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Message from the Vice Chancellor

Human Rights have gained tremendous importance in our times as they are seen as being intricately woven into the very fabric of human life inclusive of dignity, freedom, justice, equality and peace. Where technology and communication have brought together world communities like never before in the history of mankind, at the same time, they have become tools of divisiveness, destruction, discrimination and unfathomable pain to humanity with contrary forces dragging man backwards in the chain of civilization. In such challenging times, intellectual and academic endeavours such as the present are the need of the hour to act as beacon lights to governments and societies struggling to address anomalies.

Some may argue that with the end to slavery, we have put to rest the darkest and most shameful chapter of suppression of Human Rights in man's history and that there is little that plagues the world as badly. It would be pertinent to point out to them that slavery, genocide, discrimination and oppression are not eradicated much as they would like to believe. All of these have taken newer and more virulent forms that need man's collective will and effort to wipe off. Indeed these are an indivisible part of human existence much like man's intellect and his capacity to use it to oppress others. Hence, the even greater need to encourage scholarship and critical thinking in the field of Human Rights.

In this sixth volume of Noida International University International Journal of Human Rights, intellectual contributions have touched upon many dark, but nonetheless, real problems of societies across the globe. Several international inputs have lent a truly global outlook to the volume. Given the fact that a change starts from a thought, the measure to gauge the potential of such academic endeavors' does not exist.

I congratulate Dr Aparna Srivastava (Editor-in–Chief) & her team in compiling such compelling and profound thoughts in this volume and solemnly hope that together we contribute in making the world a better place for all humanity.

Prof. (Dr.) Jayanand
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Message from the Editor-in Chief

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. They include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.

World celebrated 20 years of Paris Principles in the year 2018 which are a set of international standards on Human Rights framed to guide the work of National Human Rights Institutions (NHRIs) across the globe. Drafted at an international NHRIs workshop in Paris in 1991, they were adopted by the United Nations General Assembly in 1993.

This issue of NIU International Journal of Human Rights is indeed special to us. One, a great deal of hard work, anticipation, preparation, and intellectual input has gone into it. Two, this is the first publication since the Journal got accepted into the pristine and select club of UGC CARE listed journals. For this milestone, I humbly thank our Vice Chancellor, patrons and editors for their untiring perseverance and determination in helping us achieve this goal!

In this volume we have once again included a varied range of inter-disciplinary research contributions from professionals, academicians and students as it is our vision that as equal partners we can help bring about a change. It is part of the intellectual philosophy of NIUIJHR to provide an international platform for expression of thoughts in the fields of Law, Human Rights and Social Sciences. As a result, this issue is inclusive of innovative, dynamic and solemn thoughts. This is also a part of our planned aim to make NIUIJHR a vehicle for a new type of communication, one which believes that all research must ultimately benefit the community.

My thanks to Hon'ble Chairman of Noida International University Dr. Devesh Singh, Hon'ble Pro Chancellor Prof. Vikram Singh, Hon'ble Vice Chancellor Prof. Jayanand, members of advisory and editorial boards for their continued support, guidance and feedback and liberally lending their rich, diverse and proven scholarship leading to this academic endeavor.

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Social Structural Changes in Post-Disaster Area from Marxist point of View: Reflections from Dacope, Khulna, Bangladesh

Tuhin Roy & M.M. Abdullah Al Mamun Sony***

Abstract

Disaster always brings some sort of social changes in any society. Marx explained these social changes by distinguishing economy and culture. Here he coined two terms, the base structure and the superstructure, where base structure implies economic structure and the superstructure implies norm, values, art, culture, institution, power and so on. The aim of this study is to examine social structural changes in post-disaster area from Marxist point of view. To do these purposively one of southwest coastal area Kamarkhola Union of Dacope sub-district of Khulna district of Bangladesh has been selected. Through deductive way the study used a collection of qualitative tools including, case study, FGD, KII and observation to gather vivid information. The findings show that disaster like a revolution has broken down the traditional social structure of the study area and through reconstruction a new social structure was formed in the study area. Firstly, through destroying traditional economic structure, disaster grabs the attention of developing agents of the study area. Thus, by the name of rehabilitation and relief the economic flow increases. By these ways the new economic structure took place and Marx called it as the base structural change. As much as the base structures have been changed, a paradigm shift also took place with some crisis within the super structure of affected area. However, this study opens a new door for understanding the structural change of post-disaster area. Finally, we feel that further in-depth study is needed for better knowledge on the basis of social structural change.

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Key words: - Social structure, post-disaster, economy, culture, disaster management.

Introduction

The frequent natural disaster and upstream water flow causes nexus change in southwest coastal Bangladesh. After a disaster different type of social changes been observed; of them some are tangible and some are intangible. The fact is tangible changes can convert into money but the intangible changes are not easy to convert into money which can be power or prestige. Consequently, it has a significant impact on society and culture. However, Karl Marx brilliantly separated the human society into two parts, the base structure and the superstructure, to discuss the theory of culture (Harman, 1986; Williams, 1991). For Marx, the base structure is the forces and the relation of production or the economy which control the production. The superstructure, for Marx, is the relationships and the ideas which includes culture, institutions, political power structures, roles, rituals, and state (Williams, 1991).

In every society, the base structure determines the superstructure but in some cases the superstructure often influences the base structure (Harman, 1986; Williams, 1991). Moreover, the orthodox Marxist belief is that society consists of one-way relationship, that is, only the base determines the superstructure (Williams, 1991). Similarly, putting the Marxist idea into the southwest coastal area of Bangladesh we found that the tangible changes are the base structural change and the intangible changes are the super-structural changes.

Ten years back south west coastal Bangladesh was hit by super cyclone Aila (2009) but its impact is still visible. The immediate impact of the super cyclone Aila (2009) were 190 deaths, 243,000 homeless families and 77,000 acres of destroyed farmland (Saha, 2015). At the same time, the homeless people migrated to nearby places due to their financial vulnerability, loss of physical resources, insecurity and lots of other problems (Islam & Hasan, 2016). Those who remained in the affected area started living on the embankment. Other consequences were the salinity intrusion caused by breaking of the embankment which contaminated the farm land and changed the crop cycle (Kibria et al.,

2015). These literatures indicated that Alia (2009) broke down both base and super structure in southwest coastal area. After the cyclone, both the government and non-government organization started relief ops and tried to move towards reconstruction. For example, with the help of the World Bank loan the government started reconstructing the embankment of southwest coastal area of Bangladesh on the basis of polder. Subsequently, the local farmers tried to produce non-rice crops such as sunflower, watermelon, and sesame along with boro rice compromising traditional shrimp cultivation; and these practices increased the income and food security (Kibria et al., 2015). Similarly, the micro-credit program has a significant impact to cope with disaster and rehabilitating coastal livelihoods and communities (Pomeroy, Ratner, Hall, Pimoljinda, & Vivekanandan, 2006). In post disaster period, women, the most suffering and vulnerable group, get special attention of planners and the micro-credit organizations (Alam & Rahman, 2014). So, it is clear that disaster brings partial or complete social changes in any society (Bates & Peacock, 1987; Carr, 1932). To discuss social change by disaster, Carr (1932) focused on the cultural changes, but Bates and Peacock (1987) focused on structural changes and offered a framework for future studies. Apart from this, it was also found that the social changes not only happen by disaster only but also by disaster rehabilitation program too (Oliver-Smith, 1977). But none of the studies have shown how disaster brings change in base structure and the changed base structure can change in superstructure in post disaster area. The significance of this study is in mitigating the gap from the Marxist point of view.

Research questions

The current study is designed on the basis of following three specific questions,

- How does the base structure change in post-disaster area?
- How does the base structure influence the superstructure in post-disaster area? and
- How does the social structural change go on in post-disaster area?

Methodology

Through deductive methods, the study adopted a collection of qualitative instruments including, case study, FGDs, KII and observation to gain the vivid information. Focusing on study objectives, the study area was purposively selected. The primary data were collected form Kamarkhola Union of Dacope sub-district of Khulna district of Bangladesh from March to April (2019). The secondary data and literature were collected from different types of journal articles, books and electronic sources. To gather information with the help of checklist and a voice recorder, the

chief researcher and research associate conducted six case studies. The respondents were local leaders, women and businessmen. Two FGDs (N=17) were conducted with the help of an FGD guideline in the local market area which assisted us to get collective information. Each FGD and case study consisted of forty to fifty-five munities. To get key information three KII were also conducted. The chairman, a banker and a religious master were chosen as key informants. Finally, both chief researcher and research associate observed the study area to develop an observation note. After collection, the data were coded and summarized by chief researcher and research associate. For the purpose of ethical considerations, the respondent's personal information was not taken.

Analysis

Background of study area before Aila (2009)

Historically, in this study area the people were dependent on agriculture. But this scenario changed in late 80s. Moreover, before super cyclone Aila, the main cash crop of the study area was shrimp. Most of the respondents were engaged with this cultivation. Apart from this, local people also used to go to Sundarbans for collecting honey and wood. In this area, a few people or families hold the maximum cultivable land and other people worked their fields. The landowner consisted of the local political leader and the money lender (Mahajan). Very few middle classes had lived there also, of them school teachers, shop keepers and some boat owners were common. The rest of the majority had belonged to poor classes. To discuss the nature of the social classes of the study area it is stated that,

> Most rich people had at least two or three home both in town and village, they send their children for higher education. Some of them send their children to live in abroad with their family. These rich people hold most of the cultivable land of this area and develop Gher (special pond) to cultivate shrimps. These people also let the saline water in the cultivable area for more profit and caused the salinity intrusion. The lower-class people were always obeying to them because they created the job opportunity and lend-money. People didn't dare to raise their voice against them because some of them were political leader and, at least, have close connection with government authority and police. (Quotes from case study).

The middle-class people of the study were distinctly well-off. But the poor landless people suffered more because they hardly got to send their children to education. They didn't have any other or alternative job opportunity. So, little social mobility was possible. Another respondent mentioned that,

> It (shrimp cultivation and going to forest) was profitable but as we do

> not own land so we didn't get the profit. The lion's share of the profit from the field or forest was taken by the owner of the land or boat. Subsequently, our poverty never comes to an end. (Quote from case study).

The women's status was very poor. Muslim women didn't dare to go to market but poor women used to work in the field and help with husband as an unpaid labor force. There was no room for female education and early marriage was common to them.

However, there existed a strong social solidarity and group sense. Joint families were also common and the most senior member was considered as head of the family. In community the senior citizen was respected by younger one. For example, younger one was used to give Salam to senior one and never smoke or slang in front of senior person. During any conflict resolution the senior citizen were sit beside the chairman. But the upper-class people and their family member always get the higher respect. Even an upper-class family's kid considered most prestigious than a lower- or middle-class senior member.

During any cultural participation or donation, the lion, and sometimes all, coast was provided by the upper class and the upper middle-class people. They donated not for social welfare rather made subordination. At that time, people hardly dear to stand in any political participation. Subsequently, some deviant group engaged with criminal activity by naming forest- pirates.

Scenario of study area immediate after Aila (2009)

According to respondent, Aila (2009) caused much more distraction than ever happen. Most of the people of the area loss their homestead and other property not for cyclone but for tidal surge which were the consequences of cyclone. To describe this respondent said that,

> That time there were no difference between rich and poor. All started living on the embankment and depended on relief. The upper-class people who had cyclone resistant building they were also depended on the relief. (Quote from KII).

The super cyclone Aila made the study area homogeneous. Everyone had suffered from some short of scarcity of food, water and other resources. Some people migrated to the nearby cities. Another respondent stated that,

> Cyclone Aila (2009) make equality among this society as everyone leading similar lifestyle. (quote from case study).

Present scenario of study area

It is clear that Aila caused much more destruction in the study area. After the Aila government took lots of initiatives like, food for work and some

social Safety Net programs. According to union parishad (UP) chairman, government provided rice, fresh water tank (1000 liters), sanitary materials, medicines, cash and housing materials. Government also provided some cash as compensation to those families whose members died in Aila. Government has also taken up constructing of cyclone shelter cum primary school as cyclone shelter for the local community. Now people can easily take shelter in any kind of natural threat. Through FGDs, it also clear that different types of NGOs provided aid and relief which includes, the housing material, water storage material, cash, job opportunity, livestock and education. These aid and relief made relatively permanent economic changes in the study area.

Apart from this, the grater project of the study area still running is the sustainable embankment reconstruction around the area. As we know, the homeless people took shelter on the embankment. During construction, each family got higher standard compensation form the government and now people have much more liquid money than before. At the same time, microcredit of NGOs brings a significant opportunity to create employment for women. Scientific cultivation and Hybrid crops specially the saline resistant crop also bring a change in the society. Following diagram illustrates this clearly:

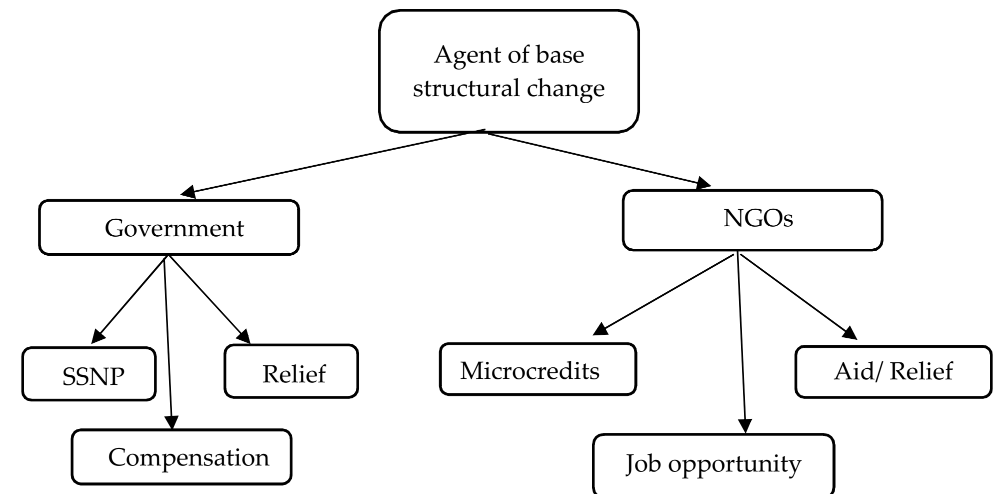

Fig 1: Changing Agent of base Structure of Study area

Changes in Superstructure

Now that people have much liquid money than before, consequently, different super-structural changes took place in the study area. Some are considered positive and some are considered as negative. Firstly, the so called 'lower class' people now became 'lower middle class or middle-middle class' as they get more compensation than their losses. Ironically,

some middle class because of social status fail to present themselves as homeless and get less compensation than their losses.

Through observation it was cleared that the so called 'poor people' now constructed cyclone resistant building but in some cases some people are still trying to represent them as poor to get more aid.

Maximum numbers of the respondents have at least one motor-cycle and they used it as a public transport and a good source of income. With the help of NGOs and GOs the people of study area have solar panel for electricity. People now don't depend on the upper-class people to communicate with nearby places, rather they have mobile phones. On the one hand, the so called 'rich people' started selling their farmland as it became barren due to salinity. On the other hand, the new middleclass are buying those lands at cheap prices. Another middle-class group, those who have migrated, are also selling their land and the new middleclass are buying their land. Thus, a new land owner came to be in the study area. People, who worked in others' farmland before Aila, are now working their own land. For investment they take microcredit loan from NGOs instead of shroff. Through case study we found that shroff takes more interest than the NGOs.

> You will be surprised that local shroff takes hundred taka per week per thousand and they take blank signature on the white paper or took some gold as security. (quote form case study).

The availability of money and educational institutions forced this neo-class to send their children for education. Now women are also taking part in social activity and with the help of microfinance they are engaged in their own business. To describe women's empowerment it is stated that,

> Now the women getting self-employed because of microcredit, the women hardly used to be dressed in veil and give Salam. They are frequently working outside the home. (quote from KII).

These statements foretell gender based structural change. Interestingly, the old people of the society don't consider it as a positive change. However, the neo-class people try to show-off their class sentiments, particularly young men have taken to modern dress and speaking in English, putting on sunglasses and taking to modern haircuts. It seems to them this is representative of an elite culture.

Now the cultural participation has also increased. People now watch satellite television and young people use the internet. Some are frequently going to nearby city for recreation. Males of the community are now spending leisure time in market by gossiping. The subject matter of their gossip are the national and international affairs. A silent competition is also visible in the study area between the traditionally rich people and the neo-class people. The neo-class people are now trying to contribute in

community development, for example construction of religious center, relatively more than the traditional rich. Besides, the community people are now organizing more cultural program than before Aila. Through donation the neo-class are trying to participate in leadership activity in both political and non-political environment. The non-political environment includes the managing committee of religious center and school. The youth are developing volunteer organization. One of the youth respondents stated that, with the help of my friends few days ago I stopped an early marriage in this village. (quoted from FGDs).

However, a social crisis is also visible in the study area. All respondents concurred that showing respect to elders has been lost from the society. For example,

> We never provoke to smoke in front of our senior before Aila but now the younger who get some money they smoke in front of us. (Quote from FGDs).

Salam or nomoskar is another indicator of politeness and showing respect to each other of this society which is on the decline. Even some divorces are also been visible in this study area. Interestingly, the divorced female lives happily than divorced male because with the help of NGOs the women have been empowered. Triangular group cold conflict between the young and elder and women has also increased (See the figure 2). Some corruption on the basis of relief has also been observed by respondents. The foremost social change experienced by local people is that people have now became self-centric. Day by day they are losing collective consciousness. A respondent of KII said some people shifted their religion from Sanatana to Christian because of money. But these people still live in their village with more prestige and security because their economic condition also shifted with religion.

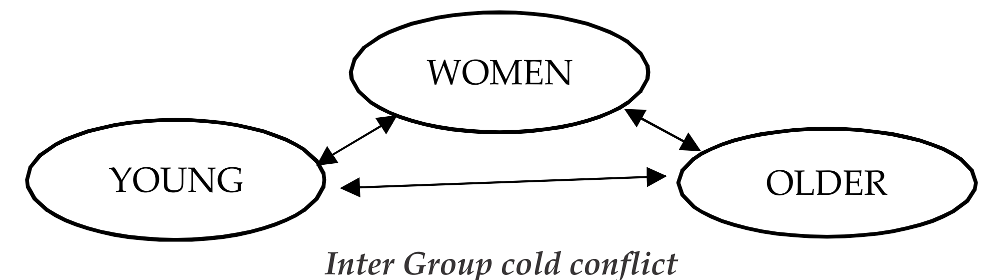

Fig 2: Triangular Group Conflict of post disaster area

The people are now conscious about disasters in the future and they try to store food and money for any crisis. Most of the active aged people have started looking for monthly and relatively permanent job source.

The findings of this study show that Aila brought positive and negative social changes in the study area. The negative changes pertained to destruction of property and life (Saha, 2015). The findings show that the economic structural changes are the earliest changes brought about by a disaster. That means disaster breaks down the usual economic structure which is also evident from Gottschang (1987) and Albala-Bertrand (1993). Ultimately, a disaster forces the society to reconstruct the traditional economic structure as has been found in the study area. Here, the role of the reconstructing agent was inacted by the GOs and NGOs (Oliver-Smith, 1977). At the same time, disaster increases foreign reserve by gaining foreign aid. However, according to Karl Marx this is called the base structural change (Williams, 1991).

According to Marx superstructure is always shaped by the base structure. The findings show that before Aila (2009) most of the people's economic condition was not strong enough. They didn't have their own cultivable land and for a livelihood they were dependent on the upper class. From Marxist point of view, because those people were property less, they often got exploited by the upper class (Dahrendorf, 1959; McLellan, 2007). Ironically, Aila brought the salinity and made the land barren. The capitalists of the study area reaped less profit than earlier, so they decided to sell lands and reinvest the returns. On the other hand, through relief and aid the poor people got some liquid assets and tried to buy the lands sold by traditional landowners. Through this way a new social class emerged in the study areas who were neither poor nor upper middle class. According to our findings the nature of this new social class is the economic security or liquid money.

Unconsciously, these new social groups, after gaining their security through relief and compensation, are trying to bring about a paradigm shift from traditional to modern. Form Marxist point of view we can say that the super structure is changing if we see the change in culture, institutions, political power structures, roles, rituals, and so on (Williams, 1991). The findings of this study evidenced that the power structure both in political and non-political have changed in the study area. Apart from these, women got empowered with the help of microcredit facility. More students are taking formal education. People who once depended on others to arrange any cultural or religious program, are no longer dependent.

Instead, at present the cultural participation has increased. The findings also show that the economic changes bring some sort of equality in the society. But, according to Kuhn, this new paradigm change can cause

social crisis (Kuhn, 1974). That is also included in super structural changes. Some of those change include, lowering of respect, inter group conflict, increase in selfishness, corruption, increased deviant behaviour, adopting foreign culture and so on. Thus, disaster brings change in the entire social structure through breaking down the old social structure.

Conclusion

In conclusion, through this study it has been clear that the disaster like a revolution not only breaks down the traditional social structure but also reconstructs a new social structure. By applying Marxist view of social structure, this study tried to show how the social structure changed because of disaster. Firstly, disaster broke down the economic structure of the affected area and that grabbed the attention of developing agents. Through relief and rehabilitation programs the economic flow increased in the affected area and created reform in traditional economic structure. Secondly, the new economic structure forced the people to create a change in superstructure. Some people welcome these changes and some do not, so a social crisis also taken place which is also explained by Kuhn. However, with a short passage of time dimension the affected also experienced the new social structure.

The study faced some methodological limitations as it only used qualitative method and tools. Because of methodological limitations we failed to address how many peoples' economic condition improved and the correlation with each other. Another challenge faced by this study was data collection and the possibility that the respondents are likely to give biased information. Some sensitive questions also limited the scope of this work. Another limitation of this study was the economic factor. Scope of samples was another limitation for this study. However, this study opens a new thought of post- disaster management study. Finally, it is recommended that further in-depth studies be undertaken to extend the knowledge about this contemporary issue.

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Role of Civil Society Organizations in the Promotion of Human Rights

Sayantani Guin*

Abstract

India, as a democratic country faces a number of human rights challenges in the form of extreme poverty, increasing pressure on resources, social discrimination, economic and industrial development and movements for self-determination etc. The main criteria of a democratic society are citizen participation, equality, tolerance, accountability, transparency, regular, free and fair elections, economic freedom, checking abuse of power, accepting the results of election, human rights, multiparty system and, rule of law. If this scope of principles works at all level of the society and the people know how to use them for their interest, then the society turns to democratic and civil, then a citizen plays a role. The two principles of citizen participation and human rights are interrelated. If the human rights are not guaranteed, the people are not involved in decision-making and be active as citizens.

Although, the legal environment of the country provides protection of the fundamental rights of the citizen by the Constitution and relevant laws, the effective implementation of these laws at all levels is not possible without the active involvement of the civil society. Starting with the evolution of human rights, the present article discusses the concept of civil society and the need and role of civil society intervention for the protection and promotion of human rights.

Key words: - Human rights, civil society, education, citizen participation, grassroots mobilization.

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Introduction

Civil Society is a society where any single citizen plays a role. Various definitions describe civil society as the whole of humanity left over once governments and for-profit firms are excised, covering all those organizations that fill in the spaces between the family, the State and the market. It is hoped that from this sphere, the agents of change will come that will cure a range of social and economic ills left by failures of Government and the marketplace viz. autocracy, poverty, disenfranchisement, oppression, social malaise etc. The realization of human rights is very much linked with awareness among the people, regarding various mechanisms available for redressal of human rights violation.

Abusing power at all levels of society is directly related with the human rights issue. The government usually makes good faces and good speeches on promoting human rights, but it is never successful without civil society's practical involvement. Without the pressure from an active civil society, human rights protection wouldn't be successful. Civil Society can play a crucial role in protecting people's rights in all spheres of society. Citizen's representing different spheres of society: women, elderly, disable and religious minorities, etc can practice a wide range of activities to protect and promote human rights issue and in developing a strong civil society. Before describing the role of civil society organizations, it is imperative to understand the concept of human rights.

Human Rights: The Concept

The concept of human rights has two basic meanings. The first refers to the inherent and inalienable rights of a man/woman simply by virtue of his/her being human. These are moral rights, and they aim at ensuring his/her dignity as a human being. The second sense is that of legal rights which are established through the law-creating processes of societies, both national and international. In layman's word, human rights are those minimal rights, which every individual must have by virtue of his being a "member of human family" irrespective of any other consideration. The original content of the philosophy of human rights was limited to civil and political rights of the individual. These were often referred to as "first generation" rights. The "second generation" rights also included economic, social and cultural rights as it was realized that without guaranteeing economic, social and cultural rights, full enjoyment of civil and political rights was not possible. As the meaning of the concept expanded, the "third generation" rights emerged which included: right to self-determination, right to sovereignty over natural wealth and resources of the country and, right to development as well as rights of

disadvantaged groups to special protection (Tiwari, 2003; Sen, 1998).

For a long time and till recently, the study and concern about human rights remained largely confined to international lawyers and diplomats. It is only in the recent decades that these rights are increasingly becoming the subjects of concern for national lawyers, activists, reformers, policy makers and other citizenry.

Human Rights: Global Emergence

The term Human Rights, as we know it today concretized after the end of the Second World War, which caused unprecedented misery, death and destruction, and large-scale violation of human rights in the form of ideologies of Nazism and Fascism. The world community felt that human rights need to be covered by effective mechanisms and procedures to guarantee, protect and to provide sanctions against these violations. Thus, it emerged the United Nations, in 1945, whose one of the main areas of future work was protection and promotion of human rights. In October 1945, the Economic and Social Council (ECOSOC) of the United Nations established the Commission on Human Rights, which drafted an International Bill of Rights. The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly on 10th of December 1948. The UDHR describes "freedom from want of fear" as the "highest aspiration of the common people". The Declaration covers two broad sets of rights-Civil and Political Rights and Economic, Social and Cultural Rights. To give binding force to the Declaration and to complete the International Bill of Rights, two covenants along with the UDHR were adopted by the UN General Assembly in 1966: International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR was re-affirmed at the Vienna World Conference of Human Rights in 1993. Also, nearly all human rights' conventions contain provisions by which any dispute between the contracting parties relating to the interpretation, application or fulfillment of the convention maybe submitted to the International Court of Justice, a principle judicial organ of the U.N. In addition, the U.N. has various specialized agencies, such as UNESCO, ILO, UNICEF, UNDP, which have contributed substantially towards the promotion of Human Rights. The work done by the UN Agencies in the field of social welfare, which is a prerequisite for human rights protection, has been an important landmark in the progress of humanity (Tiwari, 2003).

Apart from the United Nations, various local, national & international voluntary organizations, viz. Amnesty International, Asia Watch, Commonwealth Human Rights Initiative (CHRI), People's Union for

Civil Liberties (PUCL), South Asian Human Rights Documentation Center (SAHRDC), People's Union for Democratic Rights (PUDR), Center for Democracy (CFD), International Committees for Red Cross, International League for Human Rights, the International Commission of Jurists are working for the promotion & protection of human rights in every continent and in almost every country in the world (Tilak, 1998).

Human Rights: India's Commitment

Specifically, India has responded to human rights issues through the following mechanisms:

1. **Constitutional Provisions**

The Constitution of India acknowledges rights of human beings as persons, citizens, members of sexes, religions, regions and cultural communities, and seeks to protect rights of oppressed castes, tribes and classes. The Preamble to the Constitution together with the Fundamental Rights and Directive Principles of the State Policy enshrined in Part III and IV of the Constitution virtually cover the entire gamut of human rights contained in the International Bill of Human Rights. Various Articles of the Constitution assures right to equality, prohibits discrimination of religion, race, caste, sex or place of birth, etc (Mohanty, 1997).

Thus Indian Constitution not only ensures fundamental rights to every citizen but also requires the State to ensure promotion and protection of rights particularly of the vulnerable sections of the society to bring about a just and equitable social order.

Besides this, India participated in the drafting of the UDHR and adopted some 70 international instruments relating to human rights under the aegis of UN. India is already party to 17 international treaties drawn up under the auspices of the UN viz. International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Vienna Convention of 1993 and the Convention on the Elimination of All forms of Discrimination Against Women known as the Women's Convention (CEDAW). India is also an active member of the United Nations Committee on the Prevention of Crime and Treatment of Offenders. The United Nations Standard Minimum Rules for Administration of Juvenile Justice (The Beijing Rules), adopted by the General Assembly in 1985, have been substantially embodied in India in the Juvenile Justice (Care & Protection of Children) Act 2000 (Sathe, 2000).

The Constitution of India guarantees certain remedies to every citizen for the enforcement of Fundamental Rights. The remedies available to the citizens are petitions of the issue of directions/orders or writs in the nature of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo-Warranto. The Supreme Court (under Article 32) and the High Courts (under Article 226) have the powers to issue writs or orders for the enforcement of the fundamental rights. In addition to the Constitutional provisions, Parliament has been enacting laws, from time to time to keep pace with the changing trends. These Acts not only aim at implementing the Constitutional provisions but also have a direct bearing on the promotion and preservation of human rights (Tiwari, 2003).

2. **The Role of Supreme Court of India in the Protection & Promotion of Human Rights**

The Supreme Court of India has played a very important role in widening the scope of the concept of human rights. It adopted activist strategies for expanding the scope of the fundamental rights. In the late 70's with the decisions given in Maneka Gandhi Vs Union of India[1], Sunil Batra Vs Delhi Administration[2], Hussainara Khatton Vs State of Bihar[3], a new judicial trend started which saw the Supreme Court taking a view that the provisions of Part III should be given widest interpretation possible. The Court recognized the right to health care, the right to primary education, the right to shelter and the right to privacy as essential aspects of the right to life. The Court held that the right to life meant the right to live with dignity. The Court also expanded the traditional rule of locus standi that a person whose fundamental right is infringed can file a petition. The Court now allows Public Interest Litigation or social interest litigation to 'Public Spirited Citizens' for the enforcement of constitutional and legal rights to any person who are unable to approach the Court due to their social or economic handicap. A nation-wide Legal Aid scheme came to be established at the initiative of the Supreme Court. Enforcement of fundamental rights from the Supreme Court can now be sought by writing a letter, which has brought legal aid to the doorsteps of the people (Tiwari, 2003; Leila, 1999; Sinha, 1999).

3. **Protection of Human Rights Act, 1993**

The Parliament of India enacted the Protection of Human Rights Act,

1 AIR 1978 SC 27.
2 AIR 1978 SC 597.
3 AIR 1979 SC 1360.

1993 to provide for the better protection of human rights. The Act provides provisions for setting up of a National Human Rights Commission, State Human Rights Commissions and Human Rights Courts. Apart from the National Human Rights Commission (NHRC), fifteen states have established and State Human Rights Commissions (SHRCs) until recently. NHRC/SHRCs can inquire suo motto about the violations of human rights or abetment thereof or negligence in the prevention of such violation by a public servant.

In a situation of such immense Governmental measures to protect and promote human rights, one may ponder the need for the intervention of civil society organizations in promoting human rights. The following section highlights that despite the above various legal remedies, constitutional provisions and institutional mechanisms in India, there are massive violations of human rights of disadvantaged groups and marginalized sections of the society. There are outrageous violations of civil and political rights as well as violation of social and economic rights.

Human Rights Violations: Need for Civil Society Intervention

The NHRC Annual Reports of the past twelve years (1993-1994 to 2004-2005) clearly show that the number of cases registered and considered by the Commission is increasing. The crime rate increased in the past year though the police claimed that the rate has declined. The profile of crime is drastically changing and the criminal justice system has failed to keep track of the growing incidences of crime. New forms of crime are taking shape and the older ones are getting harsher and virulent. Also, the criminal justice system has failed to meet its objectives and the number of pending cases is on the increase.

Apart from this, NHRC observes large-scale prevalence of the menace of terrorism in the country especially in the States of Jammu & Kashmir and the North Eastern States. A large number of complaints received by the NHRC were against the conduct of the armed forces and State police forces including enforced disappearances, illegal detention, torture, custodial deaths, extra-judicial killings and fake encounters.

In India, the State declares itself to be secular and democratic, where the citizen's right to equality before the law is enshrined in the Constitution. However, this equality is negated in several cases by the State's inability to make uniform laws for all citizens, especially women and other weaker sections of society. State personnel, especially the police, have failed to protect the citizen from privately perpetrated violence or they themselves have engaged in violation of citizenship rights. There is a widespread feeling that different sections of the people are differently protected by

the State, and the rule of law applies to some but not to all. Autonomous spheres of power have engaged inflicting injustice to the weaker groups in society. The widespread illiteracy of the people, especially among the women, has stood in the way of citizens knowing about their fundamental rights, and in Civil Society Organizations (CSO) performing their advocacy role effectively.

In spite of several welfare provisions in the Constitution and several welfare programmes being implemented, the economic system continues to be skewed as regards economic justice. Around one-third of the population lives below the poverty line and suffer from deprivations of all sorts. The presences of sharp economic disparities and inherited social inequalities have stood in the way of the poor masses to enjoy the benefits of many of the welfare schemes. This has also detracted the CSOs in their advocacy role.

The socio-cultural values in India are lacking in many qualities that promote the growth of a healthy democracy and effective civil society. In several areas in the country, social behaviour is guided by particularistic values, and this has often led to conflict and confrontation. Many CSOs are governed by narrow ethnic, regional, communal and linguistic considerations. This has weakened the democratic apparatus and undermined the capacity of the civil society (Dhavan, 2002; Nigam, 2001).

It is evident from the above that although there are various institutional mechanisms working for the protection and promotion of human rights in India, contemporary India faces the problems of poverty, corruption, bad governance, criminalization of politics and politicization of criminals, inefficient justice delivery system etc, which themselves are violations of human rights. It is also to be noted that protection of human rights encompasses the immediate mechanisms to stop the violation of human rights. Along with it, the promotional aspect has also to be given due attention in order to prevent further violation of human rights. Thus, it is the prime responsibility of the civil society-NGOs, professional associations, religious groups, activists, & enlightened citizens to assist NHRC/SHRC through reporting of incidents of human rights violations against the State-police, prisons, etc., assisting it during investigations, research, and dissemination of information about human rights issues and thus inculcating a culture of human rights in the society. The following sections elaborate the various roles that the civil society organizations may play in the promotion of human rights. However, a brief explanation of the concept of civil society in India is necessary.

Civil Society: Indian Scenario

In India, the manifestations of civil society can be found in the early religious and social reform movements. They brought some common people together to protest against child marriage, sati, widowhood and prostitution. The struggle for independence under the leadership of Gandhi brought a new dimension to civil society in India where political action for freedom and service to the marginalized were combined. The Nehruvian Community Development Programme based on the colonial model became another attempt in the 1950s to provide a democratic platform for local civil society groups like village panchayats to participate in their own development programmes. During the 70s, India witnessed a great surge of civil society groups under the leadership of Jaya Prakash Narayan, which challenged the State of its unjust policies and threatened the power base of the ruling political party of that time. Autonomous women's groups, which mushroomed in the 80s, raised their voices against oppression and violence against women, provided space for women to demand their rights and equal position in society. There have been movements of Dalits, tribals and fisher folk in India, which brought to the fore the issues related to the violation of human rights, the right to livelihood and the conservation of the environment. Gradually the space of the civil society has widened ranging from theatre groups, church based groups to trade unions, caste panchayats, social action groups, human rights groups and advocacy groups (Alphonse, 2003).

Modern civil society in India has been a post-Independence phenomenon. Within half a century of its existence as a free nation, the country has witnessed the birth and development of a multitude of CSOs-large and small; local, state level and national. However, only very few of them have been able to live up to their objectives. Lack of proper leadership, inadequate economic base, and structural and ideological considerations have been a bane of most of them, even those that are working with some efficiency. The availability of foreign funds have been able to prop up many NGOs in India, but their real contribution to civil society objectives is yet to be examined (Nayar, 2001).

According to some scholars, civil society in India consists of very fluid social groupings, which are founded on primordial identities of caste, ethnicity, kinship lineages and religions. Autonomy of individual, protection of individual right to equal citizenship, and access to decision making apparatus and participatory democratic framework are necessary conditions of civil society. Where the State fails to guarantee these, and instead functions as an instrument of sub serving dominant sectional interests only, non-State associations and voluntary mobilization would rise (Dhanagare, 2001).

The burning of innocent women & children inside a train at Godhra on February 27, 2002 and the subsequent ethnic cleansing of Muslims in Gujarat, awakened concerned citizens from Mumbai & Ahmedabad. These enlightened citizens came together to form an 'Association of Persons', to be called Citizens for Justice & Peace (CJP). The Concerned Citizens Tribunal consisting of a panel of retired judges and prominent citizens from different walks of life was thus set up to examine & investigate the incident of arson at Godhra & the subsequent statewide violence. The Tribunal collected testimonials, recorded evidences and arrived at some prima facie conclusions of the communal massacre (Citizens for Justice & Peace, 2002).

Amnesty International has been monitoring the protection of human rights violations in India since the late 1960s. The reports have highlighted mainly on torture: patterns and victims, death in custody, impunity to law enforcement agencies, cause of torture and remedies to combat torture. Besides this, the Amnesty International has also published other reports relating to India concerning prevention of torture, the impact of violence against women.

