of surrogacy. Right from the inception of systematic research on ARTs, the medical fraternity has faced consistent opposition from some sections of the public.⁹ These technologies were not viewed as a medical advancement but as a fundamental and unacceptable alteration to the concepts of life and family.¹⁰ Immediately after the birth of the world's first IVF baby in 1978 in Britain, protests from various quarters were reported. In-fact, a series of provocative editorials and newspaper articles were published claiming that the IVF technology would not allow an abnormal child to be born because, by testing abnormality in a pregnancy, termination of the same would be processed.¹¹ However, The Vatican urged the medical fraternity to defend IVF technology on the 'licitness' according to the Canon Law.¹²

Taking note of moral dilemmas and religious concerns on the one hand and witnessing the pace in which the technology was developing on the other, in 1982 the British government established the Warnock Committee¹³

8 The Hindu, Aug.24, 2016, Surrogacy Bill gets the Cabinet Nod, <http://www.hindu.com/article9025848>.
e.e.

9 Jones, Making Reproductive History: One Doctor's Perspective on the Law, in *Legal Conceptions: The Evolving Law and Policy of ARTs*, by Crokin and Howard (eds.), The John Hopkins University Press, 2010: 3

10 Ibid. p.4.

11 Ibid.

12 Ibid.

13 The Warnock Report of the Committee of Inquiry on Human Fertilisation and Embryology Department of Health and Social Security, London, 1984.

to examine and reflect on the social, ethical and legal implications of recent and potential developments in the field of human assisted reproduction. Modern thinking on assisted reproduction and ethical debates on surrogacy begins with this Warnock Report. The role of the Committee was to develop principles for the regulation of IVF and Embryology by defining permissible limits and appropriate safeguards. The findings of the committee became the basis of the U.K.'s Human Fertilisation and Embryology Act (HFEA).

The Warnock Committee constituted members representing a wide spectrum of society, from law to theology to psychology, medicine, clinical neurology, the department of child care and others. It attempted, and to quite a large extent succeeded, in adopting a “steady and a general point of view”¹⁴. The committee however, could not unanimously agree on 3 issues: (i) the subjects (of such treatments), (ii) research on human embryos and (iii) surrogacy. Barring these, the committee drafted the recommendations and the views of all segments found a place in the recommendations. At the moment the HFEA permits only altruistic and not commercial surrogacy.

Surrogacy seems to have hurt the concept of exclusivity in marriage and seem to invade the institutionalized model of heterosexual-monogamous family. This problem has assumed giant proportions with the intermingling of technology with commercialization. The ethical discomforts that till now were, ‘in-the-closet’, have suddenly become a very poignant and urgent agenda for medical-ethicists, feminists and lawyers. This has stirred contentious debates within the jurisprudential concepts of rights and obligations, relationship between law and morality, and has presented a crucial challenge of hierarchically placing competing values, thus making surrogacy a complex terrain to tread on.

The Right to Procreate - The Question of Autonomy

There is general acknowledgement that creating and rearing biological descendants is an immensely significant life-choice for an individual. A simple understanding of procreation presumes the creation of biological descendants through gametic fusion with a partner, gestation by the female, and usually rearing by one or both of the procreators.¹⁵ The value that

14 Ibid. Read the Forward to the Warnock Report, para 2 p. 1

15 John A. Robertson Non-coital Reproduction and Procreative Liberty, Constitutional Rights, Law, and Public Policy, p. 250, From section II of “Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction.” Southern California Law Review 59 1986: 939-1041.

reproduction entails is based on the understanding that it is an inevitable human desire to replenish its next generation.

As reproduction is linked with concepts of autonomy, liberty and self-determination and theorized upon heavily in the courts of law, it seems almost indisputable that every person has a right to become a parent.¹⁶ This right to be a parent and produce offspring emanates from one of the primeval and elementary desires and interests that a person may have. Such interests, it would be fair to assume, constitute with much significance a person's self-identity and sense of belonging to the living-society.¹⁷ Furthermore, it is argued that humans have a basic reproductive instinct derived from 'guiding principles of evolution'¹⁸.

It therefore seems a logical derivation to accord persons a certain degree of liberty in creating and rearing biological descendants.¹⁹

When a right is assigned to an act like reproduction it inevitably acknowledges the intimacy between pregnancy and self-sufficiency of the individual, giving rise to the question of autonomy.

The concept of autonomy endorses the value of sovereignty over one's self. It is thus a freedom to make certain personal decisions without undue interference from others.

Reproduction, for that matter, becomes the most personal decision in this regard governing the most private of all human endeavors. When an individual's reproductive preferences are disregarded, it amounts to undermining their ability to control the most intimate spheres of their lives. Individuals' reproductive decision-making has a profound impact upon the course of their lives. Therefore, negating the opportunity to make such a decision hurts the concept of autonomy substantially. The jurists are united in their views that reproductive freedom is sufficiently integral to a satisfying life that it should be recognized as a critical "conviction about what helps to make a life good".

Since the time the articulation of human rights gained momentum in the post World-War era, the US Supreme Court has engaged in defining

16 Ibid. p.251.

17 Daniel Sperling, "Male and female he created them": Procreative liberty, its conceptual deficiencies and the legal right to access fertility care of males, *International Journal of Law in Context*, 2011: 275.

18 Ibid p.2.

19 Ibid.

the jurisprudential sphere of procreation. The opening lines of *Skinner v. Oklahoma*²⁰ read: ‘This case touches a sensitive and important area of human rights; a right that is basic to the perpetuation of a race, the right to have offspring’. Thus, it emphatically brought the concept of rights within the reproductive realm. The court in this case was hearing a matter concerning the validity of a statute that permitted sterilization of individuals convicted for felonies involving moral turpitude. This statute was held to be unconstitutional on the ground that it violates the due-process clause of the American Constitution. The Court opined that the act of procreation is one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the human race.²¹ This case went to on to establish in clear words that the ‘right to procreation’ is fundamental and procreative-autonomy is a constitutional value entitled to more than passing protection.

The Courts in a number of other occasions endorsed the significance of choice and control over one’s procreative decision making in several other judgments. The historic *Roe v. Wade*²² judgment established a personal right over one’s procreative decision-making within the first-trimester of pregnancy. In *Griswold v. Connecticut*,²³ the Court ruled that a state regulation prohibiting the use of contraception violated an implicit “zone of privacy” found within the “penumbras” of the Bill of Rights that surrounds “the sacred precincts of marital bedrooms”.²⁴

This trend of the US courts in embracing a libertarian view towards the regulation of individual life and bringing the aspects of procreative process within the constitutional realm marked the beginning of a new vision in constructing reproductive rights.

Similar and parallel developments were also articulated in other parts of the world as the international and regional conventions had started to gain its momentum, thus propelling the shaping of international customary consciousness about reproductive rights.

20 *Skinner v. State of Oklahoma*, 316 U.S. Supreme Court 535 (1946).

21 Michael & Roy, *Genetic Control and Procreational Autonomy in Bioethics and Law- Cases, Materials & Problems*, American Casebook Series, West Publishing Company, 1981: 400.

22 *Roe v. Wade*, 410 U.S. Supreme Court 113 (1973)

23 *Griswold v. Connecticut*, 381 U.S. Supreme Court 479 (1965)

24 *Ibid*, p. 484–86

The Universal Declaration of Human Rights²⁵ (UDHR), lays down the foundation of the basic principles of humanity on which the conduct of world civilization be based. This Declaration enumerated treaty obligations that were designed to give legal force to the UDHR²⁶. The International Covenant on Civil and Political Rights (ICCPR) is one such instrument. The ICCPR in Art.23 recognises the right of men and women of marriageable age to marry and found a family.

The Human Rights Committee, in its General Comment on Article 23, stated that 'the right to found a family implies, in principle, the possibility to procreate'.²⁷ Some commentators have argued that this includes the right to use reproductive technologies, subject to those prohibitions necessary to protect the rights of others.²⁸

Reproductive rights, began to appear on stage as a subset of human rights in the year 1968 with the Proclamation of Tehran, which recognized the right of parents to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect.

Women's health movements had a considerable impact on the policy making on reproductive health. Following the International Conference on Population and Development (ICPD),²⁹ in Cairo, the definition of reproductive health had a comprehensive coverage. In fact the Cairo Program remains the first policy document to define reproductive health, implying that people have the capability to reproduce and the freedom to decide if, when and how to do so. Implicit in this condition are the rights of men and women to be informed about and to have access to safe, effective, affordable and acceptable methods of family-planning of their choice, as well as other methods for regulation of fertility which are not against the law.

The essence of reproductive rights has also found echoes in the Indian version of reproductive policy making that passed several legislations governing the procreative realm of an individual.

25 International Human Rights Law, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited July. 31, 2016).

26 Rebecca Cook et al., *Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law*, 2008:148.

27 UN Human Rights Committee, General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Art 23), UN Doc HRI/Gen/1/Rev.8 (8 May 2006) 188.

28 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Engel, England, 1993: 413–14.

29 International Conference on Population and Development, held in Cairo, 1994.

Reproductive Policies in India : Placing ART-Surrogacy in the Scheme

The reproductive policy in India has largely concerned itself with the post-independence population concerns. The legal enactments concerning reproduction are reflective of these concerns and have all tried to address the dominant policy questions that the state grappled with. Therefore, the regime in India with respect to reproduction, even though overtly a feminist issue, covertly it remains a matter of policy engagements. Laws in India have pertinently articulated the questions of medical termination of pregnancy, followed by legislation to curb sex-selective abortions. Then, there has been an era of the contraceptive movement in India, which also coincided with the agenda of population control.

The reproductive discourse in India, until the arrival of the ARTs, thus seemed to be largely governed by population concerns and backed by the government. ARTs however have a slightly different history in India. Its unfolding commenced in 1984 with a research collaboration in an IVF project initiated by the Indian government, which led to the birth of Baby Harsha in 1986, the first-documented IVF birth in India. This never became a massive gender issue like contraception and abortion and no systematic engagement was reported during that decade.

Although, the author has continuously drawn parallels with the other on-going discourses on reproduction, due to its placing within the same thematic territory, it is also important to draw the basic differences between legal regulations on abortion, contraception and sterilization with that of Assisted Reproduction, in order to draw up our policy objectives with respect to the ARTs. For the sake of brevity, the author categorizes the first set of practices as Type- 1³⁰ and the second set as Type- 2³¹.

- The Type-1 methods are anti-procreative that work towards termination or prevention of birth whereas Type-2 functions in the zone of 'propelling' procreation. This vital difference makes ARTs a distinct genre within the otherwise larger scheme of things in reproductive policy-making, and requires a fresh perspective to

30 Type- 1 represents procedures like abortion, sterilisation and contraception

31 Type- 2 represents the Assisted Reproductive Techniques, Collaborative Reproduction and Surrogacy

approach the subject theoretically. E.g. if the right includes the right not to procreate then it must include the affirmative right to procreate.

- Although, in all forms of cases there has been some use of technology but technological intervention in the Type-2 cases makes them worthy of a specialized consideration. The external handling of gametes, hormonal injections, embryo-transfers, laparoscopy, genetic implants etc. are such superlative techniques that not only assist in reproduction but also cause for a lot of bodily intervention in the women's body thereby creating newer avenues for a discussion on women's rights.
- Planned pregnancy, including the number and spacing of children, has been the norm with the Type-1 cases, whereas in the Type-2 category, planning can range from choosing the genetic make-up of the child to its sex, colour of the eyes, skin etc. The precision of such designing brings in with it a whole new jurisprudence of eugenics' impact on human rights and lives.
- Procreation traditionally refers to 'exclusivity' between the owners of the gametes i.e. the parents. ARTs tend to loosen up this exclusivity and bring within its ambit external players who supply either their wombs or genetic material to bring a child to life.
- Monetary considerations play a vital role in Type-2 cases. Most government medical centres offer MTP or contraception services but the ARTs and surrogacy services have been unfolding in the privatized settings. The element of commerce sets ARTs apart wherein reproductive tourism and trade in gametes have given procreation a market-based meaning.

Therefore, considering these stark differences it is important to view ARTs and Surrogacy using a distinct lens as compared to the remaining reproductive legal scheme in India and formulate the legal policy keeping these features in mind.

Surrogacy: A Composite Moral Baggage

The beginning of a discussion on surrogacy essentially calls for identification of the problem-elements that brings the practice to scrutiny

and arouse public anxiety. What is the problem with surrogacy? Is it ‘the arrangement’ per se, or is it ‘technological inroads’ into the private realm that makes surrogacy thorny? Is it the ‘economic dimension’ or is it the ambiguity with respect to identifying owners of gametes and creating newer avenues that challenge the family framework? Or is it a combination of all of these?

Surrogacy can give rise to situations like: one woman can give birth to her own sibling, or a grandchild, or a nephew or a niece etc. This kind of set-up is generally accepted in many societies for it signifies noble intentions and works within family, rendering the arrangement relatively free of legal entanglements. This also makes it more inclusive, less alienated and away from the public glare. Therefore, it is the consolidation of an industry around surrogacy and resulting monetary dimensions that opens it up for more intense legal examination.

There is a four-pronged explanation as to the reasons of surrogacy becoming controversial; first, is commercialization.³² Commerce within a procreative context arouses corollaries with organ-trading and baby-selling, and draws comparisons with anti-trafficking legislations.

Second, is that the ARTs, involves ‘manipulation’ and ‘handling’ of ‘gametes and embryos outside of the body’, which ‘raises the problem of moral responsibility and legal ownership’³³. Surrogacy raises property rights arguments with the populist slogans of ‘renting the womb’ or ‘wombs for sale’ and tends to draw comparisons with practices like slavery, exploitation and commodification.³⁴ Third is concern about reproduction across traditional social boundaries relevant to procreation. Surrogacy puts birth outside the marital-boundary and allows a child to be procured from beyond that boundary. This question has problematic dimensions because law, till date, presumes a heterogeneous family structure for a child.

The fourth element is concerned with the nature and value of the intentions that surrogacy involves. This view was reported by the Warnock Committee: ‘in such an arrangement of surrogacy a woman deliberately allows herself to become pregnant with the intention of giving up the child to which she will give birth, and this is the wrong way to approach pregnancy.’³⁵

32 Lane, Mellisa, *Ethical Issues in Surrogacy Arrangements*, in *Surrogate Motherhood: International Perspectives*, Cook and Sclater(eds.), Hart Publishing, 2003: 121

33 *Ibid.* p.122.

34 *Ibid.*

35 *Supra* note 13, Para 8.18, and Para 8.19, pp.44-45

The moral pedestal on which pregnancy is rested and valued by a civilized society is deeply rooted within the surrogacy rhetoric.

In one of the pioneering English judgments on surrogacy, famously called 'the Baby Cotton³⁶ case', the inherent dichotomy that surrogacy offers has been articulated as follows:

"It is a strange phenomenon that a woman bearing a child from a donated egg convinces herself that she is the true mother as she gives birth to the child, whereas it is the exact opposite in host [here, 'IVF'] surrogacy, when the surrogate mother is pregnant with a transferred embryo. After the birth she is just as positive she is not the true mother."³⁷

This strangeness of the phenomena bothers most of the writers and researchers even now. They are divided on this very notion of strangeness, which makes it the first aspect for our examination.

The Body Question

The most difficult dilemma that surrogacy creates is with regards to permissible ways to use human body. The central position articulated in medical law is that the principle of respect for patients' autonomy determines that the patient has the right to control his or her body and what is done with it or to it.³⁸

As Martha Nussbaum states, "all of us, with the exception of the ones who are independently wealthy and the ones that are unemployed, take money for the use of our body. Professors, factory workers, lawyers, singers, prostitutes, doctors, legislators everyone does things with parts of their bodies for which they receive a wage in return."³⁹ Some people get good wages; some do not; some have a relatively high degree of control over their working conditions, and some have little control; some have many employment options, and some have very few. And some are socially stigmatized, and some are not.⁴⁰

36 *State of Maine v. Sherrie R. Cotton* 673 A.2d 1317 (1996)

37 *Ibid.*

38 Skene Arguments Against People Legally "Owning" Their Bodies, Body Parts and Tissue, 2, *Mac Quarie LJ*, 2002: 165.

39 Nussbaum "Whether From Reason or Prejudice": Taking Money for Bodily Services, *Journal of Legal Studies*, Vol. 27, January 1998: 693-694.

40 *Ibid.*

In earlier days, women who performed on stage as opera singers or danced in clubs were stigmatized. Likewise, there have been many activities that are stigmatized by the society, thereby causing one to evaluate the social and moral values that the activity/profession entails. The use of woman's body as a commodity is a consequence that feminists have resisted as well as debated consistently. Therefore, many of the moral questions that are raised in the surrogacy scenario are specifically because commerce is involved in the process.

For women to earn money through the use their bodies or the products of their bodies is not unique to surrogacy⁴¹. During the eighteenth and nineteenth centuries, poor Frenchwomen “often sold not only their bodies, but, as their charms began to fade, even their teeth-to be made into dentures for the wealthy elite.”⁴²Barbara Katz Rothman has stated, “When we talk about the buying and selling of blood, the banking of sperm, the costs of hiring a surrogate mother, we are talking about bodies as commodities. The new technology of reproduction is building on this commodification”⁴³.

This commodification argument features at the core of a quintessential ethical question and draws flak for its disrespect to the physical being of the woman. The simple corollary that is available in this context is: when the sale of kidneys, eyes or other organs. is not permitted in India how could renting a womb be made permissible? This argument is more relevant to the issue of legal consistency on the matter.

When modern day surrogacy gained prominence in the Baby M controversy in 1986, one of the underlying questions that the case brought forth is of autonomy over one's body and bodily materials. This case involved a contract surrogacy for an infertile couple in which the surrogate mother was also the egg donor,who then developed an attachment to the child and refused to hand her over to the commissioning parents. The matter reached the court, and finally the New Jersey Supreme Court ordered custody of the child to the commissioning parents. As the parties went ahead with their contractual arrangement, the surrogate is reported to have stated“...seeing her, holding her, she was my child.” “I signed on an egg. I didn't sign on a baby

41 The author is drawing corollaries between surrogacy and prostitution to draw the analogy pertaining to the commodification argument.

42 Supra note 39 p. 695

43 Ibid.

girl, a clone of my other little girl.”⁴⁴ Later on she explained to the court that “she would not feel whole” if she gave up her child. Deeply anguished by the proceedings, she went into depression and stated that she believed, “she has been chosen by God to show people not to do surrogate mothering.”⁴⁵

This case took the American media by storm. The surrogate mother’s statement infers a deeply-valued interest in the product of her body, that is, the womb, the egg (in this case both of which were hers) and the resultant outcome, a child, to her sense of being. Within the complicated scheme of technology and medical assistance, one tends to overlook the tender human feelings that are compromised or manipulated. Although, Baby M represents a case of full surrogacy (where she served as both the genetic and gestational mother), it is still a pertinent case on the point of submitting one’s reproductive autonomy by virtue of a contract and for money. The surrogate (Mrs. Whitehead) makes a poignant statement whereby a subtle yet affirmative connection is indicated in the sense of: ‘I own my body’⁴⁶ and all that ‘is’ and ‘from’ my body is my own⁴⁷ in a modern technologically advanced context.

In a surrogate arrangement, the use of a female’s womb for a temporary period in a contractual understanding (in lieu of a monetary compensation) brings in a lot of similarities with trade in organs, with an added possibility of emotional entanglements. The womb of a gestational carrier is ‘hired’ for a particular period by the commissioning parent/s and she is thereby expected to adhere to the contractual requirements with respect to the usage of her own body for the stipulated period.

The success rates of the IVF technique is not very high. In such situations, numerous attempts are made for a successful conception. This involves transferring of embryos into the wombs of surrogates until conception is achieved. The ART Bill version of 2010, envisaged for a surrogate a total of 5 successful ‘live-births’ including her own children. This ceiling of 5 successful live births is a confusing requirement with respect to ‘miscarriages’ as they do not amount to successful births. Even though she completes the full term of pregnancy, her labour is disregarded for the fact of the failed

44 Michele Galen, “Surrogate Law: Court Ruling,” *National Law Journal*, September 29, 1986: p.8 in *Surrogate Motherhood*, Martha A.Field, Harvard University Press, 1990 .

45 Report of Phyllis R. Silverman for use in Baby M litigation, October 23, 1986, p. 3.

46 George, Property, “Human Body & Its Parts: Reflections on Self Determination in Liberal Society”, *EUI Working Paper Law*, 2001: 20.

47 Emphasis supplied by the Author.

‘outcome’ of the said pregnancy. This further emphasizes her ‘worth’ and ‘value’, which is quantified on the basis of a successful reproductive outcome. The devaluation of a woman’s body is extremely stark. The guidelines also do not prescribe post-natal care and follow-up procedures meaning that once the child is delivered and handed over to the commissioning parents, the contract is fulfilled; thereafter the bodily changes that occur, lactation aspects, complaints arising out of C-section deliveries or multiple deliveries etc. do not feature in the medical protocols and Surrogacy guidelines in India.

The Social Question

In the Indian-social context, the components of a definition of fertility becomes all the more poignant as “fertility” defines womanhood, and womanhood is defined by a woman’s capacity to mother.⁴⁸ In India, ‘family’ is a revered institution and reproduction is almost an obvious and compulsory progression from marriage. Laws, values and institutions protect and support human desires to have offspring⁴⁹, and the rearing that follows.

The Law Commission Report⁵⁰ on the ART Bill, mentions that a woman is respected as a wife only if she is the mother of a child, so that her husband’s ‘masculinity’ and ‘sexual potency’ is proved, and the lineage continues.⁵¹ This is the evident ideology that the state endorses through the ART Bill, with respect to women’s roles. The Law Commission further states: “Infertility is seen as a major problem as kinship and family ties are dependent on progeny. Herein, surrogacy comes as a supreme saviour.”⁵² With respect to surrogacy, it also mentions that one of the intended parents should also be a donor, because the bond of love and affection with a child primarily emanates from a biological relationship.⁵³ This stance of a much-revered body like the Law Commission reflects the attitudes towards infertility and its constructions within the deep-rooted social mores.

48 Anjali Widge, Sociocultural attitudes towards infertility and assisted reproduction in India in *Current Practices and Controversies in Assisted Reproduction*, EffyVayena, Patrick J. Rowe and P.David Griffin (eds.), WHO, Geneva, 2002: 60-74.

49 A lot of activism went on to institute prevention of conception.

50 See Law Commission of India Report No. 228 “Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a Surrogacy”, para 1.2, page 6.

51 Ibid p. 6.

52 Ibid.

53 SAMA, “Unraveling the Fertility Industry: Challenges and Strategies for Movement Building”, International Consultation on Commercial, Economic and Ethical Aspects of Assisted Reproductive Technologies (ARTs)-A Report, 2010, Emerging Perspectives and Challenges: Towards a Global Movement, p.47.

Often this social pressure is internalized, giving rise to intense feelings of guilt and shame on the part of the couple for not being able to perform the “normal” and “expected” role. This three-dimensional-guilt- comprising of ‘social, familial and personal’, make for a desperate situation for a woman when she enters the ART industry and accesses a clinic.

Thus, the desire of the couple to have a child is a complex one, determined by many family expectations, and infertility becomes a major social premise to look out for as a solution in this regard.

The Commerce & Contract Question

A surrogacy contract is a pre-fertilization arrangement made between a couple and a surrogate, with the intent of relinquishing the child at its birth. The fact that a child is the ‘object’ of this kind of agreement and a familial relationship is created via a contract is what makes it a peculiar set-up.

Principally speaking, surrogacy contracts need not involve payment of a significant fee. The freedom to transact through surrogacy and the freedom of a woman to make a contract with another for this purpose derives from a common source in freedom of contract and the freedom to exercise her autonomy. This is more specifically so in cases of gestational surrogacy contracts.⁵⁴

However, there is an equally compelling opposition that presents innate problems with the contract perspective. This view suggests that considering the nature and object of such transaction, it is difficult to ascertain the free consent of the birth mother. Therefore, surrogacy contracts do not predominantly conform to the central requirements of contract law.⁵⁵ The moralist-advocates suggest that it is wrong to believe that a birth mother’s consent to such a contract could be ‘freely’ given, in light of the peculiar nature of the process of pregnancy that will intervene between the original consent and the moment of giving up the baby.

The nature of surrogacy is such that there is general feeling of immorality in terms of taking money or entering into contracts in connection with the use of one’s reproductive capacities. Feminists, on this point, pose similar arguments for marriage contracts or for that matter, pre-nuptial agreements,

54 Lascarides, A Plea for the Enforcement of Gestational Surrogacy Contracts, Hofstra Law Review, Vol.25, Issue 4, 1997: 1224.