Various politically organized civil society groups like the Narmada Bachao Andolan, the Chipko movement, Society for Promotion of Area Resource Centres (SPARC) and Action for Good Governance and Networking in India (AGNI) are working for the expansion of rights of the tribals, peasants, dalits, fisher folk and the urban citizen's (Tiwari, 2003).

Democracy requires a strong State and a vigorous civil society. A strong State is one, which protects people's lives, property and liberty. It stands up against the mafias but is also responsive to the urges and aspirations of the people. It not only protects human rights but also does not violate them either. A vigorous civil society is one, which shares the values of human rights, and acts as vigilant watchdogs upon the State and negotiates between the traditional societal values and the human rights values.

It may be said that a civil society, which shares the values of liberty, justice, equality and fraternity, is a condition pre-requisite for the promotion of respect for human rights. The civil society committed to human rights will protect human rights not only against the State but also against the civil society itself. The above are few examples of various civil society organizations operating in India. The next section presents some of the major roles that the civil society groups may play to enhance the promotion of human rights.

Catalysts of Human Rights: Role of Civil Society Organization

Civil Society Organizations can play the following major roles in protecting and promoting human rights:

1. Human Rights Communities: The People's Decade for Human Rights Education (PDHRE) is an international human rights education service organization, which undertook a historic initiative to form the "Human Rights Community". A human rights community is one in which its members, from policy makers to ordinary citizens, learn about human rights obligations, relate human rights norms to their own immediate and practical concerns, and commit themselves to their application. They make a joint commitment to enter into a dialogue for the purpose of developing the guidelines of their "Human Rights Community" (Koenig, 1998).
2. Right to Information: All organizations and their members, public and private, after learning about human rights should join to monitor human rights in the community, document violations, share their findings and observations in a newsletter to be disseminated to the general public. This process will ideally make each member of the community a human rights "educator" and a human rights "defender" (Koenig, 1998).
3. Grassroots Mobilization: State effectiveness in realizing socio-economic rights is unlikely to improve without political empowerment and mobilization of grassroots organizations in poor communities. There is direct link between grassroots mobilization and effective service delivery in local communities. Non-profit organizations across all sectors could play an important role in eradicating poverty and unemployment in partnership with the State (Pieterse & Donk, 2002).
4. Citizen Participation: Citizens representing different spheres of society: women, elderly, disable, ethnical and religious minorities should participate in the various spheres of development work. Citizen participation is a key component in developing a civil society (Rinchin, 2002).
5. Human Rights Education: Human Rights Education is education about humanism, democracy and the rule of law. It should instill tolerance, respect for the law, respect for other human beings and willingness to allow diversities of cultures, traditions and thoughts. It must create concern for the less privileged people, compassion for all living beings and love for nature and environment. It must encourage fearlessness, integrity and willingness to standup against injustice and oppression. We need to educate our police officers, judges, lawyers, politicians and citizens. Besides courses on the regular curricula,

universities should also undertake human rights education to people at large through correspondence or through public lectures, seminars or workshops (Sathe, 2000). Although, the Government of India prepared a National Action Plan for Human Rights Education in India to celebrate the occasion of United Nations Decade (1995-2004) for Human Rights Education, the implementation of this Action Plan in the real sense is yet to be ascertained (Government of India, 2001).

6. Role of mass communication media: The role of mass communication media in the advancement of human rights is immense. Radio, television and Internet can carry the message of human rights in every corner of the country and can shape and mould the thinking of the people on human rights issues. They can serve as powerful instruments for advancement of human rights and conscientise the society against suppression and violation of human rights (Sen, 1998).
7. Religious movements: India has been the land of religious movements. There is a great variety of religious activities, organized, unorganized and partly organized. There are also semi-religious and quasi-religious activities. A religious movement is also a social movement but not all social movements are religious movements. Although the direct contribution of the religious assemblies and religious movements to the formation of civil society cannot be ascertained, but religious assemblies and religious movements do have an indirect contribution (Beteille, 2001).
8. Interface of colleges of social work and civil society organizations wherein the social work educators have a crucial role to play in the issues of social equality, justice and development of the weaker sections of the society (Adsule, 2003).
9. Role of the Private Sector: The Private sector is accountable to society and must be sensitive to the social consequences of its activities. It has an influence on human rights not only through economic development, advances in technology and human development but also in contributing technologies, products as well as its ability to raise consumer awareness of humanitarian issues. Companies or the private commercial enterprises should respect international human rights law and should act much beyond voluntarism. Corporate Social Responsibility can be defined as, "Achieving commercial success in ways that honour ethical values and respect people, communities and the natural environment." In India, Infosys and Wipro, two corporates have committed a certain percentage of their profits for social causes like education, women's project, healthcare, community development, preservation of art and

culture, etc. Thus, business organizations in India can play a major role in combating situations like communal violence (Aga 2003; World Civil Society Official Report 2002).

10. Human Rights Defenders: Around the world, there is a small but vital community of human rights defenders, comprising representatives of NGOs and other individuals or associations, all involved in the frontline struggle for human rights. Human Rights Defenders are often at considerable risk of becoming themselves victims of serious violations, facing death threats, arrest and detention or suffering abduction or torture. In India, voluntary development organizations like Youth for Unity and Voluntary Action (YUVA), is being engaged in organizing workshops conducted by well-known human rights activists from all over India for the empowerment of the oppressed and the marginalized poor (Muralidhran 2003; United Nations, 1998).

The above minimal efforts could be few catalysts at the civil society level for the protection and promotion of human rights. These efforts indicate towards the increasing role of the civil society. Thus, it can be said that besides the institutional mechanisms including the Supreme Court, the High Courts, Human Rights Commissions and Human Rights Courts, civil society could also play a vital role in the protection and promotion of human rights.

Conclusion

Development is a joint effort of the State and the civil society. Indian society, which is encompassing various problems like population growth, protection of environment, empowerment of women, corruption etc are directly related to the realization of human rights. People have to be taken into confidence and told what these problems are and how they could solve them. A transparent government is needed where people have the right to information. The efforts should be to persuade people to respect human rights.

In the International arena, Human Rights NGOs have played a significant role in recent years for preservation and promotion of human rights. NGOs have brought about dynamism, credibility and dignity to the movement for protection and promotion of Human Rights. In the Indian context, among the social groups and associations of various kinds that are considered to make up civil society, non-governmental organizations (NGOs) have become especially prominent in the last two decades. Be it in the field of health, providing drinking water, organizing forest management groups, or thrift societies for working women, NGOs are supposed to take the lead. The NGO sector in India is characterized by tremendous diversity and heterogeneity. There are over 14,000 NGOs

registered under the Foreign Contribution Regulation Act. In all, there may be over 30,000 NGOs in India (Tilak, 1998: Baviskar, 2001).

The voluntary sector includes non-governmental, non-profit organizations. They may be engaged in a variety of activities: implementing grassroots/sustainable development, promoting human rights and social justice, protesting against environmental degradation, and many other similar activities. Some activists designate themselves as social action groups, political action groups or social movements.

The growing prominence of NGOs in the field of development is strongly related to the declining legitimacy of the state. Good governance functions are law and order, basic education, primary health care and some elements of physical structure like roads, power, protection of the deprived and an enabling environment for growth. But the State is considered to be corrupt, oppressive and anti-poor. Bad governance is the root of many of the afflictions of the world's peoples and of the gross violations of human rights that are rampant in the contemporary world. Equity and stronger protection of human rights demand better governance.

Civil society, particularly voluntary organizations have major responsibilities for strengthening the roots of democracy, through advocacy, protest, and initiative. These organizations are supposed to be committed to the basic concepts of democracy, namely transparency and accountability (Debroy, 2003; Ramcharan 2003; Baviskar 2001; Vyas 1993).

State structures are criticized as being rigidly bureaucratic and corrupt, and thus unsuited for performing either welfare or resource management functions, whereas NGOs are seen as 'civil society' actors that are more accountable, responsive and committed to bring about social change. Not only funding institutions but the State itself accepts the presence of NGOs and expects them to take over certain tasks. The need of the hour is that the Government and the civil society organizations, in its various forms, should work hand in hand, to develop and sustain a culture of human rights in the society leading to a progressive mankind.

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Protection of Children from Sexual Abuse: Application of the United Nations Convention on the Rights of the Child in the Domestic Legislation of Pakistan & India

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Abstract
The United Nations Convention on the Rights of the Child (UNCRC) is a universally ratified document which specifically protects children's rights. The Convention requires from State Parties to ensure children's rights and to adopt measures to transform its laws through legislation in accordance with the standards set by UNCRC. This paper will discuss the status of the UNCRC in Pakistan and India to highlight their commitment to give effect to the UNCRC in their domestic laws to protect children from sexual abuse. This paper consists of three parts. Part one will discuss the background, provisions of the UNCRC addressing protection of children from sexual abuse and implementation of the UNCRC in Pakistan and India. The second part of the paper will examine the domestic legal framework in Pakistan in the light of the UNCRC including constitutional provisions and relevant statutes protecting children from sexual abuse. Part three of the paper will discuss the application of the Convention in the domestic legislative framework addressing Child sexual abuse in India. The study of the periodical reports submitted to the UNCRC Committee and the concluding observations of the Committee will help to examine the application of the UNCRC to protect children from sexual abuse in Pakistan and India. The conclusion summarizes the main findings.

Key words: - Child, UNCRC, sexual abuse, International law, ratification.

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Introduction

The United Nations Convention on the Rights of the Child (hereinafter referred to as UNCRC) is a complete document on children's rights. It is also called a document of children's human rights (Shackel, 2003). The UNCRC contains 54 Articles which covers social, economic, civil, political and cultural rights available to children and is applicable to every child in the world. This UNCRC provides the children procedural capacity to claim the exercise of these rights. The UNCRC is the first global instrument to recognize the child as possessing rights that is highly respected by the State Parties. The State Parties are under a responsibility to provide special protection to children by implementing the rights set forth in the UNCRC and also to submit their periodical reports to the UNCRC Committee concerning their performance in implementing the UNCRC (Mower Jr., 1997). This process imposes a duty on the Sate Parties to apply the provisions of the UNCRC and protect rights of children as a guardian within their jurisdictions. This will give special protection to children as vulnerable group of society (Sloth-Nielsen, 1995). Article 34 and Article 19 of UNCRC provides children protection from sexual abuse and exploitation. The UNCRC Committee requires that member States will adopt proactive measures to prevent violence in any form against children within their State jurisdiction.

Child sexual abuse is a serious problem in Pakistan and India. A member State to the Convention is under an obligation to implement the Convention within its State Jurisdiction. Pakistan and India are under an obligation to reform their national laws in accordance with the principles of the UNCRC to protect their children from sexual abuse. Pakistan and India both adopted the monistic approach to implement international law into their national laws. Therefore, these two countries need legislation to transform UNCRC into their national laws to protect their children from sexual abuse.

The measures a Government takes to implement the principles of UNCRC includes children's rights in the Constitution and list of laws on the subject which are passed in the last two years and the proposed legislation which is under preparation. The periodical reports submitted by Pakistan and India to the UNCRC Committee and the concluding observation of the Committee on these reports is the best way to find out the implementation of the UNCRC in the domestic legislation of these countries.

The protection of basic human rights is now recognized as the primary obligation of all societies, regardless of their political ideology or level of development. The UNCRC is undoubtedly a breakthrough in the field of child justice. It provides clear goals and possible action strategies. After

analyzing the UNCRC provisions, we can examine the Constitution and laws to determine to what extent the laws of Pakistan and India today reflect the objectives and standards of the UNCRC. The exploitation and grave violation of the human rights of children living without dignity, in the form of physical and mental abuse, including sexual abuse, is one of the most pressing international issues. With regard to the social problem, different national contexts cannot differ from the international context. The position of Pakistan and India in the above-mentioned exploitation of children is not exceptional.

United Nations Convention on the Rights of Child (UNCRC)

The UNCRC is the result of a lengthy drafting process. The first step in the campaign for better protection of children was the establishment of the organization namely Save the Children International Union in 1923 which also drafted the Children's Charter (Bolzman, 2008). The origin of the children's rights started from endorsement of the first "Declaration of the Rights of the Child" known as "Geneva Declaration" in 1924 (Detrack, 1999). This instrument contained five principles for the development of child which includes the need to feed the child who was hungry, the need to attend to children first during times of relief. It also provided for the need to protect children against exploitation and the need to raise children in the consciousness.

The principles in this document formed the structure of the later Declaration on the Rights of the Child in 1959 (Detrack, 1992). This Declaration was mostly comprised of the principles of the Declaration of Human Rights. The 1959 Declaration does not specifically indicate sexual exploitation but clearly prescribes it as a restricted form of exploitation. Some of the important principles provided in this Declaration were right of a child to name and nationality, adequate nutrition, housing, and education. It also provided the right to play and recreation to children, and the right of protection from neglect and employments under risky or unsafe conditions. The 1924 Geneva Declaration provides protection of children from any form of exploitation while the 1959 Declaration forbids any form of exploitation. The 1959 Declaration does not specifically indicate sexual exploitation but clearly prescribes it as a restricted form of exploitation.

The flaws in the instruments relating to the child rights created the need to adopt a binding instrument. In 1978, Poland submitted a proposal to the United Nations urging it to adopt a "Convention on the Rights of the Child" (Cutland, 2012). After ten years, a draft was submitted to General Assembly for adoption and on November 20, 1989 it was adopted as the 'United Nations Convention on the Rights of the Child.' The UNCRC

became operational on September 2, 1990.

Four principles of the Convention

An important essence of the UNCRC is four key principles which lay down the foundation of the Convention and define the obligations of the member States. The Committee on the Rights of the Child (UNCRC Committee) in its first session in 1991, while agreeing on the guidelines on which the State Parties should write and structure their reports, emphasized on four rights. These four rights were put under a special heading before civil and political rights and other substantive Convention provisions. These principles are non-discrimination, child best interests, right to life, and right to express views. The UNCRC Committee identified these principles as the soul of the Convention (Sloth-Nielsen, 1995).

Provisions relating to protection of children from sexual abuse

The UNCRC provisions relating to the protection of children from sexual abuse are as under:

I. Child

Article 1 of UNCRC defines a child below the age of eighteen years. Article 1 is drafted keeping in view the fact that in the national law of some States, majority can be attained at an early age. The implication of this broad definition is important for the domestic application of the Convention; it covers all children within a country's territory, including aliens and refugee children (Sloth-Nielsen, 1995).

ii. Protection of children from Sexual Violence

The 1924 Geneva Declaration provides protection to a child from exploitation whereas 1959 Declaration prohibits any form of exploitation. The UNCRC is the first international instrument that specifically imposes obligations on the member countries to safeguard their children from sexual abuse. Article 34 of UNCRC protects children from sexual abuse. Article 19 of UNCRC protects children from any kind of violence including sexual abuse and imposes liability on the member States to take all necessary steps and measurements to protect children from violence.

The UNCRC Committee drafts General Comment No. 13 on Article 19 to provide guidelines to the member States to understand their obligations to implement Article 19 within their State's jurisdictions (General Comment No. 13, 2011). The terms sexual abuse and sexual exploitation are not defined in the UNCRC. The UNCRC Committee in G. C. No. 13 provides that violence means physical or mental violence including

sexual abuse. The UNCRC Committee requires that member States will adopt proactive measures to prevent violence in any form against children within their State jurisdiction (Hart, Yanghee, Wernham, 2011). States Parties should establish a national legislative framework for child protection.

The Committee in General Comment No.13 requires the States Parties to draft national, provincial and municipal laws which define frameworks to combat violence against children. States Parties that have not amended their domestic will review their national legislation to bring their national laws in accordance with the UNCRC. States Parties should amend their national laws to implement Article 19 within the framework of the Convention in their domestic legislation to eliminate any form of violence against children.

Implementation of the Convention

A state after ratification of the Convention comes under an obligation under the international law to implement it. Article 4 of UNCRC requires the member countries to adopt all suitable measures to assure the implementation of the principles of the UNCRC in their national laws (General Comment No.5, 2003).

Article 42 of the UNCRC, states that the member States shall take significant actions to aware their citizens including children about the principles of the UNCRC within their jurisdiction. Articles 43 and 45 provide the international mechanism for the application of the UNCRC. The monitoring mechanism provided in the UNCRC for its application is based on the "Committee on the Rights of the Child" which was instituted in 1991. The Committee in the beginning consisted of ten experts but afterwards it was extended to 18 experts.

The main function of the Committee is to operate the system of periodic reporting which is provided in Arts 44 and 45 of the UNCRC. It is the responsibility of the member States to submit their reports to the UNCRC Committee. These reports will briefly describe the measures which the States Parties adopt to implement the rights contained in the UNCRC and their progress to ensure these rights within their jurisdiction. Each member country will submit its first report within two years of the ratification of the UNCRC and after that must submit its report after every five years. The reports must contain adequate information in order to obtain a detail knowledge and understanding about the progress of the State Party in implementing the UNCRC within its jurisdiction. The State Party is under an obligation to review its legislation in order to assure that domestic law is in line the UNCRC. The UNCRC Committee examines not only the method of implementing the Convention but also the legal

protection to its principles and provisions by the State Party within its jurisdiction. The Committee takes a detailed review of all the national laws and provides guidance to the member States to assure full compliance with the UNCRC (J. Sloth- Nielsen, 1995).

The UNCRC is the outcome of international commitments to safeguard human rights. It is the result of almost 65 years of struggle to combine child rights under the umbrella of one document. The UNCRC recognized family a fundamental group of society and aims to provide a happy environment for the growth of children and implies a duty on the family to afford the necessary protection and assistance to the children. The UNCRC applies to all children below 18 years. The UNCRC Committee requires that the member States should comprehensively review all national laws to guarantee its full compliance with the UNCRC.

Application of the Convention in the Domestic Legislation of Pakistan and India

Child sexual abuse is widespread in Pakistan and India. The status of the UNCRC in the domestic legal system of a State is an important question with regard to the implementation of the UNCRC. There are two systems which guide the relationship between international law and national law of a State. These are known as monism and dualism (Chukwuemeka, 2015).. In the case of monism, international law after ratification is embodied in the domestic law and becomes part of the municipal law while in the case of dualist system the incorporation of international treaties into the domestic law of a State is possible through legislation (Palmer, 2008). In some States ratification of treaties will automatically turn it (Hansungule, 2010).

The measures a Government takes to implement the principles of UNCRC includes children rights in the Constitution and list of laws on the subject which are passed in the last two years and the proposed legislation which is under preparation. It requires a discussion on the protection provided in the Constitution and the legislative framework to the children. The protection provided in the Constitution in relation to the four-key principle of the UNCRC is also important to discuss. Secondly to find out the inconsistencies in the definition of the child in the current law, the Constitution and the Convention.

Application of the Convention in the Domestic Legislation of Pakistan

Child sexual abuse is not only a serious problem in Pakistan but also increasing on daily basis. This problem is hardly addressed due to the fact

that this topic is a social and cultural taboo in Pakistan (Malik, 2010). According to the report published by SAHIL, the total number of sexual abuse reports in 2018 was 3832. This means almost an average of ten cases per day (Cruel Numbers, 2018). Pakistan has ratified the Convention on the Rights of Child on November 12, 1990.

The UNCRC entered in force in Pakistan on December 12, 1990 (Moosa, 2011). By ratifying the UNCRC, Pakistan has committed itself to promote the children rights. An international treaty cannot be implemented in Pakistan unless the legislation passes a law with reference to the provisions of such treaty and make it enforceable within its jurisdiction. In Pakistan, the ratification of a treaty is an executive act and legislation is needed to meet the standard of the treaties and conventions ratified by the State. The Supreme Court established the principle that international agreement after ratification can only be enforced as a law, after its enactment through legislation. An international treaty cannot be implemented in Pakistan unless the legislation passes a law with reference to the provisions of such treat and make it enforceable within its jurisdiction (Shehla Zia vs. WAPDA, 1994).

Article 97 of the Constitution (Constitution of Pakistan, 1973) defines functions of Government relating to external relations which includes foreign policy and all those acts which are ancillary thereto, including the provision of legislative cover, if so needed for the implementation of international obligations within Pakistan. Legislation is necessary to implement treaties, pacts, agreements, extradition etc. In case of application of bilateral treaties or multilateral treaties to which Pakistan is a signatory, the legislature is empowered and responsible to enact the laws to give municipal legal affect to the treaty. The Karachi High Court discussed the question of application of international law into domestic law (Najib Zarab Ltd vs. Government of Pakistan, 1993). The Court established that every statute is to be construed and applied, as not to be inconsistent with the comity of nations or with the established rules of international law.

The protection of children from sexual abuse requires a discussion on the measures adopted by Pakistan to revise its legislation to enact laws including an adequate definition of child sexual abuse in accordance with the UNCRC. The periodical reports submitted by Pakistan and the concluding observations of the UNCRC Committee reflect the progress of Pakistan in implementing the provisions of the UNCRC within its State jurisdiction.

Constitutional Framework

The Constitution of a country is a very important legislative document

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and is supreme in the country. The UNCRC Committee emphasized its concern about the provisions in the Constitution of a State Party, whether it has granted full protection to the citizens including children or not in the form of fundamental rights? The four key principles of the UNCRC also need to be incorporated in the Constitution for their full implementation. It also becomes easy for a State Party to amend its laws in line with the provisions of the UNCRC, if these principles are incorporated in the Constitution.

The Constitution of Pakistan is the supreme law of Pakistan which governs both the federation and provinces. The Constitution guarantees fundamental rights to its citizens (Shabbar, 2014). It also provides fundamental rights to children and provides the basis for enabling legislation to ensure and protect the children rights. The Constitution of Pakistan provides a general framework for future legislative interventions in favour of children and women (Mehmood, 2010).

Article 8 of the Constitution provides that "any law which is inconsistent with the fundamental rights is void. The purpose of Article 8 is to invalidate all existing laws which are contrary to fundamental rights vested by the Constitution. According to this Article, any provision of law can be declared ultra vires if it violates any provisions of the Constitution which guarantees fundamental rights, independence of judiciary or its separation from the executive. The Supreme Court established that Fundamental Rights mentioned in the Constitution cannot be infringed, violated or destroyed by the Legislature or any other organ of the State. The Fundamental Rights are inalienable and inviolable, therefore, they are beyond the scope of amending powers of the Legislature to infringe, diminish or destroy in any manner (District Bar Association Rawalpindi vs. Federation of Pakistan, 2015).

Article 9 deals with security of person. It provides that it is obligatory on the State to safeguard all the Fundamental Rights mentioned in the Constitution including the right to life and liberty. The Constitution provides guidelines to the legislature to enact laws which are necessary to protect its citizens, particularly women and children (Watan Party and another vs. Federation of Pakistan, 2011). Therefore, a person whose life or liberty is threatened by any means may seek this right as the 'right of access to justice.' Right to life envisaged by Article 9 includes right to livelihood (Pir Imran Sajid and others vs. Managing Director Telephone Industries, 2015). The fundamental right, 'protection to life' is recognized in the entire civilized world. The Karachi High Court has established the principle that 'access to justice to all' is a well-recognized inalienable right incorporated in Article 9. And further stated that equality before the law is the prime and basic principle for the establishment of a civilized

society (Sharaf Farid v. Federation of Pakistan, 1989).

Article 25 provides for equality of justice or equality for citizens. This article contains three clauses. The first clause concerns equality. The second clause prohibits discrimination on the basis of sex. The philosophy behind this clause is that sex discrimination is widespread in Pakistan. The third clause concerns the derogation or the special provision relating to children and women. Clause (3) is a special provision for the protection of women and children. Clause (3) governs the rest of Article 25 and provides that nothing in this Article precludes the State from enacting laws protecting women and children.

The concept in Article 25 corresponds to Article 7 of the Universal Declaration of Human Rights, which states that all persons are equal before the law and have the right to equal protection of the law without discrimination (Renée, K., Cronin Furman, 2009).). Equal legal protection does not mean that all citizens are treated equally in all circumstances, but that a person with the same status is treated equally. Equality of persons does not mean that all laws/rules must apply to all subjects or that all subjects must have the same rights and obligations. No sex discrimination is allowed, but the state can enact laws to protect women and children (Abdul Khaliq vs. Federation of Pakistan, 2016).

Provisions of Article 25(3) of the Constitution provided that due to peculiar circumstances in which women and children of the Country are, the State should make special provisions to protect and uplift their status. State institutions should give special consideration to women and children while dealing with their issues. Article 25 (3) recognizes special right of protection for children due to their vulnerability. It also empowers the State to legislate laws to protect its women and children (Mehmood, 2014). Article 25 (3) recognizes special right of protection for children due to their vulnerability (Fazal Jan Vs Roshan Din, 1992).

Pakistan in its 5th periodical report (5th Periodical Report, 2015) submitted that 18th Amendment was introduced in the Constitution in 2010. By this Amendment a lot of legislative subjects has transferred to the Provinces and the legislation on the subject of child has devolved on Provinces. The power of legislation on criminal law, procedure and evidence still lies with the Federal Government by virtue of Article 142 of the Constitution. The UNCRC Committee in its concluding observations on the 5th periodical report (Concluding observations, 2016) commented that after the 18th Amendment to the Constitution, the Federal Government of Pakistan shall be responsible for the implementation of children rights provided by UNCRC throughout its territory.

The remarks of the Committee on the reports filed by Pakistan, reflects that it has a satisfactory view about the provision of the Constitution of

Pakistan. The Constitution of Pakistan has guaranteed its citizens including children freedom from discrimination, equality, social rights and economic rights. Although the 'best interests' principle is not incorporated in the Constitution but Article 25 (3) has a wider scope and imposes a duty on the Government to legislate laws for the protection of children and women. It is now on the Government to adopt active measures to legislate laws to protect children from sexual abuse.

Legislative Framework

This section will discuss the statutes that are applicable to protect children from sexual abuse.

i. Definition of Child

Until the passing of the Criminal Law (Second Amendment) Act 2016, Pakistan Penal Code (PPC) defines a child less than seven years of age. This Act describes the age of child as ten years instead of seven years by amending Section 82 of PPC and the upper age is extended from twelve to fourteen years by amending Section 83 PPC. The UNCRC Committee in its concluding observations on the 2nd periodical report (Concluding observations, 2003), 3rd & 4th periodical report (Concluding observations, 2009) recommended that Pakistan will ensure to legislate the definition of a child according to the international standards. The UNCRC Committee raised issues to the 5th periodic report (List of issues, 2015) about definition of child. Pakistan has submitted in the written reply that the Government of Pakistan has decided to amend Pakistan Penal Code by introducing Criminal Law (Amendment) Bill 2015, this Bill proposes to raise the minimum age of criminal responsibility by amending section 82 & 83 of PPC (Replies of Pakistan to issues, 2016) The Committee repeated its concern in the concluding observations on the 5th periodical report and required Pakistan to ensure to legislate the definition of child according to the provisions of the UNCRC.

There is no clear definition of child in the Pakistan Penal Code which will meet the requirements of the UNCRC standards. Such ambiguity in the definition of child introduces serious difficulties to legislate a comprehensive law to effectively combat child sexual abuse in Pakistan.

ii. Pakistan Penal Code

Before the passing of the Criminal Law (Second Amendment) Act, 2016, Pakistan Penal Code defines only a few offences relating to rape and unnatural offences. There is no provision in the Pakistan Penal Code which specifically defines child sexual abuse. Section 375 PPC defines rape. Section 376 PPC provides punishment for the

offence of rape. Sections 375 and 376 under the heading of rape and punishment for rape were included again in the Pakistan Penal Code by the passing of the Protection of Women Act. Prior to the passing of the Protection of Women Act, rape was tried under the Offence of Zina Ordinance. Section 377 PPC defines unnatural offence.

iii. The Criminal Law (Second Amendment) Act

The Government of Pakistan enacted the Criminal Law (Second Amendment) Act in 2016. This Act introduced some new Sections in the Pakistan Penal Code such as Section 292-A which relates to the Exposure to Seduction, Section 292-B defines Child Pornography, Section 292-C provides punishment for child pornography, Section 328-Arelates to Cruelty to a Child, Section 369-A relates to trafficking of human beings, Section: 377-A which defines Sexual Abuse, Section 377- B defines punishment for sexual abuse.

Pakistan has stated in the 5th periodical report that child sexual abuse and exploitation is a serious crime in Pakistan. It is also accepted in this report that the penal laws need reforms to address child sexual abuse more effectively. The UNCRC Committee on the 5th periodical report raises some issues. The Government of Pakistan in its reply stated that the Criminal Law (Amendment Act) Bill, 2016 is introduced in the Parliament. The Committee in the concluding observations on the 5th periodic report directed Pakistan to take as a matter of highest priority to enact laws that will clearly define and prosecute child sexual abuse and exploitation.

iv. The Criminal Law Amendment Act

After the Zainab's case in Pakistan (Zainab's murder, 2018), the Criminal Law Amendment Act, 2018 was passed to enhance the punishment for child pornography and sexual abuse. The punishment for child pornography is enhanced from a minimum two years to seven years and a maximum from seven to twenty years by amending Section 392-C. the punishment for sexual abuse is also enhanced from fourteen to twenty years by amending Section 377-B.

These amendments are not adequate enough to address child sexual abuse. Pakistan has failed to legislate comprehensive laws to tackle the problem of child sexual abuse. Due to the lack of comprehensive laws, the Courts always feel difficult to punish the offenders. The low conviction rate is evident of this fact. Pakistan needs a uniform statute to combat child sexual abuse.

The UNCRC Committee showed its serious concern about the large numbers of children becoming victims of sexual abuse, exploitation, rape and abduction. The Committee closely observed the lack of effective measures adopted by the government to combat child sexual

abuse and exploitation, prosecute perpetrators and provide justice to the victims, who are often stigmatized by the society. The Committee urged that Pakistan should take effective measures to enact appropriate laws that will clearly define and combat child sexual abuse and exploitation, should take speedy steps to create a child-friendly mandatory reporting system of child sexual abuse cases.

Pakistan has submitted five reports to the Committee since 1993 and the UNCOR Committee has showed its serious concern about the lack of legislation on child sexual abuse. The Pakistan Penal Code is the only penal code applied in Pakistan. The Code contains general substantive law of crimes. This Code is not sufficient to criminalize all offence relating to child sexual abuse. This fact is evident from the observations UNCRC Committee on the reports submitted by Pakistan.

Revisions need to be made to the existing legal framework to ensure that it is consistent with international standards, and provides sufficient protection for child victims. As an urgent priority, there is a need to establish a child-friendly legal process in which such children are provided with proper legal counseling.

Gaps in the Legislation to Protect Children from Sexual Abuse

The need for a law reform on child sexual abuse was first time brought to the attention of the judiciary in Pakistan in the case of State vs. Abdul Malik (State vs. Abdul Malik, 2000), the Court observed that the laws in Pakistan are not adequate enough to deal with child sexual abuse. No law in Pakistan defines child sexual abuse or child molestation. The Pakistan Penal Code is inadequate to punish the offenders. Pakistan needs a comprehensive law that will address child sexual abuse more adequately and comprehensively.

In the light of the guidelines provided in the Lahore High Court Judgment on sexual abuse of children in the above-mentioned case. The Law and Justice Commission of Pakistan drafted its Report (Report No.42, 2000), which states that a perusal of criminal statutes reveals that there is no specific law on sexual abuse of children to meet various situations and acts of molestation. The Commission reviewed the penal laws and recommended amendments in the Pakistan Penal Code but unfortunately no amendment was introduced in the penal Code. Some amendments (Criminal Law Amendment Acts, 2016 & 2018) were introduced in Pakistan Penal Code (PPC, 1860) but were not adequate enough to address child sexual abuse effectively and comprehensively.

Pakistan has failed to enact comprehensive laws to tackle the problem of child sexual abuse. Due to the lack of comprehensive laws, the Courts

always feel difficult to punish the offenders. The low conviction rate is evidence of this fact. The progress of Pakistan to comply with the formal requirements of UNCRC is slow and in respect to legislation relating to protection of children from sexual abuse is even slower.

The concluding observations of the UNCRC Committee on the periodic reports show the lack of commitment by the Government to legislate new laws and to amend the laws presently prevailing in country within the purview of the UNCRC. The legislation in Pakistan relating to children is shattered with several Government ministries, and also, by devolution of legislative subjects to provinces after the 18th Amendment in the Constitution. The existing legislation is incompatible with the Constitution and standards of the UNCRC. There is a need to codify the substantive law relating to sexual crimes against children under the umbrella of one Act and to develop effective legal provisions for the reporting, investigation and prosecution of such abuses.

Application of the Convention in the Domestic Legislation of India

Child Sexual Abuse rate has been broadly increasing from year to year in India (Srivastava, Bhat, Patkar, 2017)and the convictions rate become very low and the courts have been awarding very unite punishments by using vide discretionary powers (Jyoti & Singh, 2015). India has ratified the UNCRC in December 11, 1992 (Singh, 2009). There are over 300 million children in India. They constitute about 35 percent of India's total population. The issues relating to childcare, child welfare and child development have always been engaging attention of the Government of India (Sadual, 2015). The first obligation incurs on a State Party after singing the Convention is to refrain from acts which are against the objects of the Convention and to review its domestic laws in line with the UNCRC.

An international treaty requires parliamentary legislation for its application in India (Jolly George vs. Bank of Cochin, 1980). Article 73 (1) (b) provides that the executive power of the Government may extend to the exercise of the rights and powers which the Government of India may exercise under a contract, an agreement or a treaty. However, the executive authority of the Indian Government to conclude international treaties does not mean that international law will be ipso facto applicable after ratification. In fact, the Indian constitution follows the "dualistic" doctrine of international law. That is why international treaties are not automatically part of national law. They must, where necessary, be integrated into the legal system through legislation adopted by Parliament. A treaty can be implemented by exercising executive power. Article 253 declares that where application of a treaty requires legislation,

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Parliament has the exclusive power to enact legislation (Constitution of India, 1950). This article gives Parliament the power to enact, in whole or in part, laws in India in order to implement a treaty, agreement or treaty with one or more countries. This Article also makes it clear that this power is available to Parliament (Constitution, 1950). If needed, Indian courts can view international treaties as outside help in drafting national legislation. (P.N. Krishanlal vs. Govt. of Kerala, 1995). The Supreme Court used the International Convention to draft national laws on sexual harassment of women in the workplace (Visakha vs. State of Rajasthan, 1997).

India has submitted initial report to the UNCRC Committee on March19, 1997 and the Committee delivered its concluding observations on February 23, 2000, 2nd periodic report to the Committee was submitted on December 10, 2001 and the Committee delivered its concluding observations on February 26 2004, 3rd & 4th combined periodic report to the Committee was submitted in 2011 and the Committee delivered its concluding observations on July 7, 2014.

Constitutional Framework

The Constitution of India was promulgated in 1950, encompasses most rights included in the UN Convention on the Rights of the Child as Fundamental Rights and Directive Principles of State Policy. It presents an impressive list of rights for children, some of which are not available even to adults. Some of these Fundamental Rights are:

Article 14 concerns equality before the law and equal protection of the law, accessible to all, including children.

Article 15 (3) allows the State to provide for specific legal provisions for children. Nothing in this article should discourage the state from providing for special provisions for women and children. Therefore, even if the state does not discriminate against anyone, it can only provide for special provisions protecting the interests of women and children.

Article 21 guarantees the fundamental right to life and freedom for everyone. This Article added that no one should be denied life or personal freedom, except in the context of the procedure established by law. The Supreme Court observed that right to life is guaranteed by Article 21. The content of the right to life should not be determined on the basis of the existence of an imminent disadvantage (Unnikrishnan, J.P and other vs. State of Andhra Pradesh, 1993).

Article 21-A mandates free and compulsory education for every child from the age of six to fourteen years.

Article 23 states that human trafficking and forced labour are prohibited. The Indian Penal Code and the Code of Criminal Procedure contain

separate provisions prohibiting the movement of persons. The purchase of a girl under the age of 18 for the purposes of prostitution or for unlawful or immoral purposes is a violation of law. Through centralized operation of law throughout the country, the brothels have been abolished, running a brothel has become an offence. This Article 23 also puts total ban on forced labour.

Article 24- prohibits employment of children below the age of 14 years.

The UNCRC Committee in its concluding observations on the initial report (Concluding observations, 2000) stated that the committee is encouraged by the existence of a broad range of constitutional and legislative provisions. In the Concluding observations to the combined 3rd and 4th periodic report (Concluding observation, 2014), the Committee appreciated the better understanding of the situation of children's rights in India.

Legislative Framework

i. Definition of Child

The Indian Penal Code (IPC) defines a seven-year-old person as a child. The age of criminal responsibility is increased to 12 years if it is established that the child is unable to understand the nature and consequences of his actions (Indian Penal Code, 1860). The Protection of Children from Sexual Offences Act (POCSO) defines a child, below the age of eighteen years.

The UNCRC Committee in its concluding observations on the initial report, 2nd periodic report (Concluding observations, 2004) recommends that India will review its legislation with a view to ensuring that age limits conform to the principles and provisions of the Convention. The UNCRC Committee required the Indian Government to provide detailed information on the definition

ii. The Indian Penal Code

Until 2012, only sexual offenses against children were covered in three articles of the Indian Penal Code that are not child specific. Article 376 defines rape and Article 354 concerns the scandalous modesty of a woman, while Article 377 deals with unnatural acts.

iii. The Protection of Children from Sexual Offences (POCSO)

The Protection of Children from Sexual Offences Act was enacted to effectively combat the sexual abuse and exploitation of children. This law was announced on June 20, 2012 in the Gazette of India. This law criminalizes sexual violence, sexual harassment and pornography involving a child under the age of 18 and mandates the setting up of Special Courts to expedite trials of these offences.

iv. The Criminal Law Amendment Act

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After the protest in Kathua case (Asifa Bano, 2018), the Government of India has introduced Criminal Law (Amendment) Act, 2018, amending Indian Penal Code (IPC), Protection of Child from Sexual Offences Act 2012 (POCSO), Code of Criminal Procedure 1973 (CrPC) and Evidence Act 1872, committing the crime of rape of a minor punishable by death. The important changes the Act introduced are as follows:

Amendments Introduced in the Criminal Laws in India

a. Amendments in Indian Penal Code

- In Section 376 the minimum amount of the rape penalty was ten years. The life imprisonment remains the maximum penalty.
- If a person rapes a woman under the age of 16, it is possible to impose a minimum sentence of 20 years due to the addition of a new subsection (3) to Section 376.
- A new Section 376AB has been added, providing for a minimum of twenty years imprisonment for a person raping a girl under the age of twelve. The maximum penalty is extended to the death penalty.
- Section 376-DA and 376-DB provide for life imprisonment for persons sexually assaulted by groups under the age of 16 and under 12 years.
- The death penalty may also be imposed on persons involved in gang rape of a girl under 12 years of age.
- In Section 376 (2) (a), the words "within the police station where this police officer was appointed" were deleted. This omission implies that a police officer must be punished with a strict tenure of at least ten years if he commits a rape.

b. Amendment to Protection of Children from Sexual Offences Act POCSO

Section 42 of the POCSO Act has been also amended to add newly inserted IPC provisions i.e. Section 376AB, Section 376DA, and Section 376DB.

At first glance, these provisions seem to be good for many people, because this is the government's right answer to the question. However, this bill is nothing more than the government's patellar reflexive action to reduce the growing public anger about the growing cases of child abuse. The death penalty and more severe penalties are used to control the feelings of the public (Prashant, 2018).

The study of the Initial report, 2nd periodic report and 3rd & 4th

combined periodical report, made it clear that no legislation was enacted specifically to tackle the problem of child sexual abuse. The UNCRC Committee in its concluding observations on the initial report (Concluding observations, 2000) recommends that India shall ensure that legislation criminalizes the sexual exploitation of children.

The UNCRC Committee required detailed information on measures taken to ensure legislation on child victims and witnesses of crimes, including sexual abuse. India has enacted Protection of Children from Sexual Offences Act, 2012 which provides for extensive child friendly procedures for the child victims and witnesses. In addition, the recently enacted Criminal Law Amendment Act, 2013 has also made amendments in several sections of the Code of Criminal Procedure, 1973, to provide for protection to victims including children.

POCSO can become effective only if a police complaint is lodged reporting a child sex abuse instance. A child who has been a victim of a sexual assault has probably underwent the most traumatizing experience of his life which is likely to damage the mental health of the child irreparably. Under such circumstances, not only the victim but also the family of the victim is in the imperative need of psychological treatment as well as support on societal issues.

Also a successful implementation of the POCSO requires the State Governments to furnish explicit codes and principles that need to be strictly adhered to by the medical and healthcare professionals and the other officials involved in the child sex abuse cases, before the trial, during the trial and also after the trial. But no such concerted efforts have been taken so far.

A Comparative Analysis between Pakistan and India

The fulfillment to the obligations imposed by the UNCRC is the evidence of a country's progress in enacting its national legislation in line with the provisions of the UNCRC. A country will learn from the experiences of other country. A comparison between Pakistan and India regarding the application of the principles of UNCRC which relates to the protection of children from sexual abuse will be beneficial for Pakistan. Comparative international jurisprudence is an important factor to adopt a more structured approach relating to a comprehensive public interest (D.G. Khan Cement Company Ltd. vs. Federation of Pakistan, 2013).

The Constitution of Pakistan specifically empowers the Government to enact laws to protect children and women. The Pakistan Penal Code is not adequately dealing with the sexual crimes against children. The provisions in PPC only deal with a few offences. The Criminal Law

(Second Amendment) Act, introduced only some amendments in the Pakistan Penal Code. These amendments are not adequate enough to deal with the problem of child sexual abuse. Pakistan needs a comprehensive uniform Statute.

The reports submitted to the UNCRC Committee by Pakistan and India are evident of the fact that both countries have faced same kind of challenges in enacting laws to tackle the problem of child sexual abuse. India was facing the same problems to review its domestic legislation relating to the protection of children from sexual abuse according to the provisions of the UNCRC in the same way, Pakistan is facing today. There was a considerable increase in child sexual abuse cases, but the reporting of child sexual abuse cases is very low. Majority of the cases were rape sodomy and incest. This rapid increase in the child sexual abuse cases motivated the Indian Government to enact new laws for effective sentencing of the perpetrators. There was also no definition of child sexual abuse in the Indian Penal Code. Indian Penal Code covers only some offences dealing with rape and unnatural offence. This Act was ineffective for the protection of children. The legislation addressing sexual abuse of children was inadequate and was not in line with the guidelines provided by the UNCRC. The Indian Law Reform Commission, the legislature and judiciary, has made their efforts to review the national legislation and revised the domestic laws to bring these laws in line with the principles of UNCRC. India has succeeded in enacting a separate comprehensive Statute in the form of POCSO in 2012.

Pakistan can learn lessons from the legislative developments addressing child sexual abuse in India. As mentioned before, a wide range of sexual offences against children are not defined in the penal laws of Pakistan which are addressed in the India's legislation. There is, therefore, a need in Pakistan to reform and improve current legislation in order to address problem of child sexual abuse. Pakistan needs to enact a comprehensive law to consolidate all issues relating to child sexual abuse into one enactment, criminalize all forms of sexual abuse, and replace outdated laws with new reforms. Regardless of gender, legislation needs to be revised to protect complainants and their families from victimization, to establish a co-operative relationship between different stack holders and between all relevant government agencies with the objective of accountability. The envisaged Act will mandate legislative reforms and will result in more effective, responsive and speedy criminal justice system in combating child sexual abuse.

Conclusion

Child sexual abuse and exploitation is not limited to rape, incest, and

prostitution but it is also non- contact sexual abuse like voyeurism, exhibitionism and pornography. We cannot discuss child sexual abuse in a vacuum without considering the structures of society, viz. social, political, economic and cultural. These structures in the society also determine the nature of services available for the victims of abuse and exploitation.

The Indian constitution provides the basic framework for the application of India's international obligations under its national legal system. As a result, the Indian government has exclusive authority to conclude and apply international treaties or agreements. The Indian president holds the executive power of the Indian government and is, therefore, authorized to conclude and ratify international treaties. This does not mean that international law, after being ratified, is ipso facto applicable. In fact, the Indian constitution follows the dualistic theory of incorporating international law into national law. International treaties are not automatically part of national law in India. They must be incorporated into the legal system through a legislative act, which provides that the legislator has the power to legislate to comply with India's obligations under the international treaty.

A thorough examination of various decisions of Pakistani courts clearly shows that each rule of customary international law has two elements: (a) the general practice of states and (b) the recognition by states of this general practice as applied law in Pakistan. Provided they do not violate any provision of the national laws or principles of Islamic law. It is, therefore, clear that in cases of conflict with international law, Pakistan requires national legislation, the latter being the determining factor. It is difficult to violate national law, which reflects the law of the sovereign state. The judiciary which is the most important organs of sovereign states and not international law must enforce national laws when conflicts arise between international law. Pakistan must be a member of the international community. In the absence of apparent conflicts, the interpretation of domestic law to prevent a confrontation with the international nation may be one of the established principles of international law.

The laws focusing on the protection of children from sexual abuse are relatively weak in Pakistan. Large number of cases goes unreported and many unregistered by the police. Indeed because of social stigma and shame attached to the victim, actual picture is not focused before the public. Effective witness protection laws should be enacted in order to ensure that witnesses are able to give depositions without fear at the time of trial.

There is a need to strengthen these laws according to the guidelines provided by the UNCRC. Pakistan's progress is very slow to review its

national laws with reference to the standards of the UNCRC. India has succeeded to legislate its national laws according to the principles of the UNCRC. The Protection of Children from Sexual Offences Act is a great achievement. This is result of a long reforms process. Pakistan can learn from the legislative developments addressing child sexual abuse in the criminal justice system of India. Pakistan needs to strengthen its laws according to the guidelines provided by the UNCRC to combat child sexual abuse. Children's rights can only be safeguarded by an aware society committed to safeguard their rights by implementing sound laws in accordance with the principles of UNCRC.

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A tale of two states in the Indian Ocean: Sustainable development the basis of Indian diplomacy in Maldives

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Abstract
Maldives is among the states obtaining maximum assistance from other nations for its sustainable development. Lately, United States announced $7 million funding for maritime security to Maldives, Saudi Arab sponsored the construction of the biggest mosque in Maldives, while China financed the development of an airport. Sustainable development initiatives by big powers in Maldives are a reciprocal narrative to Maldives strategically location in the Indian Ocean in concern to trade, security and Maritime power. India is amongst the first nations in the list of support and development initiators in Maldives. While, sustainable growth has been the basis of relation between India and Maldives since ages, it is high time to explore other aspects such as security and co-existence. The article tries to study the diplomatic relation between India and Maldives in reference to sustainable development in Maldives. It briefs the interest and influence of China in Maldives in the name of sustainable development. The article tries to draft some recommendations to be considered by India in regard to create a good base in the Maldives and India Ocean Ring in future.

Key words: - Sustainable growth, diplomacy, Indian Ocean, Maritime power, security.

Introduction

The Indian Ocean is bliss to various nations such as India, Sri Lanka, Bangladesh and Maldives. Water bodies have always been the source of

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development, tourism, survival and transportation for civilizations. Indian Ocean has served the same to the adjoining nations. But, subsequent changes in the climate leading to environmental disturbances have slowly and steadily dazed the existence of the human race in the seashore areas. For instance, the archipelagic state of Maldives is sunken in the predicted threat of being submerged in the coming decades due to the enduring upsurge in the sea level. The rising sea level has questioned the sustainability of human life in Maldives. It is regularly struck by natural calamities/emergencies such as scarcity of drinking water, cyclone, and seismic sea waves which further leads to turbulences in daily living and healthy growth of human race in Maldives. Such fallouts bind the nation to incline towards foreign support for the fulfillment of basic needs and relative sustainability.

Besides such dependencies Maldives has always been the centre of discussion among the big players in the international market. Maldives strategically position in the Indian Ocean compliments it heavenly locations which is advantageous to big players for trade and maritime security. Nations wants to associate with Maldives to enhance their Maritime power. Maldives is the right blog for a security base in the Indian Ocean Ring as well as for exploration and exploitation of sea. The assistance to Maldives by nations and the benefit of friendship with such strategically located nation in India Ocean balances the relationships.

Maldives and World- A Brief

Maldives has land area of just 300 sq. km. with the population of 480,000. It is the smallest nation in the Asian region. It is 960-km-long submarine ridge running north to south. It is the most geographically dispersed country. It also forms a wall in the middle of the Indian Ocean (Abhay Kumar Singh, 2018). It is reviewed as most peaceful and adventurous holidays spot especially for sea lovers. It is surmounted by remarkable serene beauty and clear water. It is the best destination for the nature lovers sprouting out of their tiring calendars. It is admired for its picturesque private islands with water villas sitting atop stilts (Sanjay Kapoor, 2018). It attracts tourist from all over the globe. Latest statistic updated by Maldives states that 1,389,542 tourists visited Maldives in 2017 from all over the world. China is listed as nation with maximum tourists visiting to Maldives in last few years. More than 3 lakh Chinese visit Maldives per year (Statistical Yearbook of Maldives, 2018). Tourism is a good source of Income for the Maldivians.

Nations like China, Saudi Arabia and United States have supported the Maldivian economy through encouraging their citizens to visit Maldives. Besides promoting tourism these nations have made praiseworthy

initiatives for the development of the Maldivians and the Maldives economy too (Alaina B. Teplitz Roadha Veellun, 2019) (Bruce Riedel, 2018). India is nowhere behind in the list. India is mostly listed among the first nations extending support to Maldives in emergencies. For instance, India supported Maldives in 1988 to fight against a coup attempt by Sri Lankan militant organization, People's Liberation Organization of Tamil Eelam (PLOTE) (M Samatha, 2015).

Apart from its tourism and development related news, it has always been in discussion among nations due to its maritime/strategical location. Nations like India, China, and Saudi Arab have immensely invested in Maldives for its preference. In contemporary context Maldives can be well spotted in the foreign policy of China and India. Alliance with Maldives is helping the nations to portray their enhanced maritime power in Indian Ocean. Lately China has clicked sound deals with Maldives like Maritime silk Route Initiative agreement. Maldives has also supported the establishment of Joint Ocean Observation Station by China in Maldives. This initiative would surface the establishment of an observatory by China at Makunudhoo, the westernmost atoll of the Maldives in the north. (Sachin Parashar, 2019) (Wang Fukang, 2015). Recently, Maldives has affirmed its support to India for its non- permanent member post in Security Council in 2021 (Ministry of Government Affairs, 2018). Therefore, it can be noted that investments in Maldives by nations end up to magnificent favors by Maldives to those nations.

Sustainable development-the basis of Indian diplomacy in Maldives since ages

India and Maldives the close neighbors in the Indian Ocean ring share folkloric, linguistic, religious and commercial links. The intact, jovial and multi-dimensional association among them is in pace since the recognition of Maldives as an independent nation. India was amongst the first nations who recognized Maldives as an independent entity in 1965 (Ministry of External Affairs, 2014). India is in diplomatic ties with Maldives since its independence. It has successfully preserved and strengthened the historical links and neighbourhood affiliation with Maldives by providing regular support and assistance for its sustainably besides numerous emergencies. Indian initiatives to uphold the sustainable growth of Maldives has served as the basis of mutual understanding between the neighbours. On the other hand, Maldives has served as a net security provider for India in the Indian Ocean (to counter ocean related crimes).

India can be configured among the top nations in list of good friends of Maldives. India has always rendered immense support to Maldives in past

and is still propelling numerous projects of sustainable development and peace. The good neighbour cum well-wisher image of India can be determined through a brief study of the developmental work done by India in Maldives for the welfare and sustainable growth of the Maldivians. It has always tried to provide the fastest relief services in emergencies to Maldives and Maldivians. For example: in the case of devastating natural calamity- tsunami (Ministry of External Affairs, 2014). U.S. Senate Majority Leader Bill First stated that New Delhi's role in the relief operation in Maldives and Sri Lanka was noticed internationally (Anjana Pasricha, 2009).

Maldivian Foreign Minister, Mr. Abdulla Shahid in his visit to India in April 2019 had stated;

> We have always seen India as the first respondent. And that is something that the people of the Maldives really appreciate. On November 3, 1988, when mercenaries attacked the Maldives, India was the first to respond. In 2004, when the tsunami hit us, Indian naval ships were dispatched to assist us. During the last government's term, we had the Malé water crisis. Within four hours we had Indian Navy and Air Force vessels deliver water. (Manoj Kumar, 2019)

Following the readily available neighbourhood image and neighbourhood first policy, Shri Narendra Modi, the present Prime Minister of India prioritized his visit to Maldives in the second week of June 2019, immediately after assuming his office for the second term (Shubhajit Roy, 2019). This bilateral visit was diplomatically important. It was the first bilateral visit by an Indian Prime Minister to Maldives since 2011 (Shubhajit Roy, 2019). The last government of President Abdulla Yameen in Maldives from 2013-2018 was disappointing and souring for India. Though, his reign was prominently appraised and enjoyed by the Chinese government, who drew enormous benefits out of it (Sanjay Kapoor, 2018). On the other hand, Prime Minister Modi had dropped his visit to Maldives from his four-nation Indian Ocean tour in March 2015. The internal political crisis and instability in Maldives were not-welcomed by India. Indian foreign policy opted the foundational approach of 'Panchsheel' i.e. non-interference in domestic/internal issues of any nation and maintained distance from the internal politics of Maldives (N. Manoharan, 2017). Though Prime minister bilateral meetings were in absentia in Modi's last tenure, the high-level ministerial exchange visits were still going one for the sustainability of diplomatic relations. Such as Sushma Swaraj-the External Affairs minister visit to Maldives from 17-18 March 2019, at the invitation of H.E. Mr. Abdulla Shahid, the Foreign Minister of Maldives (Embassy of India, 2019).

Further, President Ibrahim Mohamed Solih win in elections (praised by

India) and his visit to India as his first foreign visit after assuming the office of President of the Republic of Maldives on 17 November 2018, broke the momentum (Ministry of Government Affairs, 2018). His first foreign visit to India was the token to "Neighbourhood-First Policy". It was further credited by Prime Minister Modi's reciprocal visit to Maldives in June 2019 (N. Sathiya Moorthy, 2019). This was the first abroad visit of Indian Prime Minister Modi too in his second term.

Maldives was quoted as "a valued partner in the Indian Ocean neighbourhood" by Prime Minister Modi. He had previously stated Maldives as a "partner" for strategic, security, economic and developmental goals (N. Manoharan, 2017).

India and Maldives have exchanged acceptance on various sustainable development parameters in past such as trade, maritime issues, airspace, and peace in past. Some of the bilateral agreements signed are: Exchange of Letters on Extending the Memorandum of Understanding on Manpower Requirements of the Indira Gandhi Memorial Hospital in 2014, Memorandum of Understanding on Cooperation in the field of Health in 2014, Agreement on the Transfer of Sentenced Persons in 2011, Memorandum of Understating on Combating International Terrorism, Illicit Drug Trafficking and Enhancing Bilateral Cooperation in Capacity Building, Disaster Management and Costal Security in 2011, Memorandum of Understating on Renovation of Indira Gandhi Memorial Hospital in 2011, Programme of Cooperation for the years 2012-2015 in 2011, Agreement on the Standby Credit Facility in 2011, Agreement on the Transfer of Sentenced Persons in 2011, Agreement on co-operation in the field of Science and Technology in 2008, MOU on Cooperation in Information Technology in 2003, Agreement for Recognition of Certificates Under the Terms of the International Convention on Standards of Training, Certification and Watch keeping for Seafarers 1978, as amended in 1995 in 2003, Tripartite Agreement between the Republic of Maldives; Ministry of External Affairs, Government of India; and Educational Consultants India Limited (EDCIL), New Delhi in 2000, Bilateral Agreement on Mutual Administrative Assistance for the Proper Application of Customs' Laws and for the Prevention, Investigation and Combating Customs Offences in 1999, MOU Concerning Manpower Requirements of IGMH in 1991, Agreement on Economic and Technical Co-operation in 1986, Cultural Co-operation Agreement in 1983, Trade Agreement in 1981, Air Services Agreement in 1979, Visa Understanding in 1979, Agreement on Maritime Boundary in the Arabian Sea and Related Matters in 1976.

One of the prominent bilateral agreement between India and Maldives is the bilateral agreement of 1981 wherein both the nations decorated each

other with "the most favoured nation" status. The agreement propounded India's favour to Maldives in terms of development. It also permitted import of certain commodities by Maldives provided by India which may be restricted or prohibited in India (Embassy of the Republic of Maldives, 2019).

Contemporary Sustainable Development initiatives by India in Maldives

Association between India and Maldives was struck under the leadership of last President of Maldives President Yameen after decades. Maldives fell victim to China's "debt trap diplomacy" similar to Pakistan, Sri Lanka and Myanmar. Maldives inclined towards China for extensive economic support. Further, the new Maldivian President, Ibrahim Mohamed Solih re-installed the friendly ties of Maldives with India and stated:

> The mistake [former] President Yameen made was to play India against China and China against India. That is a childish way of dealing with international relations; it will blow up in your own face. And that is what happened. No one trusted him. (Manoj Kumar, 2019)

Finally, the new government of Maldives forwarded and re-established serene ties and mutual co- existence with India in December 2018. Similarly, India welcomed Maldives. Further, the upcoming section deliberates the Sustainable Development initiatives of India in and for Maldives.

Humanitarian aid/relief support

India one of the big stakeholder in Maldives development which focuses on establishment of sustainable growth support system in Maldives. It has established institutions such as Indira Gandhi Memorial Hospital (IGMH), Faculty of Engineering Technology (FET) and Faculty of Hospitality & Tourism Studies (IMFFHTS). India is always among the first nations to provide emergency aid to Maldives. Such as in the case of tsunami strike on December 26, 2004 India was the first nation to provide aids to the sufferers and state. It also provided support aid of Rs.10 crores to Maldives. During the surges in May 2007 India gave US Dollars equivalent of Rs.100 million to Maldives (Embassy of India, 2019).

Completed and ongoing development assistance projects are Indira Gandhi Memorial Hospital, Major renovation of IGMH funded by Government of India in June 2017, Faculty of Engineering Technology (now called the Maldives Polytechnic), India-Maldives Faculty of Hospitality & Tourism Studies Technology Adoption Programme in

Education Sector in Maldives, Composite Training Centre for MNDF, Coastal Radar system, Construction of National Police Academy (ISLES), Construction of new Ministry of Defence Headquarters (Embassy of India, 2019).

Economic and Commercial agreements

As the output of the Trade agreement in 1981 in consideration to export of essential commodities today stands at Rs.700 crores. The commodities for trade are: agriculture and poultry produce, sugar, fruits, vegetables, spices, rice, wheat flour (Atta), textiles, drugs and medicines, various engineering and industrial products, sand and aggregate, cement for building etc. India primarily imports scrap metals. India also provides essential food to Maldives in respects to its favourable terms as a support like rice, wheat flour, sugar, dal, onion, potato and eggs and construction material such as sand and stone aggregates (Embassy of India, 2019).

Indian Business in Maldives

State Bank of India (SBI) is serving the developments in Maldives by providing loan assistance to the desiring applicants since February 1974. SBI supported the growth and development of island resorts, export of marine products and business enterprises too. Indian Private Players such Taj Group of India is providing outstanding services at its resorts, to attract tourists in Maldives. Taj runs two resorts in Maldives, namely Taj Exotica Resort & Spa and Vivanta Coral Reef Resort. Tata Housing is also serving in Maldives (Embassy of India, 2019).

People-to-People contacts

Indian airlines such as Air India, Spice Jet operate daily flights to Malé from Thiruvananthapuram, Bangalore, and Chennai, Cochin. Island Aviation Service (Maldivian Aero) is operating daily flights to Thiruvananthapuram and Chennai (thrice a week). Indians visiting Maldives yearly for tourism (from 52,000 to 83,000 in last three years) and business has grew. India is a preferred for education, medical treatment, recreation and business by Maldivians too. Maldives long term visa application for India has shown a sharp increase over the last two years (Embassy of India, 2019).

Cultural relations

Exchange of cultural troupes is often in case of both the nations as Hindi commercial films, TV serials and music are immensely popular in Maldives. The India Cultural Center (ICC) conducting courses in yoga, classical music and dance is immensely popular among Maldivians of all ages (Embassy of India, 2019).

Indian Community

Indians the second largest expatriate community in the Maldives with approximate strength of around 22,000 comprise of workers as well as professionals like doctors, teachers, accountants, managers, engineers, nurses and technicians etc. (Embassy of India, 2019).

Under the leadership of President Ibrahim Mohamed Solih, following agreements/MoUs/Joint Declaration of Intent were signed by India and Maldives in December 2018.

- Agreement on the Facilitation of Visa Arrangements;
- Memorandum of Understanding on Cultural Cooperation;
- Memorandum of Understanding for Establishing Mutual Cooperation to Improve the Ecosystem for Agribusiness;
- Joint Declaration of Intent on Cooperation in the field of Information & Communications.

Technology and Electronics

The discussion was held in consideration to mutual co-operation in other fields too. Such as Health cooperation issues particularly cancer treatment training and capacity building in diverse fields including judicial, policing and law-enforcement, audit and financial management, local governance, community development, IT, e-governance, sports, media, youth and women empowerment, leadership, innovation & entrepreneurship, art & culture, oil and gas, and renewable energy. Economic support of financial assistance up to US$ 1.4 billion in the form of budgetary support, currency swap and concessional lines of credit was also announced by Prime Minister Modi (Ministry of Government Affairs, 2018). India is grounded with sustainable developmental programmes for Maldives for the welfare of Maldivians as a true neighbour.

Bilateral Meeting in June 2019

Prime Minister Modi was decorated with "Most Honourable Order of the Distinguished Rule of Nishan Izzuddeen," the highest State honour of Maldives for a foreigner in the June 2019 visit. He discussed about openness, integration and balance. He stated about the development of the infrastructure and conservation of the historic Friday Mosque in Addu. He also discussed about a ferry service inaugural between Kulhudhuffushi and Male in Maldives and Kochi in India to connect the citizens of both the nations. He announced the funding for the drainage system in Maldives. Modi and Solih together inaugurated radar surveillance system (an India-donated networked), for security of large seas of Maldives. Modi spoke about the enhancement of the facilities for Maldives National Defense Force (MNDF) and Rupay card initiative in

Maldives to attract Indian customers. Maritime security was deliberated upon to counter the on growing terrorism in South Asia. He talked about supporting Maldives for its self-sufficiency and independency rather than dependency (N. Sathiya Moorthy, 2019).

The agreements signed during this visit were: MoU for Cooperation in the Field of Hydrography between Indian Navy and Maldives National Defence Force, MoU on Cooperation in the field of Health between Government of India (GoI) and Government of Maldives (GoM), MoU for the Establishment of Passenger and Cargo Services by Sea between Ministry of Shipping, GoI and Ministry of Transport and Civil Aviation, GoM, MoU for Cooperation in Customs Capacity Building between the Central Board of Indirect Taxes and Customs of India and the Maldives Customs Service, MoU between National Centre for Good Governance, Department of Administrative Reforms and Public Grievances and Maldives Civil Service Commission on Training and Capacity Building Programme for Maldivian Civil Servants, Technical Agreement on Sharing White Shipping Information between the Indian Navy and the Maldives National Defence Force (Press Information Bureau 2019). Both the nations have also agreed not to allow their territory to be used against each other's interests.

China's Diplomacy-Sustainable growth Programmes in Maldives

Foreign policy or diplomacy is carved out after a keen study of the diplomatic moves and ties of the Nation A, with whom Nation B wants to make relation. Indian diplomacy for Maldives does not limit to Maldives. It can be better defined after a keen study of the diplomatic ties of various international players with Maldives. International relation does not stick to idealism or realism. It is an amalgamation of both. Hence, it is important to study the interest of other international players in Maldives too. Maldives has always been a centre of interest for big players such as United States, China, India, and Saudi Arab because of its strategically geographically location. These players regularly invest in Maldives like the United States signed a multi-million, the dollar development agreement with the Maldives and $7 million funding for maritime security and re-affirmed Fulbright Academic Exchange Program (Alaina B. Teplitz Roadha Veellun, 2019).

China and Maldives have marked the graph of bilateral relation in this decade. The growth in the ties between China and Maldives is remarkable. Such as Maldives new law authorizing developers to own islands on lease for a period of 99 years for development resulting in takeover of Feydhoo Finolhu's Island by China. It is an uninhabited island which is close to Male and its international airport. It is taken on a

development lease for 50 years for $4 million (Rajeshwari Pillai Rajagopalan, 2018).

The new projects like Maritime Silk route/String of Pearls are the major initiatives where China has plotted Maldives. Lately, Beijing has been vying for a maritime base in Indian Ocean. Wherein, Maldives is the prominent locus to implant its agendas. Beijing's ambitious "One Belt One Road" project was signed by Maldives in turn to commendable financial support by China in past few years.

Maldives strategic location will easily withhold the security of China's sea lanes. The sea lanes adjacent to Maldives will be secured lane for obtaining critically-needed energy supplies from Africa and West Asia through the Indian Ocean. As Maldives location is primarily acting as an important 'pearl' in China's "String of Pearls" in the Indian Ocean China pursued Maldives. Recently China has initiated development of infrastructure in the Ihavandhoo, Marao and Maarandhoo Islands. Maldives have become the part of in the China's Maritime Silk Route project in 2014. Construction of a bridge between the capital and the airport (called the China-Maldives friendship bridge) has also been initiated. Airport development, resort development are some other initiative of the Chinese Government in Maldives (N Manoharan 2017). Port development projects, massive investment spending and collaborative naval equipment transfers by China to string together a patronage network of multiple South Asian coastal nations under the string of Pearls is a strategy advancing China's grander military and commercial determinations under the pretext of economic advancement which may upturn the Indian influence over its orbit (Tuneer Mukherjee, 2018).

India has sorted its relation with Maldives on the account of true neighbourhood policy. It is high time to click on other measures too. Although, the priority should be given to sustainable development in Maldives as per the needs of environmental threat struck nation. Co-existence and development of India and Maldives together and other agendas of security in the world politics should also be discoursed. The sea levels are projected to upsurge in the range of 10 to 100 centimeters by the year 2100 in Maldives (Mohammed Waheed Hassan 2010). Although, India should consider the fact that the climate change is endangering the existence of Maldives with around 1900 islands. But, it should also consider India's security measures in context to China's increasing influence in the Indian Ocean. The plans of China in respect to sea routes and military base should be countered. Traditionally, Portugal, the Netherlands, Great Britain, the United States, and the Soviet Union who aspired control in the Indian Ocean had a base in Maldives first. The

Gan Island in the Seenu Atoll and the southernmost island of the Maldives had served as a base for the British Royal Navy during World War II. Although, the agreement between India and Maldives in 2009 surely counters such pressures. Still, the China's initiatives to create hold in waters of Maldives with smart politics of 'One route One Belt' and 'debt trap' since 2014 will surely effect future. Maldives association with China in Maritime Silk Route after its association with Pakistan, Sri Lanka, and Bangladesh in regard to Indian Ocean is a strategy to create a counterbalance to Indian influence in Asia and India Ocean Ring (Kondapalli, 2017). India has sorted its relation with Maldives on the account of true neighbourhood policy. It is high time to click on other measures too. Although, the priority should be given to sustainable development in Maldives as per the needs of environmental threat struck nation. Co-existence and development of India and Maldives togatherly and other agendas of security in the world politics should also be discoursed.

India needs to be humanitarian and diplomatic at the same time in the case of Maldives with respect to climate threat as well as China's influence in the region. Maldives trapped in the debt policy of China allowed China to lease many Islands of Maldives for 50 years. Therefore, it becomes feasible for China to intrude in Maldives waters easily. India initiated to provide financial support to Maldives to over- come the debt. Apart from monetary assistance India should continue or enhance the ties with Maldives in regard to its sustainable growth with a long-term objective i.e. investments to inbuilt self- sufficiency trait among the Maldivians, prosper independently in future and plan to tackle the climate challenge too. Some basic developmental plans should be promoted by India to engage the youth such as: Short term degrees centers can be opened by Indian institution or educational institution in Maldives with good prospects of job in their homeland and other countries too such as ITI, hospitality degrees. Startups in Maldives with tie up with Indian institutions and companies can be initiated. Marine museum, institution can be funded as an attraction to foreign students and nationals. Collaborated maritime research institutes with students of both the nations can be planned. It will surely result in inclination and support of Maldives towards Indian government as a good neighbour in future too.

Next, India should focus on peace sustainability in Indian Ocean. South Asia is prone to terrorist attacks and recruitment by ISIS. Islamic State of Iraq Syria announced dominance in J&K (India) and Pakistan as well, after the Easter attack in Sri-Lanka (PTI 2019). Approximately 200 Maldivian nationals out of a population of 400,000 travelled to Syria to join ISIS in the last four years (N. Sathiya Moorthy, 2019). The preacher

identified in the case of Easter Blast in Sri Lanka had preached in Maldives too (Arun Janardhanan and Nirupama Subramanian, 2019). As explored in 26/11 Mumbai attacks and Sri Lankan Easter attacks, the sea route and the lack of proper communication within nations respectively were prominent. Water has always been one of the safest modes for criminals to travel. Therefore, the focus should be on bilateral agreements like exchange of information agreement and extradition treaties such as in the case of Preachers and absconders. It is important for India to promote democracy in Maldives. It will surely counter the ongoing increase in ISIS ideology affiliation which wants to de-throw all governments and replace them with Islamic hegemony. Indian Ocean states sharing common waters and suffering with common water related crimes should be in a special multilateral treaty to counter such movements. More Security (military training, equipment) related agreements should be made for aerial and water security to counter terrorism and other crimes such as trafficking, drugs and narcotics supply through sea routes. India should discourse about Human trafficking issues in Maldives (at peak) and should provide regional support such as bilateral agreement and training and equipment (technological and military) support to Maldives to counter it. India should also plan out a security route with Maldives, Sri Lanka, and Bangladesh to secure and prevent sea routes, aerial, land crimes and terrorism. Cross-border slipping pockets are readily available to criminals because of the lenient policing, extradition treaties and regional laws in India Ocean Ring. They should be countered through strong bilateral and multilateral treaties.

Besides everything prevention is best, therefore the advancement of Maldives in consideration to lifestyle and livelihood should be targeted. It will help the youth to be aloof of the radical ideas. This will in turn help to reduce the cross-border terrorism too. We should plan to let the radical ideas demolish and the innovative ideas travel for the betterment of human race. Hence, exchange of culture, opportunities and education is important. It will also help in exchange of culture and services benefitting the positive image of India. Structural development often lessens crime and propels development. A person engaged in livelihood and lifestyle will rarely incline towards crime

Conclusion

It can be concluded that sustainable development in Maldives has been the prime face of Indian diplomacy since ages. Maldives has appreciated the concern and constant support of Indian too. Today the Indian diplomacy in terms of Maldives seems to be good but requires some modifications in terms of co-existence in the global arena of security

threats. The ongoing increase in the security threats in the Indian Ocean and China's influence needs to be advocated in favour of India by Maldives in future. Therefore, it's high time to design a dual approach in Indian diplomacy rendering sustainable development services and fostering Indian affiliation in the Republic of Maldives for future prospects. Further, the trust and ties earned from constant developmental inter-ties and exchange between Maldives and India will disallow the tricky power politics approaches to foster or counter balance the politics or neo-colonialism in the name of sustainable development by nations like China. Finally, it can be stated that as every individual's development is nations and globes development, therefore, India should deepen its ties with Maldives primarily focusing on sustainable development of Maldivians cum security ties in future.

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Social Media as a gateway of Promoting Human Rights in India: A Case Study of Me-Too Movement

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Abstract

Social media had emerged as one of the key promoters of #MeToo campaign in India. The online mobilization of people centered around the Me-Too on different social media platforms had made a foray among the people to talk about the issue. In this high-speed digital age, any concern related to human rights can be easily brought up on social media leading towards a change action. Though, communication and information have historically been the fundamental sources of power in media, but the domination of social media in today's time acts as a catalyst towards change. This research article offers insights into the role of social media as an influencer in promoting human rights. The study will cover an in-depth analysis of usage of social media in promoting Me-Too movement on the two most popular SM platforms i.e. Facebook and twitter. The discussion will further move towards the power of social media in mobilizing people and generating social change. Lastly, the conclusion will generalize the positive aspects of social media as well as its shortcomings in promoting human rights.

Key words: - Human rights, social media, # Me-Too campaign, social media, digital age.

Introduction

Historically, the fight for human rights has inspired many social and political movements around the world. India is no more an exception to

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this. In 2017 India had witnessed one big storm over social media flooded with messages which swayed the dignity of many men. These messages were mostly from women, who tagged their profiles to indicate that they have been sexually harassed or assaulted. This was marked as the beginning of Me-Too era. The movement of Me Too was originally started by Tarana Burke, an American social activist and community organizer in 2006 as part of the campaign to promote "empower through empathy". Then later in Oct 2017 the Hollywood actress Alyssa Milano raged the fire by spreading the hashtag #MeToo to draw attention towards sexual harassment and abuse. In the same year it entered Indian borders as well, when Bollywood actress Tanushree Dutta made serious allegations against Nana Patekar, a veteran Bollywood actor and producer recounting her experiences during the shoot of the film, Horn OK Please, 10 years ago. Since then, the controversy has engulfed many famous and important personalities, including Union minister MJ Akbar against whom 11 women have leveled allegations. The movement has now reached around 195 countries (Dawar, 2018). To take an Indian view of #MeToo, one revelation by actress Tanushree Dutta had opened the floodgates for many women who have faced sexual harassment or assault at any time in their lives. A Lot of Bollywood celebrities and other women came up with their distress stories on social media and give rise to new age feminism.