55 See Melisa, *Supra*. 32 p. 129.

and state that such financial transactions in the area of female sexuality are demeaning to women and involve a damaging commodification and market alienation of women's reproductive capacities.⁵⁶ Also, the problem arises with the basics of a contract, that is, with the element of consent generally arising due to unequal bargaining power. The feminist argument is that such kinds of consent can be analyzed from the various studies on vulnerability and exploitation of women. As Catherine Mackinnon states⁵⁷: "If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it? The money thus acts as a form of force, not as a measure of consent. It acts like physical force does in rape."

This view however, is taken to be infantilizing women, by refusing to grant them agency of holding them responsible with respect to their reproductive choices and decision-making. It undermines the autonomy of the surrogate mother to enter freely into an agreement of surrogacy and undertake to receive money for their childbearing services. A woman might actually consent to such an agreement on equitable terms and a sweeping prohibition would result in creating an anomaly leading to a presumption that such a woman is not capable of entering into a contract and enjoy her reproductive potential (autonomy) to the full.⁵⁸ In fact, several studies have shown that the surrogate, after successfully giving birth once, wishes to return to the process for making money. This aspect of deliberation thus divides feminists on their stand about the exploitative or liberating potential that surrogacy exudes at the same time.

Surrogate Motherhood: Attempting the "Rights", Question

The most significant aspect that the ARTs have brought about is disintegration of procreation into various phases of coitus, conception and gestation⁵⁹, which in turn creates uncertainties about the prevailing conceptions of parenthood. With the ARTs, various un-related people make their distinct contributions to bringing the child to life⁶⁰. Such people could be 'known' as well as 'unknown' to each other and thus problems arising with both the categories are unique and distinct. This gives rise to several

56 Elizabeth Anderson, *Is Women's Labor a Commodity?* Philosophy & Public Affairs, 1990, Vol.19, p 71

57 Catherine Mackinnon, *Prostitution and Civil Rights*, Michigan Journal of Gender & Law, 1993, Vol. 1, pp. 13-31

58 See Supra note 54, p. 1226

59 Hill John Lawrence, 'What does it mean to be a "Parent"?' The claims of biology as the basis of Parental Rights', 66, New York University Law Review, 1991: pp. 383-417.

60 Ibid. 345

normative claims about their status as parents. In such a situation, the question as to who should be recognized as the parents of the child takes the center stage. This leads to a further critical enquiry as to what significance each component of procreation has, whether 'genetic', 'gestational' and 'social' for constituting parenthood?

The ART-Surrogacy disputes regarding parental claims have proposed several stands and one such stand has been put-forth in California called 'the intention model'. This model was first highlighted in the Baby M case wherein, the competing claims of two women was settled in favour of the commissioning mother who hired the surrogate for the purposes of procreation. Here, the commissioning mother, who was neither the genetic nor the gestational mother won her claim as she was legally the wife of the male genetic contributor. Her claim although, biologically a weak one, trumped over the otherwise stronger claim of the surrogate who had donated both her egg as well as loaned her womb for the process of creating the offspring.

A clearer articulation of the pre-birth intention as a firm turf for establishing a parental claim was articulated in *Johnson v. Calvert*⁶¹, wherein, the court acknowledged the clash of two strong claims of genetic (commissioning) parents and the gestational (surrogate) mother. There were 3 people in this case, who asserted their parental rights. When the litigation ensued, the majority of the Supreme Court considered that as both women had presented acceptable proof of maternity, a resolution was to be made by reference to the parties' respective 'intentions'.⁶² The Court awarded full parental rights to the commissioning parents, and analogized the role of the surrogate to that of a foster parent. Thus, the court implicitly recognized that in a dispute between the egg donor/intended mother and the gestational host, the former has the superior legal claim. In fact, it used the ideal of pre-birth intention as a "tie-breaker" for two equally valid and compelling claims.

The Johnson ruling therefore, brought to light a very unique concept of pre-birth original intent, in determining the status of parent, and thereby generated a judicial verdict that a legally valid family can be created merely on the basis of intention.

Since the biological basis of parenthood can now be subdivided into two:

61 *Johnson v. Calvert*, Supreme Court of California, 851 p.2d. 776 (Cal. 1993)

62 *Ibid.* 782 (reasoning that the intention of the parties involved determines parenthood as legally understood).

gestation and genetics; in the understanding of the US Courts genetics has trumped over the gestational elements.

This ruling has been upheld in several decisions in the US where, the commissioning parents' claim has been given a pre-dominance even when such parents have not contributed their gametes in the creation of their child⁶³ and there is absolutely no biological connection.

This de-valuation of gestation in the U.S. has met with a different result in other parts of the world where vesting of maternal rights are largely found in the gestational, rather than genetic. Several countries, including the UK and France., consider gestation as a factum of motherhood in the legal sense.⁶⁴

Although, the only provision in India dealing with the issue is prima facie answering the question of paternity, the subtlety of the indication is also towards the birth mother, in that it talks about the husband of the female who gives birth to be the father.⁶⁵

Application of the presumption of biology, as it has been understood traditionally, would give legal priority to the surrogate as the birth mother. The traditional Indian culture gives immense prominence to gestation, which is celebrated through rituals like godh-bharai in the 7th month of pregnancy.⁶⁶ This ritual is done to bless the unborn and the mother with joys of motherhood. Gestation holds a clear significance vis-à-vis the mother. The Indian Shastric texts talk about the much-revered Garbha-sanskar. It is traditionally believed that a child's mental and behavioral development takes shape in the womb and this is influenced by the mother's state of mind during pregnancy. This knowledge can be traced back to the ancient scriptures.⁶⁷ Thus, a woman's biological component vis-à-vis the child has been presumed to be referring to her gestation.

A number of scholars argue that the egg-donor should take precedence because the hereditary and biological characteristics of the child are derived

63 *Buzzanca v. Buzzanca* 72 Cal. Reporter.2d 280 (Cal. Ct. App. 1998).

64 Hill *Supra* note 59 p. 282.

65 Sec. 112 of the Indian Evidence Act lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

66 Pande, Sketches from a Baby farm, *Global Dialogue*, Newsletter for the International Sociological Association, Vol.4, Issue. 4, 2014.

67 <http://www.babycenter.in/garbha-sanskari/an-overview/>, accessed on December 2015.

from her.⁶⁸ The personality, facial features, body-type and emotional inclination are impacted by the genetic composition of the child. A second opinion is that gestational function assumes dominance in bringing the child to life. This argument emphasizes the directness of identifying the mother as the gestational host. The bodily involvement of the pregnant woman with the child, along with the emotional bonding gives the lady who keeps the baby in her womb, including the surrogate, a greater right to be designated the legal mother. In general terminology, the term pregnant could also be associated with the aspect of gestation. Therefore, out of two segments of biology, it is the gestational aspect that holds deeper prominence.

In the Indian context, the ART Bill 2010 under Sec. 35⁶⁹ vests with the commissioning couple the status of legal parenthood. The tone of the Bill clearly indicates the relative superiority of 'intention' in attributing legal parenthood.

In so far as the best-interests-of-the-child argument goes, there is no substantial evidence of any difference in the quality of attachment between adoptive mother and natural parent-child relationships.⁷⁰ After reviewing the literature on the bonding issue, one group of researchers noted that early contact between mother and child has no provable long-term psychological consequences for the mother's feelings towards the child and, at best, only marginal short-term advantages. In light of these studies, the post-natal mother to infant bond cannot be an adequate basis upon which to ground an argument for the best interests of the child.⁷¹

As far as the aspect of the child's emotional security is concerned, there is absolutely no evidence that the child can only form this secure relationship with a biological parent.⁷²

In the light of these arguments, concerns of the gestational carrier do not seem to stand on a strong turf. The emotional aspects nonetheless seem extremely difficult to legislate upon, being highly subjective, but certainly a pre-contract psychological assessment of the surrogate is highly recommended.

68 Robertson, *Intentional Parenting*, New York University Law Review, Vol. 66, 1995: 343

69 Sec 35 (1) A child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through sexual intercourse.

70 *Supra* note 59 401

71 *Ibid.*

72 *Ibid.* 403

Conclusion

The policy-makers in India are grappling with challenges emanating out of the changing dimensions of human society. The uniqueness of the surrogacy industry is its interconnectivity with the moral fabric of society. Legislating on a matter that has moralist overtones poses the biggest challenge before any legislator. The problem increases with the technical aspects that need to be appreciated by the lawmakers. To what extent the state prescribes specific rules for the technical experts who run the industry is an area of plausible confusions, since governance in this regard is called upon to provide doctors with a certain amount of discretion. In the exercise of their duties a basis of reasonable discretion is required, which thereby makes regulation on this subject a difficult task for the state. On the other hand, lack of regulation in individual practices is further leading to unevenness with respect to determining a proper and uniform line of treatment. The doctors are given a lot of space for using discretion, which in a way is impacted by their value judgments. There is also another dimension to the problem; since the technology has potential for further growth and research in that regard is going on, the State is not fully prepared to fix the limits by prescribing a certain code of conduct or protocol of operation.

The latest version of the surrogacy Bill that has received the Cabinet Approval attempts to take steps in the direction of prohibiting commercial surrogacy and only permitting altruistic surrogacy in a limited sense. This new version has received a mixed response considering the strong stand that the state has taken. The complete trumping of the right to become a parent through surrogacy is a difficult stand and certainly needs to be pondered upon.

The stigma and trauma attached with infertility is not an aspect that can be overlooked. The intimate nature of the feelings discourage the individuals from opening up about their desire to have a child to their families; and there are cases when a person doesnot have anyone in the family or anyone in the required age-group. This makes for a difficult situation for the individuals who want to have a child. The rights of the passive third party have to be taken into account before legislating on surrogacy policy in India. There is an immediate need to establish a scheme for identification of the surrogate through a centralized database or, as the ART Bill proposes, for a National Repository; to keep a track on the number of times surrogate pregnancies

have been undertaken. Details of the pregnancy including the nature of delivery as well as the treatment procedures employed, have to be documented along with such records. This centralized database will go a long way towards preventing the surrogate from indefinite attempts at surrogacy and any sort of exploitation in the hands of the middle-men.

Adequate follow-up of the surrogate's health is a yet another dimension that needs to be evolved. A post-procedural impact assessment shall go a long way in devising practical safeguards against long-term health risks.

The rhetoric on ARTs in general and surrogacy in particular cannot be completely understood without initiating discussion on embryonic trade. Sperm and egg donation in India unfold in the private settings and they have not received much attention as far as the regulations are concerned. Although, the rules of egg and sperm donation state that the use of sperm and egg from a near relative shall not be permitted⁷³, in cases of anonymous donors, there is no way to find out the actual identity of the donor and hence monitoring this aspect becomes difficult.

Medical advances will undoubtedly continue to challenge society in more ways than one. The ground that ARTs and surrogacy lays before the State requires it to identify the goals that it seeks to achieve and accordingly endeavor to seek solutions by proposing new and working models as a base for accommodating the questions emerging within this medico-legal sphere.

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Important Recommendations of the Commission

NHRC RECOMMENDATIONS ON RIGHT TO HEALTH CARE ON WESTERN REGION PUBLIC HEARING*

State of Rajasthan

A. Case Studies Presented on Health Rights of Specific Groups of People or Related to Specific Schemes

I. Ensuring Access to Health Services for Brick Kiln Workers

Recommendations :

- (i) Provision be made for Mobile medical units, in order to ensure outreach of health services to the migrant population of brick kiln workers in various districts of Rajasthan, with a special focus on mother and child care services.
- (ii) Periodic visits of ASHA and ANMs, registration of pregnant mothers, organisation of Health camps and MCHN (Mother & Child Health Nutrition) days should be organized periodically at the brick kiln sites.
- (iii) The State may involve civil society organisations in implementing an appropriate monitoring mechanism in various Districts, to ensure effective outreach of essential health services to brick kiln workers.

* These recommendations were made on the basis of sessions held on 7 January 2016, i.e. on second day, related to Case Studies and Systemic Issues on Right to Health Care during the two-day Western Region Public Hearing on Right to Health Care held on 6-7 January 2016 in Mumbai.

II. Community Based Monitoring of Health Services

Recommendation :

- (i) Community based monitoring should be restarted by the State Government and State Health Mission in Rajasthan, including active involvement of appropriate NGOs and civil society organisations.