The issue although specific, was largely impacting their human rights. Many other women came up with such issues and addressed the kind of inequalities they are facing at workplace. Of course, this was not the first time the demands for the rights of a mankind have been raised by any form of unrest, protest and debates. But the form of movement swayed on social media was surprising. Initially the movement started with a tweet on Twitter, but within a few days only the movement persuaded the masses and "#Me-Too was used more than 19 million times on Twitter in just English language, which comes to an average of 55,319 per day". (Pew Research). Later, the movement was picked up by Facebook as well and within 24 hours only Facebook recorded millions of posts. Instagram also recorded more than 14 lakhs posts. The #Me Too usage of the movement across the world on Instagram was 1.5 million in 2018 (News 18). Following the global outrage over the Harvey Weinstein incident in the West, #Me-Too movement in India gained momentum through social media. Facebook, Twitter and Instagram which have always been the center-stage of controversies revolving around content related issues suddenly became the crusaders of this global campaign promoting human rights. The social media platforms provided women courage to fight for their rights and being vocal on such platforms about their personal

sufferings of sexual abuse and harassment. The hashtag ushered a new age of feminism which is the sign of fundamentally shifting of societies.

New-age Social Media

Indian media has always been responsible for reporting the facts and events which affect large masses. It plays a very crucial role in acting as an agent of change and setting out an agenda which is pertinent for the smooth democratic run. Historically, the media have always tried to set the agenda that fits to the contemporary and emerging need of the nation. But at a glance, the status of Indian media is always governed by its ownership and control, its representation. Regulatory frameworks decide its course of action, understanding towards the issue and its presentation. The mainstream media i.e. newspapers, television and radio are under the effective control of government and market forces. This media is always expected to support the purpose of the state and follows the agenda of the bureaucrats and stakeholders. The address and concern of human rights on the mainstream media is always deliberate. Opposing to this the social media has emerged as a very potent tool and platforms for holding public debates and interaction where the public can fully enjoy the freedom of speech and can exchange and share their thoughts, opinions and ordeals. Specifically, the hope is that social media allows advocates to bypass the gatekeeper mainstream media – whose newsworthiness decisions can seem inscrutable and captured by elites – to instead communicate direct-to-citizen and direct-to-policymaker (e.g. Auger, 2013).

The model of communication which the social media provides is one of the most preferred ways of human communication these days. The flow of information and connectivity anywhere across the world is converging the social media with the mainstream media. Social media or digital media has altered the practice of conventional models of human interaction and role of communication in political and social change. 'Digital media and new information and communication techniques have changed the tactics of holding democratic movements' (Howard & Hussain, 2011). The objectivity, credibility and reliability of social media has increased manifold over a period. It has now emerged as a very important gateway of promoting social and political change. The next section discusses the role and significance of social media in promoting the Human Rights at national and international level.

Social media as a promoter of Human Rights

Article 19 of Universal Declaration on Human Rights (UDHR, 1948) has acknowledged as follows: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without

interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". These rights are very crucial and vital to protect the human rights of common people suffering from social disparities, suppression and sidelined by the dominant class. Despite of making strong commitments for human rights protection, India has significant problems of human rights violation. Some of them are, increased restrictions on Internet freedom, continued marginalization of Dalits, tribal groups, religious minorities, sexual and gender minorities, gender inequality (Mishra, 2015). The major reason of such violation can be attributed to India's vast population and diversity. People facing atrocities and rising number of human rights related issues are being registered every day.

In the recent years such cases have become worst and have constantly deteriorated in India, with the rising crimes, abuses, scams and humiliations human rights are being violated and taken for granted. Violence against women is increasing at an alarming rate and they are at a high risk of sexual harassment, trafficking, and forced labor including violations of equal participation in political, economic and social life. (Sharma, 2017).Due to wide scale violation of Human Rights in India every year, the problem has become acute. In that sense one must understand the role of social media to act as a supporter to so many people who want to express themselves as the victims of human rights violations. In the recent years social media has been used by various organizations and human rights activists, volunteers and the sufferers, as a platform for sharing their personal agony towards human right issue. Social media not only empowers them but also provides them faster connectivity and reach at global level. Digital network technologies, such as Facebook and Twitter, grant members 89a form of universal egalitarian recognition (Sarikakis, K. and Rodriguez-Amat, JR, 2015).

Social media has become a platform for human rights activists and other people standing up for the rights, to make their voices heard. Facebook, Twitter, Instagram are becoming more and more popular when it comes to activism around the world, whereby the people can come together, exchange ideas and inspire one another to speak out for their rights. In the last few years so many cases of human rights violations have occurred where social media had been used widely by people to express their grief and anger, for instance, cases of caste-based discrimination and violence, be it a Dalit student's suicide case because of discrimination and abuse, or growing crime against children. Communal and ethnic violence, Freedom of expression, Extra-judicial killings, LGBTI rights etc. were the major issues of human rights which were precluded online and made an uproar. But, despite of all these achievements, Social Media has also brought

potential threats of altering the Freedom of Expression and Right to Privacy (Korff, 2012) of many people wherein sometimes exaggerated posts and propaganda of small issues have also been observed just to gain publicity. Therefore, one must understand the dark side of internet freedom, Net Delusion (Morozov, 2011). The usage of social media as a platform for human rights promotion must be guarded at various levels. One must keep the vulnerability of social media in mind and respect the privacy of individuals and society at larger level.

#Me-Too Social Media Coverage

One year has passed since the movement started which became a sensation, empowering women and survivors of sexual harassment and abuse all over the world. The movement gained momentum all over the world and especially in India. India became the first country largely affected by #Me-Too and it has become the most searched term among the top ten terms on Google India. In fact, Google has created a dedicated website Me Too Rising. (Google Trends, 2018). Although this wave of Me-Too did not appear suddenly, but it took many years to ignite in India i.e. the women of India really took a long time to gain such courage to become vocal about their sexual harassment and abuse. Besides this ignition there is a long history of cases that shook the country with fear and anger. The horrifying stories of Nirbhaya and other women's sufferings have bound the women of all age groups together to use social media as a tool of their protection.

This research paper has tried to make an in-depth analysis of the available secondary data resources on the coverage of Me-Too movement across social media platforms especially Facebook and Twitter. These two major social networks were extensively used by women to hold a debate on the movement. The findings indicate that India shows the highest interest in the movement than all other nations in the list (Fig-1), while on Facebook #Me-Too has the highest coverage in relation to other important social media topics in the year 2017. Fake news and Russian meddling in the US presidential elections have been in the news throughout the year, but #Me-Too got the most attention in the shortest time span. Global media posted about #Me-Too nearly 4K times per day on Mid-October – more than 2-4 times more than Grenfell Tower fire or hurricanes. On average, #Me-Too was mentioned 1.1K times per week compared to 570 times for fake news and 250 for Grenfell Tower fire. On Twitter a visualization of 24,722 #Me-Too tweets were produced as they spread across different social communities (Erin Gallagher, 2017). #Me-Too flashed an enormously widespread reaction of tweets in which 10,709 came from distinct social groups, or small collectives of people who follow one

another and were part of that Tweet collection. If we track the numbers around #Me-Too, around half a million people reacted within 24 hours to Hollywood actress Alyssa Milano's first post in Oct 2017. And by the end of November over 1.7 million Tweets had been made over Twitter with hashtag or its translations worldwide. On the other hand, Facebook also records 12 million posts and comments within 24 Hours of Milano's post. In India the movement gained a 100% interest as compared to UAE, Bhutan, Nepal and Mauritius.

Fig 1: Comparative Trends in Middle East and Asian Countries

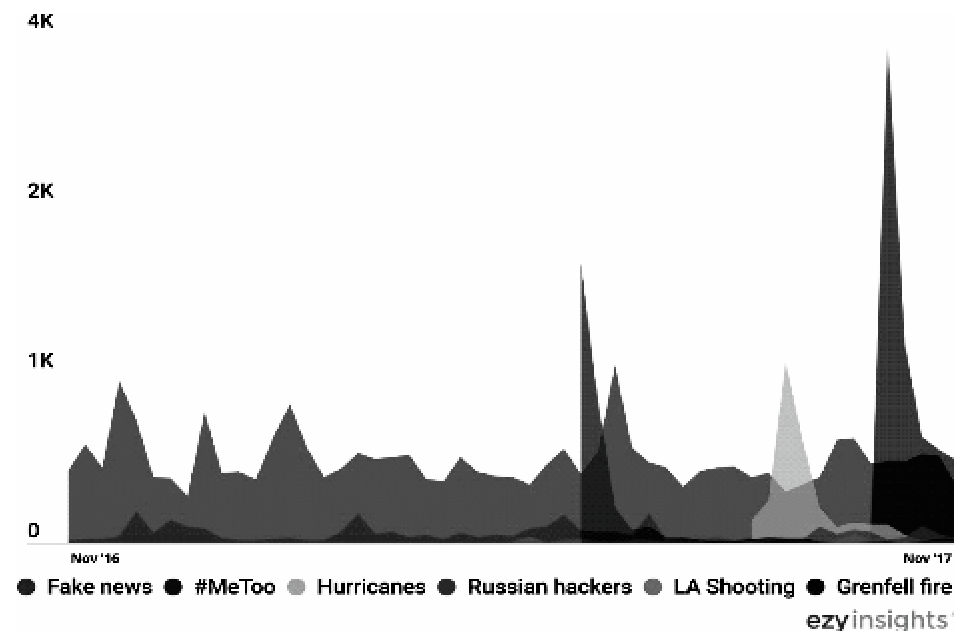

Fig 2: Significant Trends in Contemporary Media

The study also finds out that Me-Too has made a hash tag spark among the users. The searches on #Me-Too are the highest in India surpassing US. Also, the Google searches on definitions of sexual assault and harassment has been on gradual upward trend since Oct 2017. The entire idea of the #Me-Too was to measure sexual harassment and assault worldwide. It became highly visible, and it has in its ways has succeeded a lot. Some countries have even plan to frame legislations to support the Me-Too survivors and to deal with the cases of sexual harassment and abuse. But still there is lot more which needs be discussed and addressed. Surprisingly, there are some nations where the cases of Me-Too don't even exist. Till now this has been the most untouched topic across society and businesses where the culture of silence, avoiding conflicts and hypocrisy prevails but now women have broken those barriers of silence. Obviously, the movement has broken the dignity of most of the high-profile men, but they have now learnt the lesson that cases like Me-Too have become much easier to be brought on social media.

It becomes very evident from the above secondary data that #Me-Too was covered extensively across the social media platforms in India. The movement gained lot of popularity on the two major social networks Facebook and Twitter in advancing the human rights issue in India.

Conclusion

Social media like Facebook and Twitter have given a platform to people, activists and organizations around the world to address the issues of human rights concerning them. It has literally lent a voice to those who don't feel comfortable talking about their grievances and sufferings. Through the movements like #Me-Too, these have been proved instrumental in bringing about a social change. It has given people a direction and a new dimension of approaching the issues. The 24X7 connectivity of social media helps people and organizations to gather the valuable public support around their activities by sensitizing them, mobilizing them and preparing them for action and change.

The framing of the #Me-Too on social media focusing attention on the rights of women has successfully turned the movement into a big achievement. This framing has given hope and courage to many other women as well. The framing is the second level of Agenda setting (Maxwell McCombs and Donald L Shaw)

Social Media Influence (Paul.E. Lazersfield)- The secondary data analysis revealed that every woman associated with #Me-Too was directly influenced by social media in their personal lives, i.e. these women are the frequent users of Facebook and Twitter. This we have already witnessed in the case of fake news also. Contrary to this, women

who are less active or have no presence on social media have no information about the movement or are very less aware about the movement. During the research study only when a 42-year-old housewife from Ajmer (Rajasthan) was asked about her awareness of #Me-Too, she said "I am very busy with my household affairs, I have no time to read newspapers. In fact, I am not internet savvy". Similarly, another woman working as an accountant in a Jaipur based C.A firm said, "I have not heard about Me-Too through any of my office colleague". On the other hand, Zakia Soman, co-founder of Indian Muslim Women's organization and an advocate said, "This movement has broken the silence. The breaking of the silence is the important first step." Conclusively, the movement has so far impacted the lives of urban women who have access to internet facility and to those who are the regular users of social networking. The movement has yet to reach the rural women, particularly those from scheduled castes, other backward classes and tribal communities. The current outrage incited by the movement is limited to journalism, media, film industry and few other urban professions. Unfortunately, the rural women are not be able to express their outrage on #Me Too as they don't know how to approach, perhaps they don't have the device at their homes or nearby places to express themselves to a larger community and seek redressal.

Under the framework of the research, the findings also suggest that although the role of social media is very prominent in today's global environment in establishing the pillars of any issue, it acts as an influencer in promoting the various human rights. #Me-Too is one of the biggest milestones which the social media has achieved in terms of empowering women and making them vocal about their sexual harassment and abuse. But this power of social media remained concentrated in the hands of elite sections or urban class of society. The movement has so far had a reach towards the elite, urban and working women only. As India is a big patriarchal and conservative society there is a big division of regions, languages and sections of society. The movement has so far brought into focus the men of most of the high-profile industries, but a lot more work is left to be done on men who are roaming freely and are involved in the practice of sexual harassment and abuse in the rural parts of India. Also, India which has a regional and cultural diversity, differences in access to technology and the stigma around sexual violence, all of which prompt people not to speak. Many women think that if they speak, they could risk their lives. Mamata, a woman living in a small-town said, "If they have to come out and say something is happening to her, it would be really dangerous".

This issue of gender equality has been significant in our country since

time immemorial and that is why India took an active part in the drafting of UDHR particularly underlining the need of gender equality. The year 2018 marked the 70th anniversary of UDHR (United Nations Declaration of Human Rights) which is one of the positioned documents in human lives around the world. These 70 years have seen much struggle in establishing the need to advocate the human rights. Still today, there is a need to spread basic human rights education at all levels of society. Awareness among all the women groups is necessary and for this the role of the word of mouth is very important. The movement has still to take a long leap in motivating the rural women to gain courage and fight for their rights.

Another aspect of #Me-Too is coming out as #Men-Too where the men are putting allegations on women and voicing their stories of sexual harassment and abuse. Many of the men have recently reported the incidents where they have faced harassment and false allegations by the females. With the liberating capabilities of social media, one must understand carefully the sanctities attached with any issue. Castles made on falsehoods never go too high.

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Development disparities and marginalization of Tribal: An Empirical study of Odisha

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Abstract

The present research study elucidates some aspects of development disparities and marginalization of eight different tribes of Sundargarh district of Odisha. A sum of 400 households (which consist 50 households from each community) of Sundargarh district, Odisha was selected purposely and interviewed through the help of a structured interview scheduled for collecting relevant information on disparities on different aspects of indicators on socio-economic, education and health status. The major findings reveal that the socio-economic and overall quality of life of natives, is not satisfactory as the natives are very poor and they have poor educational status, poor housing facility, poor sanitary system, poor drinking water system, no electricity, less possession of assets, unavailability of medical institution, deficient food intake and low per capita income. Thus, there is an urgent need to launch income generating activities (non- technical and technical training), education and health awareness programmes as well as make the tribals aware of and help them grab the opportunities provided by the government and non-government organizations to bridge the gap on social hierarchical system to improve their status.

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Key words: - Tribe(s), quality of life, socio-economic, health, marginalization.

Introduction

The tribes in India have distinct developmental problems, mainly governed by multi-dimensional factors such as; - habitat, difficult terrains, varied ecological niches, illiteracy, poverty, isolation, superstitions and deforestation. The tribal people in India have their own lifestyles, food habits, beliefs, traditions and socio-cultural activities. The health and nutritional problems of the vast tribal populations are varied because of bewildering diversity in their socio-economic, cultural and ecological settings (Balgir, 2000). In a words 'Development' means a progression from a simpler or lower to a more advanced, mature, or complex form or stage. It is also defined as the gradual advancement or growth through a series of progressive changes. Development is a process, not a level. It is a path to achieve certain goals. Despite of the intuitive notion that employment matters for poverty reduction, there is insufficient empirical research in this area. While there is a broad consensus that not all growth spells have the same impact on poverty, marginalization and exclusion, there have been relatively few attempts to systematically unpack the relationship between the unequal distribution of society (between the tribal & non-tribal people, on the course of growth and development. Data is deficient in many low-income countries and it is difficult to ascribe causality to correlative relationships between changes in income and employment; growth and development, and social disparities may each go some way in explaining the dearth of research.

In the same way 'marginality', is an experience affecting millions of people throughout the world. This problem is considered to some extent in most of the areas. Being poor, unemployed, discriminated against, or being disabled by a society that won't work around the problems of impairment; they all bring with them the risk of exclusion. Being excluded from economic, social and political means of promoting one's self-determination can have adverse effects for individuals and communities alike, the demographic figures reveal that the tribal population were the most disadvantaged, exploited and neglected lot in India (Paltasingh and Paliwal, 2014). Despite certain Constitutional provisions, they are backward compared to the general population, even their situation is worse than the Scheduled Castes (SCs) and Other Backward Classes (OBC) population (Xaxa, 2012). They are mostly marginalized as they are usually cut off from the mainstream. Also various opinions state that majority of the tribes used to reside in the remote forest areas, remain isolated, untouched by civilization and

unaffected by developmental processes (Paltasingh and Paliwal, 2014).

Poverty also encompasses low levels of health and education, poor access to clean water and sanitation, inadequate physical security, lack of voice, and insufficient capacity and opportunity to better one's life (World Bank, 2000). This situation has changed to a great extent over the past years. But still as long as the tribal people remained underdeveloped, they are likely to depend on their set of traditional occupations: agricultural farming and forest minor-products throughout the year, as a subsistence economy. Forest is one of the strongest support-systems of tribals. They were very meagre earners as compared to non-tribals, due to their social background, educational status and cultural prospects. Now, in some parts of Odisha industrialization, urbanization have begun to set in. But still the tribal people remain in the same poor and marginalized section. Also, it is found that high level exploitation of natural resources causing deforestation to meet the urban and industrial demands has greatly affected the way of lives and their livelihood pattern. This trend has been responsible for displacing large number of tribes from their original habitation (Nathan & Xaxa, 2012; Singh, 2012).

Poverty can be defined as a social phenomenon in which a section of the population is unable to fulfil their basic needs of life. A recent focus of research in development economics at the macro- level is the relations and interactions between economic growth, poverty reduction and human development (Dollar and Kraay, 2002; Klasen, 2004; Kraay, 2006; Ravallion, 2001; Ravallion, 2004 & 2005). These studies give extensive evidence for the fact that growth is a necessary but not sufficient condition for poverty reduction. It is not sufficient because the impact of growth on poverty (the so-called elasticity of poverty with respect to growth), is influenced by the initial inequality and the development of the inequality over the growth process (Ravallion, 2005). Similar studies for India relate the differences in the impact of economic growth on poverty to initial inequalities in variables like literacy, health and infrastructure (Datt and Ravallion, 1998; Ravallion and Datt, 2002; Gupta and Mitra 2004; Nayar, 1997) has correlated the housing amenities to health improvements and examined the conventional idea that health-promoting factors such as housing condition, availability of drinking water, sanitary facilities, etc., could contribute to health improvement among the population sometimes even more significantly than health services. Whereas Bagchiand Kundu (1999) pointed out that a low figure for the percentage of households having basic amenities in a state does not necessarily reflect non-availability of those amenities or the extent of their deprivation, it could be partially attributed to natural, social and cultural factors.

A situation analysis on tribes of India

The word 'Tribe' denotes a group of people who live under primitive conditions. It is a social group with territorial affiliation, endogamous with no specialization of functions. They have a headman or a chief who controls the activities of that group. Tribals have several sub-groups all of them together known as 'Tribal Society'. It is really difficult to say whether they are indigenous or not but they are definitely the earliest settlers of India. They were living in forests since early times and even now some of the groups follow the same trends and live in forests. Tribals constitute around 9 percent of the total Indian population (Census, 2011), and of the total tribal population around 80 percent are found in central India. Since they are older settlers and living in forests they are well known as vanyajati, vanvasi, pahari, adivasi, anusuchit jati, anusuchit janjati etc. in Indian languages. The word implies the meaning itself i.e. Adi = old, Vasi = those who stay [old settlers]. There were about 635 tribal groups and subgroups including 75 primitive communities who have been designated as 'primitive' based on pre-agricultural level of technology, low level of literacy, stagnant or diminishing population size, relative isolation from the main stream of population, economic and educational backwardness, extreme poverty, dwelling in remote inaccessible hilly terrains, maintaining constant touch with the natural environment, and unaffected by the developmental process undergoing in the rest of India (Bhasin and Walter, 2001). The tribal population are the aboriginal inhabitants of India who have been living a life based on the natural environment and have cultural patterns congenial to the physical and social environment (Baiju, 2011).

Rationale of the Study

Odisha occupies a special position in the tribal map of India. With the tribals constituting around 23 percent of the state's population and 9 percent of the country's population, Odisha has one of the highest percentages of tribals in the country, next only to Nagaland. In Odisha, 62 types of STs population and 13 primitive tribes are there. Besides that district wise distribution of Scheduled Tribes population (ST) shows highest proportion (57.4 percent) in Malkangiri district, followed by Rayagada (55.8 percent), Mayurbhanj (56.6 percent) and Sundargarh (54.6 percent).The tribes of Sundargarh district of Odisha are unique in terms of having a diverse ethnic, linguistic, cultural, religious, moral values, traditions, folklore styles, food habits, and genetic strands maintaining at various levels of development- social, cultural and economic life. They mainly depend on hunting and food gathering and shifting cultivation for their livelihood. The authors have tried to map the

socio-economic condition and marginalization of the tribals of this district.

Sundargarh district is one of the thirty districts of Orissa, located in the northern extremity of 22° 7' 31.4436" N and 84° 2' 42.2412" E. The population of the district is 18,29,412 and tribals constitute around 51% (Census of India, 2001) of this. The present study has been undertaken in a tribal dominant village. Mostly, in this area different types of tribal communities are there and locally they speak 'Sadri' language which is also known as 'Sadani language'. Many displaced people of Mandira dam have been rehabilitated in this area. This indicates dense forest might have existed once, but presently this area is covered with thin forest.

The initiation of developmental projects and rapid industrialization has not made much difference in the socio-economic status; rather in some instances the situation of tribal people has become worse. The widespread poverty, illiteracy, malnutrition, absence of safe drinking water, inadequate sanitation facility, poor living conditions, ineffective coverage of maternal, child health and nutritional services have made their condition more vulnerable. The subsequent section has focused on the issues related to literacy, work-force participation, livelihood, occupational pattern, health, poverty and marginalization; impact of development disparities and related consequences among tribal communities in specific regions. Relevant suggestions and recommendations are included in the concluding section of the paper.

Objectives

This paper is a modest endeavour to examine the deprived and marginalized tribal communities in the state of Odisha with respect to development. With the help of primary field data with support from Census and other related data the paper seeks to examine the three main components as the economic status, education and access to general health facilities etc., of eight different tribal communities of Kutra Block of Sundargarh district in Odisha, with regard to the basic attributes of poverty, education and socio-economic aspects..

Research Methods

The study has potential of being an explorative and also a comparative study in nature through survey research method. This study is based on primary and secondary sources. Primary sources of data are collected through structured questionnaires for this study can be explored from eight different tribal community, top government officials, NGOs, self Help groups, community resource persons and opinion leaders of different panchayats of tribal pronged area of Sundargarh district of

Odisha. Emphasis will be laid on the original manuscript, archival sources, and records of contemporary resources from the state government. It will attempt to study tribals' changing movements and development. Secondary sources are based on the textbooks, journals and periodical from libraries across the reputed universities and the other centres of learning in Odisha and other parts of country. The research has used both qualitative and quantitative methods. As has already been indicated, impact studies have largely remained unexplored. This study adopted survey research methods for data collection. Subsequently, the quantitative data were collected from interviewing the heads of the household with a structured questionnaire. The data were collected with references to the details of availability of socio-economic status, income, education status, general health status, poverty and food resources at present and during the past. The study covered 400 households, and each community consisted of 50 households for primary study, which comes under 6 Gram panchayats, 17 villages of Kutra block of Sundargarh district. The data on socio-economic conditions of eight different tribal groups namely Bhuiya, Gond, Kumbhar, Kharia, Kisan, Lohara, Munda and Oraom have been collected, analysed, and inferences dawn. Keeping in mind the objectives of the study and amenability, the data were given in simple percentage and frequencies for analysis. In this analysis we used fourteen specified indicators like: - housing condition, safe drinking water, toilet facility, sources of energy, other-households amenities, education, workforce participation, total land holding, off-farming structure, traditional tribal occupation, poverty, food consumption pattern, income etc. which capture the status of the eight tribal communities.

Results and Discussion

The tribal population of India are scattered in all over the country depicting heterogeneous culture and socio-economic status. It is interesting to know the different types of tribes residing in different geographical locations and confronting different situations. There are about 700 tribes (with overlapping categories in some States/UTs) under Article 342 of the Constitution of India (Annual Report, Ministry of Tribal Affairs, 2012-13).

1. Reason of Development disparities and Marginalization of tribes

The tribal indigenous people who are under-developed and marginalized and suffer due to negligence of government policies and programmes. The reason is obvious; these studies are difficult in social science, because they require considerable time and prolonged efforts. As a population group, STs are at the bottom on a range of development indicators including consumption and poverty (Dubey,

2009). There exist large disparities in mean consumption and poverty incidence between ST and other population groups (Dubey, 2009). The marginalization status of tribals varies across the states and from one tribal community to that of the other. A comparison status in Table 1 shows that the tribals in the area are more marginalized in socio- economic conditions as compared to districts, states and all India status of tribals.

Table1: Comparison of Socio-economic status of STs (in percentage)

Indicators	Study Area	Odisha	India
Literacy	58.17	73.45	74.04
Housing(living with Pucca house)	3.00	15.8	22.8
Drinking water facility (Improved piped water/hand-pump)	39.75	76.7	92.8
Electricity Facility	1.00	38.8	45.6
Toilet Facility	3.25	15.9	65.8
Immunization of Children	22.06	87.2	93.9
Infant mortality rate(IMR)	342.24	51	40
Maternal mortality rate(MMR)	310.16	235	178
Poverty	85.8	32.59	21.92

*Sources: Field Data, *figures in parentheses show percentage to total population Note.1: Census of India, 2011-12*

1. Poverty Estimates 2011-12, Govt. of India, Planning Commission, July 2013.
2. Population as on 1st March 2012 has been used for estimating number of persons below poverty line. (2011 Census population extrapolated).

Table1 clearly shows that pertaining to the access to the basic amenities on education, housing, safe-drinking water, electricity facility, toilet, children's immunization (0-1years of age), Infant Mortality Rate (IMR), Maternal Mortality Rate (MMR), poverty etc. of the tribal population is quite low as compared to the all India status of the tribals. It is well known that most of the tribals are victims of acute poverty and are living in wretched conditions. Lack of money, along with illiteracy and unawareness, is often responsible for poor health conditions, and as a result the tribals remain at their present position on the graph of development (Sharma and Dwivedi,

2007). Various studies have been conducted on poverty, living standard and marginalization of different tribal populations, viz., Elwin (1939), Saxon (1957), Sharma et.el. (2002) and may others exhibit low quality of life of the tribals.

2. Socio-economic status of Tribal Communities

The status of economic disparities of tribal communities includes the basic amenities of the tribal households, which refer to such facilities as housing structure, access to safe drinking water, sanitation facilities and other-basic amenities as are vital to human survival. Here the data revels that the tribal households have poor access to their basic amenities, depicted in Table 2 below.

Table2: Basic amenities of tribal households (included five indicators)

Sl. No. 1	Housing structure	Number and %
	Kutcha house [Mud-wall and Chhaper]	343 (85.25)
	Semi pukka house [floor is plastered and roof is made of Chhaper]	45 (11.25)
	Pukka house	12 (3.00)
Sl. No. 2.	**Availability of Safe-Drinking water**	**Number and %**
	Open-well	241 (60.25)
	Hand-pump	159 (39.75)
Sl. No. 3.	**Availability of toilet facility**	**Number and %**
	Toilet & bathroom facility	13 (3.25)
	Open defecation	387 (96.75)
Sl. No.4.	**Other basic households Assets**	**Number and %**
	Radio/ Tape Recorder	29 (7.25)
	Television (TV)	5 (1.25)
	Bicycle	134 (33.5)
	Wrist watch	40 (10.0)
	Bullock-cart	74 (18.5)
	Not having anything	118 (29.5)

Source: Field Data.

* Note: figures in parentheses show percentage to total population

Possessions of different household assets reflect one's social and economic status. Hence, an attempt has been made to list out the assets possessed by the individual households. Accounting has been restricted to the possession of major assets like televisions, bicycles, watch, bullock-carts, etc., as gold, silver are highly imperceptible in the tribal households. On the other-hand it shows that a total of 7.25 percent respondents reported owning a radio/tape recorder, 1.25 percent have a TV set by those staying very close to urban areas, 33.5 percent of them have bicycles, 10.0 percent have wrist watches, 18.5 percent of them have bullock-carts, and 29.5 percent of households do not have any such assets.

3. Lives and Livelihood pattern of tribal Communities

Tribal economy is subsistence oriented. Livelihood comprises the capabilities, assets (including both material and social resources) and activities required for means of living. A subsistence economy is based mainly on collecting, hunting and fishing, or a combination of hunting and collecting minor forest produces and shifting cultivation and even engaged in ploughing using conventional farming. The tribals, wherever the scope is available, supplement their family needs with hunting and collecting minor forest produces. Table 3 reflects that the subsistence economies of the tribal households are characterized by simple technology, simple division of labour, and cottage units of production and no investment of capital. The social units of production, distribution and consumption are limited to the family and lineage. This subsistence economy is imposed by circumstances beyond the control of efficient modern developed techniques that can exploit natural resources and lack of capital for investment. It also presupposes existence of barter system and lack of market linked trade. Considering the general features, eco-system, traditional economy, supernatural beliefs and practices, the study focuses primarily on the living patterns of the households.

Table3: Livelihood pattern of tribals
(parenthesis show percentage to total population)

Sl. No. 1.	Workforce participation	Number and %
	Agriculture farming (Paddy, Pulses)	165 (17.21)
	Farming and collection of minor-forest product (Mahul flower & seed, sal leaf & seed, kendu leaf & fruit, wild-broom stick, dead-fuel-wood, lakh, jhuna, honey herbs, fodder, green grasses like sabai grass, green khajur leaves, etc.)	334 (35.87)
	Farming and traditional tribal art & crafts	178 (18.56)
	Farming and government jobs	43 (4.48)
	Farming and private jobs	56 (5.84)
	Farming and labour works (like mines/agriculture sector/ MGNREGAs)	173 (18.04)
Sl. No.2.	**Tribal Agriculture land**	**Number and %**
	No agriculture land or landless households	27 (6.8)
	Marginal land holds (less than 0.002-1.00 hectares)	53 (13.3)
	Small land (1.01 - 2.00 hectares)	105 (26.3)
	Semi-medium land (2.01 – 4.00 hectares)	180 (45.0)
	Medium land holds (4.01 -10.00 hectares)	35 (8.8)
Sl.No.3.	**Poverty**	**Number and %**
	Average poverty line (APL)	57 (14.3)
	Below poverty line (BPL)	343 (85.8)

The data shows the total number of households engaged within agricultural farming stands at 17.21 percent, the 35.87 percent of households are engaged in farming and collection of minor- forest products (MNFT) throughout the year for collection different forest products , 18.56 percent households engage farming and tribal art and craft work (traditional occupation), 4.48 percent of the households are engaged in farming and Govt. jobs, 5.48 percent of the households are into farming and private jobs, and 18.04 percent of the households are involved with farming and labour in different sectors like mines, agricultural and Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGs) etc.

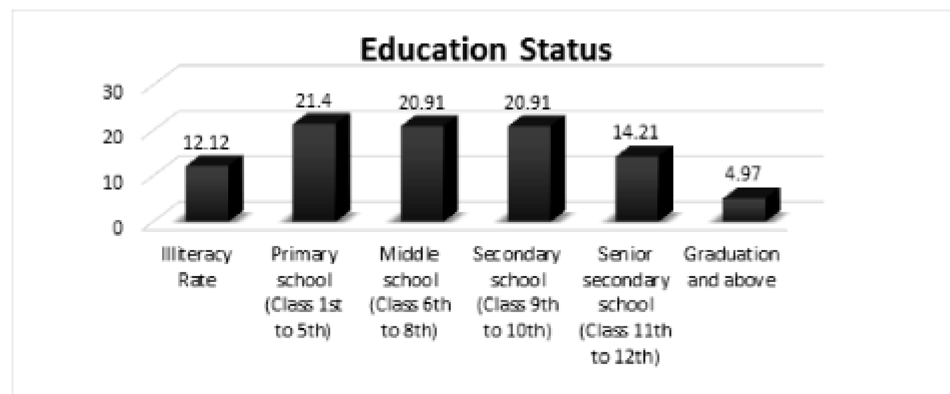
On the other side, total land holding system of the households is as follows: 6.8 percent of the households possess do not have land (0.02). 13.3 percent are marginal landholders (0.002-1.00 hectares), 26.3 percent are small landholders (1.01-2.00 hectares), 45.0 percent

are semi-medium (2.01- 4.00 hectares) landholders possessing highest lands in their communities. Only 8.8 percent own medium sized land (4.01- 10.00) hectares. The study observed that owning of land is not big issues for the tribal households but cultivating of crops in the lands is rather difficult for them. This is because although a household may possess small or marginal lands, but due to acute poverty and low fertility of the soils, the productions of crops are not sufficient for them to feed themselves throughout the year. Whereas the social status illustrates the tribal economic condition, shows that 85.8 percent of the tribal households live Below Poverty Line (BPL), while only 14.3 percent of the households are just Above Poverty Line (APL).

4. Educational profile and Healthcare status of tribals

Education is the kinship of social development. In order to bring up any community to the mainstream of development, education is a potent instrument. Education and economy in the tribal society are inseparable and attainment of literacy is explained by the socio-economic status of households. Many studies state that literacy has been always more among the higher income group (Naik, 1969). It has been tested that the educational attainments in the tribal families of upper socio-economic status groups are likely to be higher than the families of the lower and middle status groups (Rathaiah, 1997). The level of literacy in the family has a direct correlation with the socioeconomic status of the households, which has further correlated with the size of the families (Mutatakar, 1979). Poor economic condition of the tribal societies may be a greater hindrance to education. Literacy is extremely important for the tribal households as it enables them to drag from the darkness of ignorance and blind believes and values towards the brightness of a knowledge society. These communities are backward because they are far away from the knowledge society. Therefore, education in general and tertiary education and skill in particular are keys to the development of any individuals. Without appropriate study and educational environment like electricity, proper clothing, food, study room, books, etc. and accessibility to higher skill education institutions, tertiary education among the tribals is extremely low, rather in a stage of non-existence among the eight tribal communities.

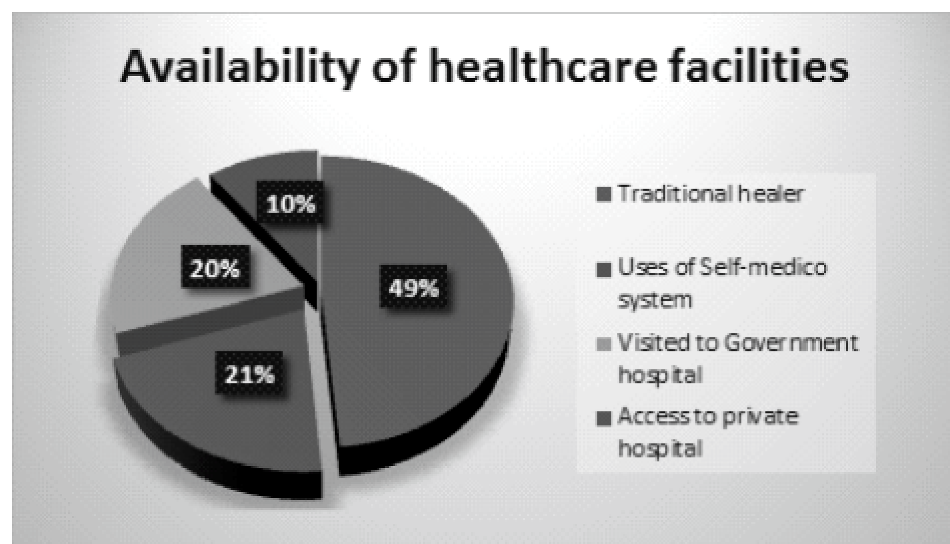
Graph1: Educational profile
(parentheses show percentage to total population)



Source: Field Data.

The data highlights that in total 13 percent of the respondents are illiterate, 23 percent of the respondents studied upto primary school (Class 1st to 5th), 22 percent of the respondents completed up to upper middle school (Class 6th to 8th), 22 percent of the respondents completed up-to secondary school (Class 9th to 10th), only 15 percent of the respondents completed senior secondary school (Class 11th to 12th), and 5 percent of the respondents completed graduation and above, which shows very less and poor educational status of these tribal communities.

Graph2: Availability of healthcare facilities



Series1, Visited to Government hospital, 20, 20%
Series1, Uses of Self-medico system, 21.25, 21%
Source: Field Data, * Note: figures in parentheses show percentage to total population

Development disparities and marginalization of Tribal: An Empirical study of Odisha

Comparing the health status of the tribals in the rural areas, we see a very poor and grim picture. All hundred percent of the respondents stated that there are no medical healthcare facilities within their villages. The data shows that when they fall sick, 48.5percent of them go to the traditional healers/ baidyas, simply because of unavailability of healthcare institution nearer to their villages. The lack of mobility and transportations are other factors found among the tribal families, which leads towards the poor health condition. 21.25 percent of the respondents used self-prescribed herbal medicines at home as first level of treatment. 20.0 percent of the respondents consulted the doctors, in nearer the PHCs/CHCs, which are situated around 120 to 180 kilometers away from the interior village areas. 10.25 percent of the respondent households had access to private hospitals during the times of emergencies. The private hospital is located around 200 kilometers away from their residence. There is a huge gap on availability of medical institutions in the rural tribal belt. On an average, around 70.00 percent of the respondents went to the traditional herbal-medico system, rather than the modern healthcare. The data reflects that on an average only 30.00 percent of the respondents had been able to access the modern healthcare system.

Conclusion

The conclusion is based on the findings and observation of study during the field work survey. The social development is in a bad condition in tribal areas depicting low level of housing, drinking water, education and poor access to modern health care facilities resulting high infant and maternal mortality rate. Further, the social and economic status in general and of the women, in particular, is astoundingly low. They are neither adequately literate compared to their male counterparts nor economically empowered to take part in social, economic and political development alongside the men. Majority of them are farmers but only some have well established themselves in different government and private services as they have good educational status. They have their own pucca houses with water and sanitary facilities, bicycle, radio, TV etc. They do not have fixed occupation which can provide them sustainable income and therefore the poverty and marginalization level is very high. They are residing in a deplorable condition having no electricity, and very low percentage of population are having access to toilet facility and potable drinking water facility. It seems that neither the government nor the civil society exist in this area to take care of the well- being of these tribals. Their diet consists of rice, dhal, curry along with milk, fruits and fish and meat or egg is very less or these are afforded only to mark an occasion or festivity. Many suffered from lifelong diseases like diabetes, asthma,

blood pressure but for lack of medical facilities, they are opting to approach traditional healers for cure. They are socio-economically marginalized. Xaxa (2014) has therefore rightly remarked that it is ironical that despite a large number of well- meaning constitutional provision and laws aimed at protecting and safe-guarding the welfare and interest of the tribal communities, the process of marginalization of the tribals has gone on unabated. Thus, there is an urgent need to launch income generating activities, health and educational awareness programmes so as to make them aware and help them to grab the opportunities given by the government and non-government organisations.

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Affordable Housing and Human Rights

*Prem Chand**

Abstract
Human Rights essentially consist of the right to be a human, and it is more than just the fulfillment of 'basic needs or necessities'. While 'Affordable Housing' is one such right, which is 'the necessity' and which along with 'clothing and food' is also considered as an essential right of a human being. Right to shelter is recognised as one of the most essential fundamental rights of the human beings, and, it is not just about (mere) roof on the head, but it means, adequate living space along with safe and decent structure to live in, and in the present context, it means that clean, healthy and decent surroundings are also necessary with sufficient light to work on, fresh and clean air and water, sustainable sources of electricity, sanitation and other necessary civic amenities, such as, appropriate roads connecting highways and other necessary public services, etc[4].

Key words: - Affordable Housing, EWS, sanitation, clothing, calamities.

Introduction

As to have a house, it is essential to have the means to procure it, 'Bank Account' is also necessary for banking transactions along with much other procedural documentation. And, therefore, it is necessary to have affordable housing for the persons belongs to Economically Weaker Sections (EWS) of the Society, who are not in a position to buy a 'house at market cost' and are also not in a position to complete other

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4 Chameli Singh v. State of Uttar Pradesh (1996) 2 SCC 549.

documentation, which has been made necessary in the present times. There are other people too who require housing, for instance, persons displaced due to natural calamities – earthquakes, floods, etc. and sometimes due to government policies also, displacement due to the building of dams is one such example. In case of building of dams, government generally provides reasonable accommodation, but, in cases of complete destruction of the house or partial destruction of the house, government has no uniform plan and therefore, persons have to face huge financial losses in case of the partial or complete destruction of housing.

Affordable Housing is a mere 'Metaphor' or 'Human Right'?

'Housing' essentially is one of the most important rights of the human beings and by providing 'housing' along with the 'affordability', the 'Right' of every human being to have shelter has to be protected and promoted. For some 'affordable housing is a metaphor,'[5] as it is not possible to fulfill the demand for housing for everyone (single unit ownership). The world, on the other hand, is facing the problem of sky-rocking rates of housing in past three decades, and this is a very serious challenge to the right to housing of the poor and persons who live their life at the margins. And, therefore, every State has its own 'affordable housing' policy to tackle the problem of shelter in indigenous ways. India has launched 'Pradhan Mantri Awas Yojana-Housing for All by 2022' for providing housing for all and had issued various tax incentives for building and buying 'affordable housing'. In the US, fees (impact fees) are charged from Real Estate Developers and the revenue generated from fees, is used to finance housing for the dense population or to provide 'affordable housing' and US also has 'Inclusionary Zoning Policy' (IZ) for promoting affordable housing. Similarly, in India, the Government has come up with 'Housing for all by 2022'[6] , as a policy initiative. And along with this scheme, is the promotion of the policy of 'Affordable Housing'. In this article, therefore, in the first part, the issues related to human rights and affordable housing have been discussed in detail, and in second part, the challenges before the policy of 'Affordable Housing' has been discussed in detail, and in third part, we will discuss the initiatives of the Indian Government towards the implementation of affordable housing and in the fourth part, Judicial Approach towards, sheltering, affordable housing has been discussed in detail and finally, suggestions have been

5 Steven J Eagle, "Affordable Housing as Metaphor," 44 Fordham, URB LJ 301, 2017.
6 Pradhan Mantri Awas Yojana-Housing for All (Urban), Ministry of Housing and Urban Affairs, Government of India, retrieved 04.07.2019, https://pmaymis.gov.in/.

entailed, which can boost the policy of 'affordable housing'.

Affordable Housing, Human Rights in India: Issues and Concerns

There are various issues attached to housing, such as segregation of the housing policy on various grounds. There are various segments of the society who are disproportionately segregated from the affordable housing scheme on various grounds such as, gender, identity, race, ethnicity, religion, age, marginalised persons, poor, Dalits, tribal, etc. and they are disproportionately affected due to lack of any appropriate and effective policy on affordable housing.[7] India is committed to providing 'Housing to all' at 'affordable' prices. After attaining independence, India was committed to the protection of Human rights and therefore was a signatory to Universal Declaration of Human Rights (UDHR) 1948, where every nation-state adheres to the protection of basic human rights. India opted to solve the housing problem by enacting laws protecting the rental rights of the tenants and therefore, in the first decade of securing independence India opted for laws such as Delhi Rent Control Act 1958. These early initiatives were necessary and proved vital for securing Housing for all. However, renting had not solved the problem, because, in sixties, ownership was considered as the benchmark for housing and 'rental accommodation' was considered as temporary housing only with very little rights. But, very quickly many things in relation to land ownership rights changed in India. Article 31 of the Constitution of India 1950 was abolished by the Indira Gandhi Government, which has provision of 'Right to Property' as a Fundamental Right.[8] But this has not changed the situation to a great extent because, now, 'Right to Property' is subject to Article 300A[9] of the Constitution of India. Thereafter, the number of schemes and plans were launched to provide economical housing to all but, all these plans were either not started at all or had to face corruption as the major bottleneck.

Corruption, Human Rights and Affordable Housing: Problem of governance

One of the major areas of concern is corruption, which led to the failure of various schemes launched to provide affordable housing to the economically weaker sections of society. In 1975 former Prime Minister of India, Smt. Indira Gandhi had launched a land distribution scheme to

7 Mayra Gómez and Bret Thiele, "Housing Rights Are Human Rights," Human Rights, 32 (3) (Summer 2005), 3.
8 'Right to property' was deleted by the 44th Constitutional Amendment Act of 1978.
9 According to Article 300A of the Constitution of India, "no one shall be deprived of his property, except by authority of law".

provide affordable housing to the lower/ marginalised sections of the society. Under this '20 point programme', small plots of land specifically for residential purposes were supposed to be issued, out of which 22,076 plots were not reached to those persons due to corruption.[10] Supreme Court-appointed panel had found that the land allotted to the economically weaker sections of the society had not reached them, rather the number of plots in the South Delhi Municipal Corporation (SDMC) were amalgamated and converted into commercial complexes, big showrooms, big gyms, and restaurants.[11] Governance, therefore, is a crucial area to work upon. 'Digitalisation of land records' is one such way by which corruption in the allotment of land can be curbed.

Judicial approach towards 'Affordable Housing'

The proactive Indian judiciary had always worked for the marginalised and under-represented persons; rather the whole history of public interest litigation in India is the history of the growth of judicial activism in India. Judiciary guided by the pragmatic approach always beneficially interpreted laws favouring human rights. In various cases court had observed that right to property in equivalent to human rights and it cannot be taken away other than by procedure established by law.[12] Courts have taken a stance in favour of 'Affordable Housing', even in cases where such policy inclusions were made at the last moment. In DB Realty Limited[13] Court has taken a proactive stand when it while deciding the validity of the notification dated 08.11.2013 issued by the State of Maharashtra, by using power under section 37(1AA) of the MRTP Act 1966[14] directly affecting the 'City of Mumbai' and 'Municipalities' of the State of Maharashtra. The Court said that the notification had provided place for the 'inclusive housing', in cases where the lands admeasuring 4000 square meters or more was supposed to be used for residential purposes and the same is not ultra vires, rather is within the power of the competent authority. Such decisions show the active stance of the courts

10 Supreme Court appointed panel has investigated the allotment of plots in Delhi, during 1981-89 under the '20 Point programme' to the lower strata of society. And, they had found the presence of irregularities in the allotment, where not all the owners had got the ownership rights.
11 The Indian Express, Monday, August 12, 2019, p. 5.
12 DB Realty Limited and Ors. vs. State of Maharashtra and Ors. MANU/MH/0173/2015. Supreme Court in Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Cock and Chem. Ltd. and Ors.(2007) 8 SCC 705 observed that "the 'right to property' is not merely a constitutional right but a human right".
13 MANU/MH/0173/2015.
14 Maharashtra Regional Town Planning Act, 1966.

while enforcing policies related to 'affordable housing'. Similarly Justice N H Patil in Neelkamal Realtors Suburban[15] case held that various provisions of Real Estate (Regulation and Development) Act, 2016 (RERA)[16] and the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 (the Maharashtra Rules of 2017)[17] are very much legal and constitutionally valid. The court while deciding the challenge made to section 18 of the RERA held that, the obligation imposed by section 18 on the promoters to pay interest until the flat was handed over to the purchaser is not unreasonable and constitutionally valid. The paying of the interest is a type of compensation only for the use of the money of the purchasers. The interest is payable to the purchaser as a consequence of the promoter's own default of non-handing over of the flat on time. The court further observed that it is necessary to keep such type of provisions within the law so as to keep control of the promoters and therefore section 18 of RERA is not in contravention to Article 20 of the Constitution of India 1950. The sole purpose is to deter the developers to fulfill the contractual obligations with the purchasers on time.

Affordable Housing and International Instruments

Every country in the world is facing the problem of 'affordable housing', and they are trying to tackle it by way of indigenous schemes and programmes – the US charges fees from the developers for collecting revenue to finance 'affordable housing schemes'. Even International Instruments also include 'Housing' as an essential part of the standard of living. "Everyone has the right to a standard of living adequate for health and well-being... including food, clothing, housing."[18] On similar grounds, International Covenant on Economic, Social and Cultural Rights also states that every human being has the right to have an adequate standard of living for his or her family, which is inclusive of housing, along with food and clothing.[19] Even Convention on the Rights of the Child also in one of its obligation expecting parties to assist within their

15 Neelkamal Realtors Suburban Pvt. Ltd. and Ors. vs. Union of India and Ors. 2018 (1) RCR (Civil) 298.
16 Sections 4, 5, 7, 8, 11 (h), 14 (3), 15, 16, 18, 22, proviso to Section 27(1)(a), Section 40, proviso to Section 43(5), proviso to Section 50(1)(a), Sections 53(1) & 53(3), 46, 59, 60, 61, 63, 64 and Section 82 of the RERA 2016.
17 Rules 3 (f), 4, 5, 6, 7, 8, 18, 19, 20, 21 of the Maharashtra Rules of 2017.
18 Article 25(1) of the Universal Declaration of Human Rights 1948.
19 Artilce 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.

means parents to with 'material assistance' and other support programmes, such as nutrition, clothing and housing.[20]

In fact, to remove all forms of discrimination against women it is essential to let her enjoy adequate and satisfactory living conditions, especially in reference to housing, sanitation, etc.[21] Similar provisions related to right to housing are found in the Article 5(e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD), where while discussing economic, social and cultural rights.[22] The situation of homelessness is gripping the world, especially in urban areas, where Right to Centrality[23] is with the elite class only. Finally, in paragraph 61 of the Habitat Agenda (Second United Nations Conference on Human Settlements, Habitat II), it was reiterated that all the states are required to fulfill the right to housing as it is one of the most essential parts of Universal Declaration on Human Rights 1948.

International Best Practices, Affordable Housing, and Human Rights

In various countries, affordable housing is taken in consonance with Human Rights and they enact laws and interpret keeping in mind human rights. The Supreme Court of Appeal of South Africa in Rand Properties[24] case addresses the issue of power of a local authority to issue evictions orders to the occupiers by giving appropriate notice to vacate a tattered building, as the same is necessary for the safety of the persons living in that building and also for the safety of the others also. The conflict was between the poverty-stricken persons living at the margin of the main city, who are without jobs and the residence they are occupying is dangerous for them to live in and they do not have any other option also with the present state of affairs, where they are forced to live in unlivable buildings due to financial and other compulsions. This has created the dilemma of living in dangerous buildings because of lack of any other option, can this be called 'a violation' of human rights? The pertinent question here is to whether vacate the persons living in dangerous buildings without providing alternative affordable housing to them or not? The reasoned solution of this problem is to provide alternative

20 Article 27(3) of the Convention on the Rights of the Child, 1989.
21 Article14(h) of the Convention on the Elimination of All Forms of Discrimination against Women 1979.
22 Article 5 (e) (iii) of ICEAFRD, 1965.
23 Lefebvre in the 1960's has linked the principle of 'Right to Centrality' with the 'Right to City'. By, this he is trying to say that everyone, including the marginalised persons has right to city who are largely put to bad and tattered places of the urban areas.
24 City of Johannesburg v. Rand Properties (Pty) Ltd [2007] 2 All SA 459 (SCA).

accommodation of housing to the evictors to the nearby places, where they have access to a livelihood or any other proper employment. High Court, in this case, had already dismissed the application of the city and directed them to implement a comprehensive programme with utmost coordination and within their resources so as to provide adequate housing to especially those people who are in desperate need of housing on the core part of the Johannesburg city. Section 26 of the Constitution of the Republic of South Africa 1996 establishes the constitutional right to adequate housing.[25] This progressive right is actively defended and implemented by the South African Constitutional Court in various cases.[26]

Conclusion

There is a school of thought according to which, the unnecessary weight has been given to the fact of ownership of property and no stress has been put on the alternative fact, that is, solving the problem of 'affordable housing' by renting. Why promote the idea of 'ownership' of the property? Appropriate 'Renting Policy' can also solve the problem of 'Affordable Housing'. Through Renting, the pressure on the government to issue individual units to each person is released and the purpose of having a house for all is also fulfilled. We have to understand the fact that land is a scarce resource, and therefore, it is not possible for the government to provide self-owned units to all.

The second important suggestion is to have appropriate housing policy, where, bungalow type housing needs be discouraged and Real Estate should take the lead in developing housing for the dense population. There must not be any space for the 'Bungalow type luxurious housing' in the 'Housing for All' Scheme. And, if luxurious houses are promoted than in that case, more tax is imposed on them so that the revenue for financing 'Affordable housing' is generated. It is essential to know, that immediately after Independence, India did not come up with any uniform policy for 'Affordable Housing'. Delhi Rent Control Act, 1958 was enacted to secure the rights of the tenants, but, this Legislation due to its lopsided approach in favour of tenants, proved to be a headache for the

25 Section 26 of the South African Constitution in clear words says that everyone in the South Africa have 'access to adequate housing' and the State is bound to take necessary legislative and other steps to achieve the success of this section as per the resources at their disposal. It further establishes the right against eviction from their home and demolition of their home without the court order and no arbitrary evictions are allowed.

26 In Residents of Joe Slovo Community, Western Cape vs. Thubelisha Homes and Others [2009] ZACC 16 Court defended the constitutional democracy of South Africa and supported the spirit of section 26 of the Constitution of South Africa.

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owners, as it is very difficult to evict the tenant under this Act. Little other legislation on similar lines have also been enacted, and therefore, in almost all the States, different types of indigenous Rent Legislations are applicable. Interestingly, umpteen attempts have been made to amend the Rent Legislations to make the provisions equal for the owners and the tenants, but, due to political pressures, nothing concrete has happened until today.

Contempt of Court: Language and the Human Right of the Freedom of Speech

Prasannanshu*, Aadarsh Singh**, and Himanshu Mishra**

Abstract
The Jurisdiction contempt of court is essential for the functioning of courts and delivery of justice. However, many a time overuse of this provision is suspected and alleged. This article attempts at, with the help of an analysis of court proceedings and the language used in the course of such proceedings, to decipher the basic issues involved and the concepts involved. It can be said that enforcement is not the act of a court rather of the police administration.

Key words: - Jurisdiction, court, justice, police, administration.

Introduction

The jurisprudence of contempt of court arose in the 18th Century[27] in common law. It perhaps is a reminiscent of the court being a king's court and the concept that king can commit no sin or crime. However, in the modern day courts this concept is still found useful as: the proceedings of a court need certain amount of order and decorum in the first place, so that the business of the court can be conducted in an uninterrupted and orderly manner, and further, if the court is not respected, and rather it is held in contempt then there would be no value of its decisions. We can argue that enforcement is not the work of a court but rather of the police administration, but courts do have a limited jurisdiction in this regard in the form of contempt of court proceedings. This is very lucidly reflected in R. V. Vermette[28] in these words:

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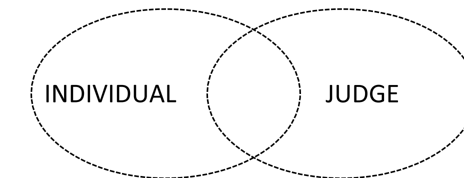
27 Joseph H. Beale's, Contempt of Court Criminal and Civil, 1908, 21 Harv. L. R., p. 161.
28 R v Vermette [1988] 1 S.C.R. 985.

> For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence,its immanent attribute. Without such a power, the court would have form but would lack substance.

The emphasis upon the need of promptness in contempt proceedings in Keeber v Keeber[30] only goes on to highlight the importance attached with contempt jurisdiction of the courts by some jurists. It can be argued that this jurisdiction is justified, with safeguards. The judicial thinking reflected in Attorney General v Leveller Magazine[31] where it was held that 'It is justice itself which is flouted by contempt of court, not the individual judge who is attempting to administer it.' appears to be clear in upholding the judicial process and not the individual dignity of the judge.



The figure shows the overlap between the rights of the judge as an individual and as an officer of the court. There is a tendency of the overlap between the two but it should be minimized and if possible eliminated.

The Scales of Justice

Despite of this giving due consideration to the freedoms at stake the Supreme Court has advised caution in Jhareswar Prasad Paul[32] in the following words: 'The power is special and needs to be exercised with care and caution. It should be used sparingly by the courts on being satisfied regarding the true effect of contemptuous conduct.' In this case the court went ahead further in defining and restricting the contempt jurisdiction to avoid its misuse in the following words: 'The contempt jurisdiction should be confined to the question whether there has been any deliberate disobedience of the order of the court and if the conduct of the party who is alleged to have committed such disobedience is contumacious.'

29 Contempt proceedings should be dealt with swiftly and decisively and adjourned only where there was a real risk of serious prejudice which might lead to injustice.
30 [1996] 1 FCR 199.
31 Attorney General v Leveller Magazine [1979] AC 440.

Further, contempt of court in essence should not be contrary to the right of freedom of speech and also it should not be used for defending the judges' individual egos, or even esteem. On the other hand as held in M.R. Prashar v. Dr. Farooq Abdullah[33] the court ruled that 'The liberty of free expression is not to be compounded with a licence to make unfounded allegations of corruption against judiciary.' This demonstrates an attempt to attain the mean position of equity where on the one hand freedom of speech is protected and on the other dignity and freedom of the court to function, and its functionaries is upheld. Likewise In re Ajay Kumar Pandey[34] it was observed:

fair comments, even if, out-spoken, but made without any malice and without attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bitter themselves to uphold their dignity and the majesty of law.

This was in continuation of the above attempt of striking a balance between two opposing goals. Again in C. Elumalai & Others[35] the court held that 'punishing a person for contempt of Court is indeed a drastic step and normally such action should not be taken.' However, in the same breath the ruling goes on to add that, 'it is not only the power but the duty of the Court to uphold and maintain the dignity of Courts and majesty of law which may call for such extreme step.' This reinforces the dilemma outlined above. Likewise in M. Muthuswamy v P. Kandasamy Madras High Court while dismissing a contempt petition held it to be a well settled principle of law 'that if the action taken by the Contemnor are bona fide, without any intention to violate the order of the court, the said action cannot be treated as wilful disobedience as defined in S. 2(b) of the Contempt of Courts Act, 1971. Here the element of intention has been added to arrive at the "balance".

32 Jhareswar Prasad Paul v. Tarak Nath Ganguly, [2002] 5 SCC 352.
33 M.R. Prashar v. Dr. Farooq Abdullah, [1984] 1 Cr LJ 433.
34 In re: Ajay Kumar Pandey, AIR 1997 SC 260.
35 (C.Elumalai & Others v. A.G.L.Irudayaraj and Another, AIR 2009 SC 2214.

Definition and types of Contempt of court

In Jhareswar Prasad Paul v. Tarak Nath Ganguly[36] it was observed that 'The power to punish for contempt of court is a special power vested under the Constitution in the courts of record and also under the statute.

The Indian law as embodied in the Contempt of Court Act 1971 has in its definition (in Sec-2)[37] recognised two types of contempt of court viz. 'civil contempt' and 'criminal contempt'. The latter has been further classified into two categories: one which has ephemeral effect while the other that causes permanent damage to the institution and the administration of the justice.[38]

The judicial interpretation of civil and criminal contempt of court however may show different judicial perspective. For example In Every Women Health Centre Society v Bridges[39] the distinction is very much on the lines of classical definition of civil and criminal law i.e. civil cases involves disputes between individuals while in criminal cases the offence is presumed to be against the state. While in AG v Time[40] the civil contempt is seen as a specific act of violating a competent court's order, and criminal contempt is a commission of prohibitive wilful interference in the administration of the justice.[41]

Jurisprudence of the contempt of court is not new and is not surprising because law is associated with the authority, and to be more than a kangaroo court and dispenser of summary justice it requires people to respect it, as in Indirect Tax Practitioners Assn. v R.K. Jain the court observed that "Faith in the administration of justice is one of the pillars through which democratic institution functions and sustains." Likewise, in another case[42] the Judge DP Mohapatra observed that 'The purpose of contempt jurisdiction is to uphold the majesty and dignity of the courts of law, since the respect and authority commanded by the courts of law are

36 ibid8
37 2. Definitions - In this Act, unless the context otherwise requires - a) "Contempt of court" means civil contempt or criminal contempt" b) "Civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court. c) "Criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which- d) Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or i. Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or ii. Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner.
38 Delhi Judicial Service Association v. State of Gujarat, [1991] 3 SCR 936.
39 [1990] 54 BCLR 273.
40 [1991] 2 All ER 398.
41 ibid15.
42 Ibid.

the greatest guarantee to an ordinary citizen and the democratic fabric of society will suffer if respect for the judiciary is undermined.

This line of thinking incorporates the concept of ‘respect’. However, this respect is of that abstract entity known as ‘Court’. Which Roughly can be construed as being made up of a building, litigants, defendants, officers (including advocates), ‘procedures’, ‘ceremonies’, and ‘symbols’ of the court and authority personified by the judge. The judge may himself, or herself be the authority for ex. the king, ruler, dictator, or may have assigned authority by virtue of being a representative of the ruler, the constitution, or God.

In light of enunciation it becomes imperative that all these elements of the court must be defended, namely: the defendant, litigant, officers of the court (advocates and judges), procedures of the court, ceremonies and symbols of the court, and the source of the authority.

In theocratic societies where the source of authority of the ruler and the judge is divine there blasphemy laws are very important and they are zealously protected. In the societies where the king is the source of the authority, sedition laws are very important, which can be seen in imperial and colonial setups, likewise where constitution is the authority the basic principles including the freedom of the speech, personal liberties also become important and hence only the procedures of the court are to be guided and defended more zealously for the practical purposes.

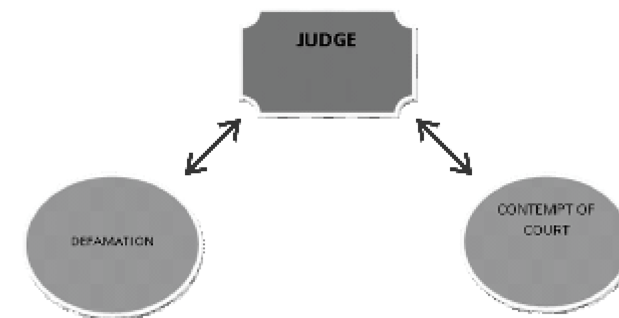
In many modern legal systems and specifically in the Indian legal system there appears to be a lack of clear understanding of these principles. In the overall picture of all the systems of legal thinking explored above it would become necessary to defend 3 things, viz. (i) Processes of the court (ii) The human elements involved (iii) The authority.

This sounds very logical and is of course necessary. Further, most of the legal systems of the world ultimately defend these three for the functioning of the legal systems. The problem is not so clear understanding of the inter-relationship between these elements and the paradigm in which they have to be protected. In India the legal system is about democracy believing firmly and vowing in, and having allegiance to the Constitution of India which is seen as the source of all judicial, administrative and executive authority. As discussed earlier in India it is important for us to uphold in any judicial proceeding the dignity of the constitutional provisions including the freedom of speech, dignity of the individual, and also functioning of the court (Art. 19(2), Art. 129, and Art. 215). In this paradigm there should be a crystal clear understanding that the judge is not the ruler, priest, or an agent of the imperial power. We primarily need to protect the judge and all other human elements as citizens. This can also be argued that the judge by virtue of holding a

constitutional position, or as a government employee himself or herself becomes a symbol of the constitution. With these concepts we should primarily defend under the contempt of court, the procedures and the proceedings.

In view of this the image of the judge should be that of a citizen first and not of a demigod, or super human being. Reflecting on other aspects the judges must by law be held as a citizen who holds a responsible office, should be addressed in consonance with the spirit of the constitutional article prohibiting titles (Art. 18). It is an anachronism that a judge be addressed as ‘Lord’ or ‘Ladyship’.

Remedies available to a Judge as an individual and as an officer of the Court



Although the judge is also a symbol of the constitutional authority but the symbol has to take a secondary role as compared to the fundamentals of the constitution namely equity, equality, and the freedom of speech. As an individual the judge can seek protection against defamation.

However, in the case of Bathina Ramakrishna Reddy[43] the court held that:

Although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character. When the act of defaming a judge is calculated to obstruct or interfere with the due course of justice or proper administration of law, it would certainly amount to contempt. Attacks upon the judges excite in the minds of the people a general dissatisfaction with all judicial determinations and whenever man's allegiance to the laws is so fundamentally shaken it is the most fatal and dangerous obstruction of justice and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges as private individuals but because they are the channels by which the King's justice is conveyed to the people.

43 Bathina Ramakrishna Reddy v. The State of Madras , AIR1952 SC 149.

Three Heads

The judge at the same time wearing the three heads, one of the private citizen and individual and the second of the public servant and third as a judge. We have already discussed the balance between judge as an individual and as the judge. However, the other axis namely the judge a public servant and as an officer of the court is also important, as S-186, IPC gives them ordinary protection against obstruction on the discharge of their duties. However, this doesn't weaken the need for the contempt laws given the very special nature of the court in the justice dispensation system.

This argument has merit, but the risk involved is obvious, and 'Clear and present danger test'[44] as practiced in deciding contempt situations in the US is certainly a step forward in the jurisprudence of contempt of court because: (i) It has tried to restrict the scope of the contempt of court jurisdiction, and (ii) It has bypassed the concept of 'dignity' and 'scandalizing'. It may arguably be said that words like 'honour' and 'dignity' are not only difficult to define, but they can be dangerous, and in many a situations courts are seen defending their dignity under the shield of the contempt laws. This to some may be reminiscent of the defence of 'honour'.

According to the Universal Declaration of Human Rights, 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[45] ' This way contempt of court jurisdiction has always to be weighed against the issue of Human Right of Freedom of speech.

Freedom of Speech

Krishna Iyer[46] very philosophically expressed his perception on the issue of contempt of court in the following words,

This shift in legal philosophy will broaden the base of the citizen's right to criticize and render the judicial power more socially valid. We are not

44 Schenck v United States [1919] 47 US 249.
45 Universal Declaration of Human Rights, Art-19.
46 Baradakanta Mishra v. The Registrar of Orissa High Court [1974] 1 SCC 374.

subjects of a king but citizens of a republic and a blanket ban through the contempt power, stifling namely, administration of justice, thus criticism of a strategic institution, forbidding the right to argue for reform of the judicial process and to comment on the performance of the judicial personnel through outspoken or marginally excessive criticism of the instrumentalities of law, and justice, may be a tall order for change through free speech is basic to our democracy, and to prevent change through criticism is to petrify the organs of democratic government. The judicial instrument is no exception.

Likewise, Lord Atkin's[47] says that 'Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men'. However, there are differing voices, for example, in Sanjiv Datta[48] the court took a contrary stand by saying that 'The court's verdict has to be respected not necessarily by the authority of its reason but always by reason of its authority.'

The Supreme Court in Rama Dayal Markarha[49] interestingly declared: "Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. In fact such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility" while refusing to consider the case of an advocate who published and distributed a paper alleging waywardness of a judge in convicting an accused without evidence to be 'fair criticism'. This demonstrates a dangerous mixture of ambiguity of language and subjectivity in interpretation of the words 'fair criticism'.

In Aligarh Municipal Boards[50] the judgement upholds the contempt proceeding by listing the following benefits: '(1) vindication of the public interest by punishment of contemptuous conduct and (2) coercion to compel the contemnor to do what the law requires of him.'

Contempt of court is a very vexed issue; it has no simple or clear-cut answers. On the one hand the freedom of speech of an individual is at stake and on the other the proceedings of the court have to be protected against threat, coercion and intimidation for the dispensation of fair justice without fear or favour. The other irresolvable issue is of the judge as a symbol of court's authority and the judge as an individual. The two

47 Lord Atkin in Ambard v Attorney General of Trinidad & Tobago [1936] UKPC 16, [1936] AC 322.
48 In Re:Sanjiv Datta [1995] 3 SCC 619.
49 Rama Dayal Markarha v. State of Madhya Pradesh, AIR 1978 SC 921.
50 Aligarh Municipal Boards and ors. v. Ekta Tonga Mazdoor Unions, AIR 1970 SC 1767.

roles of the judge are clearly distinct but the individual in the two roles is one. This leads us to the conflict between application of defamation laws for the protection of an individual's dignity, and application of the contempt of court law for the protection of the sanctity of law. This is a philosophical issue and the boundaries between the individual and the professional are bound to be fuzzy, and dependent upon perception and interpretations.

By this discussion can only hope to enrich the ongoing debate and jurisprudential thinking can inch towards a clearer understanding of the issues in whatsoever small a way, and hopefully this would also lead to a resolution sooner or later in full, or whatsoever small a fraction.

The contempt of court proceedings are not unique in the modern legal-judicial frameworks, as we also have provisions in the Indian Penal Code to provide an atmosphere of fearlessness to public servants in the discharge of their duties so that they can perform without fear or favour.[51]

In Jayarajan[52] the following points can be constructed: (i) according to the court dissection of the judgment and arguing against its legality is a fair exercise of the freedom of speech. (ii) a person has the freedom to hold their perceptions on a matter, for example in this case the defendant said that judges live in glass houses and also that the judgment's worth was less than grass. However, the court refused to accept abusive and pejorative language. This way a line was drawn by the judges, but again this is not an absolute line, it is subjective and can keep shifting from jurisdiction to jurisdiction and country to country. There are benefits of this dynamism of interpretation as it can be argued that human circumstances are so complex and varied that straitjacketed rules with no flexibility can lead to miscarriage of law more often than not, however on the flip side this very flexibility can become a victim of human biases and imperfections.

Conclusion

As we have seen in the fore going discussion, it is very difficult decision due to the considerations of the personal liberties and the societal order that often appear to be in conflict or in opposition of each other that is

51 S.186, IPC. 'Obstructing public servant in discharge of public functions. —Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.'

52 M.V Jayarajan v. High Court of Kerala & Anr, SCC OnLine 2012 Mad 3488

why arriving at a set formula for resolving all situations where contempt jurisdiction is evoked is illusive if at all possible. The issues of the contempt of court bring us face to face with the philosophical and jurisprudential issues, and have to be resolved on a care to care basis. This doesn't mean that the jurisprudence of contempt of court should not evolve, or would not evolve. Like it is true for all philosophical issues concerning law, we can say that in dealing with contempt of court cases current societal, beliefs, norms, conditions should be considered. Globalized human society as a singular entity and individual societies are moving towards the consensus of a world where human individual have greater autonomy, rights and dignity. In this perspective focus should be given precedence over 'dignity of court', but not blindly. Contempt of court jurisdiction appears to be essential and need to be applied sparingly, with greatest caution and in cases where the court purposes of this jurisdiction lie. All the superfluous cities have sediment upon the basic concepts of this jurisdiction must be dusted and removed.

Violation and Vulnerability of Human Rights in the Context of Tea Garden Workers in Assam with Special Reference to Social Protection Schemes

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Abstract

The contributions of the tea gardens to Assam's economy are enormous. The tea garden workers also have contributed to the culture of Assam over the period. Yet, there are recurrent problems pertaining to various aspects of the social and economic conditions of the tea garden workers in Assam. In everyday life, most of the plantation workers have a very low income and most of them lead a low quality of life. They are deprived of the basic facilities needed to live a decent life. Despite the existence of many well-intended social welfare programmes of the government, which are meant to uplift them from the vulnerable conditions, these groups are lacking any effective access to those programmes. Through qualitative data, this paper aims to understand the vulnerabilities of the tea garden workers, violation of their rights to have a dignified life and the barriers in having access to various social welfare schemes of the government. The paper explores conditions of tea garden workers through the assessment of their awareness level on various social welfare and entitlement schemes. Finally, this paper explores the possibilities of human rights approach to address the glaring problems faced by the tea gardens workers perpetually.

Key words: - Tea Garden Workers, vulnerability, health, education, estate.

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Introduction

Since the colonial times, many workers were brought in or came seeking work in the tea gardens of Assam, from areas that today form parts of the states of Orissa, Bihar, Chhattisgarh, West Bengal and Jharkhand. As the trade in tea grew, the lives of the local people and these outside workers became intertwined with the happenings at the tea plantation or the tea "estate". The tea estates were, and are still, run on a capitalist mode for profit basis. The workers or the labour force forms the last link in this chain. The managers and owners of these estates are incentivized to earn the maximum and keeping the costs of production at the minimum. In most cases, the labour force also lives onsite in the estates; in what are called 'Labour Lines', or in some cases, temporary housings. Their non-work life is also part of the tea estate. Children grow up on the estate; they study there; places of worship are built within the boundaries; festivals are celebrated; clinics are built inside the plantations; and in some cases, even funeral processions start from the estate.