III. Concerns Expressed due to Existing and Emerging PPP (Public Private Partnerships) in Health Sector

Recommendations :

- (i) Rajasthan Government should ensure that any model of PPP in healthcare should presently be on a short term and experimental basis, with stringent monitoring mechanisms and accountability indicators in place, while ensuring that this arrangement will not lead to any healthcare rights violation. The Government may conduct systematic scrutiny of any private bodies being contracted for operating public health facilities, prior to engaging with them in any partnership arrangement. For the Government of Rajasthan, the first priority for provision of health services to people must be through strengthened, improved and expanded Public Health services, in preference to outsourcing of services to private providers.

IV. Denial of Right to Health Care for Persons Living with HIV/ AIDS

Recommendation :

- (i) Adequate number of ART centres, second line medicines and key tests such as viral load test should be made available in Rajasthan.

ART centres and HIV related tests should be made available at all medical colleges in the State.

B. Presentations on Systemic Issues

I. Women's Access to Health Care

Recommendations :

- (i) State Health Department should ensure that skills and understanding of peripheral health workers, regarding various forms of discrimination and vulnerability faced by women in context of maternal health, need to be improved through appropriate capacity building. This would enable these issues to be factored into birth preparedness plans, health care delivery and follow up plans for women during pregnancy and delivery.
- (ii) State Health Department should ensure adequate blood availability, to avoid denial of delivery services to women in rural health centres. Ensuring blood availability should not be treated as merely the responsibility of the family. Appropriate steps may be taken by the State Government to adopt the National Blood Policy, along with implementation of Indian Public Health Standards (IPHS) regarding blood availability in all public health facilities. It is recommended that the State Health Department may evaluate the option of Unbanked Direct Blood Transfusion to ensure availability of blood especially during emergencies.
- (iii) In case of denial of maternity services in public facilities, if women are forced to avail of private services for delivery, then in keeping with the Janani Shishu Suraksha Karyakram (JSSK) entitlements, free delivery care should be ensured in such cases also.

- (iv) There should be a system of regular participatory monitoring of the JSSK in western region States, which provide entitlements for maternal health care. States should consider adopting a women-friendly grievance redressal mechanism for JSSK. This should be accompanied by access to relevant medical records.
- (v) State Health Department should ensure that regular audit of referrals related to delivery care and maternal health care must be undertaken, and the State may implement a protocol for referrals.
- (vi) State Health Department should ensure that free sonography services must be available at the level of Community Health Centres (CHCs) and Sub-Divisional Hospitals. States should ensure that appropriate and prompt compensation is provided to women where these services are not available, and women are forced to access this essential service from the private sector. States may also consider operationalising arrangements with locally available radiologists in the private sector, engaging them to provide sonography services in those public hospitals which do not presently have radiologists.

II. Human Resource Shortages in Rural Health Services

Recommendations :

- (i) To ensure regular presence of doctors in all Primary Health Centres and rural health facilities, the State Government may make it compulsory for all freshly graduated doctors to work in Public rural health services for at least 3 years, which should be made a pre-requisite for licence to practice.
- (ii) To ensure improved presence of health services staff in rural areas, State Health Department may consider adopting the current model

of staff placement being implemented in Karnataka, wherein transfer and posting is linked with a well-defined, transparent web-based system, and is accompanied by individual counselling with staff, while deciding on postings and transfers.

III. Role of Public Bodies in Redressing Denial of Patients Rights in Private Medical Sector

Recommendation :

- (i) Government of Rajasthan should promptly bring private hospitals in the State under the Clinical Establishments Act (CEA), starting by registering such hospitals under the Act, if not already done. The State Government should also ensure that the State Rules under CEA are notified at the earliest.

State of Gujarat

A. Case Studies Presented on Health Rights of Specific Groups of People or Related to Specific Schemes

I. Denial of Health Rights to Workers Under ESI Scheme

Recommendations :

- (i) ESI Corporation must ensure adequate number of dispensaries in the State of Gujarat, and should promptly fill all sanctioned posts so that health rights of all covered workers may be ensured. The State may upgrade ESI hospitals at major urban centres like Vadodara to ensure that they are properly equipped with ventilators and other necessary equipments, so that referrals to General hospitals may be minimised.

II. Denial of Services Related to Mental Health Issues

Recommendations :

- (i) Gujarat State Government must ensure accessibility of diagnostic care for mental health problems at the district hospital level, with support for transport and care.
- (ii) Gujarat State Government must make available free medication for mental health patients at CHC level hospitals, with a provision for reimbursement of out of pocket expenditure to patients due to non-availability of medicines in CHC.
- (iii) Mental health services be included in State level schemes for cashless treatment, and that community based mental health programmes, including rehabilitation of patients, be designed with community engagement.

B. Presentations on Systemic Issues

I. Women's Access to Health Care

Recommendations :

- (i) In the context of Gujarat, community based maternal death reviews (MDR) / social autopsies of maternal deaths with community and civil society participation should be institutionalised. States may incorporate NGO representatives in the District MDR committees, and should publish yearly reports.
- (ii) State Health Department should ensure that skills and understanding of peripheral health workers, regarding various forms of discrimination and vulnerability faced by women in context of maternal health, need to be improved through

appropriate capacity building. This would enable these issues to be factored into birth preparedness plans, health care delivery and follow up plans for women during pregnancy and delivery.

- (iii) State Health Department should ensure adequate blood availability, to avoid denial of delivery services to women in rural health centres. Ensuring blood availability should not be treated as merely the responsibility of the family. Appropriate steps may be taken by the State Government to adopt the National Blood Policy, along with implementation of IPHS regarding blood availability in all public health facilities. It is recommended that the State Health Department may evaluate the option of Unbanked Direct Blood Transfusion to ensure availability of blood especially during emergencies.
- (iv) Hospitals empanelled for maternal health care services under the Chiranjeevi Yojana in Gujarat should ensure timely, safe, free and accompanied referral to higher facility, in case of emergencies which cannot be handled at their level.
- (v) In case of denial of maternity services in public facilities, if women are forced to avail of private services for delivery, then in keeping with the JSSK entitlements, free delivery care should be ensured in such cases also.
- (vi) There should be a system of regular participatory monitoring of the JSSK in western region States, and of the Chiranjeevi scheme in Gujarat, which provide entitlements for maternal health care. State should consider adopting a women-friendly grievance redressal mechanism for JSSK, and also for Chiranjeevi scheme. This should be accompanied by access to relevant medical records.

- (vii) State Health Department should ensure that regular audit of referrals related to delivery care and maternal health care must be undertaken, and the State may implement a protocol for referrals.
- (viii) State Health Department should ensure that free sonography services must be available at the level of CHCs and Sub-Divisional Hospitals. State should also ensure that appropriate and prompt compensation is provided to women where these services are not available, and women are forced to access this essential service from the private sector. State may also consider operationalising arrangements with locally available radiologists in the private sector, engaging them to provide sonography services in those public hospitals which do not presently have radiologists.

II. Human Resource Shortages in Rural Health Services

Recommendations :

- (i) To ensure regular presence of doctors in all Primary Health Centres and rural health facilities, the Government may make it compulsory for all freshly graduated doctors to work in Public rural health services for at least 3 years, which should be made a pre-requisite for licence to practice.
- (ii) To ensure improved presence of health services staff in rural areas, State Health Department may consider adopting the current model of staff placement being implemented in Karnataka, wherein transfer and posting is linked with a well-defined, transparent web-based system, and is accompanied by individual counselling with staff, while deciding on postings and transfers.

III. Role of Public Bodies in Redressing Denial of Patients Rights in Private Medical Sector

Recommendation :

- (i) State Government of Gujarat may act speedily to either adopt the central CEA, or enact a similar State CEA, while ensuring inclusion of specific provisions for protection of patients' rights and grievance redressal mechanism for patients who seek care in private hospitals.

State of Maharashtra

A. Case Studies Presented on Health Rights of Specific Groups of People or Related to Specific Schemes

I. Denial of Health Rights to Workers Under ESI Scheme

Recommendations :

- (i) Appropriate action be taken by ESIC Maharashtra to ensure prompt and effective coverage of all eligible workers, so that they can gain access to all ESI health services and entitlements.

II. Community Based Monitoring of Health Services

Recommendation :

- (i) Community based monitoring be expanded and strengthened in Maharashtra, in line with the mandate and support for this activity being given by the National Health Mission. The State Government may also prioritise regular functioning of the State level committees that have been formed to support this process.

III. Denial of Right to Health Care for Persons Living with HIV/AIDS

Recommendations :

- (i) Maharashtra State Government must make adequate budgetary provisions for the crucial targeted intervention programme for persons living with HIV/AIDS.
- (ii) Maharashtra State Government must ensure time bound and regular release of the budget, so that shortage of key supplies would be avoided in future.

IV. Denial of Right to Free Health Care to Poor Patients under the Charitable Trust Hospitals Scheme

Recommendations :

- (i) Maharashtra State Government may set up an effective, accountable and publicly accessible mechanism for monitoring of the charitable trust hospital scheme across the State.
- (ii) The State Government may set up a Grievance Redressal System, with a provision for complaint tracking in the context of expected free/concessional services to be provided by Trust hospitals.
- (iii) The State Government may set up a real time website and call centre helpline, to provide information to public about real time availability of free and concessional beds in every charitable trust hospital involved in this scheme.

B. Presentations on Systemic Issues

I. Women's Access to Health Care

Recommendations :

- (i) In the context of Maharashtra, community based MDR/social autopsies of maternal deaths with community and civil society participation should be institutionalised. States may incorporate NGO representatives in the District MDR committees, and should publish yearly reports.
- (ii) State Health Department should ensure that skills and understanding of peripheral health workers, regarding various forms of discrimination and vulnerability faced by women in context of maternal health, need to be improved through appropriate capacity building. This would enable these issues to be factored into birth preparedness plans, health care delivery and follow up plans for women during pregnancy and delivery.
- (iii) State Health Department should ensure adequate blood availability, to avoid denial of delivery services to women in rural health centres. Ensuring blood availability should not be treated as merely the responsibility of the family. Appropriate steps may be taken by the State Governments to adopt the National Blood Policy, along with implementation of IPHS regarding blood availability in all public health facilities. It is recommended that the State Health Departments may evaluate the option of Unbanked Direct Blood Transfusion to ensure availability of blood especially during emergencies.
- (iv) In case of denial of maternity services in public facilities, if women are forced to avail of private services for delivery, then in keeping with the JSSK entitlements, free delivery care should be ensured in such cases also.

- (v) There should be a system of regular participatory monitoring of the JSSK in western region States, which provide entitlements for maternal health care. States should consider adopting a women-friendly grievance redressal mechanism for JSSK in various States. This should be accompanied by access to relevant medical records.
- (vi) State Health Department should ensure that regular audit of referrals related to delivery care and maternal health care must be undertaken, and the State may implement a protocol for referrals.
- (vii) State Health Department should ensure that free sonography services must be available at the level of CHCs and Sub-Divisional Hospitals. The State should ensure that appropriate and prompt compensation is provided to women where these services are not available, and women are forced to access this essential service from the private sector. The State may also consider operationalising arrangements with locally available radiologists in the private sector, engaging them to provide sonography services in those public hospitals which do not presently have radiologists.

II. Human Resource Shortages in Rural Health Services

Recommendations :

- (i) To ensure regular presence of doctors in all Primary Health Centres and rural health facilities, the Government of Maharashtra may make it compulsory for all freshly graduated doctors to work in Public rural health services for at least 3 years, which should be made a pre-requisite for licence to practice.
- (ii) To ensure improved presence of health services staff in rural areas, State Health Department may consider adopting the current model

of staff placement being implemented in Karnataka, wherein transfer and posting is linked with a well-defined, transparent web-based system, and is accompanied by individual counselling with staff, while deciding on postings and transfers.

III. Role of Public Bodies in Redressing Denial of Patients Rights in Private Medical Sector

Recommendations :

- (i) Maharashtra State Government may conduct a review of the patient grievance redressal mechanism of the Maharashtra Medical Council, especially keeping in view its large pendency of cases. Based on this, the Government may consider taking steps for expansion and re-structuring of the Ethics Committee of the Maharashtra Medical Council, to make this body more effective in addressing patients complaints related to private doctors. One option may be for State Medical Council to set up a separate tribunal to deal with patients complaints. Such a tribunal could include appropriate non-medical persons such as retired judges.
- (ii) The State Government may conduct an independent review of the mechanism being implemented by J. J. Hospital, Mumbai for screening complaints by patients desiring to file FIRs against any private hospital in Mumbai. It needs to be ensured that this mechanism is fully transparent, time bound and patient-friendly. It is recommended to the Maharashtra State Government to ensure that patient complaints, which are intended for filing FIRs against private hospitals, are screened in a time bound manner within 7 days. It is recommended to consider inclusion of non-medical experts such as a retired judge in the screening panel, to ensure

fairness during the screening process, and to arrange periodic rotation of responsibility among various public hospitals for screening of such complaints.

- (iii) The State Government of Maharashtra to act speedily to either adopt the central Clinical Establishments Act or enact a similar State Act, while ensuring inclusion of specific provisions for protection of patients' rights and grievance redressal mechanism for patients who seek care in private hospitals.

NHRC RECOMMENDATIONS ON RIGHT TO FOOD*

Working Group - I

Recommendations on Identification of Eligible Households

1. It is observed that several States have used a patch work of criteria for identification of households. These include list of BPL households based upon earlier Census and some additional criteria which are not based on any household survey. This implies that the objective basis required in identifying 'priority' households has not been built in several cases. The initial basis for identifying priority households should be the SECC or alternatively, an SECC-type survey must be conducted periodically by the State Governments.
2. The States must clearly specify the transparent, objective and verifiable criteria for identifying priority households for rural and urban areas separately. These could be based on exclusion and/or inclusion criteria. These guidelines should be notified and widely publicized.
3. The preliminary list must be notified and objections invited before approval by the Gram Sabha and finalization of the list as per provisions of the Act.

* These recommendations were made on the basis of three Working Groups. Working Group-I dealt with "Identification of Eligible Households"; Working Group-II focussed on "Nutritional Support to Pregnant Women & Lactating Mothers and Children up to 6 Years"; and Working Group-III concentrated on "Reforms in Targeted Public Distribution System". The National Conference on Right to Food was organized on 28 - 29 April 2016 at New Delhi.

4. Further, the revision of the list based on the aforementioned objective criteria should be a dynamic and continuous process.
5. There are several hard-to-reach groups, such as the homeless, people in inaccessible and tribal areas, seasonal migrants, beggars, vagrants, etc. for whom States must carry out a special survey which should be repeated at regular intervals. These vulnerable households should be included automatically in the list of priority households.
6. While it is open to States to decide the 'exclusion' and/or 'inclusion' criteria, it is observed that certain categories, such as populations in special homes, orphanages, etc. have so far not been considered for inclusion. On the other hand, it is observed that certain criteria have been kept in consideration which have been found to be defective for example, income ceiling (not linked to tax payment). It is suggested that such criteria should not be part of the objective criteria being considered.
7. Inter-State migrant workers who are included in the priority groups of the origin States should be extended similar benefit in the destination States. The Centre and the States concerned may consider the modalities by which allocations to the recipient States should reflect the migrant populations.
8. Specific steps are required to be taken to reach vulnerable and hard to reach households by designing systems which are not one size fits all.
9. For the purpose of monitoring, separate lists for SC, ST and other vulnerable groups should be maintained by the State Governments at all levels. These lists should be hosted in the public domain.
10. The State Governments should prepare rules incorporating the recommendations made above.

Working Group-II

Recommendations on Nutritional Support to Pregnant Women & Lactating Mothers and Children up to 6 Years

Integrated Child Development Services Scheme (ICDS)

1. All State/UT Governments should ensure that they take all steps to reach all ICDS services to the unreached populations.
2. In particular, in rural areas they should ensure full coverage of hamlets of PVTGs, SC/ST hamlets, nomadic and de-notified tribes, migrant workers' families, remote islands, desert settlements, frontier areas, and forest villages and so on.
3. In urban areas, likewise special care should be taken to cover homeless settlements, children of persons in begging, non-notified slums, construction worker sites, migrant populations, resettlement colonies, red light areas/ sex workers' children, etc.
4. In addition, survivors of natural and human made calamities, and IDPs living in camps should be covered. Also all children who live with their mothers inside jails; also children in other institutions.
5. Dispersed, very small settlements which do not come under existing norms for even mini ICDS centres, should also be covered by creative rearrangement to reach with nutritional support of ICDS type, even if opening of ICDS Centres is well nigh difficult, because these type of small settlements tend to be of tribal groups, salt pan workers and such communities which require nutritional support often.
6. All Anganwadi centres should effectively deliver all six services under the ICDS scheme, with necessary convergence between departments, and due accountability.

7. ICDS workers are already highly overburdened, they should not be given any other non-ICDS responsibilities.
8. Governments should strictly follow the orders of the Supreme Court banning contractors in supply of Supplementary Nutrition under ICDS. Further, the model of Tamil Nadu and Odisha which is based on collectives of local women producers should be emulated.
9. The rise of per meal budget norms under ICDS should be inflation indexed to ensure that rise in price of commodities does not affect the quality of meals. For this adequate budgetary provision must be made and raised every year by the Government of India and timely releases both by State and Central Governments.
10. ICDS procurement for preparation of SNP should preferably be based on locally produced and culturally appropriate foods with nutritional value not being compromised.
11. All Anganwadi centres should have pucca infrastructure, safe and well ventilated buildings and facilities for cooking, drinking water, sanitation, electricity services, safe storage, play and educational materials, vessels for the children, etc. For this necessary and adequate budgetary allocations should be made.
12. All orders and directions of the Supreme Court with regard to food schemes must be strictly followed.
13. The governments should ensure that all entitlements under the National Food Security Act are portable and accessible across India. In particular, children of migrant and nomadic families should not be turned away from any ICDS centre, where their parents happen to be residing at any point of time.

14. The ICDS centre should be certified to be functioning well by local Panchayat or ward, as well as women-headed social audits by parents of children. There should also be local grievance redressal mechanism. In addition, reputed NGOs and academic institutions should periodically conduct third party evaluations.
15. For ICDS centres that are located in remote, rural, hilly, forested areas adequate stock should be maintained to ensure that there is no interruption in the supply of SNP.
16. ICDS workers must be certified to be regularly trained by accredited agencies so as to build their capacities to fulfil their duties and work with infant and young children, and pregnant mothers. This should also equip them with skills of counselling as well as knowledge of appropriate government schemes.
17. ICDS workers must be adequately remunerated and receive their remuneration on timely basis. The ICDS worker should be appointed from the same hamlet as far as possible.
18. Care should be taken to ensure full nutritional value of SNP given to the children. In terms of protein intake, it appears that egg is a good, non-pilferable and non-fungible source of protein. In as much as it is not culturally repugnant, egg should be provided as in several States it is being done. Where and for those children in Anganwadis who do not take egg, milk should be provided.

Maternity Benefits

1. The Central Government should immediately frame and implement a universal and unconditional scheme for maternity benefit in accordance with Section 4 (b) of National Food Security Act (NFSA). Failure to do this is a grave violation of the NFSA law.

2. The NFSA clearly includes all women under this entitlement except those who already avail of maternity benefits. Therefore, the scheme should not be subject to any eligibility criteria restrictions such as age of marriage or number of children, other than excluding those women who are employed in the formal sector or/and are in receipt of similar benefits. Such exclusions would only serve to exclude a large proportion of the most vulnerable women, and in effect penalize them for their own victimization.
3. Adequate funds should be made available for full implementation of the maternity benefit scheme.

Mid-day Meals

1. The Government should ensure that out-of-school children are also covered under the Mid-day meal scheme and that meal is not denied to any child approaching a school by organizing bridge-schools, if necessary.
2. Mid-day meals should be served even during vacations in all drought-affected areas (all 365 days).
3. The per meal budget norms under Mid-day meals should be inflation indexed to ensure that rise in price of commodities does not affect the quality of meals.
4. All schools should have proper buildings and infrastructure with facilities for cooking, drinking water and storage of food grains.
5. The Government should make adequate budgetary and resource allocations for implementation of provisions of NFSA.
6. All orders and directions of the Supreme Court with regard to food schemes must be strictly followed.

7. The Government should ensure that all entitlements under the National Food Security Act are portable and accessible across India.
8. Schools should have separate safe and hygienic spaces for cooking.
9. It should be compulsory for all private schools to also provide mid-day meals to their students, based on cost-norms prescribed by the Government.
10. The take-away food for 6 months to 36 months old children appears to be a disorganized scenario. At least, one meal can be considered to be delivered at the ICDS Centre to children in this group as well.

Working Group – III

Recommendations on Reforms in Targeted Public Distribution System

1. Under the Constitution, it is the duty of the State to raise the level of nutrition of the people. It is therefore important that in the Public Distribution System (PDS) more items are included to meet the nutritional needs. Section 12 read with Schedule III of the NFSA has provisions to diversify and include more items in the PDS. States should endeavour in a time bound manner to include fortified salt, pulses and edible oil or any other item to raise nutritional level at reasonable price. Millets in any case is an existing entitlement in Schedule I, which must also be distributed wherever demand is identified.
2. State should make an endeavour to implement reforms as envisaged in Section 12 especially giving preference to Public Bodies, Self Help Groups, Cooperatives, etc. in a time bound manner.

3. Door-step delivery of PDS items at Fixed Price Shop (FPS) levels preferably by State Agencies should be ensured by the State. GPS tracking of the movement of food grains from FCI to doorstep should be implemented. Proper storage in the logistic chain is to be ensured to prevent leakages/pilferage.
4. End to end computerization from procurement to delivery to the beneficiary should be implemented by all the States in a time bound manner.
5. Aadhaar seeding which provides robustness to the beneficiary list should be done.
6. Standard Operating Procedures (SOP) giving multiple options for distribution of food grains should be laid down in cases where there is technological breakdown, i.e. either internet is not working or ePOS machine is not functioning or biometric authentication fails.
7. The State and Central Governments should endeavour to set up at Gram Panchayat level Grain Banks in order to ensure local food availability and security. Norms should be made at the local and State level to ensure fair distribution and storage.
8. States should endeavour to implement provisions of Schedule III Section 2 (a) (b), (c) and (d) towards ensuring decentralized procurement and storage including procuring nutritious grains like ragi, bajra, maize, etc.
9. All service providers must ensure uninterrupted GPRS connectivity up to Gram Panchayat level. Signal surveys be done at FPS levels and connectivity should be made through the best signal available.
10. Portability of food entitlements for the intra-State migrants, to begin

with and eventually for all may be implemented in a time bound manner.

11. State should implement provisions of Section 28 sub-clauses (I) & (2) related to social audits and ensure transparency in the functioning of FPS.
12. States should implement at the earliest the setting up of Vigilance Committees at all levels including the FPS level. Due representation should be given to local authorities, SC, ST, women and members of vulnerable groups including destitutes and disabled persons as stated in Section 29 (1) of the Act.
13. An effective Grievance Redressal Mechanism ought to be put into place from Panchayat and Block Level linking to the District level in every State. The DGROs and State Food Commissions at ought to be exclusively appointed for this purpose and not burdened with other additional responsibilities. It should necessarily be ensured that the DGROs and State Food Commission are not entrusted with the job of implementation of NFSA and should form a grievance redressal mechanism.
14. Certain States have raised the issue of protecting their quota of allocation of food grains by the Central Government at the level of three years average preceding the implementation of the Act as provided in Schedule IV of the Act.
15. Any beneficiary who is not able to go to the FPS in person (physically challenged, pregnant women and senior citizens) to get his/her ration may be allowed to authorize someone on his/her behalf to get the ration pertaining to his/her entitlement.
16. The entitlements under the Antyodaya Anna Yojana (AAY) is fixed at

35 Kg – 7 Kg per member for a maximum 5 member household. At the same time, no such ceiling is there for priority households being entitled 5 Kg per member. Hence, in order to remove this discrepancy, the entitlements under AAY should also be 7Kg per member without any presumed ceiling on members.

17. Special emphasis and innovative mechanism should be created for ensuring the delivery of entitlement of women, SC, ST and vulnerable groups, who are in dispersed and hard to reach locations.
18. Desegregated data of SC and ST should be maintained.
19. Food should not be replaced by cash due to market price fluctuation on one hand and the tendency to use cash for non-priority items on the other.