When we look into the provisions available for the workers, they are evidently found to be not adequate. They have been controlled and dominated by the tea plantation management. To address their issues, Government of India passed The Plantation Labour Act (PLA) in 1951 with the intention to break the centrality of control and power held by the employers and to provide some semblance of a framework of minimum labour rights to the plantation workers. The Act speaks, amongst other things, of the responsibilities of the plantation owners to provide adequate housing, drinking water and sanitation for all workers, educational and crèche facilities for children, maternity and leave allowances, and guidelines for daily working hours etc. However, as is seen, this Act has remained largely without proper enforcement, or else its requirements have been superficially fulfilled over the years. It may not also be possible for the plantation management to fulfill all the requirements of the act without taking support of the social protection and social welfare schemes provided by the Central and Assam government. It has been reported that,

Violations of the PLA in relation to health care, housing and sanitation are widespread. Workers live crowded together in cramped quarters with cracked walls and broken roofs. The failure to maintain latrines has turned some living are as in to a network of cesspools. APPL is failing to provide adequate health care, both in respect of quality and access (Rosenblum & Sukthankar 2014, p. 9)

The tea garden workers and their welfare can no longer be seen as an isolated agenda wherein the tea garden authorities hold the main stake and are obligated to provide for their entitlements. The State and its

mechanisms are very much relevant for the tea workers through the various state institutions, social protection programmes and administrative authorities prevalent in their everyday lives. The Plantation Labour Act (PLA) mandates all tea garden authorities to create provisions for the fundamental developmental needs of the worker families including food security, health, education, social security, shelter etc. However, on the onset of an umbrella of development programmes especially with the passage of landmark Acts like the Right to Food, the Right to Work and the Right to Education, it needs be established and understood that the tea garden laborers (TGL), which comprise almost 20% of Assam's population and are amongst the poorest and most vulnerable citizens, are equally eligible to access all these entitlements and schemes. The PLA, instead of becoming a conflicting piece of legislation in this context, should actually be synchronized with other legislations so that it can be complemented; and the broader objectives of development of the tea garden worker families can be materialized. The tea estates run by the State Government has relaxed all prohibitions; and has allowed the implementation of its all Social Protection (SP) programmes within the estate areas. Thus, examples like these can inform the broader process of consultation to be followed between the State and the tea associations. Strong political drive and governmental strategy are required for this, along with strengthening of grassroot-institutions like the Gaon Panchayat. Social Protection schemes and legislations such as National Food Security Act (NFSA), Indira Gandhi National Old Age Pension Scheme (IGNOAPS), Mid-Day Meal (MDM), Right to Education (RTE), Janani Suraksha Yojana (JSY) are significantly impacting the tea garden populations, especially the women and the children, as highlighted by this study. On the other hand, several schemes face issues like Indira Awaas Yojana (IAY, later rechristened as Pradhan Mantri Gramin Awaas Yojana or PMGAY), Rashtriya Swasthya Bima Yojana (RSBY), Swachh Bharat Mission (SBM) etc.

What is needed is bridging a common ground towards developing uniform approaches and codes of implementation of Government's SP schemes and programmes in the tea garden areas along with an acknowledgement of the fact that the tea gardens comprise major portions of the some of the GPs. This link between the GP and the tea plantation is the most important to be addressed to, if the potentials of these schemes and programmes to alleviate the poverty of the tea tribe populations are to be actualized. Finally, in the current scenario, it would be erroneous to consider only the tea garden workers, undermining the entire population as a whole thriving and surviving within the tea estates who need to be seen as citizens first and worker later.

Social protection deems the reduction of vulnerability, and wellbeing and development of its citizens as the responsibility of the state. The long struggle of the tea plantation community for its rights from their employers has led to a few achievements but the condition of the women, children and the vulnerable is still far from ideal. Thus, understanding of the responsibility of state towards the welfare of the plantation workers is crucial in using the social protection schemes to reduce their vulnerabilities. This paper tries to understand the local governance system with respect to the developmental and social welfare schemes of the government for tea garden workers.

Methodology

This paper is an outcome of a qualitative research conducted in various tea gardens of Sonitpur, Nagaon and Dibrugarh districts of Assam. Through semi structured interview schedule, it is attempted here to highlight the relevant problems in implementation of social protection schemes in the tea producing areas of Assam. Due to confidentiality of the participants in the research, the names of the gardens are not mentioned in the paper.

Sampling

Sampling is one of the important steps in any systematic study. Selecting the tea estates to be studied was crucial to this study. There was an attempt to be geographically varied in the selection of the estates in order to capture regional variations. There was also an effort to include a variety of tea estates ranging from small to big ones, and from the ones privately owned to those owned by the government. There were also access, logistical and time frame restrictions that prevented the selection of the tea estates from being an exact science. Based on the above considerations, it was decided to choose tea estates spread across 3 districts on Assam. A total of 9 tea estates were selected via purposive and convenience sampling.

It was decided, based on the experience during the sample site visits and to maintain the veracity and integrity of the data, to directly approach the workers at the tea estate without using the management as a conduit. In some cases where it was felt that there would be problems if the management were not notified about the study, they were duly notified. During the study there were issues with respect to access of the researchers to the tea estates due to strict vigilance of the tea garden management.

Contextualizing Rights and Development

In one of his most celebrated works, Development as Freedom, Amartya Sen argues that economic development requires a set of inter-linked freedoms. These are political freedoms, freedom of opportunity and freedom from abject poverty. He suggests that poverty should not be counted only on economic terms, instead it should include political rights and choice, freedom from vulnerability to coercive relations, and exclusion from economic choices and protections. Sen opines that real development is not about simply increasing incomes rather, it is a combination of overlapping mechanisms that help in achieving real development which can be termed as freedom (Sen 2001).

Another significant approach namely capability approach has been developed by Amartya Sen and Martha Nausabaum (2011). They have argued that the real development means the enhancement of human capability to fuller development. But these works have been criticized for not considering the issues of capitalism and neoliberalism. Sandboork (2000) argues that capitalism and neo-liberalism have decreased the freedom among the marginalized and poor people.

Shelton & Turner (2013) argue that lawyers, philosophers, and historians have dominated the academic study of human rights. The academic practice of rights is mostly confined to the areas of political philosophy and legal theory —justice, entitlement, dignity, and legality (the rule of law). Sociologists are mostly absent from the study of human rights as they think it comes under normative study. Thus, sociologists thought that to talk of human rights in universal sense may give rise to the cultural relativism. All social groups are different and they have different specificities. So, it is difficult for sociologist to formulate or argue for any common type of rights which may be applicable to all. Again, Shelton and Turner (2013) opine that the underdevelopment of sociology of human rights may be further attributed to the influence of 'methodological nationalism'. Sociologists are mostly concerned about the rights of the citizenship.

Hynes, Patricia et al (2010) mention that sociologists have struggled to negotiate their relationship to human rights, yet human rights are now increasingly the focus of innovative sociological analysis. They have analyzed the trajectory of sociological study of human rights through Marx and T.H. Marshall's analysis of citizenship rights. Bryan S Turners work on sociology and human rights along with the works of Lydia Morris and Anthony Woodiwiss strengthen sociological approaches to understand human rights. They urge sociologist to work more in the area of human rights to renew it as a sub-discipline of sociology like political sociology or economic sociology. They appeal to explore the relationship

between the individual and the social; to explore the inequality and to look for the development of interdisciplinary. So, a meaningful and more effective method could be developed to analyze the rights of the humans and citizens.

If we one considers the tea gardens of Assam. The gross violation of human rights is clearly visible. Many studies have shown the plights of the workers and their family members in the tea gardens of Assam. The plights of the tea garden workers are not limited to Assam only. It is also seen in gardens of north Bengal and Bangladesh.

Das (2013) explains that mostly the labours are governed under the tea estate and the government hardly interferes in their lives. After various advocacy groups advocated for the betterment of tea garden labour, state has started some serious initiatives for them. It is often seen that they are victims of double burden. Das terms this as estate within the state. Political leaders, panchayat members often do not take up the issues of the tea garden labours. This is because they live inside a protected area. It is also termed as walled area, hardly are they visible to the outside world. Hence, they are ignored in many such occasions. Women folk work hard. They don't get any better pay. Because of their risky nature and hazardous job, they are prone to various kinds of health risk. They are married off in a very early age. Due to lack of good health practices, hazardous working condition they fall ill. They are also prone to abuse and battering by their husbands. In tea gardens, the problem of alcohol is widely prevalent (Das 2013).

Contextualizing Martha Nussbaum (2001) will be pertinent here. She argues that in the case of "adaptive preference," where the preferences of individuals in deprived circum stances are "deformed" by poverty, marginalization and deprivation, the deformed preferences do not contribute to well-being. Shelton & Turner appeal to protect human beings from the vulnerability. They argue that:

human beings are ontologically vulnerable and insecure, and their social and natural environments are fragile. In order to protect themselves from the contingencies of the everyday world, humans must create and sustain social institutions that collectively constitute what we call 'society'. Humans depend on institutions rather than instincts. The family, kinship groups, tribes, and wider communities are all means of mutual support. In more complex societies, these protective institutions come to include a wide range of institutions, most obviously the law. (Shelton & Turner 2013, 4-5)

To understand the intricacies of the situation, it may be argued that sociology could play an important role in the field of human rights and help in exploring ways to find solutions to the problems. In teagardens,

the labourers are seen as a mechanized form of labour debarring them from the human agency.

Access to healthcare and health insurance

Significant difference can be observed in medical facilities between temporary and permanent worker families of the tea gardens. Of the families interviewed in this research, 36 of them had one member in each who was either physically disabled or sick. Among these 36, 9 families were without any permanent worker in them and had no access to the medical benefits and entitlements applicable for the permanent worker families. Of the 27 families with one permanent worker in each and having at least one ill/disabled member in the household, 13 said to have received some sorts of financial and other supports from the tea garden hospital. The support received varies from full reimbursement or free medical checkup to partial reimbursement in case of referral services. For the permanent workers, though their family members also are eligible to access the health facility within the tea garden, the expenses are reportedly debited from the earnings of the concerned worker.

Despite these discrepancies, people approach the tea garden hospital first for their medical conditions. The hospitals mostly attend to cases of minor and everyday ailments, including antenatal care services. However, for any case requiring secondary treatment, referrals are a common and almost universal practice found in all tea gardens, irrespective of the capacity or obligation of the garden hospital to treat these cases. Of the 19 tea garden hospitals visited in this study, around 50% of them forward patients for referral services even in cases of normal childbirths.

Due to the presence of accredited social health activists (ASHA) for providing services related to pregnancy and childbirths, women within tea gardens are availing an additional support regarding antenatal care. ASHAs are instrumental in facilitating pregnant women for approaching hospitals outside the tea garden for caesarean operations and helping them in availing benefits of the Janani Suraksha Yojana. This is the only support that women everywhere reported to have availed, and acknowledged the services provided by the ASHAs. Even then, availing treatment outside of the garden hospitals put heavy expenses on the family, as hospitals charge a minimum of Rs 5000/- for cases other than normal childbirths which has to be borne by the patients.

Considering the proportion of income that is spent on healthcare, most of which is unplanned, there is no insurance facility for the people to access and avail. Strikingly, there are many people in tea gardens who have been enrolled in the Rashtriya Swasthya Bima Yojana that grants an insurance cover of Rs 30,000 for Below Poverty Line (BPL) families in a year. This

was evident while interacting with workers who showed Smart Cards with registration numbers. However, none of them know how to avail the scheme. They have no idea of the concept of empanelled hospitals; and said that whoever had tried to access the amount always got rejected by hospital authorities. This was the case in all of the 19 tea gardens visited in connection to this study. Lack of access to avail any insurance scheme further heightens the risk of a household due to unpreparedness and without any major savings.

Implementation of housing schemes

This study covers the implementation of the erstwhile Indira Awas Yojana (IAY). During the field visits, the access of beneficiaries to the scheme IAY was found in 11 of the 22 tea estates visited; however, there were several issues regarding the implementation. As is the case with all other schemes, the allotment of housing under the scheme is assigned within the jurisdiction of concerned Gram Panchayat. Moreover, the priority of beneficiaries to be allotted a house under the scheme has been identified and finalized through an online management information system (MIS) called AwaasSoft.

In half of the tea estates in which the scheme wasn't being accessed by people, the conflict of land ownership was the major obstacle. There are several tea estates as mentioned above in which the management has identified barren land lying unused within the estate territory in which they have allowed for houses to be constructed. There seems to be a confusion and lack of clarity regarding the status and eligibility of the casual workers for availing of the scheme both in the case of the management as well as the GPs. As mentioned earlier in detail, this was the major reason for non-implementation of this scheme in half of the tea gardens visited.

No work for Worker

The most striking thing about MGNREGA observed in all tea estates is that in almost all tea gardens, majority of the households are enrolled and have job cards. The GP representatives in all tea gardens claimed that a large proportion of job card holders within the panchayats are comprised of workers belonging to the tea estates. For instance, in one tea estate as per the GP, there are 1434 job card holders of which 75% belong to households within the tea estate. This might be explained by the nature of entitlement that pushes the state to ensure full coverage of eligible households so that each household can demand for work. But, as is the case with MGNREGA everywhere, the demand aspect of the entitlement is never realized and more often the people are unaware that they don't

have to depend for work upon the authorities or the GP and that it is their right. The entitlements under MGNREGA have immense potential to supplement the incomes of especially casual or temporary workers who are unemployed for half of the year within the tea estate. In 4 tea estates, people have said that there hasn't been any work since the past three years and apart from two to three tea gardens in which workers have talked about being engaged in some kind of work under MGNREGA, mostly it is a sorry state of affairs as derived from the various conversations and interactions regarding access of people to the right to work. The most important point that could be inferred from all the field interactions is a notion that there hasn't been any kind of work in the last two to three years in not only in and around the tea estates but within the GPs as a whole. Interestingly, in terms of assets constructed in MGNREGA, there was no talk of confrontation with the tea garden authorities as such. This could be understood from the fact that majority of assets sanctioned under MGNREGA are community assets like roads, ponds, drains, earth filling and land leveling etc. which are supplementing the obligations of the authorities.

Mid-Day Meal Scheme

India is lagging behind in terms of nutritional intake and enrolment in the educational institution. To improve the condition, both with regard to nutritional levels among children enhancing enrolment, retention and attendance, the national programme of Nutritional Support to Primary Education (NP-NSPE) was launched as a Centrally Sponsored Scheme on 15th August 1995. In 2001 MDMS became a cooked Mid-Day Meal Scheme under which every child in every Government and Government aided primary school was to be served a prepared Mid-Day Meal with a minimum content of 300 calories of energy and 8-12 gram protein per day for a minimum of 200 days. In July 2006, the scheme enhanced the cooking cost to Rs 1.80 per child/school day for States in the North Eastern Region and Rs 1.50 per child / school day for other parts in India. The nutritional standard was also revised to 450 Calories and 12 gram of protein per child or student. In October 2007, another important change was brought in: The Scheme was extended to cover children of classes till VIII in Educationally Backwards Blocks (EBBs). The name of the Scheme was changed from 'National Programme of Nutritional Support to PrimaryEducation' to 'National Programme of Mid-Day Meal in Schools'.

Mid-Day Meal Scheme in Schools of Tea Gardens

The Headmaster of one tea garden school claimed that the school serves

mid-day meals as per the menu provided to them by the government. He said that even if there are delays in payment from the government side, they bring the commodities on credit so that the children are not deprived. During one visit to the school during lunch time, it was seen that students were being handed over packets of biscuits. Concerned teachers were unavailable at that time but the cook said that due to unavailability of logs, they could not serve the mid-day meal. On asking students for the duration that they have been getting biscuits, they said it had been for almost 10 days. There were two more such schools where children were not being provided the MDM as observed during the field visits.

In some schools, the kitchen space was found to be placed in an open and inconvenient setting, with temporary sheds outside the school without any proper structure. Moreover, the fund flow is claimed to be regular and not much of an issue, two schools were found to be providing other food like biscuits and puffed rice in place of the scheduled menu. There are also grievances among some teachers of tea garden schools regarding the added workloads, which, for them are disproportionate in comparison to the teachers of government schools.

Act and Provisions

The Planation of Labour Act of 1951 could have been better used to uplift the lives of workers. Rather it creates bottlenecks for the implementation of various welfare programmes. According to PLA, the garden management should provide housing, recreational, educational or other facilities required for the workers along with a right to have basic dignified life (https://labour.gov.in/sites/default/files/The-Plantation-Labour-Act- 1951.pdf). But we see a different scenario in the tea gardens. Due to various irregularities of the tea garden management, workers often suffer. To curb these kinds of action, through a landmark judgement, the supreme court of India has given direction to 4 states to make interim payment of Rs 127 crores to tea garden workers who had not been paid for 15 years. Through the judgment wide: International Union of Food Agr & Ors V Union of India & Ors. Writ Petition (C) NO. 365 of 2006, Supreme Court directed the states of Assam, Kerala, Tamil Nadu and West Bengal to make an interim payment of approximately Rs 127 crores to the workers of the tea garden in these states whose legal dues had remained unpaid for over 15 years. It has been reported that hundreds of the workers had died out of starvation during this period. The Supreme Court also summoned all the companies who were doing the malpractice. The decision brought a huge relief to the over 300,000 tea garden workers who had been living a wretched life for the last twenty years or so.

Conclusion

The study on the plights of tea garden workers reveals that the well-intended social welfare programmes of the central and state governments are not reaching to the real needy. Barriers and bottlenecks created between the demand and supply by the estate. It is seen that tea garden management are not willing to open the accessibility of the workers by the state machinery. They fear that they may lose control over them. An unseen form of bondage and control creates loyalty and allegiance towards the tea estate. Therefore, it is very hard for the workers to break the glass and come out of the garden. There is very limited scope of upward mobility. Hardly there is any choice to decide, they are forced to live in a wretched condition. It violates the basic human rights to have a dignified and well-meaning life.

Food Security is a major concern for the laborers. The most vulnerable people are women and children. They suffer from various diseases. The MMR in the tea garden in highest in the country. They struggle to acquire nutritious food along with the other fundamental needs like health and education comprising of minor proportion of their expenses. Out of pocket expenditure in health is another crucial issue as most of the tea garden hospitals are in defunct condition. Schemes like The Rashtriya Swasthya Bima Yojana, Swachh Bharat Mission, PM Awas Yojana are schemes which are either not reaching the people at all or face issues regarding their implementation because of the bottlenecks created by the tea garden management. Visits to two government tea gardens revealed that they had completely allowed all departments and state agencies to work within the territory of the estate. This might also be influenced by the fact that these state-run tea gardens were in a poor shape owing to losses and so the authorities are more flexible to allow for these schemes in order to compensate for their obligations which they are finding it difficult to meet. There was no uniform pattern or guidelines followed for the implementation of SP schemes within the tea garden areas. While many tea gardens have issues of conflict with the management authorities regarding issuance of NOC for infrastructure related schemes, on the other hand there are random instances whereby the tea management has collaborated with state agencies and departments for allowing infrastructure to be built for the tea populations. The major actors identified during the study who are responsible for bridging the gap between the tea garden populations and the government administration in terms of accessing the schemes are Ward members of GPs, Student Union leaders in many places and ASHAs.

Uniform guidelines related to implementation of social protection schemes in tea gardens: the implementation of schemes, especially related

to infrastructure like PMAY, MGNREGA, SBM etc. are in a confusion owing to lack of clarity in guidelines or directives from the government. There is a need to have an immediate cooperative effort between the tea estates and the State govt. to jointly develop some basic uniform guidelines for the implementation of all SP schemes in the tea gardens. Study to assess the proportionate allotment of scheme benefits to tea garden workers: There is a need for analysis of the share of the tea garden worker populations to the overall scheme beneficiaries. It would help to provide an accurate assessment of the level of access of scheme benefits and entitlements and reach of the schemes to the large cohort of tea tribe populations.

Link between Gram Panchayat (GP) and tea garden needs to be strengthened: even though the GP in Assam is still not primarily implementing all SP schemes, yet it is the primary unit of planning, identification of beneficiaries and implementation. However, the most important point of observation in this field study was the complete lack of awareness and participation of the people in the tea estates in the GP processes. There has to be concerted efforts and grassroots mobilization to include tea garden workers in the Gram Sabhas for their inclusion. Need for universal social protection programme: Scope of certain schemes is limited against the target population. There is a need to explore the possibility for an integrated and universal social protection programme especially targeted towards the most vulnerable. Awareness among the tea garden workers and entitlements – the tea garden workers need to be sensitized and made aware of the Social Protection schemes and entitlements that they are eligible for being citizens of the state apart from the entitlements as workers obligatory on the estate authorities.

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UNCRC and Child Rights Development History in India

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Abstract
Nation's children are regarded as a supremely important asset of the country and this is justified since the future and well-being of the nation is dependent upon them. In order to empower them, certain right needs to be vested on them. In a country like India with a population of over one billion, it was definitely difficult to establish child rights but the development has been significant. In this paper, we are going to shed light on the constitutional provisions surrounding child rights in the country, along with United Nations Convention on the Rights of the Child's (UNCRC) growth. Though, the growth of child rights has been very vast, we would be focusing on the aspect of UNCRC and its influence in India. Lastly, we have elaborated the term 'child abuse' since it is an issue for not just India but the whole world and we conclude the paper with our observation regarding the development.

Key words: - Child rights, development, UNCRC, child abuse, constitutional provisions.

Introduction

A nation's children are a "supremely important national asset", and the future well-being of a nation depends upon how its children grow and develop. It is the duty of the state to look after a child to (or "intending to") ensuring full development of its personality. The rights of a child are usually complex in understanding because of the special attention they

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require. The world 'child' has been used in respect of something that requires specific protection. Acts like the Indian Majority Act are established only to bring a uniform platform for the laws to serve all the citizens. In the text of constitution of India or in the General clauses Act of 1873, the word child has not been defined, but the meaning has always been associated with a relative term known as 'minor'. It is defined in the Indian Contract Act, 1872. To properly analyse the definition of a child, it is important to look at the definition laid down by the United Nations convention. 'A child means every human being below the age of eighteen years unless, under the law applicable to the child, the age of majority is attained earlier'. Being said that, an absolute definition simply put forwards who can be termed as a child, but the depth of the word and the responsibility attached towards it is much more complex than that. In popular judgments, it is laid down that, 'a nation's children are supremely important national asset and the future well-being of a nation depends upon how its children grow and develop. To ensure the future, it is essential for the state to look strictly at the rights of the children and how they are being exercised.

Constitutional Provisions

Part III of the fundamental rights of constitution of India talks about the rights which are enforceable in a court of law and the other is mentioned in part IV of directive principles of state policy, these are made enforceable by the law. Article 19 of constitution of India talks about the fundamental rights if Indian citizens, including the children:

- Article 21A of the constitution of India talks about compulsory and free education of all the children between the age group of 6 to 14 years.
- Children till the age of 14 are protected from employment involving hazardous elements under article 24 of the constitution of India.
- Occupations which are not suited for a child that involve them being abused and burdened under economic necessity are kept afar from children under article 39(e) of the constitution of India.
- All the basic facilities for the development and equal opportunities are provided to the children, along with uplifting their morals and dignity are offered under article 39(f) of the constitution of India.
- Childhood care and free education to all the children till they attain six years of age are provided under article 45.

Different viewpoints towards the fundamental rights have emerged over the course of time, enabling the constitution to expand the ambit of fundamental rights that will best suited for the citizens of the country. This has also supported in making right to education as a fundamental

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right for the children aged between 6 to 14 years of age with a qualification of high school.

UNCRC

The United Nations Convention on the Rights of the Child, or UNCRC, is the basis of all of UNICEF's work. It is the most complete statement of children's rights ever produced and is the most widely-ratified international human rights treaty in history.

The Convention has 54 articles that cover all aspects of a child's life and set out the civil, political, economic, social and cultural rights that all children everywhere are entitled to. It also explains how adults and governments must work together to make sure all children can enjoy all their rights. Every child has rights, whatever their ethnicity, gender, religion, language, abilities or any other status. The Convention must be seen as a whole: all the rights are linked and no right is more important that another. The right to relax and play (Article 31) and the right to freedom of expression (Article 13) have equal importance as the right to be safe from violence (Article 19) and the right to education (Article 28). The UNCRC is also the most widely ratified human rights treaty in the world – it's even been accepted by non-state entities, such as the Sudan People's Liberation Army (SPLA), a rebel movement in South Sudan. All UN member states except for the United States have ratified the Convention. The Convention came into force in the UK in 1992.

The four general principles of the convention are listed under the article 2 (Non-discrimination), article 3 (best interest of the child), article 6 (right to life survival and development), and article 12 (right to be heard).

UNCRC and its Influence in India

There have been multiple initiatives taken by people throughout the world to uplift the child rights and spread awareness about it. Be it international treaties or simple documents enacting the same, the world has come a long way in realising the importance. One of the very first step taken by the UN was the introduction of the United Nations International Children's Emergency Fund which was initiated in the year 1946. It turned out to be extremely popular and currently known by its abbreviation as UNICEF. The UN declared the rights of a child around the year 1989 in a document, but it was not a legally binding document but a document of moral conduct for the countries. However, in the following year a legally binding document was declared in the UNCRC which included 54 articles that touched all the major corners of the topic, right to development, right to participate, right to protection and right to

life. This was active by September 2, 1990, and created a milestone throughout the world in recognising child rights and their importance.
While the rest of the world had recognised the articles of the CRC, India did not take much time in adapting its laws with it. The first initiation would be the 1997 report submitted to the committee of child right. The sole reason for this report was to draw a picture in front of the committee so they get an idea about the current condition of child rights in India. This report provided a brief idea regarding the work of the ministries, the work of state government, and the government working with reputed NGOs and India's efforts as a whole towards the act. The report also talks about the civil rights of the people and how it is relevant to the children and proper care, nutrition, freedom that is required by the children.
The committee properly analysed the report and provided a list of recommendations that more or less addressed every major problem in India. This recommendation also made it possible for the country to work on some of the most sensitive areas and fight back with child rights violations properly. The recommendations made it possible for the country to find all the possible mediums to ensure the implementation of legislations that are related to children. A new and comprehensive nation-wide plan was introduced to collect detailed information about the issues and solutions were formulated accordingly. Some other rights of children such as, rights against discrimination, rights of a child in custody and rights of differently abled children were also a part of this recommendation.
The second report was the 2001 report by the government of India. Other than acknowledgment of the recommendation from the 97 report, the 2001 report spoke about the juvenile justice (care and protection of children) act, the national commission for children and the amendment of the infant milk substitutes, feeding bottle and infant foods regulation of production, supply and distribution Act. The recommendations by the committee to this report was remarkable as it touched almost every important issue associated with rights of a child. It spoke about optimum utilisation of budget on child right realisation and how to involve NGOs in this cause. The recommendation also laid down systematic procedures to eradicate negative influences and worthless customs that do not adhere to morals and made sure the discrimination stays at bay. Apart from social norms, it also drew attention towards the universal adoption code and legislations that prohibit/protect children from sexual exploitation along with spreading awareness about child health. Lastly, it strongly recommended an amendment in the child labour act [13] to make it stricter and extend the ambit of the Juvenile Justice Act to the State of J&K. This report also made sure child helpline centres are established

throughout the country.

Child Abuse

According to black's law dictionary, 'child abuse' is defined as any form of cruelty to a child's physical, moral or mental well-being. It is also used to describe some forms of sexual attack which may or may not amount to rape. To make it wider, the black law's dictionary defines abused and neglected children as those children who are suffering from serious physical or emotional injury inflicted on them, including malnutrition.
When a person below the age of 18 years has suffered emotional, economic, physical and sexual ill-treatment, it amounts to child abuse. In India, the increasing in the socio-economic standards and broader aspects of lifestyles have majorly increased the risk of children being prone to different forms of abuse. It can be easily termed as one of the worst human rights violations to a child when he is abused. This is a problem of the highest order and needs critical attention towards it at all times. This term may have varied definitions according to situations but it cannot be disregarded as one of the primary agendas of international human rights.
When a child is found to be begging or he is found to be a street child, then it is defined as child abuse [15] as under the juvenile justice (care and protection of children) Act, 2000 [16]. Further, children without home or without having an ostensible means to survive are also categorised under the act as abused. It is a primary phenomenon and it is interpreted differently but the primary objective remains the same. Summing them up, the practical world speaks volume about child abuse as children are being involved in begging, making them work in conditions prone to hazards, sexual abuse etc.

Conclusion

'The importance of child welfare services lies in the consideration that personality of a man is built up in the formative years and the physical and mental health is determined largely by the manner in which the child is shaped in early stages'. Considering all the different growths in this sector throughout the world and the way people are ready to acknowledge the problem and deal with it, India has come a long way in addressing child rights and its impact on the society. While the people are moving forward, it is necessary to accept the fact that the future of a nation lies with the children. While India is dealing with it efficiently, the results are evident in the progress that is witnessed in the past decade. The child mortality rates have reduced and literacy rates in the country have become better than before. The survival rates of children have gone up

and the number of students dropping out of school has decreased significantly. The governments along with the people of the country are doing there level best in determining the actual problem and working towards it to deal with it. Though, the developments still have glitches that bring it down, since there are a lot of fallouts that are witnessed over the years as well. The offence that involves children like child abuse and child right violations to have a broader picture, are not just offences to the child; they are offences towards the entire society.

There are certain things that elders need to know about the growing up period of a child, out of which it is clear that they are vulnerable to their surroundings. Needless to say, it is extremely essential to keep a vigil eye on what they perceive from the world. A suitable environment would only come from a place where the children are sufficiently protected, and they do not feel like being exploited. Apart from state responsibility, individual responsibilities should be taken as well to secure the rights and ensure a better future for the children of our country.

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Surrogacy in India and UK: Comparative Analysis

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Abstract

Surrogacy is a recent global movement in which a woman bears a child for a couple who are unable to produce children in the usual way. It is an issue of Human Rights for more than one party. This paper talks about surrogacy and its type with their laws in different countries. Commercial Surrogacy is a new form of exploitation and trafficking in women and hence is banned in many countries as it is seen as commercialization and objectification of the baby. The Surrogacy Bill, 2016 is briefly discussed with landmark cases followed by the status of surrogacy on various basis for countries like India, UK, Netherlands, Greece, Russia and countries of Africa. The paper concludes with some suggestions and recommendations including modification and simplification of adoption laws in India.

Key words: - Surrogacy, global, commercial, trafficking, adoption laws.

Introduction

Surrogacy is presented as a method of medically assisted reproduction among others, a treatment for infertility. Surrogacy is where a woman agrees to carry other's baby in her womb. The baby implanted is genetically related to the parents and in most cases is only option left with parents. The unrelated embryo is implanted in women's womb and she acts as carrier.

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53 The Warnock Report (1984).

According to the Black's Law Dictionary, surrogacy means the process of carrying and delivering a child for another person. The New Encyclopedia Britannica defines 'surrogate motherhood' as the practice in which a woman bears a child for a couple unable to produce children in the usual way. It is often depicted as a generous altruistic action meant to help couples who cannot naturally have children, to offer them the joy of parenting. Surrogacy is a global movement today. The Report of the Committee of Inquiry into Human Fertilization and Embryology[53] defines surrogacy as the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth.

The word "surrogate," is rooted in Latin "Subrogate" (to substitute), which means "appointed to act in the place of." Altruistic surrogacy is where a surrogate mother agrees to gestate a child for intended parents without being compensated monetarily in any way. In other words, this is in effect a free surrogacy. Whereas, commercial surrogacy is an option in which intending parent offers a financial incentive to secure a willing surrogate.

Types of Surrogacy

1. Traditional or Partial Surrogacy: In this process only the intended father's sperm is used to inseminate surrogate mother as her egg will be used via intrauterine insemination (IUI), in-vitro fertilization (IVF) or home insemination. Here, child is related to father but not the intended mother.
2. Gestational or Total Surrogacy: When the intended mother is not able to carry a baby to term due to hysterectomy, diabetes, cancer, etc., her egg and the intended father's sperm are used to create an embryo (via IVF) that is transferred into and carried by the surrogate mother. The resulting child is genetically related to its parents while the surrogate mother has no genetic relation.
3. Gestational Surrogacy and Egg Donation: If there is no intended mother or the intended mother is unable to produce eggs, the surrogate mother carries the embryo developed from a donor egg that has been fertilized by sperm from the intended father. With this method, the child born is genetically related to the intended father and the surrogate mother has no genetic relation.
4. Gestational Surrogacy and Donor Sperm: If there is no intended father or the intended father is unable to produce sperm, the surrogate mother carries an embryo developed from the intended mother's egg (who is unable to carry a pregnancy herself) and donor sperm. With this method, the child born is genetically related to the intended mother and the surrogate mother has no genetic relation.

5. Gestational Surrogacy and Donor Embryo: In order for a pregnancy to take place, a sperm, egg, and a uterus are necessary. When the intended parents are unable to produce sperm, egg, or embryo, the surrogate mother can carry a donated embryo (often from other couples who have completed IVF that have leftover embryos). The child born is genetically related neither to the intended parents nor the surrogate mother. Egg and sperm are extracted from the donors and in vitro fertilized (creation of the embryo in a petri dish) and implanted into uterus of the surrogate. This is an expensive procedure. Again, the unused embryos may be frozen for further use if the first transfer does not result in pregnancy.

According to another classification surrogacy can be categorized as either altruistic (non- commercial) or commercial is the term used to describe the situation where there is no formal contract or any payment or fee to the birth mother. It is usually an arrangement between very close friends or relatives. In altruistic surrogacy, the essential elements are child-bearing by a surrogate mother, termination of her parental rights after his birth and payment of money by the genetic parents. The surrogate is paid merely to recompense her for the pain undertaken by her and includes reimbursement of medical and other expenses or is not paid at all.

In contrast thereto, commercial surrogacy involves payment of hefty sum of money as income to the surrogate for the service offered by her plus any expenses incurred in her pregnancy and surrogacy is thereby looked upon as a business opportunity. It is a business like transaction where a fee is charged for the incubation service, in consideration of the birth mother surrendering the child at birth. There are usually financial arrangements like the above in addition to ancillary expenses, loss of wages etc. And often stipulates behavior the birth mother agrees to undertake (e.g. undergoing tests, or having an abortion if fetus is defective or avoid smoking and drinking). The commissioning couple and the birth mother are often strangers.

Enigmatic Legality of the Concept of Surrogacy

As far as the legality of the concept of surrogacy is concerned it would be worthwhile to mention that Article 16.1 of the Universal Declaration of Human Rights 1948 says, inter alia, that "men and women of full age without any limitation due to race, nationality or religion have the right to marry and found a family". The Judiciary in India too has recognized the reproductive right of humans as a basic right. For instance, in B. K. Parthasarthi v. Government of Andhra Pradesh[54], the Andhra Pradesh

54 2000(1) ALD 199

High Court upheld "the right of reproductive autonomy" of an individual as a facet of his "right to privacy" and agreed with the decision of the US Supreme Court in Jack T. Skinner v. State of Oklahoma[55], which characterized the right to reproduce as "one of the basic civil rights of man". Even in Javed v. State of Haryana[56], though the Supreme Court upheld the two living children norm to debar a person from contesting a Panchayati Raj election it refrained from stating that the right to procreation is not a basic human right.

Indispensable need of Surrogacy Law in India (Two Landmark Cases)

In the past decade, commercial surrogacy has grown tremendously in India. It is currently estimated to be a $2-billion industry. Before November 2015, when the government imposed a ban, foreigners accounted for 80 per cent of surrogacy births in the country. This is because most countries, barring a few such as Russia, Ukraine and some U.S. states, do not permit commercial surrogacy. Many countries in Europe have completely prohibited surrogacy arrangements, both to protect the reproductive health of the surrogate mother as well as the future of the newborn child. The debate began when, in 2008 Baby Manji Yamada vs. Union of India[57] case where a Japanese doctor couple commissioned a baby in a small town in Gujarat. The surrogate mother gave birth to a healthy baby girl. By then the couple had separated and the baby was both parentless and stateless, caught between the legal systems of two countries. The child is now in her grandmother's custody in Japan but has not obtained citizenship, as surrogacy is not legal in Japan.

In 2012, an Australian couple who had twins by surrogacy, arbitrarily rejected one and took home the other. A single mother of two from Chennai decided to become a surrogate mother in the hope that the payment would help her start a shop near her house. She delivered a healthy child, but her hopes bore little fruit for herself. She received only about Rs.75, 000, with an auto rickshaw driver who served as a middleman, taking a 50 per cent cut. After repaying the loans, she did not have enough money. On January 29, 2014, 26-year-old Yuma Sherpa died in the aftermath of a surgical procedure to harvest eggs from her body, as part of the egg donation programme of a private clinic based in New Delhi.

55 316 U.S. 535 (1942).
56 (2003) 8 SCC 369.
57 (2008)13 SCC 518
58 United Kingdom: Surrogacy Arrangements Act, 1985.

These incidents highlight the total disregard for the rights of the surrogate mother and child and have resulted in a number of public interest litigations in the Supreme Court to control commercial surrogacy.

Research Questions

Why Is Commercial Surrogacy Banned?

The term Commercial Surrogacy generally refers to any surrogacy arrangement in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses. In Commercial Surrogacy, the woman rents her body, often under coercion. Commercial Surrogacy is thus a new form of exploitation and trafficking in women. In surrogacy, the child is treated as a commodity, the object of a convention. The aim of surrogacy is not the interest of the child, but to fulfill the desire of adults, to enable foreign parents to satisfy their wish for a child at any price, contrary to PACE Recommendation 1443 (2000): there can be no right to a child. Commercial Surrogacy is legal in India, Ukraine, and California while it is illegal in England, many states of United States, and in Australia, which recognize only altruistic surrogacy. In contrast, countries like Germany, Sweden, Norway, and Italy do not recognize any surrogacy agreements.

Status of Surrogacy in UK and India

Status of surrogacy in UK

In England, commercial surrogacy arrangements are not legal and are prohibited by the surrogacy arrangement act 1985[58]. A surrogate mother still maintains the legal right for the child, even if they are genetically unrelated. Unless a parental order or adoption order is made the surrogate mother remains the legal mother of the child.

Status of surrogacy in India

In 2005, the Indian Council of Medical Research (ICMR) issued guidelines to regulate surrogacy arrangements. The guidelines stated that the surrogate mother would be entitled to monetary compensation, the value of which would be decided by the couple and the surrogate mother. The guidelines also specified that the surrogate mother cannot donate her own egg for the surrogacy and that she must relinquish all parental rights related to the surrogate child.