NHRC Recommendations on Silicosis in Endemic States*

- i. The implementation of all recommendations made by NHRC earlier should be ensured by the Central and all State Governments.
- ii. The overall approach to deal with the problem of silicosis must be broadened and it should be all encompassing – preventive, curative, rehabilitative and compensatory. However, greater emphasis is required on prevention.
- iii. Strict enforcement of all precautionary measures including the wearing of protective gears by the workers of silicosis prone industries needs to be ensured by the concerned authorities.
- iv. The endemic States need to carry out a full-fledged mapping of their respective States in terms of number of silicosis patients in their States, number of those undergoing treatment and rehabilitation, number of deaths on account of silicosis, compensation paid, etc. as this would give them an overall picture of the problem and how they could work towards its elimination.
- v. Need for use of technology so as to provide all industries with necessary equipment to minimize the exposure to silica/dust.
- vi. Need to also involve the private sector in prevention, management and rehabilitation of silicosis.

* These recommendations were made on the basis of Conference on Silicosis in Endemic States held on 22 July 2016 at New Delhi.

- vii. Creating and spreading awareness among all stakeholders, in particular the Parliamentarians, Civil Servants at the District level and Doctors of endemic States.
- viii. There is also need to conduct awareness programmes for owners and employees of silicosis prone occupations.
- ix. The Government of India should evolve a National Programme on Silicosis or bring the disease of silicosis under the National Health Mission. As treatment facilities may not be always available at PHC or CHC level, all silicosis patients need to be provided a cashless health insurance cover/life insurance cover for their treatment and associated travel and the premium paid by the State Government.
- x. Need to develop a simple and uniform format across the country for diagnosis of silicosis cases.
- xi. Need to undertake a national level survey on silicosis. This survey could be undertaken by the nodal Ministry along with the affected States, NGOs and civil society organizations. This would facilitate in understanding the depth of the issue and a better solution to the problem of silicosis.
- xii. Need to develop a central welfare fund whereby relief could be provided to all persons affected by silicosis irrespective of their nature and place of work.
- xiii. Standard pension scheme given under various schemes of Government of India should also be made available to all those afflicted with silicosis and on their death to their respective families. Efforts must also be made to include them in the BPL category so that they can enjoy minimum benefits.

- xiv. Furthermore, children who have lost one or both parents due to silicosis to be provided monthly education allowance and sustenance allowance. Likewise, there is need to rehabilitate the widow of each deceased person in other occupations so that situations like that of 'Villages of Widows' does not emerge.
- xv. Emphasis should be on alternate employments so that all the inhabitants of the village are not susceptible to silicosis through same employment.
- xvi. The families of the patients should be allowed to go in for appeal and post-mortem examination in case of occurrence of death on account of silicosis.

Book Reviews

Volume-15, 2016

Social Inclusion in Independent India: Dimensions and Approaches

T. K. Oommen, Orient Blackswan, 2014

*Tanweer Fazal**

Of late social inclusion as a concept and an identified area of study has drawn extensive attention and endorsement from social scientists, particularly from those located or interested in studying the poorer parts of the world. While the term itself could have a slightly longer history, its currency among policy makers, social activists, administrators, funding organizations and a whole lot of other stakeholders is unmistakably recent. Two developments in this regard are most noteworthy, first, its adoption by the World Bank as an important tenet for achieving the goal of ‘ending extreme poverty by 2030’; and second, the establishment of inter-disciplinary university departments and research centres to study, analyse and recommend policies for the inclusion of vulnerable groups. Social inclusion, therefore, at once is a lens to study processes of inclusion and exclusion in society as well as an instrument and mechanism that informs policy-making.

Despite current advances in the field, what has been missing is a thorough examination of the concept in terms of its historicity, definitional accuracy and implication. T.K Oommen author of *Social Inclusion in Independent India*, argues for a contextual comprehension of the processes of exclusion ‘in order to evolve a strategy of inclusion’. Discernibly, the frailties of the prevailing conceptions of exclusion are underscored. Thus neither the narrowness of the economist concentration on market driven exclusionary processes, nor its more expansive allusions, a combination of livelihood insecurities, chronic unemployment, nutritional deprivation, poor housing, education and lack of social capital, serve lucidity and precision. For the author, they either suffer from ‘conceptual obesity’ or ‘conceptual skimpiness’ and thus miss out on optimality. Critical for a definitional clarity

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is the need for an appropriate unit of analyses; individuals, groups, nations or civilizations to comprehend the level at which exclusionary processes have to be understood and probed.

While each society produces its own sources and processes of exclusion, specific to India are cultural heterogeneity, spatial externality and social hierarchy. Oommen dexterously unpacks each of these, tracks their genesis and bearing, the various efforts to overcome them at different moments of history, evaluates their failures and inadequacies and eventually shoulders the burden of suggesting a 'category specific social inclusion policy'. Exclusion and its contra, aspirations of inclusion, are typical to hierarchized society, and India offers no exception. A point of endless debate in the scholarly community is whether caste, as we observe it today, is an orientalist invention, a product of colonial statecraft. A second pertinent subject of discussion is the proximity that caste shares with race. On both counts, Oommen differs from historians and sociologists whose nationalist underpinnings compel them to put the blame for the invention of caste at the doors of the colonial masters and orientalist knowledge production. Similarly, any reference to caste practice as akin to racial discrimination is usually refuted. Oommen goes back to pre-colonial literature such as Mahabharata and the Ramayana to argue that a graded social arrangement predates the emergence of orientalist knowledge, and that the basis of this hierarchy was the racial distinction between Aryans and the Dasyus. However, beyond the texts, the co-terminality between caste and race is lost soon as the field view comes to gain salience. While racial discrimination is based on physical types, caste practices are an outcome of prevailing values in society. The point that Oommen tends to make is weighty and has immense policy implications—even though empirical reality rebuts conflation of caste and race, racial justification that supports caste hierarchy prevails in the scriptures, orientalist knowledge as much in nationalist constructs.

The author's discussion of the plight of historically deprived, the Dalits and the Tribals, is most instructive. The problem is whether formal Constitutional mechanisms of inclusion such as abolition of untouchability, scheduling of castes and tribes for preferential treatment, anti-atrocity legislation, earmarking of plan outlays have elicited substantive transformation. Unlike a nihilist, the author recognizes the changes that have set in but concurrently highlights the pitfalls and shortcomings. The rising graph of registered dalit or tribal atrocity cases together with the extremely poor rate

of conviction is indicative of how legislations have failed to ensure equity and restrain the upper caste perpetrators. On the other, the policy of reservation has definitely enhanced the SC and ST share of public employment, to the extent that, barring the lowest level, dissociation between caste and occupation is discernible. It certainly facilitated elite formation among such communities whose presence could be noticed in bureaucracy, various professions and academia as well as in the literary world. Here, the author takes up a rather contentious subject, the question of emergence of differentiation among the deprived and whether the reservation policy needs to be tuned accordingly. Unequivocally, Oommen calls out that 'inclusion should be viewed not only as an inter-group, but also an intra-group (within Dalit) process'. The author offers two immediate solutions to the impending predicament. One, the bifurcation of the category SC into more and less backward contingent on their level of development, or two, voluntary renunciation of benefits by individuals and groups who have been beneficiaries for a while.

Oommen's approach does not aim at ruining the unity of the deprived. The united struggles are critical for enhancing the scope of reservation, for instance, the task to extend it to the private sector, which has otherwise been reluctant to adopt the reservation policy. Taking note of the fact that informalization of the workforce was one of the biggest challenges in the era of globalization, the author's stratagem of inclusion includes the mobilization of entire the working class, the regularized and the informal worker, transcending the barriers of caste, gender, region, language, into collective struggles.

All along, the endeavour is to evolve a category specific policy of inclusion. The tendency to conflate the problems of Tribals with that of the ex-untouchables complicates the problem. One is reminded that the exceptionality of the tribal situation is with regard to their spatial isolation, practice of animism, uniqueness of mother tongues and so on, but not ritual impurity. Therefore, rarely do Tribals suffer upper caste atrocity on count of their polluting presence. Thus, crimes against Tribals(Oommen marshals data in support)are principally the outcome of intra-tribal or inter-tribal conflicts. The tribal question solicits a separate resolution and Oommen advocates a sort of self-governing rights; 'appropriate separate politico-administrative units wherever feasible, based on size and financial viability' (p.84-5).The provisions of Fifth and Sixth Schedule that recognized a degree of tribal sovereignty in areas of their traditional habitat could have been a step in

the right direction. Similarly, a lot of other measures including the Tribal Sub-Plan (TSP), the Tribal cooperative Marketing Development Federation (TCMDF) and the Modified Area Development Approach (MADA) for economic alleviation of impoverished tribal populations, could be listed. But such formal assurances have rarely translated into tangible results. On the contrary, pauperization is a relentless process, which is aggravated by an alarming degree of land alienation that has happened over the years (46,5000 acres amounting to 9,17,000 acres in 11 states up till 1999).

Oommen's methodology involves analytically splitting social categories to comprehend the complexity, to make sense of their deprivations in different contexts and to avoid connotations that could lead to wrong targeting, and then come up with context and category (or even sub-category) specific measures of inclusion. This schema informs his entire project of social inclusion. Thus, SCs are split into backward and more backward, the tribes into encysted and Frontier groupings and the OBCs into landowning and artisanal groups. Analogously, the author desists from temptations to club the religious minorities into a singularity. Three different subcategories of religious minorities viz.; a. Indian protest religions (Jainism, Buddhism, Sikhism), b. descendants of immigrant religions (Parsis, Jews and Bahais) and, c. religions that are erroneously perceived to be products of conquest and colonialism (Islam and Christianity), offer separate sets of problems that need distinct attention. Oommen notes the duality of approach that the Indian state adopts in case of Indic or presumably 'national' religions vis-a-vis those that are considered to be non-Indic or 'alien' religions. In the former, for instance, it has adopted the role of an interventionist to reform traditions while in the latter, it played safe to remain an expedient retreatist. This asymmetry in approach becomes most pronounced when it comes to denial of Scheduled Caste provision to untouchable converts to Islam and Christianity while the same is permitted to converts to supposedly 'casteless' religions such as Buddhism and Sikhism.

The strategy of social inclusion that Oommen suggests is all encompassing and yet nuanced. Newer groups have been classified, the exact nature of their exclusion detailed and broad policy guidelines suggested. Thus women, physically disabled, refugees, economically impoverished, foreigners and those residing in North-east India receive separate treatment. At a more abstract plane, Oommen's yearning as a theorist to contextualize western constructs, indicate their fallacies and offer improvisations is unmistakable. Thus T.H

Marshal's much referred classification of individual citizenship rights – civil, political and social, is found to be inadequate in multi-racial, culturally diverse and socially hierarchical societies of South Asia. Discrimination on account of group membership demands the recognition of group rights, therefore the need for multi-cultural citizenship to take care of misrecognition of minority cultures. Persisting problems of tribal alienation from their land, habitat and livelihood require recognition of ecological rights. Social rights need to be suitably adjusted to take into account the prevailing social hierarchy. In a nutshell, Oommen proposes an expansion in the regime of rights to evolve a comprehensive policy of social inclusion. Thus a package of six kinds of rights is proposed; civil, political, economic, cultural, social and ecological, to suit the Indian condition.

The monograph fulfils the long felt lacunae in social science literature and in the policy establishment. It combines history, empirical data and coherent theoretical formulation to offer a set of lenses through which the subject of inclusion can be studied. Policies of inclusion, if implemented without care and caution, could themselves be sources for perpetuating inequities and exclusion. The monograph highlights many such inconsistencies that over the years proved counter-productive. Some of Oommen's resolutions too run a similar risk. For instance, the idea of ethnic homeland for the Tribals needs to take into account how areas considered tribal habitats are usually disputed zones among settlers, adjoining tribal communities, sections of migrant labouring populations and others. Exclusive claims over territorial boundaries have resulted in colossal human tragedies such as what we find in Bodoland, the persisting Kuki-Naga violence, Meitees and hill tribes conflict in Manipur, or that between the Mizos and the Reangs after the formation of Mizoram.

This book remains nonetheless one that social scientists and policy planners will return to from time to time for conceptual clarity and guidance.

Volume-15, 2016

Griffin on Human Rights

Roger Crisp (ed.), Oxford University Press, 2014

*Ranbir Singh**

Nearly 70 years after the Universal Declaration of Human Rights, the language of human rights has not only gained political legitimacy but has also achieved near ubiquity. As a result, various thinkers have expressed concerns, that the ever-expanding scope of rights is devaluing the currency of human rights and denuding the term of any normative content. James Griffin, in his 2008 book *On Human Rights*¹ tackles this concern by attempting to provide a normative foundation for human rights, which would in turn help determine the appropriate scope and content of human rights. For Griffin, the foundation of human rights lay in what it means to be human. In line with Kantian and neo-Kantian philosophers, Griffin finds the defining characteristic of human beings to be their capacity for agency. This capacity for agency is at the core of human personhood. The task of human rights is to protect this agency and the capacity for its exercise. Three high order values protect this notion of human personhood: autonomy, liberty and minimum provisions. Autonomy protects human beings in deciding and defining their conceptions of the good life. Liberty, or freedom from interference, allows them to exercise their autonomy. Minimum provisions, or basic welfare, provide them the capacity to exercise their autonomy. Human rights are the instantiations of these three values, those protections and provisions required to support the human capacity for agency, no more and no less. This in sum is Griffin's theory.²

Griffin's influential book, termed "a masterpiece"³, and "arguably the most significant philosophical mediation on human rights...[since] the Universal Declaration of Human Rights", when it came out, sparked wide ranging discussions on the method, nature, and content of human rights. The book under review, in the best academic traditions, is a masterly attempt to engage with the finer points of Griffin's theory. The edited volume

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1 Griffin, James: *On Human Rights*, Oxford University Press, 2008.

2 Ibid.

3 Hooker, Brad : *Griffin on Human Rights*, Oxford Journal of Legal Studies 30 (2010):193.

carried nine articles by eminent philosophers on various aspects of Griffin's approach. Many of these articles were first presented at a conference on Griffin's book, held at Rutgers University in 2009. The book concludes with replies by Griffin to his interlocutors.

In "Two Approach to Human Rights", Carl Wellman posits his own approach to understanding human rights. In contrast with Griffin's approach of commencing with an understanding of what it means to be human, Wellman's starting point is the meaning of a 'right'. Using Hohfeldian analysis of legal rights as his paradigm, Wellman attempts to provide a structural account of human rights. In many ways, Wellman's piece is so methodologically distinct from Griffin's that there are few points of engagement. Griffin for example, would reject the idea that human rights are primarily structural relationships formed through networks of liberties, claims, powers and immunities. For Griffin, human rights are grounded more substantively in normative values relating to human personhood.

In "Taking Rights out of Human Rights", John Tasioulas⁴ critiques Griffin's attempt to ground human rights in a single moral norm – that of human agency. As such, human rights are grounded only in values of autonomy and liberty. Tasioulas finds this approach problematic because it severely limits the importance of other values that are of significant moral concern. Instead, he argues for a more prudential approach – one that gives importance to a plurality of values. The limited nature of moral values in Griffin's account has serious consequences for his argument about the universality of human rights. A more prudential account, such as the one Tasioulas argues for, would provide greater legitimacy for universalist conceptions of human rights.

David Reidy in "When the Good Alone Isn't Good Enough" argues that Griffin's attempt to redress the indeterminacy of human rights remains unrealised. In particular, Griffin's account provides little guidance to decision makers on how to resolve conflicts between rights. One reason for this indeterminacy is that Griffin's conceptualization of human rights remains at the moral plane. He does not engage with rights as rights – as structuring the relationship between persons or between persons and institutions. Reidy is conceptually aligned more to Wellman's structural approach to rights rather than Griffin's moral plane approach.

In "The Egalitarianism of Human Rights", Allen Buchanan takes issues with Griffin's dismissal of "human dignity" as a basis for grounding human rights. Griffin argues that human dignity is conceptually too ambiguous to provide any guidance on what human rights mean and what they entail.

4 Tasioulas, John : "Taking Rights out of Human Rights", *Ethics* 120 (2010): 647.

Criticizing this view, Buchanan offers an account of the importance of human dignity for grounding the egalitarian aspects of international human rights. For Griffin the higher order values that support human agency do not include equality in any form. Griffin expressly rejects this notion. Buchanan on the other hand emphasizes the moral importance of equal status to conceptions of human rights. In general, Griffin's lack of recognition of equality as a distinct moral value, important to support human agency, puts his theory not only at odds with other prominent accounts of human rights but also inadequately engages with the denial of, and aspiration for, equality in hierarchically structured societies.

In his contribution, 'Human Rights, Human Agency and Respect: Extending Griffin's View' Rowan Cruft argues for a broader conception of respect than Griffin allows for. This, for Cruft, is essential to overcome problems with certain consequences of Griffin's view – particularly those dealing with the practical application of his theory to issues relating to punishment, miscarriage of justice and the like.

The editor of the book Roger Crisp contributes a chapter titled 'Griffin on Human Rights: Form and Substance.' On questions of form, Crisp disagrees with Griffin's attempts to distinguish his theory from that of Kant or Mill. Griffin characterizes these theories as 'top-down approaches' whereas he conceives of his theory as a bottoms-up approach to constructing the bases of human rights. Crisp disagrees and points to the similarities in Griffin's approach to that of Kant and Mill, which, according to Crisp is an appealing aspect of Griffin's theory. Griffin's major point of departure from deontological theories like Kant's is that they do not allow for practical necessities to shape moral imperatives. Griffin on the other hand seeks to understand the boundaries and limits of rights based on the limits of human will and cognition. This is central to Griffin's approach to resolving conflicts between rights. While formally, the two theories might be distinct, in substance both Kant and Griffin (and for that matter Mill) rely on a remarkably overlapping conception of human personhood – that driven by agency and rationality – which it is the province of human rights to protect.

In "Personhood versus Human Needs as grounds for Human Rights" David Miller critiques Griffin's approach of grounding human rights in an account of human personhood based on moral reasoning, as opposed to political realities. Instead, he posits his own 'Human Needs' based account of human rights, which is located firmly in the domain of political contestation over the pre-conditions for fulfilling basic human activities. On this account, human rights are those that enable persons to fulfil their basic human needs. While in the end result both Griffin and Miller come up with comparable

sets of rights that support their own conception of the foundation of human rights, Miller points out that his theory is not only more determinate, but is also better placed to resolve conflicts between rights. Miller's own theory carries echoes of Amartya Sen's methodological approach of basing human rights on basic capabilities.

Brad Hooker's piece, 'Griffin on Human Rights', is a re-print of a book review of Griffin's book. As such, it provides a good summary of Griffin's argument and locates it within broad philosophical traditions and debates on human rights. As a good overview piece it is surprising that this article is located towards the end of the collection rather than at the beginning. Readers should begin their reading with this article.

The final piece in the collection is James Nickel's 'Griffin on Human Rights to Liberty.' In this piece Nickel takes issue with Griffin's characterization of the liberty interest, as well as his dismissal of the value of equality. As to the first, Nickel finds Griffin's account too narrow. As to the second, Nickel argues that in the absence of an equality requirement, Griffin provides little justification for non-discrimination in the universal enjoyment of human rights. Such a requirement for equality or non-discrimination, at the very least, would be central to ensuring equity in the enjoyment of rights. If such a value were to be recognized, Griffin's lack of recognition of rights to political participation and democracy would have to be rethought.

In the richness and intricacy of the debates, this book does full justice to the theory that it engages with. While Griffin himself appears concerned that many authors "managed to so misunderstand"⁵ him, the articles reveal not only a serious engagement with Griffin's theories, but also offers a needed corrective to the more abstruse of Griffin's ideas. In particular, the critique of moral accounts of human rights, as opposed to political ones (and idea that Brad Hooker discusses in detail) points to methodological concerns with the form of a priori reasoning that lies at the heart of Griffin's account. The radical potential of human rights is severely curtailed by such theoretical constraints on insurgent forms of claim making. Emerging legalities, particularly of a revolutionary variety, have to mould themselves into the pre-existing categories of the status quo. Similarly, the inadequate reflection on concerns over the universalism and moral absolutism that results from such a priori reasoning (which Griffin embraces through his use of the unfortunate term 'ethnocentrism') should caution third world audiences about the potential pitfalls of embracing Griffin's approach.

Griffin's book is a very significant contribution in the paradigm of human rights, which valuably brings out the importance of human rights.

5 James Griffin, "Replies", Griffin on Human Rights 211 (Roger Crisp ed., OUP, 2014).

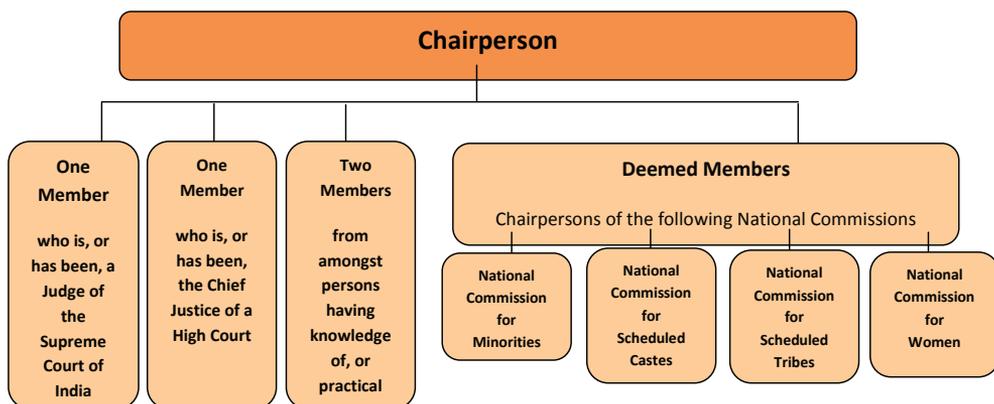
Major Activities of the Commission

National Human Rights Commission : Highlights of Activities (1 January to 30 November 2016)

The National Human Rights Commission (NHRC) was established on 12 October 1993. Its mandate is contained in the Protection of Human Rights Act, 1993 as amended vide the Protection of Human Rights (Amendment) Act, 2006 (PHRA). The constitution of NHRC is in conformity with the Paris Principles that was adopted at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights organized in Paris in October 1991, and endorsed by the General Assembly of the United Nations in Resolution 48/134 of 20 December 1993. The Commission is a symbol of India's concern for the promotion and protection of human rights.

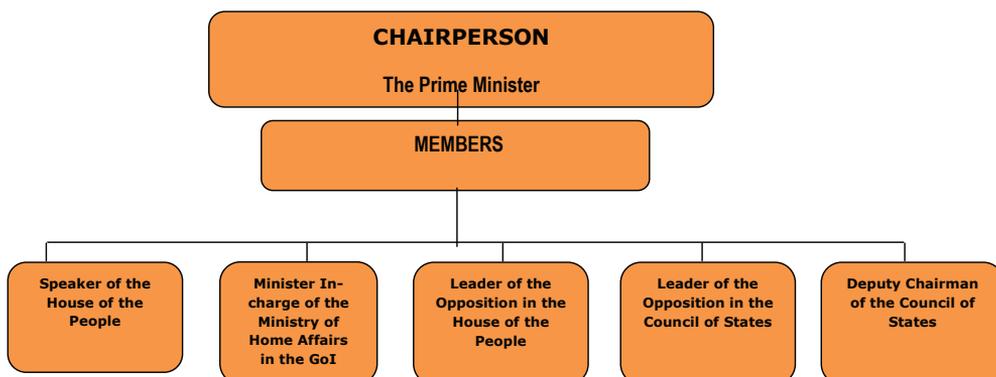
The Commission consists of a Chairperson, four full-time Members and four deemed Members.

Composition of NHRC



The Chairperson and the Members of the NHRC are appointed by the President of India, on the recommendations of a high-level Committee.

Selection Committee for Appointment of Chairperson and Members of NHRC



The Chief Executive Officer of the Commission is the Secretary-General, an officer of the rank of Secretary to the Government of India. The Secretariat of the Commission works under the overall guidance of the Secretary-General.

There are five Divisions in the Commission. These are the – (i) Law Division, (ii) Investigation Division, (iii) Policy Research, Projects and Programmes Division, (iv) Training Division, and (v) Administration Division.

The subsequent paragraphs give an overview of the significant activities undertaken by the NHRC from 1 January to 30 November 2016.

National

Complaints Handling

A total of 87,707 cases were registered in the Commission. 48,567 cases were dismissed in limine while 16,275 number of cases were disposed of with directions to the appropriate authorities for remedial measures and a total of 22,323 cases were transferred to the State Human Rights Commissions for disposal in accordance with the provisions of the Protection of Human Rights Act, 1993. These include cases of previous years as well. It recommended 6,89,20,000/- as interim relief/compensation in 372 cases.