In 2008, the Supreme Court of India in the Baby Manji Yamada vs. Union of India case highlighted the lack of regulation for surrogacy in India. In 2009, the Law Commission of India observed that surrogacy arrangements in India were being used by foreign nationals, and the lack of a comprehensive legal framework addressing surrogacy could lead to exploitation of poor women acting as surrogate mothers. Further, the Law

Commission recommended prohibiting commercial surrogacy, allowing altruistic surrogacy and enacting a law to regulate matters related to surrogacy. In 2015, a government notification prohibited surrogacy for foreign nationals. The Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha on November 21, 2016. It was passed on 18th December, 2018 after making few amendments to the proposed bill. The Bill entitles only Indian citizens to avail surrogacy; foreigners and NRIs are not allowed to commission surrogacy in India. Homosexuals and single parents are also not allowed for surrogacy and couples who already have children are also not allowed to go for surrogacy. According to the bill, women between the ages of 25 and 35 years can go for surrogacy and one woman can only be a surrogate once in her lifetime. The surrogate mother must be a 'close relative' of the intending couple.

The Bill prohibits Commercial Surrogacy, and allows altruistic surrogacy. Altruistic surrogacy does not involve any monetary compensation to the surrogate mother other than the medical expenses and insurance coverage during the pregnancy. Commercial Surrogacy includes surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding basic medical expenses and insurance coverage. The Bill permits surrogacy when it is:

(I) for intending couples who suffer from proven infertility;
(ii) altruistic;
(iii) not for commercial purposes;
(iv) not for producing children for sale, prostitution or other forms of exploitation; and
(v) for any other condition or disease specified through regulation.

The Surrogacy (Regulation) Bill, 2016, inter alia, provides for the following:

(a) To constitute the Surrogacy Boards at National and State level;
(b) To allow ethical altruistic surrogacy to the intending infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male respectively;
(c) The intending couples should be legally married for at least five years and should be Indian citizens to undertake surrogacy or surrogacy procedures; To provide that the intending couples shall not abandon the child, born out of a surrogacy procedure, under any condition and the child born out of surrogacy procedure shall have the same rights and privileges as are available to the biological child;
(d) The surrogate mother should be a close relative of the intending couple and should be an ever married woman having a child of her own and between the age of 25-35 years;
(e) To provide that the surrogate mother shall be allowed to act as

surrogate mother only once;
(f) To constitute the Surrogacy Board at National level which shall exercise and perform functions conferred on it under the Act. It is also proposed to constitute Surrogacy Boards at the State and Union territory level to perform similar functions in respective States and Union territories;
(g) To appoint one or more appropriate authorities at State and Union territory level which shall be the executive bodies for implementing the provisions of the Act?
(h) To provide that the surrogacy clinics shall be registered only after the appropriate authority is satisfied that such clinics are in a position to provide facilities and can maintain equipments and standards including specialized manpower, physical infrastructure and diagnostic facilities as may be provided in the rules and regulations;
j) To provide that no person, organization, surrogacy clinic, laboratory or clinical establishment of any kind shall undertake commercial surrogacy, issue advertisements regarding commercial surrogacy, abandon the child born through surrogacy, exploit the surrogate mother, sell human embryo or import human embryo for the purpose of surrogacy and contravention of the said provisions shall be an offence punishable with imprisonment for a term which shall not be less than ten years and with fine which may extend to ten lack rupees.

4. The Notes on Clauses explain in detail the various provisions contained in the Surrogacy (Regulation) Bill, 2016.
5. The Bill seeks to achieve the above objectives.

Table: Comparison of surrogacy laws in India and UK [59]

Countries	India[60]	United Kingdoms[61]
Types of surrogacy allowed	Altruistic (Commercial prohibited)	Altruistic (Commercial prohibited)
Payment to surrogate	Medical expenses and insurance coverage	Reasonable expenses excluding payment for the benefit of the surrogate mother.
Requirement of being married	Yes	No (Includes intending parents living in a civil partnership or living simply as partners)

59 *A comparative study on the regime of surrogacy in EU member states, European Parliament, 2013.*
60 *The Surrogacy (Regulation) Bill, 2016.*
61 *United Kingdom: Surrogacy Arrangements Act,1985.*

Citizenship and/or residency	Citizenship	Permanent residence
Existence of a medical reason	Must prove infertility i.e. inability to conceive.	No requirement.
Eligibility criteria for surrogate mother		
Age	25-35 years	Not specified
Relation to commissioning parent(s)	Close relative	No
Requirement of being married	Yes	No
Number of own children	At least one	Not required
Consent of the partner	No provision	Not required
legal guardian of the surrogate child	Intending couple	Surrogate (Transfer of guardianship through adoption if the intending parents are genetically related to the surrogate baby; otherwise through a court order)
Imprisonment for engaging in commercial surrogacy	Minimum 10 years	Maximum three months

Conclusion

It seems ironical that people are engaging in the practice of surrogacy when nearly 12 million Indian children are orphans. Adoption of a child in India is a complicated and a lengthy procedure for those childless couples who want to give a home to these children. Even 60 years of Independence have not given a comprehensive adoption law applicable to all its citizens, irrespective of the religion or the country they live in as Non-Resident Indians (NRIs), Persons of Indian Origin (PIOs) or Overseas Citizens of India (OCIs). As a result, they resort to the options of IVF or surrogacy. The Guardian and Wards Act, 1890 permits Guardianship and not adoption. The Hindu Adoption and Maintenance Act, 1956 does not permit non-Hindus to adopt a Hindu child, and requirements of immigration after adoption have further hurdles.

There is a strong need to modify and make the adoption procedure simple for all. This will bring down the rates of surrogacy. Altruistic and not commercial surrogacy should be promoted. Laws should be framed and implemented to cover the grey areas and to protect the rights of women and children.

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Restorative Justice: A Paradigm of Perfect Justice

*Divyanshu Chaudhary**

Abstract

Prison and restorative justice are two forms of providing justice to the victim which also affects the environmentally attached society. Prison is a form of punishment which is awarded to the offenders according to the gravity of their offence that mostly aims to deter the offenders from not doing the offence again and thus they are kept aside from the society whereas the restorative justice is a new kind of phenomenon which presently is in its developing stage and the main aim or objective of its invention is to restore the victim in that previous stage in which he or she would have been if the offence had not been committed to. Now, in the 21st century, when the world is growing very fast with respect to whether it is development in law and order or in power and policy making or in socio-economic aspect; in a similar way, the lifestyle and societal needs are also dynamic. Therefore, there is a need of different channels to tackle with the issues arising out of the society due to the offences committed to them and specifically those which affects their socio-economic conditions that cannot be retained back by sending the offenders to prisons then the most appropriate system is the restorative justice which functions not only as an ointment or support to the victim but also punishes the offender, although, in a different form.

Key words: - Restorative justice, victim, prisons, comparison, human rights.

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Introduction

The research paper would examine its significance in present society and the reasons as to why there was need to create this new system called as, 'Restorative Justice' with its impact on the society. The author further intends to explore various grounds where this system does not apply and the traditional method is applied. Furthermore, the author delves in examining the current scenario of the success of this system in India with other countries such as U.S.A. and U.K. "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often a real loser--in fees, expenses and waste of time"-Abraham Lincoln [62]

We the people are part of a civil society where the rule of law prevails, and the life of citizens is governed according to the laws, rules and regulations of the country. The society consist of a large number of people between whom, sometimes, there is conflict resulting into commitment of crime by some that infringes the rights of others and sometimes proves fatal thereto. The fact, that in society human conflicts are general, is of common knowledge. Such conflicts result into some kind of harm to other person depriving him/her of their basic rights and sometimes fundamental rights of a Human Being. To heal such harm or injury, the concept of providing remedy and to punish the offender is created wherein the victim or the person who has suffered the injury or loss may be compensated and the offender or the person who has done so may be punished with appropriate punishment as per the gravity of the offence according to the law established so that the decorum and peace may be maintained in the society and the rule of law and the faith in the system can be retained. [63]

There are many ways to punish the offender and two of them are to send them to prison that is behind the bars and the other is restorative justice which now a days is becoming popular as it is more beneficial to the victim not only in terms of justice but also in socio-economic terms. The prime objective behind the concept of punishment is to provide justice to the victim who has suffered injury or loss by the act of the offender. Now if the offender is sent to the prison then it will only deter the offender and would act as an aggressive punishment which has nothing to do with the life of the victim and it does not affect, in any way, the economic condition of the victim which might be lost or spoiled by the act of the offender.[64] So, when the very purpose of the punishment is to give away

62 G S Bajpai, Towards Restorative Justice, 14, (2002), available at SSRN: https://ssrn.com/abstract=3181308.
63 Morris, & G. Maxwell, Restorative Justice for Juveniles (2001).
64 Handbook on Restorative Justice Programmes 11 (2006).

the justice to the victim then how can it be possible to attain it without giving benefit to the victim as well as he/she should also be benefited to do the proper justice. Therefore, a new system has been evolved with the passing of time and that is restorative justice that not only provides the remedy to the victim but also punishes the offender without any unwanted delay or expenses in the legal affairs.[65] Restorative justice revolves around the ideas that crime is, in essence, a violation of a person by another person (rather than a violation of legal rules); that in responding to a crime our primary concerns should be to make offenders aware of the harm they have caused, to get them to understand and meet their liability to repair such harm, and to ensure that further offences are prevented; that the form and amount of reparation from the offender to victim and the measures to be taken to prevent remembers of their communities through constructive dialogue in an informal and consensual process; and that efforts should be made to improve the relationship between the offender and victim and to reintegrate the offender into the law-abiding community. [66]

The proceedings are not controlled by detached professionals but rather by the people and community affected by the crime.[67] The main objective behind the system is to make the victim beneficiary for all the offences committed to him/her by the offender and make the offender guilty by imposing appropriate amount. The only requirement for the working of this concept is the consent of both the parties without which it cannot be successful and no conclusion may be drawn therewith, therefore, unless both the parties are consented, nothing can be given effect. Therefore, it is of great significance that with the passing of time, the system must also be updated with the requirements of the society which is one pillar of the democracy. [68]

Prison and Justice to the Victim

The basic understanding behind sending the offender to the prison is to make him/her aware of the pain caused by him/her to the victim so that the justice may be provided to the victim by balancing the acts and it is the duty of the state that is responsible for the basic rights of all its

65 J. Shapland, G. Robinson, & A. Sorsby, Restorative Justice In Practice: Evaluating What Works For Victims And Offenders (2011).
66 Wright M, Justice For Victims And Offenders (1991).
67 Barb Toews Shenk And Howard Zehr, Ways Of Knowing For A Restorative Worldview, In Restorative Justice In Context: International Practice And Directions 257 (2003).
68 Mary Ellen Reimund, The Law and Restorative Justice: Friend or Foe? A Systematic Look at the Legal Issues in Restorative Justice, 53 DRAKE L. REV. 667, 673 (2005).

subjects as the state is to cater the needs of its population. The prisons are the place where the offenders are kept for the particular term pronounced by the court to complete their punishment for the offences they commit and that is considered to be fulfilling the needs of justice for the victim as it deprives the prisoners of their freedom which is very essential for any human being. But, in the contemporary society as is of today this concept is getting extinct in finding its place for getting justice as it only punishes the offender and does not make changes to the position of the victim as is required to do complete justice, although it cannot be denied in every case where the offence is of such nature that it would not be proper to make the offender free when the victim can not be retained in his/her previous position, then what is proper that the offender must be sent to the prison as in the benefit of the society as well. But when the offence is of such a nature in which it would be most appropriate not to send the offender behind the bar but make him bear all the expenses to reinstate the victim to his/her previous life what would have been if the offence had not been committed to. In such cases, the prisons do not play a healthy role as the offender feels that he has completed his sentence and then has nothing to do with the subsequent situation of the victim and on the other hand he might not have sufficient means then after coming back from prison that he may have any further costs as to that cause. [69]

Therefore, it is most appropriate and suggestive that the use of the prison should be in terms of rendering the justice in a positive way that is to the victim and not in a way that further degrades the life of the victim which is supposed to be in that position as it was before the offence. The state should bear the responsibility for providing the absoluter justice to the victim by any way but in a way that must heal all the damages occurred to the victim even if achieved by sending the offender to prison. [70]

Drawbacks of Traditional System of Prison

There are many drawbacks of the traditional system as it does not provide the complete justice to the victim in which the offenders are sent to prison as not fulfilling the needs of the victim what would be the real justice to him/her.[71] For an instance, if there is one offence committed to a person and that causes a great harm to that person in terms of money then it

69 M.S. Umbreit, B. Vos, R.B. Coates, & E. Lightfoot, Restorative Justice in the Twenty-first Century: A Social Movement Full of Opportunities and Pitfalls, 89(2) Marquette Law Review, 251-304 (2005).
70 G. Robinson, & J. Shapland, Reducing Recidivism. A Task for Restorative Justice?, 48 British Journal of Criminology, 337-358 (2008).
71 T. Van Camp, Understanding victim participation in restorative practices: Looking for justice for oneself as well as for others, 14(6), European Journal of Criminology, 679-696 (2017).

would not be complete justice to send the offender to prison but if the offender is made so that to change the present position of the victim by providing him/her appropriate compensation that would help him to be in the state of earlier kind as before the offence is committed.[72] Here if the person is punished as per the traditional method then the real ends of justice cannot be achieved as there are the following drawbacks in this system:

Expensive and Time Consuming

One of the biggest drawback of applying traditional system of sending the person to the prison is the process by which it is awarded as the process is very expensive and takes very long time as the trial for the offence is not a cake's walk but it is very much time consuming and sometimes the victim is not met with the justice as because of the process becomes so frustrating that the victim and the society losses faith in the system.[73]

Violation of Human Rights

The process is sometimes infringes the human rights of the offenders as because of the time consuming processes and the offenders are kept depriving of their liberty and sometimes they are kept for a long time even more than the complete term for that particular offence, this results into nothing but in basic rights of a human being and also affect the victim's stance. [74]

Harassment of the Victim

The process, many times, proves nothing but the harassment of the victim as when the purpose that is to be fulfilled is not met and there is no significance when it is achieved then it is of no use. As it is of common knowledge that when something is required by some person and he does not get at the very time then it is of no use if got later. It is the duty of the state to balance the rights of the victims and also to ensure that no one is left without providing justice in a way that complete justice is rendered otherwise it would be nothing but the harassment of the victim. [75]

72 I Vanfraechem, I. Aertsen, & J. Willemsens, Restorative Justice Realities: Empirical Research In A European Context (2010).
73 John Braithwaite, Principles Of Restorative Justice 87 (2003).
74 M.S. Umbreit, B. Vos and R. B. Coates, Facing Violence the path of restorative justice and dialogue, Monsey, NY: Criminal Justice Press, 67 (2003).
75 John Braithwaite, Setting Standards for Restorative Justice, 42 British Journal of Criminology, 570 (2002).

Losing of Faith in Judiciary

When justice is not met within the appropriate and reasonable period which is required then people including victim and closely related society start losing faith in judiciary and the system which is responsible to provide justice. Therefore, it is very important to do everything within time and the means should not be exploited as to provide justice. Restorative justice is the process which is very prompt and also serves the real objective and retains the faith in the system.

Concept of Restorative Justice and Its Significance

The concept of restorative justice is not a new development but it has been since very long time as John Braithwaite observes "restorative justice has been the dominant model of criminal justice throughout most of human history for all the worlds' people." [76] Albert Eglash is credited for using the term "restorative justice" in his 1977 article "Beyond Restitution: Creative Restitution,"[77] but the idea of this new system which he has given was not new as it has been applied before long ago. Zehr describes the restorative lens as the view that "crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance."[78] 'Restorative justice is most commonly presented as a viable alternative to imprisonment for many offenders. On this view, restorative justice interventions can perform many of the functions we expect imprisonment to perform, such as discouraging crime and reoffending, changing the outlook of offenders, and satisfying victims and society that something meaningful is being done in response to crime.' [79]

The purpose behind evolving this concept is to give the victim more and more benefit which he/she might not be getting by sending the offender to the prison as the purpose of complete justice can not be fulfilled without restoring the victim to a healthy state. The prison only serves one purpose and that is the realization of the pain to the offender by putting him in harsh condition for the acts committed against the victim but it does not affect the victim's side which has been spoiled by his acts. Restorative justice is a way by which the offender and the victim both may decide as

76 Andreas Von Hirsch Et Al., Restorative Justice And Criminal Justice: Competing Or Reconcilable Paradigms 79 (2003).
77 Supra note 2.
78 Howard Zehr, Changing Lenses: A New Focus For Crime And Justice (1990).
79 Gerry Johnstone, Restorative Justice In Prisons: Methods, Approaches And Effectiveness 2 (2014), Available At Https://Rm.Coe.Int/16806f9905.

to what would be the consequences the offender would be liable of and how those would be executed, this is done with the mutual consent of both the parties where the benefit is also passed to the very closely related persons to the victim. Hence, the very purpose or objective behind this approach is to give quick, justifiable and suitable benefit to the victim who has suffered a great loss that can never be retained back by any other type of punishment one of those are imprisonment as it is of general knowledge that the aggression is not always beneficial even in those cases when it may further degrade the life of other; so this policy of the punishment to put the person behind the bars should be used with a great sense of caution as to keeping in mind the then and present position of the victim.[80]

Therefore, the concept of restorative justice plays a vital role in restoring the victim to the previous stage and serves the ends of justice. The concept is, in India, in its developing stage and is consistently doing well by providing the appropriate opportunities to the parties but there are some kind of offences for which the legislature has provided different kind of punishment as per the gravity of the offences; some of them are of such nature for which restorative justice cannot be suggested like for murder, attempt to murder, rape, kidnapping, abduction and other crimes of same nature. But for the cases where it would not be beneficial for the victim rather wasting the time and expenses on procedures, the most appropriate remedy is to adopt restorative justice to avoid such unwanted links in between where even the guarantee is not provided that the justice would be received or not, therefore the justice should be achieved by anyway.[81]

The significance of the restorative justice lies in this fact that it benefits the victim and the person attached to the extent of harm caused by the acts which could not be healed by the imprisonment. The concept is pretty different from other concepts as first of all it recognizes the parties whether 'civil' or 'individual' to whom the harm is caused and the harm which has been caused and its extent. Then it recognizes the person or the offender who is liable for such harm and finally the assessment is made and fixed with the responsibility of bearing it by the offender toward the victims and other closely related persons. The very significant point with respect to restorative justice is that in this concept there is mutual participation of the parties who may actively put their say in the

80 J. Bazemore, Restorative Justice And Responsive Regulation 153 (2002).
81 L. Kurki, Incorporating Restorative and Community Justice Into American Sentencing and Corrections, Washington, DC: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 89 (1999).

discussion and may arrive at a final conclusion as in the form of responsibility by the offender where the most important thing of this concept is that it does not impose any decision by one person to another.[82]

Marshall defines restorative justice as "a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it. It is also, more widely, a way of dealing with crime generally in a rational problem-solving way. Central to restorative justice is recognition of the community, rather than criminal justice agencies, as the prime site of crime control."[83] Therefore, it is very clear that the objective of restorative justice is just to give the remedy to the victim in an effective way which would be actual justice to the victim rather than awarding any aggressive punishment to the offender that cannot affect the life of the victim and also the society losses their faith in the system because of the late deciding of the matter as the courts are full of burden with a large number of cases which also involves many petty cases even not having value to be decided and to consume the precious time of the courts.[84]

Restorative Justice- Features and Objectives

Restorative justice as discussed above is a part of criminal justice system which involves the offender and victim to decide upon the issue involves there between and by mutual understanding, they come to a conclusion without breaking any law and also avoiding any process of the court. The system implies a kind of negotiation which takes place between both the parties to the issue and which is very much similar to that are arbitration and mediation where a similar process is followed without going to the court. But here, the offender has to bear the responsibility for the wrongdoings done by him and to provide the victim with the compensation in any form as is decided between.[85] The basic element of restorative justice is that to avoid the traditional, lengthy and expensive process of the court in deciding the small matters which even do not deserve so much time to be decided and in which the issue are not of such great nature, there this very system proves decent and successful in providing the quick relief. Now, let us discuss the basic elements of the

82 Andrew Ashworth, Responsibilities, Rights and Restorative Justice, 42 British Journal of criminology, 178 (2002).
83 T F. Marshall, Grassroots Initiatives Towards Restorative Justice: The New Paradigm? In A. Duff, S. Marshall, R.E. Dobash, Et. Al. (Eds.). Penal Theory And Practice: Tradition And Innovation In Criminal Justice 245-262 (1994).
84 J. Consedine, Restorative Justice: Healing The Effects Of Crime 125 (1999).
85 F. F. Rosenblatt, The Role Of Community In Restorative Justice (2015).

restorative justice:

- When a crime is committed, it affects the victim, offender and the society or community because it is absolute violation of the relations and the rights of the other individuals.
- When any violation occurs then there is a sense of responsibility, and also, has an obligation as to make right or heal that violation and that is by the person who is the offender. Now, when the matter is decided the government plays an active role, but it is the duty of the victim, offender and of the society to be active along with government.
- It is very necessary for promoting justice that there must be harmony between the government and the society as the government must be responsible for preserving law and order and the society on the other hand must be responsible for establishing peace therein.
- The offender is made guilty in a different way and he is made liable directly to the victim.
- It is the duty of the offender to make the things right and to restore to their previous position as they were, in the different sense that to be responsible towards the victim.
- The offender is made liable for compensating the victim for the losses which occurred to and also ensure any other responsibility which had been infringed by the acts of the offender.
- The victim is also assisted and empowered by the process of restorative justice so that to be an active part of the process and to achieve or retain back all the things which had been lost by the victim by the offence committed to.
- A kind of realization is made to the offender for his offence and also that what can be the impact of their acts and their liability is fixed therewith.
- Restorative justice also addresses the need of how the offender can be reformed in a way that to become fit in a sociological way and also make them realize the consequences of their acts and how the society reacts to those acts with a fixation that to bear the losses of the parties who are affected due to the commitment of the crime.

There are two major and equal aims of the restorative justice that are 'to decrease re-offending', and 'to meet victims' needs.'[86] 'Basically it involves people in conflict (such as offenders and victims) having, with the help of a skilful facilitator, a relatively informal, emotionally rich, and mutually respectful face-to-face conversation about how the actions of one party have harmed the other (often in ways the perpetrator of the

86 Joanna Shapland, Restorative Justice and Prisons, 2.

harmful act did not realize or consider) followed by discussion of what the perpetrator can and should do in an effort to repair or make up for that harm. Often the conversation will be broadened to involve other parties closely connected to the perpetrator and victim, and sometimes representatives of various social services, in discussion of how they can provide the perpetrator with accountability and support and help the victim recover.'[87] Thus the purpose or intention behind this concept is to make the victim a beneficiary for the wrongs which have been committed to him/her by the offender by a straight forward process that is restorative justice.

Implementation of Restorative Justice with Existence of Prison System

As per the law of the country, the offences have been defined categorically with specific punishment for each such offence and the courts are bound to award in case of any offence is committed. The punishments are also of various types such as death penalty, life imprisonment, imprisonment and fine etc. according to the offence. Imprisonment is one of the most common punishment which is awarded to the offenders in cases and sometimes in cases of very low value or matters not of high urgency where other system such as restorative justice may properly work. It is very difficult in a conservative society to adopt any new development very easily as the people are addicted to one system and have complete faith as to get justice from but the restorative justice is emerging and has great future if some changes are made to the traditional system of imprisonment.[88] To implement the restorative justice effectively, many changes are required to be done in the present laws and the society should be made aware of this very healthy and beneficial system which is easier, fast and also without any lengthy process of the court. Although for all the cases, this system cannot be implemented but for a class of cases it is not a big task to be achieved, those matters are liable to be identified. It is very important for the people to know the benefits of this system otherwise they will not be able to adopt this system and there will be only one concept which would prevail and that is the imprisonment to the offenders without providing any assistance to the victims.[89] Justice must satisfy the appearance of justice.[90] There are many things which are to be implemented for an effective role of this very

87 Supra note 18 at 5.
88 Paul H. Robinson, The Virtues of Restorative Processes, the Vices of "Restorative Justice", UTAH L. REV. 375, 380- 87 (2003).
89 Susan Sharpe, How Large Should The Restorative Justice "Tent" Be?, In Critical Issues In Restorative Justice.
90 Offutt v. United States, 348 U.S. 11, 14 (1954).

system which are following:

Proper Amendment in the law

The very first thing for its effective implementation is that the categories of the offences must be divided in such a way which should specify the offences which may be settled down by using the restorative justice and not by the traditional method, although it must be there for other offences for which this system cannot be sustained and also when it is against the natural law as in cases of murder or any other offence of such gravity where it is not possible to implement this system. Plea bargaining under chapter 21A of Code of Criminal Procedure is such an example of this very system where the parties may make an application under section 265B of Cr.P.C. for settling aside the matter by mutual discussion. Such system should be given preferences by the proper amendments in law.

Separate Working day for deciding matters using Restorative Justice

The legislature must make some changes in the present system of delivering justice by adding some additional working day for providing justice using restorative justice apart from the mediation centers in the court or the regular working hours can be deducted and that deduction can be used for this system by the Judiciary to settle the matters. The real intention behind this system cannot be fulfilled unless some prompt changes are made.

Restorative Justice in India, U.S.A., and U.K.

In India, restorative justice is developing and not been fully developed as the people are not so aware of this new system, but it can be traced in old times also as the village panchayats also used this system in deciding the matters in an effective manner. 'The Indian heritage has much testimony to offer that its socio-cultural fabric contains intrinsic mechanism to bring the conflicting people together and settle their dispute in a highly informal manner. In fact, the caste panchayats and other social groups in the countryside have been an effective source to dispense justice. The verdict delivered by these bodies was acceptable to everybody. The interests of the victims were supreme. Many times, the offenders were directed to compensate or restore the harm done to the victims. The effect and impact of social expectations and social sanctions on the behaviour of the people have always been decisive. This has been able to resolve the mutual conflicts of the people. With the winds of changes, the rural India underwent a process of considerable shift. The socio-political changes have almost replaced the traditional functioning in the rural communities. The informal mechanism of settling the disputes got weakened. Crime

kept on increasing. The police and courts have made the inroads in these areas.'[91] The current position of restorative justice in India is very weak and that is because of inadequate legal support. So, the government should make appropriate steps for effective implementation.

Restorative Justice is on the rise exponentially in the United States. As millions continue to experience and witness a collective 'justice' that is tainted by racial discrimination, by billions in profit, by the warehousing of our meek, a school-to-prison pipeline and by the practices of expecting punishment and isolation for all involved when crime occurs to actually function as rehabilitative, there is a form in the air, in the political, in the grassroots, in the hearts of the people, that offers a viable life-ring out of this deluge.[92] As Rep. Lee said as he closed his speech in Toledo: We, the people, need to insist that restorative justice be implemented in every jurisdiction and in every school. The time for restorative justice is now.[93] Therefore it is very much apparent that in USA the restorative justice is getting a high place and has a bright future for the matters which are to be decided using this system.

Now when we talk about the implementation of this system in U.K. then it would be appropriate to take into consideration that 'a recent national evaluation by the Oxford Centre for Criminological Research provides an overview of a wide range of restorative justice projects in the UK. The evaluation report noted that the projects 'were not equally restorative'. Less than a fifth offered only conferencing or mediation, while others involved direct or community reparation or victim awareness. The report concluded: 'It is apparent that much progress has been made in implementing restorative justice projects within a short period of time. In a little over 18 months of operation, the 46 projects have worked with nearly 7,000 young people. Victims were contacted in the vast majority of cases, and, where they were, most agreed to some form of participation in the process. Reparation or a direct apology was facilitated to victims in around 40 per cent of cases. Just over 13 per cent of cases involved a meeting between victim and offender, which compares favourably with other large scale restorative justice projects nationally. Where the views of participants were sought, the responses were positive. Over three quarters of victims and offenders thought the process was fair, well prepared and that the intervention had helped the offender to take

91 Supra note 2 at 10.
92 Molly RowanLeach,RestorativeJusticeIsOntheRise(2016), http://www.huffingtonpost.com/entry/restorative-justice-is-on_b_3612022.html?section=india
93 Id.

responsibility for the offence.'[94] It can also be taken into consideration in this regard that 'The Crime and Disorder Act and the Youth Justice & Criminal Evidence Act offer great opportunities for the rapid development of restorative justice throughout the youth justice system. If, notwithstanding the "system resistance", the restorative justice initiatives are successful in juvenile justice, it can be hoped that expansion of restorative justice will also take place throughout the adult system as well.'[95] "However the legislation activity backed by substantial funding does suggest a definite commitment to restorative justice from central government. This is probably the best chance the UK has had for many years to achieve major restorative reforms. But we should keep in mind that attitudes towards restitution and punishment are subject to social change; it cannot be ruled out that nowadays restitutive ideas might stand less chance than a few years ago. This could be related to the current conservative climate (not depending on the official political colour) within society that favours a harsh criminal policy. And we cannot say that, on the international level, the current Prime Minister is showing any sign of a clear tendency to reconciliation, reparation, and mediation whatsoever!" [96]

Therefore, it is very clear from the above discussion that the position in UK is also not so that the restorative justice may be completely implemented. I have also discussed the situation in USA and India where on one hand the country is more and more adopting this system and on the other hand India is also, like UK, in the developing stage.

Conclusion

The concept of restorative justice is one which concerns itself with producing great results without consuming much of time and expenses and also avoiding the lengthy processes which are part of the traditional system that is to send the offender to prison. But for making this system of restorative justice more effective, appropriate steps are to be taken by the government in this context as to make the victim beneficial for the losses he/she has suffered because of the offence which other punishment cannot serve as the present provisions of the law are not that much effective to fulfil the purpose. To make the system implemented in all the aspects it is very important to make the society in general aware of the features and objectives of this new system so that they may be able to

94 Les Davey, The Development of Restorative Justice in the UK: A Personal Prospective (2016), available at http://www.iirp.edu/article_detail.php?article_id=Mzg4.

95 Gailly Philippe, Restorative Justice in England And Wales, 7 (2003).

96 Id. at 8.

come out of the curtain of conservative approach and may adopt this system leaving the way to walk on the traditional approach which serves for the same pain as the victim has suffered.

The legislature must come with such amendments in the present laws and regulations that this approach can be used for the speedy and convenient disposal of the matters and a quick justice may be provided and the purpose to restore the victim to the position where he/she would have been may be fulfilled without doing any delay. Although there are some laws which provides for such type of approaches such as plea-bargaining, mediation, arbitration and reconciliation and settlement etc but there has to be further changes in the laws to make them more effective and to make this system a priority as to render real justice to the victim.

The Landscape of Biotechnology Patenting In India

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Abstract

A patent, which is a form of industrial property can be defined as an exclusive right granted to the person (patentee/ patent holder) who has invented a novel or useful product/ process or has made an improvement to the existing product or the new process of making the product. Patents are generally granted over all types of inventions including the inventions in the field of information technology, chemical, mechanical engineering, pharmaceutical and biotechnology. Although, the plant and animal varieties or crucial biological processes for the production of plants and animals (apart from microbiological processes or their products) are not contemplated as inventions, and thus, they are excluded from being patented. But in practice, certain patentable claims on plants, animals, the traditional knowledge based on plants and the claims over the protection of plant varieties are made. The issuance of patents over the living organisms has created an ethical dilemma all over the globe. The patenting of the life forms, medicines, stem cells, traditional knowledge (biopiracy) have jiggled the planet.

Key words: - Patent, biological, organisms, medicine, inventions.

Introduction

In order to obtain a patent in any system, the patent holder is required to satisfy the triple test of patentability criteria that involves the test of novelty, non-obviousness and usefulness. The patentable inventions can

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be pondered as both useful and detrimental at the same time. For instance, the Harvard' OncoMouse was the first mammal to be patented which was developed to be used in cancer research. Biotechnology patents raise moral implications and complex issues globally. Patents not only act as a roadblock for the new entrants but also hinder the process of free use and exchange of biological materials between the communities. Although it has been said that patent encourages innovation, but in reality, it obstructs new inventions as it grants an exclusive right to the patentee to block others from entering into a related field. Also, there exists the problem of different intellectual property laws in different countries that is to say, what is protected in one country may not be considered relevant to be protected in another country.

Hence, the lack of uniformity in patent system at global level often leads to major controversies.

The present paper grails to underscore the nascent concept of biotechnology patenting in India by twirling on the history of biotechnology patenting in India, legal provisions with respect to the biotechnological patents, procedure for obtaining biotechnology patent, intercontinental controversial biotechnological cases and some recommendations in the concluding part.

Technological patent is a monopoly right that is granted to the patentee in the field of biology to exclude others for a limited duration of time (20 years) from making, using, exercising and vending his invention. Biotechnology usually involves the use of biological materials, living or non-living organisms and is broadly classified into classical and modern biotechnology. Classical biotechnology involves the processes that are based on the ability of the biological agents or microbes to conduct a reaction that generates a product. Examples- conversion of milk into curd, yeast clones, fermentation that involves the use of microbes to make food and beverages. Whereas the modern biotechnology involves the scientific use of the living organisms in whole or their parts such as molecules, cells, tissues or organs. Examples- recombinant DNA technology, transgenic organisms, GM crops, bioremediation, monoclonal antibodies (Mab) which is used for the treatment of cancers, Polymerase Chain Reaction technology which is used in molecular biology in order to intensify a single or few copies of DNA and stem cell research. Patents are granted in order to safeguard the interest of the patent holder with an object to encourage scientific research, stimulate new innovations of commercial utility and boost industrial progress. But the patents on biotechnological inventions commodify life-forms and they grant an exclusive right to the patent holder to exploit their invention and further restricting the research process. India is one of the bio-diversity rich

countries so it thus becomes prudent to provide protection to the bio-resources and not to grant patents on the life- forms on the basis of the principle of morality.

History of Patenting the Biotechnological Inventions

The first patent law (the Indian Patents and Designs Act, 1911) was enacted by the British rulers in order to safeguard the interest of the innovators. But due to the changes in the economic and political conditions of the country, the Act was found to be outmoded. Soon after independence, the government felt the need to adopt a more comprehensive law so as to ensure that the patent law did not work against the interest of the consumers or to the prejudice of industrial development, so it thereby enacted the Patents Act, 1970. During that time biotechnology had started affecting the society. The Act did not mention anything about the inventions that are patentable, but it did specify the subject matters that are non-patentable. The Indian Patents Act, 1970 did not specify anything related to biotechnological inventions as at that time biotechnology was not fully developed. Once the United States of America and the European Union started granting patents on biotechnological inventions, the demand for following a similar motion gained very much importance in many countries including India. The judicial system of the European Union and USA were responsible for the development of patent law on biotechnological inventions. Taking the role played by the biotechnological inventions into consideration, the Agreement on Trade-Related Aspects of Intellectual Property Rights provided that patents on all types of inventions in the area of science and technology (including biotechnology) shall be granted. The TRIPS agreement provided the patenting of biotechnological inventions in the member states. After having the TRIPS agreement approved, India amended its patent law and permitted the patenting of biotechnological inventions. In order to comply with the TRIPS agreement, India amended its patent law three times. In the year 1999, the very first amendment to the patent law took place. The amended law extended the patent protection to innovations associated with the manufacturing of chemical substances that can be used as a medicine or food.

This amendment was of utmost importance for the development of the biotechnology industry as the industries were now able to isolate genetic material coding for certain chemicals in any animate being which were useful in the manufacturing of medicines and drugs. After the first amendment, thousands of applications related to biotechnological inventions like chemical substances isolated from the human body were filed with the Indian Patent Office. The second amendment took place in

the year 2002 which permitted the patenting of microbes and products of chemical, biochemical and biotechnological process. Although the chemical processes were already patentable under the previous Act. Whereas, the 2002 amendment broadened the scope of chemical processes which provided that 'chemical processes include biochemical, biotechnological and microbiological processes.' This amendment also revamped Section-3 of the 1970 Act and added certain clauses to it which provides that any invention which is immoral or against public order or which is harmful to human, animal or plants or to the environment; discovery of any living or non-living substances in nature; methods of treatment of human beings or plants or animals; plants and animals in whole or parts shall not be patented. This amendment also provided that microbes are patentable but plants and animals varieties and essentially biological processes for the production of plants and animals are excluded from patentability. Although it stated that microbiological products and processes are patentable.

It further provided that the discovery of a living thing which already exists in nature is not patentable if it does not involve any human intervention. It is not an invention but a mere discovery which is already in existence. Similarly, natural things that are produced out of essentially biological processes are not patentable as they occur naturally and do not involve any human intervention which implies that a non- natural process that requires any technical intervention to a natural process is patentable. It suggests that the technical intervention to a natural or essentially biological process makes it non-biological process which is thus patentable. In 2005, third amendment took place which recognized the Budapest treaty for the deposits of microbes for the purpose of patent procedure. It provided that the application of patent for any biotechnological innovation which had a living substance can be effected by the deposit of a sample of the microbe with the specialised institution that is recognised under the treaty. The said amendment also modified the definition of 'invention' to "any product or process involving an inventive step and capable of industrial application" thereby deleting the word "manner of manufacture" as mentioned in the earlier Act. So, patents can now be granted for both products and processes in the area of biotechnology.

In the landmark case of Dimminaco A.G. v. Controller of Patents and Designs& Others, the Calcutta High Court considered microorganisms as a patentable subject matter. In the year 1998, Dimminaco A.G. (a Swiss Company) filed an application for a patent before the Controller of Patents and Designs for the process of manufacturing of an attenuated vaccine against infectious bursitis in poultry. The vaccine was developed

in order to protect the poultry from infectious bursitis and the end product of which involved a living organism in the form of viruses. The Controller dismissed the application on the grounds that the end product contained a living organism and it did not result in any substance and the procedure of its development was a natural process. On an appeal made to the Hon'ble Calcutta High Court in April 2002, the High Court held that the process of preparing of a vaccine was patentable even though the end product involved in it is a living organism and the laws do not bar the processes which end in the creation of a living thing. It also stated that the process for the manufacturing of a vaccine was a novel process and it was useful for protecting the poultry against bursitis infection. The invention thus fulfilled the triple test requirement of novelty, non-obviousness and usefulness which was important in a process so as to qualify it for the grant of patent. The Court applied for 'vendibility test' in this case and found that "if the end product of the invention is a vendible or commercial substance and for it the presence of living microorganism in the end product will not forbid it from being as a patentable subject matter." The Court concluded that a new and useful art or process is an invention, and where the end product (even if it contains living organism) is a new article, the process leading to its manufacture is an invention. Hence, this judgment opened the doors for the grant of patents to inventions where the final product of the claimed process contained living microbes.

Legal Provisions With Respect To Biotechnological Patents

(1) The Patents Act, 1970

The Indian Patents Act, 1970 is the replica of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS agreement is very much similar to the European Patent Convention regarding the inventions that are excluded from patentability. The Patent Law of Europe excludes certain biotechnological innovations from patentability on moral grounds. Article 27 of the TRIPS agreement has provided its member states to exclude certain subject matters from patentability. India, by virtue of amendment of 2002 to Section-3 has appended all the excluded patentable subject-matters as provided under the TRIPS agreement. The patent law of India excludes certain inventions from patentability such as an invention which is immoral or against public policy or which is harmful for the plant life, animals or human beings or detrimental to health or to the environment (as it will be against the moral principles/ ethical standards of the society) ; discovery of any living or non-living substances which is already existing in nature (as patents are granted only for inventions which are novel and not for the

discoveries already existing and having living substances in them) ; any technique of horticulture and agriculture (in order to have the equitable sharing of the benefits) ; any method of treatment of the human beings or animals by way of surgery , therapy , diagnosis or any curative or prophylactic methods in order to render them free from diseases or to promote their economic value or that of their commodity (so as to safeguard the interest of public) ; animals and plants as whole or any part thereof except microbes but it may include seeds, varieties and species and essentially biological processes to produce and propagate animals and plants" (on the ground of morality and patented inventions include products and processes and not the life-forms whereas in case of microbes, if they are naturally occurring they will be considered as a mere discovery therefore they won't be patentable but a genetically engineered microbe that are novel, involves inventive step and industrial applicability will be patentable) and traditional knowledge (based on the principle of equitable sharing of the benefits and the invention based on traditional knowledge will lack novelty, for example: use of turmeric for the treatment of an injury). The Patents Amendment Act 2002 brought microbes under the subject matter of patent by virtue of Section-3 (j) and microbiological, biotechnological and biochemical processes were included within the scope of chemical processes for the grant of patent.

(2) Biological Diversity Act 2002

The Biological Diversity Act was passed in India in order to meet the obligations as stated under the Convention on Biological Diversity. The Act provides a mechanism for the preservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of bio-resources, traditional knowledge and for matters connected therewith or incidental thereto. So, in order to avoid misappropriation of biological resources and traditional knowledge of India, the Biological Diversity Act requires that access to the biological resources of India is subject to the equitable benefit sharing through the approval of National Biodiversity Authority. The Act provides that no intellectual property rights including patents based on research or information on biological resources obtained from India shall be granted without the prior approval of the National Biodiversity Authority.

Procedure for Obtaining a Biotechnological Patent

The very first step involved in order to obtain a patent is the submission of an application. An application for a patent can be made by the true and first inventor of the innovation or his assignee or legal heir of a deceased person. The Indian patent system is based on the principle of first to apply

which gives a priority to the innovator who first files the patent application. For one invention only one application can be made which must in the prescribed form and must be filed with the Patent Office. The application must be accompanied by a patent specification which can either be provisional or complete with an object to disclose the invention to the public.

If the patent application is accompanied by a provisional specification then within twelve months from the date of filing the former application, a complete specification must be filed and if it is not filed within that period of time then the application will be considered to be abandoned. A complete specification shall include the title of the invention, a detailed description of the invention along with its use and its operation, disclosure of the best way of using the innovation and claims which should be definite.

The next step involves the role of the Controller in the examination of the application. The application is examined by the Controller of Patents whose duty is to check whether the application complies with the requirements of the Act and whether there are any grounds on which any objections can be raised or whether the invention has already been claimed or published previously. If on the examination of the application, the Controller of Patents raises any objections, the same has to be conveyed to the applicant by the Patent Office so that the applicant can make necessary amendments in his application. And once the objections have been corrected, the Controller will accept the application and advertise the same in the Official Gazette.

The next step involved is regarding the advertisement of the acceptance of the complete specification. The object of advertisement is to let the public know about the innovation so that they can raise objections (if they have) within a period of four months from the date of advertisement of acceptance. The opponent can object the invention on the grounds that the claims do not sufficiently define the invention, insufficient disclosure of the biotechnological invention, distinguishing features as compared to prior art given (and are unclear), the invention falls within the category of non-patentable invention (section-3 of the Patents Act which excludes certain biotechnological inventions from patentability), disclosure of deposition of biological material used in the invention or the invention did not satisfy the conditions of patentability. Once the Controller receives the application, he forwards the same copy of the notice of opposition to the applicant who is required to file a statement of his reply within a month on the receipt of notice's copy. Following that, the Controller may hear both the parties and arrive at his decision.

The last step is regarding the grant of patent. When the patent application

is accepted at the first instance itself without any opposition or after the conclusion of opposition proceedings in the favour of the applicant, then the patent shall be granted to the applicant with the seal of the Patent Office and the date on which the patent is granted shall be entered in the register of the Patent Office. The patent is granted for a period of 20 years from the date of filing of the patent application. If the decision of the Controller is against the applicant, then it can be appealed before the High Court.

Intercontinental Cases: The Controversial Biotechnological Patents

The Neem Case is a cardinal example of biopiracy. In 1995, the European Patent Office granted a patent for the preparation of a fungicide which was derived from the seeds of the neem tree to the United States Department of Agriculture and the chemical multinational company (W.R. Grace). The applicant applied for a patent over neem as a fungicide which included neemix which was used in suppressing growth of insects. On appeal made by India in 2000 against the said patent, the EPO revoked the patent on the ground that neem in diverse forms was a part of Indian traditional knowledge and thus it lacked novelty.

In The Basmati Case, the grant of US patent to Rice Tec Inc. (a US multinational company) in the name of Basmati (rice: agricultural commodity) was a matter of great concern for India as it gave the company the exclusive right over any basmati hybrid. In 2000, India challenged the patents of Rice Tec Inc. Out of 20 claims, the USPTO granted patents to only three strains of hybrid basmati as those three strains of basmati fulfilled the conditions of patentability and were distinguishable. The patent office held that Rice Tec Inc. can use basmati appellation as it was neither trademarked nor a geographical indicator only in India as it was grown in Pakistan and Thailand too.

The Turmeric Case, was again a biopiracy case. In 1995, a patent on turmeric (tropical herb grown in India) was granted to a University of Mississippi Medical Center, United States (for the use of turmeric in treating wounds) by virtue of which they got an exclusive right to sell and distribute turmeric. In 1996, Council of Scientific and Industrial Research, India filed a petition before the US Patent and Trademark Office (USPTO) challenging the novelty of the University's patent as turmeric was a part of traditional knowledge of India. In 1997, the patent was revoked on the finding of the USPTO that turmeric had been used in India long time before as an ingredient for cooking and for medicinal purposes.

Again, the patents on Indian spices and other herbs to a New York based Company was denied by the European Patent Office. In 2008, Colgate-

Palmolive filed a claim for a composition having botanical extracts from herbs which included cinnamon. In 2011, the Council of Scientific & Industrial Research (CSIR) opposed the claim on the ground that it was a part of India's traditional knowledge. The EPO ruled the case in favour of India. In 2010, Colgate- Palmolive made an application for the protection of oral composition which contained ginger, 'Bakul' tree, Indian banyan tree, neem and clove for the purpose of treating oral cavity diseases. In 2014, the said claim was challenged by India which led the patent examiner to conclude that there was no novelty in the claims made by Colgate as they were part of Indian traditional knowledge.

In the Bt. Brinjal case, it was held that taking off the plant material without the permission plus using it for commercial purposes amounted to biopiracy. In this case, the National Biodiversity Authority (NBA) decided to initiate legal proceedings against the American seeds giant Monsanto and its Indian collaborator, Maharashtra Hybrid Seeds Company (Mahyco) and their other collaborators for using the indigenous brinjalgermplasm without prior consent.

Conclusion

As per the opponents: In India, animals and plants are considered to be sacred so patenting of any animals, plants or any other life form would be a desecration. Indeed, biotechnological inventions do provide potential benefits to the society and the patent holder should be rewarded for his work but that does not mean to give the ownership or control of living organisms to the patentee. Till date no patent on living organism has been granted in India. By virtue of TRIPS agreement, India did provide patent on microbes and any other living invention that is produced through any biotechnological or microbiological process. The patent law is against the competition law as the patent law gives a monopoly right to the patentee to exclude others from making, using or exercising his invention which blocks the entry for new innovators to come up with their research and thus restricts the competition.

Whereas, according to the proponents: The moral concerns pop up when a patent is granted over a living organism but in actuality lot of plants and animals are cut down and killed to satisfy human wants and whims. The innovators should definitely be rewarded for their mental labour and capital investment put forward by them. And hence, by granting a monopoly right to them that too for a short duration is just and fair.

Therefore, "biotechnology patents must be regulated and not prevented."

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Marital Rape: Violation of Human Rights and Personal Liberty

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Abstract

"A Murderer Kills the body but a Rapist Kills the soul" - Justice Krishna Ayer.

In common law countries, husbands were exempted from being prosecuted for raping their wives. Over the past quarter century, this law has been modified somewhat, but not entirely. It has been identified that not only child-brides, but all wives need legal protection against rape within the institution of marriage. Even International law has recognized 'Rape' as a crime of genocide, crime against humanity and as a war crime. It is high time that the dignity and freedom of a woman over her body and person be recognized in India as well. It is important for the state to enter the realm of the matrimonial home as such an atrocious and heinous crime should not be left outside state interference, as it is already present in matters of cruelty, divorce and dowry demands.

Key words: - Marital, rape, murderer, atrocities, genocide.

Introduction

The patriarchal power structures have deemed marriage to be a license to forced sex thereby, negating the self-worth of women. In India, 'marital rape' is seen as legally permitted rape, abolishing the element of consent from married women. The legislative framework of India has no provision to aid the plight of a married woman who faces this evil due to the detrimental notion in society that considers sex as an obligation.

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Moreover, the exception to rape under Section 375 of the Indian Penal Code violates the fundamental rights of the women as guaranteed by the Indian constitution. Thereby, giving married woman's jurisdiction to a single man who will govern her life rather than the Indian Constitution. For a country that claims to be on the path of development, India is replete with paradoxes. The Indian legislature has argued that the concept of marital rape as understood internationally cannot be applied to Indian context due to various factors like level of education, poverty, social customs and traditions, religious beliefs and mindset of the society to treat the marriage as sacrament. However, this argument has completely ignored the fact that more than the two-third of married women in India between the age of 15 to 49 years have been beaten, raped, or forced to have sex. Moreover, it is evident from the UN Population Fund report that the marital rape occurs in all types of marriages irrespective of age, social class, race or ethnicity thereby, questioning the logic and reason given by legislature for not criminalizing marital rape.

According to the legal philosopher Jeremy Bentham the function of law is to emancipate the individual from the bondage and restraint upon his freedom. Once made free, the individual will himself look after his freedom. According to him "the end of the legislation is the greatest happiness of the greatest number". The purpose of the law and the task of the government is to bring pleasure which is the consequence of good and to avoid pain, which is the consequence of evil. Pleasure and pain are therefore the ultimate standards on which a law should be judged.

However, the Indian laws does not fulfil these standards as stated by the Bentham by not treating marital rape in the same manner as rape under Section 375 of the Indian Penal Code.

"Does a woman or man lose their degree of sexual autonomy after marriage. According to me 'no' -Justice D. Y. Chandrachud (in his recent judgment)

A Brief History of Marital Rape in India

"If all men are born free, how is it that all women are born slaves?"

Mary Astel 1668-1731: Some Reflections upon Marriage (1706 ed.)

Marital rape refers to rape committed when the perpetrator is the victim's spouse. The law in India does not recognize marital rape i.e. act of husband to rape his wife as a criminal offence under the Indian Penal Code, 1860. However, the definition of rape remains the same, i.e. sexual intercourse or sexual penetration when there is lack of consent as it is an essential ingredient to prove crime of rape. According to the existing law

in India it is presumed that there is an implied consent to have sex when the victim and perpetrator are married, thereby making idea of marital rape antithetical. The reasons behind such non recognition of act of husband to rape his wife can be found in various reports of the Law Commission, Parliamentary debates and judicial decisions. The reasons provide by these reports and debates range from protecting the sanctity of the institution of marriage to the existing alternative remedies in law.

Section 375 of the Indian Penal Code, 1860 criminalizes the offence of rape. It is an expansive definition which includes both sexual intercourse and sexual penetration such as oral sex within the definition of rape. However, Exception II to Section 375 excludes the sexual intercourse or sexual acts between a husband and wife as rape. It does not state any reason for such exclusion of sexual intercourse or sexual acts between a man and his wife from the purview of rape. The whole focus of the section 375 is on the concept of consent which assumes that there is an irrefutable presumption of consent that operates between the perpetrator and victim within the institution of marriage. However, law does not criminalize marital rape but do consider non- consensual sexual intercourse between the wife and husband living separately on account of judicial separation or otherwise as rape. Thus, Indian law does not have recourse under criminal law for the wife who has been raped by her husband except for those who are living separately.

Marital Rape: Legal Position in India and Other Countries

Until 1970s marital rape was not even acknowledged as a wrong by the society. In United States, marital rape accounts for approximately 25% of all types of rapes. Despite this number, social scientists, practitioners, the criminal justice system, and larger society has hardly showed any concern to resolve the problem of marital rape.

In 1993 marital rape became a crime in almost fifty states of the US by making it as an offence under criminal law. In seventeen states no exemption is given to husbands for raping their wives however, in thirty-three states, there are still few exemptions given to husbands for having forceful sex with their wives. This indicates that only a minority of the states have abolished the marital rape exemption in its entirety.

New Zealand, in 1985 abolished the marital rape exemption by enacting Section 128 to the Crimes Act, 1961. The sub section (4) of Section 128 stated that person will be convicted of sexual violence with another person irrespective of the fact that they are married. In 1991,

England abolished marital rape exemption in its entirety by making amendment to statutory law through Section 147 of the Criminal Justice and Public Order Act, 1994. The House of Lords in the case of R. v. R.

held that the "rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied," which was also affirmed by the European Court of Human Rights in the decision of SW v. UK.

Most recently, Sri Lanka made amendments to its Penal Code, thereby recognizing marital rape but only with regard to judicially separated partners and not with regard to those actually living together. However, many countries have recognized marital rape as an offence by refusing to accept the marital relationship as a cover for violence in the home. For example, the Government of Cyprus in its Law on the Prevention of Violence in the Family and Protection of Victims, clarified that "rape is rape irrespective of whether it is committed within or outside marriage".

In India marital rape exists de facto but not de jure. The arguments advanced by the legislature to not criminalize marital rape are erroneous as every law must be passed in conformation with the principles and ideas which are enshrined in the Indian constitution. Any law which has failed to meet these required standards are ultra vires and can be struck down or be declared unconstitutional. The Exception II to S. 375 of IPC, 1860 withdraws the protection of married women on basis of her marital status and therefore, it should be criminalized and held unconstitutional. The state by not criminalizing marital rape and not entering the private sphere of marriage, is presuming an irrevocable consent for sexual activity by a woman. It has been seen that the Exception II to S. 375 of the IPC, 1860 does not give any reason for the exclusion of sexual intercourse between a man and his wife from the purview of rape as there is a presumption of an irrefutable consent which operates between the victim and the perpetrator when they are a married couple. This presumption has been considered illegal in multiple jurisdictions and the same should be considered illegal in India as well. According to J.S Verma Report the existence of marriage does not lead to a presumption of consent. This presumption has its roots in an outdated notion of marriage where wife was treated no more than the property of the husband. In common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked.

As far back as 1736, Sir Matthew Hale declared: 'The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract'. This view is no longer accepted by several jurisdictions as marriage is regarded as a

partnership of equals and no longer one in which the wife must be the subservient chattel of the husband.

The European Commission of Human Rights in C.R. v. United Kingdom held that a rapist remains a rapist regardless of his relationship with the victim. The principle of revocable consent in marriage has also been accepted by the Australian High Court. Moreover, the Canadian Supreme Court stated that the relationship between the accused and the complainant does not change the nature of the inquiry into whether the complainant consented to the sexual act.

Furthermore, the state parties to Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) are obligated to exercise due diligence to combat violence against women. India is a state party and had ratified the CEDAW. Article 19 of CEDAW defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status". Exception II to Section 375 of the IPC, 1860 reads "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape" thereby, permitting violence against women on the basis of their marital status which in turn is inconsistent with Article 1 of CEDAW. The discrimination on the ground of gender is itself violence, prohibited by Article 1 of CEDAW. Although CEDAW does not have a binding legal authority of a convention or treaty and is universal in coverage and a strong statement of principle to the international community. Moreover, Article 2(a) of CEDAW categorically encompasses marital rape as violence against women. Therefore, state parties to CEDAW are obligated to exercise due diligence to combat violence against women. Furthermore, CEDAW in General Recommendation (GR) 1922 suggested state parties to implement effective legal measures including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence. The State's failure to criminalize marital rape is de facto encouraging crimes against the married women and fall foul of the due diligence obligation thereby, violating right of married women by forcing her to enter a sexual relationship against her wishes. Thus, State should consider the obligations imposed on India by CEDAW and the gradual change in the interpretation of civil liberties as enshrined in the Constitution of India to make marital rape as criminal offence in India.

Moreover, Rape is not simply a sexual act to which one party does not consent, but it is a degrading violent act, which violates the bodily integrity of the victim and frequently causes severe, long lasting physical and psychological harm. The Marital Rape Exception under IPC, 1860

denies the married women protection against the violent crime thereby, denying them their basic human right to consent. The argument of the legislature that it does not want the state to enter the private sphere can be problematic as it would work to the disadvantage of women. It would be incorrect to suggest that criminalizing rape would amount to excessive interference by the state. This is because whenever the fundamental rights of an individual are being taken away, the state criminalizes such activities and does not shy away from entering the private space of the individuals. If a wife is being subjected to cruelty, the state will have to enter the private sphere or else she will be left with no remedy which is the current problem with the rape laws in India. The state enters the private sphere of individuals and what can be seen in India is that there is a selective penetration of state into the private matters of individuals. This can be seen in the laws which regulate abortions where the private sphere of a woman is violated, and women are routinely harassed in this regard. This clearly shows the selective penetration of the state. The concept of private sphere when applied to marital privacy would be disastrous and could vary with the understanding of different individuals. The case of T.Sareetha v. T. Venkata Subbaiah held that the concept of forced sex was not in sync with marital privacy and the state cannot force two people to resume conjugal relations as it invades their privacy.

However, the case of Harvinder Kaur v. Harmander Singh has understood the marital privacy to denote a private sphere where the court cannot enter. This clearly shows the ambiguity in the understanding of marital privacy. The appeals to have marital privacy have usually functioned to insulate bad behaviour from state scrutiny. The perceived notion of availability of consent always, with the insulation of forced sex from public scrutiny, the state will not be protecting the women's privacy here but will be protecting the man's privacy. Recognizing a state of seclusion in which state shall be given no power will give males unconstrained power. This shows that the idea of marital privacy is ambiguous and hence should not be taken as a shield against the heinous crime of marital rape.

There shall be a shift made from marital privacy to individual autonomy. Instead of focusing on the privacy of the marital knot, the court should focus on the fundamental rights of the individuals. It has been seen in the theory of public/private dichotomy that when there is a creation of private spheres, this results in a situation where women who are victims of forms of domestic violence will have no redress. The dichotomy permits the states to avoid intervention if it is politically undesirable to do so and it legitimizes the different spheres given to men and women. This dichotomy then further works as a device of giving superior and

influential roles to males whereas, the roles of nurturing and caring which continue to be undervalued are given to females. Further, it has been held in the case of Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., that all citizens, including married women, have a right to privacy as she has decisional privacy to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions relating to intimate relations. Therefore, the courts in India should focus on individual autonomy while deciding the issue of marital rape and not marital privacy.

In India, the other challenge imposed against criminalizing marital rape is the idea of the cultural and traditional ideas of the society. The legislature has always used the Indian culture and tradition as a tool against criminalizing marital rape by considering it to be degrading approach towards development of the society. However, having a law that moves against the cultural ideas is not unknown in the Indian legislative history. There exists a relationship between tradition and law but in the case of marital rape, since we are dealing with violation of fundamental rights, the relationship shall be held redundant. One of the major reasons for this is that most of the codified laws, gender specific laws or laws for marginalized communities are not in congruity with the ideas of our society, traditions and the structure. The marital rape should be made a criminal offence keeping in mind the constitution of India and not the ideas and traditions. The ideas and morality of society keeps on changing with time and the laws should be changed parallelly. It has been seen in the case of Nimeshbhai Bharatbhai Desai v. State of Gujarat that the concept of crime keeps on changing from time to time with the change in social, political and economic set- up of the country and it is high time now that laws regarding Marital Rape are enacted by the legislature. Moreover, Independent Thought v. Union of India, the court did not accept the view that the marital rape of a girl child has the potential of destroying the institution of marriage. Marriage should not be seen as institution rather it should be perceived as personal unit. Nothing can destroy the institution of marriage except a statute that makes marriage illegal and punishable.

Furthermore, it can be argued that a divorce ends a marriage, but it cannot be seen to have destroyed the institution of marriage. A judicial separation may also dent a marital relationship, but it cannot be said that it is affecting the institution of marriage. The court in the above case also argued that in the light of the facts about how girl child's rights in a marriage are concerned, it is likely that she will be exposed to sexual intercourse at a very young age which can result in various damages to her and the baby's body. Therefore, it would not be wise to continue with

the practice, tradition as it will cause a lot of harm to the girl child's health. The courts in India in various cases has held that to avert the risk of causing harm to the health of the Girl child, the tradition and practice should not be continued. The court in such matter also takes into consideration the bodily harm and the associated psychological effects of marital rape which will be caused to women if marital rape is not criminalized due to the reason of culture and practices. It is suggested that the courts should not avoid taking public morality into consideration since public morality cannot be used to adjudge constitutional morality. This can be stated from the prevailing caste system practices in India. If public morality is applied in caste system, then a law prohibiting caste discrimination can never be enacted since it will be in accordance with public morality. It has been seen in India that there is a huge difference between constitutional morality and societal structure as there have been multiple legislations such as Dowry Prohibition Act, 1961 which go against the culturally accepted practices in India. Similarly, Sati was an accepted practice which has now been criminalized. Therefore, the fact that a heinous act of marital rape is acceptable culturally is not a reason for its decriminalization. This further adds to justify the criminalization of the marital offence since the rape culture should be taken away from the Indian society as has been by the various other States like England, New Zealand, Sri Lanka, and many others. In Meija v. Peru, the IACHR recognized that: Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

Constitutionality of Exception Ii to Section 375 of Indian Penal Code, 1980

Exception II to Section 375 of IPC, 1860 violates equality before law under Article 14 of the Indian Constitution. The Exception II to Section 375 of IPC, 1980 violates Article 14 on the ground of classification being made without any reasonable nexus and failing to provide protection against arbitrariness which is the key guarantee of Article 14 of the Indian Constitution.

Unreasonable means "Not guided by reason; irrational or capricious." An important consequence of the rights to equality is the element of reasonableness. Classification which is unreasonable is open to challenge and to this extent the policy of legislation is open to judicial review as

illustrated in the various cases. The test for valid classification is based on the reasonable nexus between the object of the law and its classification. The Exception to marital rape fails to withstand these two tests as it discriminates against married women by denying them equal protection from rape and sexual harassment. This exception has created two classes of women based on their marital status and immunizes actions perpetrated by men against their wives. The exception has made the victimization of married women possible by using the marital status of a woman as a justification thereby, just protecting unmarried women from the same acts of forceful sex.

The Indian Court in the case of Budhan Choudhary v. State of Bihar and State of West Bengal v. Anwar Ali Sarkar, held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve. Therefore, it can be said that there is no intelligible differentia and reasonable nexus between the classification and object of the marital rape exception as given in the Indian Penal Code. The object of the marital rape exception is not justified as it is creating distinction between married and unmarried women without any basis or rationale behind such differentiation. Moreover, marital rape exception frustrates the purpose of Section 375 of the IPC which is to protect women and punish those who engage in the inhumane activity of rape. Exempting husbands from such punishment is entirely contradictory to the objective of the said statute. Thus, the said object is not only unfounded and misplaced but also disentitles innocent rape victims who face violent sexual assault by their husbands without adequate protection or support from the law. The consequences of rape are the same even if the marital status of women as married or unmarried is taken into consideration. Moreover, in India, married women often find it more difficult to escape abusive conditions at home because they are legally and financially tied to their husbands. Furthermore, marital rape exception encourages husbands to forcefully enter into sexual intercourse with their wives, as they know that their acts are not discouraged or penalized by law.

Arbitrary means "founded on prejudice or preference rather than on reason or fact." "In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14." The Supreme Court in the case of Shayara Bano vs. Union of India, observed that "Manifest arbitrariness, therefore, must be something done by the legislature

capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14." The exception to marital rape i.e. Exception II to Section 375 is arbitrary as it classifies rape victims into three categories based on their marital status i.e. married, married but separated, and unmarried without any intelligible differentia between the harms they suffer and without a plausible rational nexus to an object sought to be achieved by the criminal law. Furthermore, marriage can never be a legitimate basis of classification for exempting a party to the marriage from the criminal law. Such classification does not fulfil the two conditions under Article 14 i.e. Intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and that differentia must have a rational relation to the object sought to be achieved by the statute in question.

The Apex court in the case of Ram Krishna Dalmia & Ors. Vs. Justice S R Tendolkar gave the true meaning and scope of Article 14 reiterating the tests of intelligible differentia being required to have a rational relation with the object of the legislation. Furthermore, the classification of women who are victims of rape into above three categories would be constitutional if and only if the classification is based upon sound intelligible differentia which has a rational relation to the object sought to be achieved by the exception to marital rape. Moreover, Supreme Court in the case of Anuj Garg & Ors. Vs. Kotlal Association of India and Ors. laid down the jurisprudence on Article 14 and the mandatory criteria for a constitutionally valid classification/intelligible differentia. The court stated that "No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until unless there is a compelling state purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases." Therefore, it can be said that the legislature has failed to disclose the object or purpose sought to be achieved by itself in classifying rape victims into the abovementioned categories. Indeed, the legislature has purposefully refused to recognize and accord equal rights to women in a marriage through the exception to marital rape.

The legislation should not be only assessed on its proposed aims but rather on the implications and the effects by subjecting it to strict scrutiny. Thus, exception to marital rape as stated under Section 375 of IPC should be accessed on its implication and effect on the subject matter so that it

does not suffer from incurable fixations of stereotype morality and conception of sexual role. The European Court of Human Rights while reviewing a discriminatory statute held that "The test to review such a Protective Discrimination statute would entail a two-pronged scrutiny: (a) the legislative interference (induced by sex discriminatory legalization in the instant case) should be justified in principle, (b) the same should be proportionate in measure." Therefore, Differentia which is the basis of classification must be sound and must have reasonable relation to the object of the legislation. If the object itself is discriminatory, then explanation that classification is reasonable having rational relation to the object sought to be achieved is immaterial. Thus, the personal freedom of an individual should not be compromised in the name of expediency until and unless there is a compelling state purpose. However, there can be no compelling state purpose in treating rape victims differently based on marital status and their prior relationship to the rapist. The purpose of criminal laws prohibiting rape or indeed any kind of physical violence or unwanted touching is to maintain a person's bodily integrity. Therefore, exempting husbands under the Exception II to Section 375 of the IPC, 1860 is not only creating discrimination by a substantive provision of law but also by procedural law.

The marital rape exception for the married women above the age of eighteen years fail the test of reasonable intelligible differentia having any rational nexus to the object of protecting women's physical integrity. The exception to marital rape is manifestly opposed to the legitimate objects of the criminal law and the fundamental right of a woman to bodily integrity and sexual autonomy and hence her right to personal liberty. Moreover, the legislation has no sound basis for the classification so made, as it emerges from ancient and outdated ideas of marriage and a woman's inferior status in a marriage. The said treatment of married women above the age of eighteen years is per se unconstitutional while also being in contravention of several human rights conventions, as ratified by the Union of India. Indeed, the classification of rape victim into three categories, affording different treatment under the provision of rape do not satisfy the tests of rational nexus with the object of the classification and hence, are arbitrary. Therefore, the exception to marital rape under IPC must be struck down by declaring it unconstitutional as it denies married women equal right to protection against rape in marriage.

In addition to Article 14, the marital rape exception also violates Article 15 of the Indian Constitution, 1950 based on unreasonable classification among married, unmarried and married but separated women. Article 15 also applies principle of equality but in a more specific way by highlighting the most important classes on which such discrimination is

unacceptable and therefore, the rape provision is discriminatory on the grounds of sex. The rape law in India assumes non-retractable consent of women to sexual intercourse upon marriage. Hence, this assumption reinforces various gender stereotypes leading to the subordination of women and such prejudice being disclosed and based on a ground mentioned in Article 15. Therefore, the exception to marital rape is unconstitutional due to violation of constitutional prohibition. The Hon'ble Supreme Court in the case of NALSA vs Union of India, clearly stated that the specific categories in Article 15 are not exhaustive, and include gender identity, for instance. Therefore, the marital status of women may be read into 'sex' and may be recognized as a ground for sexual and gender non-discrimination.

The rape is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It must be borne in mind that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality. The scope of Article 21 not only extends to the right to life and liberty but also includes right to health, dignity, privacy and to lead an honorable and peaceful life as stated by Supreme Court in the case of Bodhisattwa Gautam v. Subhra Chakraborty. The exception to marital rape, therefore, infringes the right of married women by denying them their basic human right to lead an honorable and peaceful life along with the right to sexual and reproductive autonomy guaranteed under Article 21 of the Indian Constitution. Moreover, the exception is in derogation of Article 21 as it violates the Right to Life and Personal Liberty which includes the right to live with dignity. It is important to recognize that women have inherited rights under Part III of the Indian Constitution to exercise the reproductive choices to procreate as well as to abstain from procreating. Women's right to privacy, dignity and bodily integrity should be respected which means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse to participate in sexual activity. The Hon'ble Supreme Court in the case of Suchita Srivastava v. Chandigarh Administration held that woman's right to make reproductive choices is as a dimension of "personal liberty" under Article 21 of the Indian Constitution. This observation of the Apex Court did not make any distinction between the rights of a married women and unmarried women in exercising their reproductive choices. Furthermore, the Supreme Court recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21 of the Constitution.

The patriarchal notions still prevail in several societies including Indian Society and are used as a shield to violate core constitutional rights of women based on gender and autonomy. As a result, gender violence is often treated as a matter of family honour resulting in the victim of violence suffering twice over – the physical and mental trauma of her dignity being violated and the perception that it has cause an affront to honour. A nine-judge bench of the Hon'ble Supreme Court stated in the case of Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors., that all citizens, including married women, have a right to privacy as she has decisional privacy to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions relating to intimate relations. The Apex court further discussed the concept of privacy by stating that "Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy…"

Moreover, the apex court cited the work of Catherine MacKinnon in a 1989 publication titled 'Towards a Feminist Theory of the State' which stated that "adverts to the dangers of privacy when it is used to cover up physical harm done to women by perpetrating their subjection. Yet, it must also be noticed that women have an inviolable interest in privacy. Privacy is the ultimate guarantee against violations caused by programmes not unknown to history, such as state-imposed sterilization programmes or mandatory state-imposed drug testing for women. The challenge in this area is to enable the state to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty." Therefore, Privacy must not be utilized as a cover to conceal and assert patriarchal mindsets.

Moreover, the scope of Article 21 is not narrow rather it has a wider scope wherein the Right to Life includes the right to live with human dignity and all that goes along with it. The Apex court in the case of Francis Coralie Mullin vs. Administrator, Union Territory of Delhi and Ors. held that any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and would be in derogation of Article 21 of the Indian Constitution unless it is in accordance with procedure prescribed by law. It further stated that any law or procedure which leads to such torture or cruel, inhuman or degrading treatment can never stand the test of reasonableness and non-

arbitrariness and thus would be unconstitutional and void as being violative of Articles 14 and 21. The court in the case of D.K Basu vs. State of West Bengal, held that married woman do not shed their right to choose or consent and be free from rape simply by being married. The very existence of Exception II to Section 375 failed to deter husbands from engaging in acts of forced sexual contact with their wives which adversely affects the physical and mental health of the woman. This in turn undermines the ability of a wife to live her life with dignity. It is implicit in Article 21 that the right to protection against torture or cruel, inhuman or degrading treatment is a fundamental right which is also enunciated in Article 553 of the Universal Declaration of Human Rights and guaranteed by Article 754 of the International Covenant on Civil and Political Rights. Therefore, the exception to rape clearly violates the Article 21 of the Indian Constitution and requires the Indian jurisprudence to understand the inhumane nature of this provision of law and strike it down.

Therefore, a crime of abovementioned nature not only violates the penal provision of the Indian Penal Code but also right of equality, right of individual identity and in the ultimate eventuality an important aspect of rule of law which is a constitutional commitment. It is important to note that the dignity of every citizen flows from the fundamental precepts of the equality clause engrafted under Article 14 and right to life under Article 21 of the Constitution. The Apex Court in the case of NALSA v. Union of India, held that "personal autonomy includes both the negative right not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in." Furthermore, the hon'ble court in the case of Vishaka vs. State of Rajasthan, held that Article 21 creates a positive obligation on the State to take active measures to protect and ensure the right to life and liberty. Thus, not recognizing non-consensual sexual intercourse within marriage as rape and not ensuring adequate protection and criminal remedies for married women is a clear and gross violation of the fundamental rights.

Conclusion

"No is not merely a word, but a statement in itself!"

- Amitabh Bachhan in the movie Pink

Rape is rape. Be it stranger rape, date rape or marital rape. Non criminalization of marital rape violates human rights as it is a gendered violence that has escaped the criminal law sanction and more than that the approbation of human rights. The silence of law against such heinous crime gives legal impunity to husbands to sexually assault or rape their

wives by making it a legitimate act. Thereby, making marital rape a human rights problem that cries out for redress both socially and legally.

Social practices and legal codes in India mutually enforce the denial of women's sexual agency and bodily integrity, which lie at the heart of the human rights of women. Thereby, making non- criminalization of marital rape as a major concern in the Indian legal system. The debate on marital rape is crucial in establishing substantive equality for married women who are otherwise relegated in public and legal discourse to the confines of their home. It is important to identify non criminalization of marital rape as a major lacuna in criminal law at present defeating the constitutional provisions that guarantees women equality and autonomy just like her counterpart. It is the legal obligation of the state to take care of women by protecting them against sexual assault or violence. The provision of rape under the Indian Penal Code has failed to provide a protection to married women against such heinous crime. This means that even today women are treated as the property of husband who has all the rights to exploit her. However, a husband's violent and non-consensual act of intercourse may entitle a wife to bring action for criminal assault, the incorporation of the principal of liability for marital rape in our penal laws is not present. This prima facie violates Article 14 and 21 of the Indian Constitution. Non-criminalization of marital rape is the major concern in the Indian legal system.

Considering the right of married women to be protected against the heinous crime of rape within marriage, we propose some suggestion to criminalize marital rape. Firstly, more research is needed in this topic to find out the accurate cases for marital rape. Secondly, medical students should be given proper training to handle cases of marital rape with special care like in other Rape cases. Thirdly, marital rape should be included under Section 375 of IPC. As law should not be different for married and unmarried women in cases of rape. Whatever the case may be, 'NO' means no. Fourthly, certain amendments should be made in the Evidence Act to ensure that it considers the complexities of prosecution in cases of marital rape. Therefore, it is important to fill the gap in laws around the world that fails to criminalize marital rape as it is noncompliance with the international human rights norms and breach of due diligence standards.

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