Investigation of Cases

The Investigation Division of NHRC dealt with a total of 6,440 cases, including 3,959 cases of deaths in judicial custody, 396 cases of deaths in police custody and 2,085 fact finding cases. The Division also dealt with 127 cases of police encounter deaths.

Further, it was directed to conduct spot enquiry in 54 cases of alleged violations of civil and political rights, and economic, social and cultural rights. Enquiries were completed in 50 cases and 4 cases are still in progress.

Training Programmes Organized

During the given period, a total of 45 training programmes, workshops and seminars were organized by the Training Division of the NHRC in collaboration with various Administrative Training Institutes, Police Training Institutes, State Human Rights Commissions, Universities, Colleges, NGOs and other institutions/organizations across the country. These were in the form of one-day basic programme, two-day advance training or three-day training of trainers.

Western Region Public Hearing on Right to Health Care

It organized the above hearing in Mumbai on 6-7 January 2016 in collaboration with Jan Swasthya Abhiyan, a network of civil society organizations working on health issues. The public hearing covered the States of Maharashtra, Gujarat and Rajasthan. The Commission heard 88 cases out of the total 106 registered cases and recommended compensation to the tune of `4,25,000/- in five cases.

Workshops on Elimination of Bonded Labour

A number of one-day workshops on 'Elimination of Bonded Labour' were organized by the Commission in collaboration with the respective State Governments at Bhubaneswar (January), Jaipur (January), Bengaluru (May), Hyderabad (September), Ranchi (September) and Bhopal (September) during the course of the year. Justice Shri D. Murugesan, Member, NHRC chaired the workshops.

National Seminar in Hindi on Human Rights

A two-day National Seminar on Global Thinking on Human Rights : A Dialogue was organized by the NHRC in collaboration with the University of Gauhati, Assam on 21-22 January 2016. Shri S. C. Sinha, Member, NHRC was the Chief Guest. Dr. Mridul Hazarika, Vice Chancellor, University of Gauhati also spoke on the occasion.

Gender Sensitization Training of Trainers Programme for Police Officers

This three-day programme was organized by the NHRC in collaboration

with Centre for Social Research, UN Women and State Police Academies at the Sardar Vallabhbhai Patel National Police Academy in Hyderabad from 3-5 February 2016.

Media and Human Rights : Issues and Challenges

A day-long Training Programme for media persons was organized by the NHRC in collaboration with the Indian Law Institute in March 2016. Shri S. C. Sinha, Member, NHRC inaugurated the programme.

National Moot Court Competition

The 4th National Moot Court Competition was organized by NHRC in collaboration with the Law Centre – I of the University of Delhi from 18-20 March 2016. The event was inaugurated by Justice Shri Cyriac Joseph, Member, NHRC and Justice Shri D. Murugesan, Member, NHRC was the Chief Guest at the valedictory function. In all, 48 teams, representing various Universities from different parts of the country participated in the event.

National Conference on Right to Food

A two-day Conference on Right to Food was organized by the Commission on 28-29 April 2016. The conference was inaugurated by Chairperson, Justice Shri H. L. Dattu.

Conference on Silicosis in Endemic States

The Commission organized a day-long Conference on the above subject in New Delhi on 22 July 2016. The endemic States covered were Rajasthan, Madhya Pradesh, Gujarat, Karnataka, Jharkhand and West Bengal.

Seminar & Workshop on Good Governance, Development & Human Rights

A two-day National Seminar on the above subject was organized by NHRC in collaboration with the National Law University, New Delhi on 19-20 August 2016. It was inaugurated by Justice Shri H. L. Dattu. Prof. Ranbir Singh, Vice Chancellor, National Law University and Ms. Maja Daruwala of Commonwealth Human Rights Initiatives were other luminaries who spoke in the seminar.

The seminar was followed by a two-day Regional Workshop in Shillong on 3-4 November 2016 for the States of Meghalaya, Mizoram, Manipur, Nagaland and Assam. The workshop was organized by NHRC in collaboration with the Government of Meghalaya.

Regional and National Consultations for Third Universal Periodic Review

The Universal Periodic Review (UPR) is a unique process involving a review of the human rights records of all the 193 United Nations Member States once every four years. It is a significant innovation of the Human Rights Council. The review of each Member State is conducted by the UPR Working Group which consists of 47 members of the Council. However, any UN Member State can take part in the discussion with the reviewed States. The documents on which the reviews are based are : (i) information in the form of a “national report” provided by the State under review; (ii) information contained in the reports of independent human rights experts and groups, known as the Special Procedures, human rights treaty bodies, and other UN entities; (iii) information from other stakeholders including non-governmental organizations and national human rights institutions.

As part of the first cycle (2008-2011) of UPR mechanism, India was reviewed on 10 April 2008 and accepted 18 recommendations made by the UN Working Group. During the second cycle (2012-2016) of the UPR, 67 recommendations were accepted by the Government of India. NHRC, India submitted its independent report both during the first and second UPR. For the third cycle commencing in 2017, it has once again decided to submit its report.

For this purpose, NHRC developed a framework indicating action required on each of the 67 recommendations along with its monitorable outcomes. Further, it organized four regional consultations of 1½ days each in Kolkata (February), Bengaluru (May), Mumbai (June) and Lucknow (July) followed by a national one in New Delhi (August). Based on all these, it made its submission to the Human Rights Council on 22 September 2016.

Human Rights Awareness and Facilitating Assessment & Enforcement of Human Rights Programme in Selected 28 Districts of India

The Commission has selected 28 districts, one from each State, from the list of identified districts availing the Backward Regions Grant Fund of the Ministry of Panchayati Raj, Government of India endorsed by the then Planning Commission of India. The main objective of the programme is to spread understanding among the people in the identified districts on key human rights concerns like health, education, food, employment, hygiene and

sanitation, housing, political and civil rights, etc. as well as make an assessment about the flagship programmes of Government of India and other programmes implemented in the State. The NHRC has so far visited 18 of these districts¹ and made review visits in four².

During the year, a visit was made to Champawat district in Uttarakhand (June) and a review visit to Wayanad district in Kerala (August).

Visits Made to Jails, Mental Hospitals, Other Institutions & Districts

The NHRC Chairperson, Members, Special Rapporteurs and Senior Officers visited the District Jails in Ludhiana and Sangrur (January), mental hospital in Thiruvanthapuram (January), mental health institution in Kilpauk (January), Budail Jail in Chandigarh (January), District Jail in Rohtak (January), Saharanpur Jail (February), After Care Home for Women in Fatehpur (February), District and Model Central Jail in Lucknow (March), Government Old Age Home in Vayalathala, Kerala (April), Bhima Bhoi Blind School in Khurda (April), Krishna & Guntur Districts (April), Tehri Garhwal District (April), Kohima (May), Government Asha Bhawan for Women in Mayanadu in Kozhikode (May), Institute of Mental Care in Purulia (June), Government After Care Home in Tellicherry in Kerala (July), Central Prison & Women's Prison in Kannur (July), Government Observation Home in Thrissur (July), Central Jail in Mangalore (August), Children's Home in Udupi (August), District Jails in Simdega and Lohardaga in Jharkhand (September) and Mental Hospital in Varanasi (October).

Comments on Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016

The Commission in the month of September gave its recommendations on the above mentioned Bill brought out by the Ministry of Women and Child Development, Government of India.

Monitoring of Commissioned Research Studies

The NHRC monitored five research studies commissioned by it. These

1 The 18 districts are – Jamui (Bihar), Hoshiarpur (Punjab), Saiha (Mizoram), Ambala (Haryana), Jalpaiguri (West Bengal), Chamba (Himachal Pradesh), North Sikkim (Sikkim), Dhalai (Tripura), South Garo Hills (Meghalaya), Sonebhadra (Uttar Pradesh), Dang (Gujarat), South Goa (Goa), Wayanad (Kerala), Kalahandi (Odisha), Chatra (Jharkhand), Tiruvannamalai (Tamil Nadu), Bidar (Karnataka) and Champawat (Uttarakhand).

2 The four districts are – Sonebhadra, Wayanad, Chamba and North Sikkim.

studies are – (i) Study of Prevailing Right to Food Situation Among BPL Families in Uttar Pradesh and Bihar (April), (ii) The Human Rights Issues Related to Right to Education of Children of Migrant Labourers in Kerala (July), (iii) Human Rights of Elderly Persons : Law, Policy and Implementation – A Study with Special Reference to Kerala (July), (iv) Study on Human Rights of Transgender as a Third Gender (July), (v) Country Assessment/National Inquiry on Human Rights in Context of Sexual and Reproductive Health and Well Being (November).

In addition, it has taken up a project to develop 27 booklets on 11 different themes. These themes are - Rule of Law and Constitution, Criminal Justice System, Remedies in Law, Child Rights, Rights of Scheduled Castes and Scheduled Tribes, Rights of Women, Rights in Conflict Areas, Labour Rights, Environmental Rights, Rights of Other Vulnerable Groups and Right to Health.

NHRC Camp Sitzings and Open Hearings

NHRC organized camp sittings and open hearings in Kerala (April), Bihar (April), Andhra Pradesh (April), Telangana (April) and Jharkhand (September). Besides, two Single Member Bench camp sitting were held in Uttar Pradesh (January) and Puducherry (April).

The objective of the camp sittings is to expedite disposal of pending complaints and sensitize the State functionaries about various human rights concerns including compliance status of NHRC recommendations. The aim of the open hearings is to look into complaints pertaining to atrocities inflicted on the Scheduled Castes.

International

NHRC Chairperson Leads Delegation to Geneva

A three-member delegation of the NHRC led by Justice Shri H. L. Dattu, Chairperson participated in the Asia Pacific Forum Regional Meeting, Commonwealth Forum of National Human Rights Institutes (CFNHRI) Annual Meeting and the 29th Annual General Meeting of the International Coordinating Committee (ICC) of National Human Rights Institutions at Geneva in March 2016. The last meeting gained prominence as ICC got renamed as the Global Alliance of National Human Rights Institutions (GANHRI) and Justice Shri Dattu was unanimously elected as a Member of the GANHRI Bureau in Geneva.

NHRC, India will now be representing Asia Pacific Region along with Mongolia, Qatar and Australia. The GANHRI Bureau consists of 16 'A' Status NHRIs, four from each region, namely America, Europe, Africa and the Asia Pacific.

Secretary General Attends Conference to End Child Marriage in Kathmandu

Dr. Satya N. Mohanty, Secretary General, NHRC participated in the two-day Conference on Accelerating Efforts to End Child Marriage in South Asia through Joint Action with Regional and National Human Rights Institutions organized by the South Asia Initiative to End Violence Against Children (SAIEVAC), the SAARC Apex Body for Children, at Kathmandu, Nepal on 2-3 June 2016.

Chairperson of NHRC Attends GANHRI Special Session & ASEM Expert Forum Meet at Seoul

Justice Shri H. L. Dattu, Chairperson attended GANHRI Special Session on Human Rights of Older Persons at Seoul, South Korea on 14 June 2016. He also attended ASEM Expert Forum on Human Rights of Older Persons on 15-16 June 2016.

NHRC Participates in GANHRI Bureau Meeting at Berlin

Justice Shri H. L. Dattu and Dr. Satya N. Mohanty participated in the above meeting held from 12-14 October 2016 at Berlin, Germany. The meeting was held under the chairmanship of Beate Rudolf of the German Institute for Human Rights, GANHRI Chair for the 2016-2018 period.

Participation of NHRC in 21st Annual General Meeting of Asia Pacific Forum

A three-member delegation led by Justice Shri H. L. Dattu participated in the 21st Annual General Meeting of Asia Pacific Forum at Bangkok, Thailand on 26 and 27 October 2016. During the meeting, APF members provided a short overview of their current activities and priorities, as well as participated in an open dialogue with NGOs from the region on issues of shared concern. The APF was established in 1996 with five members. Today, the membership includes 22 national human rights institutions from all corners of the Asia Pacific.

Compilation – J. S. Kochher & Savita Bhakhry

**JOURNAL OF THE
NATIONAL HUMAN
RIGHTS COMMISSION
OF INDIA**

Vol. 15, 2016

ISSN 0973-7596



NATIONAL HUMAN RIGHTS COMMISSION

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